



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

THIRD SECTION

**CASE OF OKLEŠEN AND POKOPALIŠKO POGREBNE
STORITVE LEOPOLD OKLEŠEN S.P. v. SLOVENIA**

(Application no. 35264/04)

JUDGMENT

STRASBOURG

30 November 2010

FINAL

28/02/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia,
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Josep Casadevall, *President*,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Ann Power, *judges*,
and Santiago Quesada, *Section Registrar*,
Having deliberated in private on 9 November 2010,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35264/04) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Leopold Oklešen, a Slovenian national, and a private enterprise called Leopold Oklešen Cemetery and Funeral Services s.p. (*Pokopališko pogrebne storitve Leopold Oklešen s.p.*) on 28 September 2004.
2. The applicants were represented by Mr D. Rituper, a lawyer practising in Murska Sobota. The Slovenian Government (“the Government”) were represented by their Agent, Mr L. Bembič, State Attorney-General.
3. The applicants alleged, in particular, that there had been a breach of Article 1 of Protocol No. 1 to the Convention and Article 14 of the Convention, because of the municipal decree which had prevented the second applicant from carrying out funeral services, which it had been providing successfully for seven years.
4. On 3 October 2007 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Mr Leopold Oklešen, is a Slovenian national who was born in 1947 and lives in Novo Mesto. The second applicant is a private enterprise called Leopold Oklešen Cemetery and Funeral Services s.p. (*Pokopališko pogrebne storitve Leopold Oklešen s.p.*) located in Novo Mesto.

6. The second applicant, which was owned, legally represented and run by the first applicant, had held a valid licence issued by Chamber of Crafts (*obrtno dovoljenje*) for the provision of funerals, landscaping and maintenance of exterior surfaces (*zunanja ureditev*) since 6 March 1995. The licence confirmed that the second applicant was in compliance with section 9 of the Crafts Act (see paragraph 22 below). The second applicant used to provide all funeral services in Novo Mesto municipality, including preparing and transporting remains, obtaining the necessary documents, arranging cremations, selling funeral items (coffins, funeral wreaths, flowers and so on) and organising ceremonies. It appears that funerals represented an important, if not the main, part of the activities of the second applicant.

7. In September 2000 a Decree on the provision of public utility as regards cemetery and funeral activities, management of cemeteries and funeral ceremonies in Novo Mesto Municipality (“the 2000 Decree”, see paragraphs 24-25 below) came into force. Subsequently, the Novo Mesto Municipal Enterprise (*Komunala Novo Mesto*, “KNM”) was entrusted with the provision of such services in the municipality's area.

8. According to KNM's website (<http://www.komunala-nm.si/>, consulted on 3 September 2007), KNM provided services concerning, *inter alia*, digging and organising graves, obtaining documents concerning the deceased, preparation and storage of remains, funeral home leasing, organisation and performance of funeral ceremonies and services and transportation of remains.

9. By a letter of 1 March 2002, KNM warned the second applicant to comply with the 2000 Decree. This implied, according to KNM, that “all activities relating to those deceased (...) who are to be buried in cemeteries managed by KNM should be carried out solely by KNM!”

10. On 19 April 2002, further to the second applicant's request, Novo Mesto Municipality explained that the second applicant was not eligible to provide funeral services because of the restrictions set out in the 2000 Decree, the 1993 Public Utilities Act and the Cemetery and Funeral Services and Cemetery Management Act (“the 1984 Cemetery and Funeral Act”). The Municipality further stated that the Constitutional Court decision

no. U-I-48/97 had confirmed that funerals should be a mandatory public utility (see paragraphs 26-27 below).

11. On 25 November 2002 the second applicant submitted a request to the Constitutional Court for a review of the constitutionality and legality (*pobuda za oceno ustavnosti in zakonitosti*) of the 2000 Decree, in particular sections 1 and 16. While section 1 provided, *inter alia*, that funerals should be provided by a public utility, section 16 established that a provider of a public utility, namely a public-law enterprise, should be contacted in the event of a death and should be responsible for transport of the remains.

