



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

SECOND SECTION

CASE OF HAMER v. BELGIUM

(Application no. 21861/03)

JUDGMENT
[Extracts]

STRASBOURG

27 November 2007

FINAL

27/02/2008

In the case of Hamer v. Belgium,

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

András Baka, *President*,

Françoise Tulkens,

Rıza Türmen,

Mindia Ugrekhelidze,

Vladimiro Zagrebelsky,

Antonella Mularoni,

Dragoljub Popović, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 18 September and 6 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 21861/03) against the Kingdom of Belgium, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Dutch national, Judith Hamer (“the applicant”), on 3 July 2003.

2. The applicant was represented by Mr C. Raymaekers, a lawyer practising in Antwerp. The Belgian Government (“the Government”) were represented by their Agent, Mr D. Flore, Senior Adviser, Federal Justice Department. Having been informed of their right to participate in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court), the Government of the Netherlands did not respond.

3. The applicant complained of the unreasonable length of the proceedings instituted against her (Article 6 § 1) for maintaining a holiday home erected without planning permission and illegally felling various trees. She complained further of discrimination in comparison with neighbouring property owners who had not been prosecuted (Articles 6 § 1 and 14 taken together) and of disproportionate interference with her property rights (Article 1 of Protocol No. 1) and her right to respect for her home (Article 8).

4. By a decision of 11 May 2006, a Chamber of the former First Section declared the application admissible. Following reorganisation of the composition of the Sections, the case was allocated to the Second Section.

5. Both the applicant and the Government filed further observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1955 and lives in Amsterdam.

7. In 1967 her parents built a holiday home without planning permission on land situated in Zutendaal (Belgium). According to the applicant, however, the house was built in 1962.

8. Following her mother's death, a deed of partition was drawn up on 6 January 1986 between the applicant (who, inheriting from her mother, became the remainderman of half of the property) and her father. That deed, which specifically mentions the existence of the building, was registered with the Mortgage Registrar at the Ministry of Finance and a registration fee was paid.

9. The applicant's father died on 21 August 1993 and she became the full and sole owner of the entire property. On inheriting the property, the applicant specifically declared in the notarised deed of distribution that the plot was a holiday home. The deeds were registered with the local authorities and the applicant paid the inheritance tax. From then on, the applicant paid an annual property tax (*précompte immobilier*) and second-residence tax on the holiday home. According to the applicant, it went without saying that her father had also paid the relevant taxes on the house.

10. The applicant carried out renovations on the house costing 50,000 euros (EUR) and had the trees on the adjoining land felled.

11. In 1994 the partly government-controlled Flemish water-supply company carried out works to connect the house to the drainage and water-supply systems. There was no reaction from the local authorities at that time.

12. On 27 January 1994 a report was drawn up by a police officer who noted that trees had been felled on the property in breach of Article 81, paragraph 3, of the Flemish forestry decree of 13 June 1990.

13. On 22 February 1994 a report was drawn up by a police officer who noted that the holiday home had been erected in 1967 without planning permission and that it was located in a forested area in which no such permission could be issued. The report also noted that the exterior and roof of the house had been renovated.

14. On 8 August 1994 the applicant voluntarily reported to the police to make a statement, which was placed on record.

15. By a decision of 11 October 1994, the municipal council (*collège des bourgmestre et échevins*) asked the planning inspector to issue an opinion on any remedial action to be taken. By a letter of 19 June 1995, the planning

inspector applied to the public prosecutor for the site to be restored to its original condition.

16. Two reports dated 26 March 1996 and 8 January 1997 mention that the police had sought to question the applicant again but had found it difficult to contact her and that she was temporarily unable to travel for health reasons.

17. At the request of the Tongeren public prosecutor, the applicant was questioned in Amsterdam on 25 March 1997 by a Dutch police officer. A report was drawn up on that occasion.

18. On 18 May 1998 the public prosecutor asked the local police to confirm whether or not the building in issue still existed.

19. A report of 16 June 1998 established that the situation had not changed.

20. The Tongeren public prosecutor issued the applicant with a summons to appear in court on 12 May 1999, firstly, for having maintained a holiday home, erected without planning permission, between 27 January 1994 and 28 April 1999 and, secondly, for having felled approximately fifty pine trees in breach of the above-mentioned Flemish forestry decree. According to the applicant, there were at least four other houses built without permission in the same forested areas, which had neither been the subject of reports establishing that an offence had been committed nor of prosecution.

21. On 25 June 1999 the Tongeren Criminal Court issued an interlocutory judgment *in absentia*, since the applicant had not been duly summoned.

