



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

FIFTH SECTION

CASE OF GÖBEL v. GERMANY

(Application no. 35023/04)

JUDGMENT

STRASBOURG

8 December 2011

FINAL

08/03/2012

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

In the case of Göbel v. Germany,

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

Dean Spielmann, *President*,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ann Power-Forde,

André Potocki, *judges*,

Klaus Köpp, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 15 November 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35023/04) against the Federal Republic of Germany lodged on 24 September 2004 with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Gerd Göbel (“the applicant”), who was born in 1948 and lives in Aljezur (Portugal).

2. The applicant, who had been granted legal aid, was represented by Mr W. Uckert, a lawyer (*Ass. Jur.*) practising in Kassel (Germany). The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice, and also by Professor J.A. Frowein, Director (emeritus) of the Max Planck Institute of Heidelberg.

3. The applicant alleged in particular that the decisions of the domestic courts, based on the relevant provisions of the Property Act, had infringed his right to the peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1.

4. Renate Jaeger, the judge elected in respect of Germany who was in office at the time of the application, decided to withdraw from the case (Rule 28 of the Rules of Court). The Government accordingly appointed Mr Klaus Köpp, a lawyer practising in Bonn, to sit as *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1 as in force at the time).

5. By a decision of 13 October 2009, the Chamber declared the application admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The facts of the case, as set out by the parties, can be summarised as follows.

A. Background to the case

8. The disputed land, having a surface area of 759 sq.m., including a dwelling house and business premises, is situated in Erfurt, on the territory of the former German Democratic Republic (GDR).

9. Under a notarially-registered agreement of 4 October 1938, the S. brothers, who were Jewish, sold this land for 256.000 reichsmarks (RM) to an industrialist, M. D. The S. brothers subsequently fled to National-Socialist Germany and took refuge in Australia.

10. After 1945, the land, which was situated in the Soviet-occupied zone, was temporarily requisitioned by the State.

11. On 28 February 1946 the President of the *Land* of Thuringia (GDR) appointed an administrator and indicated that the land, which had been sold under duress, fell within the scope of the Reparations Act (*Wiedergutmachungsgesetz*) of 14 September 1945. It was thus supposed to be returned to the former owners or to their heirs.

12. Subsequently the restitution procedure was suspended, with a view to the amendment of the Reparations Act and to the systematic expropriation of the plots of land concerned.

13. On 18 October 1948 the administrator of the disputed property entered into a friendly settlement on behalf of the S. brothers with the widow and heir of M. D., under which the latter would remain the owner of two thirds of the land and the S. brothers would obtain the remaining one third, whilst in return waiving any claims against Mrs D.

14. Subsequently the S. brothers challenged this friendly settlement, arguing that they had not been consulted.

15. After the death of Mrs D., the two thirds of the property still owned by her was left to a community of heirs.

B. Situation after German reunification

16. Under a notarially-registered agreement of 11 April 1992, one of Mrs D.'s heirs sold an initial share in the joint property (*Anteil an der Miteigentumschaft*) to the applicant for 90,000 deutschmarks (DM) and a second share to another purchaser, M. P., for the same amount. The

agreement indicated that the applicant had been provided with a description of the events leading to the current property regime of the property in question (“*wie es zu den momentanen Eigentumsverhältnissen gekommen ist*”) and that this description covered the period from 22 April 1904 to 25 September 1987.

17. On 30 October 1992 the applicant was registered in the land register as a member of the community of joint owners.

18. In two letters, of 8 September and 17 December 1992, the heirs of the S. brothers sought the restitution of the remaining two thirds of the land in accordance with section 1(6) of the law on the resolution of outstanding property issues – the Property Act (*Gesetz über die Regelung offener Vermögensfragen - Vermögensgesetz*) of 23 September 1990 (see relevant domestic law and practice, paragraph 30 below).

19. In a notarially-registered agreement of 15 March 1993 the heirs of the S. brothers sold one third of the disputed land for DM 3,700,000 to Mrs T. The same agreement contained a clause indicating that the heirs of the S. brothers were also selling the remaining two thirds of the land for DM 6,800,000 under the condition precedent that they obtained its restitution (the procedure was pending before the domestic authorities and courts – see paragraphs 23 et seq. below).