12. In its request, the second applicant argued that funeral provision should be in the free market, and requested the Constitutional Court to issue an injunction against the 2000 Decree. The second applicant further stated that, following the adoption of the 2000 Decree, KNM had obtained a monopoly in this field and did not allow it to transport remains to cemeteries. It submitted that the 2000 Decree had been introduced with the intention of closing down its successful business.

13. On 1 April 2004 the Constitutional Court rejected the second applicant's request, referring to its earlier decision no. U-I-48/97 (see paragraphs 26-27 below) finding that section 2 of the 1984 Cemetery and Funeral Act was in conformity with the Constitution. The above-mentioned provision read together with section 68 of the 1993 Public Utilities Act determined that the funeral services belonged to the mandatory public utilities. These rules were binding on the Novo Mesto Municipality, which was required to implement them.

14. According to the applicants, as a result of the above situation the second applicant has been unable to provide the core funeral services since the implementation of the 2000 Decree and has lost a large proportion of the clientele due to the 2000 Decree's restrictions.

15. The second applicant continued to operate until 2006. For illustration of the effects of the 2000 Decree's restrictions on the applicants' earnings, it would appear from the first's applicant's tax forms concerning the second applicant's activity, that his taxable income was calculated as follows: in 1998, it was approximately 15,000 euros (EUR), in 1999 it was EUR 26,000, in 2000 it was EUR 39,000 and in 2001 it was 27,000. After the implementation of the 2000 Decree, his taxable income was approximately EUR 17,000 in 2003, EUR 28,000 in 2005 and EUR 18,000 in 2006.

16. On 7 August 2006 the second applicant was removed from the Slovenian register of enterprises. The first applicant retired in November 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

17. The relevant provisions of the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*, Official Gazette no. 33/91), provide as follows:

Article 33 - Right to Private Property and Inheritance

“The right to private property and inheritance shall be guaranteed.”

Article 74 - Free Enterprise

“Free economic initiative shall be guaranteed.

The conditions for establishing commercial organisations shall be established by law. Commercial activities may not be pursued in a manner contrary to the public interest.

Unfair competition practices and practices which restrict competition in a manner contrary to the law are prohibited.”

B. The Constitutional Court Act

18. The relevant provisions of the Constitutional Court Act (*Zakon o ustavnem sodišču*, Official Gazette no. 15/94), which concern the review of constitutionality and legality, were at the relevant time as follows:

Section 24

“(1) Anyone who demonstrates a legal interest may submit a request for a procedure to be initiated for a review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority.

(2) A legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position.”

Section 25

“(1) The Constitutional Court rejects a request if the procedural conditions ... have not been fulfilled.

...”

Section 26

“...

(2) The Constitutional Court dismisses a request if it is manifestly unfounded or if it cannot be expected that an important legal question will be resolved.

(3) The Constitutional Court decides by an order to accept or dismiss a request by a majority vote of judges present. The order to dismiss a request must include a statement of reasons.

(4) If the Constitutional Court accepts a request, it may immediately proceed to decide on the merits of the case if the factual situation has been clarified and if during consideration of the request the opposing party has been given the opportunity to make statements.”

Section 30

“In deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court is not bound by the production of a request. The Constitutional Court may also review the constitutionality and legality of other provisions of the same or another regulation or general act issued for the exercise of public authority for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if this is necessary to resolve the case.”

Section 45

“...

(2) The Constitutional Court quashes regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful when it determines that it is necessary to remedy harmful consequences arising from such unconstitutionality or unlawfulness. Quashing has retroactive effect.

...”

Section 46

“(1) Any person who suffers harmful consequences due to a regulation or general act issued for the exercise of public authority which has been quashed is entitled to request that such consequences be remedied.

...”

C. The 1984 Cemetery and Funeral Act

19. Section 2 of the 1984 Cemetery and Funeral Act, which was adopted in 1984 and continued to be in force after the independence of Slovenia

(*Zakon o pokopališki in pogrebni dejavnosti ter o urejanju pokopališč*, Official Gazette of the Socialist Republic of Slovenia no. 34/84), provides that cemetery and funeral services, as well as the running of cemeteries, correspond to “municipal activities of special social importance” (*komunalna dejavnost posebnega družbenega pomena*). According to section 6, transport of the deceased was to be provided by a specially designed vehicle of a local public organisation (*komunalne organizacije*) or the local community (*krajevne skupnosti*).

