



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

THIRD SECTION

CASE OF REICHARDT v. ROMANIA

(Application no. 6111/04)

JUDGMENT

STRASBOURG

13 November 2008

FINAL

13/02/2009

This judgment may be subject to editorial revision.

In the case of Reichardt v. Romania,

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

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Corneliu Bîrsan,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 21 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 6111/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two German nationals, Mr Johan Reichardt and Mrs Gabriela Smaranda Reichardt (“the applicants”), on 12 January 2004.

The second applicant, the wife of the first applicant, died on 13 February 2005. For practical reasons, Mrs Gabriela Smaranda Reichardt will also continue to be referred to as an “applicant” in this judgment, although Mr Johan Reichardt is now to be regarded as the applicant (see *Dalban v. Romania* [GC], no. 28114/95, § 1, ECHR 1999-VI).

2. The applicants were represented by their only son, Mr Alexandre Reichardt. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu. The German Government did not make use of their right to intervene (Article 36 § 1 of the Convention).

3. On 27 February 2006 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant was born in 1925 and lives in Aachen (Germany). The second applicant was born in 1929 and died in 2005.

5. On 31 March 1976 the applicants' property, comprising flat no. 1 and appurtenant land situated in Bucharest, Intrarea Traian Demetrescu no. 14, was seized by the State under Decree no. 223/1974, following their decision to leave the country. No compensation was paid. No copy of the decision to seize the property was sent to the applicants.

6. On 18 December 1996 company T., a State-owned company responsible for the management of property belonging to the State, sold the flat to the then tenant, T.T., under Law no. 112/1995.

7. On 3 May 2001 the applicants brought court proceedings for *restitutio in integrum* and seeking to have the sale by the State declared null and void.

8. On 24 August 2001 the applicants lodged an application with the administrative authorities for restitution in kind of the property under Law no. 10/2001 governing immovable property wrongfully seized by the State. So far they have not received any answer.

9. On 11 October 2002 the Bucharest Court of First Instance allowed the applicants' action in part. In the operative part of the judgment it held, *inter alia*, that there were no grounds for rescission of the sale by the State, but ordered T.T. to allow the applicants to take possession of the flat and the appurtenant land. The court compared the property titles, finding that the seizure had been unlawful but that T.T. had made the purchase in good faith.

10. On 19 March 2003 the Bucharest Regional Court allowed an appeal by T.T. and by company T. and, in the operative part of the judgment, varied the judgment of the first-instance court by dismissing the applicants' action for recovery of the property. In its reasoning, the court considered that the first-instance court had been requested by the applicants to assess whether the seizure was null and void because they had not been sent a copy of the seizure decision, and that therefore the lower court should not have analysed the lawfulness of the seizure of its own motion. The Regional Court also considered that the failure to inform the applicants of the seizure did not affect its validity and that the applicants had no valid property title.

11. On 25 June 2003 the Bucharest Court of Appeal, in the operative part of a final decision, dismissed as groundless an appeal on points of law by the applicants. In the reasoning of the judgment the court considered that although some of the applicants' criticisms were well-founded, in particular regarding the misinterpretation of the law by the Regional Court when it

found that the Court of First Instance had exceeded the limits of the request made by the applicants, those criticisms did not constitute grounds for amending the previous judgment in accordance with Article 304 § 9 of the Code of Civil Procedure, but only for removing its reasoning. Therefore, in the reasoning part of its decision, the Court of Appeal considered, in line with the findings of the first-instance court, that the State had no valid title and that therefore the applicants had never lost their right of property. However, the court reasoned that as the applicants had not contested T.T.'s good faith in their appeal, the Regional Court had correctly dismissed their claim for recovery of the property.

II. RELEVANT DOMESTIC LAW

12. The relevant legal provisions and jurisprudence are set forth in the judgments *Brumărescu v. Romania* ([GC], no. 28342/95, §§ 31-33, ECHR 1999-VII); *Străin and Others v. Romania* (no. 57001/00, §§ 19-26, ECHR 2005-VII); *Păduraru v. Romania* (no. 63252/00, §§ 38-53, ECHR 2005-XII (extracts)); and *Tudor v. Romania* (no. 29035/05, §§ 15-20, 17 January 2008).