20. On 31 January 1997 the applicant acquired a second share in joint ownership from M. P., which was also registered in the land register on 4 May 1998. The Government pointed out that the applicant had not provided evidence that he had paid for that acquisition, whereas the applicant indicated that the value of that second share had also amounted to DM 90,000 as stipulated in the initial agreement of 11 April 1992, and that he had acquired that share from M. P. in exchange for debts owed to him by the latter.

21. On 17 June 1997, the applicant entered into a notarially-registered sales agreement for his two shares for a total sum of DM 600,000 to the company Global Pacific Investment Trust, having its registered office in Vaduz (Liechtenstein). This agreement indicated that the parties had released the notary from his obligation to inspect the land register, in spite of his warning that the existence of third-party rights could not entirely be ruled out.

22. The applicant alleged that, on account of the restitution of the disputed property, he had been unable to fulfil his undertakings under that agreement.

C. Procedures before domestic authorities and courts

23. In a decision of 8 November 1995 the Office for the Resolution of Outstanding Property Issues (*Amt für die Regelung offener Vermögensfragen*) of the town of Erfurt initially rejected the request by the

heirs of the S. brothers, on the ground that the friendly settlement reached on 18 October 1948 had ruled out any request for restitution. The heirs of the S. brothers challenged that decision.

24. In a decision of 13 October 1997 the Office for the Resolution of Outstanding Property Issues for the *Land* of Thuringia (“Office for the *Land* of Thuringia”) upheld their request and ordered the restitution of the remaining two thirds of the land. The Office took the view that there was a presumption that the disputed land had been sold under duress in 1938, because the sale price had not been appropriate and it had not been established that the sale would have taken place without the National-Socialist Party’s “rule”. Moreover, restitution could not be ruled out, whether because of the friendly settlement reached in the former GDR under the pressure of forthcoming expropriations without the agreement of those concerned, or for any of the other reasons given in section 4 of the Property Act, namely an acquisition in good faith at the time of the former GDR (see relevant domestic law and practice, paragraph 30 below). Under section 7a(2) of the Property Act, the applicant was entitled to the payment of consideration (*Gegenleistung*) for a sum equivalent to the sale price of his shares in 1938 at the conversion rate of DM 1 for RM 20, thus DM 1,250.

25. The applicant then took the matter to the Gera administrative court, complaining that the current purchasers were not responsible for the situation under the National-Socialist regime, that the friendly settlement had been valid and that the Office’s decision infringed his right to the enjoyment of his possessions under Article 1 of Protocol No. 1.

26. In a judgment of 17 April 2003 the Gera Administrative Court upheld the decision of the Office of the *Land* of Thuringia, in all its aspects, relying on sections 2(1) and 3(1) taken together with 1(6) of the Property Act (see relevant domestic law and practice, § 30 below). It explained that the Property Act had to be regarded as a law controlling the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1, having the legitimate aim of ensuring reparation for the injustice committed against Jewish citizens. Even supposing that the applicant had a possession within the meaning of that Article, the relevant provisions of the Property Act had validly defined the scope of his property right (*zulässige Inhaltsbestimmung des Eigentumsrechts*). He therefore had only a restricted right (*eingeschränkte Rechtsposition*). The Administrative Court concluded that restitution was not ruled out under section 4(2) of the Property Act, because the applicant had not acquired title to its pecuniary value (*kein Eigentum an dem Vermögenswert*) and had acquired his share after the entry into force of the Property Act. Nor had he been able to dispose of (*verfügen*) his property, and for that reason was simply registered in the land register as a member of the community of joint owners of the inherited estate.

The Administrative Court did not give the applicant leave to appeal against that judgment or to lodge an application for review with the Federal Administrative Court.

27. In a decision of 29 January 2004, the Federal Administrative Court dismissed the applicant's appeal against the Administrative Court's decision not to give him leave to lodge an application for review.

28. In a decision of 31 March 2004 the Federal Constitutional Court, ruling in a committee of three, rejected the applicant's constitutional appeal.

