



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

FIRST SECTION

CASE OF GRBAC v. CROATIA

(Application no. 64795/19)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Domestic courts' dismissal of applicant's claim to *ex lege* ownership of socially owned property through adverse possession due to civil action being brought after Constitutional Court's invalidation of legal provision allowing such claims • Findings contrary to domestic case-law and Court's *Trgo v. Croatia* judgment • Resulting failure to assess evidence and establish facts as to whether statutory requirements for such ownership satisfied • Applicant's claim with sufficient basis in national law • Art 1 P1 applicable • Findings in *Trgo* applicable: consequences of a mistake by the State authority – enacting unconstitutional legislation – to be borne by the State and not the individual • No indication of any third-party rights being affected

STRASBOURG

16 December 2021

FINAL

04/04/2022

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

In the case of Grbac v. Croatia,

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

Péter Paczolay, *President*,
Ksenija Turković,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 64795/19) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Milutin Grbac (“the applicant”), on 2 December 2019;

the decision to give notice to the Croatian Government (“the Government”) of the complaints concerning access to court and the right of property;

the parties’ observations;

Having deliberated in private on 16 November 2021,

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

INTRODUCTION

1. The case concerns a property dispute between the applicant and the local authorities. The applicant claimed to have *ex lege* acquired ownership of certain parts of plots of land by adverse possession, as he and his legal predecessors had possessed those parts for more than eighty years.

THE FACTS

2. The applicant was born in 1949 and lives in Rijeka. He was represented by Mr K. Lanča, an advocate practising in Opatija.

3. The Government were represented by their Agent, Ms Š. Stažnik.

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

I. BACKGROUND TO THE CASE

5. The legislation of the former Yugoslavia, in particular section 29 of the 1980 Basic Property Act (see paragraph 45 below), prohibited the

acquisition of ownership of socially owned property¹ by adverse possession (*dosjelost*).

6. When incorporating the 1980 Basic Property Act into the Croatian legal system on 8 October 1991, Parliament repealed the above-mentioned provision (see paragraph 47 below).

7. Subsequently, the new Property Act of 1996, which entered into force on 1 January 1997, provided in section 388(4) that the period prior to 8 October 1991 was to be included in calculating the relevant time-limit for acquiring ownership by adverse possession of socially owned immovable property (see paragraph 51 below).

8. Following several petitions for an abstract constitutional review (*prijedlog za ocjenu ustavnosti*) lodged by former owners of properties that had been appropriated under the socialist regime, on 8 July 1999 the Constitutional Court (*Ustavni sud Republike Hrvatske*) accepted the initiative and decided to institute proceedings for a review of the constitutionality of section 388(4) of the 1996 Property Act.

9. By a decision of 17 November 1999, the Constitutional Court invalidated with *ex nunc* effect section 388(4) of the 1996 Property Act. It held that the impugned provision had retroactive effect, resulting in negative consequences for the rights of third parties (primarily those who, under restitution legislation, were entitled to the restitution of property appropriated during the socialist regime), and was therefore unconstitutional (for the relevant part of the Constitutional Court's decision see *Trgo v. Croatia*, no. 35298/04, § 17, 11 June 2009). The Constitutional Court's decision came into effect on 14 December 1999, when it was published in the Official Gazette.

II. CIVIL PROCEEDINGS IN THE APPLICANT'S CASE

10. On 27 November 2006 Rijeka Township notified the applicant that he had been unlawfully occupying parts of two plots of land owned by the Township. Those parts were situated within an enclosed area of land adjoining the applicant's house (hereafter "the applicant's smallholding").

11. On 19 March 2007 Rijeka Township brought a civil action against the applicant in the Rijeka Municipal Court (*Općinski sud u Rijeci*) asking the court to order him to surrender the disputed parts into the Township's possession. The Township asserted that the applicant, who was the owner of two adjacent plots, had illegally annexed parts of the two neighbouring plots

¹ Social ownership was a type of ownership which did not exist in other socialist countries but was developed in the former Yugoslavia. According to the official doctrine, property in social ownership had no owner, the role of public authorities in respect of such property being confined to management. For more details on the concept of social ownership in the former Yugoslavia see *Trgo v. Croatia*, no. 35298/04, § 6, 11 June 2009.

of land (hereafter “the disputed parts” or “the property in dispute”) owned by the Township.

12. On 11 April 2007 the applicant responded to the civil action and lodged a counterclaim asking the court to issue a declaratory judgment establishing that he was the owner of the disputed parts, which he asserted that he had acquired by adverse possession. He submitted (a) that all the land within his smallholding had been bought by his father in 1955 from a certain Ms O.B. by means of an oral sale and purchase agreement, and (b) that the disputed parts allegedly belonging to Rijeka Township had always been a part of his smallholding because they were situated within the area enclosed by an old dry stone wall surrounding his property.

13. The applicant also stated that in 1955 his father and O.B. had not known that the property which had been the object of their sale and purchase agreement had formally (as recorded in the land register and cadastre) consisted of several plots of land. In 1963 his father had realised that some of that property had not been formally owned by O.B. but that it had been recorded in the land register as socially owned property. However, his father had believed that this situation had been fully regulated by a decision of the so-called Usurpation Commission of 27 April 1963 whereby one plot of land that had until then been recorded in the land register as being in social ownership had been recorded in his father’s name.

14. The applicant furthermore explained that in 1972 his father had wished to transfer to him by deed of gift the property that he had bought from O.B. However, at that time they had realised that one plot – which was a part of that property – was still recorded in the land register under O.B.’s name. In order to correct this the applicant had on 12 January 1972 concluded a written sale and purchase agreement whereby O.B. had sold him that plot (which his father had actually already bought from her and taken possession of in 1955 – this was expressly mentioned in the agreement). On the same day the applicant’s father had transferred another plot (which was a part of that property) into the applicant’s ownership by deed of gift. These two plots were in 1986 merged into a single plot and recorded as such in the land register under the applicant’s name.

15. In reply Rijeka Township submitted that by the applicant’s own admission the applicant’s father had by 1963 already known that what he had bought from O.B. had not been owned by her (see paragraph 13 above). Furthermore, it was unclear how his father could have believed that the discrepancy between the actual situation and the status of the property in the land register had been resolved by a decision of the Usurpation Commission, which had only transferred into his ownership the land that had been in his possession at that time. From that decision a contrary conclusion had to be drawn – namely that the disputed parts had not been in the applicant’s father’s possession, as otherwise they would have been transferred into his ownership as well.

16. Rijeka Township furthermore submitted that in 1986 the cadastral authorities had conducted a survey in the area, the purpose of which had been to update and consolidate the cadastre so to reflect the actual situation. Had the applicant been in possession of the disputed parts at the time, a new plot would have been created and he would have been recorded as its possessor in the cadastre. The Township therefore argued that the applicant had not been in possession of the disputed parts before 1986 but that he had occupied them afterwards. Since, in their view, from his counterclaim it followed that he and his father had known that those parts had not been theirs (see paragraphs 13-14 above), the applicant and his father had not held those parts in good faith. This meant that under domestic law the applicant could not have become the owner of those parts by adverse possession (under section 159(3) of the 1996 Property Act – see paragraph 50 below).

17. In the course of the first-instance proceedings, the Municipal Court heard the applicant and three witnesses called by him, conducted an on-site inspection, ordered a report from an expert surveyor and consulted various documents (including the letter of 12 May 2009 – see paragraph 20 below).

18. In his testimony the applicant stated that he had not known that the disputed parts had not been covered by the sale and purchase agreement between his father and O.B. (see paragraph 13 above) because the object of the sale had actually been a single piece of land enclosed by a dry stone wall. When replying to a question posed by the plaintiff's representative he also stated:

“I am aware that in 1985 and 1986 the cadastral authorities were surveying the land in the area ... and that I was invited to comment. The employees in the Cadastre [Office] told me that they were undertaking a consolidation [of the cadastre] and that my plot was too big and had to be reduced and asked me to sign some documents. I signed those [documents] but told them that my father had left that [land] to me as a gift. They [replied] that all that was socially owned in any case and that I was only the beneficiary of the land in question. I did not exactly read what I signed on that occasion.”

19. All three witnesses (two of whom were born in 1944 and one in 1947) testified that the disputed parts had been in the possession of the applicant's family since 1955 and before that in the possession of Ms O.B., and that no one had ever contested their ownership of those parts.

