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

THIRD SECTION

CASE OF PĂDURARU v. ROMANIA

(Application no. 63252/00)

JUDGMENT

STRASBOURG

1 December 2005

FINAL

01/03/2006

In the case of Păduraru v. Romania,

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

Mr B. ZUPANČIČ, *President*,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mrs R. JAEGER,
Mrs I. ZIEMELE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 10 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 63252/00) against Romania lodged with the European Court of Human Rights under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Anatol Păduraru ("the applicant"), on 10 July 2000.

2. The Romanian Government ("the Government") were represented by their Agent, Mrs R. Rizoiu, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the sale of his flats to third parties, which had been upheld by a judgment of the Bucharest Court of Appeal on 30 May 2000 and for which he had received no compensation, had been in beach of Article 1 of Protocol No. 1, and submitted that he had been deprived of his possessions.

4. On 9 June 2004 the Court (Second Section) decided to communicate the application to the Government. In accordance with Article 29 § 3 of the Convention, it decided that the admissibility and the merits of the case would be examined at the same time.

5. The applicant and the Government each filed observations on the merits of the case (Rule 59 § 1 of the Rules of Court). The parties replied in writing to each other's observations.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1922 and lives in Bucharest.

8. On 20 August 1940 the applicant's father purchased a building located at 7 Intrarea Domneşti Street, Bucharest, which was made up of two blocks, A and B, containing three and two flats respectively.

9. In 1950 the State nationalised the building under Decree no. 92/1950.

1. The action brought against the State for recovery of possession

10. On 7 February 1996 the applicant applied to the board established by the Bucharest City Council to deal with applications lodged under Law no. 112/1995 ("the Board") seeking the return of the whole building under Law no. 112/1995 on the legal status of nationalised residential property ("Law no. 112/1995").

11. On 23 October 1996 the Board decided that buildings nationalised prior to 1989 in respect of which former owners had lodged a claim for restitution under Law no. 112/1995 or had brought an action for recovery of possession before the courts were not to be sold to tenants until their legal status had been clarified.

12. On 23 February and 17 March 1997 the city council sold to the tenants the two flats in block B and the adjoining land, under Law no. 112/1995.

13. On 20 March 1997 the applicant brought an action against the city council before the Bucharest Court of First Instance for recovery of possession of the entire building.

14. In a judgment of 10 April 1997 the court granted the action for recovery of possession and recognised the applicant as the building's owner. It held that the applicant's father had not been among those individuals to whom Decree no. 92/1950 had applied, since he was specifically excluded by its Article II. It ordered the city council to return the building to the applicant. The judgment became final and, in the absence of an appeal, became legally binding.

15. On 16 April 1997, under Law no. 112/1995, the city council sold to the former tenants flat no. 2 – one of the three flats in block A of the building in question – and the adjoining land.

16. By a decision of 22 July 1997, issued in compliance with the judgment of 10 April 1997, the city council ordered that the whole building be returned to the applicant.

17. On 17 September 1997 the applicant and the representatives of the city council signed a memorandum assigning possession of the part of the building which had not been affected by the above-mentioned contracts of

sale (see paragraphs 12 and 15 above). They noted that, in order for the rest of the building to be returned to the applicant, the contracts concluded with the tenants would first have to be set aside.

18. On 28 April 1998 the Board informed the applicant that he could no longer benefit from the reparation measures provided for in Law no. 112/1995, a piece of extraordinary legislation, since the building's return had been ordered in the judgment of 10 April 1997.

In 1999 the city council advised the applicant that, under Law no. 112/1995, he was entitled only to damages, and not to the return of the property.

2. Action to set aside the contracts of sale

19. On 6 November 1997 the city council brought an action in the Bucharest Court of First Instance, seeking to have set aside the contracts of sale concluded with the tenants (see paragraphs 12 and 15 above). On 27 February 1998 the applicant asked to be allowed to take part in these proceedings; he too requested that the contracts be set aside.

20. In a judgment of 9 March 1999 the court dismissed the main claim lodged by the city council and allowed in part the applicant's interlocutory request.

At the same time, the court held that the agreements concerning the sale of the flats were valid, on the ground that the applicant had not proved that the parties thereto had been acting in bad faith. In those circumstances, it considered that it was open to the applicant to bring an action for recovery of possession in order to have his title to the property compared with those of the purchasers of the flats in question.

21. The applicant appealed against that judgment.

In a judgment of 11 February 2000 the Bucharest County Court dismissed the applicant's appeal. It noted that he had not submitted evidence that would rebut the presumption of the purchasers' good faith and held that, when the contracts were concluded, the tenants could reasonably have assumed that the State was the rightful owner of the flats.

In assessing the parties' good faith, the court took into account that the applicant had not expressly notified the city council of his intention to seek the building's return. It dismissed the idea that communication of the introductory claim for recovery of possession amounted to notification, on the ground that the judgment of 10 April 1997 did not refer to the exact date on which the claim had been lodged.

The court also held that the purchasers would have been unable, by taking reasonable steps, to find out about the existence of the action for recovery of possession brought by the applicant against the city council.

22. The applicant lodged a further appeal.

In a judgment of 30 May 2000, the Bucharest Court of Appeal gave judgment against him, considering that he had not proved that the

purchasers were acting in bad faith when the contracts were concluded. It observed that possible bad faith on the part of the city council did not implicitly entail that of the purchasers.

The Court of Appeal also held that at the time of the sale the purchasers did not know, and could not have found out by taking reasonable steps, that the State was not the rightful owner of the building. In addition, it considered that the application for restitution lodged by the applicant with the city council in 1996 (see paragraph 10 above) did not affect the purchasers' good faith, given that in 1999 the local authorities had informed the applicant that, under Law no. 112/1995, he was entitled only to damages and not to the return of the property.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Development of the concept of State "title"

1. The concept of "title" to property and nationalisation Decree no. 92/1950

23. In Romanian law, the concept of "title" refers to the legal act by which the right of ownership is acquired, namely, for example, through sale, gift or succession, or through the nationalisation law and its practical implementation in the actions of the legally empowered administrative authorities.

Decree no. 92/1950 was one of the nationalisation decrees that was widely applied with regard to immovable property; under it, numerous buildings, listed in the schedules annexed to the decree and which belonged to former industrialists, owners of large estates, bankers and owners of large trading enterprises, were nationalised. Article II of the decree expressly excluded from its scope immovable property belonging to workers, civil servants, small artisans, persons working in intellectual professions and retired persons.

