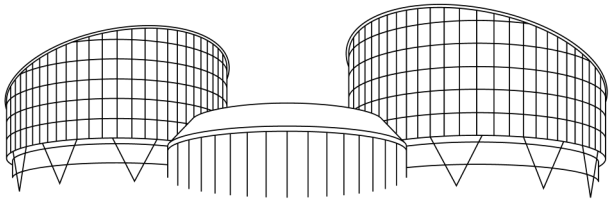

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

CASE OF KIROVA AND OTHERS v. BULGARIA

(Application no. 31836/04)

JUDGMENT

STRASBOURG

2 July 2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kirova and Others v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President,*
Rait Maruste,
Karel Jungwiert,
Renate Jaeger,
Mark Villiger,
Mirjana Lazarova Trajkovska, *judges,*
Pavlina Panova, ad hoc *judge,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 9 June 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 31836/04) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Bulgarian nationals, Mrs Todorka Atanasova Kirova, Mr Atanas Hristov Kovachev and Mrs Kristina Hristova Kovacheva ("the applicants"), on 23 July 2004.

2. The applicants were represented by Mrs S. Margaritova-Vuchkova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Dimova of the Ministry of Justice.

3. The first applicant alleged, in particular, that she had been deprived of her property in violation of Article 1 of Protocol No. 1 to the Convention. The remaining applicants alleged violations of Article 8 of the Convention.

4. On 3 April 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. Zdravka Kalaydjieva, the judge elected in respect of Bulgaria, withdrew from sitting in the case. On 30 January 2009 the Government appointed in her stead Pavlina Panova as an ad hoc judge (Article 27 § 2 of the Convention and Rule 29 § 1 of the Rules of the Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1953, 1975 and 1974 respectively and live in Sofia. The first applicant is the mother of the second and the third applicants.

7. In 1984 the first applicant bought from the Sofia municipality a two-room apartment of 61 square metres.

8. The apartment had been confiscated by the State from Mr S.M. who in 1983 had been convicted of espionage and treason and sentenced to imprisonment and confiscation of his property. In a judgment of 20 April 1990 the Supreme Court quashed Mr S.M.'s conviction finding that the courts had breached the relevant procedural rules.

9. In 1997 Mr S.M. brought *rei vindicatio* proceedings against the first applicant.

10. In a final judgment of 16 April 2004 the Supreme Court of Cassation allowed the claim. It found that the contract by virtue of which the first applicant had acquired the flat at issue in 1984 had not been signed by the mayor, as required by law, but by another official in the municipality. This rendered the first applicant's title null and void *ab initio*. She could not have acquired the apartment through adverse possession either as prior to 1996 State property could not be acquired in this way. The apartment had therefore remained State-owned and the judgment of 20 April 1990 had had the effect of restoring Mr S.M.'s title over it.

11. In August 2004 the applicants, who all lived in the apartment, vacated it. The first and second applicants rented another apartment and moved in there.

12. In April 2004 they applied for the tenancy of a municipal apartment and in June 2007 were offered a two-room flat in the outskirts of the city. They refused the offer.

13. In May 2004 the first applicant applied to receive compensation bonds under the 1997 Law on Compensation for Owners of Nationalised Real Property. According to the latest information available to the Court, as of October 2008, the regional governor had not yet decided on the request.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General background and legal provisions concerning restitution of nationalised property

14. These have been outlined in the Court's judgment in the case of *Velikovi and Others v. Bulgaria*, nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02, 15 March 2007.

15. As regards compensation through housing bonds, it was provided for in the Law on Compensation for Owners of Nationalised Real Property of 1997 ("the Compensation Law"). By section 5(3) of this Law, persons who had lost their dwellings pursuant to section 7 of the Restitution Law could also receive such bonds.

B. Nullity of contracts and adverse possession

16. Under Bulgarian civil law a contract which is null and void is deemed to have never given rise to any rights and obligations of the parties. There is no time limit for declaring a contract null and void.

17. Prior to 1996 State property could not be acquired through adverse possession.

C. Law on the Amnesty and the Return of Confiscated Property 1991 ("the Amnesty Law") and Law on the Enforcement of Sentences 1969

18. A number of offences of a political character, including espionage and treason, committed prior to December 1989, were amnestied by virtue of the Amnesty Law. It provided also that any property confiscated from persons convicted for these offences was to be returned, provided that it was still owned by the State; where it had become private property, the interested persons were to receive monetary compensation or other property.

19. The Law on the Enforcement of Sentences 1969 provides that where a confiscation has been enforced and subsequently quashed, any property confiscated is to be returned (section 151); where it is not possible to return it, the interested persons are to receive its market value.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

20. The first applicant complained under Article 1 of Protocol No. 1 that she had been deprived of her property arbitrarily, through no fault of her own and without adequate compensation.

21. Article 1 of Protocol No. 1 reads:

> "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."