20. This was also confirmed in a letter of 12 May 2009 to Rijeka Township by the Council of the Local Board of Pehlin (*Vijeće Mjesnog odbora Pehlin*)². The relevant part of that letter, which was signed by four councillors, read as follows:

² Local boards are the lowest (third) level of local authorities in Croatia which are organised and operate at the level of a town or city quarter or of a village, hamlet or other small settlement.

“The majority of the members of the Council of the Local Board of Pehlin were born in Rijeka and have permanently resided in Pehlin since their birth. They know that the disputed [parts] have been in the long-term possession of the Grbac family – first in the possession of late Milan Grbac and then, after a transfer by deed of gift, in the possession of his son Milutin Grbac.

Before the Grbac family entered into possession [of the property in dispute], [it] had been in the long-term possession of the late Ms O.B.

The accuracy of our statements is discernible from the Rijeka Municipal Court’s survey of 7 February 1972, which corresponds to the actual situation.

We therefore suggest that Rijeka Township take these statements into account in the further course of the proceedings in this case.”

21. The expert surveyor’s report established that the applicant was in possession of 98 sq. m of plot no. 388/1, as well 832 sq. m of plot no. 388/593; both plots were recorded in the land register as being under the ownership of Rijeka Township. Neither party objected to the expert report.

22. By a judgment of 22 April 2011, the Rijeka Municipal Court ruled in favour of Rijeka Township and ordered the applicant to surrender the disputed parts into the Township’s possession. At the same time the court dismissed the counterclaim lodged by the applicant (see paragraph 12 above) seeking to be declared their owner.

23. The court established, firstly, that the two plots in question (see paragraph 21 above) had on 8 October 1991 been in social ownership and that under the relevant legislation it had not been possible to acquire ownership of such property by adverse possession (see paragraph 52 below) unless the statutory requirements for doing so had been met by 6 April 1941 or after 8 October 1991.

24. However, all the witnesses called by the applicant and heard by the court had been too young (see paragraph 19 above) to know whether his predecessors had been in the possession of the property in dispute before 6 April 1941. Consequently, the applicant had not demonstrated that the statutory requirements for acquiring ownership by adverse possession had been met before that date.

25. The period from 8 October 1991 until 27 November 2006 (when Rijeka Township had notified the applicant that the property in dispute had not belonged to him – see paragraph 10 above) had been too short because immovable property owned by the local authorities could be acquired by adverse possession only after forty years (under section 159(4) of the 1996 Property Act – see paragraph 50 below).

26. The applicant appealed. In his appeal he argued that the prohibition on acquiring ownership of socially owned property by adverse possession had existed from the moment at which the property in question had passed into social ownership until 8 October 1991. It was therefore necessary to find out when the two plots of land currently owned by Rijeka Township (see paragraph 21 above) had been transferred into social ownership – a fact

which the Municipal Court had not established. To his knowledge, the land in the area had not passed into social ownership until the 1960s. The applicant also argued that the period before an item of property had been transferred into social ownership and the period after 8 October 1991 had to be combined when calculating the time necessary for acquiring ownership of such property by adverse possession.

27. By a decision of 8 May 2013 the Rijeka County Court (*Županijski sud u Rijeci*) allowed the applicant's appeal, quashed the first-instance judgment of 22 April 2011 (see paragraph 22 above) for incompleteness of facts and remitted the case for fresh consideration. It accepted the applicant's argument that it was necessary to ascertain when the two plots owned by Rijeka Township had passed into social ownership.

28. In the fresh proceedings, on 21 January 2014, the Rijeka Municipal Court heard two additional witnesses (born in 1933 and in 1940 respectively) called by the applicant who testified that the disputed parts had been situated within the area of land bounded by a dry stone wall (see paragraph 18 above); they furthermore testified that that area of land had been in the long-term possession of (and had belonged to) Ms M.O. and her family for many years before she had sold it to the applicant's father in 1955.

29. On 7 February 2014 two more witnesses were heard (who were at that time aged eighty-two and eighty-three, respectively). The testimony given by the first of those witnesses echoed that of the two above-mentioned witnesses (see paragraph 28), whereas the second knew nothing of the matter.

30. In reply to a request for information lodged by the court, on 24 April 2014 its land registry division informed it that from the data in the land register it was impossible to discern when the two plots in question (see paragraph 21 above) on which the disputed parts of land were located had passed into social ownership because the old land register folio containing that information had been damaged.

31. By a judgment of 17 June 2014, the Municipal Court again ruled in favour of Rijeka Township and dismissed the applicant's counterclaim.

32. The court held that the applicant had not proved that the land in the area had passed into social ownership in the 1960s (see paragraph 26 above) and thus had not demonstrated that his predecessors had acquired ownership by adverse possession before the property in dispute had become socially owned. Likewise, the applicant had not proved that his predecessors had been in the possession of the property in dispute before 6 April 1941 because the witnesses heard had been too young (see paragraph 19 and 28-29 above) to have had any knowledge of that. It then reiterated its earlier finding that the period from 8 October 1991 until 27 November 2006 (see paragraph 10 above) had been too short because immovable property owned by the local authorities could be acquired by adverse possession only

after forty years (see paragraph 25 above and section 159(4) of the 1996 Property Act cited in paragraph 50 below). Lastly, the court held that the period before the transfer of an item of property into social ownership and the period after 8 October 1991 could not be combined for the purposes of calculating the time necessary for acquiring ownership of such property by adverse possession.

33. The applicant again appealed. He once more argued that the Municipal Court had failed to establish when the two plots owned by Rijeka Township on which the disputed parts were located had been transferred into social ownership (see paragraph 26 above). In any event, he and his legal predecessors had acquired those parts by virtue of possessing them continuously and in good faith before and after 6 April 1941. He also reiterated his earlier argument that the period before a piece of property had been transferred into social ownership and the period after 8 October 1991 had to be combined when calculating the time necessary for acquiring ownership of such property by adverse possession (see paragraph 26 above).

34. By a judgment of 21 January 2015 the Rijeka County Court dismissed the applicant's appeal and upheld the first-instance judgment of 17 June 2014 (see paragraph 31 above). It held that as the relevant land register records were damaged (see paragraph 30 above) the burden of proving when the two plots owned by Rijeka Township had passed into social ownership had rested on the applicant, who could have provided proof by other means – for example, by furnishing a decision whereby those plots had been transferred into social ownership.

35. On 27 April 2015 the applicant lodged an extraordinary appeal on points of law (*izvanredna revizija* – see paragraph 61 below) with the Supreme Court (*Vrhovni sud Republike Hrvatske*) against the second-instance judgment. He submitted that the first- and second-instance judgments had been based, *inter alia*, on the view that the period between 6 April 1941 and 8 October 1991 could not be included in the calculation of the relevant time-limit for acquiring ownership by adverse possession of socially owned immovable property. However, that view, reflected in the existing case-law of the domestic courts, was contrary to the Court's judgment in the case of *Trgo* (cited above) and thus had to be revisited.

36. The applicant also called into question the view of the civil courts that as the relevant records (that is to say the land register) – whose maintenance was the duty of the State – had been destroyed, it was incumbent on him (and not on the party whom it benefited – see paragraphs 32 and 34 above) to prove when the two plots belonging to Rijeka Township had been transferred into social ownership.

37. By a decision of 16 April 2019, the Supreme Court declared the applicant's extraordinary appeal on points of law inadmissible because the point of law that he had raised was not important for the uniform application of the law.

38. The Supreme Court held that the respective factual circumstances in the applicant's case and in *Trgo* were different. In particular, in *Trgo* the civil action had been brought while section 388(4) of the 1996 Property Act in its original text had still been in force, whereas the applicant in the present case had lodged his counterclaim after that provision had been repealed and replaced with a new one, under which the period between 6 April 1941 and 8 October 1991 could not be included in the calculation of the relevant time-limit for acquiring ownership by adverse possession of socially owned immovable property (see paragraph 12 above and paragraphs 51-52 below).

39. The Supreme Court also added that the Court's view that the time at which a civil action was brought was irrelevant – expressed in the Chamber judgment in the case of *Radomilja and Others v. Croatia* (no. 37685/10, § 52, 28 June 2016) – no longer had legal force because that judgment had been revised by the Grand Chamber's judgment in respect of the same case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018), when the Court, for different reasons, had held that domestic courts' judgments dismissing applicants' claims to be declared the owners of socially owned property by adverse possession had not been in breach of the Convention.

