COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF GASHI v. CROATIA

(Application no. 32457/05)

JUDGMENT

STRASBOURG

13 December 2007

FINAL

13/03/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gashi v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 22 November 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 32457/05) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian citizen, Mr Shani Gashi (“the applicant”), on 4 August 2005. However, the applicant died during the proceedings. His spouse Mrs Katica Gashi expressed the wish to proceed with the application both on her own behalf and on behalf of her minor son, Edon Gashi.

2. The applicant was represented by Mrs E. Kapetanović, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. On 20 February 2007 the Court decided to communicate the complaint concerning the applicant's right to peaceful enjoyment of his possessions to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1962 and lived in Pula.

5. The applicant was an employee of a glass factory in Pula. On 20 July 1988 the factory granted the applicant and his family a flat for their use in

Pula, consisting of a kitchen, one room and a communal toilet and measuring 30.60 square metres.

6. On 3 June 1991 Parliament enacted the Protected Tenancies (Sale to Occupier) Act (*Zakon o prodaji stanova na kojima postoji stanarsko pravo*), which regulated the sale of publicly-owned flats previously let under protected tenancies, giving the right to holders of such tenancies of publicly-owned flats to purchase them from the provider of the flat under favourable conditions.

7. Under that Act the applicant as the buyer and the Pula Municipality as the seller concluded a contract for the sale of the said flat on 8 May 1996. A copy of the contract was submitted for approval by the State Attorney's Office. On 28 May 1996 approval was given.

8. In a decision of 21 September 1998 the Pula Municipal Court (*Općinski sud u Puli*) recorded the applicant's ownership of the flat in the court's land register. A copy of this decision was sent for information to the Istra County State Attorney's Office in Pula (*Državno pravobraniteljstvo Istarske županije u Puli*).

9. On 29 March 2000 the Istra County State Attorney's Office brought a civil action against the applicant and the Pula Municipality in the Pula Municipal Court, seeking annulment of the sale contract in question. They argued that the applicant could not have obtained a protected tenancy of the flat because the glass factory where he had worked had had no right to dispose of the said flat and that such a right had been vested in the Pula Municipality alone. The Municipal Court accepted these arguments and in its judgment of 22 February 2001 annulled the sale contract. The judgment was upheld by the Pula County Court (*Županijski sud u Puli*) on 15 December 2003. The relevant parts of its judgment read as follows:

> "The Boris Kidrič Glass Factory's decision of 20 July 1988, granting the first plaintiff Shani Gashi the right to use a flat in Pula at 19 M. Oreškovićeva Street, , consisting of one room, a kitchen and a communal toilet, clearly and expressly shows that the flat in question as regards its size and equipment is to be considered an unsuitable flat (*neuvjetan stan*) – provisional accommodation (*nužni smještaj*).
>
> The question whether the first plaintiff actually acquired the flat in question as provisional accommodation cannot be assessed separately in the proceedings at issue; instead we have to accept the presumption that it was so, which the first plaintiff knew or should have known, owing to which he could not acquire a protected tenancy of the flat in question since under section 8 of the Housing Act (Official Gazette nos. 51/1985 and 42/1986) in force at the time, a protected tenancy could not be acquired in respect of flats and premises used as provisional accommodation, as correctly established by the court of first instance in the impugned judgment.
>
> Since the main condition for sale of a flat under the Protected Tenancy (Sale to Occupier) Act (Official Gazette nos. 43/1992, 69/1992, 25/1993, 2/1994 and 44/1994) is that the buyer is a holder of a protected tenancy of the flat which is the subject of the sale, the first-instance court correctly found that the contract in question concluded between the first and the second plaintiff on 8 May 1996 was null and void under

section 52 of the Obligations Act because it had had no [legal] basis as the first plaintiff had not been a holder of a protected tenancy of the flat.

This court likewise accepts further findings of the first-instance court: that the first plaintiff had not acquired a protected tenancy of the flat in question, and the glass factory ... had had no right to dispose of the flat to give it to the first plaintiff for his use and so that he could acquire a protected tenancy, which he had therefore not done because, as said above, the glass factory actually gave the flat to the first plaintiff merely as provisional accommodation.

