AS TO THE ADMISSIBILITY OF

Application No. 29583/96
by Elisavieta, Marie and Vahe PANIKIAN
against Bulgaria

The European Commission of Human Rights sitting in private on 10 July 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

Mrs. M.F. BUQUICCHIO, Deputy to the Secretary to the Commission

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

Having regard to the application introduced on 3 October 1995 by Elisavieta, Marie and Vahe PANIKIAN against Bulgaria and registered on 2 January 1996 under file No. 29583/96;

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 9 September 1996 and the observations in reply submitted by the applicants on 11 November 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are Bulgarian nationals, born in 1926, 1952 and 1955 respectively and residing in Sofia. The first applicant, currently retired, is the mother of the second and third applicants, who are both medical doctors.

A. Particular circumstances of the case

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

In 1954 the first applicant and her husband became tenants in a state-owned apartment. The apartment had four rooms and the applicants' family occupied two of them. Two other families were tenants in the two remaining rooms.

In 1958 the first applicant and her husband applied to purchase the apartment where they lived as tenants. Pursuant to the Regulation on the Sale of State Housing of 1957 (Naredba za prodazhba na zhilishta ot darzhavnia zhilishten fond predostaven na narodnite saveti) ("the Housing Regulation 1957"), on 19 March 1959 the Executive Committee of the local municipality (IK na Narodnia savet) gave its consent. On 26 March 1959 the first applicant and her husband signed the sale-purchase contract.

The obligation of the first applicant and her husband to pay to the State the price of the apartment was secured by a mortgage. The mortgage was lifted in 1979 when the last amounts due were paid in.

In February 1992 the Parliament adopted the Law on the Restitution of Ownership of Nationalised Real Property ("the Restitution Law" - Zakon za vazstanoviavane na sobstvenostta varhu odarzhaveni nedvizhimi imoti) (see below Relevant domestic law and practice).

On 3 August 1992 a Mr. S. submitted to the Sofia District Court (Sofiiski raionen sad) an action against the applicants under Section 7 of the Restitution Law (see below Relevant domestic law and practice). He presented proof that the apartment, which had been purchased by the first applicant and her husband from the State in 1959 and which in 1992 was the joint property of the applicants, had been owned by his parents until 1948 when it had been nationalised. He claimed that the 1959 sale-purchase contract, between the State as the seller and the first applicant and her husband as buyers, had been contrary to certain provisions of the then existing laws. Moreover, the buyers' membership in the Communist Party and their social status had played a role in the transaction.

The Sofia municipality was also summoned as a defendant in the case. In its submissions to the Court the municipality disputed the claims of the plaintiff and asked the Court to dismiss them.

On 30 June 1993, after several hearings with the participation of the applicants and their lawyers, the District Court delivered its judgment. The Court found that the decision of the municipal Executive Committee of 19 March 1959 had not been approved by the competent Ministry as required by Section 3 of the Housing Regulation 1957. Also, the municipality had considered the first applicant's family as consisting of six persons, two of them having been her uncles, whereas under the Housing Regulation 1957 they could not be considered members of the family. In any event, even for a six-member family, the apartment had been too large because under Section 8 of the Lease Law

(Zakon za naemite), as in force at the time, a family of six was entitled only to a three-room apartment. Finally, although in one of the documents dating from 1959 it had been mentioned that the other tenants in the same apartment had agreed that it be sold to the first applicant's family, the written consent form required by the law was not found in the file.

As a result the Court found that the first applicant and her husband had acquired their apartment in breach of the law and restored Mr. S.'s ownership rights.

The applicants submitted an appeal to the Sofia Regional Court (Sofiiski gradski sad). They stated inter alia that the other tenants in the apartment had given their prior consent to the transaction as required by the law. Also, the sale-purchase contract clearly referred in its text to the approval of the transaction by the Ministry, done on 24 March 1959. The fact that some documents, among them the written consent forms and the official approval, were missing from the file held in the archives of the Sofia municipality, could not be used against them. The applicants presented a written declaration signed in 1993 before a notary by a woman, who had been one of the tenants. She stated that in 1959 she had given her written consent. The applicants also disputed the applicability of the Lease Law which concerned only leases, not sales. Moreover, the family included the uncles who were immigrants from Turkey, without any property, and had always lived with them.

On 1 February 1994 the Regional Court confirmed the lower Court's judgment. The judgment stated inter alia that even assuming the existence of an approval by the Ministry and of written consent forms, the other points discussed in the District Court's judgment were sufficient to warrant a finding of unlawfulness.

Thereupon the applicants submitted to the Supreme Court (Varhoven sad) a petition for review (pregled po reda na nadzora). They enclosed the written opinion of a leading professor in civil law, who explained in detail why the Lease Law and the restrictions as regards the number of rooms were inapplicable in the applicants' case.