THE LAW

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

13. The applicants alleged that the sale by the State of their property to a third party entailed a breach of Article 1 of Protocol No. 1, which reads as follows:

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

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

A. Admissibility

14. The Government raised an objection of incompatibility *ratione materiae* in respect of this complaint. They considered that the applicants had not had the benefit of an irrevocable decision recognising their right of property. The Government submitted that in Romanian law the principle of *res judicata* applied only to the operative part of a judgment, which was also enforceable, but not to the reasoning part. Therefore the judgment of 25 June 2003 did not represent a “possession” within the meaning of Article 1 of Protocol No. 1, because its operative part merely dismissed the applicants’ appeal on points of law and because the reasoning part, in which the court admitted that the State had no valid title, did not have the status of *res judicata*.

15. The Government also considered that the applicants had no legitimate expectation because, unlike in the cases of *Străin and Others* (cited above, § 38) and *Porteanu v. Romania* (no. 4596/03, § 33, 16 February 2006), they did not have the benefit of an irrevocable decision acknowledging that the seizure had been unlawful. They stressed that the Court of Appeal had not settled the issue of the lawfulness of the seizure in an irrevocable manner in the operative part of the judgment of 25 June 2003.

16. The applicants did not express an opinion on the matter.

17. The Court reiterates that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his “possessions” within the meaning of this provision. According to the established case-law of the Convention organs, “possessions” can be “existing possessions” or assets, including claims, in respect of which the applicant can argue that he has at least a “legitimate expectation” of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a “possession” within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82 and 83, ECHR 2001-VIII).

18. In the present case the Court notes that the applicants brought an action for recovery of possession of immovable property, requesting the court to declare the sale by the State null and void and to order its return to them. In its final decision of 25 June 2003, the Bucharest Court of Appeal established that the State had no valid title and that therefore the applicants had never lost their right of property. Nevertheless, the Court of Appeal refused to order the return of the property, considering that the former tenant had made the purchase in good faith.

19. The Government's argument is that the reasoning and the operative parts of a judgment do not have the same binding effect. The Court reiterates that, generally speaking, the reasons do not have the same binding effect as the operative part unless they form its essential underpinning (see *Perez v. France* [GC], no. 47287/99, § 25 *in fine*, ECHR 2004-I). Accordingly, the obligation to enforce a court decision is not limited to its operative part, as its merits must simultaneously be respected and applied (see *Zazanis and Others v. Greece*, no. 68138/01, § 36, 18 November 2004). The Court in its settled case-law on matters similar to that in the present case has examined whether the unlawfulness of the nationalisation in question has been acknowledged in a final decision, either in its reasoning or in its operative part. Moreover, neither in *Străin and Others* nor in *Porteanu*, to which the Government referred, did the Court make any distinction as regards the part of the final decision in which the lawfulness of the seizure had been considered.

20. In the Court's opinion, the fact that the nationalisation of the applicants' property was unlawful and that they never lost their right of property was clearly established in a final decision which has not been quashed or challenged to date. In this connection, the Court observes that the Court of Appeal in its final decision considered it necessary to change the reasoning of the lower court to include the fact that the seizure had been unlawful (see paragraph 11 above). That reasoning formed the *ratio decidendi* for the court's final decision, not merely an expression of an opinion, and was thus manifestly indissociable from the judgment's operative provisions and had the same binding effect as the operative provisions themselves. The Court therefore considers that the applicants had a "possession" within the meaning of Article 1 of Protocol No. 1 and dismisses the Government's objection.

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

B. Merits

22. The Government reiterated the arguments they had previously submitted in similar cases.

23. The applicants disagreed.

24. The Court reiterates that, according to its case-law, the sale of another's possessions by the State, even before the question of ownership has been finally settled by the courts, amounts to a deprivation of possessions. This deprivation, in combination with the total lack of compensation, is contrary to Article 1 of Protocol No. 1 (see *Străin and Others*, cited above, §§ 39, 43 and 59, and *Porteanu*, cited above, § 35).