22. On 6 January 2000 she was once again summoned to appear before the Tongeren Criminal Court.

23. On 26 May 2000 that court acquitted the applicant of the above-mentioned charges. It held in particular that after twenty-seven years the applicant could legitimately assume, as could any reasonably prudent citizen, that maintaining the building in issue would no longer constitute an offence. The court further held that it did not have jurisdiction to deal with the planning inspector's application to have the land restored to its original condition. The prosecutor appealed.

24. By a judgment of 6 February 2002, the Antwerp Court of Appeal upheld the judgment in so far as the applicant was acquitted of the charge of felling the trees. However, it found her guilty of maintaining a building erected without planning permission, pursuant to Article 146 of the town and country planning decree of 18 May 1999, and changed the impugned period to between 22 August 1993 and 28 April 1999, having regard to the date on which the applicant's father had died.

25. In her submissions the applicant had alleged a violation of the reasonable-time requirement under Article 6 § 1 of the Convention, considering that the criminal proceedings had been conducted beyond that

time-limit and that after such a long period there had been an interference with her rights of defence, in particular since it had been impossible for her to prove that the house had been built before 1962. She had also criticised the failure of the authorities to act, pointing out that her parents had paid the second-residence tax, that a notarised deed mentioning the building had been registered by the authorities, that she had paid inheritance tax on property that included the building, that extensive infrastructure works had been carried out by a partly government-controlled company with no reaction on the part of the local authorities and that for many years no legal action had been taken. She had also alleged a violation of the principle of protection of the legitimate expectations of citizens and complained of discrimination in comparison with neighbouring property owners.

26. The Court of Appeal found that a deed of partition drawn up in 1986 and signed by the applicant established that the holiday home had been built in 1967 and concurred furthermore with the findings contained in the report drawn up on 22 February 1994. The Court of Appeal considered that the applicant knew or should have known that the building had been erected without planning permission. As a reasonable and prudent citizen, and even taking account of the attitude of the authorities as she had described it, the applicant could not have inferred that the situation was totally legal and that no proceedings would be brought against her. The Court of Appeal found that the applicant had acted most imprudently by proceeding to renovate the premises after the death of her father. It also found that the fact that four other dwellings had also been erected in the same forested area without planning permission and without their owners being prosecuted did not amount to discrimination.

27. With regard, more particularly, to compliance with the reasonable-time requirement, the Court of Appeal found that the length of the criminal proceedings had been unreasonable but that this did not alter the fact that the offence had been established and that the applicant had, since 1994, been liable to prosecution. Considering, firstly, that overrunning the reasonable time did not cause the proceedings to become time-barred and, secondly, that account should be taken of the specific circumstances of the case, and in particular of the fact that the applicant had no criminal record, the Court of Appeal merely pronounced a finding of guilt against the applicant.

28. Referring to the planning inspector's application lodged pursuant to Articles 149 et seq. of the above-mentioned decree of 18 May 1999, which it deemed to be reasonable, the Court of Appeal ordered the applicant to restore the site to its former condition and to demolish the building within one year of the judgment becoming final, with a fine of EUR 125 per day's delay. It also authorised the municipal council or the planning inspector to enforce the order at the expense of the applicant in the event of non-

compliance with the demolition order. The applicant was also ordered to pay the costs and expenses of the proceedings.

29. The applicant appealed on points of law.

30. By a judgment of 7 January 2003, the Court of Cassation dismissed the appeal.

31. On grounds based on a violation of Article 6 § 1 of the Convention, the applicant claimed that the length of the criminal proceedings had been unreasonable and it could therefore be concluded that they were time-barred.

32. The Court of Cassation held that exceeding a reasonable time did not cause criminal proceedings to become time-barred and that, consequently, the Court of Appeal had not been bound to base its decision on that point.

33. The applicant also submitted that, bearing in mind that the Court of Appeal had merely pronounced a finding of guilt against her, she could not be bound to restore the site to its original condition or to pay the costs of the proceedings.

34. The Court of Cassation responded that restoration of the site to its original condition did not constitute a penalty but a civil measure, in the same way as the payment of the full costs of the proceedings at the fixed rate, and that consequently these measures were not inconsistent with a simple finding of guilt.

35. The court also dismissed the ground based on Article 8 of the Convention and Article 1 of Protocol No. 1 whereby the applicant alleged that after a thirty-year period during which they had tolerated the situation, thus creating an apparently lawful situation, the authorities could no longer rely on the public interest to justify interference with the peaceful enjoyment of her property rights and respect for her private life.

36. The Court of Cassation found that the Court of Appeal had held, in its unfettered discretion, that the applicant had been most imprudent in maintaining the house without planning permission, that the measure sought by the planning inspector was reasonable and that, consequently, that ground of appeal was inadmissible.

37. The house was demolished in July 2004 pursuant to an enforcement order. According to an expert, the value of the house at the material time was EUR 62,635. The demolition costs amounted to EUR 3,025.