2. Definition of State "title" in the case-law until 2 February 1995

24. In the absence of special legislation governing the legal status of nationalised immovable property, the courts initially considered that they had jurisdiction to deal with cases concerning such property, particularly where it had been nationalised in application of Decree no. 92/1950. In those disputes, the national courts held that they had jurisdiction to rule on whether the provisions of the various nationalisation decrees met the substantive and procedural requirements laid down in the Constitutions in force when they were adopted.

During this initial phase, the loss of ownership as a result of nationalisation was considered to have involved a transfer of "title" if, at the time of expropriation, there had been compliance with the relevant decrees, the Constitution and the international treaties to which Romania was a party.

3. Departure from precedent: the impossibility for the courts to determine the existence of State title

25. In a second period, subsequent to the Supreme Court of Justice's departure from precedent on 2 February 1995, the national courts no longer considered that they had jurisdiction to analyse the application of the nationalisation decrees and to order the return of immovable property nationalised in application of Decree no. 92/1950. They considered that legislation alone could bring the nationalisations carried out under Decree no. 92/1950 into accord with the provisions of the Constitution concerning the right of property (see also *Brumărescu v. Romania* [GC], no. 28342/95, § 37, ECHR 1999-VII).

4. Definition of State "title" by government decision no. 20/1996 implementing Law no. 112/1995 ("decision no. 20/1996")

26. In a third period the State enacted Law no. 112/1995, which allowed for the sale to tenants of nationalised buildings which had passed lawfully into the ownership of the State. The return of nationalised buildings to the former owners or their heirs was possible only if they lived in those buildings as tenants or if the property was unoccupied and had not been rented out. In respect of property which did not fulfil those conditions, it was open to the former owners to request compensation.

In decision no. 20/1996, which was binding on the authorities responsible for implementing the Law, the government defined nationalised buildings legally vested in the State as those which had passed into the ownership of the State under a legislative provision. Under the same decision, Law no. 112/1995 was not applicable to immovable property held *de facto* by the State, that is, where ownership was not based on any legislative provision, given that the State had no title to such property.

27. Legal opinion, followed in practice by the national courts, found that State "title" as governed by decision no. 20/1996 implied the existence of a legislative provision authorising nationalisation. It was sufficient for the State merely to refer to legislation that was in force at the time of the nationalisation of a property for its expropriation to be considered as having taken place lawfully (F. Baias, B. Dumitrache and M. Nicolae, *Regimul juridic al imobilelor preluate abuziv. Legea nr. 10/2001 comentată şi adnotată* ("The legal status of wrongfully seized property. An annotated commentary on Law 10/2001"), Editura Rosetti, Bucharest, 2002, vol. I,

p. 73; similarly, I. Adam, *Legea nr. 10/2001. Regimul juridic aplicabil imobilelor preluate abuziv* ("Law no. 10/2001. The legal regime applicable to wrongfully seized property"), Editura All Beck, Bucharest, 2003, p. 10; I. Adam, *Drept civil. Drepturile reale* ("Civil Law. Rights *in rem*"), Editura All Beck, Bucharest, 2002, pp. 319-23; and judgment no. 70/1998 of the Ploieşti Court of Appeal). It was thus sufficient that immovable property nationalised under Decree no. 92/1950 had been included in the schedules annexed to the decree for it to be considered as having been nationalised "by transfer of title", irrespective of whether or not the substantive and procedural requirements imposed by the decree had been met at the time of nationalisation.

5. Definition of State "title" by government decision no. 11/1997 amending decision no. 20/1996 ("decision no. 11/1997")

28. Having sold off, under decision no. 20/1996, part of the immovable property considered to have been nationalised "by transfer of title", in a fourth period, marked by the adoption and entry into force of government decision no. 11/1997 on 4 February 1997, the executive amended and added to the definition of the immovable property which had been nationalised "by transfer of title". It introduced an additional condition: under Article 1 § 2 of the latter decision, property acquired by the State through transfer of title was that which had been acquired in accordance with the requirements of the decrees in force at the material time. The decision also provided:

"...

4. Residential property which passed into State ownership in violation of the legislative provision in force at the material time, or where State ownership was not based on any legislative provision, shall be considered as having passed into State ownership without title, and is excluded from the scope of Law no. 112/1995.

5. A claim for restitution or compensation may be made under ordinary law in respect of immovable property which does not come within the scope of Law no. 112/1995 and for which the State has no valid title. ..."

29. According to precedent, as confirmed by the practice of the domestic courts, decision no. 11/1997 is considered to apply not only to property expropriated in fact, but also to that acquired in violation of the legal requirements imposed by the nationalisation decree, both of which were held to have been nationalised "without title" (F. Baias, B. Dumitrache and M. Nicolae, op. cit, p. 74; similarly, I. Adam, *Legea nr. 10/2001*, cited above, p. 11, and *Drept civil*, cited above, p. 319; and judgment no. 510/2003 of the Supreme Court of Justice).

30. Property acquired by the State under Decree no. 92/1950 was considered to have been nationalised by transfer of title if the legal requirements set out in Articles I §§ 1-5 and II of the decree were met on the

date of the nationalisation and if, on that date, the person listed as owner on the annexed schedules was the real lawful owner.

6. The new definition of State "title" introduced by Law no. 213/1998 on public property and the rules governing it ("Law no. 213/1998")

31. Section 6(1) of this Law provides:

> "Property acquired by the State between 6 March 1945 and 22 December 1989, provided that it passed into State ownership by virtue of a valid title, that is to say in a manner not contrary to the Constitution, to international treaties to which Romania was a party or to any legislation in force at the time of its transfer to the State, shall likewise form part of the public or private property of the State or other public authorities."

32. After the State had sold off, under decision no. 11/1997, some of the property nationalised "by transfer of title", Law no. 213/1998 introduced a new "validity" condition for State title; the validity of the State's right of ownership became subject to the compliance of the nationalisation decree and its administrative implementing acts with the Constitution, the international treaties to which Romania was a party and the laws in force at the date on which the property in question passed into State ownership. *A contrario*, in the absence of such compliance, the State did not have valid title and had thus not acquired ownership rights to the immovable property. The former owner could consequently claim it by applying to the competent courts for examination of the "validity" of State title (F. Baias, B. Dumitrache and M. Nicolae, op. cit., p. 75; similarly, I. Adam, *Legea nr. 10/2001*, cited above, p. 16, and *Drept civil*, cited above, pp. 324-30).

7. The courts' contradictory position after the entry into force of Law no. 213/1998 with regard to State title

33. The courts granted actions for recovery of possession brought against the State where they considered that the relevant nationalisation decree had been applied in breach of the conditions set out in it (see, for example, judgment no. 860/1999 of the Cluj Court of Appeal; and judgments nos. 1184/2000 and 1787/2000 of the Supreme Court of Justice – application of nationalisation Decree no. 92/1950 to a person who was exempt from its application; judgments nos. 1239/1999 and 1293/1999 of the Constanţa Court of Appeal – failure to comply with the administrative formalities set out in nationalisation Decree no. 223/1974).

