



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

1959 · 50 · 2009

FIRST SECTION

CASE OF TRGO v. CROATIA

(Application no. 35298/04)

JUDGMENT

STRASBOURG

11 June 2009

FINAL

11/09/2009

This judgment may be subject to editorial revision.

In the case of Trgo v. Croatia,

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

Christos Rozakis, *President*,

Nina Vajić,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 19 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 35298/04) 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 Fabjan Trgo (“the applicant”), on 11 October 2004.

2. The applicant was represented by Mr A. Nola, a lawyer practising in Makarska. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. The applicant alleged, in particular, that his right to peaceful enjoyment of his possessions had been violated because the domestic courts had refused to acknowledge his ownership that he had acquired by adverse possession.

4. On 16 January 2007 the President of the First Section decided to communicate the complaint concerning the right of property to the Government. On 4 September 2008 the Chamber 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

5. The applicant was born in 1924 and lives in Krilo Jesenice.

A. Property dispute

1. Background to the case

(a) Social ownership and its transformation

6. The legal system of the former Socialist Federal Republic of Yugoslavia (SFRY) distinguished between two types of ownership: private ownership (*privatno vlasništvo*) and social ownership (*društveno vlasništvo*). While owners of property in private ownership were private individuals (natural persons) and some private legal entities called “civil legal entities” (*građanske pravne osobe*) such as foundations, associations and religious communities, property in social ownership, according to the official doctrine, had no owner. Nevertheless, the federal State, the constituent Republics, municipalities being local government units and other various legal entities called “social legal entities” (*društvene pravne osobe*), among which the most important ones were companies, known at the time as “organisations of associated labour” (*organizacije udruženog rada*) and later on as “socially owned companies” (*društvena poduzeća*), were during the socialist period given certain quasi-ownership rights over property in social ownership, such as the right to use it (*pravo korištenja*), the right to administer it (*pravo upravljanja*) or the right to dispose of it (*pravo raspolaganja*). Private individuals could also acquire certain rights over property in social ownership. Notably, many individuals living in socially owned flats had specially protected tenancies (*stanarsko pravo*) in respect of those flats.

7. The Constitution of the Republic of Croatia of 1990 (*Ustav Republike Hrvatske*, Official Gazette, no. 56/1990 with subsequent amendments) acknowledged only one type of ownership: private ownership. Therefore, in order to bring the country’s legal system in conformity with its Constitution, in the period between 1991 and 1997 the Croatian Parliament adopted several legislative acts with a view to transforming social ownership into private ownership.

8. In particular, the Specially Protected Tenancies (Sale to Occupier) Act (*Zakon o prodaji stanova na kojima postoji stanarsko pravo*, Official Gazette no. 27/1991 with subsequent amendments – “the Sale to Occupier Act”), which entered into force on 19 June 1991, enabled the holders of specially protected tenancies to purchase their flats which were in social ownership under favourable conditions and thereby become their owners.

9. The Transformation of Socially Owned Companies Act (*Zakon o pretvorbi društvenih poduzeća*, Official Gazette no. 19/1991 with subsequent amendments), which entered into force on 1 May 1991, provided that all “socially owned companies” had to transform into commercial companies, in particular into either limited liability companies or joint stock companies.

10. On 1 January 1997 both the Ownership and Other Rights *In Rem* Act (*Zakon o vlasništvu i drugim stvarnim pravima*, Official Gazette no. 91/1996 of 28 October 1996 – “the 1996 Property Act”), and the Act on Compensation for, and Restitution of, Property Taken During the Yugoslav Communist Regime (*Zakon o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine*, Official Gazette nos. 92/1996, with subsequent amendments – “the Denationalisation Act”), entered into force. By entry into force of these two Acts the transformation of social ownership into private ownership was largely completed.

11. The 1996 Property Act provided that by its entry into force the holders of the rights to use, administer and dispose of socially owned property (see paragraph 6 above) were to become the owners of that property. As regards, in particular, commercial companies created through transformation of socially owned companies pursuant to the Transformation of Socially Owned Companies Act, the 1996 Property Act provided that those companies were already from the moment of their transformation to be considered the owners of socially owned property in respect of which they previously held the rights to use, administer and dispose of it (see section 360(1) of 1996 Property Act in paragraph 28 below).

12. The Denationalisation Act provided that in respect of certain property that had been through nationalisation or confiscation appropriated from its former owners during socialism and transferred into social ownership there was to be restitution in kind. It thereby enabled some former owners or their heirs to obtain ownership of such property which had until then been socially owned property.

(b) Acquisition of ownership of socially owned property by adverse possession

13. The legislation of the former SFRY, in particular section 29 of the Basic Property Act of 1980 (see paragraph 27 below), prohibited the acquisition of ownership of socially owned property by adverse possession (*dosjelost*).

14. When incorporating the 1980 Basic Property Act into the Croatian legal system on 8 October 1991, Parliament repealed that provision (see paragraph 27 below).

15. Subsequently, the new Property Act of 1996 provided in section 388(4) that the period prior to 8 October 1991 was to be included in calculating the period for acquisition of ownership by adverse possession of socially owned immovable property (see paragraph 28 below).

