



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

SECOND SECTION

CASE OF NEŠIĆ v. MONTENEGRO

(Application no. 12131/18)

JUDGMENT

Art 1 P1 • Deprivation of property • Applicant's lawfully acquired land declared State property according to the legislation on land situated on the seacoast • Applicant declared the user of the land until dispossession • Absence of compensation despite right to compensation provided by law • Lack of clarity of the relevant law

STRASBOURG

9 June 2020

FINAL

09/09/2020

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



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Nešić v. Montenegro,

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

Robert Spano, *President*,

Marko Bošnjak,

Valeriu Griţco,

Ivana Jelić,

Arnfinn Bårdsen,

Saadet Yüksel,

Peeter Roosma, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to:

the application against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Serbian national, Mr Ilija Nešić (“the applicant”), on 3 March 2018;

the decision to give notice to the Montenegrin Government (“the Government”) of the complaint concerning the applicant’s property rights;

the parties’ observations;

the lack of any wish on the part of the Government of Serbia to intervene in the present case, after being notified under Article 36 § 1 of the Convention and Rule 44 § 1 (a) of the Rules of Court of their right to do so;

Having deliberated in private on 12 May 2020,

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

INTRODUCTION

1. The application concerns the applicant being deprived of property without any prior individual decision having been delivered to that effect and without his being awarded any compensation for that deprivation.

THE FACTS

2. The applicant was born in 1931 and lives in Tivat. He was represented by Mr Z. Miljanić, a lawyer practising in Tivat.

3. The Government were represented by their Agent, Ms V. Pavličić.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE LAND AT ISSUE AND THE ENSUING CIVIL PROCEEDINGS

5. On 21 October 1980 the applicant bought two plots of land, registered as nos. 697/1 and 698/1, from a private person. On 22 October 1980,

pursuant to the relevant decision to that effect, the applicant was registered as their owner in the Real Estate Register.

6. Over time the numbering and sizes of the plots of land changed. Thus plot no. 698/1 was divided into several plots of land, including plots nos. 955/3 and 955/4.

7. On 17 October 2006 the State instituted civil proceedings against the applicant seeking that it be recognised as the owner of plots nos. 955/3 and 955/4.

8. In the course of the proceedings, on 1 October 2014, the Court of First Instance (*Osnovni sud*) in Kotor went to the site (*izlaskom na lice mjesta*) and established that the plots of land at issue were on the seashore (*na samoj obali mora*).

9. On 19 December 2014 the court ruled in favour of the State. It found that it was not in dispute that the applicant had become the owner of the land at issue in a lawful manner (*na zakonit način*), under the sale contract concluded in 1980. It also found that the said land was in the coastal zone (*u zoni morskog dobra*) – specifically, on the seacoast (*predstavlja samu morsku obalu*), it comprised partly a concrete beach and partly a marina. Hence it was State property under sections 2 and 4 of the Coastal Zone Act and sections 11 and 13 of the State Property Act. Furthermore, under sections 10 and 11 of the State Property Act, the seacoast and the coastal zone constituted a common resource (*javno dobro u opštoj upotrebi*) that no one could possess (*koje niko ne može imati u posjedu*), as otherwise the coastal zone could not be used (*ne bi služilo*) for exploiting the sea, for maritime transport and for fishing, which was its basic purpose (*osnovna svrha i namjena*). The court specified that the applicant’s rights ceased with the establishment of the coastal zone (*formiranjem granica morskog dobra*) – that is to say the plots at issue had become State property by virtue of the said Acts entering into force.

10. Following an appeal by the applicant, on 25 September 2015 the High Court (*Viši sud*) in Podgorica upheld the first-instance judgment, in substance endorsing its reasoning. The High Court also specified that the applicant would retain the right to use the property at issue “until dispossession” (*sve do njegovog izuzimanja*).

11. Following a further appeal by the applicant, on 16 December 2015 the Supreme Court upheld the High Court’s judgment, endorsing its reasoning.

