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

SECOND SECTION

DECISION

Application no. 26264/19
Draško TOMIĆ
against Croatia

The European Court of Human Rights (Second Section), sitting on 4 June 2024 as a Committee composed of:

Lorraine Schembri Orland*, President*,
Frédéric Krenc,
Davor Derenčinović*, judges*,
and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 26264/19) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 10 May 2019 by a Croatian national, Mr Draško Tomić ("the applicant"), who was born in 1958, lives in Zagreb and was represented by Ms B. Brkić Nakić, a lawyer practising in Šibenik;

the decision to give notice of the application to the Croatian Government ("the Government"), represented by their Agent, Ms Š. Stažnik;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns non-enforcement of an administrative decision ordering the applicant's neighbours to demolish an illegally constructed house.

2. The applicant is the owner of a summer home and the surrounding plot of land in Rogoznica.

3. In 2001 the co-owners of the neighbouring plot of land (hereafter "the neighbours") started building a house on it, which they finished in 2006.

A. Administrative proceedings

4. By a decision of 11 September 2006, a building inspector ordered the neighbours to demolish their house. On 16 October 2006 the Ministry for the Protection of the Environment, Spatial Planning and Construction dismissed an appeal by the neighbours against that decision which thereby became final and enforceable.

5. On 11 August 2008 the applicant complained to the Ministry's building inspection that the neighbours had not complied with the above decision. On 5 November 2009 a building inspector, after an on-site inspection, confirmed that the neighbours had not demolished their house. The applicant was informed of the inspector's findings on 4 March 2010.

6. On 12 November 2012 the neighbours instituted administrative proceedings seeking to legalise their house. In view of that, on 19 November 2012, the administrative enforcement proceedings for the execution of the above decision of 11 September 2006 were stayed pending the outcome of the legalisation proceedings.

7. The neighbours' request for legalisation was granted on 22 October 2013. Consequently, on 8 October 2020 the administrative enforcement proceedings for the execution of the decision of 11 September 2006 were discontinued.

B. Civil proceedings for compensation

8. Meanwhile, on 23 August 2010 the applicant brought a civil action against the State in the Šibenik Municipal Court seeking non-pecuniary damages for stress and mental anguish sustained by the administrative authorities' nonfeasance. He argued that those authorities' failure to enforce their decision of 11 September 2006 (see paragraph 4 above) had breached his personality rights. More specifically, he submitted that, because of the neighbours' illegal construction, he and his family could not enjoy the intimacy of their summer home because the neighbours had an open view on it. Moreover, he argued that he could not use his home in a peaceful and relaxed manner as he was being exposed to the neighbours' insults, noise, and smoke from their barbecue.

9. By a judgment of 30 September 2013, the Municipal Court dismissed the applicant's claim. It held that there was no causal link between the non-enforcement complained of and the non-pecuniary damage claimed, which had been the consequence of bad relations between the applicant and his neighbours.

10. On 23 May 2016 the Šibenik County Court dismissed an appeal by the applicant and upheld the first-instance judgment. It held that the administrative authorities' decision to stay the enforcement of their decision of 11 September 2006 pending the outcome of the legalisation proceedings

had been lawful and that the applicant was therefore not entitled to any compensation on that account.

11. The applicant then, on 6 July 2016, lodged a constitutional complaint. He relied on the relevant provisions of the Croatian Constitution guaranteeing equality before the law, the right to fair proceedings and the right to petition the State and other public authorities and receive a reply. He argued that he had built his summer home so that he could rest but that he could not enjoy it in peace and privacy because he was exposed to noise, smoke, and catchment water from the neighbours who also had an open view on his home.

12. By a decision of 16 October 2018, the Constitutional Court dismissed the applicant's constitutional complaint, and on 22 November 2018 it notified his representative of its decision. The court held that from the case-file and the content of the applicant's constitutional complaint it followed that he had complained of the State's non-compliance with its positive obligation to protect his personality rights, in particular his right to respect for his private life. It however held that the administrative authorities' decision to stay the enforcement of their decision of 11 September 2006 pending the outcome of the legalisation proceedings had been lawful, and that by so doing those authorities had not exceeded their margin of appreciation in striking the requisite fair balance between the applicant's right to respect for his private life and the competing interests of other individuals and the interests of the community.

