



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

FIRST SECTION

**CASE OF ARSOVSKI v. THE FORMER YUGOSLAV REPUBLIC
OF MACEDONIA**

(Application no. 30206/06)

JUDGMENT
(Just satisfaction)

STRASBOURG

7 February 2019

FINAL

24/06/2019

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

In the case of Arsovski v. the former Yugoslav Republic of Macedonia,

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

Linós-Alexandre Sicilianos, *President*,

Krzysztof Wojtyczek,

Armen Harutyunyan,

Pauliine Koskelo,

Tim Eicke,

Jovan Ilievski,

Gilberto Felici, *judges*,

and Renata Degener, *Deputy Section Registrar*,

Having deliberated in private on 15 January 2019,

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

PROCEDURE

1. The case originated in an application (no. 30206/06) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Macedonian nationals, Mr Stojko Arsovski, Mr Stefan Arsovski and Mrs Verka Arsovska (“the applicants”), on 7 July 2006. After Mr Stefan Arsovski’s death in 2007, his widow, Mrs Dragica Arsova, and his daughters, Mrs Karolina Joseva and Mrs Kalinka Stefanovska, applied to continue the application in his name. Mrs Verka Arsovska died on 1 October 2017. Her sons, Mr Blage Arsovski and Mr Chedo Arsovski, applied to continue the application in her stead. The Government did not object to the right of Mrs Verka Arsovska’s heirs to pursue the proceedings in her name.

2. In a judgment delivered in 2013 (“the principal judgment”), the Court decided that Mr Stefan Arsovski’s heirs had standing to continue the application in his name, declared the application admissible and held that there had been a violation of Article 1 of Protocol No. 1 in that the expropriation of the applicants’ land (pasture of a total surface area of 880 sq. m.) had placed an excessive and disproportionate burden on them (see *Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, § 62, 15 January 2013).

3. Under Article 41 of the Convention, the applicants sought compensation in respect of both pecuniary and non-pecuniary damage. The Court awarded 3,000 euros (EUR) each to Mr Stojko Arsovski and Mrs Verka Arsovska and EUR 3,000 jointly to Mr Stefan Arsovski’s heirs, plus any tax chargeable, in respect of non-pecuniary damage. It dismissed

the remainder of the applicants' claim as regards non-pecuniary damage and rejected their claim for costs and expenses.

4. Since the question of the application of Article 41 of the Convention was not ready for decision with regard to pecuniary damage, the Court reserved it and invited the Government and the applicants to submit, within three months from the date on which the judgment became final, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, § 67 and point 5 of the operative provisions).

5. The applicants and the Government failed to reach an agreement and filed observations concerning the question of pecuniary damage under Article 41 of the Convention. On 30 September 2014 the Chamber decided to adjourn the examination of the issue of pecuniary damage pending the outcome of the applicants' request for reopening of the expropriation proceedings. Subsequently, the parties filed further observations and informed the Court that by a final judgment of 13 October 2015, the Higher Administrative Court had rejected as out of time the applicants' request for the reopening of the expropriation proceedings. The court held that the request had been lodged more than five years (time-limit specified under the Administrative Disputes Act) after the expropriation order had become final. The applicants did not seek the reopening of the non-contentious proceedings in which they had been awarded compensation for the expropriated land.

THE LAW

6. 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.”

A. Damage

1. The parties' submissions

(a) The applicants

7. The applicants submitted that there were no legal and factual obstacles preventing the land being returned into their possession. The concessionaire (a private company) had only constructed a water transmission system on the land. The water processing plant was located on another plot. They stated that restoration of the land into their possession

would not affect the concessionaire's rights and interests under the concession contract (see paragraph 8 of the principal judgment). In this connection, they denied that such a measure would entail significant financial losses for the concessionaire and undermine legal certainty (paragraph 12 below). If the land was restored into their possession, they would regulate their relationship with the concessionaire by means of a lease agreement.

8. The applicants submitted that restoration of their ownership rights to the land would not offset the damage they had sustained after the expropriation. In this connection, in their initial submissions they claimed EUR 500,000, which, according to them, was a reasonable share of the concessionaire's income obtained since 2 June 2003, the date on which the expropriation order became final. In their updated submissions, they claimed EUR 1,513,610 plus interest, which represented 14% of the profits obtained by the concessionaire between August 2000 (the date on which the concession contract regarding the land in issue was signed) and 2012 (the last year in respect of which information was available in the Central Register regarding the concessionaire) (see paragraphs 7 and 8 of the principal judgment). The applicants further claimed an unspecified amount for loss of income in respect of 2013 up to the date of the Court's final judgment on the matter.

