



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

THIRD SECTION

CASE OF WITTEK v. GERMANY

(Application no. 37290/97)

JUDGMENT

STRASBOURG

12 December 2002

FINAL

09/07/2003

In the case of Wittek v. Germany,

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

Mr I. CABRAL BARRETO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr R. TÜRMEK,

Mr B. ZUPANČIČ,

Mr J. HEDIGAN,

Mrs H.S. GREVE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 14 March and 21 November 2002,

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

PROCEDURE

1. The case originated in an application (no. 37290/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ms Sabine Wittek and Mr Harro Wittek (“the applicants”) on 8 February 1997.

2. The applicants were represented before the Court by Mr S. von Raumer, a member of the Berlin Bar. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, of the Federal Ministry of Justice.

3. The applicants alleged in particular that the refusal of the German courts to order restitution of their land originally located on the territory of the German Democratic Republic had infringed their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

7. By a decision of 14 March 2002 the Court declared the application partly admissible.

8. The applicant and the Government each filed written observations on the merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant was born in 1958 and the second applicant in 1948; they both live in Bad Münde (Germany).

A. Background to the case

10. Under a purchase agreement dated 26 May 1986, the applicants purchased a dwelling house in Leipzig, on the territory of the German Democratic Republic (GDR) for 56,000 East German marks. The house was built on land belonging to the State (*volkseigenes Grundstück*) over which the applicants obtained a usufruct (*dingliches Nutzungsrecht*) under Articles 287 et seq. of the Civil Code (*Zivilgesetzbuch*) of the GDR.

11. On 26 October 1989 the applicants made an official request for permission to leave the GDR, as they believed that they had been discriminated against on political grounds in their work.

The applicants say that they were informed by the District Internal Affairs Department (*Abteilung innere Angelegenheiten des Stadtbezirks*) in Leipzig that to obtain permission to leave the GDR permanently they would have to transfer (*veräußern*) their property by sale or gift.

12. On 8 December 1989 the applicants purported to transfer the property to a couple, Mr and Mrs Böllmann, by a notarial deed of gift in which the dwelling house was stated to be worth 120,000 East German marks. In reality, Mr and Mrs Böllmann paid the applicants 55,000 German marks (DEM) into a Swiss bank account.

13. The applicants say that the true value of their house and land would today be approximately DEM 600,000.

14. That figure is disputed by the Government, who say that the applicants had possessed only a usufruct over the land.

15. Following German reunification, the applicants attempted to recover their house and their usufruct over the land, firstly from the purchasers and subsequently in proceedings in the civil and administrative courts of the Federal Republic of Germany (FRG).

B. Proceedings in the civil courts

16. On 21 March 1991 the applicants applied to the Leipzig Court of First Instance (*Kreisgericht*) for an order for restitution of their house and rectification of the entry in the land register (*Grundbuch*).

17. The Leipzig Court of First Instance rejected that application on 26 June 1991.

18. In a judgment of 5 March 1992, the Leipzig District Court (*Bezirksgericht*) dismissed an appeal by the applicants, holding that they had no right to restitution. It pointed out that no transfer of property had in fact taken place, as both the gift and the sale in the GDR were null and void. However, the applicants were not entitled to rely on that nullity, as they had opted for that form of contract in full knowledge of the facts and the purchasers had not taken advantage of any coercion (*Zwangslage*) to which the applicants may have been subject at the time. The application for restitution accordingly failed under the principle of good faith and fair dealing (*Treu und Glauben*).

19. In a judgment of 19 November 1993, the Federal Court of Justice (*Bundesgerichtshof*) dismissed a further appeal by the applicants. In common with the ordinary courts, it found that both the gift and the sale were null and void. However, it reiterated that in cases such as this, in which the applicants had made a sham gift in order to attenuate the effects of being forced to sell their property on leaving the GDR, the applicable legislation was the Resolution of Outstanding Property Issues Act – the Property Act – of 23 September 1990 (*Gesetz zur Regelung offener Vermögensfragen – Vermögensgesetz*; see “Relevant domestic law and practice” below), whose interpretation was a matter for the administrative, not the civil, courts.

