CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 48191/99
by Ayten and Mehmed KUSHOGLU
against Bulgaria

The European Court of Human Rights (First Section), sitting on 29 September 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 28 September 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Ayten Kushoglu (alias Ayten Zeynal Ali) and Mr Mehmed Kushoglu (alias Mehmed Sali Ali), have Bulgarian and Turkish nationality. They were born in 1958 and 1956 respectively and live in Malkara, Turkey.

A. The circumstances of the case

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

The applicants were born in Bulgaria, in the Silistra region. In 1989 the communist regime in Bulgaria forced tens of thousands of ethnic Turks, among them the applicants, to emigrate. Before leaving, on 24 July 1989 the applicants sold their two-storey house in Dulovo to the local municipality.

At the relevant time, a person willing to sell his real estate could only do so through the intermediary of the local municipality. The price was fixed at 19,288 Bulgarian levs ("BGL"), in accordance with an evaluation made by an expert at the municipality.

On 12 February 1990 the municipality sold the house to two individuals, Ms A. and Mr N. The price was BGL 21,376.

On an unspecified date in 1991 the applicants brought an action against the Dulovo municipality for a declaration that the 1989 transaction between them was null and void as being contrary to the law or concluded in circumstances of urgent necessity and under obviously unfavourable terms.

On an unspecified date in 1993 the applicants brought another action against Ms A. and Mr N. claiming that the contract of 12 February 1990 between the Dulovo municipality as the seller and Ms A. and Mr N. as the buyers was also null and void as being contrary to the law. On that basis the applicants asked the court to order the defendants to "surrender the ownership and the possession" over the disputed house.

The proceedings in the above two cases were joined on 19 February 1993.

On 2 March 1994 the Dulovo District Court gave judgment. It rejected the applicants' claim that the 1989 transaction had been concluded in circumstances of urgent necessity and under obviously unfavourable terms, as it had been submitted out of the one-year statutory time-limit.

It further dismissed on the merits the applicants' claims that the 1989 and 1990 transactions were null and void as being contrary to the law. Therefore, the *rei vindicatio* claim also failed.

Upon the applicants' appeal, on 8 June 1994 the Silistra Regional Court upheld the lower court's judgment.

The applicants submitted a petition for review to the Supreme Court. On 17 January 1995 the Supreme Court quashed the lower courts' judgments.

In its judgment of the same day the Supreme Court found that the 1989 transaction between the applicants and the municipality was null and void as it had been signed on behalf of the municipality by its vice-president who had not been authorised to do so. The Supreme Court found that as a result the 1989 transaction had been null and void *ab initio* and declared its nullity with final effect in its judgment.

As to the applicants' claim that the 1990 transaction between the municipality and the third parties who had bought the house from it was also null and void, the Supreme Court found that the lower courts had not considered all relevant factors. Therefore, the Supreme Court referred this part of the case back to the Regional Court. It also referred for renewed examination the applicants' *rei vindicatio* claim, stating that:

> "it must be considered in the light of the outcome of the dispute about the validity of the 1990 contract".

In the renewed examination of the remainder of the case, on 19 April 1995 the Silistra Regional Court found that the 1990 contract was valid. It also stated:

> "The binding directions given by the Supreme Court [in its judgment of 17 January 1995] appear to indicate that the outcome of the *rei vindicatio* claim depends on the outcome of the claim [that the 1990 contract was null and void]. The latter claim must be dismissed as there are no defects in the 1990 transaction. In this sense, the defendants Ms A. and Mr N. are in possession of the disputed property on existing grounds."

On that basis the Regional Court dismissed the remainder of the applicants' claims.

The applicants' ensuing petition for review was dismissed by the Supreme Court on 8 February 1996. In the introductory part of its judgment, while restating the procedure in the case, the Supreme Court stated:

> "The Silistra Regional Court [in its judgment of 19 April 1995] dismissed the claims ... on the grounds that the [1990] contract was valid and that Ms A. and Mr N. were the owners of the property".

In its reasoning and in the operative part, the Supreme Court upheld the Regional Court's judgment of 19 April 1995.

In 1996 the applicants sent complaints to the municipal authorities in Dulovo and other institutions. In reply, on 28 February 1997 the mayor of Dulovo advised them that following the Supreme Court's judgment of 17 January 1995 declaring null and void the 1989 contract whereby the municipality had bought their house, the applicants were considered its owners.