12. On 23 October 2017 the Constitutional Court dismissed a constitutional appeal lodged by the applicant. As regards his complaint in so far as it fell under Article 1 of Protocol No. 1 the court held as follows:

“The Constitutional Court protects the right to property by prohibiting the State authorities from restricting or depriving [anyone] of that right, unless such restriction or the deprivation (*oduzimanje*) is based on law. ... Having regard to the contents (*sadržaj*) of the right to property ..., the findings expressed in the reasoning of this

decision and the object of the dispute preceding the proceedings before the Constitutional Court, the [court] finds that there was no violation of ... Article 1 of Protocol No. 1.”

II. OTHER RELEVANT FACTS

13. On 14 October 2016 the applicant instituted proceedings against the State seeking that he be registered as the user of the two plots of land (*nosilac prava korišćenja*) until dispossession.

14. On 13 April 2017 the Court of First Instance in Kotor ruled in favour of the applicant, finding that he had a pre-emptive right to use the land at issue (*ima preče pravo korišćenja*) until dispossession. The court repeated the wording of its findings in the judgment of 19 December 2014 (see paragraph 9 above) and, referring to section 30 of the Coastal Zone Act, noted that former lawful owners were entitled to compensation under the relevant provisions on expropriation.

15. That judgment was upheld on 12 January and 6 June 2018, respectively, by the High Court and the Supreme Court, which endorsed the reasoning of the Court of First Instance.

16. As can be seen from the relevant excerpt from the Real Estate Register (*list nepokretnosti – prepis*) dated 13 June 2019, the State was registered as the sole owner of the land at issue, and the applicant was registered as the user.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION OF THE REPUBLIC OF MONTENEGRO 1992 (*USTAV REPUBLIKE CRNE GORE*; PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF MONTENEGRO - OG RM - NO. 048/92)

17. Article 45 of the 1992 Constitution guaranteed the right to property. In particular, it provided that no one could be deprived of the right to property and nor could this right be restricted except when the public interest – as defined by statute (*utvrđen zakonom*) – so required or on a statutory basis and in return for compensation at market value.

II. CONSTITUTION OF MONTENEGRO 2007 (*USTAV CRNE GORE*; PUBLISHED IN THE OFFICIAL GAZETTE OF MONTENEGRO - OGM - NOS. 001/07 AND 038/13)

18. Article 58 of the 2007 Constitution guarantees the right to property. In particular, it provides that no one can be deprived of it or restricted in respect of it, except when the public interest so requires and in return for just compensation (*uz pravičnu naknadu*). It also provides that natural

resources and resources in public use (*prirodna bogatstva i dobra u opštoj upotrebi*) are the property of the State.

III. 1980 PROPERTY ACT (*ZAKON O OSNOVAMA SVOJINSKO-PRAVNIH ODNOSA*; PUBLISHED IN THE OFFICIAL GAZETTE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA NOS. 006/80 AND 036/90; THE OFFICIAL GAZETTE OF SOCIALIST REPUBLIC OF YUGOSLAVIA NO. 029/96; AND OG RM NO. 052/04)

19. This Act regulated property rights in detail. Section 3 provided, *inter alia*, that an owner had the right to use and dispose of his or her property within the statutory limits, and that everybody had a duty to refrain from violating other persons' property rights. Section 8 provided that a person could be deprived of the right to property or that this right could be restricted, in accordance with the constitution or the law. Section 20 provided that property could be acquired *ex lege*, through a legal transaction, by means of inheritance, or on the basis of a decision issued by a State body in accordance with the law.

IV. 2009 PROPERTY ACT (*ZAKON O SVOJINSKO-PRAVNIM ODNOSIMA*; PUBLISHED IN THE OGM NO. 19/09)

20. The 2009 Property Act replaced the 1980 Property Act. Section 6 thereof, however, essentially replicates section 3 of the 1980 Property Act. Section 10 provides, *inter alia*, that the right of property "can be restricted in accordance with law" (*može ograničiti u skladu sa zakonom*) and that no one can be deprived of his/her property, except in the public interest and in return for just compensation.

21. Section 20 provides that "common resources" (*dobra od opšteg interesa*) enjoy special protection under law; such resources include natural resources, resources in public use, and the coastal zone.