9. The above-mentioned claim was based on an expert report dated 26 June 2013 drawn up at their request by a privately commissioned expert, a copy of which they submitted in support of their claim. The report explained, in detail, the methods used for the calculation of the concessionaire's profits obtained between 2000 and 2012. In order to calculate the concessionaire's profits, the expert, *inter alia*, deducted its costs and expenses, for which he used a fixed rate of 50%, from its turnover (gross income). The expert further noted that the concessionaire had been involved in extracting mineral water from another site and that it also bottled other beverages.

10. The applicants argued that if they had remained the owners of the land in question, they would have leased it and obtained rent. In this connection, they submitted a copy of a public announcement for the lease of a buffet bar in the Skopje Court of First Instance. According to the announcement, the asking price for the lease of the bar, which had a total surface area of 18.7 sq. m., was EUR 5 per sq. m. The final bid could have been much higher. Given that the two properties (the land in question and the bar) were different and incomparable in terms of their location (one being in a rural area and the other in a court building in the capital city), the purpose they served, and the income they generated, the applicants argued that it was likely that the concessionaire would have paid some EUR 10 per sq. m. if they had rented out the land in question. In any event, they maintained that the level of rent was not set by any law or regulation, but

was, rather, to be agreed by the contracting parties. Since the land in question would have been leased for the purpose of exploiting mineral water, any rent would have included a share of the concessionaire's income. If the applicants had obtained that money, they could have invested it or deposited it in a bank, which would have generated additional income.

11. Lastly, they stated that "the market value of the land at the time of expropriation could not be determined. Had it been possible, it would have been determined in the non-contentious proceedings". In this connection, they contested the relevance of the material submitted by the Government regarding selling prices of other "comparable" land (paragraph 15 below). In any event, it confirmed that private owners of land beneath which there was a mineral resource which a private concessionaire was authorised to exploit were entitled to decide about that land and retain ownership after the resource was exhausted. Lastly, they referred to an article published on 22 July 2013 by a Serbian online financial portal reporting on a public auction on eBay of a plot of land in Serbia, beneath which there was geothermal mineral water ready for extraction. The owner of that land had set the asking price at 550,000 United States dollars.

(b) The Government

12. The Government submitted that the land in question could not be restored into the applicants' possession. They argued that the concessionaire had constructed a pit and other installations on the land in order to exploit mineral water and that it had recently obtained ownership of the borehole. There were a significant number of constructions and their removal would entail "serious factual obstacles". It would also call into question the concessionaire's legitimate expectations based on the still valid concession contract (valid for a renewable period of thirty years) and would jeopardise "the legal certainty of domestic investors".

13. The Government further contested the applicants' claim for loss of income as unsubstantiated and vague. They submitted that any claim in respect of pecuniary damage could not be linked to the revenue and/or profits of the concessionaire. In that connection, they stated that the mineral water was State-owned and that the applicants had not demonstrated any intention to carry out geological research on the land themselves or that there had been any other party interested in renting or purchasing the land for that purpose.

14. They also challenged the quality of the expert examination. According to them, the methodology used by the expert was ambiguous, speculative and frivolous. The report also relied on the wrong parameters and disregarded some important elements. The applicants had also failed to substantiate how the alleged loss of income, which they seemed to be presenting as unpaid rent, amounted to 14% of the concessionaire's profit.

15. As regards the land's market value at the time of expropriation, they referred to findings made by the Bureau of Judicial Expertise (*Биро за судски веештачења*) in 2013 that there was no expert methodology that would take into account the specific features of the land (the mineral water beneath it) in calculating its market value. Accordingly, they suggested that plot's market value was to be determined on the basis of the market value of "similar" plots of land. In this connection, the Government referred to sales agreements regarding plots in the same area and in different areas, concluded between 2001 and 2013, in which the selling price ranged between EUR 0.50 (undeveloped land) and EUR 78 per sq. m. (partly developed land with an industrial plant for the production, packaging and supply of mineral water). In 2001 an undeveloped plot of land (555 sq. m.) with mineral water beneath it, in the same area as the land in question, was sold by the owner to an individual (for water exploitation) for EUR 5 per sq. m. They also submitted a copy of a contract dated 2010 under which a concessionaire agreed to provide hot water (for free) to the owner of some land (beneath which there was thermal water) during the validity of the concession agreement. The Government further referred to a decision of the local authorities of 2010 according to which the market value of pasture in the same zone as the plot in question – considered the least developed for property trade in the respondent State – was below EUR 1 per sq. m. Lastly, they referred to the 1996 civil proceedings brought by the applicants for recognition of their title to the land (paragraph 7 of the principal judgment) in which they had set the value at EUR 330. In any event, a reopening of the non-contentious proceedings regarding the amount of compensation for the expropriated land had been the most appropriate avenue to resolve the issue of material damage in a "thorough and effective manner". The applicants, however, had not availed themselves of that opportunity (see paragraph 5 above). The Government concluded that the compensation awarded to the applicants at the domestic level in return for the expropriated land (EUR 880, paragraph 16 of the original judgment), based on the valuation report commissioned in the non-contentious proceedings (confirmed by another expert report of 2011) had been reasonable.