16. Following several petitions for constitutional review (*prijedlog za ocjenu ustavnosti*) submitted by the former owners of property that had been appropriated during socialism, on 8 July 1999 the Constitutional Court (*Ustavni sud Republike Hrvatske*) accepted the initiative, and decided to institute proceedings to review the constitutionality of section 388(4) of the 1996 Property Act (decision nos. U-I-58/1997, U-I-235/1997, U-I-237/1997, U-I-1053/1997 and U-I-1054/1997 of 8 July 1999, Official Gazette no. 80/1999 of 30 July 1999).

17. On 17 November 1999 the Constitutional Court abrogated section 388(4) of the 1996 Property Act (decisions nos. U-I-58/1997, U-I-235/1997, U-I-237/1997, U-I-1053/1997 and U-I-1054/1997 of 17 November 1999, Official Gazette no. 137/99 of 4 December 1999). It held that the impugned provision had retroactive effects with adverse consequences for the rights of third persons and was therefore unconstitutional.

The Constitutional Court's decision in its relevant part reads as follows:

DECISION

I.

The provisions of section ... 388 paragraph 4 of the [1996 Property Act] are hereby abrogated.

II.

...

Reasons

I.

The petitioners consider that the impugned provision tends to favour various users of property, who used it without any title, by enabling them to acquire ownership at the expense of [former] owners from whom it was taken during Communism ... They also point out that retroactive [application of the rules of] adverse possession should not be allowed.

...

The petition [for constitutional review] is well founded.

The impugned provision attributes a common quality to a certain state of facts even in respect of the period during which that quality was expressly excluded by law.

Namely, section 29 of the [1980 Basic Property Act] provided that ownership of socially owned property could not be acquired by adverse possession. That provision was repealed by section 3 of the Act on the Incorporation of the [1980 Basic Property Act] (...), as a result of which all immovable property which had been in social ownership before the adoption of the [new 1990] Constitution, regardless of its status in the transitional period, came under the general regime also as regards [the acquisition of ownership by] adverse possession.

Since, in the court's view, repealing in the particular case amounts only to abrogation *ex nunc* [ukidanje] and not to annulment *ex tunc* [poništavanje], it has to be concluded that the period of possession of the socially owned property before 8 October 1991 (the day of entry into force of the Act on the Incorporation of the [1980 Basic Property Act]) cannot be taken into account for the purposes of acquiring ownership by adverse possession ...

Namely, the possessors of the property, in respect of which the acquisition of ownership by adverse possession was expressly excluded by law, were aware that this

property was not susceptible to [acquisition of ownership by] adverse possession, which was also known to the holders of [various] rights over the same property (the right to administer, use and dispose of it), who therefore did not [have to] use relevant remedies against the risk of losing the property on account of its acquisition by its possessors through adverse possession. Therefore, in the application of the impugned provision it may happen that holders of certain property rights lose these rights, which the Constitution allows only exceptionally and with compensation.

What is more, the impugned provision makes possible the acquisition of ownership of certain property even before the time-limits for acquisition by adverse possession started to run, while [at the same time] the time-limits for acquisition by adverse possession of many types of former socially owned property are actually being extended (the property owned by the Republic of Croatia, counties and units of local self-government ...).

[For these reasons], the court finds that the impugned provision is not, in the substantive sense [substantive unconstitutionality], in conformity with the highest values [of the constitutional order] of equality, inviolability of property and the rule of law enshrined in Article 3 of the Constitution, and the guarantee of property enshrined in Article 48 paragraph 1 of the Constitution.

Furthermore, the court concludes that the impugned provision has retroactive effects, for which reason it is not in conformity with the provision of Article 90 paragraph 2 of the Constitution either.

...

..., [T]he court finds that while determining the retroactive effects of the said provision of section 388 paragraph 4 of the [1996 Property Act], the procedure prescribed by the Rules of Procedure of the Croatian Parliament was not observed.

For the court, when [in the legislative process] the legislator breaches its self-prescribed rules of procedure.... ...the legislative act adopted in such improper way, is not in accordance with ... the [principle of the] rule of law enshrined in Article 3 of the Constitution.

This further means that ... the impugned provision ... is not even in the formal sense [formal unconstitutionality] in compliance with Article 90 paragraph 2 of the Constitution.

2. Proceedings in the particular case

18. In 1997 the applicant instituted civil proceedings before the Makarska Municipal Court (*Općinski sud u Makarskoj*) against the Municipality of Podgora (*Općina Podgora*) and the State seeking a declaration of his ownership of certain plots of land and their registration in his name in the land register. The applicant claimed that the property at issue had been owned by his late uncle and confiscated in 1949 by the socialist authorities. The applicant's late mother had been in possession of the land since 1953, as the applicant had continued to be after her death on 16 February 1992. Given that the prescribed period for acquisition of ownership by adverse possession had elapsed, the applicant claimed to have acquired ownership of the land.

19. On 16 February 2001 the Municipal Court ruled for the applicant and ordered that he be recorded in the land register as the owner of the property. The court held:

“After finding that the plaintiff’s mother was a bona fide possessor of the immovable property in question, it needs to be established whether she possessed it during the statutory period necessary to acquire ownership by adverse possession.