34. In certain cases the Supreme Court of Justice decided, in application of the new condition introduced by Law no. 213/1998, that certain nationalisation decrees had been contrary to the Constitutions in force at the time of their adoption and to the international treaties to which Romania had been a party.

Thus, in judgment no. 46/2003, it held that Decree no. 92/1950 failed to comply with the 1948 Constitution; in judgment no. 2078/2000, it held that

Decree no. 223/1974 was contrary to the 1965 Constitution on account of its discriminatory nature; in judgment no. 2434/2000, it stated that Decrees nos. 218/1960 and 712/1966 did not comply with the provisions of the 1952 and 1965 Constitutions respectively. This case-law was followed by some of the lower courts (for example, judgments nos. 1246R/2000 and 1140R/1999 of the Braşov Court of Appeal – published in M. Voicu and M. Popoacă, *Dreptul de proprietate şi alte drepturi reale. Tratat de jurisprudenţă 1991-2002* ("The right of ownership and other real-property rights. Treatise on the case-law 1991-2002"), Editura Lumina Lex, Bucharest, 2002, p. 342 – which noted the failure of Decree no. 223/1974 to comply with the 1965 Constitution; judgment no. 1680/1998 of the Bacău Court of Appeal, published in M. Voicu and M. Popoacă, op. cit., p. 333).

35. In other cases, the Supreme Court of Justice, followed by another group of courts, held that Decree no. 223/1974 conferred "valid State title" (judgments nos. 440/2003 and 709/2003, Supreme Court of Justice; no. 1R/2001, Târgu-Mureş Court of Appeal; nos. 761R/2001 and 1495R/2001, Braşov Court of Appeal; nos. 2062/1997 and 715/1999, Ploieşti Court of Appeal, published in M. Voicu and M. Popoacă, op. cit., p. 355).

36. In addition, although the Supreme Court of Justice considered in judgments nos. 3696/2003 and 4009/2003 that Decree no. 223/1974 was contrary to the 1965 Constitution and the 1948 Universal Declaration of Human Rights, it nonetheless held in judgment no. 2814/2004 that that decree conferred valid State title.

37. As to Decree no. 92/1950, the Supreme Court of Justice ruled in judgments nos. 1424/2001, 1945/2001 and 46/2003 that it contravened the 1948 Constitution, although it held in judgments nos. 1005/2003 and 634/2004 that it conferred "valid State title".

B. The sale of another's property and actions for recovery of possession brought by the righful owners prior to the entry into force of Law no. 10/2001

38. Where the seller is not the owner of the possession to be sold, Romanian legislation does not explicitly penalise the sale of someone else's property, which is not regulated by statute. Legal opinion and precedent have consistently noted that this does not deprive the rightful owner of his or her title (see, for example, judgment no. 2467/1992 of the Supreme Court of Justice, published in the journal *Law*, no. 10-11/1993, p. 113; judgment no. 132/1994 of the Supreme Court of Justice, published in the journal *Law*, no. 5/1995, p. 77; judgment no. 197/1996 of the Bacău Court of Appeal, published in *The Case-Law of the Bacău Court of Appeal in 1996*, p. 18; judgment no. 486/1999 of the Bacău Court of Appeal). In practice, the contract of sale concluded between a seller who is not the owner and the

purchaser is binding on them alone (*res inter alios acta*) and not in respect of the rightful owner; the property does not cease to belong to the rightful owner, who continues to be free to dispose of it (see, for example, judgment no. 132/1994 of the Supreme Court of Justice, Case-Law Reports, 1994, p. 39).

The fate of the contract depends on the good or bad faith of the parties to it. If the parties acted in bad faith in concluding the contract, in that they were aware that the seller was not the owner of the property, legal opinion and the case-law generally consider that the sale was a speculative operation, was unlawful in purpose and, accordingly, that it is null and void (*fraus omnia corrumpit*) (see, for example, judgment no. 419R/1994 of the Galaţi Court of Appeal, published in *Summary of the Judicial Practice of the Galaţi Court of Appeal*, 1 July 1993-31 December 1994, p. 84).

If the parties to the contract, or at least the purchaser, concluded the sale in good faith and if the purchaser was persuaded that the seller fulfilled all the legal requirements to be entitled to transfer title (Article 1899 § 1 of the Civil Code), the contract is tainted only by relative nullity (see, for example, judgment no. 2467/1992 of the Supreme Court of Justice, published in the journal *Law*, no. 10-11/1993, p. 113; judgment 190/1979 of the Olt County Court, published in the *Romanian Law Journal*, no. 6/1980). The lawful owner cannot apply to have such a sale set aside, because he or she is not a party to the contract, but he or she does have the option of defending his or her title by means of an action for recovery of possession if the property is in the purchaser's possession (see, for example, judgment no. 279/1976 of the Supreme Court, Case-Law Reports, 1976, p. 81; judgment no. 2467/1992 of the Supreme Court of Justice, published in the journal *Law*, no. 10-11/1993, p. 113; judgment 2207/1967 of the Supreme Court, delivered on 1 January 1967 and published in the *Romanian Law Journal*, no. 5/1968, p. 161; judgment no. 132/1994 of the Supreme Court of Justice, published in the journal *Law*, no. 5/1995, p. 77; judgment no. 197/1996 of the Bacău Court of Appeal, published in *The Case-Law of the Bacău Court of Appeal in 1996*, p. 18).

39. Legal opinion and the case-law define an action for recovery of possession, which is not regulated by statute, as an action by which the owner of a specific individual property who has lost possession of it to a third party seeks to have his or her title to the property re-established and to obtain possession of it from the third party, who is not the owner. The claim, as an indefeasible action to establish title which is not subject to limitation of time, is intended to establish directly the existence of the claimant's title; obtaining possession is merely an incidental effect.

The Romanian courts have considered that it is sufficient during recovery proceedings to examine the two titles, namely those of the claimant and the respondent, in order that the court examining the action may declare that one of them had priority (*este mai caracterizat*) over the other on account,

for example, of its chronological priority or the fact that it had previously been included in a land register (see, for example, judgment no. 2543/1996 of the Ploieşti Court of Appeal, published in M. Voicu and M. Popoacă, op. cit., p. 358, and judgment no. 1554/2000 of the Cluj Court of Appeal).