...

The evidence submitted does not show that the first plaintiff acquired a protected tenancy of the flat in question or that the flat was part of the glass factory's housing assets, or that the Pula Municipality or the City of Pula recognised the first plaintiff's protected tenancy of the flat ... and therefore the sale contract in question ... is in fact null and void because it has no [legal] basis – that is to say because the first plaintiff was not a holder of a protected tenancy of that flat...”

10. The applicant then lodged a constitutional complaint, arguing that a number of his constitutional rights, including his right to property, had been infringed because the lower courts' judgments had deprived him of his ownership of the flat in question. On 3 February 2005 the Constitutional Court dismissed the complaint.

II. RELEVANT DOMESTIC LAW

11. The relevant provisions of the Housing Act (*Zakon o stambenim odnosima*, Official Gazette nos. 51/1985, 42/1986, 22/1992 and 70/1993) read as follows:

Section 8

“A protected tenancy cannot be acquired on:

1. Flats designated for temporary or provisional accommodation...”

12. The Protected Tenancies (Sale to Occupier) Act (*Zakon o prodaji stanova na kojima postoji stanarsko pravo*, Official Gazette no. 27/1991 with further amendments - “the Act”) regulates the conditions of sale of flats let under protected tenancies.

Section 1 of the Act gave the right to the holders of protected tenancies of publicly-owned flats to purchase such flats under favourable conditions, provided that each holder bought only one flat.

Section 21 obliged a seller to submit the sale contract for approval by the competent State Attorney's Office within eight days.

13. The relevant part of the Obligations Act (*Zakon o obveznim odnosima*, Official Gazette, nos. 53/91, 73/91, 3/94, 7/96 and 112/99), as then in force, read:

III [LEGAL] BASIS

Permissible [legal] basis

Section 51

"(1) Each contractual obligation shall have a permissible [legal] basis [*causa*].

(2)The basis is not permissible if it contravenes the Constitution, peremptory norms or morals.

..."

Null and void contract on the ground of its [legal] basis

Section 52

"Where there is no [legal] basis or where it is not permissible, the contract is null and void."

Unlimited right to plead nullity

Section 110

"The right to plead nullity shall be inextinguishable."

14. The relevant parts of the State Attorney's Office Act (*Zakon o državnom odvjetništvu*, Official Gazette no. 75/1995) read:

Section 24

"...

... the competent State Attorney's Office shall ... seek the annulment of a contract ... which contravenes peremptory norms."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

15. The applicant complained that he had been deprived of his property in violation of Article 1 of Protocol No. 1 to the Convention. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

16. The Government contested these submissions.

A. Admissibility

1. *Compatibility* ratione temporis

17. The Government requested the Court to declare the application inadmissible as being incompatible *ratione temporis* with the provisions of the Convention. They argued in this connection that the proceedings before the national courts had concerned exclusively the facts related to a period prior to the date on which the Convention had come into force in respect of the respondent State.

18. The applicant disagreed with the Government's objection.

19. The Court notes that on 5 November 1997 when the Convention entered into force in respect of the respondent State, the applicant was the owner of the flat in question. His ownership was finally terminated by virtue of the Zagreb County Court judgment of 15 December 2003, upholding the Pula Municipal Court's judgment of 22 February 2001 which had annulled the contract of sale transferring the ownership to the applicant. The applicant's title having been nullified by virtue of judicial decisions delivered after 5 November 1997, the date of the Convention's entry into force in respect of Croatia, the Court finds that it is competent *ratione temporis* to examine the application. Therefore, the Government's objection as to the Court's competence *ratione temporis* must be rejected.

2. *Applicability of Article 1 of Protocol No. 1*

20. The Government argued further that Article 1 of Protocol No. 1 was not applicable in the present case because the applicant had never had a protected tenancy of the flat in question. The fact that the applicant's ownership had been recorded in the land register was of no relevance since such an entry had only a declaratory effect.

