



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

FIFTH SECTION

CASE OF WIEGANDOVÁ v. THE CZECH REPUBLIC

(Application no. 51391/19)

JUDGMENT

Art 1 P1 • Control of the use of property • Encumbering of a flat owned by the applicant by virtue of an *ex lege* unpaid easement created by the property restitution legislation in favour of a housing cooperative for which the flat was constructed under the former communist regime • Wide margin of appreciation in regulating complex property issue in transition from communist regime to a democratic public order protecting private property • No individual and excessive burden • Balance between applicant's interests and those of the community and not upset

Prepared by the Registry. Does not bind the Court.

STRASBOURG

11 January 2024

FINAL

24/06/2024

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

In the case of Wiegandová v. the Czech Republic,

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

Georges Ravarani, *President*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Mattias Guyomar,
Mykola Gnatovskyy, *judges*,
Pavel Simon, *ad hoc judge*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application (no. 51391/19) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Czech national, Ms Helena Wiegandová (“the applicant”), on 26 September 2019;

the decision to give notice to the Czech Government (“the Government”) of the application;

the decision of the President of the Section to appoint Mr Pavel Simon to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court), Ms K. Šimáčková, the judge elected in respect of the Czech Republic, having withdrawn from sitting in the case (Rule 28 § 3);

the parties’ observations;

Having deliberated in private on 28 November 2023,

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

INTRODUCTION

1. The application concerns a restriction of the applicant’s property rights consisting of an *ex lege* unpaid easement over a flat in her ownership. The easement had been created on the basis of restitution legislation from 1992 and was in favour of a housing cooperative for which the flat had been constructed under the former communist regime.

THE FACTS

2. The applicant was born in 1948 and lives in Prague. She was represented by Mr R. Vaněk, a lawyer practising in Brno.

3. The Government were represented by their former Agent, Mr V. A. Schorm, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. In January 2003 the applicant inherited a tenement house which her partner had acquired in restitution from the State in October 1991, under Law no. 87/1991 on Extra-Judicial Rehabilitations, following its expropriation to the State from his legal predecessor in 1961. The building had a total surface area of 691 square metres and contained, among other residential and non-residential premises, six flats (loft conversions) that had been built by a construction cooperative when the building was owned by the State. The funds invested at that time came to 1,219,145 Czechoslovak korunas (KČS), the country's then currency, of which KČS 766,969 had been a government loan.

6. Since 1992 an easement in respect of the six cooperative flats has existed based on statutory measure no. 297/1992 (*zákonné opatření*). The easement is in favour of a housing cooperative which acquired the flats from the construction cooperative in 1987. The statutory measure, which entered into force on 23 June 1992, was intended to contribute to fair arrangements of property relations in the post-1989 nascent democratic society, specifically between the owners of restituted property and other persons. Since the property-related injustices caused to the original owners of real properties or their legal successors could not be redressed at the expense of the rights of other persons who, relying upon the pre-1989 legislation, had acquired property rights to real properties in good faith, the statutory measure was intended as a compromise solution to govern property-related situations.

7. On 12 June 2009 the applicant made an owner's declaration (*prohlášení vlastníka*) in respect of the building, on the basis of which specifically defined sections of the building were recorded as non-residential or residential units; in total there were 59 units, including those built by the construction cooperative. The applicant became the owner of all those units. The easements in favour of the housing cooperative, concerning the use of the six flats, were preserved.

8. Between 2006 and 2011 the housing cooperative's share of the costs related to the tenement house varied between 15.83% and 17.86%.

9. Between 2009 and 2019 the applicant successively sold 58 of the 59 units in the building. That included the sale of five of the cooperative flats to their occupants, members of the housing cooperative, the last sale being carried out a few months before the introduction of the present application. The applicant was paid a total of about 99 million Czech korunas (CZK – 3.7 million euros (EUR)) for the 58 flats and she still owns the last flat, number 823/607, which has a surface area of 59.45 square metres.

II. PROCEEDINGS ON UNJUSTIFIED ENRICHMENT

10. On 10 June 2013 the applicant, who, at that time, still owned two of the cooperative flats, brought an action against the housing cooperative seeking compensation of CZK 428,054.40 (EUR 16,700 at that time) in respect of unjust enrichment on account of the easement over the two flats, which had been created free of charge and without any limitation in time. The applicant contended that she had not been compensated in that connection as the cooperative's members paid rent directly to the housing cooperative.

11. On 16 January 2014 the Prague 10 District Court rejected the applicant's action, noting that under the statutory provisions on restrictions imposed on the owners of buildings, the provisions on the leasing of cooperative flats applied to the tenancy of flats built by way of loft conversions or roof raising and that the Cooperative had the right to collect rent from the tenants of the flats. Thus, there had been no unjustified enrichment.

12. The applicant appealed against that judgment, but on 11 June 2014 the Prague Municipal Court (*městský soud*) upheld it. The court referred to the relevant case-law of the Supreme Court and the Constitutional Court, according to which the emergence of such easements was the result of multiple reasons, one of them being the nascent democratic society's effort to achieve equitable arrangements of property relations, something to which the preceding regime had not paid due attention. In such cases, the right corresponding to an easement should be equivalent to the improvement of the real property to prevent the unjustifiable enrichment of the building owner.