C. Law no. 10/2001 of 8 February 2001 on the rules governing immovable property wrongfully acquired by the State between 6 March 1945 and 22 December 1989 ("Law no. 10/2001") and the development of the case-law under its influence

1. The Law's provisions

40. The new Law establishes the principle of the return of unlawfully nationalised property, subject to certain exceptions, including one concerning buildings sold to tenants under Law no. 112/1995, introduced by section 18(d) of Law no. 10/2001. Where return of property is not possible, the former owners are entitled to compensation. The relevant sections of Law no. 10/2001 provide:

Section 2

"...

(2) Persons who were owners of immovable property seized by the State without valid title shall conserve their title ..."

Section 18

"The compensation awarded to former owners shall be exclusively in the form of damages:

...

(d) the building was sold to the former tenant in compliance with the provisions of Law no. 112/1995 ..."

Section 46

"...

(2) The sale or donation of immovable property unlawfully seized by the State shall be declared null and void, save where these transactions were concluded in good faith. ..."

2. Position of the executive with regard to Law no. 10/2001

41. On 18 April 2003 the government adopted decision no. 498/2003 on the uniform application of Law no. 10/2001, which enshrines the principle of the stability of property relations by upholding the rights of persons who acquired nationalised immovable property in good faith (in judgment no. 2822/2003, the Supreme Court of Justice held that, if the immovable property had been sold to the tenants and the former owner had not obtained rescission of the contract of sale, the immovable property could not be returned to him or her under Law no. 10/2001).

42. The aim of decision no. 498/2003 was to preserve the legal status of property which had already been sold under Law no. 112/1995. In respect of section 46(2) of Law no. 10/2001, it stated:

> "Sales concluded prior to Law no. 213/1998, under Law no. 112/1995 and in compliance with the latter's conditions, enjoy the full protection afforded by Law no. 10/2001 in that their effects are recognised and maintained. With regard to sales concluded after the enactment of Law no. 213/1998, the maintenance or, as appropriate, rescission of the conveyancing act is subject to evidence of the purchaser's good faith when the sale was concluded."

3. Position of the courts and legal opinion on the application and effects of Law no. 10/2001

43. Romanian legal opinion and the domestic courts have given at least five different interpretations, some of them conflicting, of sections 18(d) and 46(2) of Law no. 10/2001 and their effects (see, for example, F. Baias, B. Dumitrache and M. Nicolae, op. cit., p. 294; *"Discuţii cu privire la admisibilitatea acţiunii în revendicare a adevăratului proprietar împotriva subdobânditorului de bună credinţă al unui imobil"* ("Examination of the admissibility of an action for recovery of possession by the lawful owner against the purchaser in good faith of a property 'P' ") – or R. Popescu, E. Dincă, first part, and P. Perju, second part, *Law*, no. 6/2001, pp. 5 and 18; I. Adam, *Legea nr. 10/2001*, cited above, p. 9; D. Chirica, *"Regimul juridic al revendicării imobilelor preluate de stat fără titlu valabil de la subdobânditorii care se prevalează de buna lor credinţă la data cumpărării"* ("The rules governing actions for the recovery of possession of immovable property appropriated by the State without valid title, brought against purchasers who rely on their good faith at the time of the sale"), *Law*, no. 8/2002, p. 59).

44. In a consistent series of rulings, the Supreme Court of Justice has dismissed as inadmissible actions for the recovery of possession of nationalised buildings brought by the former owner against the State or the purchasers following the entry into force of Law no. 10/2001 (see, for example, judgments nos. 1856/2003; 2601/2003; 2810/2003; 3164/2004; 4705/2004; 4109/2003; 3702/2003; 1400/2004; 1426/2004; 3652/2004).

45. In a series of more recent judgments, the Supreme Court of Justice has dismissed actions for recovery of possession brought by former owners against purchasers following the entry into force of Law no. 10/2001 while indicating that, where the courts had upheld the sale of someone else's property, this consolidated, *ipso jure*, the transfer of title to the purchasers, as such an effect was inherent in the contract of sale and could not be overturned through a comparison of the competing titles to the same property (judgments nos. 3962/2003, 4229/2003, 5555/2003 or 5395/2004 of the Supreme Court of Justice).

46. In other judgments, the Supreme Court of Justice has dismissed actions brought against purchasers for recovery of possession by applying the theory of appearances (see, for example, judgments nos. 4268/2002, 2685/2003 and 634/2004), without however explaining the nature of the joint and unavoidable error or the difference between that and mere good faith on the part of the purchaser (in judgment no. 709/2003, the Supreme Court of Justice noted the purchasers' "public" error at the time of the sale, because they had considered, when concluding the sale, that the State was the rightful owner of the immovable property; it also noted that the purchasers had been acting in good faith because they had believed that the State was the true owner. In contrast, in judgment no. 132/2004 it refused to apply the same theory on the ground that the purchaser had not proved the existence of a joint and unavoidable error).

47. On several occasions, the Supreme Court of Justice took the view that section 46(2) of Law no. 10/2001 was applicable in proceedings introduced before that provision was enacted and dismissed actions for recovery of possession brought by the former owner against the purchaser on the basis that the assumption of the purchaser's good faith was to take priority (see, for example, judgments nos. 1/2003, 4894/2003 and 3835/2003). It also considered that the absolute nullity of the sale was an essential premise for the admission of an action against the purchaser for recovery of possession (judgment no. 439/2003).

48. In other judgments the Supreme Court of Justice and the other domestic courts have dismissed actions for recovery of possession on account of the purchaser's good faith without reference to Law no. 10/2001 (see, for example, judgments no. 759R/2001, Braşov Court of Appeal; no. 470/A/2000, Bucharest Court of Appeal, upheld by judgment no. 2702/2002 of the Supreme Court of Justice; and nos. 3787/2003, 3737/2003 and 555/2004 of the Supreme Court of Justice).

D. Good faith: definition and burden of proof

49. In accordance with the definition given by Article 1898 § 1 of the Civil Code, good faith is "a conviction on the part of the occupier that the seller met all the legal requirements to be able to transfer title". Thus, in

judgment no. 4894/2003, the Supreme Court of Justice considered that good faith consisted in the purchasers' conviction that they had concluded a contract with the rightful owner and in compliance with the legal provisions in force at the time the contract was concluded, and that those two conditions had been met in the case in question.

50. Bad faith has been defined by Romanian legal opinion as the attitude of a person who carries out an action or an act in breach of the law while being fully aware of the unlawful nature of his or her conduct (see S. Ghimpu, G. Brehoi, G. Mocanu, A. Popescu and I. Urs, *Dicţionar juridic*, Editura Albatros, Bucharest, 1985).

