AS TO THE ADMISSIBILITY OF

Application No. 26530/95
by Daniella KANEVA
against Bulgaria

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 October 1994 by Daniella KANEVA against Bulgaria and registered on 15 February 1995 under file No. 26530/95;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 11 March 1996 (and on 24 September 1996) and the observations in reply submitted by the applicant on 24 April 1996 ;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, a Bulgarian national born in 1938, resides in Sofia. Before the Commission she is represented by Mr. Hristo Tepavicharov, a lawyer practising in Sofia.

Particular circumstances of the case

In 1981, by virtue of an order of the local municipality, the applicant and her brother were granted jointly the tenancy of a state owned apartment. On 16 January 1989 the applicant purchased the apartment from the municipality.

On 24 June 1991 the local municipality brought before the Sofia District Court (Rayonen sad) an action against the applicant claiming that the sales contract had been null and void as contrary to the law and that therefore the municipality was the owner of the apartment. The District Prosecutor's Office (Rayonna prokuratura), acting under its authority to institute or join civil proceedings for purposes of defending state interests, joined the action.

In its written submissions of 19 September 1991 the municipality stated that the sale had been contrary to Section 117 of the Regulation on State Property (Naredba za darzhavnite imoti) and to the Law on the Property of Individuals (Zakon za sobstvenostta na grazhdanite). Thus the conditions for sale of an apartment rented by a sister and her brother had not been fulfilled. Also, there had been discrepancies between the rental order, by virtue of which the applicant and her brother had become tenants in 1981, and the order allowing the sale of the apartment. Moreover, under the then existing restrictions on the size of dwellings, it had been unlawful to sell to the applicant an apartment consisting of five rooms with a surface of 143 square meters, as she had no family. In these submissions there was also a remark that the sale had been a "nomenklatura" type scheme.

The Court held three hearings on the matter.

On 15 June 1992 the Court declared null and void the contract for the purchase of the applicant's apartment. As a consequence, the municipality was the owner of the apartment and the applicant was ordered to vacate it.

The Court found that, contrary to Section 117 of the Regulation on State Property, the apartment had been sold only to the applicant whereas it should have been sold to the applicant and her brother jointly as both of them had been the tenants. Under Section 117 of the said Regulation, if the tenancy was held jointly by persons related by lineal consanguinity, the apartment could be sold to one of them with the written consent of the other. If, however, the co-tenants were brothers or sisters, they could purchase the apartment only jointly. The purpose of this requirement had been to prevent the circumvention of the rules concerning state housing. In the case before it the Court noted that shortly after the applicant had bought her apartment her brother had acquired another state-owned apartment.

The Court also examined in detail the other grounds on which the plaintiff municipality had relied and dismissed them.

Upon the applicant's appeal the Sofia Regional Court (Gradski sad) upheld the lower court's judgment on 4 May 1993. The Court confirmed that there had been a breach of Article 117 of the Regulation on State Property. In reply to the applicant's submission that, even if the purchase contract was void, she should not be ordered to vacate it as she used to be a tenant and therefore had legal ground to stay in the apartment, the Court stated that as from the date of the purchase contract the applicant had commenced to possess the apartment as an owner and not as a tenant. The tenancy relationship between the applicant and the administrative body which had granted it in 1981 could not be considered as automatically revived.

In her ensuing petition for review to the Supreme Court (Varhoven sad) the applicant stated that the judgments were absurd because her brother had given up his purchase right by virtue of a written declaration and did not want to acquire ownership in the apartment.

On 10 May 1994 the Supreme Court dismissed the petition for review stating inter alia that the apartment could be sold to brother and sister co-tenants only if both of them wished to purchase it. While the brother could have sold his part to his sister immediately after the joint purchase, he would have needed to declare such

transaction and would not have been able to buy another state-owned apartment. This was in fact what the applicant's brother had done and had thus profited of the low state prices exactly at the end of 1990, just before the prices rose enormously. For these reasons the rule requiring a sister and a brother to buy an apartment jointly was not absurd. Its purpose was to safeguard the interests of the State in the process of the management and the sale of the state housing fund. Also, the Court found that the above rule was applicable regardless of the fact whether the second state-owned apartment had been purchased from the municipality or from a state-owned institution.