Once section 29 of the 1991 Basic Property Act was repealed... it has become possible to acquire ownership by adverse possession of socially owned immovable property ... [Also], under section 388(4) of the 1996 Property Act, in calculating the period for the acquisition by adverse possession of immovable property which was socially owned on 8 October 1991, the period before that date has also to be taken into account.

Section 388(4) of the 1996 Property Act was abrogated by a decision of the Constitutional Court ... , which means that, in the period prior to its abrogation, that provision was in force, that is until late 1999...

In order to acquire ownership by adverse possession of State-owned immovable property, under section 159(4) of the 1996 Property Act, a period twice as long as that set out in paragraphs 2 and 3 of that section is required, which means that in respect of the land at issue a continuous undisturbed possession in good faith over a period of forty years is needed.

Having regard to the fact that ... the plaintiff was, through his mother, in continuous possession of the land in question since 1953, it has to be concluded that he acquired ownership by adverse possession ...”

20. On an appeal by both respondents, on 18 June 2004 the Split County Court (*Županijski sud u Splitu*) reversed the first-instance judgment and dismissed the applicant’s claim on the following grounds:

“It is undisputed between the parties that:

- the immovable property at issue was confiscated from the plaintiff’s legal predecessor... in 1949;
- the respondent was recorded [as owner] in the land register on the basis of the confiscation decision;
- the plaintiff and his legal predecessor have had continuous possession [thereof] since 1953...

The first-instance court erred in finding that the plaintiff had acquired ownership by adverse possession of the immovable property at issue because he and his legal predecessor had had continuous possession since 1953, on the basis of section 388(4) of the 1996 Property Act, which was subsequently abrogated by a decision of the Constitutional Court... In its decision the Constitutional Court held that the unconstitutionality of the abrogated provision existed already prior to it being abrogated, that is, since its entry into force, a conclusion that is also accepted by this court. Consequently, irrespective of the fact that section 388(4) was in force until the publication of the Constitutional Court’s decision in the Official Gazette, the [first-instance court’s] decision could not be based on an unconstitutional provision.”

21. The applicant lodged a constitutional complaint against that judgment, claiming, *inter alia*, an infringement of his property rights. On 3 March 2005 the Constitutional Court dismissed the applicant's complaint, finding that:

"During the... proceedings ... the Constitutional Court has established that [the second-instance judgment] was reached in application of the relevant provisions of substantive law, and that the legal findings of the second-instance court were well reasoned, and that therefore there has been no infringement of the complainant's ownership rights..."

B. Reopening of criminal proceedings

22. In 1994 the applicant requested the reopening of criminal proceedings which had ended in 1945 and in which his uncle had been convicted.

23. On 14 October 2003 the Split County Court declared the applicant's request inadmissible, finding that he had not been entitled to make such a request. On appeal, the Supreme Court (*Vrhovni sud Republike Hrvatske*) upheld the first-instance decision on 18 February 2004.

24. Subsequently, on 30 June 2004 the Constitutional Court declared the applicant's complaint inadmissible for lack of jurisdiction.

C. The administrative proceedings for the restitution of confiscated property

25. On 5 May 1997 the applicant applied to the competent administrative authority seeking restitution of the above plots of land that had been confiscated from his late uncle in 1949 by the socialist authorities. In doing so he relied on the Denationalisation Act. It appears that the proceedings were later on stayed and that they are formally still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitutional Court Act

26. The 1999 Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/1999 of 29 September 1999, which entered into force on 24 September 1999 – "the Constitutional Court Act"), as amended by the 2002 Amendments (*Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 29/2002 of 22 March 2002, which entered into force on 15 March 2002), in its relevant part reads as follows:

Section 53

“(1) The Constitutional Court shall abrogate [*ukinuti*] a statute or its provisions if it finds that they are incompatible with the Constitution ...

(2) Unless the Constitutional Court decides otherwise, the abrogated [*ukinuti*] statute or its provisions shall cease to have legal force on the date of publication of the Constitutional Court’s decision in the Official Gazette [i.e. *ex nunc*].

(3) ...”

Section 56

“(1) The final sentence for a criminal offence based on a statutory provision that has been abrogated as contrary to the Constitution shall cease to produce legal effects from the day of the entry into force of the Constitutional Court’s decision abrogating the statutory provision on the basis of which the sentence was delivered and may be set aside by [a petition for] reopening of criminal proceedings.

(2) Every natural or legal person who has lodged with the Constitutional Court a petition to review constitutionality of a statutory provision, or a constitutionality or legality of a provision of subordinate legislation, and whose petition has been accepted by the Constitutional Court and [that] provision abrogated [*ex nunc*], has a right to lodge with the competent authority [a petition for reopening of proceedings] and ask that the decision based on the abrogated ... provision ... be set aside.

(3) ...

(4) [The petition for reopening of the proceedings] referred to in paragraphs 2 and 3 of this section may be lodged within five months of the publication of the Constitutional Court’s decision in the Official Gazette.

(5) In proceedings in which no final decision has been adopted before the date of the entry into force of the Constitutional Court’s decision abrogating a statute, [...] or its provisions, and this statute [...] is directly applicable in the case, the abrogated statute [...] or its provisions shall not be applied from the date of the entry into force of the Constitutional Court’s decision.”