II. RELEVANT DOMESTIC LAW AND PRACTICE

38. The Flemish town and country planning decree of 18 May 1999 (which came into force on 1 October 1999) provides as follows.

“Article 107

The Flemish Government shall determine the conditions that must be met by an application in order to be considered complete. Where the application concerns works,

operations or modifications as referred to in Article 158, the contractor shall mention specifically which works, operations or modifications have been carried out, made or continued without permission and for which of these works, operations or modifications planning permission is being sought.

The Flemish Government may allow joint applications for permission to be made to the local authority under this decree and under the decree of 28 June 1985 concerning environmental permits. The Flemish Government may determine the conditions and procedures for compiling the application file.

...

CHAPTER I. – Criminal provisions

Section 1. – Penalties

Article 146

Anyone who

1. carries out, continues or maintains the operations, works or modifications defined in Articles 99 and 101, either without advance permission or in contravention of that permission, or after the expiry, cancellation or lapse of the term of that permission, or where that permission has been suspended

...

shall be liable, on conviction, to a prison sentence of between eight days and five years and a fine of between (EUR 26) and (EUR 400,000) or either of these penalties.

Article 147

All the provisions of Book 1 of the Criminal Code, including Chapter VII and Article 85, shall apply to the offences referred to in Article 146.

Section 2. – Inspection

Article 148

Without prejudice to the powers of senior police officers and their assistants [*agents et officiers de police judiciaire*], the planning inspectors, the other civil servants appointed by the Flemish Government, and the civil servants of the province and the municipalities of the province appointed by the governor thereof shall be authorised to detect the offences defined in this part and to place them on record. The reports establishing the offences described in this part shall remain valid until any evidence to the contrary is produced.

The senior police officers, their assistants and the civil servants referred to in the first paragraph shall have access to the work site and to the buildings in order to carry out any inspections and draw up any observations as may be necessary.

...

Section 3. – Remedial measures

Article 149

§ 1. In addition to the penalty, and upon the request of the planning inspector or the municipal council of the municipality on whose territory the works, operations or modifications referred to in Article 146 have been carried out, the court shall order that the site be restored to its original condition or that the illegal use cease and/or the execution of any construction or adaptation works and/or payment of a fine equal to the capital gain accrued on the property subsequent to the offence.

The capital gain can no longer be claimed in the following cases:

1. in the event of repetition of an offence that has been made punishable by this decree;
2. in the event of failure to comply with a cessation order;
3. where the offence causes unacceptable planning-related nuisance for neighbours;
4. where the offence constitutes a serious breach of the essential planning requirements for intended use under a spatial development or land-use plan.

The Flemish Government may determine other conditions and procedures in cases in which the capital gain cannot be claimed.

Where the action brought by the planning inspector and that brought by the municipal council do not coincide, the action brought by the first-mentioned shall take priority.

For execution of the remedial measures, the court shall set a time-limit of a maximum of one year and, upon expiry thereof, at the request of the planning inspector or the municipal council, a fine per day's delay in implementing the remedial measure.

§ 2. An action for remedial measures shall be lodged with the prosecutor's office by ordinary letter, on behalf of the Flemish region or the municipal council, by the planning inspectors and officials of the municipal council.

§ 3. Where the action involves an application for construction or adaptation works and/or payment of an amount equal to the capital gain, explicit reasons must be given for that action in terms of town and country planning, compatibility with the immediate environment and the seriousness of the offence.

§ 4. The application shall mention at least the relevant requirements and give a description of the situation prior to the offence. A recent extract from the planning register shall accompany the application.

The Flemish Government may establish additional conditions which must be met by the letter referred to in § 2, first sub-paragraph, and the file accompanying that letter.

§ 5. The court shall determine the amount of the capital gain.

Where the offender is ordered to pay an amount equal to the capital gain, he or she may validly discharge his or her obligations by restoring the site to its original condition or by ceasing the adverse use in the year following the judgment.

The Flemish Government shall determine the method for calculating the amount to be claimed and payment of the capital gain.

Article 150

Where an action for remedial measures brought by the civil party on the one hand and the planning inspector or the municipal council on the other do not coincide, the court shall determine the necessary remedial measure that it deems appropriate.

Article 151

The planning inspector and the municipal council may also, before the court of first instance, sitting as a civil court, in the jurisdiction in which the works, operations or modifications referred to in Article 146 are wholly or partially carried out, apply for remedial measures as defined in Article 149 § 1. The provisions of Article 149 § 1, second sub-paragraph, §§ 3, 4 and 5 and Article 150 shall also apply.