On 15 April 1998 the applicants brought a *rei vindicatio* action against Ms A., Mr N. and the Dulovo municipality, stating that they based their new action on grounds different from those raised in the previous proceedings. In particular, they did not claim that the 1990 contract between the

municipality and Ms A. and Mr N. was null and void but that it had never had any effect *in rem* since, in accordance with the basic principles of property law, ownership could only be acquired by dealing with the owner. Since the 1989 contract had been null and void *ab initio*, the Dulovo municipality had never become the owner of the disputed house and thus could not validly transfer the title thereto.

On 20 July 1998 the Dulovo District Court terminated the proceedings on the basis that the dispute was a *res judicata*. It referred in particular to the judgment of the Supreme Court of 8 February 1996.

The applicants appealed, stating that the previous proceedings had been limited to the issue whether or not the 1990 transaction had been null and void. The courts had never dealt with the question who was the owner of the disputed property. Any other interpretation of the judgments in the previous proceedings was absurd, as it would run contrary to the basic principles of property law.

On 26 September 1998 the Silistra Regional Court dismissed the appeal in private. The applicants' ensuing appeal to the Supreme Court of Cassation was also dismissed in private, on 29 December 1998. The Supreme Court of Cassation stated:

> "The parties to the [previous] proceedings and the current proceedings are the same ... The dispute [in the previous proceedings] concerned the ownership of the [same house] ... The grounds invoked were the nullity of the 1989 transaction between the applicants and the municipality and, on that basis, the [alleged] nullity of the subsequent transaction [of 1990] between the municipality and [Ms A. and Mr N.].
>
> All matters have been decided and are *res judicata* ... "

B. Relevant domestic law and practice

Under the Law on Obligations and Contracts, as interpreted by the courts, a contract that is null and void as being contrary to the law is considered null and void *ab initio*. Furthermore, under the Property Act and the relevant judicial practice, a person who has bought a real estate from another does not become its owner if the seller was not the owner. In such cases, the sale-purchase contract is valid (unless contrary to the law) and gives rise to rights and obligations for the parties but does not produce effects *in rem*. The buyer under such a contract may seek from the seller recovery of the price paid and damages for breach of contract.

Judgments of the civil courts are binding on the parties, their successors, the courts and all other State organs (Article 220 § 1 of the Code of Civil Procedure).

Final judgments preclude any re-examination of the same dispute between the same parties (Articles 221 and 224 of the Code). They are not

conclusive, however, in respect of disputes on the same subject between different parties or between the same parties on a different subject matter.

Thus, a final judgment in *rei vindicatio* proceedings in which A claimed unsuccessfully that he had purchased the disputed property from B precludes any fresh *rei vindicatio* action by A against B on the same grounds. However, such judgment does not preclude a fresh *rei vindicatio* action by A against B on grounds, for example, that A had acquired the property by way of acquisitive prescription.

The issue determined in a court's findings on the merits is a *res judicata.* In order to establish the content of the issue determined, regard must be had to the scope of the dispute and, therefore, to the court's reasoning. In addition, certain decisive findings on elements directly determinative of the disputed right or obligation may also be seen as *res judicata* (201-91-I, 987-90-I, 433-90-I, 30-64-OSGK).

COMPLAINTS

The applicants complained, relying on Articles 6, 13, 14 and Article 1 of Protocol No. 1 to the Convention, that they were unable to obtain possession of their house despite the judgment of the Supreme Court of 7 January 1995. They submitted that the courts decided arbitrarily and denied them justice. There had been, moreover, discrimination on the basis of their Turkish ethnic origin.

THE LAW

The Court notes that the time-limit for the submission of the Government's observations was twice extended upon their request and expired on 26 August 2004. However, the Government did not submit any observations within that time-limit.

Insofar as the applicants complained that they were unable to repossess back their house, that the courts had decided arbitrarily and denied them justice, the Court considers, in the light of the material in the case, that the complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that the above complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

The applicants also complained that the events in the present case constituted an unjustified discrimination on the basis of their Turkish ethnic origin.

The Court, having examined this complaint under Article 14 in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1, finds that it is unsubstantiated and therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It follows that this complaint must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits of the case, the applicants' complaints that they were unable to repossess their house, that the courts had decided arbitrarily and denied them justice;

Declares inadmissible the remainder of the application.

Søren NIELSEN
Registrar

Christos ROZAKIS
President