22. The Government contended that the first applicant had failed to exhaust domestic remedies, as she could have asked to be provided with the tenancy of another municipal apartment and because the regional governor had not yet decided on her application for compensation bonds. The Government further argued that the first applicant's deprivation of her possessions had not been arbitrary but in accordance with the law for the achievement of a legitimate aim. In their view, a fair balance had been achieved as the first applicant was entitled to receive bonds under the Compensation Law.

23. The first applicant contested these arguments. She pointed out that she had refused the tenancy of the municipal apartment offered to her because it had been in the outskirts of Sofia and not convenient for her and the second applicant. She considered that she would most likely receive no compensation under the Compensation Law as she was not eligible.

24. The first applicant also argued that under the Amnesty Law 1991 and the Law on the Enforcement of Sentences (see paragraphs 18-19 above) Mr S.M. should have received other property or monetary compensation and that, therefore, her flat should not have been taken from her.

A. Admissibility

25. The Court finds that the question of exhaustion of domestic remedies raised by the Government (see paragraph 22 above) relates to the merits of the present complaint. Therefore, to avoid prejudging the latter, both questions should be examined together. Accordingly, the Court holds that

the question of exhaustion of domestic remedies should be joined to the merits.

26. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

27. The Court considers that the facts complained of constituted an interference with the first applicant's property rights and fall to be examined under the second sentence of the first paragraph of Article 1 of Protocol No. 1 as a deprivation of property – as in other similar cases which concerned the effects on third persons of the restitution carried out in Bulgaria after the fall of communism (see *Velikovi and Others v. Bulgaria*, cited above, §§ 159-161, and *Manolov and Racheva-Manolova v. Bulgaria*, no. 54252/00, § 35, 11 December 2008).

28. The Court must examine, therefore, whether the deprivation of property at issue was lawful and in the public interest and whether the authorities struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

29. The Court considers that the interference was provided for by law as the domestic courts applied existing rules of civil law on the nullity of contracts (see paragraphs 10 and 16 above). Furthermore, it is of the view that although the deprivation of property did not result directly from the application of special legislation on the restitution of nationalised property, as in the case of *Velikovi and Others*, cited above, it still pursued the legitimate aim of undoing wrongs of the communist regime (see paragraph 8 above).

30. The Court is mindful of the differences between the cases examined in *Velikovi and Others*, cited above, which concerned the application of special restitution legislation to formerly nationalised property, and the present case where the first applicant lost her apartment as a result of the application of general rules on the nullity of contracts, as interpreted by the domestic courts in the specific situation that occurred in the present case. Despite this difference, the Court is of the view that the measures applied were similar and that in assessing whether in the present case the authorities struck a fair balance between the demands of the general interest and the requirements of the protection of the first applicant's fundamental rights it is thus appropriate to apply the criteria developed in its judgment in *Velikovi and Others* (see §§ 177-192). The Court recalls that it adopted a similar approach in the more recent case of *Maslenkovi v. Bulgaria*, no. 50954/99, § 34, 8 November 2007.

31. Applying the said criteria, the Court notes that the first applicant's title was found to be null and void and she was deprived of her property on the ground that the contract whereby she had acquired the apartment in 1984 had not been signed by the official in whom the relevant power was vested (see paragraph 10 above). This error was attributable to omissions on the part of the authorities, not the first applicant.

32. Moreover, the Court notes that the law, as interpreted by the domestic courts, did not restrict by any time-limit Mr S.M.'s right to seek the nullification of the first applicant's title (see paragraph 16 above). In fact, he brought an action against her in 1997, seven years after the Supreme Court judgment quashing the confiscation of his property. The Court is of the view that this unlimited possibility to challenge the validity of title to property acquired from the State cannot be reconciled with the principle of legal certainty.

33. Therefore, the Court is of the view that the present case is similar to the case of *Todorova*, examined in *Velikovi and Others* (cited above, §§ 236-242), where it found that the authorities had failed to set clear boundaries on the recovery of property from *bone fide* post-nationalisation owners and that their approach had generated legal uncertainty. In *Todorova*, the Court found that the principle of proportionality required that compensation reasonably related to the market value of the property be paid to the applicant (see *Velikovi and Others*, cited above, § 238).

34. However, in the present case the first applicant did not receive any compensation. The Court does not accept the Government's arguments that she could receive compensation as she was entitled to receive bonds under the Compensation Law and could also seek to be provided with the tenancy of a municipally-owned apartment (see paragraph 22 above). The Court notes that section 5(3) of the Compensation Law does not entitle persons in the first applicant's position to receive bonds as this provision only concerns persons who have lost their dwellings pursuant to section 7 of the Restitution Law (see paragraph 15 above). The Government have not provided any examples of court decisions where this provision was applied in cases such as the first applicant's and have not referred to any other provision entitling her to receive bonds. As to their argument that she could seek the tenancy of a municipal flat, the Court notes that this could not make good the loss of her apartment.