D. The 1993 Public Utilities Act

20. The 1993 Public Utilities Act (*Zakon o gospodarskih javnih službah*, Official Gazette no. 32/93, entered into force on 2 July 1993) provides in section 3 that mandatory public utilities should be established by law. Local decrees should regulate the way the local public utilities operate. Section 6 provides that public utilities may be ensured through the form of a public-law enterprise (*javno podjetje*), or through concessions (*koncesija*) granted to private enterprises.

21. Finally, section 68 provides that until the introduction of legislation establishing specific public utilities, “activities of special social importance” should be deemed to be public utilities.

E. Crafts Act

22. Section 9 of the Crafts Act (*Obrtni zakon*, Official Gazette no. 50/1994) provides the following conditions under which a licence may be issued by the Chamber of Crafts:

“(1) The conditions for obtaining a licence to provide a crafts service are as follows:

- title of master craftsman,
- proof of fulfilment of the minimum requirements prescribed for providing a certain service.

(2) The conditions for obtaining a craft licence to provide a service which is similar to a crafts service are ...

(3) The minimum requirements prescribed for providing a certain service from the preceding paragraphs are as follows:

- minimum technical and other conditions relating to the space where the service is provided, land and other exterior surface, facilities and equipment,

– minimum sanitary and health conditions relating to the space where the service is provided, land and other exterior surface, facilities, equipment and the people who work in the workplace

– minimum conditions relating to the exterior surface (land and other exterior surface).”

F. The Municipal Decrees

1. The Decrees on the provision of public utilities in Novo Mesto Municipality

23. On 27 October 1994 the Novo Mesto Municipal Council adopted a Decree on the provision of public utilities (“the 1994 Decree”, Official Gazette 71/94), which listed funeral services as optional public utility. This Decree was amended on 11 May 1998 (“the 1998 Amendment”, Official Gazette 40/98). The latter listed funeral and cemetery services among the mandatory public utilities and stipulated that with respect to the cemeteries provided under special decree these services should be provided by a public-law enterprise. On 26 April 2001 the Municipal Council adopted a new Decree on the provision of public utilities (“the 2001 Decree”, Official Gazette 40/01), which quashed the previous decree and its amendment. It also listed cemetery and funeral services as mandatory public utilities and stated that a special municipal decree should determine the exact structure by means of which each of the listed public utilities should be provided. On 31 January 2002 the 2001 Decree was amended (“the 2002 Amendment”, Official Gazette 11/02), to include a provision stating that “public utilities funeral and cemetery services, which should be carried out by a public-law enterprise according to specific decrees, shall be provided by KNM”. The 2002 Amendment also stated that “provided that a particular public service is not entirely provided by KNM, a part of that service can be carried out by another entity on the basis of a contract signed with KNM...”

2. The Decree on the provision of public utility as regards cemetery and funeral activities, management of cemeteries and funeral ceremonies in Novo Mesto Municipality (“the 2000 Decree”)

24. According to the 2000 Decree (Official Gazette no. 74/00, entered into force in September 2000), cemetery and funeral services, management of cemeteries and funeral ceremonies in Novo Mesto Municipality should be provided by a mandatory public utility in the form of a public-law enterprise (sections 1 and 2). The Decree lists 32 cemeteries situated within the Novo Mesto municipal area; it applies to all of them.

Section 6 of the Decree provides:

“Funerals are normally conducted outside cemeteries and include in particular the following:

- obtaining the required documents;
- preparation of the body and transport of the remains;
- renting graves and managing the registry of cemeteries;
- providing an emergency funeral service;
- providing other services established by the law or this decree.”

25. Section 16 of the 2000 Decree provides that the relatives and the relevant institutions should report the death of a person to the provider of a mandatory public utility. The remains can be taken from a hospital or a retirement home only by the provider of a mandatory public utility. The latter should take the remains from the person or institution concerned and take them to a place specifically designated for this purpose...”