40. Then, on 3 July 2019, the applicant lodged a constitutional complaint against the Supreme Court's decision. He relied on the relevant Articles of the Croatian Constitution guaranteeing the right to fair proceedings, the right of ownership and the right to equality before the law. The applicant argued that the Supreme Court and the lower courts had not applied the relevant provisions of the Convention and that the Supreme Court had unjustifiably declared his extraordinary appeal on points of law inadmissible. He averred that, contrary to the reasoning of the Supreme Court (see paragraph 39 above), the Grand Chamber in its judgment in *Radomilja and Others* had not called into question the Chamber's finding that the time at which a civil action was brought was irrelevant for the application of the *Trgo*-related case-law, but had found no violation of Article 1 of Protocol No. 1 for different reasons.

41. By a decision of 25 September 2019, the Constitutional Court (*Ustavni sud Republike Hrvatske*) declared the applicant's constitutional complaint inadmissible, finding that the case did not raise a constitutional issue. It expressly agreed with and reiterated the Supreme Court's reasoning concerning the legal effects of the Court's judgments in *Trgo* and *Radomilja and Others* on the applicant's case (see paragraphs 38-39 above).

42. The Constitutional Court's decision was served on the applicant's representative on 9 October 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. PROPERTY LEGISLATION AND PRACTICE

A. The 1811 Civil Code

43. Article 1468 of the Austrian General Civil Code of 1811 (*Opći građanski zakonik* – “the 1811 Civil Code”), which was applicable in Croatia from 1852 until 1980 (see *Radomilja and Others*, cited above, §§ 47-49), provided that if immovable property was not recorded in the land register in the name of the person in whose possession it was, the possessor could acquire the ownership of such property by adverse possession after thirty years.

B. The 1980 Basic Property Act

44. Section 28 of the Basic Ownership Relations Act (*Zakon o osnovnim vlasničkopravnim odnosima*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 6/80 and 36/90 – “the 1980 Basic Property Act”), which entered into force on 1 September 1980, provided that a person possessing in good faith immovable property owned by someone else would become its owner by adverse possession after twenty years.

45. Section 29 prohibited the acquisition of ownership by adverse possession of socially owned property.

46. Section 72(1) provided that possession had to be considered in good faith if the possessors did not know or could not have known that the property they possessed was not theirs. Section 72(2) provided that possession in good faith had to be presumed.

47. Section 3 of the Act on the Incorporation of the Basic Ownership Relations Act (*Zakon o preuzimanju zakona o osnovnim vlasničkopravnim odnosima*, Official Gazette of the Republic of Croatia no. 53/91 of 8 October 1991), which entered into force on 8 October 1991, repealed section 29 of the Basic Property Act.

C. The 1996 Property Act

48. Since 1 January 1997 matters concerning possession and ownership have been regulated by the Ownership and Other Rights *In Rem* Act (*Zakon o vlasništvu i drugim stvarnim pravima*, Official Gazette no. 91/96, with subsequent amendments – “the 1996 Property Act”).

49. Section 18 provides when a possessor is considered to be in good faith. The relevant part of that provision reads as follows:

Section 18

“(1) Possession is lawful if the possessor has a valid legal basis for that possession (right to possession).

(2) ...

(3) Possession is in good faith if the possessor, when he or she acquired it, did not know nor, given the circumstances, did not have sufficient reason to suspect that he or she did not have the right to possession. However, good faith ceases as soon as the possessor learns that he or she does not have the right to possession.

(4) If, in a dispute over the right to possession, it has been decided by a final decision that the right to possession does not belong to the possessor, his possession shall be [considered to be] in bad faith from the moment at which he or she received the [relevant] statement of claim.

(5) Possession shall be considered to be in good faith, unless proven otherwise.”

50. The relevant provision of the 1996 Property Act concerning acquisition of ownership in general and, specifically, by adverse possession, read as follows:

Legal grounds for acquisition

Section 114

(1) Ownership may be acquired by legal transaction, by decision of a court or other public authority, by succession, or by operation of law.

Acquisition [of ownership] by operation of law

...

(d) Acquisition by adverse possession

Section 159

(1) Ownership may be acquired by adverse possession on the basis of the exclusive possession of a [particular] property if such possession is of the quality required by law and has lasted continuously for a period of time determined by law, and if the possessor is capable of being the owner of such property.

(2) An exclusive possessor who possesses lawfully, in good faith and whose possession is free of vice³ shall acquire ownership of movable property after three years and of immovable property after ten years.

(3) An exclusive possessor who possesses at least in good faith shall acquire ownership of movable property after ten years and of immovable property after twenty years of continuous exclusive possession.

(4) An exclusive possessor of a property owned by the Republic of Croatia, counties or [other local authorities] ... shall acquire ownership by adverse possession once his or her ... possession has lasted continuously for a period twice as long as that set out in paragraphs 2 and 3 of this section.”

³ Free of vice means that the property must not have been at any time taken by force, by fraud (stealth, secretly) or by gratuitous revocable loan by the person claiming to have acquired ownership by adverse possession or by a previous possessor (*Nec vi, nec clam, nec precario*).

51. The original text of section 388 of the 1996 Property Act provided as follows:

Section 388

“(1) The acquisition, modification, legal effects and termination of rights *in rem* after the entry into force of this Act shall be assessed on the basis of its provisions ...

(2) The acquisition, modification, legal effects and termination of rights *in rem* until the entry into force of this Act shall be assessed on the basis of the rules applicable at the time of the acquisition, modification or termination of those rights or of their legal effects.

(3) If the prescribed time-limits for acquiring or terminating rights *in rem* set out in this Act started to run before its entry into force, they shall continue to run pursuant to paragraph 2 of this section ...

(4) In calculating the period for acquiring by adverse possession immovable property socially owned on 8 October 1991, and for acquiring [other] rights *in rem* over such property, the period before that date shall also be taken into account.”

52. After the Constitutional Court, on 17 November 1999, had invalidated paragraph 4 of section 388 of the 1996 Property Act as unconstitutional (see paragraph 9 above), that provision was amended by the 2001 Amendment to the 1996 Property Act (*Zakon o izmjeni i dopuni Zakona vlasništvu i drugim stvarnim pravima*, Official Gazette no. 114/01), which entered into force on 20 December 2001. The new text of paragraph 4 reads as follows:

“In calculating the period for acquiring by adverse possession immovable property socially owned on 8 October 1991, and for acquiring [other] rights *in rem* over such property, the period before that date shall not be taken into account.”

D. Relevant practice

1. As regards the acquisition of immovable property by adverse possession in the period between 6 April 1941 and 8 October 1991

53. According to the interpretation adopted at the extended plenary session of the Federal Supreme Court of Yugoslavia of 4 April 1960, a person in possession of immovable property in good faith would acquire ownership of it by adverse possession after twenty years. That interpretation applied (retroactively) from 6 April 1941 until its adoption on 4 April 1960 and from that date until 1 September 1980, when the 1980 Basic Property Act entered into force and codified that interpretation (see paragraph 44 above). In a number of cases the Supreme Court of Croatia referred to this interpretation as valid law at the time (for those cases see *Radomilja and Others*, cited above, §§ 59-60).

54. In decision no. Rev-291/14-2 of 17 April 2018 the Supreme Court, upon an extraordinary appeal on points of law and referring to the Court’s judgment in *Trgo*, ruled in favour of the plaintiffs, who sought to be

declared the owners by adverse possession of certain land that had in earlier times been socially owned. It quashed the lower courts' judgments whereby those courts had dismissed the plaintiffs' action brought on 7 September 2009 and remitted the case. The relevant part of the Supreme Court's decision reads as follows:

"When acquiring ownership by adverse possession of property that before 8 October 1991 was in social ownership, the period elapsed before 8 October 1991 should also be taken into account when calculating the time necessary for acquiring ownership by adverse possession, if this does not violate the ownership rights of third persons who did not acquire those rights on the basis of section 388(4) of the [1996 Property Act] but on the basis of other provisions of that Act.

The risk of any mistake made by the State authorities must be borne by the State, and the errors must not be remedied at the expense of the individual who acquired ownership by adverse possession on the basis of a statutory provision that the Constitutional Court later invalidated as unconstitutional – especially in those cases where there is no other conflicting private interest of third persons.

Since from the information in the case-file it can be discerned that the plaintiffs' predecessors possessed the immovable property in dispute even before 8 October 1991, the [first-instance] court shall in the fresh proceedings examine in detail those circumstances as well, take other evidence that the parties may propose and examine whether there are circumstances [warranting] the application of the legal view expressed by the European Court of Human Rights in the judgment of *Trgo v. Croatia* ... as regards the acquiring of ownership by adverse possession in respect of immovable property that was, by the acts of the former authorities, transferred from [private] ... to social ownership."

