

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

SECOND SECTION

# CASE OF JAKELJIĆ v. CROATIA

*(Application no. 22768/12)*

JUDGMENT

STRASBOURG

28 June 2016

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
20/03/2018

*This judgment may be subject to editorial revision.*



**In the case of Jakeljić v. Croatia,**

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

Işıl Karakaş, *President,*
Nebojša Vučinić,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 31 May 2016,

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

# PROCEDURE

1. The case originated in an application (no. 22768/12) 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 two Croatian nationals, Mr Jakov Jakeljić and Mr Ivica Jakeljić ("the applicants"), on 27 March 2012.

2. The applicants were represented by Mr B. Duplančić, an advocate practising in Split. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

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

4. On 25 June 2015 the complaint concerning the right of property was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1960 and 1970 respectively and live in Split.

## A. Background to the case

6. The legislation of the former Yugoslavia, in particular section 29 of the 1980 Basic Property Act (see paragraph 25 below), prohibited the acquisition of ownership of socially owned property by adverse possession (*dosjelost*).

7. When incorporating the 1980 Basic Property Act into the Croatian legal system on 8 October 1991, Parliament repealed the above-mentioned provision (see paragraph 26 below).

8. Subsequently, the new Property Act of 1996, which entered into force on 1 January 1997, provided that the period prior to 8 October 1991 was to be included in calculating the period for acquiring ownership by adverse possession of socially owned immovable property (see paragraph 28 below).

9. Following several petitions for an abstract constitutional review (*prijedlog za ocjenu ustavnosti*) submitted by former owners of properties that had been appropriated under the socialist regime, 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.

10. By a decision of 17 November 1999, the Constitutional Court invalidated section 388(4) of the 1996 Property Act. It held that the impugned provision had retroactive effect, resulting in adverse consequences for the rights of third parties (primarily those who, under the restitution legislation, were entitled to the restitution of property appropriated during the Communist regime) and was therefore unconstitutional (for the relevant part of the decision see *Trgo v. Croatia*, no. 35298/04, § 17, 11 June 2009). The decision came into effect on 14 December 1999 when it was published in the Official Gazette.

## B. Proceedings in the particular case

11. On 25 May 1993, 21 February 1996 and 20 July 1999 respectively, the applicants bought three plots of land from various individuals. However, the plots were recorded in the land register in the name of Stobreč Municipality as the legal predecessor of Split Township.

12. On 4 April 2002 the applicants brought a civil action in the Split Municipal Court (*Općinski sud u Splitu*) against Split Township (*Grad Split* – hereinafter "the local authorities"), seeking a declaration of their ownership of the three plots of land and registration in their names in the land register. They submitted that the property at issue, even though it had been recorded in the land register in the name of Stobreč Municipality as the legal predecessor of Split Township, had been in the possession of their legal predecessors for more than 100 years. Given that the statutory period

for acquiring ownership by adverse possession had elapsed in respect of their legal predecessors, the applicants claimed that by buying the land from them they had validly acquired ownership.

13. By a judgment of 1 June 2007, the Municipal Court ruled in favour of the applicants. It established, firstly, that the land in question had been in social ownership on 8 October 1991 and that under the relevant legislation it had not been possible to acquire ownership of socially owned property by adverse possession before that date unless the statutory requirements for doing so had been met by 6 April 1941 (see paragraphs 19, 25 and 31-32 below). It found, however, that the applicants had proved that their predecessors had had continuous possession of the three plots of land in good faith for more than forty years before 6 April 1941, and had continued to do so until they had sold them to the applicants (see paragraph 11 above). The applicants' predecessors had therefore, under Article 1472 of the 1811 Civil Code (applicable in Croatia from 1852 until 1980, see paragraphs 18-20 and 22 below), acquired ownership of the land by adverse possession even before that date.