B. The 1980 Basic Property Act

27. Section 29 of the Basic Ownership Relations Act (*Zakon o osnovnim vlasničkopravnim odnosima*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 6/1980 and 36/1990, which entered into force on 1 September 1980 – “the 1980 Basic Property Act”) prohibited the acquisition by adverse possession of ownership of socially owned property.

Section 3 of the Act on the Incorporation of the Act on Basic Ownership Relations (*Zakon o preuzimanju zakona o osnovnim vlasničkopravnim odnosima*, Official Gazette of the Republic of Croatia no. 53/1991 of 8 October 1991) repealed section 29 of the Basic Property Act.

C. The 1996 Property Act

28. The relevant part of the Ownership and Other Rights *In Rem* Act (*Zakon o vlasništvu i drugim stvarnim pravima*, Official Gazette no. 91/1996 of 28 October 1996, which entered into force on 1 January 1997 – “the 1996 Property Act”), as in force at the material time, read as follows:

Part three

RIGHT OF OWNERSHIP

...

Chapter 6.

ACQUISITION OF OWNERSHIP

Legal grounds for acquisition

Section 114

“(1) Ownership may be acquired by legal transaction, by decision of a court or other public authority, by succession, or by the operation of law.”

Acquisition [of ownership] by the operation of law...

...

(d) Acquisition by adverse possession

Section 159

“(1) Ownership may be acquired by adverse possession on the basis of the exclusive possession of a certain property... if such possession has lasted continuously for a period of time determined by law and if the possessor is capable of being the owner of such property.

(2) An exclusive possessor who possesses under just title, in good faith and whose possession is free of vice shall acquire ownership of movable property after three years and of immovable property after ten years.

(3) An exclusive possessor who possesses at least in good faith shall acquire ownership of movable property after ten years and of immovable property after twenty years of continuous exclusive possession.

(4) An exclusive possessor of a property owned by the Republic of Croatia ... shall acquire ownership by adverse possession once his or her ... possession has lasted continuously for a period twice as long as that set out in paragraphs 2 and 3 of this section.”

Part nine

TRANSITIONAL AND FINAL PROVISIONS

Chapter 1.

TRANSFORMATION OF SOCIAL OWNERSHIP

General provisions on transformation**Section 359**

“(1) ...

(2) The right of ownership and other rights *in rem* acquired under the provisions of this Act on transformation of the rights to administer, use or dispose of socially owned property ... shall be considered acquired under the condition that they are not in collision with the rights of other persons over [such] property under the denationalisation legislation.

Transformation of the rights to administer, use and dispose of [the socially owned property]**Section 360**

“(1) The right to administer, use or dispose of socially owned property became by the transformation [privatisation] of its holder the right of ownership of that person who through the transformation became the former holder’s universal legal successor ...

(2) The right to administer, use or dispose of socially owned property which before the entry into force of this Act was not transformed into a subject of the right of ownership, shall by this Act’s entry into force become [its] right of ownership ...

(3) The provisions of paragraph 1 and 2 of this section shall be applied, *mutatis mutandis*, to other rights *in rem*.

(4) Registration of the right to administer, use or dispose of [socially owned property] in the land register ... shall be considered registration of the right of ownership.”

Presumptions**Section 362**

“(1) It is considered that the owner of a socially owned immovable property is a person registered in the land register as a holder of the right to administer, use or dispose of that immovable property.

(2) ...”

Protection of the transformed rights**Section 363**

“(1) Person whose right of ownership is derived from the former right to administer, use or dispose of socially owned property ... shall have the right to protect it as any owner ...”

...

Chapter 4.**FINAL PROVISIONS****Section 388**

“(1) The acquisition, modification, legal effects or termination of rights *in rem* after the entry into force of this Act shall be assessed on the basis of its provisions...

(2) The acquisition, modification, legal effects and termination of rights *in rem* until the entry into force of this Act shall be assessed on the basis of rules applicable at the moment of the acquisition, modification or termination of those rights or of their legal effects.

(3) If the prescribed time-limits for the acquisition and termination of rights *in rem* set out in this Act started to run before its entry into force, they shall continue to run pursuant to paragraph 2 of this section...

(4) In calculating the period for the acquisition by adverse possession of immovable property which was socially owned on 8 October 1991, and for the acquisition of [other] rights *in rem* over such property, the period before that date shall also be taken into account.”

D. The 2001 Amendment to the 1996 Property Act

29. The relevant part of the 2001 Amendment to the 1996 Property Act (*Zakon o izmjeni i dopuni Zakona vlasništvu i drugim stvarnim pravima*, Official Gazette no. 114/2001 of 20 December 2001, which entered into force on the same day) that were enacted following the abrogation of section 388(4) of the 1996 Property Act by the Constitutional Court on 17 November 1999, reads as follows:

Section 2

“In section 388, a new paragraph 4 shall be added after paragraph 3, to read:

‘In calculating the period for the acquisition by adverse possession of immovable property which was socially owned on 8 October 1991, and for the acquisition of [other] rights *in rem* over such property, the period before that date shall not be taken into account.’”