16. Lastly, the Government maintained that no analogy could be drawn between a public auction for the lease of a buffet bar in a court building and the lease the applicants might have concluded with the concessionaire if they had been the owners of the land in question. Furthermore, there was no statutory requirement for any such rent to include a share of the concessionaire's income. They also challenged the credibility and relevance of the online auction of some land on eBay referred to by the applicants.

2. *The Court's assessment*

17. The Court reiterates that a judgment in which it finds a violation imposes on the respondent State a legal obligation to put an end to the

violation and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

18. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility to do so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Brumărescu v. Romania* [GC], no. 28342/95, § 20, ECHR 2001-I, and *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, §§ 79 and 80, ECHR 2014).

19. The basis on which the Court proceeds as regards pecuniary damage depends on the nature of the breaches found (see *Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria* (just satisfaction), no. 3503/08, § 13, 24 November 2016). In this connection, it reiterates that the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 250, ECHR 2006-V, and *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 75, 28 November 2002).

20. In the principal judgment, the Court held that the interference in question had been lawful (see paragraphs 50 and 51 of the principal judgment). The finding of a violation was based on two grounds, namely that the domestic authorities had failed to explain why a lease, as less restrictive for the applicants' property rights, had been inappropriate in their case, on the one hand, and that the compensation paid to the applicants had been insufficient to offset the burden borne by them, on the other hand. In such circumstances, the Court found that the impugned expropriation had made the applicants bear an excessive and disproportionate burden (see paragraphs 55-62 of the principal judgment). Accordingly, the act of the Government which the Court held to be contrary to the Convention was an expropriation that would have been legitimate but for the failure of the authorities to justify it and pay fair compensation.

21. The Court notes that the parties presented contradictory arguments as to whether the land could be restored into the applicants' possession. The applicants argued that there were no factual and legal obstacles preventing the land in question being returned to them. In this connection, they submitted that the concessionaire's rights would be safeguarded by a lease agreement which they would conclude if they obtained ownership of the

land. The Court observes that the examples referred to by the Government confirm that the State's interest in exploiting mineral resources in the public interest did not necessitate expropriation of the land for the purpose of exploiting the resource beneath that land. However, none of those examples concerned a lease agreement between an owner of such a land and a concessionaire. The Court further observes that the relevant legislation has changed since the expropriation of the applicants' land and no longer provides for a lease in cases of research into and the exploitation of mineral resources (see paragraphs 26 and 29 of the principal judgment). No other provision of domestic law providing for such a possibility was brought to its attention.

22. In addition to the above, the Court attaches particular importance to the fact that the disputed circumstances regarding the expropriation of the land in question were not limited to the applicants and the State, but also involved the concessionaire as the beneficiary of the expropriation. In this connection, the Court accepts that the restoration of the land into the applicants' possession might have direct and adverse effects on the concessionaire and its rights under the concession contract.

23. In such circumstances, and having regard to the nature of the violation found in the principal judgment, the Court does not consider that it can proceed on the basis of the principle of *restitutio in integrum*. The applicants' claim for restoration of the land into their possession should thus be rejected. Consequently, there is no basis on which the applicants can claim any compensation for loss of enjoyment of the land since the expropriation. Furthermore, the Court would make the following observation regarding the claim for loss of income, as submitted by the applicants.

24. The applicants' claim for the lost income that they would have obtained over the years if they had remained the owners of the land was twofold: they claimed 14% of the profits the concessionaire had earned from the sale of the mineral water extracted from the land, on the one hand, and the lost rent which they would have obtained if they had leased the land over the years, on the other hand. As to the former, the Court observes that it was not presented with any examples of domestic law and practice, or any other relevant material, to demonstrate that private landlords enjoyed such an entitlement with regard to the exploitation of mineral water or any other mineral resources, which, as stated in the principal judgment, are State-owned commodities (see paragraphs 27, 53 and 61 of the principal judgment). Similar considerations apply to the particular share (14%) of the profits sought by the applicants. As to the lost rent, the applicants referred to a public announcement for the lease of a buffet bar in a court building in Skopje. It was common ground between the parties, and the Court sees no reason to hold otherwise, that the two properties are different in nature and any related rental agreements cannot be compared.

