

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

FOURTH SECTION

DECISION

Application no. 12664/05
Komnya Peycheva KUPENOVA and others
against Bulgaria

The European Court of Human Rights (Fourth Section), sitting on 7 May 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Krzysztof Wojtyczek, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 29 March 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms Komnya Peycheva Kupenova, Mr Nikola Peychev Karabadzhakov, Mr Stefan Angelov Karabadzhakov and Mr Kiril Angelov Karabadzhakov, are Bulgarian nationals who were born in 1939, 1949, 1963 and 1967 respectively. Ms Komnya Peycheva Kupenova and Mr Nikola Peychev Karabadzhakov live in Burgas and Mr Stefan Angelov Karabadzhakov and Mr Kiril Angelov Karabadzhakov live in Sozopol. The

applicants are represented before the Court by Mr M. Ekimdzhiev and Ms K. Boncheva, lawyers practising in Plovdiv.

2. The Bulgarian Government ("the Government") are represented by their Agent, Ms R. Nikolova, of the Ministry of Justice.

A. The circumstances of the case

3. The facts of the case may be summarised as follows.

4. An ancestor of the applicants owned agricultural land in the area of Sozopol, situated close to the seashore. In the 1980s the land was included in the territory on which a new sea resort called Duni was constructed.

5. The resort was initially managed by a State-owned enterprise, which was, in 1990, transformed into a State-owned company. This entailed, under the relevant domestic legislation, its becoming an owner of the assets it had until then used and managed. In 1991 it was registered as a joint-stock company. Between 1997 and 2001 the majority of its shares were privatised. After the privatisation the company was named Duni AD.

6. In the meantime, after the Agricultural Land Act ("the ALA") entered into force in 1991 (see paragraph 14 below), on 16 November 1991 the applicants requested the restitution of their ancestor's land.

7. In a decision of 16 January 1995 the competent body, the Sozopol agricultural land commission, adopted a decision in favour of their request for the restoration of their property rights to a plot of 9,000 square metres in the area of Duni. The decision did not contain reasoning mentioning possible property claims of the company managing the resort, nor whether the plot was subject to restitution in accordance with the criteria set in the law in force at the time.

8. On 6 February 1995 the applicants obtained a notary deed for the plot of land. On the same day the land commission issued an act for the formal transfer to them of possession of the plot. However, the applicants never obtained actual possession and did not start using the land, which remained within the fenced territory of the resort. The applicants did not bring proceedings to challenge this situation.

9. In December 2000 Duni AD brought *rei vindicatio* actions against all persons who had had their property rights to land in the territory of the resort restored after 1991. In the applicants' case, the company argued that the land commission's decision of 16 January 1995 had been null and void because the commission had not been competent to restore rights to land which had ceased to be agricultural before the adoption of the ALA in 1991.

10. The proceedings ended by final judgment of the Supreme Court of Cassation of 3 December 2004. The domestic courts found that the land at issue had been included in the resort's territory since 1985, had been used and managed by the State-owned enterprise existing before 1990 and had become its property after its transformation into a State-owned company.

Under the relevant legislation this land had not been subject to restitution. The land commission, in not taking the above circumstances into account, had given a decision which was null and void. Lastly, although they acknowledged that the land had remained within the fenced territory of the resort, the courts ordered the applicants to surrender possession.

11. In particular, in its judgment the first-instance District Court noted that:

> "There is no proof and it has not been alleged that at the time of restitution [the land commission] took into account the fact that the plot has been subject to urban planning."

It found in addition that:

> "By section 10b of the [ALA], in a case such as the present the owners have to be offered compensation, because the land is not subject to restitution, as is accepted in the constant judicial practice."

12. In its judgment the Supreme Court of Cassation noted the following:

> "The present case concerns the construction of a resort, which is a complex of buildings, installations, promenades, alleys, car parks, roads and other communicating areas. Its territory is fenced and the totality of the land is being used for the resort's needs. The plot at issue is situated at the centre of the resort, as seen from the plan presented by the [court-appointed expert]. Its restitution to the previous owners and its physical separation from the resort would infringe upon [the latter's] entirety and unity. In adopting the provision of section 10b of the [ALA] the legislator aimed at preserving and guaranteeing what already existed as a complex of buildings and installations, and that is why it has been provided that such land would not be subject to restitution, but that the owners would be compensated through other means. What is decisive is the plot's situation at the time of the law's adoption in 1991. ... The plot's separation through restitution does not correspond to this aim of the law and would have gone contrary to its spirit."

13. The applicants have not claimed compensation in lieu of restitution through comparable land or compensation bonds under the ALA or through shares in Duni AD under the legislation regulating the privatisation of former State-owned enterprises.

B. Relevant domestic law and practice

14. The Agricultural Land Act (*Закон за собствеността и ползването на земеделските земи*, "the ALA"), adopted in 1991, provides, *inter alia*, that persons, or their heirs, whose land has been collectivised, may request restoration of their ownership rights under certain conditions. Restitution can be in kind, if the relevant conditions have been met, or through compensation with other comparable land or compensation bonds.