14. Following an appeal by the defendant authority, on 29 May 2008 the Split County Court (*Županijski sud u Splitu*) reversed the first-instance judgment and dismissed the applicants' action. It stated that even though the Municipal Court had established the facts correctly, the applicants' predecessors had only been in possession of the land in question (continuously and in good faith) since 1912. The forty-year time-limit for acquiring ownership by adverse possession set forth in Article 1472 of the 1811 Civil Code had not therefore expired by 6 April 1941 (see paragraph 22 below). In the subsequent period between 6 April 1941 and 8 October 1991 the relevant legislation had prohibited the acquisition of ownership of socially owned property by adverse possession (see paragraph 6 above and 25 below). This had interrupted the running of the statutory time-limits elapsed before that period. The time elapsed before 6 April 1941 had therefore not continued to run after 8 October 1991 – it had actually started to run again.

15. The applicants then lodged a constitutional complaint against the second-instance judgment, alleging violations of their constitutional rights to equality before the law, equality before the courts and fair procedure.

16. By a decision of 15 September 2011, the Constitutional Court dismissed their constitutional complaint and on 4 October 2011 it served its decision on their representative.

# II. RELEVANT DOMESTIC LAW AND PRACTICE

## A. The Constitutional Court Act

17. The relevant provision of the 1999 Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/99 with subsequent amendments – "the Constitutional Court Act"), which has been in force since 24 September 1999, reads:

**Section 53**

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

(2) Unless the Constitutional Court decides otherwise, the invalidated [*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*]."

## B. Property legislation and practice

### *1. 1811 Civil Code*

18. The Austrian General Civil Code of 1811 (*Opći građanski zakonik* – "the 1811 Civil Code") entered into force in the territory of present-day Croatia on 1 May 1853.

19. The Act Invalidating Legislation Enacted before 6 April 1941 and during the Enemy Occupation (*Zakon o nevažnosti pravnih propisa donesenih prije 6. aprila 1941. i za vrijeme neprijateljske okupacije*, Official Gazette of the Federal People's Republic of Yugoslavia nos. 86/46 and 105/47), enacted in 1946, deprived all legislation in force on 6 April 1941, including the Civil Code, of its legal force. However, it allowed for the application of that pre-war legislation as long as it was not contrary to the Constitution of Yugoslavia or its constituent republics, or the legislation in force.

20. The Civil Code rules concerning property thus remained applicable under those conditions until the entry into force of the 1980 Basic Property Act (see paragraph 23 below). The relevant provisions of the Civil Code provided as follows.

21. Article 1468 provided that if immovable property was not recorded in the land register in the name of the person in whose possession it was, the possessor could acquire ownership of such property by adverse possession after thirty years.

22. Article 1472 provided that a possessor could acquire ownership of immovable property owned by State, municipal or church authorities by adverse possession after forty years.

*2. 1980 Basic Property Act*

23. 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 – "the 1980 Basic Property Act") entered into force on 1 September 1980.

24. Section 28 provided that a person in possession in good faith of immovable property owned by someone else would become its owner by adverse possession after twenty years.

25. Section 29 prohibited the acquisition of ownership by adverse possession of socially owned property.

26. Section 3 of the Act on the Incorporation of the 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), which legislation entered into force on 8 October 1991, repealed section 29 of the Basic Property Act.

*3. 1996 Property Act*

27. The relevant provisions of the Ownership and Other Rights *In Rem* Act (*Zakon o vlasništvu i drugim stvarnim pravima*, Official Gazette no. 91/96 with subsequent amendments – "the 1996 Property Act"), in force since 1 January 1997, read:

**Part three**

RIGHT OF OWNERSHIP

...

**Chapter 6.**

ACQUISITION OF OWNERSHIP

**Legal grounds for acquisition**

**Section 114**

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

**Acquisition [of ownership] by 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 [particular] 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."

28. The original text of section 388 of the 1996 Property Act read as follows:

**Section 388**

"(1) The acquisition, modification, legal effects and 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 the rules applicable at the time of the acquisition, modification or termination of those rights or of their legal effects.

(3) If the prescribed time-limits for acquiring or terminating 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 acquiring by adverse possession immovable property socially owned on 8 October 1991, and for acquiring [other] rights *in rem* over such property, the period before that date shall also be taken into account."