G. Constitutional Court's case law

26. On 6 July 2000 the Constitutional Court issued a decision in a case brought by a private funeral provider, P., from Ravne na Koroškem municipality. The court found that section 2 of the 1984 Cemetery and Funeral Act was not in conflict with Article 74 of the Constitution, and neither was the impugned municipality decree, which established funeral services as a local public utility. The Constitutional Court noted that, since no new act had been adopted in this area, funeral and cemetery services were deemed to be public utility on the basis of section 68 of the 1993 Public Utilities Act read together with section 2 of the 1984 Cemetery and Funeral Act.

27. The Constitutional Court found that the restrictions resulting from the system whereby cemetery and funeral services must be provided as a public utility were justified by the public interest. In addition, the court accepted the municipality's argument that for ethical, health and sanitary and hygiene reasons funerals could not be provided in the free market. Finally, the Constitutional Court took into consideration the fact that the impugned regulation was of a transitional nature pending the adoption of a specific law, and found that the duration of this situation had not yet contravened the principle of the rule of law.

H. Decisions of the Office for Protection of Competition of 3 October 2002 and 13 July 2007

28. On 3 October 2002 the Office for Protection of Competition (*Urad za varstvo konkurence* – “the Competition Office”) issued a decision declaring lack of jurisdiction to deal with the complaint lodged by the private funeral services provider P. The latter argued that the municipal enterprise authorised to provide funeral services on the basis of the municipal decree refused to accept at the cemetery remains transported by it.

29. The Competition Office declared lack of jurisdiction to deal with the complaint, since the impugned decree concerned the State's control of the market. Despite this, the Competition Office expressed criticism concerning the regulation of funerals in Slovenia. It was, in particular, critical of the fact that, due to a legal vacuum, the 1984 Cemetery and Funeral Act, adopted under the previous regime, was still in force. This Act did not distinguish between funerals and cemetery services. Consequently, funerals and cemetery services were automatically considered public utilities on the basis of section 68 of the 1993 Public Utilities Act. The Competition Office further noted that funerals, which could not have been provided freely and privately under the previous regime, had in fact been carried out by registered private enterprises since the independence of Slovenia and the transition of the economic system. These private enterprises had provided all services except those concerning cemeteries.

30. The Competition Office then listed the funeral products and services which should continue to be provided by private funeral enterprises. They included, *inter alia*, the sale of funeral articles (coffins, upholstery, cremation urns and memorials), funeral flower arrangements, transport of remains (except for emergency services which should be provided through concession), preparing obituary notices, obtaining the necessary permits and documents, organising ceremonies and graveside services, and the sale and installation of tombstones and memorials.

31. The Competition Office was of the opinion that the listed services should undoubtedly be subject to a free market regime and that the restrictions in question could not be justified on ethical, health or sanitary or hygiene grounds.

32. P. lodged a new complaint in 2003, claiming that the municipal enterprise had acted in a discriminatory manner when it refused to bury the remains transported by him while allowing the remains to be transported by some other private entrepreneurs. Further to the remittal of the case by the Supreme Court, the Competition Office issued a final decision on 13 July 2007. It found that while it was true that P. had suffered damage due to the municipal enterprise's acts, the municipal enterprise had a lawful monopoly on the territory of the respective municipality, which included the

transport of remains. It has therefore protected its position by preventing P. from carrying out business which he could not have done lawfully. The other entrepreneurs who were allowed to bring remains to the cemetery were from other municipalities. As *obiter dictum*, the Competition Office again questioned the appropriateness and constitutionality of the system, which should operate only as a transitional measure.

III. COMPARATIVE LAW AND PRACTICE

33. According to the information available to the Court from a number of member States, in most of them funeral services are subject to the free market and provided by private firms. In some countries public bodies may choose to provide funeral services, however if they do they must compete with private enterprises. For example, in Austria, Belgium, Bulgaria and France, funeral services may also be provided by public bodies. If so, they are subject to market regulations and must compete on the free market with private enterprises. On the other hand, in Croatia, as in Slovenia, funeral services are listed as public utilities and are mostly provided by public bodies.

34. As far as can be seen, funeral services providers are regulated by law in some countries, as is the case in Belgium, France, Italy or Slovakia, and unregulated or self-regulated in others, like Germany, Latvia, Ireland and the United Kingdom.

