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

THIRD SECTION

DECISION

Application no. 8095/11
Peter POPIVČÁK
against Slovakia

The European Court of Human Rights (Third Section), sitting on 5 November 2013 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 26 January 2011,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Peter Popivčák, is a Slovak national who was born in 1950 and lives in Košice.

He was represented before the Court by Mr T. Šafárik, a lawyer practising in Košice.

2. The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

A. The circumstances of the case

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

1. Property

4. The facts of the present case revolve around a piece of real property, situated in a regional capital, which used to form part of the site of a factory belonging to a (socialist) State-owned enterprise.

5. In the 1980s an above-ground heat distribution pipeline was built in the area in order to provide it with heating. The pipeline passes through the property in question.

6. The applicant is a self-employed entrepreneur. In that capacity, in 1991 and 1992 he rented the said property from the private company which had meanwhile become its owner. Subsequently, in 1993, the applicant himself acquired title to the property by way of purchase.

7. The property forms a part of a shop in which the applicant runs a business which is essentially a car scrapyard.

8. The property partly consists of a road. According to the Government's submission, which is supported by photographs and which has not been contested by the applicant, the remaining part of the property is used for storing wrecked cars.

9. The pipeline runs alongside the applicant's premises approximately 3 metres above the ground and between 4.5 and 9.5 metres from the fence, and it rests on pylons anchored in the ground.

10. The pipeline belongs to a commercial joint-stock company producing and distributing heating for the town concerned.

11. The bone of contention in the present case is the lack of compensation for the restrictions on the use of the applicant's property due to the pipeline. The applicant unsuccessfully applied for such compensation in the proceedings which lie at the heart of the present case. However, prior to those proceedings he had asserted similar claims in another set of proceedings, but also unsuccessfully. Both sets of proceedings are described below, chronologically, with focus on the contested proceedings.

12. Until 2004, by virtue of section 4(1)(l) of the Real Estate Tax Act (Law no. 317/1992 Coll., as in force at the relevant time), real property encumbered by easements such as the one in the present case were exempt from real-estate tax. According to the Government, whose submission the applicant has not contested, from 2005 this exemption continued to apply to the property in question by virtue of a decision of the municipality concerned.

2. Proceedings prior to the contested proceedings

13. In 2000 the applicant lodged an action against the above-mentioned heat production and distribution company seeking compensation in respect of unjustified enrichment on account of the easement relating to the pipeline.

14. The action was dismissed by the Košice II District Court (*Okresný súd*) on 9 December 2002 and, following an appeal by the applicant, by the Košice Regional Court (*Krajský súd*) on 19 May 2003.

3. Contested proceedings

15. On 25 April 2008 the applicant lodged a new action against the same defendant, arguing that the latter was the owner of the pipeline and that, along with the protective zones around it, the pipeline prevented him from making use of about 500 square metres of his property.

16. The applicant submitted that the average yearly rent for land in the area was equivalent to approximately 3.70 euros (EUR) per square metre. Accordingly, the applicant requested an order for the payment of the equivalent of approximately EUR 1,850 to cover the four years before the introduction of his action, plus each subsequent year.

17. In support of his claims, the applicant invoked, *inter alia*, Articles 1 of Protocol No. 1 and 20 §§ 1 and 4 of the Constitution (Constitutional Law no. 460/1992 Coll., as amended), as well as the relevant provisions of the Civil Code (Law no. 40/1964 Coll., as amended) and the 2004 Thermal Energy Sector Act (Law no. 657/2004 Coll., as amended).

18. The applicant also relied on a judgment (*nález*) of the Constitutional Court (*Ústavní soud*) of the Czech Republic (whose legal tradition is similar to that of Slovakia) of 18 November 2003 in case no. I. ÚS 137/03.