29. After the Constitutional Court on 17 November 1999 invalidated paragraph 4 of section 388 of the 1996 Property Act as unconstitutional (see paragraph 10 above), that provision was amended by the 2001 Amendment to the 1996 Property Act (*Zakon o izmjeni i dopuni Zakona vlasništvu i drugim stvarnim pravima*, Official Gazette no. 114/01), which entered into force on 20 December 2001. The new text of paragraph 4 reads:

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

### *4. Relevant practice*

30. According to the interpretation adopted at the extended plenary session of the Federal Supreme Court of Yugoslavia of 4 April 1960 a person in possession of immovable property in good faith acquired ownership of it by adverse possession after twenty years.

31. The Supreme Court of Croatia referred to this interpretation as valid law at the time in eight of its decisions. In case no. Rev 250/03-2 of 16 June 2004 it held as follows:

"Since it was established that the disputed property was on 8 October 1991 in social ownership ... in order to determine whether it had been acquired by adverse possession, in applying the current paragraph 4 of section 388 of the [1996] Property Act, it must be ascertained whether the plaintiff, through its legal predecessors, was in possession of the disputed property before 6 April 1941 [and thus a sufficiently long time] to become its owner by adverse possession according to the provisions applicable at the time and the way they were applied pursuant to the interpretation adopted at the extended plenary session of the Federal Supreme Court of Yugoslavia of 4 April 1960."

32. In case no. Rev-x 51/13-2 of 23 July 2014, the Supreme Court held:

"The lower courts dismissed the plaintiff's action because they found that the plaintiff had begun to acquire ... ownership of the property by adverse possession from its purchase in [1969], at a time when it was [still] in private ownership. The [period for acquiring ownership by] adverse possession therefore began [to run] before the entry into force of the [1980] Basic Property Act, at a time when the rules of the former [1811] Civil Code were still applicable. Under Article 1468 of the [1811] Civil Code the period of thirty years, or twenty years according to the interpretation adopted at the extended plenary session of the Federal Supreme Court of Yugoslavia of 4 April 1960, was necessary to acquire ownership by adverse possession. That period had not expired at the time the [1980] Basic Property Act entered into force, and thus continued to run [in accordance with that Act]. The period necessary for acquiring ownership by adverse possession would have expired in 1989. [However, by that time the property was already in social ownership, having been transferred in 1983]. Given that at the time the property was transferred into social ownership (1983) the period of twenty years for acquiring ownership by adverse possession had not expired because the time between 1983 and 8 October 1991 (when section 29 of the [1980] Property Act was repealed) does not count toward the period necessary to acquire ownership by adverse possession, the plaintiff did not become the owner of the property by adverse possession."

## C. Other relevant legislation

*Civil Procedure Act*

33. The relevant provision of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/1977, with subsequent amendments, and Official Gazette of the Republic of Croatia no. 53/91 with subsequent amendments), reads:

**5.a. Reopening of proceedings following a 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 judgment of the European Court of Human Rights becoming final, file a petition with the court in the Republic of Croatia which adjudicated at first instance in the proceedings in which the

decision violating the human right or fundamental freedom was rendered, to set aside the decision [in question].

(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 observe the legal views 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

34. The applicants complained that the Split County Court judgment had deprived them of property they had acquired by the operation of law. They 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."

35. The Government contested that argument.

### A. Admissibility

36. The Government disputed the admissibility of the application, arguing that Article 1 of Protocol No. 1 was not applicable to the present case.

#### *1. The parties' submissions*

##### (a) The Government

37. The Government averred that the present case had to be distinguished from the case of *Trgo v. Croatia* (cited above) in which the Court had found Article 1 of Protocol No. 1 to the Convention applicable and had eventually found a violation of that Article. In particular, they submitted that, unlike in the *Trgo* case, the applicants had instituted civil proceedings after the Constitutional Court had invalidated section 388(4) of the 1996 Property Act (see paragraphs 10 and 12 above). Accordingly, the

applicants could not have had legitimate expectations that the said provision would be applied in their case and that their claim to be declared owners of the property in question would be granted.

38. The Government further stated that the applicants had not relied on the *Trgo* case. In the Government's view, the applicants' arguments as to why Article 1 of Protocol No. 1 to the Convention was nevertheless applicable (see paragraphs 39-41 below) concerned questions of fact and the application of domestic law, which under the Convention were not the Court's task to examine.

