



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

1959 · 50 · 2009

FIRST SECTION

CASE OF PAULIĆ v. CROATIA

(Application no. 3572/06)

JUDGMENT

STRASBOURG

22 October 2009

FINAL

01/03/2010

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

In the case of Paulić 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 1 October 2009,

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

PROCEDURE

1. The case originated in an application (no. 3572/06) 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 Smiljan Paulić (“the applicant”), on 13 January 2006.

2. The applicant was represented by Ms S. Pavić, a lawyer practising in Požega. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. On 16 October 2007 the President of the First Section decided to communicate the complaint concerning the applicant's right to respect for his home to the Government. It was also decided that the merits of the application would be examined at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1953 and lives in Požega.

5. The applicant was employed as a civilian by the Yugoslav People's Army (YPA). On 18 June 1991 the Požega Garrison Command issued a conclusion noting the applicant's application to be granted a flat and classifying it in “group one” on the basis of his employment with the YPA from 19 October 1988. On 17 July 1991 the Government adopted the Decree on the Prohibition of All Real Estate Transactions in Croatia

(*Uredba o zabrani raspolaganja nekretninama na teritoriju Republike Hrvatske* – published in Official Gazette no. 36/1991 of 24 July 1991) which banned all transactions in respect of immovable property situated in Croatia and belonging to the former Yugoslavia's federal institutions or legal entities having their seat in one of its former federal units. This decree entered into force on 24 July 1991.

6. On 20 August 1991 the above-mentioned Garrison Command adopted a decision to grant the applicant, as their civilian employee, together with his wife and son, the right to occupy and purchase a flat in Požega owned by the YPA. The applicant and his family moved into the flat in September 1991. Pursuant to the Government's decree of 2 October 1991, all possessions of the former YPA came into the ownership of the Republic of Croatia. The applicant left the YPA and made himself available for the Croatian Army.

7. On 3 June 1991 Parliament enacted the Protected Tenancies (Sale to Occupier) Act (*Zakon o prodaji stanova na kojima postoji stanarsko pravo*), which regulated the sale of publicly-owned flats previously let under protected tenancies, giving the right to holders of such tenancies of publicly-owned flats to purchase them from the provider of the flat under favourable conditions. On the basis of that Act, in 1997 the applicant requested the Ministry of Defence as the owner of the flat to enter into a contract for the sale of the flat with him as the buyer. Since the owner declined his request, the applicant brought a civil action in the Požega Municipal Court (*Općinski sud u Požegi*) seeking a judgment in lieu of the contract of sale.

8. On 17 October 1997 the State brought a civil action against the applicant in the same Municipal Court, seeking his eviction. The State submitted that it was the owner of the flat and that the applicant, as a result of the decree of July 1991, had never obtained a specially protected tenancy in respect of the flat, so the State had the right to repossess it. The two proceedings were joined.

9. In a judgment of 25 October 2000 the Municipal Court accepted the State's action and dismissed the applicant's counterclaim. It also ordered that the applicant be evicted. The relevant part of the judgment reads as follows:

“... the decision relied on by the defendant [the applicant] is null and void pursuant to the Decree on the Prohibition of All Real Estate Transactions. No other decision has been adopted concerning the defendant's [rights] in respect of the flat in question. Under the Housing Act a specially protected tenancy could have been acquired on the basis of a final decision on allocation of a flat for occupation or any other valid legal entitlement (section 3 of the Housing Act, Official Gazette no. 51/85). Save for his occupation of the flat in question, the defendant does not possess a final decision that he had acquired a specially protected tenancy or any other valid legal entitlement to that effect ...”

10. On appeal, on 19 September 2001 the Požega County Court (*Županijski sud u Požegi*) upheld the first-instance judgment. The relevant part of the appellate judgment reads as follows:

“By the decree of 3 October 1991 the Republic of Croatia became the owner of all real estate, movables, property rights and monetary resources situated on its territory and formerly under control of the YPA. The decree which came into force on 24 July 1991 banned all transactions in respect of the real estate situated in Croatia (including its sale, exchange, transfer of the right of use, etc.) which was in possession or owned or under control of the federal organs or institutions. Therefore, the conclusions of the first-instance court that after that decree had come into force, the YPA, which was the owner of the flat, had no right to dispose of it and that the decision of 20 August 1991 which served as a basis for the defendant's occupation of the flat, was null and void, are correct.