21. The applicant disagreed with these arguments.

22. According to the Convention organs' case-law, "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention may be either "existing possessions" or valuable assets, including claims, under certain

conditions. By contrast, the hope of recognition of a former property right which has not been susceptible of effective exercise for a long period of time is not to be considered a "possession" (see *Weidlich and Others v. Germany,* nos. 18890/91, 19048/91, 19049/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, p. 5, and the case-law referred to there on p. 18). According to the jurisprudence of the Croatian courts, it appears that the applicant's title to his flat was considered void *ab initio* which had the effect that he was considered never to have owned it. The Court considers that the applicant had a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention even if his title was null and void *ab initio*. The Court notes that for about four years he possessed the flat in question and was considered its owner for all legal purposes. Moreover, it would be unreasonable to accept that a State may enact legislation which allows nullification *ab initio* of contracts or other titles to property and thus escape responsibility for an interference with property rights under the Convention (see *Panikian v. Bulgaria*, no. 29583/96, Commission decision of 10 July 1997). It follows that the Government's objection as to the applicability of Article 1 of Protocol No. 1 to the Convention must likewise be rejected.

3. Conclusion

23. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

The parties' submissions

1. The Government

24. The Government contended that there had been no interference with the applicant's property rights because the applicant had never been the owner of the flat in question. Even if the Court found that there had been an interference, it had complied with the conditions of Article 1 of Protocol No. 1 to the Convention since the States enjoyed a wide margin of appreciation in this respect. The nullification of the contract of sale had had a basis in domestic law. The entitlement of the State Attorney's Office to seek such a nullification was clear since its role was to protect the State's interests and ensure that the laws in effect were complied with.

25. As regards the proportionality of the measure applied, the Government contended that the following factors should have been taken

into consideration. The flat in question had been given to the applicant as provisional accommodation and the applicant could not have obtained a protected tenancy of it and consequently could not have purchased the flat. The applicant should have known that he was not entitled to purchase the flat. There had obviously existed a public interest that such a contract be nullified.

2. The applicant

26. The applicant argued that the decision of the glass factory which gave him the flat had not mentioned that it had been provisional accommodation. Furthermore, he had paid rent on the flat and had been entitled to use the flat as a tenant. His ownership of the flat had been acquired bona fide and annulled in contravention of the principles established under Article 1 of Protocol No. 1 to the Convention.

The Court's assessment

1. Was there an interference?

27. The Court notes that in 1996 the applicant bought the flat in question and thus clearly became its owner, which fact was also recorded in the land register. The Court notes further that the applicant was deprived of his property as a consequence of the findings of the Pula Municipal Court and the Pula County Court in their respective judgments of 22 February 2001 and 15 December 2003. By virtue of these judgments the applicant's property title to the flat in question was nullified.

28. The Court finds, therefore, that there was a deprivation of property within the meaning of the second sentence of Article 1 of Protocol No. 1 to the Convention. Such deprivation of property must be lawful, in the public interest and must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

2. Whether the interference was provided for by law

29. The applicant's property title was declared null and void by the national courts under Croatian civil law on contracts and the law regulating the functions of the State Attorney's Office. The Court, noting that its power to review compliance with domestic law is limited (see, among other authorities, *Allan Jacobsson v. Sweden (no. 1)*, judgment of 25 October 1989, Series A no. 163, p. 17, § 57), is thus satisfied that the nullification of the applicant's property title was in accordance with domestic law.

3. Legitimate Aim and Proportionality

30. The Court reiterates that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a matter of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation (see, among many authorities, *Edwards v. Malta*, no. 17647/04, § 64, 24 October 2006).

31. The Court must also examine whether an interference with the peaceful enjoyment of possessions strikes the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposes a disproportionate and excessive burden on the applicant (see, among many other authorities, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 93, ECHR 2005-VI). Despite the margin of appreciation given to the State the Court must nevertheless, in the exercise of its power of review, determine whether the requisite balance was maintained in a manner consonant with the applicant's right to property (see *Rosinski v Poland*, no. 17373/02, § 78, 17 July 2007). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 to the Convention as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38, and *The Former King of Greece and Others v. Greece*, [GC], no. 25701/94, § 89). Thus the balance to be maintained between the demands of the general interest of the community and the requirements of fundamental rights is upset if the person concerned has had to bear a "disproportionate burden" (see, among many other authorities, *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, pp. 34-35, §§ 70-71).