**(b) The applicants**

39. The applicants submitted that Article 1 of Protocol No. 1 to the Convention was applicable because their claim to be declared owners of the land in question had sufficient basis in national law, specifically Article 1472 of the 1811 Civil Code (see paragraph 22 above) or alternatively the interpretation adopted at the extended plenary session of the Federal Supreme Court of Yugoslavia of 4 April 1960, which was still being applied by the Croatian Supreme Court in cases similar to theirs (see paragraphs 30-32 above). According to that interpretation a person would acquire ownership of immovable property by adverse possession after being in possession in good faith for twenty years (see paragraph 30 above).

40. In this connection, the applicants submitted that the Split Municipal Court had established that their predecessors had been in possession of the land in question for more than forty years before 6 April 1941 (see paragraph 13 above). Yet, the Split County Court, while stating that the Municipal Court had established the facts correctly, had somehow distorted those factual findings by holding that the applicants' predecessors had actually only been in possession since 1912 (see paragraph 14 above). Had it correctly understood those factual findings, the County Court would have reached the same conclusion as to the law as the Municipal Court, namely that the applicants' predecessors had, under Article 1472 of the 1811 Civil Code, acquired ownership of the land by adverse possession before 6 April 1941 (see paragraph 13 above).

41. In any event, even if their predecessors had possessed the land in question since 1912, they should have acquired it by adverse possession before 6 April 1941 based on the above-mentioned interpretation requiring twenty years of possession in good faith (see paragraphs 30 and 39 above). The applicants, who had bought the land in question from their predecessors, could have therefore legitimately expected that their claim to be declared owners of that land would be granted. Yet, the Split County Court and the Constitutional Court had misapplied domestic law and dismissed their claim, holding that a period of forty years had been necessary to acquire ownership by adverse possession.

*2. The Court's assessment*

42. The Court does not find it necessary to deal with the applicants' arguments as to the applicability of Article 1 of Protocol No. 1 to the Convention (see paragraphs 39-41 above) because it is in any event applicable to the case at issue for the reasons set out below.

43. The Government claimed that the circumstances of the present case were different from those in the *Trgo* case, where that Article had been found to be applicable (see paragraph 37 above). They explained that this was so because the applicants in the instant case had brought their civil action on 4 April 2002, that is to say after section 388(4) of the 1996 Property Act in its original text had no longer been in force (see paragraphs 10, 12 and 37 above). That provision, which was in force between 1 January 1997 and 14 December 1999 (see paragraphs 8, 10 and 27-28 above), stipulated that in calculating the period for acquiring by adverse possession immovable property socially owned on 8 October 1991, the period before that date had to be taken into account (see paragraphs 8 and 28 above).

44. In this connection, the Court reiterates its findings in the *Trgo* case:

> "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 ...
>
> ...
>
> 48. It would appear from the findings of the domestic courts [...] 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."

45. These findings suggest that the time when the applicant had brought a civil action was irrelevant for establishing whether his claim to be declared the owner of property by adverse possession could qualify as an "asset" protected by Article 1 of Protocol No. 1 to the Convention. Rather, what was important was whether ownership of the property in question had been vested in him by the operation of law at the time when section 388(4) of the 1996 Property Act in its original text had still been in force (see paragraphs 8, 10, 27-28 above).

46. Having regard to the factual findings of the domestic courts in the present case, according to which the applicants' predecessors had been in possession in good faith of the land in question since at least 1912 (see paragraphs 13-14 above), that is to say for more than forty years, it would appear that they had thus already in 1952 met the statutory conditions for

acquiring ownership by adverse possession. It may therefore be inferred that the applicants, on the basis of the original version of section 388(4) of the 1996 Property Act, *ex lege* became the owners of the two plots of land they had bought in May 1993 and February 1996 (see paragraph 11 above) on 1 January 1997 when the Act entered into force (see paragraphs 27-28 above). As that provision remained in force until the Constitutional Court invalidated it with *ex nunc* effect on 14 December 1999 (see paragraphs 10 and 17 above), the applicants also acquired ownership of the third plot of land, and so on the same day they bought and entered into possession of it, namely, on 20 July 1999 (see paragraph 11 above). The Court thus considers that at the time of the alleged interference (see paragraph 14 above), the applicants' claim to be declared the owners of the three plots of land had a sufficient basis in national law to qualify as an "asset" protected by Article 1 of Protocol No. 1.