35. In Austria, Croatia, France, Hungary, Italy, Lithuania and Slovakia, for example, private funeral service providers may only operate with a licence or concession from a public body. Permits or licences are granted by local authorities and subject to a number of requirements, such as professional qualifications and competence, fulfilment of technical, security and health protection standards, and analysis of the company's financial situation.

36. Unlike funerals, it would appear that cemetery and crematorium services are generally provided by public bodies, mostly the municipalities, since they are considered essential public services which are intrinsically linked to public health issues. When crematoria were nationalised in Belgium, a transitional period was provided and a certain form of compensation was paid to the private enterprises which had formerly run the country's crematoria.

THE LAW

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

37. Under Article 1 of Protocol No. 1 to the Convention, the applicants complained that due to the 2000 Decree and the acts of KNM, the second applicant was prevented from providing funeral services, which it had been successfully doing for years. As a result, the first applicant's family's economic and social situation has been put at risk and the second applicant is under threat of liquidation.

Article 1 of Protocol No. 1 which 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.”

A. Admissibility

1. *Victim status*

38. The Government objected to the first applicant's claim to be a victim of the alleged violation, as he had not participated as a party to the domestic proceedings, in particular as regards the proceedings before the Constitutional Court. In addition, the second applicant had ceased to exist on 7 August 2006 and therefore there were no grounds for the examination of the present application.

39. The applicants disagreed. The first applicant was a private entrepreneur (*samostojni podjetnik*) and had been liable for the obligations deriving from his business with all his assets, personal and professional. The operations of the second applicant were carried out using the first applicant's identification numbers, including his tax number.

40. The Court notes that the applicants complained that their right under Article 1 of Protocol No. 1 had been violated by the local authorities, which prevented the second applicant from continuing to provide funeral services. It further observes that the first applicant was a private entrepreneur, and therefore the sole owner of the business carried out by the second applicant. He was also a legal representative of the second applicant and was liable

with his property for its obligations and debts. The Court notes that in this particular situation, where the owner and the professional entity are so closely connected, the first applicant can be considered to be a person directly effected by the acts at issue (see *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51) and can therefore claim to be a victim of the violation alleged in the present case. The Court further notes that the second applicant ceased to exist in 2006 and that therefore it is only the first applicant who can continue to pursue the present application.

2. Exhaustion of domestic remedies

41. The Government argued that the applicants had had at their disposal an effective remedy, namely a request for a review of constitutionality and legality. However, the second applicant lodged it only against the 2000 Decree and not against the previous 1994 Decree and 1998 Amendment or the subsequent 2001 Decree and 2002 Amendment. The 2000 Decree set out only the means of organisation of funeral services. However, funeral services were classified as a public utility in the 1994 Decree. In addition, the second applicant only challenged section 1 and 16 of the 2000 Decree, while it should have challenged section 2, which established that a provider of funeral services should be a public-law enterprise.

42. The applicants contested this argument, submitting that they had used all the avenues available in the domestic legal system.

43. The Court observes that the applicants specifically complained about the effects of the 2000 Decree, which the second applicant had challenged before the Constitutional Court. The latter, which had the power to consider the legality and constitutionality of all of the provisions of the impugned decree (see paragraph 18 above), found that the system complained of was in conformity with the applicable laws and the constitution (see paragraph 13 above). The Court also notes that it was the 2000 Decree which determined that funerals should be provided by a public-law enterprise, which is at the centre of the applicants' complaint. The subsequent 2001 Decree and 2002 Amendment, which concerned all public utilities in the municipality, did not add anything significant which would seem to have a prospect of changing the position of the Constitutional Court on this subject. It further notes that both the 1994 Decree and the 1998 Amendment to which the Government referred, had been annulled by the 2001 Decree.

44. Having regard to the above, the Court must reject the Government's objection concerning exhaustion of domestic remedies.

3. Conclusion

45. The Court notes that the part of the application concerning the complaints under Article 1 of Protocol No. 1 pursued by the first applicant 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. On the other hand, the part of the application concerning the second applicant shall be declared inadmissible in accordance with Article 34 of the Convention (see paragraph 40 above). The first applicant will be referred to hereinafter as “the applicant”. The second applicant will be referred to as “the applicant's company”.