55. The Supreme Court reiterated the same view in cases nos. Rev-158/2017-2 of 7 May 2019 in respect of a civil action brought on 27 February 2014, Rev-x 974/2017-2 of 7 May 2019 in respect of a civil action brought on 28 September 2004, Rev-578/2017-2 of 7 May 2019 in respect of a civil action brought on 29 November 2010, Rev-389/2014-5 of 29 May 2019 in respect of civil action brought on 9 November 2011, and Rev-2771/2013-2 of 13 August 2019 in respect of a civil action brought on 23 August 2011.

2. *As regards possession in good faith*

56. The Supreme Court of Croatia has consistently held that the mere fact that someone other than the possessor was recorded in the land register as the owner of a piece of real estate does not render his or her possession as being in bad faith and thus does not prevent such a possessor from acquiring ownership of that property by adverse possession. For example, in cases nos. Rev-2426/1990 of 15 February 1991 and Rev-1209/2016-3 of 11 February 2020 the Supreme Court held that:

"... the [lower] courts correctly concluded ... that the possession of the plaintiffs' ancestors had been in good faith, regardless of the fact that the appellant's ancestors were recorded in the land register as the owners of the disputed real estate. In

particular, next to the established fact that the plaintiffs' ancestors always behaved as the owners of the disputed real estate, and that the appellant's ancestors never disputed their right of ownership, even though they exercised [it] in plain view of them, the mere fact that the appellant's ancestors were recorded in the land register as the owners does not render the possession of the plaintiffs' ancestors as being in bad faith. The plaintiffs' ancestors had no reason to consult the land register to establish the land-register status of the property. On the basis of the above circumstances, they had a well-founded belief that they were the owners. Therefore, their failure to consult the land register cannot be held against them [by way of arguing] that they could not have remained unaware [of the fact] that the owners [as recorded] in the land register were the appellant's ancestors."

57. However, in case nos. Rev-1719/2013 of 21 September 2016 and Rev-830/2014-2 of 16 July 2019 the Supreme Court held that the concerned possessors of immovable property had lost the possibility to claim to be acting in good faith after they, by participating in certain land registry proceedings, had learned that the property they had possessed thus far was not recorded under their name in the land register.

58. The Government referred to judgment of the Zagreb County Court no. Gž-1537/16-3 of 15 January 2019, in which that court held that the party opposing a possessor's claim for acquiring ownership by adverse possession was not required to prove the possessor's bad faith if from the possessor's own testimony it followed that his or her possession had been in bad faith.

II. CIVIL PROCEDURE ACT

59. The Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77, with subsequent amendments, and Official Gazette of the Republic of Croatia no. 53/91, with subsequent amendments), in its section 2(1), provides that civil courts must decide within the bounds of the claim lodged within the proceedings. Section 354(2)(12) provides that deciding *ultra* or *extra petitem* in a judgment always constitutes a serious breach of civil procedure and grounds for appeal and an appeal on points of law.

60. Section 186(3) embodies the principle of *iura novit curia* by providing that civil courts are not bound by the legal basis indicated by the plaintiffs for their claims.

61. The text of paragraphs 2-4 of section 382 of the Civil Procedure Act, as in force at the relevant time, which concerned the remedy of an extraordinary appeal on points of law, is reproduced in *Mirenić-Huzjak v. Croatia* (dec.), no. 72996/16, § 26, 24 September 2019. Such an appeal could have been lodged, *inter alia*, in the event that a decision in the civil proceedings had depended on the resolution of a point of substantive or procedural law in respect of which there had existed established case-law, but that case-law had had to be revisited in view of changes in the legal system occasioned by decisions of the European Court of Human Rights.

62. The relevant provision of the Civil Procedure Act concerning the reopening of proceedings following a final judgment of the European Court of Human Rights (namely, section 428a) is cited in *Lovrić v. Croatia* (no. 38458/15, § 24, 4 April 2017).

III. OTHER RELEVANT LEGISLATION

63. The relevant provision of the 1999 Constitutional Court Act is cited in *Radomilja and Others*, cited above, § 46). Section 53 provides that primary legislation (that is to say statutes) can only be invalidated as unconstitutional by the Constitutional Court with *ex nunc* – that is, with *pro futuro* – effect, meaning that the legal effects that it produced before being invalidated will remain. Secondary (subordinate) legislation can be invalidated with *ex tunc* effect under certain, rather restrictive, circumstances, in which case the effects that it produced before being invalidated will be erased.

64. The Act on Compensation for, and Restitution of, Property Appropriated During the Yugoslav Communist Regime (*Zakon o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine*, Official Gazette nos. 92/96, with subsequent amendments – “the Restitution Act”), which entered into force on 1 January 1997, enabled former owners of confiscated or nationalised property, or their heirs in the first line of succession (direct descendants or a spouse), to obtain under certain conditions either the restitution of or compensation for property appropriated under the socialist regime.

THE LAW

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

65. The applicant complained that the domestic courts’ decisions dismissing his claim to be declared the owner of the property in dispute had been in breach of his right to the peaceful enjoyment of his possessions. He relied on Article 1 of Protocol No. 1 to the Convention, 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

66. The Government disputed the admissibility of this complaint, arguing that Article 1 of Protocol No. 1 was not applicable to the present case and that the applicant had failed to exhaust domestic remedies.

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

(a) **The parties' arguments**

(i) *The Government*

67. The Government submitted that the applicant's claim to be declared the owner of the property in dispute did not have a sufficient basis in national law and thus could not qualify as an "asset" and hence a "possession" to which Article 1 of Protocol No. 1 would be applicable. In this regard they first submitted that when examining this issue, the period between 1941 and 1991 had to be excluded. In the alternative, they contended that the applicant's claim could not be considered to constitute a "possession", even if the Court were to take that period into account.

68. In the Government's view the applicant had not relied on the period between 1941 and 1991 when lodging his counterclaim (see paragraph 12 above). Likewise, in the domestic proceedings he had never relied on the original version of section 388(4) of the 1996 Property Act (see paragraph 51 above) and had in both of his appeals against the first-instance judgments accepted the statutory prohibition on acquiring ownership of socially owned immovable property by adverse possession in that fifty-year period (see paragraphs 26 and 32 above).

69. Thus, unlike in the *Trgo* case, it could not be said that the applicant before the domestic courts had "reasonably relied on legislation, later on abrogated as unconstitutional" (see *Trgo*, cited above, § 67).

70. The domestic courts could not have taken the said fifty-year period into account *proprio motu* because under domestic law they had been bound by the factual basis of the applicant's counterclaim, which had not included that period. In those circumstances, taking that period into account would have meant deciding beyond the scope of the case and would have constituted a serious breach of civil procedure (see paragraph 59 above).

71. Furthermore, although the first-instance judgment in his case had been delivered on 17 June 2014 – that is, five years after the Court's judgment in *Trgo* – the applicant for the first time relied on *Trgo* in the extraordinary appeal on points of law that he had lodged on 27 April 2015 (see paragraph 34 above).

72. In this regard the Government referred to the Court's view, expressed in the Grand Chamber judgment in *Radomilja and Others*, that the temporal element was of central importance for acquiring ownership by adverse possession and that the later addition of a period amounting to more

than fifty years to the factual basis of the complaint had therefore to be seen as changing the substance of that complaint (see *Radomilja and Others*, cited above, § 132).

73. The Government argued that the same should apply to the proceedings before the Croatian Supreme Court and that the applicant's reliance on *Trgo* at as late a stage as in his appeal on points of law should be seen as changing the substance on his initial (counter)claim. That remedy had not allowed the parties to change their unsuccessful legal strategy and obtain a new judgment from the Supreme Court on entirely different legal grounds.

74. If the period between 1941 and 1991 was excluded, as argued above, it still could not be said that the applicant's claim to be declared the owner of the property in dispute had a sufficient basis in national law and that it amounted to a "possession" attracting the guarantees of Article 1 of Protocol No. 1. In this regard the Government in essence referred to the same reasons for which the Grand Chamber had found that Article inapplicable in *Radomilja and Others* (cited above, §§ 144-151).

75. The Government then went on to argue that the applicant's claim did not have a sufficient basis in national law in any case (that is, even if the said fifty-year period was taken into account). In particular, while in *Trgo* it had not been disputed that the applicant had been in continuous possession in good faith since 1953 (see *Trgo*, § 48), that was not so in the present case. In this regard the Government referred to the arguments of the Rijeka Township advanced in the civil proceedings in question (see paragraphs 15-16 above).