That judgment concerned, *inter alia*, the continued application of the 1957 Electrification Act (Law no. 79/57 Coll.) (see below), which had been adopted at the time of the Czechoslovak Republic. The Czech Constitutional Court observed an ideological distinction between the "old law", that is to say, that of the "old (communist) regime" prior to November 1989, and the law applicable under the subsequent democratic constitution. This distinction reflected the political and economic changes that had taken place. While there was a general continuity with the old law, there was a discontinuity in respect of the values of the old regime. Thus, the interpretation and application of the old rules had currently to take due account of the protection of human rights and fundamental freedoms, including the protection of property. The latter consideration was all the more relevant when the beneficiary of an *ex lege* easement was making use of it in order to obtain economic gain. While the lawfulness of the creation of an *ex lege* easement as such was undisputed, where the applicable public-law legislation contained no provision for compensation in respect of expenses relating to the exercise of the easement, the relevant provisions of private law were to be used as an alternative. Such provisions provided for compensation in respect of running costs, which was to be agreed on by those concerned or to be ordered by a court. A lack of compensation for such expenses would constitute unjust enrichment on the part of the beneficiary of the easement.

19. The action was dismissed by the District Court on 14 January 2009 and, following an appeal by the applicant, by the Regional Court on 5 May 2010. The courts' reasoning can be summarised as follows.

20. To start with, the courts found that, although the action concerned the same parties and the same property and was based on the same line of argument, the matter was not *res judicata* by reason of the judgments of 2002 and 2003 (see paragraph 13 above). This was so because the claims raised in it concerned a different period of time (see paragraph 15 above), and new legislation had been enacted in the meantime (see below).

21. In this regard, the courts observed that the heat-distribution facility had been built under a construction permit granted in 1981; that it had begun to operate in 1987; and that it was located on land which, at that time, had belonged to the (socialist) State.

By operation of section 18 of Governmental Directive no. 80/1957 Coll. (applicable at the relevant time) on the implementation of the 1957 Electrification Act, the application of that Act had been extended to heat-distribution facilities, such as the one in the present case.

The 1957 Electrification Act thus authorised the construction of the facility but, as a matter of principle, it did not provide for compensation. However, if the owners or users of the real property concerned were significantly encumbered in its use, they could claim adequate one-off compensation. The claim had to be filed within three months of the entry of the installation into use or else it would lapse.

The 1957 Electrification Act provided for *ex lege* easements and the subsequent legislation, in particular section 42(2) of the 1998 Energy Act (Law no. 70/1998 Coll.) and section 38(4) of the 2004 Thermal Energy Sector Act, had left them intact. None of these pieces of legislation envisaged any compensation for the restrictions inherent in the continued existence of the *ex lege* easements, other than the one-off compensation at the time of their creation. Providing for new compensation claims would have the effect of creating new titles to restitution, which the lawmaker was free under the Constitution not to choose to do.

The applicant had acquired his plot in 1993 by purchasing it from a private seller. It had been his responsibility to examine the condition of the property, including the existence of the impugned *ex lege* easement, and to ensure that that was reflected in the purchase price. The contested *ex lege* easement fell outside the scope of the existing unjustified-enrichment rules, which accordingly were not applicable.

4. Constitutional complaint

22. On 18 June 2010 the applicant challenged the judgement of the ordinary courts by way of a complaint before the Constitutional Court (*Ústavný súd*) under Article 127 of the Constitution.

In substance, he reiterated the above arguments and alleged a violation of his rights under Articles 6 § 1 of the Convention and 1 of Protocol No. 1.

In addition, he submitted that the courts' argument concerning how he had acquired the property was of secondary importance and did not deal with the question of principle obtaining in cases such as his.

23. On 7 October 2010 the Constitutional Court declared the complaint inadmissible as being manifestly ill-founded.

The Constitutional Court reiterated its established case-law to the effect that a general court could not bear "secondary liability" for a violation of fundamental rights and freedoms of a substantive nature unless there had been a constitutionally relevant violation of the rules of procedure. However, no such procedural issue had been established.

The essence of the applicant's complaint was that there was no law enabling him to claim compensation for the *ex lege* easement over his property. However, in contrast to some other jurisdictions, including the Czech Republic, an individual in Slovakia had no power to challenge the compliance of the legislation, or lack of it, with the Constitution. The applicant's argument made in reliance on the case-law of the Constitutional Court of the Czech Republic was therefore without consequence.

The ordinary courts had supported their judgments by adequate reasoning and their conclusions as to the facts and law manifested no signs of arbitrariness or lack of justification.