13. On 15 May 2015 the Supreme Court (*Nejvyšší soud*) dismissed an appeal on points of law lodged by the applicant against the municipal court's decision. The court referred to the relevant established decision-making practice and stated, *inter alia*:

“The legal regulation contained in [section 28d of Act no. 42/1992] is unequivocal and cannot be interpreted in any other way than that the compensation for the restriction of the ownership right by the creation of an easement consists in the increase in value of the encumbered real estate.”

14. The applicant subsequently lodged a constitutional complaint against those decisions of the ordinary courts, along with an application for the repeal of the statutory provisions on compensation for restrictions on ownership by way of the creation of easements. On 18 August 2015 the Constitutional Court (*Ústavní soud*) dismissed as manifestly ill-founded the applicant's constitutional complaint (decision I. ÚS 2096/15). The Constitutional Court did not find any reason to depart from its case-law relating to the issue of easements. In respect of the proposal to limit the existence of an easement in time, the court stated that that could not be applied universally by deciding to repeal some provisions of the law, but only on a case-by-case basis through the civil courts and considering the circumstances of each individual case.

It therefore referred the applicant to the relevant applicable legislation under which the termination of easements could be sought.

III. PROCEEDINGS TO TERMINATE OR REDUCE THE EASEMENT

15. On 28 November 2016 the applicant sought the termination or reduction of the easement over the two cooperative flats which, at that point, she still owned. Her reasons for the application included the passage of time since the completion of the flats and the fact that the cooperative members were not using the flats and were not contributing to the payments for services.

16. On 9 May 2017 the District Court rejected the applicant's action holding, *inter alia*, as follows:

“... the court concluded that terminating the easements allowing the use of residential units nos. 823/606 and 823/607 could not be considered ... (even having regard to the passage of time) since statutory measure no. 297/1992, which amended Law no. 42/1992, was adopted precisely because of the need for property rights arrangements in cases where a real property owned by a third-party entity had been improved by a construction cooperative (in other words, the termination of the easement would have made the defendant's position uncertain, as it had been before the amendment via the statutory measure).

...

... Easements allowing the use of residential units 823/606 and 823/607 could not be reduced with the passage of time for the same reasons (and the court has rejected the action for those reasons) that prompted the adoption of the statutory measure (on which see above) and also considering that the restrictions on the claimant caused by the easements are offset by the defendant's obligation to contribute to repairs of the building.”

17. Following an appeal against that judgment lodged by the applicant, on 8 September 2017 the Municipal Court upheld the first instance judgment, referring to the Supreme Court's case-law on restrictions on owners of flats built by roof raising or loft conversion and encumbered by easements, adding the following:

“[T]he passage of time alone is not capable of disrupting the balance between a lasting improvement of the property on the one hand and the restrictions on the ownership of the property on the other hand. On the one hand, there is the claimant's ownership of the residential units; on the other hand, there is the general principle that when an asset is created (a loft conversion is completed), the ownership thereof is acquired. The legislature has ‘balanced’ these two absolute real rights, which are unlimited in time (imprescriptible), by creating [this particular type of] easement On the one hand, this gives legal protection to the housing cooperative that has established (created) the object of ownership by granting it at least some attributes of a legal title (the right to use and the right to dispose). On the other hand, this protects the building owner because the housing cooperative is prevented from seeking payment for the improvement of the building by the *dictum* that the improvement is offset by the establishment of an easement, and, moreover, the housing cooperative is obliged to contribute to the costs of maintaining and repairing the building. Thus, where the claimant argues that the

defendants have ‘gradually used up’ the benefit of the easement ‘by enjoying housing’ as time was passing, her arguments miss the very substance of easement creation ... The mere passage of time cannot in the given case constitute a change establishing a gross disproportion between the [burden of the] easement and the benefit to the [housing cooperation], which would be a reason for the termination or limitation of the easement.”

18. The applicant lodged an appeal on points of law with the Supreme Court. On 27 March 2018 the Supreme Court rejected the applicant’s appeal. In her appeal on points of law, the applicant directed her claims against the assessment of the question of a change in the prevailing conditions. The court noted the following in that regard:

“[The legislator] was aware of the possibility of restricting the right to use another’s property to a limited period of time based on facts that occurred before the property was restituted. It must therefore be assumed that it was not its intention to limit the duration of that right according to the passage of time. The constitutionality of [section 28d of statutory measure no. 297/1992] has not been called into question. ...

It is not, however, entirely unreasonable to argue that the ownership thus acquired does not confer a real benefit on the owner of the building. That is, however, a consequence of the principle that [immovable property should be] restituted in the state in which [it was in] on the date of seizure; the restitution of a [property] was not even a reason for the lifting of the easement burdening it due to a change of relations.

...

In its decision no. I. ÚS 2096/15 of 18 May 2015 [adopted in a previous constitutional complaint lodged by the present applicant], the Constitutional Court stated: ‘... the applicant also addresses the possibility of a limitation in time [of the easement], specifically proposing its revision in the sense of assessing whether the value of an immovable property corresponds to the value of an [easement] exercised on it over time. The Constitutional Court states, in this respect, that such a revision cannot be implemented by a general decision to repeal [section 28d of the statutory measure], but only individually with a focus on specifics of a concrete case. ...

Such a solution in the current legal administration is offered by Article 1299 of the Civil Code, according to which the owner of servient property (*vlastník služebné věci*) in the event of a permanent change causing a gross disproportion between the encumbrance of the easement and the benefit for ... the holder of the easement may demand the restriction or cancellation of the easement for reasonable compensation. It would therefore be up to the general courts to weigh the advantages and disadvantages for the owner of the flats, based on an evaluation of the matter and [considering] their inability to actually use the flat, as well as ... [taking into account] the possibility [for the easement holder] to use housing units which do not belong to them free of charge with the right to rent them and [the impact on them of] their losing that advantage’.