B. Merits

(a) The parties' arguments

46. The applicant maintained that because of the 2000 Decree and the subsequent delegation of the exclusive right to provide funeral services to KNM, the applicant's company, had been prevented from providing services concerning the deceased who were to be buried in the cemeteries managed by KNM; specifically, he was unable to provide transport of remains, preparation of bodies and preparation of display rooms in funeral homes.

47. The Government argued that the applicant's company had never had the right to provide public services in terms of funerals and cemetery services. These services had already been classified as a public utility in the 1994 Decree. The 1998 Amendment, which classified them as a mandatory public utility, entered into force on 5 June 1998. The applicant therefore knew or should have known that funerals were a public utility before he obtained the licence. What is more, the 1984 Cemetery and Funeral Act had already established that cemetery and funeral services had been municipal activities of special social importance and had been classified as public utilities with the introduction of the Public Utilities Act in 1993. Therefore, the 2000 Decree cannot be understood as interfering with the applicant's right to property.

48. In addition, while the Government admitted that the applicant's company could not provide core funeral services, such as those concerning the preparation of bodies and transport of remains, it could and did continue to sell funeral items. The allegation that the applicant's company, was at risk of liquidation due to the 2000 Decree was therefore unsubstantiated.

49. The Government further maintained that the interference, provided that the Court found that there was one, was in the public interest and was justified on ethical, health and sanitary and hygiene grounds. In particular, determination of the time of death, special diligence in cases of communicable diseases and special hygiene requirements concerning the transport and keeping of remains did not allow for a free market regime in this field. In addition, it would be unethical and not in the interest of the consumer to allow competition in this area of services. Control of these services by local authorities was therefore essential.

50. The Government disputed the relevance of the Competition Office's opinion, arguing that the Competition Office had declined jurisdiction to deal with the case. In addition, they submitted a copy of a decision of 13 July 2007 in which the Competition Office found that P., who was a private entrepreneur with a licence to provide funeral services, was unsuccessful with his complaint similar to that of the applicant.

51. Furthermore, the Government submitted that the interference was strictly necessary, as this was the only way to protect the public interest. In this respect they mentioned that some private companies providing funerals had been preparing deceased for funerals in inappropriate conditions.

52. The Government further maintained that the same system existed in other Slovenian municipalities and submitted copies of municipal decrees demonstrating that funerals were regulated either through a concession being awarded to a private company through competition or through public enterprise. The Government moreover argued that the decision to regulate the provision of funerals as a public utility was a matter which fell within the State's margin of appreciation.

(b) The Court's assessment

53. The Court must examine whether the applicant had a "possession" within the meaning of Article 1 of Protocol No. 1 before considering whether the relevant legislation or the way it was applied to the applicant interfered with his rights as guaranteed by that provision (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 40, ECHR 2004-IX).

54. The Court reiterates that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The applicability of Article 1 of Protocol No. 1 therefore extends also to professional practices and their clientele, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets (see among many authorities, *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101, and *Buzescu v. Romania*, no. 61302/00, § 81, 24 May 2005).

55. Furthermore, the concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right (see, for example, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII).

56. Bearing in mind the above principles, the Court needs to examine whether the circumstances of the present case, considered as a whole, may

be regarded as having conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 124, ECHR 2004-XII).

57. It is undisputed in the present case that the applicant had developed a significant level of goodwill in relation to funeral provision, such as preparation of bodies and transport of remains (see paragraph 6 above), during his seven years of providing this service. However, in 1995, when the applicant obtained his craft licence, funeral provision had already been designated as public utility by the 1993 Public Utilities Act. The latter left to the local authorities the latitude to choose to regulate funeral provision through the form of a public-law enterprise or through concessions granted to private enterprises. The local authorities in the applicant's municipality fully regulated this area by 2002, when the 2002 Amendment was adopted and when public utilities were entrusted to the municipal enterprise KNM, which acquired a lawful monopoly on providing funeral services in the municipal area.