35. As the first applicant did not have any means to obtain compensation, the Government's objection concerning non-exhaustion of domestic remedies, which was joined to the merits (see paragraph 25 above), must be rejected.

36. The Court thus concludes that the fair balance between the public interest and the need to protect the first applicant's right to property was not achieved in the case. There has therefore been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATIONS OF ARTICLES 8 AND 14 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

37. The first applicant complained under Article 8 of the Convention that she had been deprived of her home and, in addition, that this had represented an interference with her private life and family life. She also complained under Article 14 of the Convention that the legislation applied in her case benefitted the State to the detriment of good faith buyers of State property like herself and that she had been placed in a less advantageous position than individuals buying State property after 1996 when it had become possible to acquire such property by adverse possession.

A. Admissibility

38. Having regard to its conclusion in paragraph 26 above, the Court considers that these complaints must be declared admissible.

B. Merits

39. The Court has examined above the first applicant's complaint that she had been arbitrarily deprived of her property. In view of its finding on that point, the Court considers that no separate issues arise under Articles 8 and 14 of the Convention (see, *mutatis mutandis*, *Velikovi and Others*, cited above, §§ 250-52).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION IN RESPECT OF THE SECOND AND THIRD APPLICANTS

40. The second and third applicants also complained that they had been deprived of their home and that the authorities had interfered with their private and family lives.

41. The Court has examined these complaints. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

43. In respect of damage, the Court considers it appropriate to adopt the approach set out in other similar cases (see *Todorova and Others v. Bulgaria* (just satisfaction), nos. 48380/99, 51362/99, 60036/00 and 73465/01, 24 April 2008), and in particular, the approach followed in the case of *Todorova* (see paragraphs 11 and 13-20 of the above cited judgment).

1. Pecuniary damage

44. The first applicant requested that the State be ordered to transfer to her the property of an apartment similar to the one she had lost. Failing that, she claimed 184,600 Bulgarian levs (the equivalent of approximately EUR 95,000) for the value of the apartment. She submitted a valuation report of October 2008 by an expert commissioned by her, assessing the value at that level. She also claimed EUR 9,960 for rent paid by her and the second applicant from August 2004 to September 2008. In support of this claim she presented the relevant receipts.

45. The Government did not comment.

46. The Court, having regard to the circumstances of the case and to information at its disposal about real-estate prices in Sofia, awards the first applicant EUR 73,000 for pecuniary damage.

2. Non-pecuniary damage

47. The first applicant claimed EUR 11,000.

48. The Government did not comment.

49. Having regard to the circumstances of the case and deciding on an equitable basis, the Court awards the first applicant EUR 4,000 under this head.

B. Costs and expenses

50. The applicants claimed EUR 2,010 for thirty-three and a half hours of legal work by her lawyer, Mrs S. Margaritova-Vuchkova, at an hourly rate of EUR 60, after the communication of the application. In support of

this claim they presented a contract for legal representation and a time-sheet. They requested that any sum awarded under this head be paid directly to Mrs Margaritova-Vuchkova.

51. The applicants claimed another 250 Bulgarian levs (BGN), the equivalent of EUR 130, already paid by them, for legal work by Mrs Margaritova-Vuchkova. They also claimed BGN 600 (the equivalent of EUR 308) for legal fees charged by the lawyer who had prepared the initial application to the Court, and BGN 378.50 (the equivalent of EUR 194) for postage and translation. In support of these claims they presented the relevant receipts.

52. The Government did not comment.

53. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

54. In respect of legal fees charged by Mrs Margaritova-Vuchkova, the Court, considering that she was not involved in the initial stages of the proceedings and that part of the complaints have been rejected, awards to the first applicant EUR 1,000 under this head. As Mrs Margaritova-Vuchkova has already received EUR 130 from the applicants, EUR 870 of the sum awarded is to be paid directly into her bank account.

55. In respect of the remaining legal fees and other costs and expenses, the Court, having regard to the information in its possession, finds that they were actually and necessarily incurred. As to quantum, considering that some of the complaints have been rejected, it finds it reasonable to award to the first applicant EUR 500.

C. Default interest

56. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the question of the exhaustion of domestic remedies;

2. *Declares* the complaints of the first applicant admissible and the complaints of the second and third applicants inadmissible;

3. *Holds* that, in respect of the first applicant, there has been a violation of Article 1 of Protocol No. 1 to the Convention and accordingly *dismisses* the Government's preliminary objection based on non-exhaustion of domestic remedies;

4. *Holds* that, in respect of the first applicant, no separate issues arise under Articles 8 and 14 of the Convention;

5. *Holds*
(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
(i) EUR 73,000 (seventy-three thousand euros) in respect of pecuniary damage and EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses, EUR 870 (eight hundred and seventy euros) of which is to be paid directly into the account of the applicants' legal representative;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President