Thus, the Constitutional Court did not rule out the possibility of terminating the encumbrance in the interest of [fairness]; nor, however, it did not express a legal opinion that would necessarily lead to the satisfaction of the claim in this matter; it left the definition of the conditions for the termination of such encumbrances to the current courts.

The provisions of the Civil Code on the tenancy of cooperative flats apply to tenancies of flats built by roof raising or loft conversion and encumbered by the above easement ... The cooperative lets cooperative flats to its members, who are owners of

‘a membership share in the housing cooperative’ (that is to say owners in the broader sense ...), which is transferrable together with the right to tenancy of a cooperative flat (see, for example, the Supreme Court’s judgment of 29 April 2002, no. 29 Odo 440/2001) and is also heritable, provided that the right to tenancy of the cooperative flat passes to the beneficiaries ... A membership share in a housing cooperative therefore has a value as an asset, which is expressed as the customary price, that is to say the price that could be achieved for the transfer of the membership share at the relevant time and place (judgment of the Grand Panel of the Supreme Court’s Civil and Commercial Division dated 14 November 2002, no. 31 Cdo 2428/2000). The content of the right to tenancy of a cooperative flat, which originates from holding a membership share, approximates – unlike the tenancy of a flat owned by other entities – to the content of a legal title; it is a generally known fact, of which the Supreme Court is also aware ..., that the prices for the transfer of a membership share approach the prices for the transfer of a legal title to a flat (unit).

Should the easement in favour of the housing cooperative be terminated ..., then the tenants of the flats built by the loft conversion – the members of the housing cooperative – will have their right to tenancy of the cooperative flat extinguished and their membership share in this cooperative will become virtually worthless. It should also be taken into account that over the more than 25 years since the creation of this easement, a number of people have acquired membership shares and rights to tenancy of the associated cooperative flat for the customary ... prices.

Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and in return for compensation (Article 11 § 4 of the [Czech] Charter of Fundamental Rights and Freedoms [– ‘the Charter’])....

Had a court terminated the easement in favour of the cooperative ..., the result would have been the extinguishment of a property right – the tenancy of the cooperative flat – and impairment of the tenant’s membership share, and that in proceedings to which the tenant (in the instant case) would not have been a party and so would not have been able to influence the content of the decision. Such a course of action would have been contrary to Article 11 § 4 of the Charter ... This also applies to a reduction of the easement, which would have resulted in the defendant having to pay the claimant over and above the contributions set down in statute for the use of the units by its members. The procedure indicated by the Constitutional Court [namely the option of terminating the easement in return for compensation of the corresponding change in the prevailing conditions] could then have been considered if, on the day of the court’s decision, the particular cooperative member did not hold the right to tenancy of the cooperative flat (in which case it would have been a ‘free’ flat, or unit).

In the instant case, it had not been claimed or proved that the units at issue were ‘free’, that is to say that the cooperative’s members did not hold a right to tenancy of the cooperative flats (the onus being on the claimant to claim and prove that).

In respect of the claim that the defendant and the people whom the defendant allows to use the premises are abusing the benefits to the claimant’s disadvantage – specifically, that they are letting the premises to relations of the defendant’s members or are even collecting income from leases to third parties, and in respect of the claim that the defendant is not performing its obligations to the claimant – specifically, that it is not paying the costs related to the use of the units encumbered by the easement and that the claimant herself has to pay those costs to the association of owners of residential units [= condominium]:

In civil proceedings, the principle of party presentation is applied; it emphasises the party's responsibility for the outcome of the proceedings, including the appellate proceedings. Although it is possible in the appellate proceedings to review the first instance court's judgment on grounds that were not raised in the appeal, the fact *per se* that the appellate court did not examine an issue that was not raised in the appellate proceedings does not establish grounds, consisting of an incorrect assessment of the matter as to the law, for lodging an appeal on points of law. ... in the appellate proceedings, the appellant on a point of law had not raised the above complaints, and the appellate court therefore cannot be criticised for the fact that it did not examine them."

19. The applicant lodged a constitutional complaint concerning that decision with the Constitutional Court, which on 26 March 2019 dismissed it as manifestly ill-founded (I. ÚS 2163/18). It held, in particular, that:

"[Such matters can be addressed] only individually, focusing on the specificities of each particular case, because the improvement of the real property is different in each situation; what is also different is the period of time at the end of which the value of the right of use was to equal the improvement of the real property, the equality being achieved by the passage of time. ... in the legislation in force, such an approach is offered by Article 1299 of the new Civil Code, under which in case of a permanent change resulting in a gross disproportion between the encumbrance on the servient tenement and the benefit for the dominant tenement or the holder of the easement, the servient owner may [bring a] claim that the servitude be reduced or terminated for reasonable compensation. The appellant has made use of the above procedure ...

