CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54998/00
by Uwe BALLERSTEDT and Others
against Germany

The European Court of Human Rights (Third Section), sitting on 17 November 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mrs R. JAEGER,
Ms I. ZIEMELE, *judges,*
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 14 July 1999,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Uwe Ballerstedt, Mr Götz Dieter Lohse, Ms Antje Rink, Ms Silke Luther and Mr Hans-Dieter Lohse, are German nationals who live in Pretzien. They were represented before the Court by Mr M. Moeskes, a lawyer practising in Magdeburg.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

The applicants are heirs of associates of a limited partnership (*Kommanditgesellschaft*) which owned land in Pretzien on the territory of the former German Democratic Republic (*neue Bundesländer* – hereinafter called New *Länder*). The land comprised forests and a quarry. On 19 September 1967 the property was expropriated by the authorities of the German Democratic Republic ("GDR") pursuant to the Reconstruction Act (*Aufbaugesetz*) in order to create a recreational area (*Erholungsgebiet*). Compensation amounting to 19,092.00 Marks of the GDR was fixed under the "Act on Compensation for Expropriation under the Reconstruction Act" (*Gesetz über die Entschädigung bei Inanspruchnahme nach dem Aufbaugesetz*). However, that sum was never paid out, as it was charged up against claims the State had against the limited partnership.

Following German Unification the applicants requested restitution under the Property Act (see "Relevant domestic law and practice" below) on 20 October 1992. On 18 November 1993 the Office for the Resolution of Outstanding Property Issues (*Amt zur Regelung offener Vermögensfragen*) rejected their request, stating that the requirements for restitution were not met. On 13 January 1997 the Regional Office for the Resolution of Outstanding Property Issues (*Landesamt zur Regelung offener Vermögens-fragen*) rejected the applicants' opposition. Subsequently they brought an action in the Magdeburg Administrative Court.

1. The judgment of the Magdeburg Administrative Court of 5 May 1998

The court rejected the claim for restitution confirming that the requirements of sections 1 (1a), 1 (1b) and 1 (3) of the Property Act were not fulfilled.

Firstly, the court held that section 1 (1a) of the Property Act was not applicable, as the applicants' predecessors had been expropriated and compensated. It was irrelevant that the compensation had actually not been paid out, as section 1 (1a) of the Property Act applied only to expropriations for which no compensation was provided under GDR law. It referred to the judgment of the Federal Administrative Court of 24 March 1994 (see "Relevant domestic law and practice" below).

Secondly, the court found that the requirements of section 1(1b) of the Property Act were not met. It explained that according to the Federal Administrative Court's case-law that provision had to be interpreted restrictively. Contrary to its wording, the amount of compensation alone was not decisive. It applied only to those expropriations which had been carried out by the GDR authorities pursuant to a discriminatory State

practice. As an example the court mentioned the decision of the GDR cabinet (*Ministerratsbeschluss*) of 28 July 1977, which had fixed a lesser amount of compensation for real estate which was owned by persons residing in West-Berlin and other "capitalist States". The court found no indication for such a discriminatory State practice in the present case.

Lastly, the court elaborated on the requirements of section 1(3) of the Property Act. At the outset it noted that, according to the Federal Administrative Court's case-law, "arbitrary" or "manipulative" expropriations also fall within the ambit of that provision. However, "arbitrary" or "manipulative" meant more than a mere violation of GDR law. The court recalled that an expropriation was arbitrary if there had been either no legal basis for the purpose of the expropriation under GDR law or if the GDR authorities had falsely indicated a purpose while secretly pursuing a different one. Regarding the present case, the court acknowledged that the Reconstruction Act did not, according to its wording, allow expropriations for creating recreational areas. Its purpose was rather to reconstruct or maintain housing. However, the court pointed out that the GDR authorities had applied the Reconstruction Act extensively, as had already been held by the Federal Administrative Court in its judgment of 5 March 1998 (see "Relevant domestic law and practice" below). Furthermore, the court referred to several resolutions by the Council of the District of Magdeburg (*Rat des Bezirks Magdeburg*) dating back to the expropriation era, which had called for the creation of additional recreational areas. The court found that the authorities then involved had, possibly wrongly, assumed that the Reconstruction Act was a blanket clause for expropriations which served important social projects. The court also referred to a GDR textbook on the Reconstruction Act in which the author indicates that the Reconstruction Act was not only used for the creation of housing, but also for other projects such as cemeteries or farm stables. The court therefore concluded that in GDR practice such expropriations under the Reconstruction Act were possible and common. It further found that the expropriation had been considered to fall within that purpose. Furthermore, the court found that the authorities had acted in accordance with the "basic ideological ideas" (*ideologische Grundvorstellungen*) on which the GDR legal system was based. The court therefore concluded that there was no indication of a "manipulative" or "arbitrary" expropriation within the meaning of the Property Act and refused the applicants leave to appeal on points of law.