32. The Court notes at the outset that the national courts' findings which led to the applicant's property title being declared null and void were concentrated on two main grounds. First, the flat in question had been provisional accommodation only and under the relevant legislation the applicant could not have acquired a protected tenancy of such accommodation. Second, the glass factory had had no right to dispose of the flat to grant the applicant a specially protected tenancy, since that right had been vested in the Pula Municipality. In this regard the Court emphasises

that its task in the present case is not to call into question the right of a State to enact laws aimed at securing the rule of law by providing for nullification of defect contracts contravening peremptory norms, but, in accordance with its supervisory powers to review under the Convention the manner in which these laws were applied in the applicant's case and whether the decisions taken by the relevant domestic authorities complied with the principles enshrined in Article 1 of Protocol No. 1 to the Convention.

33. The Court recalls that it has already dealt with the question of annulment of contracts of sale under which applicants bought flats they occupied (see *Panikian v. Bulgaria*, cited above; *Pincová and Pinc v. the Czech Republic*, no. 36548/97, ECHR 2002-VIII; *Bečvář and Bečvářová v. the Czech Republic*, no. 58358/00, 14 December 2004; *Netolický and Netolická v. the Czech Republic* (dec.), no. 55727/00, 25 May 2004; *Mohylová v. the Czech Republic* (dec.), no. 75115/01, 6 September 2005, and *Velikovi and Others v. Bulgaria*, nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02, 15 March 2007). In those cases, however, the Court and the Commission were called upon to assess particular situations, all of which concerned legislation adopted with the aim of making good injustices dating back decades and inherited from communist rule in the respective States.

34. Quite differently from the situations where old injustices had to be addressed in newly adopted legislation, the present case does not concern an applicant who bought a nationalised flat under favourable conditions during the communist regime owing to his privileged position. On the contrary, the applicant in the present case was rather an ordinary citizen, enjoying no special privileges, who bought a flat consisting of a kitchen, one room and a communal toilet. The purchase was based on the laws applicable to all holders of protected tenancies of publicly-owned flats, and not at all reserved for some sprivileged category of citizens.

35. Bearing in mind these specific features of the present case, the Court, in making its assessment as to whether the Croatian authorities pursued a legitimate aim in the public interest and whether they struck a fair balance between the general interest of the community and the applicant's right to the peaceful enjoyment of his possessions, gives decisive importance to the following factors.

36. First and foremost, the flat in question was *ab initio* social property. While in the above-mentioned cases concerning Bulgaria and the Czech Republic two conflicting private interests, namely those of the initial owners whose property had been nationalised during the communist regimes and the new owners who bought the nationalised flats, had to be taken into consideration, in the Court's assessment under Article 1 of Protocol No.1 to the Convention, in the present case no such sensitive balance is at stake.

37. The flat at issue was given to the applicant for his use by the glass factory where he had worked, which was a common practice in the former

Yugoslav socialist regime. The Court notes that the flat is a rather modest one, comprising merely a single room, a kitchen and a communal toilet, and was intended to meet the essential housing needs of the applicant and his family, namely a wife and two children. The national courts' finding that a protected tenancy could not have applied to the flat in question since it was merely provisional accommodation has to be seen against the fact that the applicant's family has lived there since 1988 and that it has thus become their normal dwelling, not significantly differing from any other small flat. Therefore, it cannot be said that the applicant took advantage of a privileged position or that he even held any such position during the socialist regime, or that he otherwise acted unlawfully in order to acquire certain rights to the flat in question.

38. The Court notes that the contract of sale was annulled, *inter alia*, on the ground that the glass factory which had allowed the applicant to use the flat had not been entitled to dispose of the flat, but that such a right had been vested in the Pula Municipality. In this respect the Court, without questioning these findings of the national courts, notes that the Pula Municipality sold the flat in question to the applicant. Assuming that the Pula Municipality had actually been the relevant authority to dispose of the flat in the first place, the Court considers that by selling the flat in question to the applicant, it recognised the applicant's rights in respect of the flat. Therefore, the argument that the applicant obtained certain rights regarding the flat from the glass factory instead of from the Pula Municipality cannot be accepted, even if an initial right was given to the applicant by the factory.

