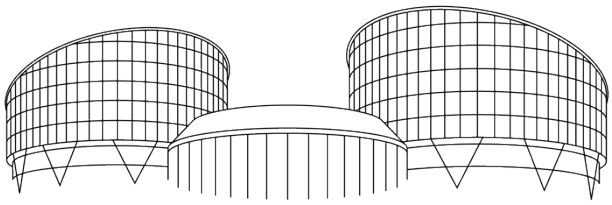

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 41148/11
Lyudmila Fedorovna KONDRATYUK and Anton Alekseyevich KONDRATYUK
against Russia
lodged on 25 June 2011

STATEMENT OF FACTS

The applicants, Ms Lyudmila Fedorovna Kondratyuk and Mr Anton Alekseyevich Kondratyuk, are Russian nationals, who were born in 1952 and 1985 respectively and live in Moscow. They are represented before the Court by Mr I.F. Puzanov, a lawyer practising in Moscow.

A. The circumstances of the case

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

The applicants are mother and son. On 6 February 2003 the first applicant bought a flat in Moscow at 17-1 Yeniseyskaya Street ("the flat") and has been living there with the second applicant. The seller of the flat, Mr A., had inherited it from Ms L., who had acquired it under the privatisation scheme in 1993. The facts relating to the ownership of the flat prior to the first applicant's acquisition of it and the subsequent invalidation of her title may be summarised as follows.

1. Privatisation and sale of the flat

Before its privatisation the flat was owned by the city of Moscow. On 28 June 1993 Ms L. privatised the flat and became its owner. In June 2000 Ms L. died. Nobody claimed inheritance during the six months statutory time-limit. However, on 23 May 2002 Mr A. instituted proceedings against Tax Inspection no. 16 of Moscow (which represented the State for the purposes of transfer of inheritance into State property) to claim the inheritance on the ground that he was Ms L.'s heir according to her will and asked for an extension of the statutory time-limit.

On 14 November 2002 the Babushkinskiy District Court of Moscow extended the time-limit and granted Mr A.'s claim. The decision was not appealed against and became final.

On 14 January 2003 Mr A. obtained inheritance certificate for the flat issued by notary V.

On 17 January 2003 Mr A. registered his ownership of the flat in the State register (*Единый государственный реестр прав на недвижимое имущество и сделок с ним*).

On 23 January 2003 Mr A. obtained property certificate for the flat.

In 2002-2003 the applicants decided to move to Moscow from Chelyabinsk so as the second applicant could continue his studies at the Moscow State University. They sold their flat in Chelyabinsk which was their only dwelling.

On 6 February 2003 the first applicant concluded a contract of sale of the flat with Mr A., under which she became the owner of the apartment. The contract was certified by notary Sh.

On 7 February 2003 the first applicant registered her ownership of the flat in the State register.

On 13 February 2003 the first applicant obtained property certificate for the flat.

The second applicant moved into the flat and obtained the right to live in it. As it was damaged by a fire, the applicants had to carry out renovation works.

2. Criminal proceedings against Mr A.

On 31 August 2007 criminal proceedings were instituted against Mr A. on account of swindling with the flat.

On 23 April 2008 the Moscow Housing Department (*УДЖП и ЖФ г. Москвы в СВАО*) was granted victim status in the proceedings.

On 5 December 2008 the Nikulinskiy District Court of Moscow convicted Mr A. of swindling. The court found that together with a non-identified person Mr A. forged Ms L.'s will and on its basis applied to the Babushkinskiy District Court of Moscow for extension of the statutory time-limit to claim inheritance. Then he presented the forged will to the notary, on its basis obtained the inheritance certificate and registered it. Subsequently he concluded the contract of sale of the apartment with the first applicant.

On 4 March 2009 the Moscow City Court upheld the judgment in the relevant part.

The applicants were neither involved in nor informed of the proceedings.

3. Challenge to the applicant's ownership and eviction proceedings

On 4 June 2008 the Moscow Housing Department instituted proceedings against the applicants claiming the return of the flat to the city of Moscow on the ground that the sale was based on the forged will. The applicants objected to the claim. They argued, firstly, that the city of Moscow, not having been the owner of the flat at the relevant time, had no standing to bring the claim. Secondly, they contended that the first applicant had

purchased the flat in good faith (a *bona fide* acquirer) and had not been aware of the swindling with the will.