58. The Court finds that the applicant could, admittedly, be said to have an existing possession in respect of providing the funeral services in question (see paragraphs 6, 46 and 48 above) during the period of legal vacuum. However, the applicant's complaint concerns the period following the implementation of the 2000 Decree and the 2002 Amendment and therefore a question as to whether he could have been considered to have a reasonable expectation of continuing to provide these services after they were designated to the municipal enterprise.

59. The Court cannot question the decision made by the local authorities to designate the funeral provision to the municipal enterprise instead of regulating it through the means of concession; an issue which was left by the national legislation to their discretion and which certainly falls within the State's margin of appreciation. It attaches decisive importance to the fact, undisputed by the applicant, that he had been throughout the entire period, in which he provided funeral services, aware that this was only a temporary solution pending the implementation of the national legislation, which required the municipality to regulate funeral provision as public utility.

60. The Court observes that several local decrees and amendments were adopted in Novo Mesto Municipality since 1994 regulating the public utilities. It is true that the first one of them, the 1994 Decree, apparently mistakenly, listed funeral services as the optional public utilities. However, in view of the clear provisions of the 1993 Public Utilities Act and the 1984 Cemetery and Funeral Act and in the absence of any further implementing local legislation this could not be understood as eliminating the funeral services from the public realm. In any event, this Decree was amended by the 1998 Amendment, which listed funeral services as mandatory public utilities, as did all the subsequent decrees (see paragraphs 23-25 above). The

Court therefore observes that the applicant's *de facto* possibility to provide funeral services in question in the period of seven years, which *de jure* ceased following the implementation of the 2002 Amendment, was from the beginning of an obviously transitional nature.

61. The Court considers that the fact that the authorities did not adversely interfere with the applicant's activity during the seven year period could not affect the above conclusion. Unlike in *Öneryıldız v. Turkey* (cited above, §§127-9) and *Beyeler v. Italy* ([GC], no. 33202/96, § 121, ECHR 2000-I), where the authorities largely contributed to the uncertainty as to the fate of the applicants' possessions, the authorities in the present case did nothing to contribute to the applicant's expectation to be able to continue to provide funeral services after the necessary regulations were adopted and also immediately and consistently informed him about the effects the relevant decrees had for his business (see paragraphs 9, 10 and 13 above). As regards the more general context, the applicant has not provided proof of any inconsistency on the part of different municipalities in implementing the 1993 Public Utilities Act in this field, by showing that some of them refused to regulate funeral services as public utilities.

62. Therefore, having regard to all of the above and notwithstanding the Competition Office's opinion questioning the appropriateness of the system (see paragraphs 28-32 above) and the fact that the full nationalisation or municipalisation of funeral services appears to be a rare occurrence in the member States (see paragraphs 33-36), the Court cannot conclude that the applicant's hope of being able to continue to provide funeral services in question constituted a claim of a kind that was sufficiently established to constitute a legitimate expectation, and hence a distinct "possession" within the meaning of the Court's case-law (see, *mutatis mutandis*, *Öneryıldız*, cited above, § 126, and *Zhigalev v. Russia*, no. 54891/00, §§ 143 and 146, 6 July 2006).

63. This being so, the 2000 Decree and KNM's acts, which prevented the applicant from continuing to provide the funeral services, cannot be considered an interference with the applicant's "possession" within the meaning of Article 1 of Protocol No. 1. The guarantees of that provision do not therefore apply to the present case.

64. The Court thus concludes that there has been no violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ TOGETHER WITH ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

65. The applicant complained that the Constitutional Court's decision of 1 April 2004 (see paragraph 13 above) was incompatible with the rights

enshrined in Article 14 of the Convention read together with Article 1 of Protocol No. 1 to Convention.

Article 14 reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

66. The Court notes that as regards the applicant's company, it cannot be considered to have a standing to pursue this part of the application before the Court, for the reasons set out in paragraph 40 above.

67. As regards the applicant, the Court, having regard to the finding relating to Article 1 of Protocol No. 1 (see paragraphs 53-64 above) and the arguments adduced by the applicant, finds that this complaint is unsubstantiated and it must therefore be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Mr Leopold Oklešen's right under Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 30 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President