E. The 1996 Denationalisation Act

30. The Act on Compensation for, and Restitution of, Property Taken During the Yugoslav Communist Regime (*Zakon o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine*, Official Gazette nos. 92/1996, 92/1999 (corrigendum), 80/2002 and 81/2002 (corrigendum), which entered into force on 1 January 1997 – “the 1996 Denationalisation Act”) enables the former owners of confiscated or nationalised property, or their heirs in the first line of succession (direct descendants and a spouse), to seek under certain conditions either restitution of or compensation for the appropriated property.

F. The Civil Procedure Act

31. The 1977 Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/1977, 36/1977 (corrigendum), 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991 and Official Gazette of the Republic of Croatia nos. 53/1991, 91/1992, 112/1999, 117/2003 and 84/2008, which entered into force on 1 July 1977 – “the Civil Procedure Act”), as amended by the 2003 Amendments (Official Gazette no. 117/2003, which entered into force on 1 December 2003) in its relevant part reads as follows:

Reopening of proceedings following the final judgment of the European Court of Human Rights in Strasbourg finding a violation of a fundamental human right or freedom

Section 428a

“(1) When the European Court of Human Rights has found a violation of a human right or fundamental freedom guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms or additional protocols thereto ratified by the Republic of Croatia, a party may, within thirty days of the finality of the judgment of the European Court of Human Rights, file a petition with the court in the Republic of Croatia which adjudicated in the first instance in the proceedings in which the decision violating the human right or fundamental freedom was rendered, to set aside the decision by which the human right or fundamental freedom was violated.

(2) The proceedings referred to in paragraph 1 of this section shall be conducted by applying, *mutatis mutandis*, the provisions on the reopening of proceedings.

(3) In the reopened proceedings the courts are required to respect the legal opinions expressed in the final judgment of the European Court of Human Rights finding a violation of a fundamental human right or freedom.

THE LAW

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

32. The applicant claimed to have *ex lege* acquired ownership of the above-mentioned plots of land by adverse possession on the basis of section 388(4) of the 1996 Property Act. He complained that the refusal of the domestic courts to acknowledge his ownership in the above civil proceedings – because that provision had been abrogated by the Constitutional Court while those proceedings had been pending – had violated his property rights. He explained that under the domestic law the ownership was acquired by adverse possession *ipso jure*, that is when the conditions were met, and that he had met those conditions prior to the Constitutional Court’s decision, which decisions have only *ex nunc* effects. He relied on Article 1 of Protocol No. 1 to the Convention, which reads:

“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.”

33. The Government contested that argument.

A. Admissibility

34. The Government disputed the admissibility of this complaint on two grounds. They argued that the applicant had failed to exhaust domestic remedies and that Article 1 of Protocol No. 1 was not applicable to the present case.

1. *Non-exhaustion of domestic remedies*

35. The Government noted that, apart from bringing a civil action with a view to being declared the owner of the property at issue on the basis of section 388(4) of the 1996 Property Act, the applicant had also instituted administrative proceedings under the Denationalisation Act seeking restitution of the same property, which had been confiscated from his late uncle, and that these proceedings were still pending.

36. That being so, the Government deemed that in a situation where an applicant attempts to use two remedies available at the domestic level at the same time in order to assert his rights, the rule of exhaustion of domestic remedies required that both remedies be used, up to the highest level of

jurisdiction. Since the administrative proceedings for the restitution of property under the Denationalisation Act were still pending, the Government argued that the applicant's complaint was premature.

37. They added that the Denationalisation Act was legislation adopted precisely for the purposes of resolving the issues relating to the restitution of property appropriated during the socialist regime. Thus, administrative proceedings instituted on the basis of that Act were the primary remedy to be used by persons in situations comparable to that of the applicant.

38. The applicant did not comment on this issue.

39. For the Court, it is sufficient to note that under the Denationalisation Act the only persons entitled to restitution of, or compensation for, property appropriated during the socialist regime are the former owners themselves or their heirs in the first line of succession, that is, a former owner's spouse and direct descendants. Since the applicant is only a nephew of his late uncle he is not entitled to restitution of the property in question. Accordingly, his application for restitution before the administrative authorities, in the Court's view, has no prospects of success.

40. It follows that the Government's objection concerning non-exhaustion of domestic remedies must be dismissed.

2. Applicability of Article 1 of Protocol No. 1

41. The Government argued that the applicant had never had a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. They considered it undisputed that he had never had "effective enjoyment of a property right over the immovable property in question." In their view, the applicant had only a conditional claim in respect of those plots of land, on the basis of which he thought he could acquire, by adverse possession, the right of ownership. However, under the domestic law, the applicant could not have had a legitimate expectation of having his claim satisfied.

42. The Government admitted that at a specific moment in time, the legislator had adopted the provision under which the applicant's conditional claim would have been granted had that provision remained in force. However, that provision had been abrogated by the Constitutional Court as being unconstitutional. Accordingly, as early as the time of passing of the first-instance judgment, let alone at the time when the second-instance court reversed it, the applicant could not have had a legitimate expectation that he would acquire ownership by adverse possession, because it had been clear that he had not met the necessary requirements and that the first-instance court could not have based its judgment on that provision.