On 27 April 2009 the Babushkinskiy District Court of Moscow granted the claim of the Moscow Housing Department. Relying on Articles 302 and 1151 of the Civil Code the court found that after Ms L.'s death the flat should constitute heirless property subject to transfer into property of the city of Moscow. Due to unlawful actions of Mr A. the flat left the city of Moscow's possession in the absence of the latter's intention to divest itself of it. The court noted that the city of Moscow could not have been aware of the transactions with the flat as it had neither been informed of the flat left unoccupied after Ms L's death, not had it been a party to the proceedings instituted in 2002 by Mr A. or to his subsequent transactions. At the same time the court noted that the first applicant purchased the flat for a price that had been below the market price. On these grounds with a reference to Article 302 (1) of the Civil Code the court refused to recognise the first applicant a *bona fide* acquirer. The court noted that it was open to her to institute proceedings against Mr A.

The applicants appealed against the decision.

On 22 September 2009 the Moscow City Court quashed the decision and remitted the case for a fresh examination. The appeal court noted, in particular, that the first-instance court failed to investigate why the flat was brought for the price below the market price. It failed to address the fact that the flat was bought after a fire and needed renovation works. Furthermore, the first-instance court did not assess the first applicant's argument that she could not have been aware of Mr A.'s unlawful actions with the flat as prior to conclude the sale contract she was provided with a court decision in his favour and the inheritance certificate.

On 21 September 2010 the Babushkinskiy District Court of Moscow granted the claim of the Moscow Housing Department, terminated the first applicant's ownership right to the flat and ordered the applicants' eviction. The court found that the flat should have been transferred to the city of Moscow as heirless property and that the Moscow Housing Department had not missed the statutory time-limit as it had not been aware of the inheritance proceedings initiated by Mr A. The court briefly noted that the applicant's argument that she had not been aware of Mr A.'s fraudulent actions and should be protected as a *bona fide* acquirer should be dismissed in accordance with Article 302 (10 of the Civil Code. According to the applicants, in the hearing the court refused their requests to question an expert and to conduct an additional expert examination.

The applicants appealed against the decision. They argued, in particular, that the State as represented by Tax Inspection no. 16 of Moscow was aware of Mr A.'s having instituted proceedings for the extension of the statutory time-limit to claim inheritance. Hence, in this case the flat had not left the State's possession in the absence of the latter's intention to alienate it. Furthermore, the city of Moscow missed the statutory time-limit for bringing the claim. They also pointed out that the first applicant was a *bona fide* acquirer, that the flat was their only dwelling and they had renovated it.

On 28 March 2011 the Moscow City Court upheld the decision of the first-instance court. It found that the flat had constituted heirless property and had left the city of Moscow's possession without the latter's intention to

divest itself of it as it had been transferred into Mr A's property as a result of his fraudulent actions. The court further found that the Moscow Housing Department had not missed the time-limit for bringing the claim as it had not been a party to the proceedings brought by Mr A. against the Tax Inspection no. 16 of Moscow and had not been aware of the transfer of the flat into his property. Therefore, there were no grounds to apply the statute of limitations. The court also noted that the first applicant had bought the flat for the price below the market price and, insofar as she argued that she had not been aware of Mr A.'s fraudulent actions, it was open to her to institute proceedings against him so as to recover damages.

The applicants' requests for cassation and supervisory review of the judgment were rejected.

On 26 June 2012 the Babushkinskiy District Court of Moscow refused the applicants' request to stay the execution of its judgment of 21 September 2010 as upheld by the Moscow City Court on 28 March 2011.

On 7 February 2013 the execution proceedings were instituted.

On 7 March 2013 the applicants were summoned to the bailiffs' office.

B. Relevant domestic law

Article 167 General Provisions on Consequences of Invalidity of a Transaction

"1. An invalid transaction shall not entail legal consequences, with the exception of those connected with its invalidity, and shall be invalid from the moment of its conclusion.

2. If a transaction has been recognised as invalid, each of the parties shall be obliged to return to the other party all it has received as part of the transaction, and if return is impossible in kind (including where the transaction concerns the use of property, work performed or services rendered), its cost shall be reimbursed in money - unless other consequences of the invalidity of the transactions have been stipulated by law.

3. If it follows from the content of the disputed transaction that it may only be terminated for the future, the court, while recognising the transaction as invalid, shall terminate its operation for the future."

Article 302 Reclaiming property from a *bona fide* acquirer

"1. If the property has been purchased for a price from a person who had no right to alienate it, and the acquirer is unaware and could not have been aware (the *bona fide* acquirer, or the acquirer in good faith), the owner shall have the right to reclaim this property from the acquirer, if the said property was lost by the owner or by the person into whose possession the owner has passed the property, or if it was stolen from one or the other, or if it has left their possession in another way, in the absence of intention on their part to divest themselves of it.

2. If the property has been acquired without consideration from a person who had no right to alienate it, the owner shall have the right to reclaim the property in all cases.