Nevertheless, the Constitutional Court has not found that the courts involved in these proceedings [on the termination or reduction of the easement] diverged from the fair trial requirements. The Constitutional Court does not consider that the appellant's emphasis on the time aspect as the crucial reference criterion was substantiated, for the reason that the courts examined the same relations between the appellant and the housing cooperative a short time from the end of the preceding proceedings (on unjustified enrichment). In that respect, they primarily took into account the fact that neither the appellant's legal predecessor, to whom the building had been restituted, nor the appellant herself had contributed to the building of the six residential units in the loft. If the courts have now based their decisions on the fact that the passage of time (by way of the actual 'gradual using up' of the easement) *per se* is not capable of resulting in a change in the prevailing conditions, they have not proceeded in a manner incompatible with the constitution, and at the same time they have protected the legitimate interests of the investors in the units or their legal successors. The Constitutional Court has emphasised that the period of time at the end of which the value of the right of use was to equal the improvement of the real property, the equality being achieved by the passage of time, cannot be determined without taking into account additional important facts, which are unique in each particular case. The circumstance that the appellant instituted new proceedings soon after the end of the original proceedings also has an impact on the assessment of the gross disproportion; thus, in the trial court's view the assessment could not have changed since the preceding proceedings in any significant manner ..."

RELEVANT LEGAL FRAMEWORK

I. LEGAL PROVISIONS

A. Civil Code (Law no. 40/1964) as in force from 1 January 1992

20. Under Article 151n §§ 1 and 3 of the Civil Code, an easement restricts the owner of a real property in favour of another person so that the owner is obliged to suffer something, to refrain from something, or to do something. The rights corresponding to easements are either connected with the ownership of a certain real property or are held by a certain person. Unless the parties have agreed otherwise, the person who is entitled to use another person's property on the basis of a right corresponding to an easement shall bear the reasonable costs of maintaining and repairing such property; however, if its owner also uses the property, the owner shall bear these costs depending on the extent of co-use.

21. Under Article 151p § 3, where a change in the prevailing conditions precipitates a gross disproportion between encumbrance caused by the easement and the benefit inuring to its holder, the court may decide that the easement be reduced or terminated for a reasonable compensation. Should it not be possible, due to the change in the prevailing conditions, to insist in a fair way on payment in kind, the court may decide that payment in cash be provided instead of payment in kind.

22. Under Article 463 § 1, a heir can refuse the inheritance.

B. Statutory Measure no. 297/1992 of the Presidium of the Federal Assembly, amending Law no. 42/1992 on the regulation of property relations and settlement of property claims in cooperatives

23. Under section 28d(1) of statutory measure no. 297/1992, in cases where construction cooperatives built flats for which financial, credit and other assistance had been granted under regulations on financial, credit and other assistance to cooperative housing construction projects realised by raising the roof or a loft conversion in existing buildings, but the building did not become subject to common tenancy of the cooperative and the original owners of the building, an easement over the building in favour of the cooperative or its legal successor under Article 151n et seq. of the Civil Code was created on the date when the statutory measure came into effect. Such easements restrict the owner of the building as follows:

- a) The provisions of the Civil Code on the tenancy of cooperative flats shall apply to the tenancy of flats built by raising the roof or a loft conversion;
- b) The cooperative or its legal successor has the rights and obligations of a landlord in relation to the flats concerned, unless agreed otherwise with the building owner;

c) Regulations on the method of calculating the rent for flats built by housing construction cooperatives must apply to the calculation of the rent for such flats;

d) Tenants pay the rent for such flats to the cooperative or its legal successor; tenants pay charges for the services attendant on the use of the flats to the building owner or to another person.

24. Under section 28d(2) the improvement of the building through the building of a flat or non-residential premise under regulations on the provision of financial, credit, and other assistance to cooperative housing construction consisting of roof raising or loft conversion is, for the purposes of this statutory measure, regarded as compensation for the restriction on the ownership through the creation of the easement.

C. Flat Ownership Act (Law no. 72/1994) as in force since 1 July 2000

25. Under section 27(3) of the Flat Ownership Act, if a cooperative is wound up without a legal successor, on the day on which the cooperative is wound up an easement materialises in favour of the hitherto tenant of a flat built under subsection (1) of section 27. That easement passes to the tenant's legal successor in the same extent. A similar easement, having the same extent and carrying the right capable of being transferred to every subsequent legal successor, materialises in favour of the tenant of the flat if a tenant's membership of the cooperative is terminated. The content of the easement is the right to use the flat and the common areas to the same extent as agreed between the tenant and the cooperative. The provisions of the Civil Code on the tenancy of cooperative flats shall apply to the that usage *mutatis mutandis*.

D. New Civil Code (Law no. 89/2012), as in force since 1 January 2014

26. Under Article 1299 § 2 of the new Civil Code, in the case of a permanent change resulting in a gross disproportion between the encumbrance caused to the servient tenement and the benefit for the dominant tenement or the holder of the easement, the servient owner may lodge a claim for the reduction or termination of the servitude in return for reasonable compensation.

E. Business Companies and Cooperatives Act (Law no. 90/2012)

27. Under section 744 of Law no. 90/2012, the members of a housing cooperative who are tenants of cooperative flats pay the cooperative a rent that only includes the cooperative's reasonably incurred costs related to the management of those cooperative flats, including the costs of repair, modernisation, and refurbishment of the building in which they are located

and contributions to a long-term fund for repairing and investing in those cooperative flats.

II. RELEVANT LEGAL PRACTICE

A. The Constitutional Court's case law

28. The Constitutional Court has repeatedly scrutinised the issue of easements created, *inter alia*, in connection with cooperative construction and the restitution of property.