15. Section 10b of the ALA, introduced in 1992, provides that former owners would receive compensation where the land formerly owned by

them "has been constructed upon or a complex of construction works (*мероприятия*) which do not permit restoration of property have been carried out".

16. The remaining relevant domestic law and practice concerning restitution of agricultural land and compensation in lieu thereof, and the transformation and privatisation of public enterprises, have been summarised in the Court's judgments in the cases of *Sivova and Koleva v. Bulgaria* (no. 30383/03, §§ 29-54, 15 November 2011) and *Lyubomir Popov v. Bulgaria* (no. 69855/01, §§ 83-95, 7 January 2010).

17. *Rei vindicatio* is provided for under section 108 of the Property Act. This provision and the relevant case-law require that the plaintiff in *rei vindicatio* proceedings must prove two elements: 1) the validity of his title and 2) the fact that there are no legal grounds for the defendant to hold the property.

COMPLAINTS

18. The applicants complained, relying on Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1, that they had been arbitrarily deprived of their property, which they had acquired pursuant to the decision of the Sozopol agricultural land commission of 16 January 1995. They considered that the courts had disregarded that decision's legal effect in the *rei vindicatio* proceedings.

THE LAW

19. The Court is of the view that the applicants' complaints are most appropriately examined under Article 1 of Protocol No. 1 alone, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Arguments of the parties

20. The Government considered that the applicants had failed to exhaust the available domestic remedies because they had not brought a tort action against the State. Furthermore, the Government pointed out that the applicants could have applied to receive compensation under the ALA, through other land or compensation bonds, once it had become clear that the actual restitution of their land was impossible.

21. In addition, the Government contended that the land commission's decision of 16 January 1995 had not created title to property for the applicants and that the case did not involve deprivation of property. They considered that the applicants could not have legitimately expected to have their property rights validly restored, given that the land claimed by them had been within the boundaries of the Duni resort.

22. The applicants disputed these arguments. They reiterated that they had been deprived of property they had acquired pursuant to the land commission's decision of 16 January 1995, but they acknowledged that they had never entered into possession of the plot they had claimed.

23. Relying on the Court's findings in the case of *Kehaya and Others v. Bulgaria* (nos. 47797/99 and 68698/01, 12 January 2006), the applicants contested the domestic courts' failure to view the decision of 16 January 1995 as binding on Duni AD.

24. Concerning the Government's referral to the possibility to apply for compensation under the ALA, the applicants stated that they refused to accept compensation in lieu of the restitution of their plot and considered that the compensation mechanism at issue could not ensure to them the market value of the plot they had claimed. They were of the view that their situation was similar to that of the applicants in the case of *Tzilevi* (examined in *Velikovi and Others v. Bulgaria*, nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02, §§ 223-228, 15 March 2007) where the Court found that the applicants' failure to seek the compensation offered by the State was not decisive for the outcome of their complaint under Article 1 of Protocol No. 1.

B. The Court's assessment

25. The Court takes note of the Government's objection for non-exhaustion of domestic remedies (see paragraph 20 above). Concerning the objection's first limb, it is of the view that it is not necessary to examine whether the present complaint should be dismissed on the ground that the applicants should have brought a tort action against the State, because in any event it considers the complaint inadmissible for the reasons below. As to the possibility for the applicants to apply for compensation under the ALA, also referred to by the Government, the Court will discuss it later.

26. The Court has recapitulated the relevant principles applicable to restitution of nationalised property in the case of *Kopecký v. Slovakia* ([GC], no. 44912/98, § 35, ECHR 2004-IX) in the following manner (citations omitted):

> "(a) Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'.
>
> (b) Article 1 of Protocol No. 1 does not guarantee the right to acquire property.
>
> (c) An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his 'possessions' within the meaning of this provision. 'Possessions' can be either '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. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition.
>
> (d) Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners.
>
> 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.
>
> On the other hand, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the Contracting State's ratification of Protocol No. 1."

27. In addition, the Court has held (see *Kopecký*, cited above, § 52; and *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, § 137, 12 October 2010) that

> "where the proprietary interest is in the nature of a claim it may be regarded as an 'asset' only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it."

28. Turning to the case at hand, the Court notes that the parties in the case appear to agree on the fact that the applicants were among those for

whom the ALA gave rise to a legitimate expectation to restitution, also confirmed by the decision of the land commission. The applicants argued that the land commission's decision of 16 January 1995 determined with finality this right and that it was to be considered a stable legal ground, creating enforceable property rights in regard of the specific plot of land. The Government disagreed on that latter point.

29. The Court notes, in the first place, that although the decision of 16 January 1995 served as a basis for the issuance of a notary deed and the land commission issued an act for the formal transfer to the applicants of the plot (see paragraph 8 above), the decision remained unenforced and the applicants never assumed actual possession. They did not attempt to change this situation and obtain possession (ibid.).

