



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

FIRST SECTION

CASE OF SMOJE v. CROATIA

(Application no. 28074/03)

JUDGMENT

STRASBOURG

11 January 2007

FINAL

11/04/2007

*This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention. It may be subject to editorial revision.*

In the case of Smoje v. Croatia,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 7 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 28074/03) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Frano Smoje (“the applicant”), on 14 July 2003.

2. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. On 25 April 2005 the Court decided to communicate the complaint concerning the length of the proceedings to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1950 and lives in Split.

A. Background to the case

5. On 1 January 1997 the Act on Restitution of and Compensation for Property Taken during the Yugoslav Communist Regime (“the Denationalisation Act”) entered into force.

6. Pursuant to section 22 of the Denationalisation Act, nationalised flats in respect of which third persons had acquired specially protected tenancies (*stanarsko pravo*), were not to be restored to their former owners. The tenants had a right to purchase the flats from the Fund for the Restitution of and Compensation for Property Taken (*Fond za naknadu oduzete imovine*) under favourable conditions set out in the Specially Protected Tenancies (Sale to Occupier) Act. At the same time, the former owners or their heirs had the right to financial compensation in respect of the flats. Exceptionally, the former owners or their heirs had a right to restitution in kind of their nationalised flats in respect of which no “tenancy relationship” (*stanarski odnos*) existed.

B. The particular circumstances of the case

7. In 1958 a flat in Split owned by the applicant's grandmother was nationalised by the Communist authorities. Subsequently, it was given to a certain D.P. who acquired a specially protected tenancy of the flat. When D.P. died in July 1996 the tenancy was transferred to his wife A.P. She died in October 1996.

1. Administrative proceedings instituted by the applicant

8. On 27 February 1997 the applicant instituted administrative proceedings before the Office for Property Affairs of the Split-Dalmatia County (*Županija Splitsko - Dalmatinska, Gradski ured za imovinskopравne poslove*, “the Office”) seeking restitution in kind of the abovementioned flat. He relied on the Denationalisation Act.

9. Since the Office did not give a decision within the statutory time-limit of two months, on 6 April 1998 the applicant lodged an appeal for failure to respond (see paragraph 30 below) with the Ministry of Justice (“the Ministry”).

10. As no decision on his appeal of 6 April 1998 had been given within the statutory time-limit of two months, the applicant first filed a rush note with the Ministry on 9 June 1998. On 10 July 1998 he brought an action for failure to respond (see paragraph 31 below) against the Ministry in the Administrative Court (*Upravni sud Republike Hrvatske*).

11. On 17 September 1998 the Office decided to stay the proceedings pending the outcome of concurring administrative and civil proceedings (see below under 2.). On 23 March 1999 the applicant extended his initial appeal of 6 April 1998 to the Ministry to include the decision on the stay of proceedings. Since no decision was given on that appeal either, on 21 June 1999 the applicant filed a rush note with the Ministry and then, on 7 July 1999, extended his initial action for failure to respond (that was pending before the Administrative Court) to include the Ministry's failure to decide on his extended appeal.

12. On 28 June 2000 the Administrative Court gave judgment for the applicant and ordered the Ministry to decide, within sixty days, on his appeal against the decision to stay the proceedings.

13. Since the Ministry did not do so, on 13 September 2001 the applicant applied to the Administrative Court, requesting it to give its own decision on his appeal, which would entirely substitute for the decision of the Ministry.

14. On 27 February 2002 the Administrative Court, sitting as a court of full jurisdiction, delivered a decision dismissing the applicant's appeal against the decision to stay the proceedings. The court held that the principal issue in concurring administrative and civil proceedings was the existence of the tenancy relationship on the flat. Since that issue was decisive for the question whether the applicant was entitled to restitution in kind or compensation, it was justified to stay the proceedings.

15. On 15 June 2002 the applicant lodged a constitutional complaint against that decision with the Constitutional Court (*Ustavni sud Republike Hrvatske*) alleging a violation of his constitutional right to property. On 10 December 2002 the Constitutional Court declared the applicant's complaint inadmissible as premature because the impugned decision did not concern the merits of the case.

16. On 25 July 2005 the Office for Property Affairs decided to resume the administrative proceedings.

17. At the hearing held on 6 September 2005 the Office requested the relevant local authorities to provide the documentation necessary to calculate the amount of compensation to be awarded to the applicant for the flat in question.