43. The applicant disagreed.

44. The Court reiterates that an applicant may allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions relate to his or her "possessions" within the meaning of that provision. "Possessions" can be "existing possessions" or claims that are sufficiently established to be regarded as "assets". The Court has also referred to claims in respect of

which an applicant can argue that he has at least a “legitimate expectation” that they will be realised, that is, that he or she will obtain effective enjoyment of a property right (see, *inter alia*, *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, ECHR 2002-VII, § 69, and *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). However, a legitimate expectation has no independent existence; it must be attached to a proprietary interest which must itself be sufficiently established (see *Kopecký*, cited above, §§ 45-53). In reality, the question for the Court is therefore whether the applicant has a sufficiently established claim to attract the protection of Article 1 of Protocol No. 1.

45. Turning to the present case, the Court notes that the applicant suggested that the ownership of the property at issue vested in him without the intervention of the courts (see, by converse implication, *Kopecký*, cited above, § 41) whereas the Government argued that he had a “claim” rather than an “existing possession”.

46. The Court notes that under Croatian law ownership will, in principle, be acquired by adverse possession *ipso jure* when all statutory conditions are met. However, it also notes that the question whether or not the applicant satisfied the statutory conditions for acquiring ownership by adverse possession was to be determined in the proceedings before the competent courts, and that he needed a declaratory judgment acknowledging his ownership in order to effectively enjoy his property. The Court therefore considers that the proprietary interest relied on by the applicant was in the nature of a claim and cannot be characterised as an “existing possession” within the meaning of the Court’s case-law.

47. The Court reiterates that where a proprietary interest is in the nature of a claim, it may be regarded as an “asset” only if there is a sufficient basis for that interest in national law or, in other words, when the claim is sufficiently established to be enforceable (see paragraph 44 above, as well as *Kopecký*, cited above, §§ 49 and 52; and *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B).

48. It would appear from the findings of the domestic courts (see paragraphs 19-20 above) that it was uncontested that the applicant and his mother had been in exclusive and continuous possession in good faith of the property in question since 1953, that is for more than forty years, and that he had thus already in 1993 met the statutory conditions for acquiring ownership by adverse possession. It may therefore be inferred that the applicant, on the basis of section 388(4) of the 1996 Property Act, *ex lege* became the owner of the land at issue on 1 January 1997 when the Act entered into force. That provision remained in force until the Constitutional Court abrogated it almost three years later. The Court thus considers that the applicant’s claim had a sufficient basis in national law to qualify as an “asset” protected by Article 1 of Protocol No. 1.

49. It follows that the Government’s objection as to the non-applicability of Article 1 of Protocol No. 1 must also be dismissed.

50. The Court furthermore concludes 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

1. The parties' submissions

51. The Government submitted that the case did not disclose any interference with the applicant's property rights. They explained that the applicant had complained against the second-instance judgment, which had reversed that of the first-instance court passed in his favour. However, since he could not have acquired any right under the first-instance judgment that had not become final, the judgment of the second-instance court could not have interfered with his property rights.

52. They further claimed that, even assuming that there had been interference, it had been justified as lawful, pursuing a legitimate aim and proportionate. In particular, they argued that the case should be viewed in the context of process of restitution of, and compensation for, the property appropriated during the socialist regime, which process involved comprehensive moral, political and economic considerations. In such situations, which necessarily involve balancing of conflicting interests between current users of the property and persons from whom it had been taken, the State had a wide margin of appreciation. The Split County Court in its judgment relied on the decision of the Constitutional Court which abrogated section 388(4) of the 1996 Property Act because it retroactively allowed acquisition of ownership of socially owned property by adverse possession to persons who held the possession of it without any title and who knew that they could not have acquired its ownership through adverse possession. In such circumstances the impugned provision had thus created a completely new legal situation affording those persons preferential treatment over the former owners from whom the property had been taken by force during the socialist regime. Therefore, the abrogation had had a legitimate aim of protecting the rights of others and maintaining the principle of legal certainty. Furthermore, the Constitutional Court's decision had not been contrary to the principle of proportionality because by adopting the Denationalisation Act the State had regulated the issue of restitution of, and compensation for, the nationalised and confiscated property, and it was under that Act the applicant should have, and indeed had, asserted his right in respect of the property confiscated from his late uncle.

53. The applicant disagreed.

2. *The Court's assessment*

(a) **Whether there was an interference with the peaceful enjoyment of “possessions”**

54. In the light of the above finding that the applicant's claim was sufficiently established to qualify as an “asset” attracting the protection of Article 1 of Protocol No. 1, the Court considers that the refusal of the second-instance court to grant that claim and thereby acknowledge the applicant's ownership of the property in question undoubtedly constituted interference with his property rights.

55. In order to further establish whether that interference was justified it has to be borne in mind that the applicant did not complain about the abrogation of section 388(4) of the Property Act by the Constitutional Court in its decision of 17 November 1999, and the reasons behind that decision. Rather, he complained that, unlike the first-instance court, the second-instance court had not acknowledged the legal consequences that that provision had already produced before it had been abrogated, namely that he had *ex lege* acquired the ownership of the property at issue. Instead, the County Court had, in the applicant's opinion, unwarrantedly applied the Constitutional Court's decision of 17 November 1999, contrary to section 53(2) of the Constitutional Court Act. This resulted in the refusal of his claim, which in the applicant's view amounted to a violation of his property rights.