76. Moreover, the Government noted that the sale and purchase agreement and the deed of gift of 12 January 1972 had indicated both the cadastral number and the surface area of each of the then two plots of land owned by the applicant's father (see paragraph 14 above). It was thus difficult to believe that the applicant and his father had not noticed that they were actually in possession of an area of land that was considerably larger in surface than that which was indicated in those documents (see paragraph 21 above).

77. The Government furthermore referred to domestic practice, according to which a party opposing a possessor's action to acquire ownership by adverse possession was not required to prove the possessor's bad faith and rebut the statutory presumption of good faith (see section 159(3) of the 1996 Property Act in paragraph 49 above) if from the possessor's own testimony it followed that his or her possession had been in bad faith (see paragraphs 13 and 58 above).

78. Lastly, they pointed out that the applicant and his father had participated in several cadastral surveys in the area over the years – notably the one conducted in 1986 (see paragraphs 16 and 18 above) – and thus could not have remained unaware that the disputed parts that they had been

occupying were not in their ownership. Given that knowledge, their possession of those parts could not have been in good faith (see paragraph 54 above).

(ii) *The applicant*

79. The applicant submitted that in his counterclaim and throughout the proceedings before the domestic courts he had consistently argued that he and his legal predecessors had been in lawful and continuous possession in good faith of the property in dispute for more than eighty years. He thus contested the Government's argument that those courts could not have taken the period between 1941 and 1991 into account (see paragraph 67 above).

80. To the Government's argument that he had not relied on the original version of section 388(4) of the 1996 Property Act (see paragraph 65 above) the applicant replied that he had not been required to do so because, owing to the principle of *iura novit curia*, civil courts were not bound by the legal arguments of parties.

81. As regards the Government's remaining arguments, the applicant stressed that what his father had bought from Ms O.B. was in reality a single land unit that had from all sides been bounded by a dry stone wall. She had been the actual owner of all the land within those bounds, regardless of the fact that, as it turned out, it had formally stretched over several cadastral plots and that some of that land had been formally recorded in the land register as socially owned property.

82. The applicant and his father had believed that this discrepancy between the actual situation on the one hand and the situation recorded in the cadastre and the land register on the other hand had been rectified in 1963 (see paragraph 13 above). That belief had been perpetuated by the fact that before 2006 (see paragraph 10 above) no one had contested their right to possess the land within those bounds or called into question their good faith and the continuous nature of their possession.

83. The fact that Rijeka Township *pro forma* had disputed the uninterrupted character of their possession and their good faith (see paragraphs 15-16 above) should not have been of any relevance in the light of the evidence taken in the domestic proceedings (see paragraphs 19-20 and 28-29 above). The applicant pointed out that under domestic law Rijeka Township had borne the burden of proving that his and his father's possession had not been in good faith (under section 18(5) of the 1996 Property Act – see paragraph 49 above) and that it had not been continuous.

84. The applicant concluded that he had *ex lege* acquired the ownership of the property in dispute on the basis of the original version of section 388(4) of the 1996 Property Act, before that provision had been invalidated by the Constitutional Court in 1999.

(b) The Court's assessment

85. The Court reiterates that an applicant may allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions relate to his or her “possessions” within the meaning of that provision (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX).

86. Even though that Article does not guarantee the right to acquire property, its application is not limited to “existing possessions”. It also extends to “assets”, including claims in respect of which an applicant can argue that he or she has at least a “legitimate expectation” of obtaining effective enjoyment of a property right (*ibid.*, § 35). Such expectations will arise only in respect of claims for which there is a sufficient basis in national law – that is, in respect of claims which are sufficiently established as to be enforceable (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B, and *Kopecký*, cited above, §§ 49 and 52).

87. In the present case the applicant argued that he had acquired ownership of the property in dispute by adverse possession. Under Croatian law, ownership will be acquired by adverse possession *ipso jure* when all statutory conditions are met (see paragraph 50 above). However, in reality the question of whether the possessors satisfied the statutory conditions for acquiring ownership by adverse possession must be determined in proceedings before civil courts, because possessors need a declaratory judgment acknowledging their ownership in order to be able to effectively enjoy their property. The Court therefore considers that the proprietary interest relied on by the applicant in the present case was in the nature of a claim and cannot be characterised as an “existing possession” within the meaning of the Court’s case-law (see *Trgo*, cited above, § 46).

88. The Court must therefore examine whether that claim had a sufficient basis in national law. However, before doing so, it must address a preliminary issue.

(i) Preliminary issue

89. The Government argued that the period between 1941 and 1991 should not be taken into account when assessing the applicability of Article 1 of Protocol No. 1 to the present case (see paragraph 67-74 above).

90. In this regard it is to be noted that from the very beginning of the civil proceedings in question the applicant alleged that he, and his father before him, had been in continuous and uninterrupted possession of the disputed parts since 1955 (see paragraphs 12-14 above). Moreover, the age and testimony of all the witnesses heard in the first round of the proceedings before the Rijeka Municipal Court suggest that they had been called by the applicant to corroborate those factual allegations – namely to testify that he

and his father had indeed been in the possession of the property in dispute since 1955 (see paragraph 19 above).

91. Only after the adoption of the first-instance judgment of 22 April 2011 (see paragraph 22 above) did it become clear that the Municipal Court was not going to take the period between 1941 and 1991 into account in calculating the time necessary for acquiring ownership by adverse possession. Accordingly, the applicant changed his legal strategy and in his appeal against that judgment (see paragraph 26 above) submitted two alternative arguments, which he pursued in the second round of the proceedings before the first- and the second-instance courts (see paragraphs 28-34 above). Specifically, he argued (a) that it had to be established when the two plots of land owned by Rijeka Township, including the disputed parts, had passed into social ownership, and (b) that the periods of time that elapsed before the passing of those two plots into social ownership and after 1991 should be combined (see paragraph 26 above). That is why in the second round of the proceedings before the Rijeka Municipal Court he called older witnesses (see paragraphs 28-29 above) who, given their age, could, in his view, testify that his legal predecessors had been in the long-term possession of the property in question even before the 1960s, when, to his knowledge, the land in the area had passed into social ownership (see paragraph 26 above).

92. Once these alternative arguments failed, the applicant changed his legal strategy again and in his extraordinary appeal on points of law relied on the Court's judgment in the *Trgo* case (see paragraph 35 above).

93. There is nothing to suggest that the applicant was not allowed to do so under domestic law. The Court also notes that under the Civil Procedure Act civil courts are not bound by the legal arguments of parties (see paragraph 60 above).

94. Furthermore, it seems evident that the purpose of the applicant relying on the grounds cited in his extraordinary appeal on points of law (see paragraphs 35 and 61 above) was to bring domestic case-law into line with that of the Court. If the Government's argument were to be accepted, then parties to civil proceedings would, for example, not be able to rely in extraordinary appeals on points of law on the Court's judgment that became final shortly after the adoption of the second-instance decision in their particular case. That would have frustrated the very purpose of such grounds of appeal.

95. Contrary to the Government's argument (see paragraphs 72-73 above), the applicant's reliance on *Trgo* in his appeal on points of law did not entail a change in the factual basis of his (counter)claim which, as established above, did not exclude the period between 1941 and 1991.

96. Had the Supreme Court considered that the factual basis of the applicant's (counter)claim did not encompass this period, it is reasonable to assume that this would have been reflected in its decision on the applicant's

extraordinary appeal on points of law. That court declared the remedy in question inadmissible after giving detailed reasons as to why the applicant's case had to be distinguished from *Trgo* (see paragraphs 38-39 above). Absent from those reasons was the applicant's alleged non-reliance on the period between 1941 and 1991 and on the original version of section 388(4) of the 1996 Property Act.

97. The Court also notes that the Constitutional Court endorsed the reasoning of the Supreme Court (see paragraph 41 above).

98. Lastly, as regards the Government's argument that the view expressed in the Grand Chamber judgment in *Radomilja and Others* should apply by analogy to the proceedings before the Croatian Supreme Court in the present case (see paragraphs 72-73 above), the Court notes that the situations in the two cases are not comparable. In this regard it is sufficient to note that the Grand Chamber in *Radomilja and Others* did not take into account the period between 6 April 1941 and 8 October 1991 because the applicants in their observations before the Chamber had expressly excluded it from the factual and legal basis of their complaints. However, in the present case the applicant had not excluded that period at all, let alone expressly, from the factual or legal basis of his counterclaim in the proceedings before the first- and the second-instance courts (see paragraphs 90-91 above).