The Prosecutor's Office did not take any part in the proceedings before the Sofia Regional Court or the Supreme Court.

The decisions in the applicant's case did not deal with the recovery of the price which she had paid for the apartment. Apparently no such request had been made by the applicant.

The applicant continued to live in the apartment at issue as she was not evicted. On 21 February 1995 she received a letter from the local municipality inviting her to sign a lease for the apartment and to pay rent as from 10 May 1994, the date of the Supreme Court's decision in her case. The applicant has not substantiated whether she has accepted this offer or whether she pays a rent.

Relevant domestic law and practice

1. The Regulation on State Property (Naredba za darzhavnite imoti), as in force at the relevant time, in its Chapter XV set out the rules for the sale of state lodgings. The decision to sell was within the competence of the local municipality. According to Section 113 the housing need of the applying individual or family had to be considered.

Section 117 covered situations where an apartment for sale was rented by more than one individual. This provision, as in force at the relevant time, read as follows:

<Translation>

"(1) Dwellings rented by tenants who are members of a family can be sold to both or to one of the spouses.

(2) Dwellings rented by two or more tenants related in lineal consanguinity who are members of separate families within the meaning of section 50 of the Law on the Property of Individuals can be sold to one of the families upon mutual consent.

(3) A dwelling rented by families of persons related in lineal consanguinity or by brothers and sisters can be sold jointly to them or jointly to them and to members of their families in such shares as agreed among them in a written agreement certified by the municipality or the mayor's office. In cases of a sale to brothers and sisters and to members of their families a prior permission of the Ministry of Finance shall be required. In those instances the sale shall be effected simultaneously.

(4) In case the dwelling can be divided in accordance with the building regulations, the part actually occupied by each tenant can be sold to him or her, but all parts shall be sold. A sale of only one of the parts shall be effected with the permission of the Ministry of Finance. In both cases the sale shall be effected after the dwelling has been duly reconstructed.

(5) No sale of a dwelling rented by two or more families within the meaning of Section 50 of the Law on the Property of Individuals shall be effected unless it falls under one of the above paragraphs.

..."

At the time when the applicant purchased her apartment the Law on the Property of Individuals prohibited the possession of more than one dwelling per family, a family being defined as a single individual of full age or spouses with their children under age. A family which owned an apartment could acquire a second one only in limited cases, inheritance being among them, and was required to sell it within a two years' time limit. Also, it was prohibited to own an apartment larger than 120 square meters except in certain circumstances or by virtue of a special permission. This restrictive legal regime was abrogated in March 1990.

2. The Law on Obligations and Contracts (Zakon za zadalzheniata i dogovorite), which is the main legislative act in the domain of general civil law, provides that contracts which are contrary to the law are null and void ab initio. According to the jurisprudence the nullity can be declared by a court at any time and in any proceedings. Under Section 34, as in force since February 1993, each party can recover from the other the sums paid or the property transferred under a void contract.

3. The Law on State Responsibility for Damages (Zakon za otgovornostta na darzhavata za vredi prichineni na grazhdani) provides for the grounds and the procedure for bringing an action for damages against state organs.

In a judgment of 18 January 1996 the Constitutional Court was confronted with the claim that it was contrary to the principle of state responsibility for damages to deprive an individual from property purchased from the State, when the purchase was found to be null and void but this was due to breaches of the law committed by the state organ, the seller. Addressing this issue the Court noted inter alia that a contract which was contrary to the law was null and void regardless of which party was responsible. The Court further stated that the person whose title has been declared null and void on such ground could submit a claim for damages against state organs or state officials who had breached the law at the time of the transactions (Reshenie po const. delo No. 29/95, D.V. broi 9/96).