56. While the reasons justifying the application of the Constitutional Court's decision in the applicant's case resulting in refusal of his claim and those justifying the abrogation of section 388(4) are different and should be kept analytically separate, they are nevertheless interrelated and the Court will examine them together when determining whether the interference pursued an aim that was in the public (general) interest and whether it was proportional to that aim. However, it has first to establish whether the interference was lawful.

(b) **Whether the interference was “provided for by law”**

57. The Court notes that, as a consequence of the abrogation of section 388(4) of the 1996 Property Act by the Constitutional Court, the Split County Court was under an obligation to apply the Constitutional Court's decision of 17 November 1999 in the (pending) proceedings before it pursuant to the Constitutional Court Act, in particular its section 56(5). The County Court's judgment was thus in accordance with the law. Apart from this constitutional law aspect, the judgment was lawful in its civil law aspect as it was based on the provisions of the 1996 Property Act, as amended by the 2001 Amendment.

(c) **Whether the interference was “in the public interest”**

58. The Court observes that under section 53(2) of the Constitutional Court Act, the abrogation of a statute or statutory provision has only *ex*

nunc effects. However, this rule – that was motivated by the principle of legal certainty, which aims to protect acquired rights – is not absolute. For instance, that rule does not apply to pending cases, that is to situations where one party to the proceedings claims to have acquired certain rights relying on a statute or statutory provision in force at the time of the institution of the proceedings but later on abrogated by the Constitutional Court before the adoption of a final decision (section 56(5) of the Constitutional Court Act). This provision is not only intended to protect the rights of persons who have suffered consequences of an unconstitutional statute or provision. It also reflects the principle that the courts cannot decide on the basis of a statute or statutory provision that has been abrogated as unconstitutional.

59. In that situation, as well as in those envisaged in other paragraphs of section 56 of the Constitutional Court Act, the protection of the rights of those who have suffered consequences of an unconstitutional statute or statutory provision prevails over the principle of legal certainty, that is, over the acquired rights of those who have benefited from an unconstitutional statute or provision.

60. It follows that the interference in the present case, that is the judgment of the Split County Court rendered in the application of section 56(5) of the Constitutional Court Act served to protect the rights of those who might have suffered consequences of the application of section 388(4) of the 1996 Property Act before its abrogation. In particular, as it follows from the Constitutional Court's decision, section 388(4) of the 1996 Property Act was abrogated because of its retroactive effects and the resultant adverse consequences for the property rights of persons (hereafter: "the third persons") who had acquired those rights on the basis of: (a) other provisions of that Act (such are, for example, commercial companies, see paragraph 11 above), (b) the Denationalisation Act (former owners or their heirs, see paragraph 12 above) or (c) the Sale to Occupier Act (former tenants of the flats in social ownership let under the specially protected tenancies who purchased their flats and thereby became their owners, see paragraph 8 above).

61. Thus, the Constitutional Court's decision is to be seen as a correction of the unfair effects of section 388(4) of the 1996 Property Act and was therefore in the "public interest".

(d) Proportionality of the interference

62. The Court considers that the issue it has to determine is whether the application of the rule embodied in section 56(5) of the Constitutional Court Act – which in the circumstances such as those prevailing in the present case gives precedence to the rights of those who have suffered consequences of an unconstitutional statute or provision over the rights of those who have benefited from it – resulting in the interference with the applicant's property rights, struck the requisite fair balance between the demands of the general interest and the requirements of the protection of the

individual's fundamental rights, and whether it imposed a disproportionate and excessive burden on the applicant (see, *inter alia*, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 93, ECHR 2005-...).

63. In this connection the Court reiterates that in situations such as the one in the present case, involving fundamental reform of a country's political, legal and economic system during the transition from the socialist regime to a democratic state, the national authorities face an exceptionally difficult exercise in having to balance the rights of different persons affected by the process. Under these circumstances, a wide margin of appreciation should be accorded to the respondent State (see, *Jahn and Others*, cited above, §§ 91-92, and, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 182, ECHR 2004-V).

64. The Court observes that during the socialist regime in Croatia, that is for more than forty years, the acquisition of ownership of the socially owned property by adverse possession was expressly prohibited by law. The Court adheres to the Constitutional Court's view that given the mentioned prohibition the persons enjoying certain rights over socially owned property (see paragraph 6 above) in the socialist period had no need to exercise those rights with the same vigour, or to use appropriate remedies to protect that property against the adverse possessors, as if the prohibition had not existed. Thus, by enacting section 388(4) of the 1996 Property Act the legislator indeed legislated retroactively as it attached legal consequences to a previous behaviour to which such consequences could not have been attached at the relevant time. By doing so it failed to give the opportunity to the persons enjoying rights over socially owned property to adjust their conduct.