V. COASTAL ZONE ACT (*ZAKON O MORSKOM DOBRU*; PUBLISHED IN THE OG RM NOS. 014/92, 059/92, 027/94, OGM NOS. 051/08, 021/09, 073/10 AND 040/11)

22. Section 2 provided that the coastal zone included the seacoast (*morska obala*). Section 3 defined the seacoast as a strip of coast up to the line reached by the biggest waves in the stormiest weather (*do koje dopiru najveći talasi za vrijeme najjačeg nevremena*) and at least six metres beyond that. Parliament could also declare land beyond that to constitute seacoast. Section 4 provided that the coastal zone was the property of the

State, but that exceptionally, land beyond the six-metre strip declared seacoast by the Parliament could be privately owned.

23. Section 30 provided, *inter alia*, that owners of land within the coastal zone who had obtained such property lawfully before this Act entered into force and which was duly registered in the Real Estate Register as private property were entitled to compensation in the event of dispossession, pursuant to the provisions on expropriation. They also had a pre-emptive right to use the coastal zone (*preče pravo korišćenja morskog dobra*), under the same conditions, in accordance with the spatial (that is to say urban) plan.

24. This Act entered into force on 11 April 1992.

VI. STATE PROPERTY ACT (*ZAKON O DRŽAVNOJ IMOVINI*; PUBLISHED IN THE OGM NOS. 021/09 AND 040/11)

25. This Act entered into force on 28 March 2009 and thereby replaced section 4 of the 1992 Coastal Zone Act. However, sections 10, 11 and 13 of this Act, taken together, provide, *inter alia*, that the coastal zone, including the land, seacoast and beaches (*kupališta*) owned by the State therein, constitute common resources managed (*kojima raspolaže*) by Montenegro. Section 9 provides that natural resources and resources in public use cannot be private property (*ne mogu biti objekti private svojine*).

VII. 2000 EXPROPRIATION ACT (*ZAKON O EKSPROPRIJACIJI*; PUBLISHED IN OG RM NOS. 55/00, 12/02, 28/06, AND IN OGM NO. 21/08)

26. Section 1 defines expropriation as the deprivation or restriction of the right to property when this is required in the public interest, in return for just compensation. Public interest in the expropriation of a piece of real estate is “established by law, or on the basis of law”.

27. Section 7 provides that expropriation can be undertaken for the benefit (*za potrebe*) of the State, municipalities, State funds, and companies whose major owner is the State and which undertake activities in the public interest.

28. Section 14 sets out details as regards defining the public interest. In particular, if a public interest in the expropriation of certain real estate was not established by means of a statute, it can otherwise be established by the Government of Montenegro. A proposal for establishing the public interest in the expropriation of certain real estate is submitted by a person who, pursuant to this statute, would be the beneficiary (*korisnik*) of that expropriation. The proposal must contain, *inter alia*, the amount to be paid by way of just compensation. The Government must decide on that proposal within thirty days. In the wording of the same decision, where it defines the

public interest in the expropriation in question, the Government must also determine the beneficiary of the expropriation.

29. Section 19 provides that an expropriation proposal may be submitted by the beneficiary of that expropriation only after the public interest in the expropriation of the real estate in question has been established.

30. Section 25 provides, *inter alia*, that any decision on expropriation must identify the beneficiary of the expropriation, the property in question and its owner.

31. Sections 35-60 provide details as regards the types and the amount of possible just compensation.

THE LAW

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

32. The applicant complained under Article 1 of Protocol No. 1 to the Convention about being deprived of his property without any prior individual decision to that effect being taken and without his being compensated for it. The said Article 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 contested the applicant’s complaint.

A. Admissibility

1. *Compatibility* *ratione temporis*

34. The Government submitted that the land at issue had become State property by virtue of the 1992 Coastal Zone Act. As the relevant statute had entered into force before the Convention did in respect of Montenegro, and as the deprivation of the property had been an instantaneous act, the application was incompatible *ratione temporis*.

35. The applicant maintained that the actual breach had taken place in September 2015, when the first-instance judgment, which had deprived him of his property, had become final. The application was, therefore, compatible *ratione temporis*.

36. The relevant principles in this regard are set out, for example, in *Broniowski v. Poland* (dec.) [GC], no. 31443/96, §§ 74-77, 19 December

2002. The Court reiterates, in particular, that in order to establish its temporal jurisdiction it is essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (see *Blečić v. Croatia* [GC], no. 59532/00, § 82, ECHR 2006-III).