29. In its judgment no. I. ÚS 66/03 of 12 April 2006, the Constitutional Court held, in respect of the termination of an easement due to a change in the prevailing conditions, the following:

“... a precondition for a court to decide to terminate an easement is the simultaneous existence (at the time when the court is deciding) of the following conditions: a) a change in the prevailing conditions; b) a gross disproportion between the encumbrance caused by the easement and the benefit for its holder and c) a causal nexus between the conditions under a) and under b). The law does not specify the nature of the change in the prevailing conditions which warrants a change in the specification of the extent and content of an easement. It can result from a change in the objective circumstances as well as a change in the parties' personal situations if that significantly affects the further content or duration of the easement. Thus, a change in the prevailing conditions represents a relatively broad range of the consequences of various legal facts ... A gross disproportion between the encumbrance caused by the easement and the benefit for its holder results from comparing the easement holder's rights with the obliged person's obligations ...

Only a gross disproportion resulting from a change in the prevailing conditions is legally relevant; this implies that even in the case of a change in the prevailing conditions and an existing gross disproportion between the encumbrance caused by an easement and the benefit for its holder, the conditions for terminating the easement do not exist where this gross disproportion already existed before the change in the prevailing conditions.”

30. In its decisions nos. I. ÚS 477/05 of 16 September 2008, I. ÚS 1437/09 of 1 October 2009 and II. ÚS 3829/11 of 10 April 2012, the Constitutional Court noted the following on the creation of easements and the obligations of those holding them:

“The creation of an easement under statutory measure no. 297/1992 cannot be subject to Article 11 § 4 of the Charter. It is the result of efforts by the nascent democratic society to achieve fair arrangements of property rights, a subject to which the preceding regime had not paid due attention. There is no doubt that the right corresponding to an easement should be the equivalent of the improvement of the real property owned by another person; the building owner would be the object of unjustified enrichment without the legislation in question. At the same time, the holder of the easement continues to be obliged to contribute to the costs of maintaining and repairing the building under 151n(3) of the Civil Code.”

31. On the issue of improvement of the real property, the Constitutional Court held the following in its decision no. I. ÚS 1437/09 of 1 October 2009:

“... it is not possible to agree with the appellants’ claim that in their case they received no equivalent benefit to offset the emergence of the easement. In this context, the Constitutional Court points out that two residential units were built in the appellants’ real property and that these are their property without the appellants having had to pay anything for the building of these units.”

32. On the issue of the legal relationship between the owner of the real property and persons that use residential units which are encumbered by an easement, the Constitutional Court noted in its decision of 10 November 2009, no. IV. ÚS 2759/07:

“There is no doubt that there is no legal relationship between the defendants and claimants, for they only make use of the benefit flowing from the easement that, nonetheless, was not created in their favour but in favour of [a cooperative] ... For this reason, then, the payments for using the flat are made to the housing cooperative, which has a legal relationship with the defendants. If the appellant feels that her ownership is materially restricted by the easement, she must seek remedy of the situation from the entity that holds the right flowing from the contentious easement.”

B. The Supreme Court’s case-law

33. On the issue of the termination of an easement on the ground of a change in prevailing conditions, the Supreme Court found the following in its judgment of 28 February 2002 in case no. 22 Cdo 755/2000:

“... a change in the prevailing conditions precipitating a gross disproportion between the encumbrance caused by the easement and the benefit for its holder can result from a change in the objective conditions or a change in the parties’ personal situations and, under certain circumstances, it can also result from a change in the parties’ behaviour.”

34. On the issue of surrendering property under restitution laws and preserving the stability of real rights, the Supreme Court held the following in its judgment of 10 December 2002 in case no. 22 Cdo 1152/2001:

“The existence of easements, which have a real nature, also co-creates the status of the real property being surrendered: the reason is that the easements pass to the entitled persons together with the property being surrendered.

...

And so, on the one hand, there is the interest in the stability of real rights, in particular easements from the creation of which the parties legitimately expect a lasting arrangement of their legal relationships; on the other hand, there is the interest in the broadest possible return of restituted legal titles to their original extent. Actions to address this conflict of legitimate interests should be based on the fact that the purpose of property restitution is to mitigate injustices because the complete redress of injustices is not always possible and sometimes could result in new injustices. The law therefore does not connect the surrender of the property to the entitled person with the extinguishment of easements that were created over the property after the moment when the entitled person (or his/her predecessor) was deprived of the legal title in the period relevant for property restitution. Had the legislature wanted easements to be extinguished in consequence of property surrender, it would have laid that down explicitly and would have formulated section 7(1) of the restitution law differently.”

35. On the issue of the improvement of a building by the construction of flats, for the purposes of statutory measure no. 297/1992, the Supreme Court observed the following in its decision of 26 March 2009 in case no. 26 Cdo 2097/2007:

“... where flats were built by way of raising the roof or loft conversion by a construction cooperative, they were built without the owners of the building spending any financial or other resources on them. However, since such built-above and built-in flats were not free-standing assets, the relationship between the owner of the building and the person who arranged for the raising of the roof or loft conversion was (across the board) legally formulated so that the resulting situation would be as fair a solution as possible in the circumstances: on a formal legal basis, the owners of the building became the owners of the built-above and built-in flats, but their ownership of the flats was restricted by the creation of easements in favour of the cooperative (or its legal successor) that had caused the construction of the built-above and built-in flats; the granting of compensation for restrictions on the ownership to the owners of the building matches this solution.”