25. Accordingly, the Court considers that “the closest possible situation to that which would have existed if the breach in question had not occurred” is limited to the payment of appropriate compensation which should have been awarded at the time of the expropriation (see *Vistiņš and Perepjolkins v. Latvia* (just satisfaction) [GC], no. 71243/01, § 34, ECHR 2014). That is so because in the present case, as noted in paragraph above, it is the lack of adequate compensation and not the inherent unlawfulness of the taking of the land that was at the origin of the violation found under Article 1 of Protocol No. 1. to the Convention (see *Scordino (no. 1)* [GC], cited above, § 255).

26. As to the amount to be awarded to the applicants, the Court reiterates its findings in the principal judgment that the domestic authorities did not take into consideration the existence of mineral water in calculating the expropriation compensation. That failure had upset, in the Court’s opinion, the requisite fair balance between the demands of the general interest of the community and the requirements of the protection of the applicants’ fundamental rights (see paragraph 61 of the principal judgment). In determining the appropriate amount of compensation, the Court must have regard to the criteria laid down in its case-law concerning Article 1 of Protocol No. 1, according to which, without payment of an amount reasonably related to its value, the taking of property normally constitutes a disproportionate interference which cannot be considered justifiable under that Article. The Court therefore deems it appropriate to fix an amount that is, as far as possible, “reasonably related” to the market value of the plot of land (see *Vistiņš and Perepjolkins*, cited above, § 36).

27. The Court observes that the compensation to be awarded to the applicants at the time of expropriation rested on an expert valuation of the land carried out by a court-appointed expert who fixed its market value at EUR 880 (1 euro per sq. m.). From that amount, the domestic courts deducted EUR 475 for the costs incurred by the concessionaire (see paragraph 16 of the principal judgment). The Court found that amount insufficient to offset the burden borne by the applicants. Accordingly, it does not find it appropriate to use it as the basis for calculating the pecuniary damage as claimed by the Government (see paragraph 15 above).

28. The Court observes that the applicants did not submit their own expert valuation of the land that would take the existence of the mineral water into account for the calculation of its value. Instead, they referred to an online auction on eBay of seemingly similar land in Serbia (see paragraph 11 above). Given the nature of that announcement, the fact that it concerned land in a different State and the absence of any information about the size and nature of the land, as well as the outcome of the alleged sale, the Court finds any reference to it inappropriate and inconclusive for the present case.

29. On the other hand, the material submitted by the Government as to the sales agreements regarding similar land seems to suggest that the specific features of the land, namely the existence of a mineral resource beneath it, influenced its market value. In this connection, the Court notes that under a sales agreement concluded in 2001 the selling price of a similar land in the same area as the applicants' land was five times the estimated market value of the applicants' land (see paragraph 15 above). However, in the absence of further supporting guidelines, the Court cannot base its conclusion as to this aspect of the assessment of the value of the property in question solely on the basis of a single example of domestic practice. In such circumstances, in determining the appropriate amount of compensation, the Court will have recourse to equitable considerations (see, *mutatis mutandis*, *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 79, 28 November 2002)

30. Making an overall assessment of the relevant considerations, the Court deems it equitable to award the applicants jointly, including Mrs Verka Arsovska, whose sons (see paragraph 1 above) have the requisite standing under Article 34 of the Convention to continue the application in her name (see *Streltsov and other "Novocherkassk military pensioners" cases v. Russia*, nos. 8549/06 and 86 others, § 39, 29 July 2010), as compensation for the pecuniary damage sustained, a lump sum of EUR 15,000, plus any tax that may be chargeable on that amount. In the Court's view, this amount represents adequate compensation for the pecuniary damage that the applicants sustained, inclusive of consequential damages since the authorities took possession of the land. That the applicants did not seek the reopening of the non-contentious proceedings (see paragraph 15 above) is of no relevance in making this award.

B. Default interest

31. The Court considers it appropriate that the default interest rate for non-compliance with the present judgment should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* that Mrs Verka Arsovska's sons, namely Mr Blage Arsovski and Mr Chedo Arsovski, have standing to continue the present proceedings in their late mother's stead;

2. *Holds*

- (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of pecuniary damage, plus any tax that may be chargeable, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 February 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Deputy Registrar

Linos-Alexandre Sicilianos
President