29. On 26 July 2004 the applicant filed a request for compensation under the Law of 27 September 1994 on compensation in accordance with the Property Act – the Compensation Act (*Gesetz über die Entschädigung nach dem Vermögensgesetz – Entschädigungsgesetz* – see relevant domestic law and practice, paragraph 31 below) and that procedure is still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Law on the resolution of outstanding property issues – the Property Act

30. On 29 September 1990 the Property Act of 23 September 1990, which was also to be part of the Unification Treaty (*Einigungsvertrag*), came into force. Under the Treaty the Property Act would remain in force in Germany after the reunification of the two German States on 3 October 1990. The Act's purpose was, in particular, to settle any conflicts relating to property on the territory of the GDR in a manner that was socially acceptable, in order to ensure long-term legal security in Germany.

Section 1(1) of the Property Act provides that it is applicable to rights in respect of property that was expropriated at the time of the GDR and section 1(6) provides that it also applicable to persons against whom proceedings were brought in Germany between 30 January 1933 and 8 May 1945 on racist, political, religious or ideological grounds (*weltanschauliche Gründe*) and who had consequently lost their property "by forced sale, expropriation or other means". Sections 2 and 3 of the Act complement section 1.

Section 3(1) of the Property Act provides that any property that became "people's property" will be returned on request unless excluded by the law. Section 3(2) provides that if a number of parties make a request for restitution concerning the same property, it is the party that was "first" injured which is thus entitled. That means that, as in the present case, when property was sold under duress during the National-Socialist period, then subsequently expropriated in the former GDR, the heirs of the original Jewish owners have a priority right to restitution.

Restitution is ruled out if it proves impossible in practice (section 4 (1) of the Act) or if the purchasers acquired the property in good faith between 8 May 1945 and 18 October 1989 (section 4 (2) of the Act). However, it is not excluded if, as in the present case, the acquisition took place after that date.

Section 30a(1), first sentence, of the Property Act provides that applications for restitution had to be lodged no later than 31 December 1992.

31. In the event of the property's restitution, section 7a(2) of the Property Act provides that consideration equivalent to the original sale price must be paid to the new purchasers. The conversion rate is DM 1 for RM 20. In this connection, no distinction is made between the heirs of the initial purchaser in the National-Socialist era and a new purchaser, who, as in the present case, has more recently acquired joint-ownership shares from the community of heirs of the initial purchaser.

Section 7a(3b) provides that the heirs of the initial purchaser or the new purchaser may also opt for the payment of compensation in accordance with the Compensation Act of 27 September 1994 if the original sale price had been paid in reichsmarks (RM) in the National-Socialist era. The objective of this provision was to alleviate the effect of the devaluations resulting from two changes of currency since that time. Only those persons who had acted in a manner contrary to the principles of humanity or who had abused their position in the National-Socialist era were to be excluded from the possibility of obtaining such compensation.

THE LAW

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

32. The applicant argued that the decisions of the domestic courts based on the relevant provisions of the Property Act had infringed his right to the enjoyment of his possessions, as guaranteed by 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.”

33. The Government disputed that allegation.

A. The parties' submissions

34. The applicant maintained that he was a victim of a deprivation of property without compensation, as in the case of *Jahn and Others* (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI).

He did not dispute the restitution as such, nor the legitimate purpose pursued by the German legislature and its margin of appreciation in such matters. The applicant took the view, however, that he was entitled to fair compensation and that the payment of DM 1,250 by way of consideration, as provided for in the Property Act, placed a disproportionate burden on him. He submitted that he had acquired his property lawfully and in good faith, after German reunification, from the legitimate heirs of the initial purchaser in the National-Socialist era. In his submission, if the FRG, as successor State, sought to provide redress for the injustices committed by the National-Socialist State, it was incumbent on the FRG to assume the consequences and it could not do so to the detriment of an ordinary purchaser who had nothing to do with the events of that era. Contrary to what the Government had argued, the State's objective had precisely not been to strike a fair balance between the interests at stake, but to avoid paying damages on the basis of legal arguments.