Section 4. – Execution of the judgment

Article 152

The offender shall immediately inform the planning inspector and the municipal council, by registered mail or by delivery against receipt, when the reparation measure imposed has been voluntarily carried out. Following a site inspection, the planning inspector shall immediately draw up a report of his findings.

The planning inspector shall send a copy of the report of his findings to the municipal authority and to the offender.

Unless there is any evidence to the contrary, the report of findings alone shall constitute evidence that the remedial measure has been performed and of the date thereof.

Article 153

Where the site is not restored to its original condition, adverse use is not ceased or construction or adaptation works are not carried out within the time-limit set by the

court, the decision of the court referred to in Articles 149 and 151 shall order that the planning inspector, the municipal council and, as the case may be, the civil party may proceed to enforce the judgment themselves.

The authority or individual enforcing the judgment or order shall be authorised to sell, transport and remove the materials and objects generated by the restoration of the site to its original condition or the cessation of adverse use.

Any offender still in default shall be bound to indemnify all enforcement costs, less the proceeds from the sale of the materials and items, upon presentation of a statement, issued by the authority referred to in sub-paragraph two, or budgeted and declared enforceable by the civil court judge dealing with attachment of property.

...

Article 158

Where the offence referred to in Article 146 does not consist of the carrying out of works or the conduct or continuation of operations or modifications that are in contravention of spatial development or land-use plans or execution of the rules laid down by virtue of this decree or the requirements of a permit to divide into plots, and where either planning permission is subsequently obtained with a view to such works, operations and modifications, or the site is restored to its original condition and the adverse use is terminated, the planning inspector may reach a settlement with the offender provided that he has paid the amount agreed in settlement within the time-limit set by the planning inspector.

The planning inspector shall not propose a settlement until he has received the prior written agreement of the public prosecutor.

Payment of the amount agreed in settlement brings an end to the criminal proceedings and the right of the authorities to claim compensation."

39. By a judgment of 3 June 2005, the Court of Cassation reiterated in the following terms the scope of the powers of control of the courts and tribunals where an application is brought before them based on Article 149 of the decree of 18 May 1999:

"Article 149 § 1, first sub-paragraph, as amended, of the decree must be read in the context of Article 159 of the Constitution, according to which the courts and tribunals do not apply administrative measures which are not in conformity with the law; ... According to that last provision, it is a matter for the court to assess the formal and substantive legality of the application referred to in Article 149 as amended and to ascertain whether it is in conformity with the law or whether it is founded on an abuse or misuse of powers; ... More particularly, the court must ascertain whether the authority's decision to seek a particular remedial measure has been taken for the sole purpose of proper town and country planning; ... If it appears that the application is founded on grounds that are unrelated to town and country planning or a clearly unreasonable view of proper town and country planning, the court shall not allow the application; ... It is not a matter for the court, however, to assess the appropriateness of the measure sought; the court must allow the remedial measure sought if it is in conformity with the law."

40. On 13 September 2005 the Court of Cassation held in another judgment that “the court must order the site to be restored to its original condition whenever that proves necessary for the purposes of eradicating the consequences of the offence”.

41. Article 12 of the royal decree of 28 December 1972 concerning the design and implementation of draft regional plans and regional plans defines forested areas as follows:

“Forested areas are areas that are wooded or that are to be planted for the purposes of commercial exploitation. They may incorporate buildings that are necessary for such exploitation and for monitoring the timber, as well as hunting and fishing shelters, provided that the latter cannot be used as a residence, even on a temporary basis. Reconversion into an agricultural zone shall be allowed in accordance with the provisions of Article 35 of the Rural Code relating to the demarcation of agricultural and forested zones.”

42. Section 65 of the Town and Country Planning Act of 29 March 1962 provides:

“1. In addition to the penalty, the court shall order, at the request of the delegated civil servant or the municipal council, but with their mutual agreement in the cases referred to in (b) and (c),

(a) either restoration of the site to its original condition

(b) or landscaping or development works

(c) or payment of an amount representing the capital gain accrued on the property subsequent to the offence;

...”

43. By a judgment of 26 November 2003 (no. 154/2003), the Administrative Jurisdiction and Procedure Court (*Cour d'arbitrage*) considered that, although of a civil nature, a remedial measure is a matter of public policy and is, in certain respects, an ancillary penalty which cannot be dissociated from the criminal penalty; in fact, this measure is an extension of the criminal penalty because it is intended – beyond the criminal conviction – to prevent the continuation of a situation perpetuating the offence. The case-law of the Court of Cassation conflicts with that (judgments of 8 September 1998 and 16 January 2003).

44. The Law of 17 April 1878 contains the preliminary part of the Code of Criminal Procedure. A new section 21 *ter*, which came into force on 12 December 2000, is worded as follows:

“If the length of the criminal proceedings should exceed a reasonable time, the judge may make a simple finding of guilt or impose a penalty lower than the minimum penalty provided for by law.