4. Section 219 of the Civil Procedure Code (Grazhdanski protzesualen Kodeks) provides that a first instance judgment, when appealed against, enters into force after the decision of the second instance court.

5. Section 27 of the Civil Procedure Code provides that the prosecutor may institute or join civil proceedings on behalf of a third person whenever this is expressly provided for in the law or where it is necessary for the protection of state interests. The law provides expressly for the prosecutor's participation in various types of proceedings such as, among others, guardianship and other matters concerning minors or mentally disabled persons, and challenging void notarial deeds. According to the jurisprudence, under Section 27 the prosecutor acts as a state authority but assumes the role of a party to civil proceedings for the protection of the interests of the State or of the individual.

COMPLAINTS

1. The applicant alleges a breach of Article 1 of Protocol No. 1 to the Convention in that she has been deprived of her property unlawfully, arbitrarily and not in the public interest. Thus Section 117 of the Regulation on State Property, in the applicant's view, allowed her to purchase the apartment alone, with the written consent of her brother. The courts, however, wrongly interpreted this provision as establishing a prohibition for those who had the right to

acquire a certain property jointly, to acquire it separately. This was unreasonable and not in conformity with the general principles of the Constitution and of international law. Also, the applicant's brother had purchased another state-owned apartment not from the municipality, but from the state institute where he worked. Hence, he acquired it based on the fact that he had been a valuable employee, not because of a housing need. Furthermore, when ordering the vacation of the apartment, the courts did not mention at all the fact that the applicant had already paid its price.

2. The applicant also complains under Article 6 of the Convention that in the civil proceedings in her case there has been a violation of the principle of equality of the parties and that the courts were partial. Thus the action against her was brought by the municipality, which is a state authority and was joined by the prosecutor, another state authority. It was unlawful that at the hearing on 28 May 1992 the prosecutor raised additional grounds for the contract's nullity although the courts did not admit them. The courts were biased as they interpreted the law arbitrarily and to the applicant's detriment.

3. Invoking Articles 14 and 18 of the Convention the applicant submits that the purpose of the deprivation of her property has been political. Thus the plaintiff municipality wrote in its submissions to the District Court that the purchase of the apartment had been a "nomenklatura" type scheme. Also, the courts decided arbitrarily, based on the applicant's past and present political affiliation.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 October 1994 and registered on 16 February 1995.

On 29 November 1995 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 4 March 1996, after an extension of the time-limit fixed for that purpose. The applicant replied on 24 April 1996. On 24 September 1996 the Government submitted additional observations which were transmitted to the applicant on 30 September 1996.

THE LAW

1. The applicant complains under Articles 6, 14, 18 and Article 1 of Protocol No. 1 (Art. 6, 14, 18, P1-1) to the Convention of the judicial decisions concerning her apartment.

The Commission notes at the outset that in the present case the Government submit that there have been breaches, on the part of Bulgaria, of Article 6 and Article 1 of Protocol No. 1 (Art. 6, P1-1) to the Convention, and that therefore the application is admissible.

The Commission recalls that an issue going to the merits of a case has to be examined independently of the attitude of the respondent State (Eur. Court HR, H. v. France judgment of 24 October 1989, Series A no. 162, p. 20, para. 47; No. 14365/88, Dec. 17.5.90, unpublished; Robins v. the United Kingdom, Comm. Rep. 4.7.96. paras. 27, 28 and 38; No. 28858/95, Dec. 25.11.96, unpublished).

The Government's assertion that the facts complained of amounted to violations of the Convention is a statement concerning the merits of the application which cannot be relied upon by the Commission, even at the stage of admissibility, without an independent assessment.

The Commission must, therefore, undertake an examination of the facts of the case and also of the submissions of the parties, and on this basis establish whether the application is admissible.

