



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

1959 · 50 · 2009

THIRD SECTION

CASE OF TAMIR AND OTHERS v. ROMANIA

(Application no. 42194/05)

JUDGMENT

STRASBOURG

15 September 2009

FINAL

15/12/2009

This judgment may be subject to editorial revision.

In the case of Tamir and Others v. Romania,

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

Josep Casadevall, *President*,

Elisabet Fura,

Corneliu Bîrsan,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 25 August 2009,

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

PROCEDURE

1. The case originated in an application (no. 42194/05) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by seven Israeli nationals, Mr Dov Tamir, Mrs Doris Sharon, Mrs Maritta Bar-Josef, Mrs Vera Kimhi, Mr Eduard Zelig, Mr Herman Zelig and Mrs Margareta Ebner (“the applicants”), on 11 November 2005. The first two applicants and the last applicant also have Romanian nationality.

On 13 March 2007 Mr Paul Ebner, the son and only heir of the seventh applicant, Mrs Margareta Ebner, informed the Court that the latter had died on 29 January 2004 and expressed his wish to pursue the application.

2. The applicants were represented by Mr Alexandru Găzdag and then by the first applicant, Mr Dov Tamir. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu.

3. On 9 February and 13 September 2007 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 six applicants were born in 1946, 1940, 1936, 1945, 1937 and 1941 respectively and live in Israel. The seventh applicant was born in 1920 and died in 2004.

5. In 1950, a building and 1,683 sq. m of appurtenant land situated in Mediaş, Piaţa Regele Ferdinand no. 2, the property of F.A., Z.E. and K.I., were seized by the State under Decree no. 92/1950 on nationalisation.

6. In 1974 the property was divided up and registered under two topographical numbers: 200-201/2/1 and 200-201/2/2. Title to the immovable property under number 200-201/2/2 was registered in the names of M.I. and M.A., and the immovable property under the first number was divided into six apartments together with the corresponding appurtenant land.

7. On 21 May 2001 the applicants, as heirs of F.A., Z.E. and K.I., lodged an application with the administrative authorities for return of property under Law no. 10/2001 governing immovable property wrongfully seized by the State.

8. On 11 December 2002 the Mayor of Mediaş upheld in part their request and ordered the return of Apartments 1, 2 and 4, since they had not been sold by the State to third parties. As to the land appurtenant to those three apartments, their request for restitution was rejected on the ground that the applicants did not have Romanian nationality. The Mayor also dismissed their request in respect of Apartments 3, 5, 6 and that registered under the number 200-201/2/2 on the ground that they had been sold under Law no. 112/1995. However, he held that the applicants would receive pecuniary compensation for those apartments.

9. The applicants contested the Mayor's decision before the courts, claiming restitution of the whole property.

10. On 4 March 2003 the Sibiu County Court upheld in part their action, annulled the provision regarding the land appurtenant to Apartments 1, 2 and 4, and ordered the Mediaş Town Council to enable the applicants to recover that land. It took into account that three of them had proved their Romanian nationality before the court. The court considered that the whole property, namely the building and 1,683 sq. m of appurtenant land, had been unlawfully seized by the State. It also noted that the State had in its ownership only Apartments 1, 2 and 4 with the appurtenant land and held that the applicants only had a right of compensation under Article 18 (d) of Law no. 10/2001 for the apartments transferred to third parties.

11. The applicants appealed, claiming the whole property.

12. On 17 June 2003 the Alba Iulia Court of Appeal dismissed their appeal. It held that the previous court had rightly established that the four items of immovable property which had not been restored had been sold in accordance with Law no. 112/1995 and that the applicants were entitled only to compensation under Article 18 (d) of Law no. 10/2001.

13. On 18 May 2005 the High Court of Cassation and Justice dismissed by a final decision a further appeal by the applicants.

14. On 5 June 2006 the Mayor of Mediaş varied the provisions of the administrative decision of 11 December 2002 and authorised the applicants to recover the land appurtenant to Apartments 1, 2 and 4. He also held that for the other four apartments, which were impossible to recover, the applicants had a right to pecuniary compensation under Law no. 247/2005.

15. So far the applicants have not received any compensation for the part of the property that was considered impossible to recover.

II. RELEVANT DOMESTIC LAW

16. The relevant legal provisions and jurisprudence are described in the following 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, 1 December 2005); and *Tudor v. Romania* (no. 29035/05, §§ 15-20, 17 January 2008).

THE LAW

I. SCOPE OF THE APPLICATION

17. The Court reiterates that the existence of a victim of a violation, that is to say, an individual who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Karner v. Austria*, 40016/98, § 25, ECHR 2003-IX).

18. The Court, through its jurisprudence, normally permits the next of kin to pursue an application provided he or she has sufficient interest, where the original applicant has died after the introduction of the application before the Court (see *Malhous v. the Czech Republic* (dec.), no. 33071/96, ECHR 2000-XII). The Court considers, however, that the present case must be distinguished from those cases which were introduced before this Court by the applicants themselves and only continued by their relatives after their

subsequent death (see *Fairfield v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI, with reference back to *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999-VI).

19. In this connection, it notes that the seventh applicant, Mrs Margareta Ebner, died before the application was introduced in her name on 11 November 2005 by the then applicants' representative. Therefore the Court finds that the seventh applicant does not have the requisite standing under Article 34 of the Convention and that the application must be rejected as incompatible *ratione personae* with the provisions of the Convention in accordance with Article 35 §§ 3 and 4. Accordingly, her son and only heir cannot be regarded as pursuing an application lodged by his relative, subsequent to her death.