If the judge makes a simple finding of guilt, the guilty party shall be ordered to pay costs and, as appropriate, to perform restitution. A special confiscation order shall be made.”

45. In relation to the prosecution of town and country planning offences, the Government have produced statistics covering the years 1998-2003. For the Flemish region alone, these statistics establish that, on average, 2,580 reports are drawn up every year and that 251 judgments ordering restoration were issued in 1998 (out of 453 decisions), 141 in 1999 (out of 329), 183 in 2000 (out of 328), 105 in 2001 (out of 193), 76 in 2002 (out of 129) and 131 in 2003 (out of 264).

THE LAW

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

46. The applicant complained that the reasonable time had been exceeded. She pointed out that even though the house had been built in 1967 at the latest, that she had inherited it in 1993 and that the report recording the offence had been drawn up in 1994, she had not been convicted until 2002. She considered that, once the Court of Appeal had found that the reasonable period had been exceeded in the instant case, it should have concluded that the criminal proceedings were time-barred. She submitted further that the order to restore the site to its original condition and to pay the costs of the proceedings was inconsistent with a mere finding of guilt against her. She relied on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time, by [a] ... tribunal ...”

47. According to the Government, the restoration of the site to its original condition did not constitute a penalty but a measure to remedy the damage done to the environment, since it could be ordered both by the criminal and the civil courts in accordance with Article 151 of the decree of 18 May 1999. It did not involve penalising the owner of the site maintained, but rather preventing the continuation of an offence. The measure was fully justified in order to protect the public interest and to remedy environmental damage. The strictly remedial scope of an order to demolish an unlawful building had moreover been confirmed by the case-law of the Court itself, notably in *Saliba v. Malta* (no. 4521/02, 8 November 2005). It was a civil measure, not a criminal penalty.

48. The Government contended that a mere finding of guilt without any penalty constituted, having regard to the Court’s case-law, an acceptable

consequence of the finding that the reasonable time had been exceeded. Reparation of loss incurred as a result of the time-limit having been exceeded could not preclude reparation of the loss arising, for the general interest, out of acts constituting an offence.

49. The Government considered that the length of the proceedings had no bearing on the lawfulness of a building under the town and country planning requirements laid down in the general interest. The applicant had been prosecuted for maintaining an unlawful building, which constituted a continuing offence not subject to limitation. For such time as the offence continued without the building being demolished, the remedial measure could not be excluded by way of compensation for loss incurred as a result of the reasonable time having been exceeded. It should also be pointed out that even if the domestic court had, by way of a penalty for exceeding the reasonable time, declared the proceedings inadmissible, there would have been nothing to prevent the planning inspector or the municipal council from applying for demolition in the civil courts.

50. The applicant challenged that argument. She claimed that the Belgian courts had acknowledged that the reasonable time had been exceeded but that this overrunning had not been sufficiently compensated by that finding in so far as she had been ordered to demolish her holiday home on pain of a fine. She explained that, being in no doubt as to the lawfulness of the building, she had incurred considerable renovation costs and had been obliged to pay substantial sums of money to ensure that the site was restored to its original condition. Having regard to the criminal nature of the principal offence and to the seriousness of the measure imposed for the offender, the impugned measure did in fact constitute a penalty. The applicant considered furthermore that the judgment was contradictory in so far as it made a mere finding of guilt as regards the offence of maintaining an unlawful building, yet also ordered her to restore the site to its original condition. The measure was not a remedial one because in this particular case no damage had been done to the landscape since the house was not visible and the authorities had tolerated the building for more than thirty years.

51. The Court considers it necessary in the first place to single out the following facts for particular consideration.

52. As regards the offence of maintaining a building erected without planning permission, the Court of Appeal, bearing in mind that the reasonable time under Article 6 of the Convention had been exceeded, made a mere finding of guilt against the applicant under Article 21 *ter* of the Code of Criminal Procedure. According to that provision, the court may, if the reasonable time has been exceeded, make a simple finding of guilt or impose a penalty lower than the minimum penalty provided for by law.

53. In addition, the Court of Appeal ordered the applicant to restore the site to its former condition and accordingly to demolish the impugned building.

54. This “remedial measure”, consisting of restoring the site to its original condition, is provided for in Article 149 of the decree of 18 May 1999 (see paragraph 38 above), which stipulates that in addition to the “penalty” the criminal court shall order the site to be restored to its original condition upon an application by the planning inspector. The court is not empowered to take the initiative in this regard (it cannot therefore order the measure of its own motion); it can review the lawfulness of the measure but not the appropriateness. Furthermore, the measure may only be ordered as a result of a contravention of planning law and is therefore dependent on the outcome of the criminal proceedings.