47. As to the Government's argument that the applicants had not relied on the *Trgo* case (see paragraph 38 above), the Court reiterates that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see, among many other authorities, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998 I). It further reiterates that the issue whether a particular Article of the Convention or a Protocol thereto is applicable or not, is a matter that goes to the Court's jurisdiction *ratione materiae*. The scope of the Court's jurisdiction is determined by the Convention itself, in particular by its Article 32, and not by the parties' submissions in a particular case. Accordingly, the Court, has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction of its own motion (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III; and *Nylund v. Finland* (dec.), no. 27110/95, 29 June 1999).

48. It follows that the Government's objection as to applicability of that Article must be rejected.

49. The Court further notes that this application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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' arguments*

#### (a) The applicants

50. The applicants reiterated their above arguments that the domestic courts had misapplied the relevant domestic law in their case (see paragraphs 39-41 above). The interference with their right to peaceful

enjoyment of their possessions had therefore not been lawful. The applicants also submitted that no third parties had ever acquired or claimed any rights in respect of the land in question.

**(b) The Government**

51. If the Court were to accept that Article 1 of Protocol No. 1 to the Convention was applicable in the present case and that, consequently, the Split County Court judgment constituted an interference with the applicants' right to peaceful enjoyment of their possessions, the Government argued that the interference in question had been justified. In particular, it had been lawful as it was based on the amended text of section 388 of the 1996 Property Act, in particular its paragraph 4, and on Article 1472 of the 1811 Civil Code (see paragraphs 22 and 29 above). The interference in question had also been in the public (general) interest and had been proportionate.

*2. The Court's assessment*

52. The Court has already found a violation of Article 1 of the Protocol No. 1 to the Convention in a case raising similar issues as the present one (see *Trgo*, cited above, §§ 54-68).

53. Having examined all the material submitted to it, 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.

54. In particular, there is no indication, nor did the Government submit, that anyone apart from the local authorities themselves acquired any rights over the land in question, or that any party except the applicants (or their predecessors) ever claimed any rights in respect of that land. The Court therefore considers that the concerns that prompted the Constitutional Court to invalidate section 388(4) of 1996 Property Act (see paragraphs 10 and 28 above) were not present in the applicants' case. That provision was invalidated to protect the rights of third parties, whereas the applicants' case did not involve any such rights (see *Trgo*, cited above, § 66).

55. In these circumstances, the applicants, who reasonably relied on legislation later invalidated as unconstitutional, should not – in the absence of any prejudice to the rights of others – bear the consequences of the State's own mistake committed in enacting such unconstitutional legislation (see *Trgo*, cited above, § 67). In fact, as a consequence of the invalidation, the ownership of the property the applicants acquired by adverse possession on the basis of the provision later on invalidated as unconstitutional, was returned to the local authorities (compare with *Trgo*, cited above, loc. cit.). In this way the State benefited from its own mistake (see *Trgo*, cited above, loc. cit.), it being understood that from the Court's perspective the hierarchy between different organs of the State (here between local and central authorities) is irrelevant while examining an application (see, for example, *Čikanović v. Croatia*, no. 27630/07, § 53, 5 February 2015). 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 *Trgo*, cited above).

56. There has, accordingly, been a breach of Article 1 of Protocol No. 1 to the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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*

58. The applicants claimed 1,370,880 Croatian kunas (HRK) in respect of pecuniary damage and HRK 100,000 in respect of non-pecuniary damage.

59. The Government contested these claims.

#### *2. The Court's assessment*

##### (a) Pecuniary damage

60. 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 the applicants may now 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 applicants' 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 would be to reopen the proceedings complained of. As domestic law allows such reparation to be made, the Court considers that there is no call to award the applicants any sum in respect of pecuniary damage (see *Trgo*, cited above, § 75).