37. Turning to the present case, the Court firstly notes that the applicant lawfully obtained the land at issue in 1980 and remained its registered owner until well after 3 March 2004, which is when the Convention entered into force in respect of Montenegro (contrast *Petrović and Others v. Montenegro*, no. 18116/15, § 31, 17 July 2018, in which the applicants' predecessor was by 1997 no longer registered as the owner of the property in dispute already).

38. The Court furthermore notes that the State was not registered as the owner of the land automatically, simply on the basis of the Coastal Zone Act and the State Property Act; rather, it had to institute proceedings to that end against the applicant in order to establish its right in that regard. It was only after the courts had ruled in its favour that the State was declared the owner of the plots at issue, and on the basis of that ruling it was registered as such in the Real Estate Register. It is clear from the case file that the domestic courts' decisions were the only decisions delivered that related to the ownership of the plots of land, and that they were all issued well after the Convention had entered into force in respect of the respondent State (contrast *Blečić*, cited above, §§ 83-85; see, also, *mutatis mutandis*, *Turgut and Others v. Turkey*, no. 1411/03, §§ 72-73 and 75, 8 July 2008).

39. Lastly, the applicant also complains about the State's failure to pay compensation for the said land – a failure that has yet to be rectified, which means that his situation is of a continuous nature (see, *mutatis mutandis*, *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, §§ 41-43, ECHR 2000-I, and *Broniowski*, cited above, § 76).

40. The Government's objection in this regard must therefore be dismissed.

2. The Court's conclusion

41. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *Submissions by the parties*

(a) The applicant

42. The applicant reaffirmed his complaint. In particular, he had been deprived of all proprietary rights both *de facto* and *de iure*, given that the respondent State had been declared the sole owner of the land at issue without any compensation being paid to him, contrary to section 30 of the Coastal Zone Act. That interference with his property rights had been in no way justifiable. The subsequent proceedings, which had been aimed at establishing his right to use the land in question, were irrelevant, given that the State had remained its sole and exclusive owner. He maintained that his right to property, as guaranteed by the Convention, had therefore been breached.

(b) The Government

43. The Government did not contest that there had been an interference with the applicant's property rights. Rather, they maintained that it had amounted to the control of the use of property. Notably, even though the State was registered as the owner of the land at issue, it was the applicant who had possession thereof and the right to use it until dispossession, under section 30 of the Coastal Zone Act. Therefore, the fact that the State was registered as its owner was of no relevance, given that no action had been undertaken to *de facto* deprive (*oduzmu*) the applicant of it.

44. The interference had been lawful, given the fact that all the relevant legislation provided that the coastal zone, including its seashore, was a natural resource, which could only be the property of the State. It had also had the legitimate aim of preserving the environment – that is to say the coastal land, which fell within the domain of public interest.

45. Lastly, the interference had been proportionate, as the regional policy for planning and protecting the environment (in respect of which the common interest of the community prevailed) gave the State a wide margin of appreciation.

46. The Government also submitted that there were special circumstances justifying the absence of compensation, given that the applicant would remain the lawful user of the land at issue until dispossession. In the event that the land was actually dispossessed the expropriation proceedings (*postupak eksproprijacije*) would be instituted and he would be paid the compensation accordingly.

2. The Court's assessment

(a) The relevant principles

47. The relevant principles are set out in *Vistiņš and Perepjolkins v. Latvia* [GC] (no. 71243/01, § 93, §§ 95-99 and §§ 108-114, 25 October 2012) and *Hutten-Czapska v. Poland* [GC] (no. 35014/97, §§ 163-168, ECHR 2006-VIII).

48. In particular, any interference by a public authority with the peaceful enjoyment of possessions must be lawful. However, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal principles upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application (see the above-cited cases of *Vistiņš and Perepjolkins*, §§ 96-97, and *Hutten-Czapska*, § 163). Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue that concerns the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see *Hutten-Czapska*, cited above, § 168 *in fine*; *Fleri Soler and Camilleri v. Malta*, no. 35349/05, § 70 *in fine*, ECHR 2006-X; *Broniowski v. Poland* [GC], 31443/96, § 151, ECHR 2004-V; and, *mutatis mutandis*, *Belvedere Alberghiera S.r.l. v. Italy*, no. 31524/96, § 58, ECHR 2000-VI).