65. Against this background, the domestic authorities balancing the competing interests took the stance that the mere fact that for a brief period of time amounting to less than three years (between the 1996 Property Act's entry into force on 1 January 1997 and the abrogation of its section 388(4) by the Constitutional Court on 17 November 1999) the possessors of the socially owned property (like the applicant in the present case) had a legal opportunity to become its owners through adverse possession was not sufficient to outweigh the rights and interests of third persons (see paragraph 60 above) over such property. To hold otherwise would mean to allow section 388(4) to subsist and produce consequences even after it had been abrogated as unconstitutional, and effectively prevent those third persons from realising their legally acknowledged rights over the socially owned property.

66. Turning to the particular circumstances of the present case, the Court observes that the domestic courts established: (a) that the land in question had been owned by the applicant's late uncle, (b) that it had been confiscated in 1949 by the socialist authorities and that the State had been recorded as its owner in the land register ever since, (c) that the applicant's mother had been in possession of the land since 1953, as the applicant had

continued to be after her death on 16 February 1992. There is no indication that anyone, apart from the State itself, acquired any rights over that land during socialism, or that any (third) person (see paragraph 60 above), except the applicant himself (see paragraph 25 above), has ever claimed any rights in respect of that land. The Court therefore considers that the concerns that prompted the Constitutional Court to abrogate section 388(4) of 1996 Property Act were not present in the applicant's case. That provision was abrogated to protect the rights of third persons whereas in the applicant's case there were no rights of third persons involved.

67. In these circumstances, the Court considers that the applicant, who reasonably relied on legislation, later on abrogated as unconstitutional, should not – in the absence of any damage to the rights of other persons – bear the consequences of the State's own mistake committed by enacting such unconstitutional legislation. In fact, as a consequence of the abrogation, the ownership of the property the applicant acquired by adverse possession on the basis of the provision later on abrogated as unconstitutional, was returned to the State, which thereby benefited from its own mistake. In this connection, the Court reiterates that the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned, especially where no other conflicting private interest is at stake (see, *Gashi v. Croatia*, no. 32457/05, § 40, 13 December 2007, and *Radchikov v. Russia*, no. 65582/01, § 50, 24 May 2007).

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

69. The applicant also complained about the domestic courts' decisions not to reopen criminal proceedings in which his uncle had been convicted. He relied on Articles 2, 6, 7, 9, 10, 13 and 14 of the Convention, which provide, respectively, for right to life, right to a fair trial, no punishment without law, freedom of thought, conscience and religion, freedom of expression, right to an effective remedy and prohibition of discrimination in the enjoyment of Convention rights.

70. The Court reiterates that according to the established case-law of the Convention organs Article 6 does not apply to proceedings concerning the reopening of a criminal case (see, for example, *Carlotta v. Italy*, no. 22420/93, Commission decision of 20 May 1997, Decisions and Reports (DR) 89-B, p. 27). It further observes that the remaining complaints do not concern interferences with the applicant's Convention rights. It follows that this part of the application is incompatible *ratione materiae et personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

1. The parties' submissions

72. The applicant claimed 15,000 euros (EUR) in respect of pecuniary damage sustained on account of unlawful confiscation and the resultant impossibility to use his property. He also claimed EUR 15,000 in respect of non-pecuniary damage.

73. The Government contested these claims. They submitted, in particular, that the applicant was not entitled to any pecuniary damage on account of the alleged impossibility to use his property because it was undisputed that he had actually used the land in question.

2. The Court's assessment

(a) Pecuniary damage

74. As regards the claim for pecuniary damages, the Court notes that throughout the domestic proceedings and before the Court the applicant argued that he and his late mother had been in continuous possession of the land in question since 1953. That being so the Court cannot accept his argument that he was unable to use it.

75. Furthermore, the Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences. If national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, §§ 32-33, ECHR 2000-XI). In this connection the Court notes that under section 428a of the Civil Procedure Act an applicant may file a petition for reopening of the civil proceedings in respect of which the Court has found a violation of the Convention. Given the nature of the applicant's complaint under Article 1 of Protocol No. 1 and the reasons for which it has found a violation of that Article, the Court considers that in the present case the most appropriate way of repairing the consequences of that violation is to reopen the proceedings complained of. As it follows that the domestic law allows such reparation to be made, the Court considers that there is no call to award the applicant any sum in respect of pecuniary damage.

76. In the light of the foregoing considerations, the Court rejects the applicant's claim for pecuniary damages.

(b) Non-pecuniary damage

77. As regards the claim for non-pecuniary damages, the Court considers that a finding of a violation of Article 1 of Protocol No. 1 to the Convention constitutes in itself sufficient just satisfaction in the circumstances.

B. Costs and expenses

78. The applicant also claimed EUR 1,000 for the costs and expenses incurred before the domestic courts and EUR 2,000 for those incurred before the Court.

79. The Government did not express an opinion on the matter.

80. The Court notes that the applicant failed to submit any relevant supporting documents proving that he had actually incurred any costs, although he was invited to do so. It follows that he failed to comply with the requirements set out in Rule 60 § 2 of the Rules of Court. The Court therefore rejects his claim for costs and expenses (Rule 60 § 3).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the right of property 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* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Søren Nielsen
Registrar

Christos Rozakis
President