Since the defendant has no legal entitlement to occupy the flat, the decision of the first-instance court ordering his eviction ... is correct.”

11. With a view to securing the applicant's eviction the State instituted enforcement proceedings before the Požega Municipal Court on 17 October 2002. The eviction order was issued on 23 October 2002. On 24 October 2001 the applicant lodged an appeal on points of law with the Supreme Court (*Vrhovni sud Republike Hrvatske*). On 19 November 2002 the applicant sought that the eviction be adjourned, pending the resolution of his appeal on points of law before the Supreme Court. He also submitted medical documentation concerning his son, born in 1989, showing that he suffers from a malign brain tumour and chronic hepatitis B. In view of the applicant's pending appeal on points of law and the condition of the applicant's son, the eviction was adjourned in a decision of 9 January 2003. On 14 January 2004 the Supreme Court dismissed the applicant's appeal on points of law.

12. The applicant lodged a constitutional complaint on 21 April 2004. He complained, *inter alia*, that his constitutional right to the protection of his personal and family life had been violated in that the lower courts' decision had ordered and upheld his eviction. He argued that these decisions had been contrary to the law and that he had a specially protected tenancy in respect of the flat in question and thus the right to occupy it.

13. The Požega Municipal Court scheduled the eviction of the applicant and his family for 13 April 2005. The applicant asked for an adjournment. On 8 April 2005 the State Attorney's Office, which represented the Ministry of Defence in the proceedings, agreed to the applicant's request owing to his difficult family situation. They stressed, however, that it was only a temporary solution and invited the applicant to file a request for accommodation with the Požega Municipality. On 11 April 2005 the Požega Municipal Court again adjourned the applicant's eviction until the Constitutional Court's decision, on the ground that the applicant's constitutional complaint was pending and that the creditor, that is the State, had agreed with the adjournment owing to the applicant's difficult family situation.

14. A letter of the Požega Municipality of 14 April 2005 sent to the Ministry of Defence indicates that the Municipality had no flats at its disposal where the applicant and his family could be accommodated. In a

letter of 26 April 2005 the applicant expressed his intention to purchase another flat.

15. The applicant's constitutional complaint was dismissed as being ill-founded by the Constitutional Court (*Ustavni sud Republike Hrvatske*) on 11 July 2005. The enforcement proceedings have not been resumed so far.

16. In a letter of 6 December 2006 the applicant informed the Ministry of Defence that he was finally about to resolve his housing situation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. Article 34 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette nos. 41 and 55) reads as follows:

“The home is inviolable.

A search of a person's home or other premises shall be ordered by a court in the form of a reasoned written warrant based on law.

An occupier, or his or her representative, shall be entitled to be present during the search of a home or other premises. The presence of two witnesses shall be obligatory.

Under the conditions prescribed by law and where it is necessary to execute an arrest warrant or to apprehend a person who has committed a criminal offence or in order to remove serious danger for the life or health of people, or for property of greater value, the police may enter a person's home or other premises and carry out a search without a court's warrant or the occupier's consent and without any witnesses being present.

Where there is a probability that evidence may be found in the home of a person who has committed a criminal offence, a search shall be carried out only in presence of witnesses.”

18. Section 161, paragraph 1, of the Ownership Act (*Zakon o vlasništvu i drugim stvarnim pravima*, Official Gazette no 91/1996) reads as follows:

“The owner has the right to seek repossession of his or her property from the person in whose possession it is.”

19. The Specially Protected Tenancies (Sale to Occupier) Act (Official Gazette nos. 27/1991, 33/1992, 43/1992, 69/1992 25/1993, 26/1993, 48/1993, 2/1994, 44/1994, 47/1994, 58/1995, 11/1996, 11/1997 and 68/1998, *Zakon o prodaji stanova na kojima postoji stanarsko pravo*) regulates the conditions for the sale of flats let under specially protected tenancies. In general, the Act entitles the holder of a specially protected tenancy of a publicly owned flat to purchase it under favourable conditions of sale.