36. On the importance of the individual circumstances in respect of the reduction or termination of easements, the Supreme Court noted the following in its decision of 18 February 2014 in case no. 22 Cdo 3133/2012:

“When deciding whether to reduce or terminate an easement owing to a change in the prevailing conditions, account should be taken of all the circumstances of the case. Primarily, it has to be established whether or not a change in conditions has occurred and, if so, [the court should examine] the extent to which this change has influenced the exercising of the right corresponding to the easement and how the change has manifested itself in the use of the property encumbered by the easement, taking into account the damage that the holder of the easement will sustain in consequence of the reduction or termination of the easement in return for compensation, and this damage should be compared with any damage caused to the owners ...”

THE LAW

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

37. The applicant complained that, regarding the flat that she still owns, she had to endure a situation where, as a result of the *ex lege* easement which encumbered her property right without any limitation in time and without any compensation, she was restricted in the use of her property to the extent that she retained the ownership in name only (*nuda proprietas*). She relied on Article 1 of Protocol No. 1, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance

with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

38. 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. Parties' submissions

39. The applicant maintained that the attic space had been taken free of charge and used by means of a free easement in favour of the housing cooperative. Although she remained the owner of the flat in question, her ownership was in name only, since it did not allow her to use the flat or to transfer it to anyone other than a tenant – who had to be a member of the housing association. However, the applicant had to attend to the flat as its owner in the usual way and pay for the maintenance of the common parts of the tenement house from her own resources. Accordingly, the restrictions on her property rights could not be regarded as measures controlling the use of her property but rather as a deprivation of her property. The applicant added that the loft conversions were not, for her, an added value but a loss having regard to the prices for which she was able to sell them to their occupants, members of the housing cooperative. According to a private expert opinion, the current value of the attic space was CZK 17,440,000 (EUR 709, 936) whereas the applicant received CZK 7,256,065 (EUR 295,375) for the sale of five cooperative flats.

40. The applicant disputed that the cooperative and its members had acted in good faith when the flats were built. She submitted that the cooperative and its members had known when they began the construction that they were going to build flats for themselves on someone else's premises, that they had never paid anyone for the opportunity to occupy the premises and build the flats, and that they did not intend to pay for that opportunity.

41. The applicant denied that the purpose of the easement created *ex lege* in 1992 was to strike a balance between the rights of the owners of flats in tenement houses and the rights of housing associations and their members. In her view, the owners had been forced to bear a one-sided burden without the housing cooperatives having to bear any burden other than the costs of necessary repairs.

42. The applicant further maintained that if the adoption of statutory measure no. 297/1992 and the creation of the easement had been justified by the exceptional circumstances prevailing in the post-communist period, the easement should have been limited in time. However, the restriction on the

applicant's enjoyment of her human rights had been imposed for an indefinite period. More than thirty years had elapsed since the building of the loft conversions and the end of the historical context of the year 1989. The applicant considered that thirty years was more than enough time to settle the relations which had arisen in that historical context.

43. The Government submitted that the existence of the easement did not constitute deprivation of ownership as the applicant could still sell the flat. They further maintained that she had inherited the tenement house with the easement already established for the benefit of the housing cooperation and that the balance of the rights and obligations related to the use of the property had remained unchanged. Accordingly, there could not be any interference with the applicant's ownership.

44. Should the Court not share that view, the Government considered that the applicant's case should be examined as a measure of control of the use of her property under the second paragraph of Article 1 of Protocol No. 1 to the Convention. In that case, the Government were convinced that the interference was lawful, pursued a public interest and was proportional.

45. The Government submitted that the easement over the flat had been prescribed by law and had pursued the aim of protecting the rights of the housing cooperative and its members. Moreover, it had struck a fair balance between the general interest in the protection of the property rights of the housing cooperative and its members, and the requirement to protect the applicant's ownership of the building and not impose an excessive burden on her.

46. The Government maintained that the cooperative's members had participated in the funding, at their own expense, and the construction of the cooperative flats, and that in doing so they had intended to obtain new living premises and, therefore, to improve the property which was later returned to the original owner. They had been compensated for the construction costs by their opportunity to use the flats for an unlimited period of time.

47. The Government further emphasised the extraordinary circumstances of the restitution process under which the easement had been created and because of which it continued to exist. Buildings such as the tenement house in question had been surrendered to the entitled persons, including in this case the flats built by the construction cooperative, and it was necessary to respect the rights of the cooperative members. Therefore, in the interest of legal certainty and respect for the rights that they had acquired, a compromise had been adopted in 1992, on the basis of which easements in favour of such cooperatives were established under statutory measure no. 297/1992, with the improvement to the building in the form of the additional flats being regarded as adequate compensation for such restrictions on the ownership of the entitled persons.

48. The Government submitted that the applicant had accepted the inheritance including the tenement house with all the attendant rights and

obligations. She must have been aware that her ownership would be restricted by the existence of the easement in favour of the housing cooperative or its legal successor and that she could not expect the termination or reduction of the easement at any point in the future. Moreover, the relevant legislation allowed the termination or reduction of easements to be sought on the ground of a material change in the individual circumstances where a change in the personal situation or the parties' behaviour could constitute a change in the prevailing conditions precipitating a gross disproportion between the encumbrance of the easement and the benefit for its holder. However, the applicant's contention that the members of the housing cooperative had not been living in the cooperative flats and had been abusing their benefit in favour of third parties had not been properly brought before the domestic courts.