55. In the instant case, although the Court of Appeal had held that the reasonable time within the meaning of Article 6 of the Convention had been exceeded, it drew no conclusion from that as regards the remedial measure for which the competent planning inspector had applied to the public prosecutor in June 1995, and ordered the demolition of the house in issue.

56. The Government alleged that there was no provision in Article 21 *ter* of the Code of Criminal Procedure for the “remedial measure”, which was of a strictly civil nature and was not dependent upon the outcome of criminal proceedings in the event that the reasonable time was exceeded.

57. The Court notes that, even assuming that the measure falls under the civil head of Article 6, it is nonetheless subject to the reasonable-time requirement. It notes further that the classification of the remedial measure in domestic law is the subject of conflicting legal theory and case-law (see, in particular, the judgments of the Court of Cassation of 8 September 1998 and 16 January 2003, according to which it is not a penalty but a civil measure, and the ruling of the Administrative Jurisdiction and Procedure Court of 26 November 2003, according to which, although civil, the measure cannot be dissociated from the criminal proceedings – paragraph 43 above). In the present case the planning inspector’s application arose out of criminal proceedings brought against and having very serious consequences for the applicant.

58. In its decision on admissibility of 11 May 2006, the Court concluded, having regard to the fact that the reasonable time had been exceeded, that the fact that the Court of Appeal had merely pronounced a finding of guilt against the applicant did not deprive the applicant of her status as victim because she had simultaneously been ordered to restore the site to its original condition.

59. The Court reiterates that the concept of a “criminal charge” within the meaning of Article 6 is an autonomous one. In earlier case-law, the Court has established that there are three criteria to be taken into account when it is being decided whether a person was “charged with a criminal

offence” for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence, and the degree of severity of the penalty that the person concerned risked incurring (see, among other authorities, *A.P., M.P. and T.P. v. Switzerland*, 29 August 1997, § 39, *Reports of Judgments and Decisions* 1997-V).

60. Having regard to the foregoing considerations, the Court considers that the demolition measure can be regarded as a “penalty” for the purposes of the Convention.

61. Although the length of the proceedings on the merits (a little over three and a half years for three levels of jurisdiction between May 1999 and January 2003) does not in itself appear to be unreasonable, the police report recording the unlawful nature of the building dates from February 1994. It is on the basis of that finding that the continuing offence consisting of maintaining a building erected without planning permission was established and the applicant was subject to criminal proceedings and thus charged within the meaning of the case-law. Therefore, the reasonable time commenced as of the date of that report (see *Hozee v. the Netherlands*, 22 May 1998, § 43, *Reports* 1998-III, and *Włoch v. Poland*, no. 27785/95, § 144, ECHR 2000-XI). Considered as a whole, the proceedings therefore lasted between eight and nine years for three levels of jurisdiction, including more than five years at the investigation stage, which, however, was not particularly complex.

62. Furthermore, the Court sees no evidence to show that at any stage of the proceedings the applicant hindered the smooth running of the investigation. In these circumstances, the Court cannot deem a period of more than five years merely for the investigation phase to be reasonable.

63. There has therefore been a violation of Article 6 § 1 of the Convention.

...

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

71. The applicant complained of a violation of her property rights guaranteed by Article 1 of Protocol No. 1:

“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.”

72. According to the Government, the local authorities do not inspect all inheritance deeds or monitor all tax returns or requests to be connected to the water-supply system for the purposes of checking whether the buildings in question had planning permission. Moreover, to make buildings erected without planning permission immune from taxation would be tantamount to encouraging this kind of offence. The water-supply companies were not empowered to check the lawfulness of the buildings that they connected to their network. Furthermore, the registration information provided by the applicant dated back to 1993-94, the time when the first record of offence was drawn up. The building ban covering the applicant's land in no way constituted expropriation since she retained her full property rights. In addition, the States Parties were able to control the use of property for reasons of town and country planning affecting the general interest, and equip themselves with effective tools to ensure the pertinence of any measures thus adopted. Such tools included demolition and the restoration to their original condition of sites on which buildings had been erected in breach of legislation requiring planning permission. It had to be borne in mind that the applicant's house could not be rendered compliant as it had been built in a forested area in which no building was allowed. Admittedly, the applicant had received no compensation in this particular case but it was in full knowledge of the facts that her father had built the house in an area in which no building was permitted. Unlike the case of *Öneryıldız v. Turkey* ([GC], no. 48939/99, ECHR 2004-XII), there was no uncertainty in Belgian law as to the legal status of the house in issue. Furthermore, the Belgian State could not be accused of negligence. In the instant case, the applicant's situation had not been the subject of any disclosure that could have led to any assumption of tolerance on the part of the authorities.