51. Certain domestic courts have ruled that the purchaser must be asked to provide evidence that he or she took reasonable steps to establish the legal status of the property. Other courts have taken the view that the purchaser's good faith should be presumed and that it was for the other party to prove bad faith. Thus, there is no consistent case-law indicating either which party bears the burden of proving good faith or the facts which the party wishing to contest that good faith is required to prove.

52. In judgment no. 510/2003, the Supreme Court of Justice upheld an action for recovery of possession brought by the former owner of a nationalised building, holding that the purchaser's bad faith "did not seem open to question, given that ... he knew or might have known that the building was likely to be claimed by the former owners, that he could and indeed ought to have apprised himself of the steps taken by the former owner to recover possession, and that his passivity was to be taken into account". It also ruled – in judgment no. 4218/2002 – that it was inconceivable that, when purchasing such a significant item of property as a building, the tenant would have failed to take reasonable steps to establish that property's legal status.

In addition, it stated – in judgment no. 4623/2002 – that, as a minimum and prior to conclusion of the sale agreement, the purchaser ought to have checked whether an application for restitution had been submitted in respect of the building under Law no. 112/1995 or whether an action for recovery of possession was pending, failing which his good faith could be questioned. In judgment no. 4561/2003, the Supreme Court of Justice considered that the purchaser's lack of information or ignorance with regard to the legal status of the property acquired was not such as to excuse his or her mistake.

53. In judgment no. 3962/2003, however, the Supreme Court of Justice indicated that the failure by a tenant to take steps to establish the legal status of the building which he was in the process of acquiring had no legal consequences.

In other judgments, the Supreme Court of Justice applied the principle set out in Article 1899 § 2 of the Civil Code, by which good faith is presumed and bad faith must be demonstrated by the party relying on it, but without however examining the steps that the purchaser had or had not

taken prior to purchasing a nationalised property (see, for example, judgments nos. 781/2003; 5359/2003; 1476/2004; 2559/2004; 3855/2004; and 4229/2003).

THE LAW

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

54. The applicant alleged that, in the absence of any compensation, the sale of his flats to third persons, upheld by the Bucharest Court of Appeal's judgment of 30 May 2000, had violated 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."

...

B. The merits

...

2. The Court's assessment

63. The Court considers in this case that it is appropriate to make a distinction between the position with regard to flat no. 2 in block A, sold on 16 April 1997, in other words after the applicant's action against the State for recovery of possession had been granted, and the position with regard to the two other flats in block B, which were sold on 23 February and 17 March 1997 respectively, in other words before that action had been brought.

(a) Flat no. 2 in block A ("flat no. 2")

(i) Whether there was a possession

...

65. In the present case, the Court notes that the applicant brought an action for recovery of property, seeking both a declaration that the nationalisation of his whole building had been unlawful and that building's return. In its final judgment of 10 April 1997 the Bucharest Court of First Instance established that the property concerned had been nationalised in breach of nationalisation Decree no. 92/1950, held that the applicant remained the legitimate owner and ordered the State to return the property to him (see paragraph 14 above). This judgment was binding on the State, the only legal person which could legitimately claim to be owner of the property at that date and which was ordered to return the building to the applicant. The title which was thus recognised, with retrospective effect, was irrevocable.

Furthermore, the applicant's title has not been overturned or challenged to date, and the Government expressly recognise that the applicant remains the owner and have based their defence on that hypothesis. The Court therefore considers that, with regard to flat no. 2, the applicant had a possession within the meaning of Article 1 of Protocol No. 1.

(ii) Whether there was an interference

66. The Court notes that the Bucharest Court of First Instance found that the nationalisation of the applicant's building had been illegal and ordered the State, which was in possession of the building at the material time, to return it to the applicant. But six days after that judgment the State sold flat no. 2 to the tenant.

67. The Government contend that the sale by the State of flat no. 2 did not infringe the applicant's right of property, as he remains the owner and has the possibility of bringing an action for recovery against the purchaser in order to regain possession of the flat

68. Firstly, the Court considers that this was not simply the sale of someone else's property, but a sale that took place in flagrant violation of a judicial decision in the applicant's favour. Although the judgment of 10 April 1997 had retrospectively acknowledged the applicant's title and had ordered the State to return the building to him, the State sold the building to the tenant on 16 April 1997. It is not clear whether on 16 April 1997 the judgment of 10 April 1997 had become final. Nonetheless, as the guardian of public order, the State had a moral obligation to lead by example and a duty to ensure that the bodies it had charged with the protection of public order followed that example (see *Zwierzyński v. Poland*, no. 34049/96, § 73, ECHR 2001-VI). Selling the flat in question after being ordered to return it to the applicant and without having expressed the least opposition to the judgment by, for example, lodging an appeal, amounted to denying the work of the courts.

69. Secondly, the Government's argument must also be dismissed because the applicant no longer has any means of recovering possession of his flat.

Thus, the procedure provided for in Law no. 10/2001, as governed by government decision no. 498/2003 and upheld by the Supreme Court of Justice (see paragraphs 41 and 42 above), could not have resulted in the return of the flats, given that the courts had refused to set aside contracts of sale.

It should be noted that, under Romanian law, the lodging of an action for recovery of possession against the purchasers is not subject to limitation of time (see paragraph 39 above). The applicant was therefore not obliged to lodge such an action immediately after the dismissal of his action seeking to have the contract of sale set aside. It would be excessive to impose such an obligation on him for the period between the final dismissal of that action, on 30 May 2000, and the entry into force of Law no. 10/2001 on 14 February 2001, given the two sets of proceedings which he had previously undertaken and the effort and financial costs they had entailed.

Since the entry into force of Law no. 10/2001, the applicant has been unable to bring an action for recovery of possession of the flat, since the Supreme Court of Justice's consistent case-law is that such an action must be dismissed as inadmissible (see paragraph 44 above). Even supposing that he could have brought such an action, his chances of success would have been at best uncertain, since the Supreme Court of Justice systematically dismisses actions for recovery of possession if it finds that the purchasers were acting in good faith (see paragraphs 45-48 above).

70. It follows from the above that, by selling to a third party the flat that it should have returned to the applicant, the State deprived him of any possibility to recover possession of it (see, *mutatis mutandis*, *Guillemin v. France*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 164, § 54).

71. In the light of the above, the Court considers that the sale of the flat, which made it impossible for the applicant to recover his property in spite of a final judgment to that effect, undoubtedly amounted to an interference with the applicant's right to the peaceful enjoyment of his possessions.

(iii) Whether the interference was justified

72. It remains to be determined whether or not the interference found by the Court was in breach of Article 1 of Protocol No. 1.

...