49. In response to the applicant's point that it was not possible for her to use the loft space because of the construction of the cooperative flats, the Government submitted that, since the applicant had acquired the tenement house in 2003, her activities had consisted only of selling the residential and non-residential units except for the flat which she still owns, which she could still dispose of by selling it. As regards alleged losses, the Government submitted that the applicant's claim was speculative and had never been submitted before the national courts. The Government questioned the competence of the author of the expert opinion relied upon by the applicant and also noted that the amount put forward concerned the whole attic space whereas the application concerned only one flat.

50. The Government were also of the opinion that, having regard to the content of the right to tenancy of a cooperative flat arising from the ownership of a membership share, which approximated to the ownership of the flat, terminating an easement on the basis of "using up the benefit in the form of housing" over time would amount to a material interference with the cooperative members' property rights because their shares in the cooperative would become worthless. At the same time, the applicant's argument that the members had been "using up the benefit" also failed to take into account the funds that the housing cooperative, and ultimately its members, contributed or ought to have contributed to the repairs and modernisation of the tenement house.

2. The Court's assessment

(a) Scope of the complaint

51. The Court notes at the outset that the applicant's complaint is limited to the easement which encumbers the flat that she still owns. While the facts regarding the remainder of the building may be relevant in the assessment of the context and the proportionality of the alleged interference, they do not fall within the scope of the applicant's complaint. In addition, since the applicant

acquired the tenement house in 2003 – when the easement over six cooperative flats had already been established for more than 20 years – the complaint does not concern directly the creation of the easement, but rather its continued existence in respect of the flat at issue.

(b) Whether there was an interference

52. The Court first observes that it was in 2003 that the applicant became directly affected by the impugned easement, that being the year in which she inherited the tenement house (see paragraph 5 above). While over the years, the applicant successively sold units in the building, including five of the encumbered cooperative flats (see paragraph 9 above), the continued existence of the easement undoubtedly limits her enjoyment of the flat which she still owns. In particular, because of the easement, the applicant may not use the flat, the cooperative being vested with the rights and obligations of landlord without limitation in time and being entitled to collect rent from the actual occupants (see paragraph 23 above). Indeed, it appears that the applicant may not enter into any transaction regarding the flat except for its sale.

The Court considers, therefore, that there was an interference with the applicant's property rights and that it falls to be examined under the second paragraph of Article 1 of Protocol No. 1, which allows the Contracting States to control the use of property in accordance with the general interest.

(c) Whether the interference was justified

53. The Court reiterates that in order for an interference to be compatible with Article 1 of Protocol No. 1 it must be lawful, be in the general interest and be proportionate, that is, it must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, for example, *Pařízek v. the Czech Republic*, no. 76286/14, § 42 with further references, 12 January 2023). The Court will examine these three steps in turn.

(i) Whether the interference was lawful

54. The Court observes that the legal basis for the contested easement was statutory measure no. 297/1992, amending Law no. 42/1992 (see paragraphs 6 and 23-24 above). It further observes that no issue regarding the “quality of the law” arises.

(ii) Whether the interference was “in accordance with the general interest”

55. The Court reiterates that because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than an international judge to decide what is “in the public interest”. Under the system of protection established by the Convention, it is thus for the

national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property. The notion of “general interest” is necessarily extensive. The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies, especially in the context of a change of political and economic regime, should be a wide one, and will respect the legislature’s judgment as to what is “in the general interest” unless that judgment is manifestly without reasonable foundation (see *Pařízek*, cited above, § 49). This logic applies to such fundamental changes in a country’s system as the transition from a totalitarian regime to a democratic form of government and the reform of the State’s political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation (see *Palevičiūtė and Dzidzevičienė v. Lithuania*, no. 32997/14, § 55 with further references, 9 January 2018).

56. The Court notes that easements which, like the one in the present case, result from the process of restitution of immovable property seized by the former communist regime were aimed at regulating relations between two groups of holders of property rights protected by Article 1 of Protocol No. 1: on the one hand, the original owners or their legal successors to whom the State returned immovable property in restitution, and, on the other hand, members of housing cooperatives to whom the former communist regime had given the opportunity to construct, at their own expense, flats on the premises of the restituted buildings. In those circumstances, the Court accepts that the easement over the flat in the applicant’s ownership, which was built by a construction cooperative, served and continues to serve not only the interests of the housing cooperative and its members but also the general interests of society as a whole. The Court, referring to the national courts’ assessment and conclusions, further notes that the legal relations created by the easement in the present case have remained unchanged over the years. Insofar as the applicant argues that the impugned measure has lost any legitimate purpose with the passage of time, the Court considers that this argument relates to the issue of proportionality, to be examined below.

(iii) Whether the interference was proportionate

57. Not only must an interference with the right of property pursue, on the facts as well as in principle, a “legitimate aim” in the “general interest”, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual’s property. That requirement is expressed by the notion of a “fair balance” that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The concern to achieve this balance is reflected in the

structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden. According to the Court's case-law, the character of the interference, the aim pursued, the nature of property rights interfered with, and the behaviour of the applicant and the interfering State authorities are among the principal factors material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants (see *Karahasanoğlu v. Turkey*, nos. 21392/08 and 2 others, § 149 with further references, 16 March 2021).