73. The Government indicated that the aim of the interference arising out of a demolition order made on the basis of town and country planning legislation was to protect the environment. That was a legitimate aim, in accordance with the general interest for the purposes of the second paragraph of Article 1 of Protocol No. 1, as the Court had already affirmed in *Pine Valley Developments Ltd and Others v. Ireland* (29 November 1991, § 57, Series A no. 222). The applicant could not claim any legitimate expectation on the basis of the age of the building. She had inherited a property which was in contravention of the law and had immediately carried out acts which themselves required planning permission, without making any attempt to apply for that permission or to ascertain whether or not the building could be made compliant. She could not therefore claim any tolerance on the part of third parties that had prejudiced her own rights. The measure complained of was therefore in no way disproportionate.

74. According to the applicant, the Belgian authorities had to be deemed to have been aware of the existence of the building, notably because between 1994 and 2005 she had paid second-residence tax on it in addition

to property tax and because various documents referring to the building had been registered. The Government, which had taken no action in relation to this house for over thirty years, could not rely on their poor organisation. The general interest required coherent, clear and rapid action on the part of the authorities. The circumstances of the case demonstrated that they had waived their right to take action in the instant case. Accordingly, it must be held that they could not suddenly go back on their decision without breaching the principle of the legitimate expectations of citizens. The enforced demolition had therefore constituted a disproportionate interference with the applicant's property rights.

75. The Court reiterates its case-law according to which the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Zwierzynski v. Poland*, no. 34049/96, § 63, ECHR 2001-VI). Certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II, and *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I). "Possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right (see, for example, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII, and *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII).

76. In the instant case, the impugned building had been in existence for twenty-seven years before the domestic authorities recorded the offence. Recording breaches of the town and country planning legislation and allocating the necessary resources to do so is undeniably the responsibility of the authorities. The authorities could even be considered to have been aware of the existence of the building in issue since the applicant had paid taxes on the building, just as her father had done before her. In this regard, the Belgian State cannot properly rely on its internal organisation and a distinction between the town and country planning authorities and the tax authorities. It must therefore be considered that the authorities tolerated the situation for twenty-seven years (1967-94) and continued to tolerate it for ten years after the offence had been established (1994-2004, the year in which the house was demolished). After such a long period had elapsed, the applicant's proprietary interest in the enjoyment of her holiday home had been sufficiently established and weighty to amount to a substantive interest and therefore a "possession" within the meaning of the rule expressed in

Article 1 of Protocol No. 1. Furthermore, the applicant had a “legitimate expectation” of being able to continue to enjoy that possession.

77. The Court observes that the applicant’s house was demolished on the orders of the domestic authorities. This was undeniably an interference with the applicant’s “possession”. That interference was in accordance with the law (the decree of 18 May 1999). It was also intended to control the use of property in accordance with the general interest since it involved bringing the property into conformity with a land-use plan establishing a forested zone in which no building was permitted. The debate therefore centres on the proportionality of this interference. In this regard, the Court must ascertain whether a fair balance was struck between the demands of the general interest and the requirements of the protection of the individual’s fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). The requisite balance will be upset if the person concerned has had to bear “an individual and excessive burden” (see, in particular, *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98).

78. The Court notes that this case concerns rules applicable to town and country planning and environmental protection, areas in which the States enjoy a wide margin of appreciation.

79. It reiterates that while none of the Articles of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI), in today’s society the protection of the environment is an increasingly important consideration (see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 48, Series A no. 192). The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.

80. Thus, restrictions on property rights may be allowed on condition, naturally, that a fair balance is maintained between the individual and collective interests concerned (see, *mutatis mutandis*, *Fotopoulou v. Greece*, no. 66725/01, 18 November 2004).

81. The Court therefore has no doubt as to the legitimacy of the aim pursued by the impugned measure: the protection of a forested area in which no building is permitted.

82. It remains to be determined whether the benefit for proper town and country planning and protection of the forested area in which the applicant's house was located can be considered proportionate to the inconvenience caused to her. In this regard, various factors must be taken into consideration.

83. Firstly, the Court notes that a great deal of time had elapsed since the offence occurred. The applicant, and her father before her, had had peaceful and uninterrupted enjoyment of the holiday home for a total of thirty-seven years. The deed of partition drawn up on 6 January 1986 between the applicant and her father had been registered with the Mortgage Registrar at the Ministry of Finance and a registration fee had been paid (see paragraph 8 above). On the death of the applicant's father in 1993, the notarised deed of distribution specifically referred to the house as a holiday home and the applicant paid the inheritance tax. Since then, the applicant had been paying an annual property tax and second-residence tax on the house (see paragraph 9 above). The water-supply company carried out works to connect the house to the water and drainage system with no reaction from the authorities (see paragraph 11 above). Furthermore, when the offence was established, after twenty-seven years, the authorities then allowed a further five years to elapse before instituting criminal proceedings, thus treating the matter with no particular urgency. It is therefore clear that the authorities knew or should have known of the existence of the applicant's house for a long time. However, notwithstanding the provisions of the relevant legislation, they failed to take the appropriate action to ensure compliance. They thus contributed to the continuation of a situation which could only be detrimental to the protection of the forested area which that legislation sought to protect.