75. The Court notes that the situation created by the combined effect of the sale of the flat, the Bucharest Court of Appeal's refusal in its judgment of 30 May 2000 to set aside the flat's sale and the entry into force of Law no. 10/2001, following which the Supreme Court's consistent case-law blocked the possibility of recovering property sold to third parties acting in

good faith, deprived the applicant of the benefit of the part of the judgment of 10 April 1997 which established his title to flat no. 2, by preventing him from recovering possession of it.

Admittedly, the Court in its settled case-law has examined failures to execute a judicial decision from the perspective of the first sentence of the first paragraph of Article 1 (see *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 45, 6 March 2003; and *Sabin Popescu v. Romania*, no. 48102/99, § 80, 2 March 2004). In the instant case, however, it notes, firstly, that at the time of the sale the judgment was not enforceable, and, secondly, that this case does not involve a simple failure to execute, but the sale of the possession claimed to a third party. Following that sale, the applicant was no longer able to take possession of the property, or to sell, devise, donate or otherwise dispose of it. In those circumstances, the Court notes that this situation had the effect of depriving the applicant of his possession within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1.

...

78. The Court observes that Law no. 112/1995 only applied to the situation of possessions in respect of which the State had a property title (see paragraphs 26-30 above) and that no other domestic provision granted the State the right to sell property which was *de facto* in its possession and for which it did not therefore have title. Moreover, neither the applicant nor the Government have claimed that the sale to an individual of a property which was confiscated or nationalised without valid title had a legal basis at the material time.

79. In the instant case, the Court, like the Bucharest Court of First Instance in its judgment of 10 April 1997, notes that at the time of the sale the State had no title to flat no. 2 and that the impugned interference had no basis in law, given that Law no. 112/1995 permitted only the sale of property acquired with valid title.

80. In the light of the foregoing, the Court concludes that the interference with the applicant's right of property lacked a legal basis and, consequently, that there has been a violation of Article 1 of Protocol No. 1.

(b) The two flats making up block B of the property ("block B") (sold on 23 February and 17 March 1997)

(i) Whether there was a possession

81. With regard to block B, the applicant brought his action for recovery of possession on 20 March 1997, in other words after this part of the property had been sold to the former tenants. It must therefore be ascertained whether the applicant nonetheless had a "possession" within the meaning of Article 1 of Protocol No. 1.

It must be recognised that, in its final judgment of 10 April 1997, the Bucharest Court of First Instance established that the whole building claimed by the applicant had been nationalised in violation of Decree no. 92/1950, noted that the applicant continued to be the lawful owner and ordered that the building, including block B, be returned. The right of title to block B which was thus recognised, with retrospective effect, was irrevocable.

82. Admittedly, this recognition of the applicant's title was not to the detriment of the other legal entities, specifically the purchasers, who could legitimately have claimed to be owners of the properties at the time the action for recovery of possession was lodged before the national courts. Secondly, the applicant did not come into possession of block B following the judgment of 10 April 1997 (see paragraph 17 above). In those circumstances, the applicant's "possession" could consist in the interest in having block B returned to him by the purchasers. It is therefore necessary to determine whether that interest satisfied the conditions necessary to be considered as an "asset" to be protected under Article 1 of Protocol No. 1, namely whether it constituted a pecuniary interest which had a sufficient basis in domestic law (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 47, ECHR 2004-IX).

83. It is incontestable, and indeed undisputed, that the applicant's interest in having the flats returned is a pecuniary interest.

84. The Court considers that this pecuniary interest had a sufficient basis in domestic law since it was, firstly, expressly recognised by the State and, secondly, confirmed by the courts' established case-law.

Firstly, as indicated by the Government ..., save in exceptional circumstances (adverse possession or, according to a minority legal opinion and a sparse case-law, appearances), until 2001 the settled case-law allowed actions to recover possession brought by the lawful owner against the purchaser of someone else's property, even where the latter had acted in good faith. The applicant could thus legitimately hope to have his pecuniary interest materialised if he were to bring a successful action for recovery of possession against the purchasers.

Secondly, with regard to the recognition of this interest by the State, section 2(2) of Law no. 10/2001 explicitly provides that persons who owned buildings which the State had seized without valid title conserved their title. Thus, this is not a new right, but explicit and retrospective recognition of the continuation of the old right. It should be noted that the legislation makes no distinction between the situation of buildings sold to tenants, as in the case of block B, and buildings which remain in the State's possession.

85. In the Court's opinion, these elements prove that the applicant had a pecuniary interest which was recognised under Romanian law and which was subject to the protection of Article 1 of Protocol No. 1 (see, *mutatis*

mutandis, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 129, ECHR 2004-XII, and *Beyeler v. Italy* [GC], no. 33202/96, § 105 *in fine*, ECHR 2000-I).

86. Furthermore, the applicant's title to block B has not been overturned or challenged to date. In addition, the Government expressly recognise that the applicant remains the owner and have based their defence on this hypothesis.

87. Accordingly, the Court considers that the applicant had a pecuniary interest in the flats which amounted to a possession within the meaning of Article 1 of Protocol No. 1.

(ii) Nature of the alleged violation

88. The Court points out that Article 1 of Protocol No. 1, the essential object of which is to protect the individual against unjustified interference by the State with the peaceful enjoyment of his or her possessions, may also entail positive obligations requiring the State to take certain measures necessary to protect the right of property (see *Broniowski* [*v. Poland* [GC], no. 31443/96], § 143 [,ECHR 2004-V]; *Öneryıldız*, cited above, § 134; and *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII).

89. It reiterates that the Convention imposes no specific obligation on States to right injustices or harm caused before they ratified the Convention. Equally, Article 1 of Protocol No. 1 cannot be interpreted as restricting the freedom of Contracting States to choose the conditions under which they agree to restore property which was transferred to them before they ratified the Convention (see *Kopecký,* cited above, § 35). The enactment of laws providing for the restitution of confiscated assets or compensation of persons who suffered such confiscation requires a wide-ranging review of many moral, legal, political and economic issues. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has stated that it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *James and Others* [*v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98], p. 32, § 46, and *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII). This logic applies particularly to such fundamental changes of 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 *Broniowski*, cited above, § 149).

90. This does not mean that the conduct of the national authorities in a particular case may not raise an issue under Article 1 of Protocol No. 1, where the latter fail to comply with their obligations under the Convention.

91. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing

in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of.

While they have a wide margin of appreciation in assessing the existence of a problem of public concern warranting specific measures and in implementing social and economic policies (see *Kopecký*, cited above, § 37), where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency (see *Beyeler*, cited above, §§ 110 *in fine*, 114 and 120 *in fine*; *Broniowski*, cited above, § 151; *Sovtransavto Holding*, cited above, §§ 97-98; *Novoseletskiy v. Ukraine*, no. 47148/99, § 102, ECHR 2005-II; *Blücher v. the Czech Republic*, no. 58580/00, § 57, 11 January 2005; and *O.B. Heller, a.s., v. the Czech Republic* (dec.), no. 55631/00, 9 November 2004).