18. After the receipt of the aforementioned documentation, the Office held another hearing on 1 September 2006 at which the applicant requested to be granted a time-limit for further submissions and presentation of some additional evidence. The Office granted the request and also invited the applicant to provide some further documentation. The Government submitted that the applicant has so far not complied with that request.

19. The proceedings are still pending before the Office as the first-instance administrative authority.

2. Other proceedings concerning the flat in question

(a) Administrative proceedings

20. Meanwhile, on 7 January 1997 N.K., the daughter of D.P. and A.P. (see paragraph 7 above) applied to the Commission for Housing Affairs of the Split-Dalmatia County (*Županija Splitsko - Dalmatinska, Komisija za stambene poslove*) to be recognised as holder of a specially protected tenancy of the abovementioned flat. On 17 January 1997 the Commission declared her request inadmissible for lack of jurisdiction.

21. On 24 February 1997 the competent Ministry dismissed her appeal. N.K. then brought an administrative action in the Administrative Court challenging that decision.

22. On 17 February 1999 the Administrative Court quashed the administrative authorities' decisions and remitted the case to the first-instance authority.

23. In the resumed proceedings, on 2 December 2002 the Commission for Housing Affairs again dismissed N.K.'s request for lack of jurisdiction. On 24 July 2003 the Ministry dismissed her appeal and upheld the first-instance decision. As N.K. did not bring an action in the Administrative Court, the decisions of the administrative authorities became final.

(b) Civil proceedings

24. On 2 February 1997 the Town of Split ("the local authorities") brought a civil action in the Split Municipal Court (*Općinski sud u Splitu*) against N.K. seeking her eviction. Soon afterwards, N.K. filed a counter-claim seeking the conclusion of a lease contract under so-called protected rent (*zaštićena najamnina*) in respect of the flat. It appears that at some point the applicant joined those proceedings as an intervener (*umješac*) on the side of the local authorities.

25. On 10 June 2003 the Split Municipal Court dismissed the claim of the local authorities while accepting that of N.K. The court found that she had *ex lege* acquired a specially protected tenancy of the flat after the death of her mother A.P., and that she was therefore entitled to conclude a lease contract under the protected rent with the plaintiff. The applicant appealed as intervener.

26. On 21 May 2004 the Split County Court (*Županijski sud u Splitu*) dismissed the applicant's appeal and upheld the first-instance judgment which thereby became final.

27. Relying on the courts' findings that she had *ex lege* acquired a specially protected tenancy of the flat, on 15 December 2004 N.K. concluded, instead of a lease contract with the local authorities, a sale contract with the Fund for the Restitution of and Compensation for Property Taken (see paragraph 6 above) by which she bought the flat in question. Shortly afterwards she recorded her ownership of the flat in the land register.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

28. Article 29 § 1 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette no. 41/2001 of 7 May 2001) reads as follows:

“In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.”

B. The relevant legislation

1. The Constitutional Court Act

29. The relevant part of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 49/2002, of 3 May 2002; “the Constitutional Court Act”) reads as follows:

Section 62

“1. Everyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the decision of a state authority, local or regional self-government, or a legal person invested with public authority, on his or her rights or obligations, or about suspicion or accusation for a criminal offence, has violated his or her human rights or fundamental freedoms, or right to local or regional self-government, guaranteed by the Constitution (hereinafter: constitutional right)...

2. If another legal remedy is allowed against the violation of the constitutional rights [complained of], the constitutional complaint may be lodged only after this remedy has been exhausted.

3. In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law (*revizija*) are allowed, remedies shall be considered exhausted only after the decision on these legal remedies has been given.”

Section 63

“(1) The Constitutional Court shall examine a constitutional complaint whether or not all legal remedies have been exhausted if the competent court fails to decide a claim concerning the individual's rights and obligations or a criminal charge against him or her within a reasonable time ...

(2) If a constitutional complaint ... under paragraph 1 of this section is upheld, the Constitutional Court shall set a time-limit within which the competent court must decide the case on the merits...

(3) In a decision issued under paragraph 2 of this section, the Constitutional Court shall assess appropriate compensation for the applicant for the violation of his or her constitutional rights ... The compensation shall be paid out of the State budget within three months from the date a request for payment is lodged.”

2. *The Administrative Procedure Act*

30. The relevant provisions of the Administrative Procedure Act (*Zakon o općem upravnom postupku*, Official Gazette no. 53/1991 of 8 October 1991) provide as follows:

Section 218(1) provides that in simple matters, where there is no need to undertake separate examination proceedings, an administrative authority shall give a decision and serve it on a party within one month following the submission of an application. In all other, more complex cases, the authority shall give a decision and serve it on a party within two months.