30. In its judgments in the cases of *Lyubomir Popov* (§ 117) and *Sivova and Koleva* (§ 74), both cited above, the Court observed that, under the national law, administrative decisions determining claimants' rights to restitution under the ALA were given in *ex parte* proceedings before the land commission and could be challenged either directly or indirectly by another person claiming property rights over the same land. It noted further that third parties claiming rights to the same land could defend these rights in a subsequent procedure, such as *rei vindicatio* judicial proceedings (see *Sivova and Koleva*, cited above, § 104). The possibility to re-examine an administrative decision for restitution in kind in subsequent judicial proceedings with third parties is the subject of well-established practice of the national courts (ibid., §§ 102-103). The effective enforcement of favourable decisions for restitution in kind is thus possible, unless further legal obstacles exist.

31. The Court is thus of the view that, given the approach under domestic law, the administrative decision of 16 January 1995 allowing the applicants' restitution claims could not be considered to have validly created property rights prior to the examination of any third parties' competing claims to the same land (see *Sivova and Koleva*, cited above, § 74). Unlike the case of *Kehaya and Others* (cited above, see in particular §§ 67-69 and 76 of the judgment) on which the applicants rely, in the present case the initial decision in favour of the applicants was not reached in court proceedings and Duni AD did not participate in the procedure before the land commission. Moreover, the land commission failed in its decision to comment on any possible rights of the company (see paragraph 7 above). For these reasons, and since, as in *Sivova and Koleva*, the applicants must have been aware from the beginning of Duni AD's competing claims because the company was holding and using the land (see paragraph 8 above), the Court considers that the applicants could not have legitimately expected that the decision of 16 January 1995 determined with finality their restitution rights, which were contested by a third party.

32. The present case is also to be distinguished from another Bulgarian case concerning restitution of agricultural land, namely *Mutishev and Others v. Bulgaria* (no. 18967/03, 3 December 2009), where the decisions allowing the applicants' claims for restitution in kind were challenged by the land commission itself and those challenges were subsequently rejected by the courts (see §§ 18-22 of the judgment). In *Mutishev and Others*, in contrast to the present case, there were no obstacles or competing claims by third parties. That is why the Court considered that the restitution decisions were final and enforceable (see §§ 129-138 of the judgment).

33. Unlike *Kehaya and Others* (cited above, §§ 67-69), in the present case the question whether all preconditions for restitution in kind had been met, including whether Duni AD had acquired rights to the land at issue which it could oppose to the applicants' rights, was for the first time examined in the adversarial *rei vindicatio* proceedings brought by the company against the applicants. In the present case the land commission's decision of 16 January 1995 made no specific reference to the relevant requirements for restitution and the extent to which the plot claimed by the applicants satisfied them. By contrast, in the *rei vindicatio* proceedings, in what appear to be well-reasoned judgments based on a comprehensive examination of the relevant circumstances (see paragraphs 11-12 above), the courts found that the preconditions for restitution in kind had not been met: the plot had, as early as 1985, been included in the territory of the resort, and in 1991 when the ALA had entered into force had not been subject to restitution. The courts noted in addition that the land commission had not examined these matters in its decision of 16 January 1995.

34. In view of the above, the Court agrees with the Government's position (see paragraph 21 above) that the land commission's decision of 16 January 1995 did not represent a stable legal basis which could give rise to final property rights and thus to an "asset" for the applicants (see *Sivova and Koleva*, cited above, § 91).

35. At the same time, the final decision in favour of Duni AD in the *rei vindicatio* proceedings did not have, as argued by the applicants, a final determinative effect on their rights to restitution, and did not reject their legitimate expectation to have those rights determined. In particular, the courts' finding in favour of Duni AD did not prevent a subsequent decision on the applicants' further entitlement to compensation in lieu of the restitution of the land.

36. Once it became clear that restitution in kind was impossible, it remained open for the applicants to apply for compensation, through other comparable land or compensation bonds under the ALA, as indicated by the Government (see paragraph 20 above), or through shares in Duni AD under the legislation concerning the privatisation of former State-owned enterprises (see *Sivova and Koleva*, cited above, §§ 52-54 and 108-109). In

a similar situation in the case of *Sivova and Koleva* (see §§ 109-114 of the judgment) the Court found that the modalities of these compensation schemes did not run contrary to the requirements of Article 1 of Protocol No. 1.

37. However, the applicants stated that they did not wish to seek compensation (see paragraph 24 above). In this respect they relied on the case of *Tsilevi*, cited above, which concerned the effects of the restitution process on third parties. In that case the applicants had been deprived of property acquired decades earlier and the Court, requiring a certain level of adequacy of the compensation offered to them, found that that level had not been met; accordingly, the applicants could not be blamed for failing to seek the compensation offered (see *Velikovi and Others*, cited above, §§ 224-228).

38. The present case, which, as the Court found above, did not involve deprivation of property, differs substantially from *Tsilevi*. As already noted, the present case does not concern compensation for lost property, but the provision of an alternative means of completing the restitution process, once restitution in kind was found to be impossible.

39. Lastly, the Court notes that, unlike the applicants in *Sivova and Koleva* (see §§ 115-118), the applicants in the present case did not complain of delays in the restitution procedure or of lack of legal certainly endured on that ground.

40. It follows from the considerations above that the present application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President