The first six applicants are therefore the sole applicants for the purposes of this application.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

20. The applicants alleged that the sale by the State of the four items of immovable property to third parties had not been performed in good faith and further complained that they had not received either their property or any kind of compensation. This had 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

21. The Government raised an objection of incompatibility *ratione materiae* in respect of this complaint. They considered that the courts had not settled the issue of the lawfulness of the seizure in an irrevocable manner in the operative part of a judgment; therefore the applicants had not secured acknowledgment of any property rights in respect of those apartments and the appurtenant land.

22. 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. The applicants were “merely claimants” (see *Pentia and Pentia v. Romania* (dec.), no. 57539/00, 23 March 2006).

23. The applicants pointed out that the courts had acknowledged that the whole property had been unlawfully seized by the State and found no justification for the restoration of only one part without receiving any compensation for the rest.

24. The Court notes that a similar objection by the Government was dismissed in the *Reichardt v. Romania* (no. 6111/04, §§ 14-20, 13 November 2008) and *Popescu and Dimeca v. Romania* (no. 17799/03, §§ 21-24, 9 December 2008) judgments and finds no reasons to depart from its conclusion in those cases. It therefore dismisses the Government’s objection.

25. The Court concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

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

27. The applicants disagreed with those arguments.

28. 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. Such deprivation, in combination with a 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).

29. 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’ possessions still prevents them from enjoying their right of property as 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 six years, without any compensation having been paid.

30. The Court 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 system to recover damages reflecting the commercial value of the possessions of which they were deprived, in accordance with a foreseeable procedure and timetable.

31. Having regard to its case-law on the subject, the Court considers that in the instant case the deprivation of the applicants’ possessions, 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.

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

32. The applicants complained under Article 6 § 1 of the Convention that the proceedings in question had been unfair.

33. Having carefully considered the applicants' submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. The applicants claimed restitution of the four items of immovable property or, if that would be impossible, the sum of 200,000 euros (EUR) in respect of pecuniary damage, representing the value of the properties, on the basis of an expert report from July 2007. They did not submit a claim in respect of non-pecuniary damage.

36. The Government considered *restitutio in integrum* as the most appropriate manner to make reparation but, if restitution was not possible, compensation might be awarded. They submitted that, in line with their own expert reports from September 2007 and April 2008, the applicants could not claim an amount exceeding EUR 180,470.82 in respect of pecuniary damage.

37. 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 domestic 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.

38. The Court notes that the applicants are not the only persons who may claim a right in respect to the property in issue (see paragraphs 8 and 10 above). Since it does not appear from the documents in the file that the applicants had divided up that property, the Court would not order to the respondent State to return those items of property to the applicants, in part or in whole (see *Muşat v. Romania*, no. 33353/03, §§ 60-61, 11 October 2007; *Nistorescu v. Romania*, no. 15517/03, § 24, 17 June 2008).

39. The Court holds that the respondent State is to pay to the applicants, in respect of pecuniary damage, an amount corresponding to the value of the property. Having regard to the information and to the expert reports submitted by the parties concerning real estate prices on the local market, the Court awards them jointly EUR 181,000.

40. The Court is aware of the fact that the heir of Mrs Margareta Ebner may claim a right in respect to that property. However, since he was not considered to be a party to the present proceedings before the Court (see paragraphs 17-19 above), the Court considers it appropriate to award the whole amount to the applicants, as the heir has at his disposal the means offered by the internal law to settle any potential dispute with the applicants.

B. Costs and expenses

41. The applicants also claimed EUR 8,919 for costs and expenses, broken down as follows: EUR 3,287 for a flight from Israel to Romania in November 2006, car rental and accommodation, EUR 2,948 for seven lawyers’ fees, EUR 1,365 paid to the Mediaş Town Council for land and construction taxes, EUR 36 for translations, EUR 583 for expert reports, and EUR 700 for postal, phone and fax expenses. They submitted invoices.

42. The Government contested these claims. They considered that the flight from Israel to Romania in November 2006 had not been necessary, as the applicants were represented both in the domestic proceedings and before the Court. As for the lawyers’ fees, the applicants had not submitted the contracts for judicial assistance to prove whether they had been paid for domestic or Court proceedings related to the present application. However, the low degree of complexity of the present case had not justified the high amounts paid to several lawyers. The Government also submitted that the amounts paid to the town council, although related to a violation of their rights guaranteed by the Convention, had been occasioned by their ownership of a part of the property. The amount claimed for postal expenses was excessive and unsubstantiated.

43. According to the Court's well-established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see Rule 60 and, among other authorities, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award them jointly the sum of EUR 1,000 covering costs and expenses under all heads.

C. Default interest

44. 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 in so far as the applicants Dov Tamir, Doris Sharon, Maritta Bar-Josef, Vera Kimhi, Eduard Zelig and Herman Zelig are concerned 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 pay jointly to the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the amount of EUR 181,000 (one hundred and eighty-one thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (b) that the respondent State is to pay jointly to the applicants, within the same three-month period, the amount of EUR 1,000 (one thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses;
 - (c) that the aforementioned amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(d) 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 15 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President