2. The applicant complains that there has been a breach of Article 1 of Protocol No. 1 (P1-1) to the Convention in that the courts, upon the action of the local municipality and a prosecutor, declared null and void as contrary to the law a contract by virtue of which she had purchased an apartment from the state.

Article 1 of Protocol No. 1 (P1-1) provides 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."

The Government criticise the judicial decisions in the applicant's case and state that there has been a breach of this provision. They submit that the applicant fulfilled all administrative requirements for the purchase of state housing and thus validly became, in 1989, the owner of the apartment at issue in the present case.

The Government also submit that, under the relevant rules as in force in 1989, in transactions with state housing the municipality acted not only as a seller, but also as a notary public. Therefore, if there were some omissions in the execution of the applicant's sale-purchase contract this must have been the responsibility of the municipality. Nevertheless, it was the same municipality which two and a half years later sought to invalidate the sale-purchase as contrary to the law. According to the Government this was contrary to the principle of state responsibility for damages, as enshrined in Section 7 of the Constitution.

The Government further submit that the courts wrongly interpreted Section 117 of the Regulation on State Property. It was not true that paragraph 3 of this provision required imperatively a joint purchase in cases of siblings co-tenants. The provision only provided for a possibility for a joint purchase, thus leaving it to the persons concerned to agree otherwise if they wished. The Government conclude that the legal reasoning of the judgments in the applicant's case was against the law, and that therefore the applicant was deprived of her property unlawfully. Moreover, the alleged bad faith on the part of the applicant was not proved and the courts wrongly took into account the fact that the applicant's brother bought another apartment in 1990, as this was an event which occurred after the disputed purchase.

The applicant agrees with the position of the Government.

The Commission notes that in the present case the judgment of the District Court was delivered before 7 September 1992, the date of the Convention's entry into force in respect of Bulgaria, but that the decision to declare the applicant's contract null and void has come into force after its confirmation by the Regional Court on 4 May 1993. It follows that the alleged breach of Article 1 of Protocol No. 1 (P1-1) to the Convention has taken effect after the Convention's entry into force for Bulgaria and that the Commission is competent ratione temporis to examine this complaint.

The Commission further notes that the impugned decisions declared the applicant's title to her apartment null and void ab initio and that therefore she was considered to have never had a property right. Nevertheless, the Commission need not decide whether the applicant can invoke Article 1 of Protocol No. 1 (P1-1) to the Convention as the application is in any event manifestly ill-founded for the following reasons.

The Commission recalls that Article 1 of Protocol No. 1 (P1-1) to the Convention guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The deprivation rule is intended to refer to acts whereby the State lays hands on, or authorises a third party to lay hands on, a particular piece of property which is to serve the public interest (cf. Eur. Court HR, Air Canada v. the United Kingdom judgment of 5 May 1995, Series A no. 316, paras. 29, 30; No. 11949/86, Dec. 1.12.86, D.R. 51, pp. 195, 209).

Where there has been a state interference with the right to peaceful enjoyment of a property right the task of the Convention organs is to examine the lawfulness, purpose and proportionality of the decision taken by the domestic authorities (cf. No. 12258/86, Dec. 9.5.88, D.R. 56, p. 215).

The Commission recalls also that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (No. 10000/82, Dec. 4.7.83, D.R. 33, pp. 247, 255).

The Commission notes in this respect that the applicant's title to her apartment was declared null and void as contrary to the law by the courts in civil proceedings in which the applicant was legally represented and freely put forward all her arguments. Also, the courts gave detailed reasoning explaining their factual findings and the interpretation of the law. Contrary to the parties' contention it does not appear that the courts decided arbitrarily or that they relied on facts posterior to the relevant period. Their finding of a breach of Section 117 para. 3 of the Regulation on State Housing followed from the very fact that the apartment at issue was sold to the applicant only, whereas it should have been sold to her and to her brother jointly.