3. Money and securities in respect of the property shall not be reclaimed from the bona fide acquirer."

Article 1151 Inheritance of heirless property

1. If there are no heirs under either the legal succession or the testamentary succession, or if none of the heirs has the right to inherit, or if all of them are disinherited, or if all of them refused the inheritance and none of them indicated that he/she refused it in favour of another heir, the property is considered heirless.

2. Heirless property consisting of residential premises in the territory of the Russian Federation shall be transferred under legal succession into property of the municipality in whose territory it is situated; if it is situated in the constituent entity of the Russian Federation or in a federal city, i.e. Moscow or St.-Petersburg, [it shall be transferred] into property of such entity. Such premises shall be included in the residential fund for social housing. Other heirless property shall be transferred under legal succession into property of the Russian Federation.

3. The procedure for succession and registration of heirless property transferred under legal succession into property of the Russian Federation, as well as its transfer into property of constituent entities of the Russian Federation and municipalities shall be governed by the law.

By its ruling no. 6-P of 21 April 2003 the Constitutional Court interpreted Article 167 of the Code as not allowing the first owner to reclaim his property from a *bona fide* buyer unless there is a special legislative provision to this effect. Instead, a claim vindicating prior rights (*виндикационный иск*) could be lodged under Article 302 of the Code if the conditions indicated in paragraphs 1 and 2 are met, in particular if the property has left the owner's possession in the absence of intention on the part of him or her to divest themselves of it, or if the property has been acquired without consideration.

Further interpretation of Article 302 of the Civil Code was provided by the Plenary of the Supreme Court of the Russian Federation and the Plenary of the High Commercial Court of the Russian Federation, contained in the second paragraph of item 39 of their joint ruling of 29 April 2010, no. 10/22 "On certain questions arising in judicial practice in respect of resolution of disputes connected with the protection of property rights and other real rights" and in the Constitutional Court's ruling of 27 January 2011, 188-O-O. They held in particular that there was no automatic link between invalidity of a transaction and an owner's intention or otherwise, to divest himself/herself of the property. The Constitutional Court's ruling held, in so far as relevant, as follows:

"... the uncertainty of the legal provisions [including Article 302] challenged by the claimant is eliminated by the interpretation of the Plenary of the Supreme Court of the Russian Federation and the Plenary of the High Commercial Court of the Russian Federation, contained in the second paragraph of item 39 of the [ruling of 29 April 2010, no. 10/22]: 'the invalidity of the transaction in execution of which the transfer of property was effected does not by itself prove that it left the possession of the owner in the absence of intention to divest on their part; the courts need to establish whether the owner intended to transfer possession to another person'".

COMPLAINTS

1. The applicants complain under Article 1 of Protocol No. 1 to the Convention about the deprivation of their possessions. They argue that the

State was aware of Mr A.'s transactions with the flat and that the first applicant should be protected as a *bona fide* acquirer.

2. They complain under Article 8 of the Convention about the forthcoming eviction alleging that it would be unlawful and disproportionate.

3. Relying on Article 6 of the Convention the applicants complain that the domestic courts failed to comply with the instruction of the Moscow City Court given in the decision of 22 September 2009 to address the first applicant's arguments that she was a *bona fide* acquirer; that in the hearing of 21 September 2010 the first-instance court failed to examine an expert and conduct an additional expert examination; and that the decisions in their case were unfair.

4. The applicants also complain under Articles 14 in conjunction with Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 that they were subjected to discriminatory treatment as in their case the domestic courts did not apply ruling 6-P of the Constitutional Court of 21 April 2003.

QUESTIONS TO THE PARTIES

1. In the light of the judgment by the Babushkinskiy District Court of Moscow of 21 September 2010 (upheld on 28 March 2011) is the applicants' eviction from the flat imminent? Where the applicants would be lodged after the eviction?

2. Are the applicants able to request a stay of the execution of the eviction on the ground of their inability to afford substitute housing or on the ground of this application pending before the Court?

3. Have the applicants been deprived of their possessions in the public interest, in accordance with the conditions provided for by law and in accordance with the principles of international law, within the meaning of Article 1 of Protocol No. 1?

If so, was that deprivation necessary to control the use of property in accordance with the general interest? In particular, did that deprivation impose an excessive individual burden on the applicants?

4. Has there been an interference with the applicants' right to respect for their home, within the meaning of Article 8 § 1 of the Convention?

If so, was that interference in accordance with the law and necessary in terms of Article 8 § 2?

5. Did the applicants have a fair hearing in the determination of their civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular, was the principle of equality of arms respected as regards the refusal of the applicants' requests in the hearing of 21 September 2010?

6. Have the applicants suffered discrimination in the enjoyment of their Convention rights, contrary to Article 14 of the Convention read in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1?