The relevant provision of the Act provides as follows:

Section 4

“Every holder of a specially protected tenancy (hereinafter 'the tenant') may submit a written application to purchase a flat to the ... owner ('the seller') ... and the seller shall be obliged to sell the flat.

...”

20. The relevant part of the Constitutional Court's decision no. U-III/408/2003 of 18 February 2004 reads as follows:

“As regards the alleged violation of the constitutional right guaranteed under Article 34 of the Constitution, it is to be said that that a violation of that right cannot occur in the enforcement proceedings, since Article 34 of the Constitution guarantees inviolability of home which concerns conduct of the police during entries and searches of home in execution of arrest warrants or in order to comprehend a perpetrator of a criminal offence or to remove serious risk for lives and health of persons or for valuable assets. Therefore, the provision in question is not applicable in the proceedings at issue.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

21. The applicant complained that the national courts' judgments ordering his eviction violated his right to respect for his home, contrary to Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

22. The Government contested that argument.

A. Admissibility

23. The Government firstly maintained that the applicant had failed to exhaust domestic remedies, arguing that he had not, in the proceedings before the national courts and, especially, in his constitutional complaint, alleged any violation of his right to respect for his home. They asserted that Article 34 of the Constitution guaranteed such a right.

24. The applicant disputed these arguments.

25. The Court reiterates that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65 and 68, *Reports of Judgments and Decisions* 1996-IV).

26. Turning to the present case, the Court observes that the wording of Article 34 of the Constitution does not expressly guarantee the right to respect for one's home within the meaning of Article 8 of the Convention, but is aimed at securing protection from unjustified searches only. In this connection the Court observes that even the Constitutional Court itself has so held in its decisions (see § 19 above). However, and leaving that question aside, the Court notes that the applicant did lodge a constitutional complaint in which he, at least in substance, complained that as a result of the lower courts' decision ordering his eviction he would lose his home. In these circumstances the Court is satisfied that the applicant exhausted domestic remedies in respect of his complaint under Article 8 of the Convention concerning his right to respect for his home. Accordingly, that complaint cannot be dismissed for failure to exhaust domestic remedies.

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

B. Merits

1. Submissions by the parties

28. The applicant argued that the domestic authorities had violated his right to respect for his home by ordering his eviction from the flat where he had been living with his family for more than seventeen years. He maintained that he had been given the right to occupy the flat in question already in June 1991 when the Požega Garrison Command issued its formal conclusion noting his application for the allocation of a flat to his family, that is to say prior to the Decree on the Prohibition of All Real Estate Transactions in Croatia which had banned all transactions in respect of immovable property situated in Croatia and belonging to the former Yugoslavia's federal institutions or legal entities having their seat in one of

its former federal units since this decree had entered into force only on 24 July 1991. The applicant argued that the domestic courts had not taken all those circumstances into account when ordering his eviction, but had reached that decision only on the grounds that he had no legal entitlement to occupy the flat.

29. The Government argued that there had been no interference with the applicant's right to respect for his home since he was still living in the flat and although his eviction had been ordered by a court's judgment, the enforcement of that judgment had been adjourned.

30. However, were the Court to find that there had been an interference, the Government contended that it was based on the laws regulating ownership. The decision ordering the applicant's eviction also pursued a legitimate aim, namely the right of the State to claim possession of its property.

31. As to the proportionality of the interference, the Government claimed that they enjoyed a wide margin of appreciation and that the applicant had no legal entitlement to occupy the flat. The national authorities had taken into account the applicant's vulnerability and adjourned his eviction in view of his difficult family situation and were willing to leave him in the flat until he found alternative accommodation for himself and his family. Furthermore, he had not applied for allocation of a publicly-owned flat. The Government submitted that the applicant had decided to purchase his own flat.