58. Turning to the specific circumstances of the present case, the Court finds it of relevance that the applicant was not the original owner of the tenement house from whom the building had been transferred to the State in 1961; nor was she the legal successor to whom the building had been returned in restitution in 1991, including the six flats built by a construction cooperative when the building had been owned by the State, in respect of which the easement in favour of the housing cooperative had been created *ex lege* one year later (see paragraphs 5 and 6 above). The applicant only acquired the building in 2003, as part of an inheritance (see paragraphs 5 and 52 above). At the time she acquired the building she must, therefore, have been aware of the existence of the easement over the cooperative flats and the legal regime in respect of it, as provided for in section 28d of Law no. 42/1992, and in particular of the fact that the easement was, in principle, not limited in time and that the improvement of the building via the construction of the flats by a construction cooperative was regarded as adequate compensation for the restriction on the ownership (see paragraphs 23-24 above). Nevertheless, she accepted the inheritance and thereby became the owner of the property (see *Petrová and Valo v. Slovakia* (dec.), no. 49103/09, § 48, 5 November 2013).

59. The Court also notes that, since the applicant's acquisition of the property, there had been no legislative, jurisprudential or other development leading to any change of her legal position, namely that of the owner of a property partly encumbered by an easement created *ex lege* by the relevant statutory measure. In that connection, the Court has found no elements supporting a conclusion that the applicant might at any stage have entertained a legitimate expectation in terms of the Convention case-law that the applicable rules regarding the easement would change so as to provide a basis to terminate or reduce it.

60. The Court observes that, in the applicant's submission, the main issue in the present case appears to be the lack of compensation in respect of the permanent restrictions on the enjoyment of her ownership right over the flat stemming from the contested easement, and in particular the fact that it was not possible for her to use it and rent it freely. Admittedly, where a measure

controlling the use of property is in issue, a lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved, but is not of itself sufficient to constitute a violation of Article 1 of Protocol No. 1 (see *Depalle v. France* [GC], no. 34044/02, § 91, ECHR 2010). The Court notes the specificity of easements created *ex lege* by statutory measure no. 297/1992 and the fact that that measure was upheld by the Constitutional Court, which excluded the impugned easements from the applicability of Article 11 § 4 of the Czech Charter of Fundamental Rights and Freedoms according to which any limitation upon property rights must be compensated (see paragraph 30 above). As the Court has already mentioned, this was the result of a difficult compromise adopted by the State in the complex situation of post-communist transition in the sphere of property rights. Contracting States enjoy a wide margin of appreciation in such specific contexts (see *Pincová and Pinc v. the Czech Republic*, no. 36548/97, §§ 47-48, 5 November 2002; *Mohylová v. the Czech Republic* (dec.), no. 75115/01, 6 September 2005; *Velikovi and Others v. Bulgaria*, nos. 43278/98 and 8 others, § 172, 15 March 2007).

61. While the complaint under examination only concerns the flat that the applicant still owns, in the above mentioned complex context and seeing that the applicant's partner from whom she inherited had obtained the building as a result of the operation of the laws on restitution of nationalised property (see paragraph 5 above), the Court considers that the proportionality of the interference at issue must be assessed by taking into account not only the situation regarding that remaining flat but also the fact that the applicant obtained a substantial financial benefit after selling most of the residential and non-residential units in the building (see paragraph 9 above).

62. The Court further observes that the applicant sought to terminate or, alternatively, to reduce the easement arguing a gross disbalance in the relationship between her as the owner and the housing cooperative as the beneficiary of the easement, mainly on the basis of the passage of time since the completion of the flats. The domestic courts dismissed the applicant's action considering that the passage of time alone was not capable of disrupting the balance between a lasting improvement of the property on the one hand and restrictions on the ownership of the property on the other hand. They explained that the legislature, by virtue of statutory measure no. 297/1992, had balanced the two absolute real and imprescriptible rights – the applicant's ownership of the flats and the housing cooperation's ownership of the created asset – by creating a particular type of easement. The mere passage of time could not, therefore, have constituted in those circumstances a change bringing about a gross disbalance between the encumbrance of the easement and the benefit for its holder, which could have been a reason for the cancellation or limitation of the easement (see paragraph 16 above).

63. Moreover, the termination of the easement in favour of the cooperative would have resulted in the extinguishment of a property right – tenancy of the cooperative flat – and the impairment of the tenant’s membership share. The same would also have been true of a reduction of the easement which would have meant that the housing cooperative would have to pay the applicant over and above the contributions set down in statute for the use of the units by its members (see paragraph 18 above).

64. The Court observes that the domestic courts seem to have taken into account all the available evidence and made conclusions on the matter in a way which was coherent from the perspective of the relevant national jurisprudential practice, including the case-law of the Constitutional Court. The Court finds particularly significant, for purposes of its proportionality analysis in the present case, the fact that the permanent existence of the easement was considered by the Constitutional Court as instrumental to preserving property rights acquired in exchange of pecuniary contributions by *bona fidae* by private individuals – the cooperative and its members.

65. Having regard to all the foregoing considerations, emphasising above all the wide margin of appreciation that the respondent State enjoys in regulating complex property issues in the transition from the communist regime to a democratic legal order protecting private property, the Court considers that the applicant did not bear an individual and excessive burden as a result of the flat remaining in her ownership being encumbered by the easement. Accordingly, in the specific circumstances of the present case the balance between the interests of the community and those of the applicant was not upset.

66. Consequently, there has not been a violation Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1.

Done in English, and notified in writing on 11 January 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller
Deputy Registrar

Georges Ravarani
President