B. Relevant domestic law and practice

*1. The Charter (*Listina základných práv s slobôd*)*

24. The Charter (Constitutional Law no. 23/1991 Coll.) was introduced into the legal order by way of a constitutional law which was enacted by the Federal Assembly of the Czech and Slovak Federal Republic on 9 January 1991 and which entered into force on 8 February 1991. The law remains in force in Slovakia today.

25. The relevant part of Article 11 provides:

> "1. Everyone has the right to own property. Each owner's property right shall have the same content and enjoy the same protection. [The right of] inheritance is guaranteed.
>
> 2. The law shall designate the property necessary for securing the needs of society as a whole, the development of the national economy, and public welfare, which may be owned exclusively by the State, a municipality, or by designated legal persons; the law may also provide that certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic.
>
> 3. Ownership entails obligations. It may not be misused to the detriment of the rights of others or in conflict with legally protected public interests. It may not be exercised

so as to cause harm to health, nature, or the environment beyond the limits laid down by law.

4. Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation."

2. The Constitution

26. The relevant part of Article 20 provides:

"1. Everyone shall have the right to own property. The property rights of all owners shall be uniformly construed and equally protected by law. The right of inheritance is guaranteed.

...

4. Expropriation or restrictions to the right of property may be imposed only to the extent necessary and in the public interest, in accordance with the law and for adequate compensation."

3. Civil Code

27. Articles 3 § 1:

"The exercise of rights and fulfilment of duties under civil law must not interfere with the rights or legally protected interests of others without a lawful ground and may not be *contra bonos mores*."

28. Article 123:

"The owner shall be entitled, within the limits prescribed by law, to hold the object of his ownership, to use it, to benefit from its fruits and proceeds and to make dispositions in respect of it."

29. Article 124:

"All owners shall have the same rights and duties and shall be granted the same legal protection."

30. Article 128:

"1. The owner of a thing must endure the use of his thing [by another person] in a state of emergency or in a pressing public interest, for the necessary time, to the necessary extent, and in return for compensation, if the purpose cannot be achieved otherwise.

2. In the public interest, ... the ownership of [a thing] may be restricted if the purpose cannot be achieved otherwise, provided that the expropriation or restriction has a basis in law, and only for that purpose and for compensation."

31. Article 151n et seq. provides for basic rules in relation to easements:

"1. Easements shall constitute a restriction on the owner of real property for the benefit of someone else, so that the owner must endure, refrain from doing or do something. The rights constituting an easement shall be linked to and originate from the ownership of particular real property or be linked to and belong to a particular person.

2. Easements linked to and originating from the ownership of real property shall pass to the acquirer together with the acquisition of the ownership of the property.

3. Unless the participants agree otherwise, the person who is entitled to use somebody else's thing on the basis of a right constituting an easement must bear an adequate share of the costs of its maintenance and repair; however, if the thing is co-used by its owner, the owner must bear these costs in proportion to the extent of the joint use."

32. The relevant part of Article 151o § 1 provides:

"Easements can arise on the basis of a written contract, on the basis of a will, in connection with the outcome of inheritance proceedings, on the basis of an approved agreement among the heirs, on the basis of a decision by the competent authority, or by operation of law."

4. Energy laws

33. Under section 22(1) of the 1957 Electrification Act, an enterprise active in the energy sector was entitled: (a) to build and operate electrical installations on other persons' real property to the extent permitted under the building permit, to erect support pylons, to connect the plots by conductors and to establish the electricity main on them; (b) to access the real property directly concerned for the purposes of the construction, operation, maintenance, and modification or removal of the main; and (c) to remove or prune trees obstructing the main.

34. Subject to section 22(2), the exercise of the entitlements pursuant to section 22(1) was subject to no compensation. However, if the owners or users of real property not belonging to the (socialist) State were significantly encumbered in the use of the property because of the establishment of the main, they could a claim with the construction authority for the company concerned to pay them adequate one-off compensation. The claim was to be submitted within three months of the entry of the installation into permanent use on the pain of expiry.

35. Under section 18 of Governmental Directive no. 80/1957 Coll. (as in force at the relevant time) on the implementation of the 1957 Electrification Act, the application of section 22 and certain other provisions of the 1957 Electrification Act was extended to heat-distribution facilities.