61. In the light of the foregoing considerations, the Court rejects the applicants' claim for pecuniary damages.

**(b) Non-pecuniary damage**

62. As regards the claim for non-pecuniary damages, the Court considers that the finding of a violation of Article 1 of Protocol No. 1 to the Convention constitutes in itself sufficient just satisfaction in the circumstances (see *Trgo*, cited above, § 77).

## B. Costs and expenses

63. The applicants also claimed HRK 54,840 for the costs and expenses incurred before the domestic courts and HRK 138,760 for those incurred before the Court.

64. The Government contested these claims.

65. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

66. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of 2,000 euros (EUR) for costs and expenses incurred in the proceedings before it, plus any tax that may be chargeable to the applicants.

67. However, the claim for costs and expenses incurred in the domestic proceedings must be rejected, given that the applicants will be able to have those costs reimbursed in the proceedings following their petition for reopening (see paragraph 60 above, and *Vinčić and Others v. Serbia*, nos. 44698/06, and 30 other applications, § 65, 1 December 2009).

## C. Default interest

68. The Court considers it appropriate that the default interest rate 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

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*, by six votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

4. *Holds*, by six votes to one,
(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses, to be converted into Croatian kunas at the rate applicable on the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Stanley Naismith | Işıl Karakaş |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

A.I.K.
S.H.N.

# DISSENTING OPINION OF JUDGE LEMMENS

1. To my regret, I cannot agree with the conclusions of the majority in this case.

I am afraid that the decisions to declare the application admissible and well-founded are based on an overly far-reaching recharacterisation of the complaint.[1]

2. In their application to the Court the applicants complained that the Split County Court had deprived them of property that they had lawfully bought from the previous owners.

The County Court had found that property could be acquired by continuous possession for forty years, and had further held that only the years of possession before 6 April 1941 and after 8 October 1991 could be taken into account, but not the years between those dates. Turning to the facts, it determined that the predecessors of the vendors had been in possession of the plots of land, continuously and in good faith, since 1912 only, and therefore had not reached the required forty years by 6 April 1941. When the applicants bought the plots between 1993 and 1999, the vendors were not the lawful owners and therefore could not validly sell them to the applicants. As a result, the plots could not be registered in the applicants' name, but remained registered in the name of the Split Township (see paragraph 14 of the judgment).

The applicants complained about this decision on two grounds. First, they argued that the County Court had erred in finding that the vendors' predecessors had not had possession of the plots for forty years by 6 April 1941 (see paragraphs 40 and 50 of the judgment). Second, and alternatively, they argued that the required period of adverse possession was not forty years, but only twenty years, and therefore the vendors' predecessors had fulfilled the requirement by 6 April 1941 (see paragraphs 41 and 50 of the judgment). In sum, the applicants argued that the County Court had been wrong in considering that the vendors' predecessors had not already met the forty-year requirement *by 6 April 1941*.

3. The complaint examined by the majority seems to be a different one.

The majority accept the finding of the County Court that the required period of adverse possession is forty years (see paragraph 46 of the judgment), thus (implicitly) rejecting the applicants' subsidiary argument. In order to examine whether that number of years was reached, they base

1. This is not the first time that the recharacterisation of a complaint by a majority is criticised by a dissenting judge. For a recent instance, see the separate opinion of Judge Keller in *Aldeguer Tomás v. Spain*, no. 35214/09, 14 June 2016 (paragraph 3 of the opinion).

themselves on the transitional provision of section 388(4) of the 1996 Property Act – a provision which was not relied upon by the applicants in the proceedings before the domestic courts, nor in their application before our Court. By virtue of that provision, in force between 1 January 1997 (that is after two of the three purchases of the plots of land had taken place) and 20 December 1999, the period *between 6 April 1941 and 8 October 1991* could also be taken into account for the calculation of the number of years of adverse possession (see paragraph 28 of the judgment). On that basis the majority hold that the vendors or their predecessors had acquired ownership in 1952 and that the applicants became the owners by buying the plots from the previous owners (see paragraph 46 of the judgment).[2] The majority thus substitute their own opinion on a crucial aspect of the dispute for that of the County Court. It seems to me that such a stark departure from the final judgment in the domestic proceedings is not very respectful of the principle of subsidiarity. But this is not my main point.