Section 218(2) provides that a party whose application has not been decided and served within the time-limits set out in paragraph (1) may lodge an appeal (appeal for failure to respond, *žalba zbog šutnje administracije*) as if his or her application had been dismissed.

Section 247(1) provides that the decision on the appeal shall be given and served on a party as soon as possible but at the latest within two months following the submission of the appeal.

Section 246(1) provides that the second-instance administrative authority deciding on the appeal for failure to respond shall request the first-instance authority to give reasons for its omission. If it finds that the failure to respond was attributable to the party or the reasons for such omission were otherwise justified, the second-instance authority shall order the first-instance authority to give a decision within one month. If it finds that the omission was not justified, it shall request the case-file.

Section 246(2) provides that if the case-file contains sufficient information, the second-instance administrative authority shall decide the case. Otherwise, it shall first hear the case and take evidence, and then give a decision. Exceptionally, if it considers that such a procedure would save time and costs, it shall order the first-instance authority to hear the case and take evidence within a specified time-limit, whereupon it shall decide the case itself. Such a decision shall be final.

3. *The Administrative Disputes Act*

31. The relevant provisions of the Administrative Disputes Act (*Zakon o upravnim sporovima*, Official Gazette nos. 53/1991, 9/92 and 77/92) provide as follows:

Section 26(1) provides that if the appellate authority fails to give a decision on a party's appeal against the first-instance decision within sixty days, and fails to do so upon a repeated request within a further period of seven days, the party may bring an action in the Administrative Court (action for failure to respond, *tužba zbog šutnje administracije*), as if his or her appeal had been dismissed.

Section 26(2) provides that when the first-instance administrative authority fails to give a decision against which no appeal lies, the party may directly bring an action in the Administrative Court.

Section 26(3) provides that, in matters where the right of appeal exists, if a first-instance administrative authority fails to give a decision on a party's application within sixty days, the party may submit his or her application to the appellate administrative authority. Against the latter authority's decision the party may bring an action in the Administrative Court, and if the authority fails to give a decision, the party may bring an administrative action under the conditions set out in paragraph 1.

Section 42(5) provides that when the Administrative Court, following the action for failure to respond, finds for the plaintiff, it shall either instruct the respondent administrative authority how to decide the case on points of law, or shall itself rule on the application (acting as a court of full jurisdiction under paragraph 2 of section 64).

Section 64(1) provides that, in the execution of the judgment rendered under section 42(5), the administrative authority shall issue its decision immediately but at the latest within 30 days. Otherwise, a party may by a special submission request it to do so. If the authority does not issue a decision within seven days following that request, a party may apply to the Administrative Court.

Section 64(2) provides that if such an application is made, the Administrative Court shall first ask the administrative authority to give reasons for its omission. The authority shall reply immediately but at the latest within seven days. If the authority fails to do so, or if the reasons given do not justify the failure to decide, the Administrative Court shall give a decision entirely substituting for the decision of the administrative authority.

4. The Civil Obligations Act

32. The relevant part of the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette, nos. 53/91, 73/91, 3/94, 7/96 and 112/99) provided as follows:

Section 103 of the Civil Obligations Act provided that a contract was considered null and void if it was contrary to the Constitution, peremptory rules, or morals.

Section 110 provided that a right to have a contract declared null and void could not extinguish.

33. On 1 January 2006 new Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette, no. 35/2005 of 7 March 2005) entered into force. Its sections 322 and 328 contain the same provisions as sections 103 and 110 of the former Civil Obligations Act.

C. The Constitutional Court's practice

34. In its decisions nos. U-III-2467/2001 of 27 February 2002, U-III/3638/2003 of 18 February 2004 and U-III/635/2004 of 25 November 2004 the Constitutional Court, seized under Section 63 of the Constitutional Court Act to examine the length of administrative proceedings, held that only the inactivity of the judicial authorities was relevant for a breach of Article 29 § 1 of the Constitution. In its view it was not possible for proceedings before the administrative authorities to last unreasonably long because the statutes regulating those proceedings contained the presumption that the application had been dismissed if the administrative authorities failed to give a decision within the statutory time-limits (see paragraphs 30 and 31 above).

THE LAW

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

35. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

36. The Government contested that argument.

37. The period to be taken into consideration began on 6 November 1997, the day after the entry into force of the Convention in respect of Croatia. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time. The period in question has not yet ended. It has so far lasted some nine years.