84. The Court observes, secondly, that Articles 107 and 158 of the decree of 18 May 1999, taken together, make general provision for an application to be made to render compliant a building without planning permission. However, the provisions of Article 158 clearly indicate that a building erected in contravention of a land-use plan (see paragraph 38 above) cannot be rendered compliant. The applicant's house was located in a forested area and, under Article 12 of the royal decree of 28 December 1972, that area could incorporate only buildings necessary for the exploitation and monitoring of the timber, as well as hunting and fishing shelters, provided that the latter could not be used as a residence, even on a temporary basis (see paragraph 41 above).

85. In addition, the fact that the applicant had not been the owner of the property when the house was built and that the authorities had failed to react for a protracted period of time could not give the applicant the impression

that proceedings could not be brought against her, since under Belgian law the offence was not subject to limitation and the public prosecutor could decide to apply the law at any time.

86. Lastly, the Court cannot see what measure other than restoration of the site could have been sought by the planning inspector in this particular case, particularly as none of the measures set out in Article 149 § 1 of the decree of 18 May 1999 (order to cease all adverse use, order to carry out building works, payment of the capital gain acquired by the property subsequent to the contravention – see paragraph 38 above) appeared appropriate in the particular circumstances of the case, which concerned an undeniable interference with the integrity of a forested area in which no building was permitted.

87. As a secondary consideration, the Court distinguishes this case from the “Turkish coast” cases (see, among many others, *N.A. and Others v. Turkey*, no. 37451/97, ECHR 2005-X). In those cases, the applicants’ property had been registered in the land register and the parties concerned had obtained from the Ministry of Culture and Tourism a tourist-investment certificate with a view to building a hotel on the land, and the State Planning Agency had awarded them an investment-incentive certificate with a view to building the hotel. Those cases did not therefore involve the merely implicit consent of the authorities, as in the instant case, where the house in issue had been erected without permission by the applicant’s parents.

88. All the above leads the Court to conclude that the applicant has not suffered disproportionate interference with her property rights.

89. Accordingly, there has been no violation of Article 1 of Protocol No. 1.

...

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Under Article 41 of the Convention,

“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

95. The applicant submitted that she had incurred considerable pecuniary damage. Since the property in issue had been in existence for twenty-seven years without having been subject to any measures, she had undertaken restoration of the land and house in good faith and invested considerably in it. When she had inherited the house from her father, it had

been in poor condition; she had decided to renovate it, being in no doubt as to its lawfulness. She had thus incurred damage of 62,635 euros (EUR) for the loss of the house, EUR 43,865.46 for the investments made and EUR 3,025 for the demolition costs.

96. The applicant considered that she had also suffered non-pecuniary damage, which she quantified *ex aequo et bono* at EUR 25,000. Firstly, she had been deprived of the holidays and periods of rest that she used to take at her second home. Furthermore, since it was the only thing that she had inherited from her father, in her view the house had been of particular value.

97. The Government considered that the amount indicated by the applicant as representing the market value of her property was unrealistic. In their view, the house was worthless on the property market. Articles 141 and 142 of the decree of 18 May 1999 imposed an obligation, upon the sale of any immovable property, to inform the buyer of the existence of planning permission. Since she would have been unable to produce evidence of such permission, the applicant would not have been able to find a buyer. Her house had not thus added any value to the land, of which, moreover, she had not been dispossessed. Her claim in respect of pecuniary damage should therefore be dismissed.

98. The Government left the matter of non-pecuniary damage to the Court's discretion.

99. The Court points out that the violation found relates to the fact that the reasonable time was exceeded. It does not however see any causal link between that violation and the alleged pecuniary damage. It therefore dismisses this head of the claim.

100. As to non-pecuniary damage, the Court considers that the unreasonable length of the investigation in issue caused prolonged uncertainty as to the fate of the house. This situation of uncertainty justifies an award of compensation. Ruling on an equitable basis, as required by Article 41, the Court awards the applicant EUR 5,000 for the non-pecuniary damage thus incurred.

...

C. Default interest

105. 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. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

...

3. *Holds* that there has been no violation of Article 1 of Protocol No. 1;

...

5. *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, the following amounts:

(i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

...

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 27 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

András Baka
President