99. In view of the above, the Court cannot accept the Government's argument that the period between 1941 and 1991 should be excluded when assessing applicability of Article 1 of Protocol No. 1 to the present case.

(ii) *Whether the applicant's claim had a sufficient basis in national law*

100. The Court firstly notes that the property in dispute was in social ownership on 8 October 1991 (see paragraph 23 above). During the socialist regime and up until that date it was not possible to acquire ownership of socially owned property by adverse possession (see paragraphs 5 and 45 above).

101. Section 388(4) of the 1996 Property Act, which entered into force on 1 January 1997, provided that the period prior to 8 October 1991 was to be included in calculating the time-limit necessary for acquiring ownership of such property by adverse possession (see paragraphs 7 and 51 above). By a decision of 17 November 1999, which came into effect on 14 December 1999, the Constitutional Court invalidated that provision as unconstitutional (see paragraph 9 above).

102. However, the effects which that provision produced while it was in force remained because under Croatian law the Constitutional Court's decisions invalidating primary legislation (statutes) have only *ex nunc* effect (see paragraph 63 above).

103. According to the view taken by the Supreme Court and the Constitutional Court in the present case the circumstances of this case were

different from those in *Trgo*, where Article 1 of Protocol No. 1 had been found to be applicable (see paragraphs 38-39 and 41 above). They considered that this was so because the applicant in the instant case had lodged his counterclaim on 11 April 2007 – that is to say, after section 388(4) of the 1996 Property Act in its original version was no longer in force (see paragraphs 7, 9 and 12 and 51 above).

104. In this regard the Court reiterates its findings in the *Trgo* case:

“46. The Court notes that under Croatian law ownership will, in principle, be acquired by adverse possession *ipso jure* when all statutory conditions are met ...

...

48. It would appear from the findings of the domestic courts [...] that it was uncontested that the applicant and his mother had been in exclusive and continuous possession in good faith of the property in question since 1953, that is for more than forty years, and that he had thus already in 1993 met the statutory conditions for acquiring ownership by adverse possession. It may therefore be inferred that the applicant, on the basis of section 388(4) of the 1996 Property Act, *ex lege* became the owner of the land at issue on 1 January 1997 when the Act entered into force. That provision remained in force until the Constitutional Court abrogated it almost three years later. The Court thus considers that the applicant’s claim had a sufficient basis in national law to qualify as an “asset” protected by Article 1 of Protocol No. 1.”

105. These findings suggest that the date on which the applicant in *Trgo* had brought a civil action was irrelevant for establishing whether his claim to be declared the owner of property by adverse possession could qualify as an “asset” protected by Article 1 of Protocol No. 1 to the Convention. Rather, what was important was whether the ownership of the property in question had been vested in him by operation of law at the time when the original version of section 388(4) of the 1996 Property Act had still been in force (see paragraphs 7, 9 and 50-51 above).

106. This view – that the time at which a civil action is brought is irrelevant for acquiring ownership by adverse possession on the basis of the original version of section 388(4) of the 1996 Property Act – is in line with what by now seems to be the well-established case-law of the Supreme Court (see paragraphs 54-55 above).

107. In this regard it cannot but be noted that the Supreme Court’s decision in the applicant’s case was not in line with that case-law. More specifically, it contradicts the decision of the same court in a similar case adopted a year earlier (see paragraph 54 above) and with several decisions in similar cases adopted within a month of the decision in the applicant’s case (see paragraph 55 above).

108. It follows that the factual differences which the Supreme Court and the Constitutional Court cited when distinguishing the present case from *Trgo* are irrelevant for determining the applicability of Article 1 of Protocol No. 1 in the instant case.

109. Unlike the Supreme Court and the Constitutional Court in the applicant's case, the Government did not even attempt to argue that the time at which the applicant's counterclaim had been lodged was relevant for the applicability of Article 1 of Protocol No. 1 to the Convention. Rather, they contended that, unlike in *Trgo* where the findings of the domestic courts suggested that the applicant and his mother had been in continuous possession of the property in question in good faith for the required period of time, those statutory requirements had not been met in the present case (see paragraphs 75-78 above).

110. Whether the applicant and his predecessors had met those statutory requirements for acquiring ownership by adverse possession had in the present case indeed been disputed domestically by Rijeka Township (see paragraphs 15-16 above).

111. The Court reiterates that, in principle, it cannot be said that an applicant has a sufficiently established claim amounting to an "asset" for the purposes of Article 1 of Protocol No. 1 where the question of whether or not he or she complied with the statutory requirements is to be determined in judicial proceedings and the courts ultimately find that this was not the case (see, for example, *Kopecký*, cited above, §§ 50 and 58).

112. The Court furthermore reiterates that it is not its task to take the place of the domestic courts, which are in the best position to assess the evidence before them, establish facts and interpret domestic law (see, for example, *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007). It has emphasised that, when it comes to establishing the facts, it is sensitive to the subsidiary nature of its role, and that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances (see, for example, *Bărbulescu v. Romania* [GC], no. 61496/08, § 129, ECHR 2017 (extracts)).

113. In the present case the domestic courts took the evidence relevant for establishing whether the applicant and his predecessors had possessed the property in dispute continuously and in good faith in the period between 1941 and 1991. However, those courts did not assess that evidence and establish the relevant facts with a view to reaching a conclusion as to whether those statutory requirements for acquiring ownership by adverse possession had been satisfied in the applicant's case. That was so because the courts were of the view that the fifty-year period in question could not be taken into account in calculating the time necessary for acquiring ownership of socially owned property by adverse possession.

114. Their view is contrary to the Court's judgment in the *Trgo* case (see *Trgo*, cited above, §§ 54-68) and to the above-mentioned case-law of the Supreme Court (see paragraphs 54-55).

115. Since under the Court's case-law Article 1 of Protocol No. 1 applies only to those claims for which there is a sufficient basis in national law (see paragraphs 86-88 above), the examination by the domestic courts

of whether the applicant and his legal predecessors had satisfied the statutory requirements for acquiring ownership by adverse possession in the period between 6 April 1941 and 8 October 1991 was important for determining whether that Article is applicable to the present case.

116. In the absence of the relevant findings by the domestic courts, the principle of subsidiarity requires the Court to make those findings itself for the purposes of establishing whether the applicant's claim had a sufficient basis in national law. The need for the Court to take on this role in the present case is further supported by the principle that Article 1 of Protocol No. 1, like the Convention as a whole, must be interpreted in such a way as to guarantee rights that are practical and effective, not theoretical or illusory (see, among many other authorities, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 114, 25 October 2012). It would run contrary to that principle to hold that the applicant's claim did not have a sufficient basis in national law merely because the domestic courts failed to examine whether the relevant statutory requirements were satisfied – especially in a situation where their failure to do so was based on a view which was contrary to the Court's case-law.

117. In the Court's view, the evidence gathered by the domestic courts, together with the relevant statutory provisions of the domestic law, is enough to conclude that the applicant's claim to be declared the owner of the property in dispute had a sufficient basis in national law.

118. In particular, the Court notes that in the absence of the relevant findings by the domestic courts the applicant can rely on the statutory presumption that property is possessed in good faith (see section 18(5) of the 1996 Property Act cited in paragraph 49 above). It further notes that, save for one witness who knew nothing of the matter, all the remaining six witnesses heard in the domestic proceedings testified that the disputed parts had been in the possession of the applicant's family since 1955 and, before that, in the possession of Ms O.B., and that no one had ever contested their ownership of those parts (see paragraphs 19 and 28-29 above). This was confirmed by several members of the Council of the Local Board of Pehlin in the letter of 12 May 2009 (see paragraph 20 above).

119. The Court therefore concludes that the applicant's claim to be declared the owner of the property in dispute had a sufficient basis in national law and that Article 1 of Protocol No. 1 is therefore applicable.

120. It follows that the Government's objection based on the inapplicability of that Article must be dismissed.

121. The Court finds it important to emphasise that this finding is without prejudice to a possible future finding by the domestic courts (see paragraph 139 below) that the applicant's and his predecessors' possession was not continuous and in good faith and that therefore he did not acquire ownership of the property in dispute by adverse possession. It merely means that, for the Court, given the relevant statutory provisions of

the domestic law and the evidence taken domestically, his claim had a sufficient basis in national law to attract the guarantees of Article 1 of Protocol No. 1, it being understood that this Article applies to such claims as well, and not only to “existing possessions” (see paragraph 86 above).