39. The Court places special emphasis on the fact that the purchase of the flat in question was under the State Attorney Office's control, since pursuant to section 21 of the Protected Tenancies (Sale to Occupier) Act all contracts of sale in respect of flats previously let under protected tenancies had to be submitted to that authority for prior approval. It is undisputed in the present case that the contract of sale in question, concluded between the Pula Municipality as a seller and the applicant as a buyer, was submitted for approval to the Istra State Attorney's Office (see paragraph 7 above). Thus, the relevant authorities had an opportunity to verify the contract in question and to prevent its taking effect if they found any ground justifying such a measure. However, the Istra County State Attorney's Office gave its consent on 28 May 1996 without making any objections.

40. The Court considers that the mistakes or errors of the State authorities should serve to the benefit of the persons affected, especially where no other conflicting private interest is at stake. In other words, the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned (see, *mutatis mutandis*, *Radchikov v. Russia*, no. 65582/01, § 50, 24 May 2007). What is more, the nullification of the applicant's property title in the proceedings instigated by the Istra County State Attorney's

Office, once that same office had consented to the sale contract giving that title to the applicant, contravenes the principle of legal certainty. The manner in which the litigation ended does not appear to have been consistent with the State's obligation to deal with the applicant's situation in as coherent a manner as possible (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I).

41. Lastly, the Court reiterates that it has held that a person deprived of his or her property must in principle obtain compensation "reasonably related to its value", even though "legitimate objectives of 'public interest' may call for reimbursement of less than the full market value". It follows that the balance mentioned above is generally achieved where the compensation paid to the person whose property has been taken is reasonably related to its "market" value, as determined at the time of the expropriation (see *Pincová and Pinc* cited above, § 53).

42. As to the present case, the Court observes that the Government did not put forward any arguments concerning possible compensation for the applicant. In this connection, the Court notes also that certain social issues cannot be ignored, as the present application, since the applicant's death, now concerns vulnerable individuals, namely a widow with two children, one of whom is still a minor child of fourteen years.

43. As to the question of whether the national courts pursued a legitimate aim, the Court notes that the respondent Government did not advance any arguments in this connection. In the view of the Court's considerations above, the Court finds it difficult to discern a possible legitimate aim on the part of the national authorities in annulling the sale contract at issue. In any event, and leaving that question aside, the Court considers that the interference with the applicant's property rights in the particular circumstances of the present case failed to strike a fair balance between the public interest and the applicant's rights protected under Article 1 of Protocol No.1 to the Convention.

There has therefore been a violation of Article 1 of Protocol No. 1 to the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

44. The applicant also complained under Article 6 § 1 of the Convention about fairness of the proceedings and under Article 8 of the Convention claiming that his right to respect for his home had been violated. He further complained under Article 14 of the Convention claiming that he had been discriminated against because of his Albanian origin and poor economic situation.

45. In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court considers that this part of the application does not disclose any appearance of a violation

of any of the above Articles of the Convention. It follows that these complaints are inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

47. The applicant's widow and son claimed 32,634.77 euros (EUR) in respect of pecuniary damage and EUR 35,000 in respect of non-pecuniary damage. They further claimed 12,653 Croatian kunas in respect of costs and expenses.

48. The Government deemed the sums requested excessive and unrelated to the violations claimed.

49. In the circumstances of the case the Court considers that the question of the application of Article 41 is not ready for decision. It is therefore necessary to reserve the matter, due regard being had to the possibility of an agreement between the respondent State and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that the applicant's widow (Mrs Katica Gashi) and his son (Mr Edon Gashi) have standing to continue the present proceedings in his stead;

2. *Declares* the complaint concerning the applicant's right to peaceful enjoyment of his possessions admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

4. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision;

accordingly,

(a) *reserves* the said question in whole;

(b) *invites* the Government and the applicant to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 13 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President