2. The Court's assessment

(a) Whether a right protected by Article 8 is in issue

32. The first question the Court has to address is whether the applicant may arguably claim that he had a right protected by Article 8 and – more specifically in the present case – whether the flat in question may be considered as the applicant's home.

33. The Convention organs' case-law is clear on the point that the concept of “home” within the meaning of Article 8 is not limited to those premises which are lawfully occupied or which have been lawfully established. “Home” is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a “home” which attracts the protection of Article 8 § 1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place (see *Buckley v. the United Kingdom*, 25 September 1996, *Reports* 1996-IV, §§ 52-54, and Commission's report of 11 January 1995, § 63; *Gillow v. the United Kingdom*, 24 November 1986, § 46, Series A no. 109; *Wiggins v. the United Kingdom*, no. 7456/76, Commission decision of 8 February 1978, DR 13, p. 40; and *Prokopovich v. Russia*, no. 58255/00, § 36, ECHR 2004-XI (extracts)). Thus, whether a property is to be classified as a “home” is a question of fact and does not

depend on the lawfulness of the occupation under domestic law (see *McCann v. the United Kingdom*, no. 19009/04, § 46, 13 May 2008).

34. As to the present case, it is undisputed that the applicant and his family have been living in the flat in question since September 1991. The facts of the case show that they have had no other home. The Government have not disputed that the flat in question was the applicant's actual place of residence. Having regard to the factual circumstances outlined above, the Court finds that the applicant had sufficient and continuing links with the flat at issue for it to be considered his "home" for the purposes of Article 8 of the Convention despite the fact that he had no right under domestic law to occupy it.

(b) Whether there has been an interference with the applicant's right to respect for his home

35. The Court has so far adopted several judgments where it assessed the issue of an interference with an applicant's right to respect for his or her home in the circumstances where an eviction order had been issued. In the case of *Stanková v. Slovakia* (no. 7205/02, 9 October 2007) the Court held as follows:

"57. The Court notes, and it has not been disputed between the parties, that the obligation on the applicant to leave the flat amounted to an interference with her right to respect for her home which was based on the relevant provisions of the Civil Code and the Executions Order 1995 ..."

36. Subsequently the Court held in the *McCann v. the United Kingdom* (no. 19009/04, 13 May 2008):

"47. It was further agreed that the effect of the notice to quit which was served by the applicant's wife on the local authority, together with the possession proceedings which the local authority brought, was to interfere with the applicant's right to respect for his home."

37. Further, the Court has held in *Ćosić v. Croatia* (no. 28261/06, 15 January 2009):

"18. The Court considers that the obligation on the applicant to vacate the flat amounted to an interference with her right to respect for her home, notwithstanding the fact that the judgment ordering the applicant's eviction has not yet been executed."

38. The Court sees no reason to depart from this approach in the present case. It considers that the obligation for the applicant to leave the flat amounted to an interference with his right to respect for his home, notwithstanding the fact that the judgment ordering the applicant's eviction has not yet been executed. The fact that the national courts adjourned the applicant's eviction is not of decisive importance since these proceedings might be resumed at the request of the State at any time.

(c) Whether the interference was prescribed by law and pursued a legitimate aim

39. The applicant was ordered to vacate the flat in question by the national courts under Croatian laws regulating ownership, which allow an owner to seek repossession of his or her property when the possessor has no legal grounds for possession. The Court, noting that its power to review compliance with domestic law is limited (see, among other authorities, *Allan Jacobsson v. Sweden (no. 1)*, 25 October 1989, Series A no. 163, p. 17, § 57), is thus satisfied that the national courts' decisions ordering the applicant's eviction were in accordance with domestic law and in particular the relevant legislation related to the disposal of the housing stock (see §§ 17-19). The interference in question therefore pursued the legitimate aim of the economic well-being of the country.

(d) Whether the interference was "necessary in a democratic society"

40. The central question in this case is, therefore, whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society". It must be recalled that this requirement under paragraph 2 of Article 8 raises a question of procedure as well as one of substance. The Court set out the relevant principles in assessing the necessity of an interference with the right to "home" in the case of *Connors v. the United Kingdom*, (no. 66746/01, §§ 81-84, 27 May 2004) which concerned summary possession proceedings. The relevant passage reads as follows:

"81. An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention ...