Furthermore, the Supreme Court found that Section 117 required siblings who were co-tenants in a state-owned apartment, if they wished to purchase it, to do it jointly. The Court explained that this requirement prevented the danger of arrangements between siblings to acquire two state apartments instead of one.

The Commission does not find an indication that the purpose of the requirements in question was incompatible with Article 1 of Protocol No. 1 (P1-1) to the Convention. The rules enforced against the applicant and laid down in Section 117 of the Regulation on State Property, as interpreted by the courts, aimed at the just appropriation of the state housing resources by preventing individuals from putting themselves artificially in a situation of a housing need. It is not for the Commission to assess the domestic authorities' approach in drafting or interpreting these legal rules.

Finally, it appears that a decision declaring null and void a

contract which contravenes the regulations for the sale of state housing would be a proportionate measure for their enforcement. Insofar as the applicant contends that the municipality was responsible for the irregularities, and that if she claims the recovery of the price paid this would not compensate the value of the apartment, the Commission notes that it was open to her to seek damages in this respect from the liable state organs or officials.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Under Article 6 (Art. 6) of the Convention the applicant complains of the alleged unfairness of the civil proceedings in view of the participation of a prosecutor in the proceedings before the District Court, of the alleged partiality of the courts and their allegedly arbitrary interpretation of the law.

The Government submit that the courts based their decisions partly on irrelevant facts. Also, they actively pursued the examination of the grounds for nullity, but at the same time failed to inform the applicant that she could claim to recover the price paid by her. Therefore, the courts were biased and there has been a breach of Article 6 (Art. 6) of the Convention.

The applicant agrees and also states that the courts wrongly considered that they were competent to examine the lawfulness of the 1981 administrative order by virtue of which the applicant became a tenant in the apartment at issue.

The Commission recalls its case-law according to which "when the Commission's competence (ratione temporis) begin in the course of proceedings before a second instance, it may examine such proceedings, but not those at first instance" (No. 8261/78, Dec. 11.10.79, D.R. 18, p. 150; No. 24140/94, Dec. 22.2.1995, unpublished). Therefore the Commission finds that it is not competent to examine the proceedings before the District Court ending with the judgment of 15 June 1992 as they were concluded prior to the Convention's entry into force for Bulgaria.

As regards the proceedings before the Regional and the Supreme Courts, the Commission recalls that the Convention organs' task when examining complaints under Article 6 (Art. 6) of the Convention is to ascertain whether the proceedings considered as a whole were fair (see Eur. Court HR, Windisch judgment of 27 September 1990, Series A no. 186, p. 10, para. 25).

In the present case the Commission notes that a prosecutor took part only in the proceedings before the District Court, which fall outside the Commission's competence ratione temporis.

Furthermore, it does not appear that the fairness of the proceedings before the Regional and the Supreme Courts have been affected by the fact that the plaintiffs were state organs. There is no indication that the applicant was unable to put forward her point of view, that the other party had been put in a better position, or that the proceedings were otherwise unfairly conducted. Moreover, the courts based their judgments on an analysis of the relevant law. There decisions do not appear to be arbitrary. The Commission already dealt with the applicant's contentions in this respect.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant invokes Articles 14 and 18 (Art. 14, 18) of the Convention in that the purpose of the state action against her had been

political. Thus, the plaintiff municipality wrote in its submissions to the District Court that the purchase of the apartment had been a "nomenklatura" type scheme. Also, the courts decided arbitrarily, based on the applicant's political affiliation.

The parties' observations do not mention this complaint.

Insofar as a separate issue arises under Article 14 in conjunction with Article 1 of Protocol No. 1 (Art. 14+P1-1) to the Convention, the Commission finds that the applicant's allegations are based solely on a remark made by the plaintiff municipality in its submissions to the District Court, which does not appear to be conclusive of the existence of a political bias on the part of the courts. Moreover, the Commission has just found that their decisions do not appear to be arbitrary.

Therefore the remainder of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber