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

FIRST SECTION

DECISION

Application no. 60223/09
Borislav GUSTOVARAC and Zdravka GUSTOVARAC
against Croatia

The European Court of Human Rights (First Section), sitting on 18 February 2014 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 30 October 2009,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Borislav Gustovarac and Ms Zdravka Gustovarac, are Croatian nationals who were born in 1943 and 1950 respectively and live in Pula. They were represented before the Court by Ms L. Štok, a lawyer practising in Pula.

2. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

4. In 1972 the applicants moved to a flat in Pula owned by the Yugoslav Peoples' Army ("the YPA") on the basis of a handwritten note signed by Đ.V., allegedly the person authorised by the YPA Garrison Command in Pula to dispose of the YPA's flats. The note bore the Command's official stamp.

5. The applicants paid the rent and utility bills in respect of the flat from that date onwards.

6. In 1974 criminal proceedings were conducted in the Pula Military Court against Đ.V. He was found guilty of abusing his position on the ground that he had, *inter alia*, unlawfully provided the applicants with the flat at issue. The first applicant was a witness in these proceedings.

7. After Croatia declared independence in 1991, all the YPA's property became State property.

8. According to the Government, in 1994 the first applicant bought another flat in Pula, measuring 33 square metres, which he donated to his son in 1995.

9. On 1 March 2000 the State brought a civil action against the applicants in the Pula Municipal Court claiming repossession of the flat formerly owned by the YPA and the applicants' eviction.

10. According to the Government, since 2001 the applicant's elder son has been renting out another flat in Pula.

11. The Municipal Court granted the claim against the applicants on 16 May 2002. The relevant part of the judgment reads:

> "... it has been established that in 1972 an authorized person from the Garrison Command of the former YPA, Đ.V., issued an order, handwritten on an ordinary piece of paper, instructing R.S. (an administrator of the then 'Pula Housing Company') to hand over the keys of the flat at issue to the first defendant, stamped it with the stamp of the Garrison Command and signed it. Subsequently, Borislav Gustovarac presented that certification to R.S., who gave him the keys to the flat. Borislav Gustovarac was employed at that time with 'Uljanik Harbour', and was therefore neither a member of the military personnel within the YPA nor a civilian in its service.
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> ...
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> Had the first defendant belonged to the category of persons who could have acquired the right to use such a flat, that is to say, had he fulfilled the requirements for the granting of a specially protected tenancy of the flat at issue, nothing would have prevented the authorized person of the former Garrison Command of the YPA, Đ.V., from issuing him a valid decision to such effect ...
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> ...
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> The fact that the defendants lived in the flat at issue for a long period of time with the 'knowledge and approval' of the provider of the flat and entirely fulfilled the obligations of protected tenants is irrelevant ... as regards their lack of status as holders of a specially protected tenancy ... because such a status could be implicitly recognised only in respect of persons who had acted in good faith. In this case it is clear that this element was missing, since the defendants knew or ought to have known that they acquired possession of the flat at issue in an illegal and unlawful

manner. The fact that the provider of the flat did not ask for the eviction of the defendants cannot place them in a more favourable legal position ..."

12. The first-instance judgment was upheld by the Pula County Court on 31 May 2004. It endorsed the reasoning of the first-instance court and added:

"According to the case-law [of the Supreme Court] concerning the application of section 59 of the former Housing Act, a person who dwells in a flat for a long period of time with the knowledge and consent of the provider of the flat, and who fulfils all the obligations of a holder of a specially protected tenancy and acts in every respect as a person who has concluded a written contract for a protected tenancy, may be regarded as a holder of a protected tenancy even though there is actually no written contract governing the use of the flat.

However, even though the defendants have been using the flat at issue since 1972 and have paid the rent and utility bills for it, they cannot be regarded as holders of a protected tenancy of the flat since they acquired possession of it as a result of the abuse of office of the authorized person [representing] the former provider of the flat, [a fact of] which the defendants, and in particular the first defendant, had been aware and ought to have been aware [sic] because they were witnesses in the criminal proceedings conducted before the Split Military Court against the persons concerned ... Therefore, the defendants did not act in good faith, which is a condition for recognizing [them as holders of a] specially protected tenancy ..."

13. According to the Government, in 2005 the applicants moved to Bosnia and Herzegovina, where they have had their registered residence ever since. The second applicant rented the flat at issue to other persons between an unspecified date in 2005 and April 2011.

14. The applicants lodged a constitutional complaint on 30 July 2004 which was dismissed by the Constitutional Court on 22 April 2009. The Constitutional Court endorsed the lower courts' reasoning.

15. According to the Government, on 7 April 2011 the applicants vacated the flat.

16. According to the applicants they were forcibly evicted from the flat in 2011.

B. Relevant domestic law

17. The relevant part of the Housing Act (Official Gazette nos. 51/1985, 42/1986, 22/1992 and 70/1993) reads:

Section 59

"A specially protected tenancy is acquired on the date the tenant moves into the flat on the basis of a final decision allocating the flat or on another valid legal basis, unless otherwise provided by this Act."

18. Section 161 paragraph 1 of the Property Act (*Zakon o vlasništvu i drugim stvarnim pravima*, Official Gazette no 91/1996) reads as follows:

"An owner has the right to seek repossession of his or her property from a person in whose possession it is."

COMPLAINT

19. The applicants complained under Article 8 of the Convention that their right to respect for their home had been violated.

THE LAW

Alleged violation of Article 8 of the Convention

20. The applicants complained that by ordering them to vacate the flat in question, the domestic courts had violated their right to respect for their home. They relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

21. The Government submitted that the applicants had not suffered significant damage because by the time the civil proceedings whereby their eviction had been sought had started, they had already moved to Bosnia and Herzegovina. They had had another flat in Pula and, since at least 2001, a third flat in Pula as well. Thus, there had been no need for them to live in a State-owned flat.

22. The Government further contended that the flat at issue had not been the applicants' home because in 2005 they had moved to Bosnia and Herzegovina, where they have had their registered residence since 2000, and had come to the flat in Pula only occasionally since then.

23. As regards the manner in which the applicants moved into the flat at issue, the Government maintained that it had been the result of a criminal offence by a third person, namely Đ.V., a fact which the applicants had been aware of.

24. The applicants argued that they had come to live in Croatia in 1968 and had returned to Bosnia and Herzegovina only in 2011 after they had been forcibly evicted from the flat at issue. They had been granted two

small flats in Pula because they had two children. The second flat measured 33 square metres and could not accommodate the whole family of four. Therefore, only their elder son had moved into that flat. Neither the applicants nor their sons had a third flat in Pula; the second flat had two entrances from two different streets. The applicants did not refute the Government's allegation that they had had a registered residence in Bosnia and Herzegovina since 2005, but considered that fact irrelevant.

2. The Court's assessment

25. The Court does not have to address all the issues raised by the parties since the application is in any event inadmissible for the following reasons.

(a) Whether a right protected by Article 8 is in issue

26. The first question the Court has to address is whether the applicants may arguably claim that they had a right protected by Article 8 and – more specifically in the present case – whether the flat in question may be considered as the applicants' home.

27. The Convention organs' case-law is clear on the point that the concept of "home" within the meaning of Article 8 is not limited to those premises which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a "home" which attracts the protection of Article 8 § 1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place (see *Prokopovich v. Russia*, no. 58255/00, § 36, ECHR 2004-XI (extracts); and *Globa v. Ukraine,* no. 15729/07, § 37, 5 July 2012). Thus, whether a property is to be classified as a "home" is a question of fact and does not depend on the lawfulness of the occupation under domestic law (see *McCann v. the United Kingdom*, no. 19009/04, § 46, 13 May 2008).

28. As to the present case, the applicants had lived in the flat in question between 1972 and at least 2005. The judgment ordering their eviction became final in 2004. Thus, at the time when the interference with the applicants' right to respect for their home occurred, they were living in the flat in question. Having regard to the factual circumstances outlined above, the Court finds that the applicants had sufficient and continuing links with the flat at issue for it to be considered their "home" for the purposes of Article 8 of the Convention, despite the fact that according to the national courts' findings they had no legal basis for occupying it.

(b) Whether there was interference with the applicant's right to respect for their home

29. The Court notes that the applicants lived in the flat at issue from 1972 until at least 2005 and that it has already held that a judgment ordering a person's eviction amounts to an interference with that person's right to respect for his or her home (see, for example, *Trifunović v. Croatia* (dec.), no. 34162/06, 6 November 2008, and *Paulić v. Croatia*, no. 3572/06, §§ 35−38, 22 October 2009). It sees no reason to hold otherwise in the present case.

(c) Whether the interference was justified

30. The Court must further examine whether that interference was justified in terms of Article 8 § 2, that is, whether it was in accordance with the law, pursued a legitimate aim and was necessary in a democratic society (see *Gillow v. the United Kingdom*, 24 November 1986, § 48, Series A no. 109 and *Galović v. Croatia* (dec.), no. 54338/09, § 57, 5 March 2013).

(i) Whether the interference was in accordance with the law

31. The applicant was ordered to vacate the flat in question by the national courts under Croatian laws regulating ownership, which allow an owner to seek repossession of his or her property when the possessor has no legal grounds for possession (see the relevant provision of the Property Act in paragraph 18 above).

32. In this connection the Court first reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see *Orlić v. Croatia,* no. 48833/07, § 61, 21 June 2011; and *Pelipenko v. Russia*, no. 69037/10, § 65, 2 October 2012). The Court will not substitute its own interpretation for theirs in the absence of arbitrariness (see, for example, *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII).

33. The Court is thus satisfied that the national courts' decisions ordering the applicants' eviction were in accordance with domestic law, in particular, the Housing Act and the Property Act (see paragraphs 17 and 18 above).

(ii) Whether the interference pursued a legitimate aim

34. The Court further considers that the interference in question pursued the legitimate aim of protecting the rights of others, in particular the rights of the owner of the flat.

(iii) Whether the interference was necessary in a democratic society

35. The Court has adopted several judgments against Croatia on the ground that the national courts ordered the applicants' eviction solely because they had no legal basis for occupying the flats at issue, without having carried out a proportionality test as to the measures taken against the applicants (see, for example, *Ćosić v. Croatia*, no. 28261/06, § 18, 15 January 2009; *Paulić*, cited above; *Orlić*, cited above, § 59; *Bjedov v. Croatia*, no. 42150/09, §§ 65 and 68, 29 May 2012; and *Brežec v. Croatia*, no. 7177/10, § 40, 18 July 2013).

36. However, the present case differs from the-above cited cases in some crucial aspects.

37. Unlike in the previous cases, where the applicants moved into the flats they occupied on the basis of decisions granting them the right to dwell in those flats, the applicants in the present case moved into the flat at issue on the basis of a handwritten note issued by an employee of the YPA. In the first place, the applicants ought to have known that such a note could have no validity before the law since neither of them had at any time been employed with the YPA in any capacity. Use of YPA flats could be granted to employees of the YPA only, whether military personnel or civil servants. Furthermore, the applicants must have been aware that a handwritten note on an ordinary piece of paper could not serve as a decision granting them use of the flat. Lastly, as early as 1974 the person who issued that note was convicted of a criminal offence in that connection and the first applicant was a witness in those proceedings. All these elements show that the applicants did not act in good faith when they moved into the flat in 1972.

38. Furthermore, in the present case the national courts did not restrict their findings to the fact that the applicants had no legal basis for occupying the flat at issue but also examined whether their right to dwell in the flat could be established on the basis of long-term use of the flat and the fact that they had paid the rent and utility bills (see paragraphs 11 and 12 above). However, the national courts concluded that because the applicants had acquired possession of the flat as a result of the criminal offence of a third person and had known about it, no further factors could justify their occupation of the flat.

39. In this regard the Court does not call into question the right of a State to enact laws aimed at securing the rule of law by preventing anyone from profiting from criminal offences and the gains thus obtained from becoming lawful with the passage of time.

40. In these circumstances it cannot be said that ordering the applicants' eviction was disproportionate to the legitimate aim pursued or was not necessary in a democratic society within the meaning of Article 8 of the Convention.

41. In view of the above, the Court finds that the present 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.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President