13. Relying on the Court's case-law (they cited *Kostić v. Serbia*, no. 41760/04, 25 November 2008, and *Antonetto v. Italy*, no. 15918/89, 20 July 2000), four dissenting judges considered that the Constitutional Court should have examined the applicant's constitutional complaint under the relevant Article of the Constitution guaranteeing the right of ownership and that it should have found a violation of that right.

C. Complaint

14. Relying on the same case-law, before the Court the applicant complained that the failure of the administrative authorities to enforce their decision of 11 September 2006 had resulted in the decreased value of his summer home and had amounted to a breach of the State's positive obligations under Article 1 of Protocol No. 1 to the Convention to protect his property.

THE COURT'S ASSESSMENT

15. The Government submitted that the applicant had not exhausted domestic remedies, *inter alia*, because in his constitutional complaint he had not complained, either expressly or in substance, of a violation of his right of ownership. He had not relied on Article 1 of Protocol No. 1 to the Convention

or the corresponding provision of the Croatian Constitution (see paragraph 11 above), nor had he adduced any arguments regarding the right to property. Yet, in his application to the Court the applicant had expressly relied on Article 1 of Protocol No. 1 and the Court's case-law and advanced pertinent arguments in that regard such as the drop of value of his summer home (see paragraph 14 above).

16. The applicant replied that in the civil proceedings and in his subsequent constitutional complaint he had complained that he could not enjoy his summer home in peace and privacy. By complaining that he could not peacefully enjoy his home he had in substance complained of a breach of Article 1 of Protocol No. 1 (see paragraphs 8 and 11 above).

17. The Court reiterates that in order to properly exhaust domestic remedies it is not sufficient that a violation of the Convention is "evident" from the facts of the case or the applicant's submissions. Rather, he or she must actually complain (expressly or in substance) of such a violation in a manner which leaves no doubt that the same complaint that was subsequently submitted to the Court had indeed been raised at the domestic level (see, for example, *Fu Quan, s.r.o. v. the Czech Republic* [GC], no. 24827/14, § 172, 1 June 2023).

18. Under the Court's case-law it is not always necessary for the Convention to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance". However, determining whether the complaint submitted to the Court had indeed been raised beforehand, in substance, before the domestic authorities, requires taking into account not only the facts but also the applicant's legal arguments (see, for example, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 117, 20 March 2018).

19. In the present case the applicant in his constitutional complaint did not rely on Article 1 of Protocol No. 1. Nor did he rely on the relevant provision of the Croatian Constitution which guarantees the right of ownership. Instead, he referred to the provisions of the Constitution guaranteeing equality before the law, the right to fair proceedings and the right to petition State and other public authorities and receive a reply (see paragraph 11 above).

20. Moreover, even though the applicant complained about the same set of facts before the Constitutional Court and before this Court, namely of the non-enforcement of the administrative authorities' decision of 11 September 2006, his legal arguments, although partially overlapping, were not the same. In particular, in his constitutional complaint he argued that because of that non-enforcement he could not enjoy his summer home in peace and privacy. The Constitutional Court characterised those arguments as a complaint of a violation of his right to respect for his private life (see paragraph 11 above). Given that in the civil proceedings that preceded his constitutional complaint the applicant advanced the same arguments to complain of a breach of his personality rights and sought non-pecuniary damages (see paragraph 8

above), the Court considers that the Constitutional Court's characterisation of those arguments does not disclose any arbitrariness. In contrast to this, before the Court the applicant argued that the non-enforcement in question had also resulted in the decreased value of his property and that it had amounted to a breach of the State's positive obligations to protect his property (see paragraph 14 above).

21. In these circumstances, the Court finds that in his constitutional complaint the applicant did not complain of the violation of his right to the peaceful enjoyment of possessions in a manner which leaves no doubt that the same complaint was subsequently submitted to the Court (see paragraph 17 above).

22. It follows that the Government's objection must be upheld. The present application is inadmissible under Article 35 § 1 of the Convention for non-exhaustion of domestic remedies and must therefore be rejected pursuant to Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 27 June 2024.

Dorothee von Arnim Deputy Registrar	Lorraine Schembri Orland President