36. The 1957 Electrification Act was abolished and replaced by the 1998 Energy Act as of 1 July 1998, which in turn was abolished by virtue of the 2004 Energy Act (Law no. 656/2004 Coll.) as of 1 January 2005.

However, under both Acts, as well as under the 2004 Thermal Energy Sector Act, entitlements in respect of other persons' real property and limitations on the use of it which had been established previously remained intact.

37. Under the relevant part of section 10 of the 2004 Thermal Energy Sector Act,

"1. The holder of a licence [to carry out business in the thermal energy sector] ... shall have the right:

a) to enter with machinery or on foot another person's land, buildings or facilities in connection with the operation, service, taking of readings, repairs and maintenance of the heating facility network ... after obtaining the consent of the owner of the real property [concerned], which consent shall not be required in the event of an immediate threat to life, health or property ...,

b) in a protective zone to remove and prune trees and other coppice which undermines the security and reliability of the thermal energy facilities if the owner or other entitled user of the real property [concerned] has not done so despite a previous written request ...,

2. The holder of the licence is liable for:

...

c) providing one-off compensation for the restriction on the exercise of ownership rights in respect of real property which he or she has entered in the discharge of his or her tasks under [the above-cited] sub-section 1,"

38. In addition, under section 33(1)(a) of the 2004 Thermal Energy Sector Act, individuals and legal entities are entitled to adequate compensation for restrictions on the exercise of their ownership rights due to the establishment of a protective zone, and for entry onto their real property for the purposes of the reconstruction, repair or maintenance of a system of thermal installations.

5. Judicial practice

39. By way of an action in the Prešov District Court (case no. 9C 207/00), an individual sued a municipality and a public-transport company of that municipality for compensation in connection with electrical installations situated on his real property and used by the defendants in operating the public transport system. The legal provisions applicable in respect of such installations were similar to those applicable in the present case. For unclear reasons the applicants were third parties to the proceedings.

40. In the context of those proceedings, the Court of Appeal challenged before the Constitutional Court the constitutionality of section 42(2) of the 1957 Electrification Act, applicable by virtue of section 69(10) of the 2004 Energy Act, which had replaced the 1998 Energy Act.

41. On 28 September 2005 the Constitutional Court dismissed the challenge (case no. PL. ÚS 28/05) holding that the impugned statutory provisions merely concerned the continued existence of ex lege easements and provided for no new possibility to claim compensation. Providing for new compensation claims would amount to enabling new restitution claims, which the lawmaker was free under the Constitution to choose not to do.

COMPLAINT

42. The applicant complained that the outcome of the proceedings in his action had been arbitrary and contrary to his rights under Article 1 of Protocol No. 1.

THE LAW

43. The applicant alleged a violation of Article 1 of Protocol No. 1, which 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."

44. In reply, the Government objected that the contested easement had been established in the 1980s, that is to say, prior to 18 March 1992 when the Convention became applicable *ratione temporis* in respect of Slovakia.

45. They further contended that the applicant had bought the property in question in 1993; that for the purposes of the present application and from the applicant's perspective, no deterioration of his legal position had taken place since then; and that the applicant must have known about the lack of basis for his compensation claim at the latest in 2003 when his action of 2000 was dismissed (see paragraphs 13 and 14 above). Although at the national level his action of 2008 had not been treated as dealing with the same matter, that had only been for technical reasons (see paragraph 20 above), and in the proceedings in the 2008 action no new questions of law had been raised. Therefore, in the Government's view, the present application, which had been brought in 2011, was belated.

46. Furthermore, the Government pointed out that the applicant had bought the property in question after first renting it for two years. He must therefore have been perfectly aware of the condition of the property and it had been up to him to have that reflected in the purchase price. In their view, the applicant could not have had any legitimate hope of seeing the applicable rules on compensation change to his advantage.

47. The Government also pointed to the relevant provisions of the Civil Code (see paragraphs 31 and 32 above), the 2004 Thermal Energy Sector Act (see paragraph 37 above), and a Supreme Court's judgment in another similar case, in accordance with which the applicant was entitled to

compensation in respect of expenses and losses linked to the maintenance and repair of the thermal energy facility situated on his property, and also in respect of the inconvenience caused by the entry onto his property of the owner of that facility. As he had, however, not pursued any claim to that effect, he had failed to comply with the requirement of exhaustion of domestic remedies.