25. Having examined all the material in its possession, 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. The sale by the State of the applicants' possession still prevents them from enjoying their right of property acknowledged by a final decision. The Court considers that such a situation amounts to a *de facto* deprivation of possessions and notes that it has continued for more than five years, in the absence of any compensation.

26. The Court notes that at the material time there was no effective means in Romanian law capable of providing the applicants with compensation for this deprivation (see *Străin and Others*, cited above, §§ 23, 26-27 and 55-56, and *Porteanu*, cited above, §§ 23-24 and 34-35). Moreover, it observes that to date the Government have not demonstrated that the system of compensation set up in July 2005 by Law no. 247/2005 would allow the beneficiaries of this law to recover damage reflecting the commercial value of the possessions of which they were deprived, in accordance with a foreseeable procedure and timetable.

27. Having regard to its case-law on the subject, the Court considers that in the instant case the deprivation of the applicants' possession, together with the total lack of compensation, imposed on the applicants a disproportionate and excessive burden in breach of their right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1.

There has accordingly been a violation of Article 1 of Protocol No. 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

28. The applicants complained under Article 6 § 1 that the outcome of the proceedings had been unfair and that the domestic courts had failed to assess the facts correctly and had misinterpreted the domestic law.

29. The Court observes that the allegations of abuse of process by the authorities are unsubstantiated, while the complaint regarding the outcome of the proceedings is of a "fourth-instance" nature. Moreover, the Court considers that in the proceedings complained of, seen as a whole, there is no appearance of unfairness or arbitrariness which would infringe the guarantees of a fair hearing within the meaning of Article 6 § 1 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicants sought restitution in kind of the property, as the most appropriate manner for the State to provide redress. They considered that the current value of the property amounted to a minimum of 300,000 euros (EUR). They also claimed EUR 300,000 in respect of non-pecuniary damage.

32. The Government considered, in line with their own expert report based on a theoretical assessment of the value, that the current value of the property was EUR 61,478. Further, they considered that the finding of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage which the applicants might have suffered. In any event, they considered that the amount claimed in this connection was too high.

33. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation under the Convention to put an end to the breach and make reparation for its consequences. If the internal law allows only partial reparation to be made, Article 41 of the Convention gives the Court the power to award compensation to the party injured by the act or omission that has led to the finding of a violation of the Convention. The Court enjoys a certain discretion in the exercise of that power, as the adjective “just” and the phrase “if necessary” attest.

34. Among the matters which the Court takes into account when assessing compensation are pecuniary damage, that is the loss actually suffered as a direct result of the alleged violation, and non-pecuniary damage, that is reparation for the anxiety, inconvenience and uncertainty caused by the violation, and other non-pecuniary loss (see, among other authorities, *Ernestina Zullo v. Italy*, no. 64897/01, § 25, 10 November 2004).

35. The Court considers, in the circumstances of the case, that the return of the property in issue (flat no. 1 and the appurtenant land) would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1.

36. Failing such restitution by the respondent State, the Court holds that the respondent State is to pay jointly the first applicant and the heirs of the

second applicant, in respect of pecuniary damage, an amount corresponding to the current value of the property. Having regard to the information at its disposal concerning real estate prices on the local market and to the expert report submitted by the Government, the Court estimates the current market value of the property at EUR 120,000.

37. The Court considers that the serious interference with the applicants' right to the peaceful enjoyment of their possession could not be compensated in an adequate way by the simple finding of a violation of Article 1 of Protocol No. 1. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards jointly the first applicant and the heirs of the second applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

38. The applicants did not claim costs and expenses.

C. Default interest

39. 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 Article 1 of Protocol No. 1 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds*
 - (a) that the respondent State is to return to the first applicant and to the heirs of the second applicant flat no. 1 and the appurtenant land situated in Bucharest, Intrarea Traian Demetrescu no. 14, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention;
 - (b) that, failing such restitution, the respondent State is to pay jointly the first applicant and the heirs of the second applicant, within the same three months, the amount of EUR 120,000 (one hundred and twenty thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;

- (c) that, in any event, the respondent State is to pay jointly the first applicant and the heirs of the second applicant, within the same three months, the amount of EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (d) that the aforementioned amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
- (e) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President