C. Proceedings in the administrative courts

20. The applicants then lodged an administrative appeal with the Leipzig City Council requesting the restitution of their property. They relied on the Property Act.

21. In a decision of 2 June 1994, the Leipzig City Council turned down their request on the grounds that the conditions set out in section 1(3) of the Property Act (see “Relevant domestic law and practice” below) were not satisfied, as the applicants had not shown that they had acted under duress (*Nötigung*). Duress linked to a departure from the GDR could only have existed prior to the opening of the border on 9 November 1989. Thereafter, it was clear that all restrictions on leaving the GDR had been lifted.

22. The applicants appealed against that decision to the Regional Office for the Resolution of Outstanding Property Issues (*Landesamt zur Regelung offener Vermögensfragen*) of the *Land* of Saxony, which dismissed their

appeal, again on the grounds that the applicants had not acted under duress following the opening of the border on 9 November 1989, and in particular following the Resolution of Property Issues Order (*Anordnung zur Regelung von Vermögensfragen* – see “Relevant domestic law and practice” below) of 11 November 1989 and its publication on 23 November 1989.

23. In a judgment of 21 December 1995, the Leipzig Administrative Court (*Verwaltungsgericht*) found against the applicants following a hearing.

It found that they were not entitled to restitution (*Rückübertragungsanspruch*) in the absence of any unfair dealings (*unlautere Machenschaften*) within the meaning of section 1(3) of the Property Act. The border had been opened on 9 November 1989, with the result that all citizens of the GDR had been free to leave the country, while the Resolution of Property Issues Order of 11 November 1989 stipulated that they were no longer required to transfer their property prior to their departure. However, the deed of transfer was only executed on 8 December 1989. It added that there had not been any deception (*Täuschung*) within the meaning of section 1(3) of the Property Act.

The Administrative Court also found that even if the previous position had remained unchanged, the conditions set out in section 1(3) of Property Act would not in any event have been satisfied, as the applicants did not own the land but merely had a usufruct over it. Under GDR legislation – the State-Owned Land (Grants of Usufructs) Act of 14 December 1970 (*Gesetz über die Verleihung von Nutzungsrechten an einem volkseigenen Grundstück*) – persons entitled to a usufruct were required to use the land themselves. Even if the applicants had moved house within the GDR, the land would have reverted to the State and the applicants' only entitlement would have been to compensation. The applicants had been aware of that situation, which is why they had sought to transfer their property.

24. By two decisions of 2 September and 22 October 1996, the Federal Administrative Court (*Bundesverwaltungsgericht*) declined to examine an application for review by the applicants.

It referred to its leading judgment of 29 February 1996 in which it had stated that instances of unfair dealings between 23 November 1989 (the date of publication of the Resolution of Property Issues Order in the Official Gazette (*Gesetzblatt*) of the GDR) and 31 January 1990 (when the Travel Order (*Reiseverordnung*) of the GDR dated 30 November 1988 was revoked) would be rare. The Leipzig Administrative Court had conducted a thorough review of the facts of the case and concluded that there had been no duress or deception within the meaning of section 1(3) of the Property Act.

The Federal Administrative Court also referred to its leading judgment of 29 August 1996, in which it stated that there would not be unfair dealing within the meaning of section 1(3) of the Property Act in cases in which the

obligation to transfer property had arisen under the State-Owned Land (Grants of Usufructs) Act of 14 December 1970 of the GDR.

D. Proceedings in the Federal Constitutional Court

25. In two decisions of 22 January 1997, the Federal Constitutional Court (*Bundesverfassungsgericht*) declined to hear constitutional appeals by the applicants against either the civil courts' or the administrative courts' decisions.