On 17 April 1995, following a hearing at which the applicants were represented by three lawyers, the Supreme Court refused the petition. It discussed all arguments of the applicants and found inter alia that the Lease Law was applicable, that the existence of a ministerial approval and of consent forms had not been proven and that the lower courts had not breached the rules of civil procedure.

The other defendant in the case, the Sofia municipality, was summoned but did not take part either in the appeal or in the review proceedings.

On unspecified dates Mr. S. instituted against the applicants two sets of proceedings seeking the possession of the apartment and also 140,000 leva in damages as the applicants had unlawfully refused to vacate it. A hearing in the revindication case was scheduled for 18 November 1996 and, in the damages case, for 8 October 1996. The parties have not provided information about any later developments.

B. Relevant domestic law and practice

a. The Law on the Restitution of Ownership of Nationalised Real Property, which entered into force in February 1992, provides, inter alia, that the former owners, or their heirs, of certain types of real property nationalised by virtue of several specific laws dating from the period between 1947 and 1952, become ex lege the owners of their nationalised property if it still exists, if it is still owned by the State and if no adequate compensation had been received at the time of the nationalisation.

Section 7 provides for an exception to the requirement that the real property be still owned by the State. It provides that, even if certain property had been acquired by third persons after the nationalisation, the former owners or their heirs can recover their property rights if the third persons had become owners either in breach of the law, or by virtue of their party or official position, or through abuse of power. In cases under Section 7 the former owners have to bring an action before the courts within one year from the entry into force of the Restitution Law.

The Restitution Law does not state expressly the nature of the judgments under Section 7 and their consequences as far as the "third persons" are concerned. The practice of the Supreme Court (Reshenie No. 1623 ot 10.03.1994 po gr.d. No. 186/1993 na IV gr. otd. na VS; Reshenie No. 1036 ot 13.07.1994 po gr.d. No. 9/1994 na IV gr. otd. na VS) and its Interpretative Decision No. 1 (TR 1/95, OSGK, Biul. VS kn. 4/95) have clarified that these are declaratory judgments and that their effect is to declare the sale-purchase contract null and void as contrary to the law, based on the respective provisions of the general civil law.

b. On 19 April 1995, 14 September 1995, and 30 May 1996 the Parliament adopted amendments to the Restitution Law, most of which were thereafter declared unconstitutional by the Constitutional Court (D.V. br.br. 40/1995, 87/1995 i 51/1996; Resh. No. 9 po k.d. No. 4/95, D.V. br. 66/95; Resh. No. 20 po k.d. No. 24/95, D.V. br. 94/95; Resh. No. 11 po k.d. 10/96, D.V. br. 61/96, popr. D.V. br. 87/96).

An amendment which appears to be in force since June 1996 is contained in paragraph 3 of the supplementary provisions to the Restitution Law (D.V. br. 51/96). It provides that persons who have been ordered to vacate their apartments under Section 7 are to be paid by the State the price of the property, adjusted to reflect the market price as of the date of the eviction. Also, until this payment is effected, they are given temporarily State owned apartments for rent, or a rent allowance, which would enable them to let an apartment.

c. In a judgment of 18 January 1997 the Constitutional Court refused a motion to declare unconstitutional Section 7 of the Restitution Law. The Court noted, inter alia, that in cases under this provision the persons who had purchased nationalised property from the State by virtue of a void contract "had never become owners ..." (Resh. po k.d. No. 29/95, D.V. br. 9/96).

COMPLAINTS

The applicants complain that, after having owned their apartment for more then 35 years, they were deprived of it arbitrarily and in violation of Article 1 of Protocol No. 1 to the Convention. Moreover, they can now claim back only a nominal amount, which would hardly suffice to rent housing for several months, let alone to enable them to buy another apartment. They also invoke Article 8 of the Convention.

Furthermore, they submit that there has been a violation of Article 14 of the Convention as they were discriminated against on the basis of their Armenian ethnic origin and their political affiliation.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 October 1995 and registered on 2 January 1996.

On 13 May 1996 the Commission decided to communicate the

applicants' complaints under Articles 8 and 14 and Article 1 of Protocol No. 1 concerning the loss of their apartment, and to declare inadmissible the remainder of the application.

The Government's written observations were submitted on 9 September 1996, after an extension of the time-limit fixed for that purpose. The applicants replied on 11 November 1996.

On 6 December 1996 the Commission granted the applicants legal aid.

THE LAW

1. The applicants complain under Article 1 of Protocol No. 1 (P1-1) to the Convention that they have lost the ownership of their apartment. They also invoke Articles 8 and 14 (Art. 8, 14) of the Convention.