A. Admissibility

38. The Government invited the Court to reject the application on the ground that the applicant had failed to exhaust domestic remedies as required under Article 35 § 1 of the Convention. They submitted that the applicant had an opportunity to lodge a constitutional complaint under section 63 of the Constitutional Court Act and to complain about the length of the proceedings. However, he had not done so.

39. It was true that the applicant had already lodged a constitutional complaint. However, he had lodged a regular constitutional complaint under

section 62 of the Constitutional Court Act against the Administrative Court's decision of 27 February 2002 (see paragraphs 14 and 15 above), rather than a complaint about the length of the proceedings under section 63 of that Act.

40. The applicant disagreed.

41. The Court recalls that it recognised a constitutional complaint under section 63 of the Constitutional Court Act as an effective remedy for the length of proceedings still pending in Croatia (see *Slaviček v. Croatia* (dec.), no. 20862/02, ECHR 2002-VII). However, in the light of the subsequent practice of the Constitutional Court, the Court has recently revised this case-law in respect of the length of administrative proceedings (see *Počuča v. Croatia*, no. 38550/02, 29 June 2006).

42. In the present case it is sufficient to note that the above-cited practice (paragraph 34) indicates that the Constitutional Court considers only the inactivity of the judicial authorities to be relevant for a breach of Article 29 § 1 of the Constitution. As in the present case the applicant complained about the length of the administrative proceedings pending before the administrative authorities, the constitutional complaint under section 63 of the Constitutional Court Act cannot be considered an effective remedy for the purposes of Article 35 § 1 of the Convention. It follows that the Government's objection must be dismissed.

43. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

44. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Cocchiarella v. Italy* [GC], no. 64886/01, § 68, to be published in ECHR 2006; and *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

45. The Court considers that the length of the administrative proceedings at issue, that have so far lasted some nine years, and are still pending, is *a priori* unreasonable and calls for a global assessment. Their overall length could be justified only under exceptional circumstances. However, the arguments adduced by the Government's cannot sufficiently explain such a substantial delay, which resulted from the decision to stay the proceedings pending the outcome of concurrent civil and administrative cases. Although such a measure could in principle be regarded as justified for the proper

administration of justice, the Court considers that the undue delay which had occurred in these two cases had inevitable repercussions on the stayed administrative proceedings. In these circumstances, the length of the proceedings complained of is likewise imputable to the authorities (see, *mutatis mutandis*, *Todorov v. Bulgaria*, no. 39832/98, § 48, 18 January 2005; *Djangozov v. Bulgaria*, no. 45950/99, § 38, 8 July 2004; and *Kerékgyártó v. Hungary*, no. 47355/99, § 42, 16 December 2003).

46. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, apart from the cases cited in the preceding paragraph, *Pastellis v. Cyprus*, no. 19106/03, 2 March 2006, and *Shacolas v. Cyprus*, no. 47119/99, 4 May 2006).

47. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

48. The applicant also complained that the decision of the Administrative Court of 27 February 2002, as well as the sale of the flat to N.K. on 15 December 2004, amounted to a breach of his right to property as they had prevented him from obtaining restitution in kind, to which he would otherwise be entitled. He relied on Article 1 of Protocol No. 1 to the Convention which reads as follows:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Admissibility

49. As regards the Administrative Court's decision, the Court observes that the proceedings complained of are still pending before the first-instance administrative authority. In case of unfavourable outcome, the applicant

would be able to lodge, consecutively, an administrative appeal, an action in the Administrative Court, and, eventually, a constitutional complaint.

50. As regards the sale of the flat to N.K., the Court observes that the applicant had, and still has, an opportunity to bring an action (see paragraphs 32 and 33 above) against the parties to the sale contract with a view to having it declared null and void. However, he has never done so.

51. It follows that this part of the application is inadmissible under Article 35 § 1 for non-exhaustion of domestic remedies and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

53. The applicant claimed 90,000 Croatian kunas (HRK) in respect of pecuniary damage resulting from the loss of rent, and HRK 350,000 in respect of non-pecuniary damage.

54. The Government contested these claims.

55. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 4,800 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

56. The applicant also claimed HRK 527,992 for the costs and expenses incurred before the domestic courts.

57. The Government contested the claim.

58. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court observes that there is no evidence in the file to suggest that the applicant incurred any extra costs and expenses in the domestic courts as a result of the violation of his right to a hearing within a reasonable time. The Court therefore rejects the claim for costs and expenses incurred in the domestic proceedings.

C. Default interest

59. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,800 (four thousand eight hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at a rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President