82. In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation' The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the

individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant

83. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 ...”

41. The Court notes at the outset that the proceedings about which the applicant is complaining involved two separate claims, each of which may in itself give rise to the question of respect for the applicant's home. The applicant himself instituted proceedings before the national courts whereby he claimed his right to purchase the flat in question under favourable conditions as the holder of a specially protected tenancy, under the Protected Tenancies (Sale to Occupier) Act. At the same time the State authorities lodged their own claim arguing that the applicant had no legal basis for occupying the flat and seeking his eviction. The two sets of proceedings were joined and one judgment was delivered, dismissing the applicant's claim to purchase the flat and at the same time ordering his eviction.

42. The Court notes that when it comes to the decisions of the domestic authorities in the present case, their findings were restricted to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant, namely his eviction from a State-owned flat. However, the guarantees of the Convention require that the interference with an applicant's right to respect for his home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention (see *Stanková v. Slovakia*, cited above, § 24, 9 October 2007).

43. In this connection the Court reiterates that any person at risk of an interference with his right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, he or she has no right to occupy a flat (see *McCann v. the United Kingdom*, no. 19009/04, § 50, 13 May 2008). The Court, however, emphasises that such an issue

does not arise automatically in each case concerning an eviction dispute. If an applicant raises an Article 8 defence to prevent eviction, it is for him to do so and for the opponent to rebut the claim. As previously held, the Court does not accept that the grant of the right to an occupier to raise an issue under Article 8 would have serious consequences for the functioning of the domestic systems or for the domestic law of landlord and tenant (see, *McCann v. the United Kingdom*, cited above, §§ 28 and 54).

44. The Court notes that in the present case the applicant raised the issue of his right to home which was not taken up by the national courts. While it is true that the applicant's eviction has been temporarily adjourned owing to the illness of his son in the course of the enforcement proceedings, this in itself does not satisfy the requirement that the reasonableness and the proportionality of the eviction order as such has to be assessed by an independent tribunal. The Court notes that enforcement proceedings – which are by their nature non-contentious and whose primary purpose is to secure the effective execution of the judgment debt – are, unlike regular civil proceedings, neither designated nor properly equipped with procedural tools and safeguards for the thorough and adversarial examination of such complex legal issues. Therefore, competence for carrying out the test of proportionality lies with a court conducting regular civil proceedings in which the civil claim lodged by the State and seeking the applicant's eviction was determined.

45. In the circumstances of the present case the civil court ordered eviction of the applicant from his home without having determined the proportionality of the measure. Thus, it has not afforded the applicant adequate procedural safeguards. There has, therefore, been a violation of Article 8 of the Convention in the instant case.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. The applicant complained that the proceedings before the national courts had been unfair and that he had been discriminated against. He relied on Article 6 § 1 and Article 14 of the Convention. He further complained under Article 1 of Protocol No. 1 that he was unable to purchase the flat in question.

47. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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.”

49. The applicant did not submit a claim for just satisfaction or for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on these accounts.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning Article 8 admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;

Done in English, and notified in writing on 22 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) concurring opinion of Judge Nicolaou;
- (b) dissenting opinion of Judge Malinverni.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE NICOLAOU

The domestic courts found that the applicant had not acquired a protected tenancy of the flat and that, therefore, he had no right to purchase it under the provisions of the Specially Protected Tenancies (Sale to Occupier) Act 1991. As a result, although he was occupying the flat lawfully, he was doing so only as a non-secure tenant. This meant that the State, as owner, was entitled to immediate possession by virtue of the Ownership Act 1996. Consequently, relying on the legal provisions protecting the proprietary interests of the owner, the domestic courts made a possession order but did so without examining the issue, which the applicant had raised, of interference with his right under Article 8 of the Convention. He had pleaded it by way of defence to the State's action for possession and was, apparently, seeking to prevent the making of a possession order altogether rather than simply to defer it. But the latter must be taken as included in the former; so there was good reason to examine the matter in its entirety.