49. Even if it has taken place “subject to the conditions provided for by law” – implying the absence of arbitrariness – and in the public interest, an interference with the right to the peaceful enjoyment of possessions must always 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. 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 *Vistiņš and Perepjolkins*, cited above, § 108). Compensation terms under the relevant legislation are material to an assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. The Court has already held that the taking of property without the payment of an amount reasonably related to its value would normally constitute a disproportionate interference (*ibid.*, § 110).

(b) The Court's assessment

50. The Court notes that the applicant was the lawful owner of the land at issue and was registered as such until the domestic courts ruled in favour of the State, after which the State was registered as its owner. The Court therefore considers that by virtue of the domestic courts' decisions and the

registration of the State's title the applicant was deprived of his property. His continued right to use the land at issue does not change this, given the fact that he lost his ownership. In the present case there was therefore an interference with the applicant's right to the peaceful enjoyment of his possessions, amounting to a "deprivation" of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1.

51. It is furthermore observed that the 2007 Constitution provides that natural resources and resources in public use are the property of the State. The 1992 Coastal Zone Act provided that the coastal zone, including the seacoast, was the property of the State, which was also provided by the 2009 State Property Act. Therefore, there was a legal basis in domestic law for the State becoming the owner of the land at issue.

52. It is also noted, however, that the Constitutions consistently provided that property rights could be limited only in return for compensation (see paragraphs 17-18 above). The Property Acts also provide, either indirectly or directly, for the payment of just compensation when owners are deprived of their property. Notably, the 1980 Property Act referred back to the Constitution in this regard, whereas the 2009 Property Act itself explicitly provides for just compensation when the owners are deprived of their property (see paragraphs 19-20 above). The 2000 Expropriation Act also provides for compensation (see paragraph 26 above). Lastly, the Coastal Zone Act also provided that lawful private owners of land in the coastal zone should be afforded compensation in the event of dispossession pursuant to the provisions on expropriation (see paragraph 23 above). Therefore, while the relevant legislation allows for the State to become the owner of the land at issue, it also provides for the applicant's right to compensation in return. In the instant case, the State never contested the applicant's submission, either in the domestic proceedings or before this Court, that he had never received any compensation.

53. Furthermore, as noted above, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal principles upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application (see paragraph 48 above). The Court notes in this regard that the Government submitted that if the applicant was dispossessed he would be entitled to compensation pursuant to the provisions on expropriation, in accordance with the Coastal Zone Act. It is unclear, however, what expropriation actually means in this context: the courts suggested that the applicant lost title *ex lege*, but it is also clear that further procedure was necessary to formalise the State's title, as well as to determine the compensation, and even after the court decisions it is suggested that dispossession through formal expropriation has not yet taken place. The Government's submission in this regard and the Coastal Zone Act provision also seem to imply that it could also be the case that no

formal expropriation at all occurs, in which case the applicant would not receive any compensation, which runs contrary to all the other pieces of legislation providing for compensation in cases of deprivation of property. The Coastal Zone Act itself provides no details as to when, and if at all, the formal expropriation of land in the coastal zone is obligatory. Therefore, it is unclear if and when formal expropriation will take place. Furthermore, it is unclear in the instant case in respect of whom such expropriation would be undertaken, given that the applicant is no longer the owner of the land at issue.

54. In view of the above, the Court finds that the said interference was not in accordance with the law. Therefore, there has been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant made no claim in respect of pecuniary or non-pecuniary damage. The Court therefore makes no award in that regard.

B. Costs and expenses

57. The applicant claimed 10,268.81 euros (EUR) for the costs and expenses incurred before the domestic courts. He also claimed the costs incurred before the Court, the amount of which he left to the Court’s assessment.

58. The Government contested the applicant’s claim as unfounded and excessive – particularly given the fact that he had succeeded during the proceedings in being registered as the user of the land at issue, and had been, accordingly, awarded the costs thereof.

59. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,150 for costs and expenses in the domestic proceedings, and EUR 1,250 for the proceedings before the Court – that is to say EUR 5,400, covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

60. The Court considers it appropriate that the default interest rate 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* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 5,400 (five thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President