35. As to the Government, they accepted that the applicant had a "possession" within the meaning of Article 1 of Protocol No. 1, even though they noted that he had only a share of an inherited estate (*Miterbenanteil*) and not title to the disputed land, which was held by the community of heirs as a whole (*Gesamthandseigentum*). They added that even supposing there had been a deprivation of possessions in the present case, that deprivation was based on the relevant provisions of the Property Act and was therefore "provided for by law". It was also in the "public interest", given that its objective was to return property to the heirs of the former Jewish owners who had been the victims of persecution under the National-Socialist regime.

The Government further argued that the interference was justified and that it struck a fair balance between the interests at stake, in the light of the margin of appreciation afforded to the State in the context of German reunification and taking into account the need to provide redress for the injustices committed under the National-Socialist regime. In the absence of any general regulations to that end in the GDR, the FRG had sought to make up for that shortcoming after German reunification.

In addition, the applicant had acquired his shares after the entry into force of the 1990 Property Act for a minimal sum and had been apprised of the history of the property in question. He had thus knowingly taken the risk

of acquiring property against which a restitution application might be lodged by the heirs of the original Jewish owners. In accordance with the objectives of the Property Act, the applicant was entitled to the payment of consideration based on the sale price in the National-Socialist era; he also had the possibility of requesting payment of compensation under the Compensation Act, which – according to the Government – amounted to DM 15,000. They alleged that, in reality, the applicant had hoped to earn money through a property deal and had perhaps suffered a loss as he was unable to fulfil his undertakings in respect of the subsequent sale of his share. His hope of doing a “good deal”, however, was not part of the rights protected by Article 1 of Protocol No. 1.

B. The Court’s assessment

1. The existence of interference with the peaceful enjoyment of a “possession”

36. According to the Court’s case-law, the notion of “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”, for the purposes of this provision (see, among other authorities, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 53, Series A no. 306-B, and *Wittek v. Germany*, no. 37290/97, § 42, ECHR 2002-X).

37. The Court notes in the present case that the applicant, under notarially registered agreements of 11 April 1992 and 31 January 1997, acquired in joint ownership two shares belonging to the community of heirs of the initial purchaser for the total sum of DM 180,000 and was registered in the land register as a member of the community of joint owners of the inherited estate. Even though he did not acquire title to the land in question, he nevertheless acquired shares in the estate under joint ownership. He thus had a “possession”, within the meaning of Article 1 of Protocol No. 1, and this has not in fact been disputed by the Government.

38. As a result, the restitution of the land to the heirs of the original owners, in accordance with the relevant provisions of the Property Act and subject to the payment to the applicant of consideration amounting to DM 1,250, a sum equivalent to the sale price of those shares in 1938, or of compensation under the Compensation Act, constituted interference with his right to the enjoyment of his possessions.

39. Having regard to its case-law in such matters, the Court takes the view that interference with the applicant’s right to the enjoyment of his possession must be regarded as a “deprivation” of possessions, within the meaning of the second sentence of Article 1 of Protocol No. 1. It must

therefore ascertain whether the interference complained of is justified under that provision.

2. Justification for the interference

(a) “Provided for by law”

40. The Court notes that the impugned measure was based on sections 2(1) and 3(1), taken together with section 1(6) of the Property Act of 23 September 1990. Section 1(6) indicates that the Property Act, which contains very clear provisions on the conditions of restitution of land expropriated at the time of the former GDR, is also applicable to the pecuniary rights of persons against whom proceedings were brought in the National-Socialist period. Section 7a(2) of that Act provides for payment to the new purchasers of consideration equivalent to the original sale price and section 7a(3b) provides for payment of compensation under the Compensation Act.

41. The deprivation of possessions was thus provided for by law, in compliance with Article 1 of Protocol No. 1.

(b) “In the public interest”

42. 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 of the existence of a problem 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.

Furthermore, the notion of “public interest” is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature’s judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation (see *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98; *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII; and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67 *in fine*, ECHR 2002-IX).

43. In the present case the Court has no doubt – and this has not in fact been disputed by the applicant – that the aim pursued by the German legislature to return the property to the heirs of the original Jewish owners,

who were victims of persecution under the National-Socialist regime, was “in the public interest”.

(c) Proportionality of the interference

44. The Court reiterates that interference with the peaceful enjoyment of possessions 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 (see, among many other authorities, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 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*, 20 November 1995, § 38, Series A no. 332).