2. The decision of the Federal Administrative Court of 30 September 1998

The court rejected the applicants' complaint against the refusal of leave to appeal on points of law, confirming the lower court's reasoning in respect of the application and interpretation of sections 1 (1a), (1b) and (3) of the Property Act.

In particular, the court stressed that in GDR law and practice the Reconstruction Act was interpreted broadly. It held that even if the Reconstruction Act had not provided for expropriation in the present case, this mistake would not constitute a grave and evident violation of the principles of the Reconstruction Act. Therefore, the expropriation could not be considered arbitrary or manipulative within the meaning of section 1 (3) of the Property Act.

3. The decision of the Federal Constitutional Court of 5 January 1999

The Federal Constitutional Court refused to admit the applicants' constitutional complaint.

B. Relevant domestic law and practice

1. The Joint Declaration of the Federal Republic of Germany ("FRG") and the GDR on the Resolution of Outstanding Property Issues

"...

3. Expropriated real estate is in principle to be returned to the former owners or their heirs, having regard to the type of case specified in sub-paragraphs (a) and (b) below.

(a) It is not possible to restore rights of ownership over land and buildings whose use or purpose has been altered, in particular by being dedicated to public purposes, used for housing developments, for commercial purposes or incorporated into new business units.

Compensation will be paid in these cases, in so far as it has not already been made pursuant to the laws and regulations applicable to citizens of the German Democratic Republic.

(b) In so far as citizens of the German Democratic Republic have in good faith acquired ownership or rights of user *in rem* (*dingliche Nutzungsrechte*) over real estate, socially acceptable indemnification (*sozialverträglicher Ausgleich*) is to be made to the former owners by substituting real estate (*Grundstücke*) of a comparable value or by paying compensation. ..."

2. The Resolution of Outstanding Property Issues Act / Property Act

The Resolution of Outstanding Property Issues Act of 23 September 1990, also known as the Property Act, entered into force on 29 September 1990 and was also part of the German Unification Treaty. Under the terms of the Treaty, the Property Act was to continue to subsist in

the unified Germany after the unification of the two German States on 3 October 1990. The aim of the Act was to resolve disputes over property in the territory of the GDR in a way that was socially acceptable in order to achieve permanent legal order in Germany. The pertinent provisions read as follows.

Section 1

"(1) This Act settles claims to property,

(a) which was expropriated without compensation and transferred to public property (*Volkseigentum*);

(b) expropriated for a lesser amount of compensation than citizens of the German Democratic Republic were entitled to; ..."

(3) This act shall also apply to rights in or over immovable property and usufructary rights acquired by unfair dealings, such as abuse of power, corruption, duress or deception by the purchaser, the State authorities or third parties."

In its annotation of the bill the German Government made the following comments on the Property Act's purpose and meaning.

"... For the time after the foundation of the German Democratic Republic (7 October 1949) this Act provides for restitution, if owners were deprived of their property assets (*Vermögenswerte*) in a way which is incompatible with the rule of law. This Act does not intend to amend every interference with private means (*Privatvermögen*) which took place during the last 40 years pursuant to GDR law on the basis of a socialist economic and social order. ..."

3. The German Unification Treaty

Article 19

"Administrative Acts of the German Democratic Republic which were issued before the accession takes effect remain in force. They can be revoked if they are incompatible with the rule of law of the provisions of this treaty. ..."

4. The Federal Administrative Court's interpretation of the Property Act

(a) The first judgment of 24 March 1994

Regarding the interpretation of section 1 (1a) of the Property Act the Federal Administrative Court held that restitution was excluded, even if the prescribed compensation, although provided under GDR law, had not been fixed, had not been paid out, had been charged up or had been withheld for other reasons by the GDR authorities. Furthermore, the court elaborated that the Property Act provided only for the revocation of certain cases of expropriations. It pointed out that the first sentence of Article 19 of the Unification Treaty stipulates that all administrative acts of the GDR authorities remain in force. Only administrative acts which were incompatible with the principle of the rule of law (*rechtsstaatliche Grundsätze*) and the principles of the Unification Treaty were to be revoked.