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 13 (Art. 13) of the Convention and of Article 1 of Protocol No. 1 (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, D.R. 87, p. 130).

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 remainder of the application is admissible.

2. Article 1 of Protocol No. 1 (P1-1) to the Convention, insofar as relevant, provides as follows:

> "Every ... 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 ..."

The Government first make a detailed analysis of the legislation concerning the sale of state housing, as in force in 1959. They state inter alia that the Housing Regulation 1957 did not provide for any restriction on the size of the dwelling to be sold. Citing several decisions of the Supreme Court from the 1960's, the Government conclude that the courts in the applicants' case wrongly decided that the Lease Law was applicable in this respect.

Furthermore, the Government maintain that under the relevant law at the time it was within the competence of the administrative organs of the municipality and of the respective Ministry to assess all factors and to decide whether an apartment should be sold or not.

Therefore, and in accordance with interpretative decision No. 47 of 1967 of the Supreme Court, the courts should be considered competent only to review whether there had been a valid consent between the State (the seller) and the buyer. It was not for the courts to replace the administrative bodies and analyse issues such as, for example, the size of the apartment.

The Government also make an analysis of the legal issues related to the Restitution Law and dispute its interpretation by the Supreme Court and by the Constitutional Court. The Government contend that the applicants can invoke their right to peaceful enjoyment of their possessions because Section 7 of the Restitution Law provided for a nullification ex nunc and not ab initio. This was so because, inter alia, Section 7 gave a one year time-limit, as from February 1992, for the bringing of an action by the pre-nationalisation owner. After the expiration of this time-limit, and if no action was brought, the rights of the owners would again become stable. On the other hand the nullity of a contract which had been null and void ab initio could be declared to be so at any time, in any proceedings. This was not the case under Section 7 of the Restitution Law, whose legal effect is in fact now over, the one year time-limit having expired.

The Government conclude that the applicants lost their property pursuant to the Restitution Law, in proceedings where the courts decided wrongly on issues of fact and law and that, therefore, there has been a breach of Article 1 of Protocol No. 1 (P1-1).

The applicants agree with the Government and also bring additional arguments. Thus, there was another decree of 1957, which was relevant and should have been applied by the courts. Also, when deciding whether the required consent and authorisation forms had existed back in 1959, the courts wrongly put the burden of proof on the applicants. It was absurd to state that these forms had not existed simply because the applicants could not produce copies of them. Moreover, it was the Government's, and not their fault, if these documents had been lost, as they were supposed to be kept in the archives of the municipality.

Furthermore, the applicants state, in agreement with the Government, that the courts should have examined proprio motu whether they had power to review the administrative decisions of 1959. The applicants contend that there have been breaches of Articles 6 and 13 (Art. 6, 13) of the Convention and of Article 1 of Protocol No. 1 (P1-1) to the Convention.

3. According to the Convention organs' case-law "possessions" within the meaning of Article 1 of Protocol No. 1 (P1-1) may be either "existing possessions" or valuable assets, including claims, under certain conditions. By contrast, the hope of recognition of a former property right which has not been susceptible of effective exercise for a long period of time, is not to be considered as a "possession" (see Nos. 18890/91, 19048/91, 19049/91, 19342/92 and 19549/92, Dec. 4.3.96, D.R. 85, p. 5, and the case-law referred to there on p. 18).

According to the jurisprudence of the Bulgarian courts on Section 7 of the Restitution Law it appears that the applicants' title to their apartment was considered void ab initio which had the effect that they were considered to have never owned it. It is true that the Government of Bulgaria present a different interpretation of the law in this respect and state that this jurisprudence was wrong. However, in accordance with the basic principles of the rule of law, the Commission considers that for purposes of the proceedings before it the relevant interpretation of domestic law is to be found in its text and in the competent courts' jurisprudence.

The Commission considers that the applicants had a "possession" within the meaning of Article 1 of Protocol No. 1 (P1-1) to the

Convention even if their title was null and void ab initio. Thus, for about 35 years they possessed the apartment in question and were considered owners for all legal purposes. Moreover, it would be unreasonable to accept that a State may enact legislation which allows nullification ab initio of contracts or other titles to property and thus escape the responsibility for an interference with property rights under the Convention.

The applicants' title having been nullified by virtue of judicial decisions delivered after 7 September 1992, the date of the Convention's entry into force in respect of Bulgaria, the Commission finds that it is competent ratione temporis to examine the complaints (cf. No. 26530/95, Dec. 27.2.97, unpublished).

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 third, contained in the second paragraph, concerns the control on the use of property. 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 p. 195, 209).

Insofar as the applicants contend that the courts decided wrongly, the Commission recalls 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).