In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). Nevertheless, the Court cannot fail to exercise its power of review which requires it to determine whether the requisite balance was maintained in a manner consonant with the applicant’s right to the peaceful enjoyment of his possessions, within the meaning of the first sentence of Article 1 of Protocol No. 1 (see *Zvolský and Zvolská*, cited above, § 69).

45. Compensation terms under the domestic legislation are material to the assessment as to whether the contested measure respects the requisite “fair balance” and, in particular, whether it imposes a disproportionate burden on the applicant. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *Jahn and Others*, cited above, § 94).

46. The Court first notes that the Property Act, which governs disputes concerning property situated in the former GDR, affords a priority right of restitution to the heirs of the original Jewish owners, who were the first injured parties prior to the heirs of owners whose land was expropriated in the former GDR, who were thus the second injured parties, as was the case for the community of heirs from whom the applicant in the present case acquired his shares after German reunification. These second injured parties

are entitled either to the payment of consideration equivalent to the original sale price or to compensation under the Compensation Act (see relevant domestic law and practice, paragraphs 30-31 above). This also applies to the applicant, who was registered in the land register as a member of the community of joint owners of the inherited estate.

47. In that connection the Court further reiterates that the State has a wide margin of appreciation in the enactment of laws in the unique context of German reunification, having regard to the immense task facing the legislature to deal with all the questions that necessarily arose as a result of the changeover from a Communist regime to that of a democratic market economy (see, in particular, *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 74, 77 and 110, ECHR 2005-V; *Jahn and Others*, cited above, § 113; and lastly, *mutatis mutandis*, *Vistiņš and Perepjolkins v. Latvia*, no. 71243/01, § 85, 8 March 2011).

48. In the present case, the Court notes that the applicant acquired the first share from the community of heirs on 11 April 1992, after the entry into force on 29 September 1990 of the Property Act of 23 September 1990 and before the expiry of the time-limit for restitution applications, fixed at 31 December 1992. In addition, the applicant had been duly informed by the notary of the property's history since the beginning of the century.

49. The Court thus accepts the Government's reasoning to the effect that the applicant knowingly took the risk of acquiring property against which a restitution claim could be made. This is particularly the case for the acquisition of his second share on 31 January 1997, over five years after the lodging of the restitution applications on 8 September and 17 December 1992 by the heirs of the original owners, and a few months after the decision of 13 October 1997 by the Office of the *Land* of Thuringia to grant their request.

50. However, the applicant did not complain of the restitution as such but of the minimal amount of consideration provided for by section 7a(2) of the Property Act, based on the original sale price of the shares in the National-Socialist era. In this connection, the Court notes that section 7a(3b) of the Property Act also affords the applicant the possibility of seeking payment of compensation under the Compensation Act, as he did on 26 July 2004. The procedure in this connection is still pending and the Government assessed the amount of the compensation to which the applicant would be entitled at DM 15,000.

51. In the present case, what appears crucial in the Court's view is first the aim of the Property Act, which was to afford a priority right of restitution to the heirs of the original Jewish owners who had been despoiled at the time of the National-Socialist regime, and second the fact that the applicant acquired his shares after the entry into force of the Property Act with full knowledge of the risk that an application for restitution of the land might be lodged by the heirs of the original owners.

As regards the amount of the consideration or compensation to which the applicant would be entitled under the Property Act or the Compensation Act, the Court observes that he cannot assert any rights going beyond those provided for by those two Acts (see *Maltzan and Others*, cited above, §§ 112-113, and *Leuschner v. Germany* (dec.), no. 58623/00, 15 May 2007). The fact that the applicant was entitled to claim compensation also distinguishes the present case from the case of *Jahn and Others*, cited above, where the second law amending the property legislation did not provide for the payment of any compensation to the applicants (§ 110).

52. In view of the foregoing, and in particular the exceptional circumstances related to German reunification, the Court finds that the respondent State has not overstepped its margin of appreciation and that it has not failed, having regard to the legitimate aim pursued, to strike a “fair balance” between the interests of the applicant and the general interest of German society.

There has therefore been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in French and in English, and notified in writing on 8 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President