After having found that the applicants could claim the protection of Article 1 of Protocol No. 1, the majority examine the merits of the complaint. [3] That complaint is (implicitly) recharacterised as follows: by not applying section 388(4) of the 1996 Property Act, because it was invalidated on 17 November 1999 by the Constitutional Court with an *ex nunc* effect from 14 December 1999, the domestic courts violated the applicants' right to the peaceful enjoyment of the plots of land which they had bought from the lawful owners (see paragraphs 54-55 of the judgment). In sum, the majority characterise the complaint as being directed at the domestic courts' acceptance of the abrogation by the Constitutional Court of the (short-lived) possibility to take into account the years of possession *between 6 April 1941 and 8 October 1991*.

However, as is pointed out by the Government, the applicants did not complain about the fact that the domestic courts had excluded that period from the calculation of the number of years of adverse possession.

4. In order to justify the recharacterisation of the complaint, the majority refer to the case-law of the Court according to which "a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on" (see paragraph 47 of the judgment, referring to

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2. The majority state that "at the time of the alleged interference", which is – according to them – the date of the judgment of the County Court (29 May 2008), "the applicants' claim to be declared the owners of the three plots of land had a sufficient basis in national law to qualify as an 'asset' protected by Article 1 of Protocol No. 1" (see paragraph 46 of the judgment). It seems to me that in fact the applicants do not complain that a "claim" was extinguished, but rather that the courts refused to recognise that they had a title to the plots of land which, according to them, were part of their existing "possessions" (within the meaning of Article 1 of Protocol No. 1). I will, however, not comment on this further.

3. I leave open the question whether domestic remedies have been exhausted. The Government did not raise an objection to that effect.

*Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I).

That formula gives rise to problems of interpretation. What exactly is a "complaint" and to what extent is the recharacterisation of a complaint possible? According to the formula, a complaint is characterised "by the facts *alleged* in it" (in French: "par les faits qu'il (le grief) *dénonce*"). My understanding is that a complaint contains an allegation, and that it is characterised by the facts of the allegation. Furthermore, the Court can, in my opinion, recharacterise the facts or, better, the complaint, by considering that the complaint is to be examined under another Article or paragraph than the one relied upon by the applicant. By contrast, however, it seems to me that the Court cannot "create" a new complaint not invoked by the applicant (see *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172).

It follows logically from the foregoing that, in order for an original complaint and a recharacterised complaint to be the same, it is not sufficient that both complaints are based on the same Article (Article 1 of Protocol No. 1) or that they both relate to the same measure (denial of acquisition of ownership by adverse possession). The *allegations* should also be the same. In my opinion, this is not the case here.

5. The majority declare the recharacterised complaint admissible and, following the *Trgo* precedent (*Trgo v. Croatia*, no. 35298/04, 11 June 2009), conclude that there has been a violation of Article 1 of Protocol No. 1.

For my part, I have a problem with the admissibility of the complaint as invoked by the applicants.

In so far as the applicants argued that the County Court had erroneously held that the vendors' predecessors were not in possession of the land for forty years on 6 April 1941, I would consider that the applicants were criticising the assessment of facts by the domestic courts.

In so far as the applicants argued that the number of years of possession required for acquiring ownership was not forty years, but twenty, I would consider that this was an argument not raised before the domestic courts. In any event, I would consider that the applicants thus criticised the interpretation and application of domestic law by the domestic courts.

Seeing no arbitrariness or manifest unreasonableness in either the assessment of the facts or the interpretation and application of domestic law, I would conclude, assuming that domestic remedies have been exhausted, that the complaint is manifestly ill-founded.

6. The majority clearly want to apply the *Trgo* reasoning in the present case. Even if the facts of the case may lend themselves to such an application, I find that the majority examine a complaint that has not been

invoked before the Court and which the Court cannot invoke of its own motion.

The fact that an applicant may be the victim of a violation of human rights cannot be a justification for extending the Court's jurisdiction beyond the limits drawn by the applicant himself or herself in his or her application. To hold differently would, in my opinion, take the Court out of its judicial role.