2. Exhaustion of domestic remedies

(a) The parties’ arguments

(i) The Government

122. The Government submitted that, while the applicant in his constitutional complaint had formally stated that a number of his constitutional rights had been violated, it was clear from its content that he had only complained of a violation of his right of access to the Supreme Court (see paragraph 40 above). Specifically, in his constitutional complaint the applicant had complained that even though he had met all the formal requirements for lodging an extraordinary appeal on points of law and had argued that the existing case-law had to be revisited in the light of the Court’s judgment in *Trgo*, the Supreme Court had nevertheless declared his appeal on points of law inadmissible.

123. In the alternative, the Government argued that the applicant should have sought restitution of the disputed land by instituting administrative proceedings under the Restitution Act (see paragraph 64 above).

(ii) The applicant

124. The applicant replied that he had used all available remedies. In particular, he submitted that he could not have instituted the relevant proceedings suggested by the Government because he could not have been considered a former owner under the Restitution Act (see paragraph 64 above), since neither he nor his father had ever been registered as the owners of the property in dispute.

(b) The Court’s assessment

125. As regards the Government’s argument that the applicant in his constitutional complaint had essentially complained only of a breach of his right of access to the Supreme Court (see paragraph 122 above), the Court finds it sufficient to note that the applicant relied on the relevant Article of the Croatian Constitution guaranteeing the right of ownership and that he adduced rather intricate arguments based on three Court judgments adopted in cases similar to his, which all concerned the application of Article 1 of Protocol No. 1 to the Convention (see paragraph 40 above).

126. As regards the Government’s argument that the applicant should have instituted the relevant proceedings under the Restitution Act, the Court considers that this remedy has essentially the same purpose as the

applicant's counterclaim lodged in the civil proceedings complained of (see paragraph 12 above), it being understood that when one remedy has been attempted, the use of another remedy that has essentially the same purpose is not required in order for the applicants to comply with their obligation to exhaust domestic remedies under Article 35 § 1 of the Convention (see *Kozacioğlu v. Turkey* [GC], no. 2334/03, §§ 44 et seq., 19 February 2009, and *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009).

127. It follows that the Government's objections concerning the non-exhaustion of domestic remedies must also be dismissed.

3. Conclusion as regards admissibility

128. The Court furthermore notes that this complaint 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. The parties' arguments

(a) The applicant

129. The applicant firstly submitted that no third parties had ever acquired or claimed any rights in respect of the property in dispute. He then reiterated his argument, which he had raised before the Supreme Court and the Constitutional Court, that the first- and the second-instance judgments in his case had been contrary to the Court's judgment in *Trgo* (see paragraphs 35 and 40 above) and, as such, in breach of his right to the peaceful enjoyment of his possessions.

(b) The Government

130. The Government argued that if the Court were to accept that Article 1 of Protocol No. 1 to the Convention was applicable in the present case – and that, consequently, the Rijeka Municipal Court judgment (see paragraph 31 above) constituted an interference with the applicant's right to the peaceful enjoyment of his possessions – then the interference in question had been justified. In particular, it had been lawful, as it had been based on the amended text of section 388 of the 1996 Property Act (in particular, its paragraph 4) and on the relevant provisions of the 1811 Civil Code (see paragraphs 43 and 52 above). The interference in question had also been in the public (general) interest and had been proportionate.

2. *The Court's assessment*

131. The Court has already found a violation of Article 1 of Protocol No. 1 to the Convention in a case raising similar issues as the present one (see *Trgo*, cited above, §§ 54-68).

132. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

133. In particular, and without prejudice to a possible future finding to the contrary by the domestic courts (see paragraph 139 below), there is no indication, and nor did the Government submit, that anyone apart from Rijeka Township acquired any rights over the property in dispute, or that any party except the applicant (or his predecessors) ever claimed any rights in respect of that property. Therefore, it would seem that the concerns that prompted the Constitutional Court to invalidate section 388(4) of 1996 Property Act (see paragraph 9 above) were not present in the applicant's case. That provision was invalidated in order to protect the rights of third parties, whereas the applicant's case did not seem to involve any such rights (see *Trgo*, cited above, § 66).

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

135. The applicant complained that the domestic courts' decision to shift to him the burden of proving when the property in dispute had been transferred into social ownership, even though the relevant records (the land register) had been destroyed, had been in breach of his right of access to a court, as guaranteed by Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ...
... hearing ... by [a] ... tribunal ...”

136. Having regard to the facts of the case, the submissions of the parties and its findings under Article 1 of Protocol No. 1 to the Convention (see paragraphs 65-134 above), the Court considers that it has examined the main legal question raised by the present application and that it is not necessary to examine the admissibility and merits of this remaining complaint (see, for example, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

137. 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.”

138. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to that breach and to make reparation for its consequences. If national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, §§ 32-33, ECHR 2000-XI). In this regard the Court notes that the applicant can now lodge a request under section 428a of the Civil Procedure Act (see paragraph 62 above) with the Rijeka Municipal Court for the reopening of the above-mentioned civil proceedings, in respect of which the Court has found a violation of Article 1 of Protocol No. 1 to the Convention.

139. Given the nature of the applicant’s complaint and the reasons for which it has found a violation of Article 1 of Protocol No. 1, the Court considers that in the present case the most appropriate way of affording redress would be to reopen the proceedings complained of in due course (see *Trgo*, cited above, § 75).

140. Having regard to the foregoing and given that the applicant’s representative did not submit a claim for just satisfaction, the Court considers that there is no call to award the applicant any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaint concerning the right to the peaceful enjoyment of possessions admissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaint under Article 6 § 1 of the Convention.

GRBAC v. CROATIA JUDGMENT

Done in English, and notified in writing on 16 December 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Péter Paczolay
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Poláčeková and Sabato is annexed to this judgment.

P.P.C.
R.D.

JOINT DISSENTING OPINION OF JUDGES POLÁČKOVÁ AND SABATO

1. We voted against the admissibility of the application and, in any event, for a finding of no violation of Article 1 of Protocol No. 1 to the Convention. While we fully agree with the conclusion of the majority that the proprietary interests relied on by the applicant were in the nature of a claim and cannot be characterised as an “existing possession” within the meaning of the Court’s case-law (see paragraph 87 of the judgment), we respectfully disagree with the conclusion that the applicant’s claim to be declared the owner of the property in dispute had a sufficient basis in national law (see paragraph 121 of the judgment).

2. In order to reach this conclusion the majority referred to the Court’s case-law concerning the concept of a “legitimate expectation” of obtaining the effective enjoyment of a property right. Such expectations will arise only in respect of claims for which there is a sufficient basis in national law – that is, in respect of claims which are sufficiently established as to be enforceable (see paragraph 86 of the judgment). According to the majority, the applicant’s claim, given the evidence taken domestically, had a sufficient basis in national law to attract the guarantees of Article 1 of Protocol No. 1 of the Convention (see paragraph 121 of the judgment).

3. In our view, with all due respect, the stance of the majority does not reflect the concept of “legitimate expectation” as developed in the Court’s well-established case-law.

4. In order to explain our dissent, we need not take a position on those corollaries of the concept of “legitimate expectation” with reference to which legal literature¹ has criticised the Court for alleged inconsistencies and lack of clarity². Indeed, it will suffice for us to refer to two features of the above notion that appear to us to be unquestionable.

¹ See, for example, in a recent source, M. Cousins, “Legitimate Expectations and Social Security Law Under the European Convention of [sic] Human Rights”, *European Journal of Social Security*, vol. 23, I, March 2021, p. 24 et seq., esp. p. 32, where the author draws, from language in a separate Opinion annexed to the judgment in *Bikić v. Croatia*, no. 50101/12, 29 May 2018, inferences as to divisions in the Court and the fact that the majority in *Radomilja and Others v. Croatia* (cited in the text) had refused some of the principles stated in *Bélané Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016. See also M. Sigron, “Legitimate Expectations under Article 1 of Protocol No. 1 to the European Convention on Human Rights”, Cambridge-Antwerp-Portland: Intersentia, 2014.