It referred, *inter alia*, to its leading judgment of 8 October 1996 in which it had held that it was not unconstitutional for civil rights to be supplanted (*verdrängt*) by the provisions of the Property Act in cases involving the departure of GDR citizens for the FRG. Accordingly, the Federal Court of Justice's interpretation in the instant case was consistent with that authority.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Resolution of Property Issues Order (GDR)

26. Article 1 § 1 of the Resolution of Property Issues Order of 11 November 1989, which came into force on 14 November and was published on 23 November 1989, laid down that citizens of the GDR wishing to leave the GDR to settle permanently in another State or in West Berlin were required to “take necessary measures to ensure the conservation and proper administration of their property in the GDR” (“*haben die notwendigen Massnahmen für die ordnungsgemässe Sicherung und Verwaltung Ihres in der Deutschen Demokratischen Republik zurückgelassenen Vermögens zu treffen*”). Article 3 revoked with immediate effect GDR Orders nos. 1 and 2 of 1 December 1953 and 20 August 1958 on the Use of the Property of People who left the GDR after 10 June 1953, and the Works Directive (*Arbeitsanweisung*) of 5 December 1953 of the same name, which at the time required GDR citizens wishing to leave the GDR to transfer their property before their departure.

B. The Joint Statement of the FRG and the GDR on the Resolution of Outstanding Property Issues

27. During the reunification process in 1990, the two German governments began negotiations on the many property issues arising and subsequently issued the Joint Statement of the Federal Republic of Germany and the German Democratic Republic on the Resolution of Outstanding

Property Issues (*Gemeinsame Erklärung der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen*), which became an integral part of the German Unification Treaty (*Einigungsvertrag*) of 31 August 1990. The negotiations covered both the questions of restitution of property that had been expropriated in the GDR to its owners and the transfer of property by citizens of the GDR on leaving the country.

In the statement, the two governments said that in seeking solutions to the contentious property issues, they needed to find a socially acceptable balance (*sozial verträglicher Ausgleich*) between the competing interests, while taking into account the need for legal certainty and clarity and to protect the right of property.

C. The Resolution of Outstanding Property Issues Act (FRG)

28. The Resolution of Outstanding Property Issues Act of 23 September 1990, also known as the Property Act, entered into force on 29 September 1990 and was also a part of the German Unification Treaty. Under the terms of the Treaty, the Property Act was to continue to subsist in the reunified Germany after the reunification of the two German States on 3 October 1990. The aim of the Act was to resolve disputes over property in the territory of the GDR in a way that was socially acceptable, in order to achieve permanent legal order in Germany.

29. Section 1(3) of the Property Act provides:

“This Act shall also apply to rights in or over immovable property and usufructuary rights acquired by unfair dealings, such as abuse of power, corruption, duress or deception by the purchaser, the State authorities or third parties.”

30. The Property Act established the principle of a right to restitution for citizens of the GDR who had been forced to transfer their property in order to leave the country legally, save where restitution was precluded, as for instance if the purchasers had acted in good faith (*redlicher Erwerb*) (section 4(2) of the Act). In such cases, the former owners had a right to compensation under the Resolution of Outstanding Property Issues (Compensation) Act of 27 September 1994 (*Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen*).

31. However, the rule set out in section 4(2) of the Property Act does not apply in principle if the transfer was made after the transitional date of 18 October 1989 (when Mr Erich Honecker, President of the Council of State (*Staatsratsvorsitzender*) of the GDR, resigned) and without the parties' agreement (however, see below for the decisions of the Federal Court of Justice on this point).

32. The legislature deliberately chose to give the administrative courts jurisdiction for the interpretation of the Property Act in litigation concerning

the transfer of property by citizens wishing to leave the GDR, in order to avoid direct confrontation between former owners and new owners in the civil courts. To that end, it set up offices for the resolution of outstanding property issues which were responsible for deciding the disputes by carrying out investigations of their own motion (*Amtsermittlungsgrundsatz*), while also having regard to the general interest.

D. The case-law of the Federal Court of Justice

33. In a leading judgment of 3 April 1992 (Fifth Civil Division, no. 83/91), the Federal Court of Justice held that a sale agreement could not be challenged in the civil courts when the dispute concerned property which citizens of the GDR had been forced to transfer. For such cases, the Property Act had established an exclusive right to restitution under public law (*öffentlich- rechtlicher Rückübertragungsanspruch*).