It is true that the applicants also complain that the courts deprived them of their property as they acted arbitrarily. However, the Commission recalls that in its partial decision of 13 May 1996 it found that the impugned judgments, which declared the applicants' title to their apartment null and void as contrary to the law, were given by the courts in civil proceedings where the applicants were legally represented and freely put forward all their arguments. Also, the Commission noted that the courts gave a detailed reasoning, addressing every relevant objection of the applicants and explaining their factual findings and the interpretation of the law.

The essence of the applicants' complaints is, rather, in their criticism of Section 7 of the Restitution Law, of the manner in which it was applied, and of the alleged injustice resulting therefrom. The Commission considers that this complaint should be examined in the light of the first sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1) to the Convention (cf., Eur. Court HR, Matos e Silva Lda and Others v. Portugal judgment of 16 September 1996, to be published in Judgements and Decisions 1996).

For the purposes of this examination the Commission must determine whether a fair balance was struck between the general interest of the community and the requirements of the protection of the individual's fundamental rights (Eur. Court HR, Pressos Compania Naviera S.A. and others v. Belgium judgment of 20 November 1995, Series A no. 332, p. 23, para. 38; No. 12258/86, Dec. 9.5.88, D.R. 56, p. 215).

In matters under Article 1 of Protocol No. 1 (P1-1) States enjoy a certain margin of appreciation. Where the legislature has made a choice by enacting laws, which it considered in the general interest, the possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the authorities remain within the bounds of their margin of appreciation, it is not for the Convention organs to say whether the legislation represented the best solution (cf., mutatis mutandis, Mellacher and others v. Austria judgment of 19 December 1989, Series A no. 169, p. 28, para. 53).

In the present case the applicants' title to their apartment derived from a transaction, concluded in 1959, which was found to have been in breach of certain provisions of the law then in force. However, its lawfulness was not challenged at the time, in 1959 and in the following years. Also, it appears that at the time only the municipality (the seller) and the State had locus standi to bring an action to declare the contract null and void. Years later, in February 1992 the Parliament decided to introduce a new possibility for contesting the lawfulness of such transactions, by giving locus standi to third persons, the pre-nationalisation owners. Mr. S., the pre-nationalisation owner of the applicants' apartment, seized this opportunity and challenged the applicants' title, which had been practically stable for the past 33 years. The courts, upon his action, reviewed the lawfulness of the 1959 transaction and declared it null and void.

In examining whether the interference with the applicants' rights under Article 1 of Protocol No. 1 (P1-1) to the Convention, resulting from the above legislation and its implementation in the case, was justified, the Commission attaches special importance to the very particular circumstances which formed the background of the Restitution Law. This Law was apparently adopted with the aim to make good injustice dating back decades in the past and inherited from the communist rule in Bulgaria. Also, it had a strictly transitional character, the possibility to bring an action under Section 7 having been limited to only one year, which expired in February 1993.

The Commission further notes that according to the law in force since June 1996 the applicants can claim from the State the price of the apartment, adjusted to reflect its market value as of the date of the eviction. Moreover, they are entitled to a rent allowance for the period of time between the eviction and the receipt of the amount due in respect of the price of the apartment.

In these circumstances the Commission does not consider that the Bulgarian authorities acted beyond the margin of appreciation left to States under Article 1 of Protocol No. 1 (P1-1) to the Convention.

It follows that the applicants' complaint under Article 1 of Protocol No. 1 (P1-1) to the Convention is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicants further complain that they were deprived of their apartment contrary to Article 8 (Art. 8) of the Convention. They also state that there has been a breach of Article 14 (Art. 14) of the Convention.

The Commission considers that, insofar as the apartment at issue is the home of some of the applicants, their complaint under Article 8 (Art. 8) of the Convention does not raise an issue separate from that already examined under Article 1 of Protocol No. 1 (P1-1) to the Convention.

As regards the alleged discrimination contrary to Article 14 (Art. 14), on the basis of the applicants' Armenian ethnic origin, the Commission finds that this complaint is unsubstantiated and therefore

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

5. The Commission finally notes that the applicants state in their observations that there have been breaches of Articles 6 and 13 (Art. 6, 13) of the Convention. However, in its partial decision of 13 May 1996 the Commission declared inadmissible the applicants' complaints raised under Article 13 (Art. 13) of the Convention, and examined under Article 6 para. 1 (Art. 6-1) of the Convention.

Insofar as the applicants may be understood as requesting the reopening of the proceedings in respect of these complaints, the Commission finds that they have not raised any substantial new element, which would require a reopening (cf. No. 19975/92, Dec. 3.12.92, unpublished).

For these reasons, the Commission, by a majority,

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO	S. TRECHSEL
Deputy to the Secretary	President
to the Commission	of the Commission