92. While the Convention does not impose an obligation on the States to restore confiscated assets, let alone to dispose of them in accordance with the elements of the right of property, once a solution has been adopted by a State, it must be implemented with reasonable clarity and coherence, in order to avoid, in so far as possible, legal uncertainty and ambiguity for the legal persons concerned by the measures to implement it.

In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is an important factor to be taken into account in assessing the State's conduct (see *Broniowski*, cited above, § 151).

93. In addition, each Contracting State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it. The Court's sole task is to consider whether in the instant case the measures taken by the Romanian authorities were adequate and effective (see *Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003; *Piven v. Ukraine*, no. 56849/00, § 37, 29 June 2004; and *Zhovner v. Ukraine*, no. 56848/00, § 35, 29 June 2004).

(iii) Whether the State complied with its positive obligation

(α) The general legal uncertainty generated by the lack of clarity and consistency in the applicable legislation and its consequences for the applicant

94. The Court notes that several concepts seem to be essential in Romanian law when defining the applicant's situation, namely State "title", the "sale of another's property", the purchaser's "good faith", "action for recovery of possession" and "appearances in law". Apart from the concepts of State "title", which is defined in different ways in various successive legal instruments, and of "good faith", which is defined by the Civil Code but interpreted and applied in different ways in practice, the three other

concepts cited above are not defined by legislation but have been developed in legal writings and applied in a case-law that is not always consistent (see paragraphs 38, 39 [and] 49-53 ... above).

95. With regard to State "title", the Court notes that the domestic courts' practice has not been consistent in deciding, for example, whether Decree no. 92/1950 or Decree no. 223/1974 complied with the Constitutions in force at the time of their application and whether they could therefore constitute State "title" (see paragraphs 33-37 above).

This lack of consistency concerns not only the possibility for the courts to examine State title and the different or even contradictory interpretations they have given to this question of law, but also the way in which the Government have defined this concept: if "title" was initially understood in a very broad sense, it has been interpreted in an increasingly restrictive manner through successive amendments to the legislation. The Court notes that this legislative development did not take place prior to the process of selling former owners' property, which would have been desirable, but in the course of that process (see paragraphs 23-32 above). This was likely to result, for example, in a situation where property which was sold because it was considered as "nationalised by transfer of title" at the time of its sale was in fact "without title" when assessed against later interpretations given by the Government, and this was undeniably a source of conflict when two different persons had competing legitimate interests in the same building: on the one hand, the former tenants, to whom the law had granted the right to acquire ownership of the property in which they lived, and, on the other, the former owners, whose properties were ordered to be returned at the close of proceedings for recovery of immovable property, upheld by the national courts in final decisions which were subsequently impossible to enforce in practice.

96. It is undeniable that many court actions, either for recovery of possession or to have contracts of sale set aside, such as those instituted by the applicant in the instant case, have been brought as a result of this uncertainty, and the courts have been required to determine such disputes in the absence of a sufficiently foreseeable and consistent legislative context. In this respect, it must be observed, firstly, that numerous legal interpretations of the concept of State "title" were possible and, secondly, that the concepts of the purchaser's "good faith" and "appearances in law" and their interaction with actions for recovery of possession were not clearly regulated, which has led to varying judicial rulings by different domestic courts on the same legal question (see paragraph 51 above).

97. As to actions for recovery of possession, prior to the enactment of Law no. 10/2001 the case-law had established that, in the event of the sale of another's property, such actions, brought by the rightful owner against a third-party purchaser who had acted in good faith, were admissible, save in exceptional circumstances, following a comparison of the competing titles

to the disputed property. Appearances in law, for which there is no statutory framework and which, according to the Government, is a criterion disputed by the majority of legal writers, were strictly interpreted and subject not only to the purchaser's good faith, but also to the existence of a joint and unavoidable error (see paragraphs 38 [and] 39 ... above).

Following the entry into force of Law no. 10/2001, the exceptions would appear to have become the rule, and the Supreme Court dismissed actions for recovery of possession either by referring to the purchasers' good faith alone, by ruling that in Law no. 10/2001 the legislature had given priority to the purchaser's good faith, or by considering as applicable appearances in law, interpreted broadly, with no clear distinction between joint and unavoidable error and good faith (see paragraphs 46-48 above). In addition, on several occasions the Supreme Court refused to compare competing titles, holding that, where the courts had upheld the sale of someone else's property, this consolidated, *ipso jure*, the transfer of title to the property to the purchaser, an effect that could not be overturned by the comparison of titles (see paragraph 45 above).

98. The Court has already held that divergences in case-law are an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, and that the role of a supreme court is precisely to resolve conflicts between decisions of the courts below (see *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 59, ECHR 1999-VII). In the instant case, however, it should be noted that even the Supreme Court of Justice did not have a uniform case-law on the legal questions in issue.

The Court considers that, in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty (see, *mutatis mutandis*, *Sovtransavto Holding*, cited above, § 97) and to reduce the public's confidence in the judicial system, which is one of the essential components of a State based on the rule of law.

99. In conclusion, the Court considers that the lack of consistency at the legislative level and the conflicting approaches by the domestic courts with regard to the nationalisation of property were likely to create a general climate of ambiguity and legal uncertainty.

(β) The consequences for the applicant of general legal uncertainty

100. The system of individual petition provided under Article 34 (former Article 25) of the Convention excludes applications having the nature of an *actio popularis*. Complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they

were "directly affected" by the measure complained of (see, for example, *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A, p. 22, § 44, and *İlhan v. Turkey* [GC], no. 22277/93, § 52, ECHR 2000-VII).

101. The Court must therefore assess how this general climate of uncertainty affected the applicant's particular case.

The sale of the flats in block B

102. The Court notes that on 7 February 1996 the applicant applied to the Bucharest City Council for the return of the building. In addition, on 23 October 1996, the Bucharest City Council's Board for the application of Law no. 112/1995 decided that the buildings for which an application for restitution had been lodged would not be sold until such time as their legal status had been clarified (see paragraph 11 above). Finally, on 4 February 1997, government decision no. 11/1997, amending the concept of State "title", came into force. The flats were sold on 23 February and 17 March 1997.