34. In two other leading judgments of 16 April and 7 May 1993 (Fifth Civil Division, nos. 87/92 and 99/92), it extended that principle to cases in which, as here, the former owners had executed a sham deed of gift in order to attenuate the effect of being required to transfer their property before leaving the GDR.

35. In two further leading judgments of 14 January and 12 May 2000 (Fifth Civil Division, nos. 439/98 and 47/99), the Federal Court of Justice held that the Property Act could apply to legal transactions entered into after the transitional date of 18 October 1989 if the factors vitiating consent would have resulted in the transfer being null and void in the light of the new situation obtaining in the GDR, both on the facts and in law.

COMPLAINT

36. The applicants submitted that the German courts' refusal to order the restitution of their property situated on the territory of the GDR had infringed their right of property, as guaranteed by Article 1 of Protocol No. 1.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

37. The applicants submitted that the German courts' refusal to order the restitution of their property situated on the territory of the GDR had infringed their right of property, as guaranteed by Article 1 of Protocol No. 1, which provides:

“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. The parties' submissions

1. The Government

38. The Government said that even if there had been an interference in the present case, it had been provided for by the Property Act, was in the public interest and struck a fair balance between the competing interests. They stressed the special nature of German reunification and the fact that the Property Act sought to ensure legal order by protecting purchasers' rights too, provided they had acted in good faith. The legislature had chosen to give jurisdiction to hear disputes over the restitution of property which people had been forced to transfer on leaving the GDR to the administrative courts and it was they who were competent to decide questions of construction of the Property Act. Their interpretation in the instant case had not been arbitrary. Moreover, under the case-law of the Federal Court of Justice, the Property Act could also apply to legal transactions entered into after the transitional date of 18 October 1989. Lastly, the applicants had received fair compensation, as they had been paid a consideration of 55,000 German marks (DEM) for the property.

2. *The applicants*

39. The applicants submitted that the transfer made under pressure from the GDR authorities was null and void and that they had only lost their title to the house with the Federal Court of Justice's decision of 19 November 1993, that being the true act of expropriation for practical purposes. Above all, they contested the interpretation of the Property Act by the Federal Court of Justice, the Federal Administrative Court and the Federal Constitutional Court, whose decisions were, in their submission, inconsistent. Initially, the Federal Court of Justice had found that the transfer agreement was null and void, but held that their civil rights had been supplanted by the provisions of the Property Act, which were applicable in their case. Subsequently, the Federal Administrative Court had ruled that the conditions under which the Property Act would be applicable were not satisfied. Lastly, neither court had taken into account the fact that the transfer agreement had been entered into after the transitional date of 18 October 1989. The Property Act ceased to be applicable after that date and the need to protect bona fide purchasers had to yield to the right of former owners to restitution.

B. The Court's assessment

40. The Court notes at the outset that it has jurisdiction in the present case, since, even though the Property Act of 23 September 1990 was passed in the GDR on 29 September 1990, it continued to be applicable in the reunified Germany after 3 October 1990.

41. The Court reiterates that Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37). The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see, among other authorities, *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II).

1. Whether there was interference

42. Under the Court's case-law, the notion “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”, for the purposes of this provision (see, among other authorities, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, p. 46, § 53, and *Iatridis*, cited above, § 54).

43. The Court notes that in the present case the applicants had a right of property in their dwelling house, coupled with a usufruct over the land belonging to the State on which it stood in accordance with the relevant GDR legislation, the State-Owned Land (Grants of Usufructs) Act of 14 December 1970.

44. Accordingly, it considers that the present dispute should be examined under the first sentence of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Českomoravská myslivecká jednota v. the Czech Republic* (dec.), no. 33091/96, 23 March 1999, and *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001).

45. In the present case, the Federal Court of Justice found that the transfer of the land by the applicants during the subsistence of the GDR was null and void. However, the applicants were subsequently unable to establish a right to restitution in either the civil or the administrative courts.