That the flat had been, since 1991, the home of the applicant and his family was undisputed. It was also clear that the applicant's immediate eviction would, in the circumstances, constitute an interference with his right to respect for his home. Such interference was, undoubtedly, legitimate. As we have recently said in the similar case of *Čosić v. Croatia* (no. 28261/06, 15 January 2009):

“...the interference in question pursued the legitimate aim of protecting the rights of the State as the owner of the flat.”

However, to be compatible with Article 8 of the Convention such interference must also pass the proportionality test. “Home” is an autonomous concept which may exist even where occupation lacks a legal basis in domestic law (see *Buckley v. the United Kingdom*, 25 September 1996, § 54, *Reports of Judgments and Decisions* 1996-IV). The absence of a legal right may be the cause of a possession order or, as here, the result. In either case the occupier may have the right, under Article 8, to remain in occupation of the property for some time thereafter. This aspect of the right to respect for the home is obviously an important one, but it must be seen and assessed in the context of proprietary and contractual rights and within the principle of legality. The Convention requires that the two competing interests be balanced by a judicial decision.

It is obvious that in the present case the question of proportionality meant, in practical terms, giving the applicant time so that he could make suitable arrangements to obtain alternative accommodation. This might have been achieved by an appropriate order for a temporary stay of execution of the possession order with, in my view, the possibility of reviewing the stay of execution in the event that it proved inadequate.

As it turned out, the domestic authorities did, for one reason or another, grant the applicant time. It was more than ample. However, that did not redress the situation. The applicant lacked certainty and remained, throughout, at the mercy of the authorities when he was entitled to a judicial determination of the matter. This requirement is underlined in the following extract from *McCann v. the United Kingdom*, no. 19009/04, § 50, 13 May 2008:

“The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end”.

I agree, therefore, that there has been a violation of Article 8 of the Convention in the present case.

DISSENTING OPINION OF JUDGE MALINVERNI

(Translation)

1. I cannot agree that in this case there has been a procedural violation of Article 8 of the Convention. The majority have reached this conclusion on the grounds that the civil court ordered the applicant's eviction from his home without having determined the proportionality of the measure. Thus, the applicant had not been afforded adequate procedural safeguards (paragraph 45).
2. Referring to the case of *McCann v. the United Kingdom* (no. 19009/04, paragraph 50, 13 May 2008), the Chamber states that any person at risk of an interference with the right to respect for the home should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.
3. On the other hand, the Chamber emphasises that such an issue does not automatically arise in each case concerning an eviction dispute. If an applicant wishes to raise an Article 8 defence to prevent eviction, it is for him to do so and for a court to reject the claim.
4. The Chamber's criticism of the domestic courts stems from their apparent failure to strike a balance between the competing interests: on the one hand, the owner's right to the peaceful enjoyment of his property and, on the other, the applicant's right to respect for his home.
5. In my opinion, the only significant argument that the applicant could have raised in support of his claim and that could have been examined in the balancing of interests was his son's state of health. However, he failed to rely on this before the lower courts and only did so before the Supreme Court (paragraph 11). The courts below could not therefore have known about this problem and they cannot be criticised for failing to take it into account.
6. An owner of a flat, be it a private individual or the State, has the right to dispose freely of that property. Thus, an eviction order against a tenant occupying a flat owned by a third party issued on the grounds that the tenant is occupying a flat without a valid legal basis is not as such contrary to the Convention, regard being had to the guarantees under Article 1 of Protocol No. 1 to the Convention.
7. Furthermore, in the present case, although the eviction order was issued in October 2002, it has not been enforced to date. The applicant's eviction was adjourned on several occasions owing to the illness of his son. No attempts at eviction have been made since April 2005. This shows that the national authorities have taken due account of the applicant's personal situation.

8. In my view, the circumstances of the present case were not capable of giving rise to an arguable case that would have required further examination of the issue of proportionality by the civil court which conducted the proceedings ending with an order for the applicant's eviction.