² A corollary of the notion of “legitimate expectation” – one of those that have formed the object of extensive judicial and doctrinal debate – is that relating to “conditional claims”. In the present case, the claim was indeed, in our view, conditional, as the applicant had to fulfil conditions concerning, *inter alia*, the extension of possession in time as well as good faith (the Government in their observations of 17 March 2021, §§ 66 and 67, because of the

5. Firstly, under the Court’s case-law “where the applicants’ claim ... failed because they had not met one of the essential statutory conditions, ... the claim was not sufficiently established”, there being “a difference between a mere hope ... and a ‘legitimate expectation’, which must ... be based on a legal provision or a legal act such as a judicial decision”; moreover, “...no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts” (see, for example, *Kopecký v. Slovakia*, no. 44912/98, §§ 49-50, 28 September 2004, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 142, 20 March 2018, where “settled” domestic case-law is indicated as being a sufficient basis).

6. We consider that, in the present case, since there was a “dispute as to the correct interpretation and application of domestic law” and there was no clearly applicable “legal provision or ... legal act such as a judicial decision”, no legitimate expectation accordingly existed.

7. The majority themselves indeed clarify that “... the question of whether the possessors satisfied the statutory conditions for acquiring ownership by adverse possession must be determined in proceedings before civil courts, because possessors need a declaratory judgment acknowledging their ownership in order to be able to effectively enjoy their property” (see paragraph 87). It follows that, in order to prove a currently enforceable claim that was sufficiently established, a successful applicant in a similar situation should either be the registered owner of the plot of land or a successive proprietor, registration being a “legal act” within the above

cadastral surveys conducted, provided serious factual and legal reasons supporting the view that the applicant – who bears the burden of proof – was not in material possession of the two disputed plots, let alone in good faith, until 1999). The majority seem to overlook this conditional nature of the claim, when they refer to the fact that “ownership will be acquired by adverse possession *ipso jure*”; but then they add themselves that the *ipso jure* acquisition occurs only “when all statutory conditions are met” (paragraph 87 of the judgment). For reasons of brevity, we prefer not to deal with such an intricate matter; however, in our view, the majority should not have considered that the Court had to substitute its own assessment for that of national judges when it came to reviewing legal and factual circumstances (paragraphs 115-118 of the judgment, paragraph 10 of this opinion). The majority, in paragraphs 113-115 of the judgment, justify their approach by arguing that, since the domestic courts took a legal standpoint which made it unnecessary to proceed with factual findings, “the principle of subsidiarity requires the Court to make those findings itself” (paragraph 116), albeit “without prejudice to a possible future finding by the domestic courts” along a different pathway (paragraph 121). In this area, in which – as we try to clarify in the text – the Court must consider facts and national law “as interpreted by domestic courts” (*Kopecký*, cited in the text, § 54), we have a different vision of subsidiarity, allowing the Court only to review arbitrariness. In this regard, it must be said that the majority have not found any arbitrariness when reassessing (in our view, in an inappropriate way) the facts and the law as interpreted domestically, and with which the majority merely disagreed because the domestic approach was allegedly “contrary to the Court’s judgment in the *Trgo* case” (paragraph 114 of the judgment).

meaning (which was the case in *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 62, 30 August 2007, and, more recently, in *Liamberi and Others v. Greece*, no. 18312/12, § 59, 8 October 2020), or he or she should have obtained a domestic declaratory judgment, this being a “judicial decision”. As in the present case all the requirements for a “legitimate expectation” are lacking (see paragraph 5 of this opinion), the applicant had a “mere hope” to be recognised as owner of the land in question.

8. The applicant showed some awareness of such a need, as he lodged a counterclaim asking the domestic courts to issue a declaratory judgment establishing that he was the owner of the disputed areas of land which, he asserted, he had acquired by adverse possession (see paragraph 12 of the judgment). But this claim was definitively dismissed by the domestic courts in the decision of the Supreme Court of 16 April 2019 and subsequently, in a decision of 25 September 2019, the Constitutional Court declared the applicant’s constitutional complaint inadmissible.

9. Secondly, and more importantly, in order to assess “whether there was a sufficient basis in domestic law” for a legitimate expectation, the Court must consider the same law “as [that] interpreted by domestic courts” (*Kopecký*, cited above, § 54), while the Court “has only limited power to deal with alleged errors of fact or law committed by national courts, to which it falls in the first place to interpret and apply domestic law”; such power being limited to the finding of an “appearance of arbitrariness” (*ibid.*, § 56).

10. We consider that the reasons provided by domestic courts to reject the applicant’s claim were not arbitrary at all. Nor do the majority say that they were. Since we believe that the Court should not have gone further, our views, too, could just as well end here.

However, we cannot pass over in silence the fact that we dissent also on one of the core arguments that the majority have used to “correct” (albeit, in our view, contrary to the Court’s case-law) the legal argumentation that the Supreme Court developed to hold that the *Trgo* judgment was not an authority in the given circumstances (paragraphs 38 and 39 of the judgment).

While it is true that the Grand Chamber in *Radomilja and Others* did not, for procedural reasons, address the legal issues dealt with in *Trgo* (paragraph 98 of the judgment), this does not at all mean, in our view, that the *Trgo* principles apply necessarily to the different factual circumstances in the present case (which was the essence of the Supreme Court’s finding in the present case, even though this line of case-law was subsequently overruled, see paragraphs 53-55 of the judgment). A hint of the fact that interpretations differing from that of the majority in the present case are feasible (and such a prospect should once more have encouraged them to defer to national judges, in a spirit of genuine subsidiarity) may be found in

one of the separate opinions annexed to the *Radomilja and Others* judgment: those judges who did not share the procedural approach chosen by the majority (which made it unnecessary to explore the further legal issues) were in fact obliged to deal with the legal issues at stake. In our approach it is not surprising, but it is nevertheless a fact, that their reasoning is so similar to that which would subsequently be developed by the Supreme Court that one could infer that the Croatian judges were at least inspired by the opinion³.

In the light of the above, we respectfully consider that, rather than opposing an interpretation of the law given by national judges, incidentally consistent with that expressed by some judges of the Court, the majority should have abided by the principles according to which:

– “unless the interpretation is arbitrary or manifestly unreasonable, the Court’s role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention” (*Radomilja and Others*, cited above, § 149; see also *Kopecký*, cited above, § 50);

– as to the law, “whether or not [the applicant] complied with the statutory requirements is to be determined in judicial proceedings” (*Radomilja and Others*, cited above, § 149);

– as to the facts, which are also relevant to applying the law, “the Court ... is sensitive to the subsidiary nature of its role and cautious in taking on the role of first-instance tribunal”, save for cogent reasons (*Radomilja and Others*, cited above, § 150).

11. In these circumstances we are unable to conclude that the applicant did have a “possession” within the meaning of the first sentence of Article 1

³ See Joint Partly Dissenting, Partly Concurring Opinion of Judges Yudkivska, Vehabović and Kūris attached to the *Radomilja and Others* Grand Chamber judgment, cited above. In particular, paragraph 13 of that Opinion reads as follows:

“... we cannot agree with the Chamber that section 388(4) of the Property Act was applicable to the applicants’ situation. At the time when the applicants brought their civil actions before the domestic authorities, that provision was no longer the valid law and therefore was not applicable, owing to the decision of 17 November 1999 by the Constitutional Court. ... Even conceding (which would be a hard thing to do because of the reasons stated in the preceding paragraph) that the *Trgo* judgment (cited above) suggests that that applicant’s claim had a sufficient basis in domestic law to qualify as an ‘asset’, because he instituted relevant proceedings as soon as the Property Act in its original version entered into force in 1997 and thus had some expectations which at the material time might have been seen, at least from some perspective, as legitimate, and which he retained over the next three years until the Constitutional Court declared section 388(4) of that Act unconstitutional, and that all this triggered the applicability of Article 1 of Protocol No. 1 in *Trgo*, the legal situation in the instant case is different in at least one crucial respect. In the instant case, the applicants had not instituted any proceedings regarding the adverse possession of the land in question while section 388(4) of the 1996 Property Act was still in force. Once it was declared unconstitutional by the Constitutional Court (in our opinion, very reasonably), the applicants had no legitimate expectation whatsoever in respect of the land in question. But it was exactly then (and with a not insignificant delay) that they presented their claims to the domestic authorities, already in the absence of any legal basis in domestic law for legitimisation of their expectations. Expectations they might have had (and we have no doubt that they did have them) – but expectations and legitimate expectations are not necessarily two matching realities. Very often they do not match, just like in the instant case.”

of Protocol No. 1. The guarantees of that provision therefore do not apply to the present case. In any event, there has not been a violation of that Article.

12. In our view, the present judgment is a regrettable development of the Court's case-law.