46. Consequently, there has been an interference with the applicants' right to the peaceful enjoyment of their possessions.

2. Whether the interference was justified

47. As to whether the interference was prescribed by law, the Court notes that it was based on the provisions of the Property Act, which are precise and accessible to all. In addition, the Federal Court of Justice, the Federal Administrative Court and the Federal Constitutional Court have established rules governing the application of that Act to disputes over the deprivation of property in the GDR.

48. In the instant case, in a judgment of 19 November 1993, the Federal Court of Justice dismissed the applicants' claim for restitution by applying a rule that was well-established in both its own and the Federal Constitutional Court's case-law that an agreement for sale could not be challenged in the civil courts if the dispute was over the restitution of property which citizens of the GDR had been forced to transfer before leaving the country. In such cases, the applicable legislation was the Property Act and its interpretation was a matter for the administrative, not the civil, courts. Subsequently, when the administrative courts applied the Act to the facts of the present

case, they held that the conditions set out in section 1(3) of the Property Act (see “Relevant domestic law and practice” above) were not satisfied.

49. The Court considers that that was not an arbitrary interpretation and reiterates in that connection that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2955, § 31, and *Glässner v. Germany* (dec.), no. 46362/99, ECHR 2001-VII).

50. As regards the purpose of the interference, the Court finds that the Property Act, which was intended to resolve property disputes following German reunification by seeking to establish a socially acceptable balance between the competing interests, indisputably pursued an aim that was in the public interest (see *Teuschler*, decision cited above).

51. It also considers that it was legitimate for the legislature to treat all disputes over the restitution of property which citizens of the GDR were forced to transfer before their departure in a uniform manner under the Property Act and to leave the interpretation of that Act to the administrative courts.

52. Lastly, the Court has to consider whether the interference was proportionate.

53. Under the Court's case-law, an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 as a whole. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38, and *Yagtzilar and Others v. Greece*, no. 41727/98, § 40, ECHR 2001-XII).

54. The Court must examine in particular whether the contested measure strikes the requisite fair balance and whether it imposes a disproportionate burden on the applicants.

55. In the present case, the Court notes that, in its judgment of 21 December 1995, the Leipzig Administrative Court conducted a thorough review of the facts of the case and the applicants' arguments before finding that, in the absence of duress or deception, there had been no unfair dealing within the meaning of section 1(3) of the Property Act.

56. The applicants executed the deed transferring their property on 8 December 1989, almost a month after the border opened on 9 November 1989 – by which time citizens of the GDR were free to leave the country – and after the publication of the Resolution of Property Issues Order on

23 November 1989, which released citizens of the GDR from the obligation to transfer their property before leaving.

57. In the Court's view, that analysis was sound, even though the period between the opening of the border between the two German States on 9 November 1989 and formal German reunification on 3 October 1990 was a time of considerable uncertainty, particularly from a legal standpoint.

58. Independently of that aspect, the applicants' only interest in the land under GDR law was a usufruct under the State-Owned Land (Grants of Usufructs) Act, so they would have been unable to retain the property even if they had moved house within the GDR.

59. There is a further factor which the Court finds decisive: the applicants purchased the house on 26 May 1986 for 56,000 East German marks. When they made the sham gift of the property on 8 December 1989, they were paid DEM 55,000 by the purchasers, which, at the exchange rate of 1 to 4 applicable at the time to transactions between private individuals, was equivalent to 220,000 East German marks.

60. Accordingly, even allowing for subsequent increases in value of the property, the applicants cannot be regarded as having borne “a disproportionate burden”.

61. Having regard to all of the above considerations and in particular to the exceptional circumstances of German reunification, the Court considers that the respondent State has not overstepped its margin of appreciation and, in view of the legitimate aim pursued, has succeeded in achieving a “fair balance” between the applicants' interests and the general interest of German society.

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Article 1 of Protocol No. 1.

Done in French, and notified in writing on 12 December 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President