103. In view of the Board's decision of 23 October 1996, the flats should not have been sold before their legal status had been clarified, that is, until the validity of the State's title had been examined. In the light of government decision no. 11/1997, this supposed that the administrative authority responsible for the application of Law no. 112/1995 would check, *inter alia*, whether the applicant's father had been exempted from the application of Decree no. 92/1950 under its Article II, as the Court of First Instance did in its judgment of 10 April 1997. This did not involve complex legal considerations, such as evaluation of the decree's compliance with the 1948 Constitution, but simple verification of a fact, which could have been carried out by asking the applicant to submit the relevant documents. The Government have not provided any document proving that the administrative authorities confirmed the existence of the State's title in this way at the time of the sale.

Further evidence that the State failed to take steps to establish the legal status of the disputed building is provided by the fact that it sold flat no. 2 a mere six days after the judgment ordering it to return that property to the applicant. In addition, although the city council's decision of 22 July 1997 ordered the return of the whole building, it was not until the point of transferring title that the authorities seem to have realised that they were unable to transfer possession to the applicant of the three flats which they had previously sold.

104. It is highly likely that the change to the concept of State title and the new legal requirement, introduced by government decision no. 11/1997 on compliance with the provisions of the nationalisation decree at the date on which the State took possession of the property, influenced the conduct

of the authorities, who probably did not have the time necessary to change their administrative practices.

While it was sufficient for them to consult the schedules appended to Decree no. 92/1950 (see paragraph 27 above) in order to confirm the State's "title" as defined by government decision no. 20/1996, since the property was considered to have been nationalised "by transfer of title" if it appeared in those schedules, the new legal requirement introduced by government decision no. 11/1997 entailed additional steps: the authorities were obliged to check, firstly, whether the person listed as the owner on the schedules drawn up in application of the decree was actually the lawful owner on the date of nationalisation and, secondly, whether or not the rightful owner had been exempted from application of the decree by its Article II. To that end, it was essential that the authorities contact the former owners or their heirs – who could have lodged claims for recovery under Law no. 112/1995 – but that was not done in the present case.

105. Admittedly, each State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by the Convention. Nonetheless, in the instant case, there seems to be no justification in the circumstances for the sale by the State of the flats in the disputed property until such time as a court or administrative authority had ruled on the request for their return, lodged by the applicant under a special law intended to compensate damage sustained by former owners during the communist period.

106. The Court does not consider it unreasonable to regard the actions of the administrative authorities as being at least partly due to the general uncertainty which surrounded the definition of State "title" (see paragraph 95 above).

The action to have the sale set aside and the assessment of the purchasers' good faith

107. The Court notes that the domestic courts which examined the applicant's action to have set aside the competing titles to the property which was to be returned to him held by third parties gave priority to the purchasers' good faith, without however establishing a difference between the legal status of the flats in block B, sold prior to the action for recovery of possession, and that of flat no. 2 in block A, sold after 10 April 1997, the date on which the applicant's action for recovery of possession was granted by a final court judgment. They applied the presumption of good faith to both situations and held that, even by taking reasonable steps, the purchasers could not have known that the State was not the rightful owner.

108. It is not for the Court to define the concept of "good faith" in Romanian law, let alone to assess the good faith of the purchasers in the present case. The Court reiterates that its sole duty, according to Article 19 of the Convention, is to ensure the observance of the engagements

undertaken by the Contracting States. In particular, it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, in particular, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

109. The Court does not deny the complexity of the problems with which the courts were faced, but considers that this complexity was due, at least in part, to the lack of a clear and consistent definition of good faith and of a standard method for determining the burden of proof with regard to it and the evidence required to discharge that burden. The shifting definition of the concept of State title, which was crucial in determining whether the purchasers could have realised that the State was not the owner of the property at the time of its sale, and the lack of precision with regard to who was to take the reasonable steps to clarify the legal status of a building put up for sale by the State, were further aspects of this complexity. In the Court's view, these problems, which were not resolved by the courts examining the applicant's action to set aside the contracts of sale, probably reflected the general uncertainty which surrounded the definition and evaluation of good faith in domestic law.

The impossibility of gaining possession of the flats

110. The Court shares the Government's opinion that, when the action to set aside the contracts was dismissed, domestic law enabled the applicant to have the building returned by bringing an action for recovery of possession against the purchasers (see paragraphs 38 [and] 39 ... above). Nonetheless, the applicant cannot be criticised for not having immediately brought a third action for recovery of possession against the purchasers, given the human effort and financial resources involved in the two sets of proceedings he had already brought before the domestic courts, which also constituted appropriate remedies capable of providing redress for his complaints (see paragraph 69 above).

111. It must be noted that, after the entry into force of Law no. 10/2001, the applicant was unable to recover possession of the parts of his property that had not been returned, since the combined effect of sections 18(d) and 46(2) of Law no. 10/2001 (see paragraphs 40-42 above) afforded him merely the possibility of pecuniary restoration. In addition, it was no longer open to him to bring an action for recovery of possession against the purchasers under ordinary law (see paragraph 44 above). Even supposing that he could have brought such an action, his chances of success would have been uncertain, given the Supreme Court of Justice's consistent case-law, which systematically dismissed actions for recovery of possession where it found that the purchasers had acted in good faith (see paragraphs 45-48 above).

This unforeseeable change in the case-law had the effect of depriving the applicant of any reasonable possibility of recovering possession of the flats sold to the former tenants, as he could legitimately have expected to do previously under the final judgment of 10 April 1997. This change seems to have been facilitated by the lack of an appropriate legal framework and of appropriate administrative and judicial practice on the legal questions related to the sale of someone else's property, appearances in law and the applicable rules in this area, which definitively prevented the applicant from realising the legitimate expectation arising from the judgment of 10 April 1997, namely of having his entire property returned to him.

(γ) Conclusion

112. In the light of the foregoing, the Court notes that the State has failed to discharge its positive obligation to take timely and consistent action to address the issue of general interest raised by the return or sale of property transferred to State ownership under nationalisation decrees. The general uncertainty thus created had repercussions for the applicant, who was unable to recover his entire property, even though he had obtained a final judgment ordering the State to return it to him. Consequently, the State has failed to comply with its obligation to recognise the applicant's right to the effective enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1, thus upsetting the "fair balance" between the demands of the public interest and the need to protect the applicant's right to the peaceful enjoyment of his possessions (see, *mutatis mutandis*, *Sovtransavto Holding*, cited above, § 96).

113. Consequently, there has been a violation of Article 1 of Protocol No. 1.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

3. *Holds* that the issue of the application of Article 41 of the Convention is not ready for decision; accordingly,
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the

matter and, in particular, to notify the Court of any agreement that they might reach;
(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in French, and notified in writing on 1 December 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER	Boštjan ZUPANČIČ
Registrar	President