48. Lastly, the Government emphasised that the property in question was exempt from real-estate tax and that the applicant was actually using it for his business (see paragraphs 8 and 12 above).

49. The applicant rejoined by reiterating his disagreement with the interpretation of the relevant laws by the Government and the domestic courts and with their application by the latter. He considered the arguments concerning the belatedness of his complaint, his responsibility in relation to the purchase price of the property in question, and his use of it for business purposes (see paragraphs 45, 46 and 48 above) irrelevant and concluded that Slovakia had failed to protect his rights under Article 1 of Protocol No. 1.

50. The Court observes that the Government has raised a number of objections to the admissibility of the present application with regard to its compatibility with the provisions of the Convention, the exhaustion of domestic remedies and its timeliness. It considers, however, that it is not required to rule on them because the application is in any event inadmissible for the reasons set out below.

51. The Court points out at the outset that its task is not to review the relevant domestic law and practice *in abstracto* but rather to determine, at this stage of the proceedings, whether the case satisfies the requirements of admissibly under Article 35 of the Convention (see, *mutatis mutandis*, *Fruni v. Slovakia*, no. 8014/07, § 133, 21 June 2011, with further references).

52. The Court considers that the present complaint falls to be examined under the second paragraph of Article 1 of Protocol No. 1, which allows for the Contracting States to control the use of property in accordance with the general interest.

53. For any such control of the use of property to comply with the requirements of Article 1 of Protocol No. 1, it must first and foremost be lawful, and furthermore pursue a legitimate aim.

The Court observes that, in the present case, there has been no dispute between the parties about the fulfilment of these two criteria, that the legal basis for the contested easement was undoubtedly the energy laws of 1957, 1998 and 2004, and that the aim of supplying the population with thermal energy was both in the general interest and legitimate.

54. The Court reiterates, however, that not only must an interference with the right of property pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State,

including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden.

In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of, whereas the existence of procedural and other safeguards may be of a certain relevance (for a summary of the applicable principles see, for example, *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 167-8, ECHR 2006 VIII, with further references).

55. From this perspective, the Court observes that the easement on the property concerned was established in the 1980s; that applicant acquired title to the property in 1993 after renting it for two years; that accordingly there can be no doubt that he as businessman knew the condition of that property; and that he decided to acquire if of his free will (see *Łącz v. Poland* (dec.), no. 22665/02, 23 June 2009).

56. The Court also notes that, since the time of the applicant's acquisition of the property, there has been no legislative, jurisprudential or other development leading to any deterioration of his position in respect of it. Moreover, the Court has found no elements supporting a conclusion that the applicant might at any stage have entertained a legitimate expectation in terms of the Convention case-law that the applicable rules would change so as to provide a basis for compensation such as he was claiming in the impugned proceedings (see, for example, *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35 and 45-52, ECHR 2004 IX, with further references).

57. The fact that no compensation was envisaged under the applicable laws in respect of the fact of the continued existence of the easement on that property, other than the compensation potentially available at the time of its creation, became known to the applicant in 2003 at the latest.

58. As to expenses, damage or other actual loss in relation to the upkeep of the impugned thermal energy facility, it is first of all to be noted that this does not appear to have been the actual object of the applicant's concern either at the domestic level or before the Court and that, in any event, the applicable laws provide for such a claim for compensation, as they do in respect of any loss the applicant might incur as a result of the entry by the facility's owner onto his property.

59. Lastly, the Court observes that the property concerned is effectively exempt from real-estate tax and that it is used for the applicant's business.

60. In view of the above considerations, there is no indication that the legal regime in respect of the applicant's property and the easement on it entails actual financial losses for the applicant, or otherwise constitutes a disproportionate and excessive burden for him (for contrast and comparison, see *Hutten-Czapska*, cited above, § 223-225).

61. In sum, within the parameters of admissibility under Article 35 of the Convention, and in so far as the matters complained of have been substantiated, the Court has found no indication that in the specific circumstances of the applicant's case the dismissal of his 2008 claim was incompatible with his right to the peaceful enjoyment of his possessions.

It follows that the 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.

Santiago Quesada
Registrar

Josep Casadevall
President