The court held that the legislator had not intended to grant restitution in a case in which the compensation payment was actually not made, but only in cases in which GDR law did not provide for compensation at all. Only those expropriations reached a level of injustice that justified restitution.

(b) The second judgment of 24 March 1994

In a second judgment of the same day the Federal Administrative Court elaborated the following on the scope of section 1 (1b) of the Property Act. It stated that, contrary to its wording, that provision required more than just an expropriation for a lesser amount of compensation than citizens of the GDR were entitled to. The court held that section 1 (1b) had to be read in conjunction with section 1 (1a). The court said that, if the fact that compensation was fixed, but not paid out, did not entitle to restitution under section 1 (1a), it could not be that a lesser amount of compensation was in itself sufficient under section 1 (1b) to justify restitution. It followed that only those expropriations fell within the ambit of section 1 (1b) which had been conducted pursuant to a discriminatory State practice. As an example for such a discriminatory State practice the court mentioned the decision of the GDR cabinet (*Ministerratsbeschluss*) dated 28 July 1977 which fixed a lesser amount of compensation for real estate which was owned by persons residing in West-Berlin and other "capitalist States".

(c) The judgment of 31 August 1995

Regarding the interpretation of section 1 (3) of the Property Act, the Federal Administrative Court held that "manipulative or "arbitrary" expropriations also fall within the ambit of that provision. However, it is not sufficient that the expropriation was unlawful under GDR law. It is necessary that the threshold of arbitrariness was crossed. The Federal Constitutional Court stated that an expropriation was arbitrary or manipulative if the GDR authorities had falsely indicated a legitimate purpose for the expropriation, but secretly pursued a different purpose. Furthermore, an arbitrary or manipulative expropriation was given if there had been no legal basis for it under GDR law.

(d) The judgment of 29 February 1996

The Federal Administrative Court repeated that section 1 (3) of the Property Act demanded an examination on a case-by-case basis and required an elevated level of injustice in each case (*qualifiziertes Einzelfallunrecht*). Such a level of injustice was not reached if an expropriation had been conducted in accordance with GDR legal provisions and pursuant to the basic ideological ideas (*ideologische Grundvorstellungen*) on which those provisions were based.

(e) The judgment of 5 March 1998

In this judgment the Federal Administrative Court held the following regarding the application and interpretation of the Reconstruction Act by the GDR authorities. It stated that the GDR authorities were of the view that the Reconstruction Act had a very broad scope. Expropriations for the benefit of *inter alia* State-owned enterprises, co-operatives, parties and mass organisations had been allowed. In the case which was decided by the Federal Administrative Court, the expropriation had been carried out for the benefit of the unified trade union (FDGB). The Federal Administrative Court doubted whether that expropriation, as a matter of principle, fell within the scope of the Reconstruction Act, but found that even if the GDR authorities had wrongly applied the Reconstruction Act, this would not constitute a grave and evident violation of the basic principles of the Reconstruction Act. Therefore, the measure in issue could not be considered an arbitrary expropriation within the meaning of section 1 (3) of the Property Act.

COMPLAINTS

The applicants complained under Article 1 of Protocol No. 1, read in conjunction with Article 14 of the Convention, about the refusal of the restitution of property by the German authorities and courts. They contested in particular the domestic court's interpretation and application of sections 1 (1a) and 1 (3) of the Property Act. Furthermore, they argued that, according to the Federal Administrative Court's case-law regarding section 1 (3) of the Property Act, the expropriation in the present case had been arbitrary since there had been no basis for it under the GDR Reconstruction Act. In this connection the applicants hold that in the present case the Reconstruction Act had not been applied extensively but *contra legem* by the GDR authorities. Hence the expropriation pursuant to the Reconstruction Act had been arbitrary within the meaning of Section 1 (3) of the Property Act.

THE LAW

The applicants complain of a violation of Article 1 of Protocol No. 1 in conjunction with the Article 14 of the Convention.

Article 1 of Protocol No. 1 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."

Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court recalls the principles that have been established by the case-law of the Court under Article 1 of Protocol No. 1, recently re-stated in the *v. Maltzan and Others v. Germany* decision ([GC], no. 71916, 71917/01 and 10260/02, §§ 74 - 77, ECHR 2005 -...).

An applicant can allege a violation of Article 1 of Protocol No. 1 only insofar as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can either be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right.

The Court recalls that the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused by another State. That also applies to the legal situation of a State such as the FRG, which is the legal successor of the GDR. Similarly, Article 1 of Protocol No. 1 does not restrict the freedom of the Contracting States to choose the conditions under which they agree to restore property rights to dispossessed persons or to determine the arrangements whereby they agree to pay indemnification or compensation to the persons concerned.

In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No. 1.

In the present case the Court must first consider whether Article 1 of Protocol No. 1 is applicable. Therefore, it has to be examined whether the applicants had "possessions" within the meaning of Article 1 of Protocol No. 1, *i. e*. "existing possessions" or a "legitimate expectation" of obtaining the effective enjoyment of a property right.

The applicants clearly did not have "existing possessions", as their predecessors' property had been expropriated more than 30 years ago and as they have thus been unable to exercise their ownership rights during that period. Hence the Court has to determine whether the applicants had a "legitimate expectation" of restitution. In this respect the Court recalls that a legitimate expectation must be based either on a legal provision or have a

solid basis in the domestic case-law (see *von Maltzan and Others*, cited above, § 112).

Prior to German Unification the FRG and the GDR issued the Joint Declaration of 15 June 1990 on Outstanding Property Issues, which laid down the fundamental principles in this respect. Those principles were then implemented by the German legislature in the Property Act of 29 September 1990. The Property Act became part of the Unification Treaty and subsisted after the reunification. Therefore, the Court has to examine whether there was a basis for a right to restitution either in the legal provisions of the Property Act or in the case-law pertaining thereto.

The Court notes that the Magdeburg Administrative Court held in its judgment of 5 May 1998 that, pursuant to the Federal Administrative Court's case-law, the applicants did not meet the requirements for restitution under sections 1 (1a), 1 (1b) and 1 (3) of the Property Act.

The Court observes that the Federal Administrative Court interprets the pertinent provisions of the Property Act very restrictively. In this respect the Court recalls that the German legislator only intended to revoke certain types of expropriation, namely expropriations which constituted particular violations of the rule of law. This approach is reflected in the Federal Administrative Court's case-law. Furthermore, the Court finds the Federal Administrative Court's case-law sufficiently clear and consistent. In this connection the Court reiterates that the Contracting States, including their judiciary, enjoy a wide margin of appreciation when regulating property issues in transitional periods (see *von Maltzan and Others*, cited above, §§ 110 and 111). Taking into account the unique context of the German reunification, the Federal Administrative Court's interpretation of the Property Act cannot be considered arbitrary.

Insofar as the applicants maintain that the expropriation in 1967 by the GDR authorities had been arbitrary within the meaning of section 1 (3) of the Property Act and contest the Magdeburg Administrative Court's findings to the contrary, the Court notes the following.

It is not the Courts' task to deal with errors of fact or law allegedly committed by national courts unless and insofar as they may have infringed rights and freedoms protected by the Convention. Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II).

The Magdeburg Administrative Court provided sufficient and detailed reasons for its conclusion that in GDR practice the Reconstruction Act had been applied extensively and that such expropriations were possible and common under GDR law. Thus, the German courts' conclusion that the expropriation in the present case was covered by the Reconstruction Act and was hence not arbitrary within the meaning of section 1 (3) of the Property Act, does not appear far-fetched or arbitrary.

The Court therefore finds that the applicants did not meet the requirements for restitution under the Property Act. It follows that there were neither legal provisions nor domestic case-law which might create a "legitimate expectation" within the meaning of Article 1 of Protocol No. 1. Hence Article 1 of Protocol No. 1 is inapplicable.

As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Hans-Adam von Liechtenstein v. Germany* [GC], no. 42527/98, § 91, ECHR 2001-VIII).

Having regard to the finding that Article 1 of Protocol No. 1 is not applicable, the Court holds that Article 14 of the Convention cannot be taken into account.

It follows that the applicants' complaints under Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention are incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto within the meaning of Article 35 § 3 of the Convention.

Therefore, the application must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Mark VILLIGER
Deputy Registrar

Boštjan M. ZUPANČIČ
President