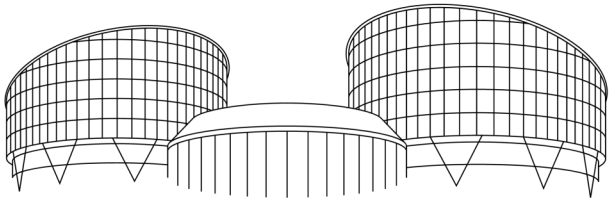

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF YONKOV v. BULGARIA

(Application no. 17241/06)

JUDGMENT

STRASBOURG

2 September 2010

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 Yonkov v. Bulgaria,

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

Peer Lorenzen, *President,*
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *judges,*
Pavlina Panova, ad hoc *judge,*

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 6 July 2010,

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

PROCEDURE

1. The case originated in an application (no. 17241/06) 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 a Bulgarian national, Mr Hristo Markov Yonkov ("the applicant"), on 19 April 2006.

2. The applicant was represented by Mr S. Terziyski, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms S. Atanasova, of the Ministry of Justice.

3. The applicant alleged that he had been deprived of his right to use an apartment and that he had been ordered to pay damages to the apartment's former owners, in violation of Article 1 of Protocol No. 1 to the Convention.

4. On 6 May 2008 the President of the Fifth Section decided to give notice of the application to the Government. He also decided to examine the merits of the application at the same time as its admissibility (Article 29 of the Convention).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1927 and lives in Sofia.

7. In 1968 the applicant and his wife bought from the Sofia municipality a two-room apartment of 49 square metres which had become State property by virtue of the nationalisations carried out by the communist regime in Bulgaria in 1947 and the following years.

8. In February 1992 the Restitution Law entered into force.

9. In December 1992 the applicant and his wife conveyed their title to their grandson, retaining for themselves the right to use the apartment. The applicant's wife died in 1995; the applicant and their daughter were her heirs.

10. On 30 December 1997, following a renewal of the initial one-year time-limit to bring an action under section 7 of the Restitution Law, the heir of the former owner of the apartment brought such an action against the applicant and his daughter, seeking to establish that the title of the applicant and his wife had been null and void.

11. The ensuing proceedings ended by final judgment of the Supreme Court of Cassation of 14 July 2005. The domestic courts found that the title of the applicant and his wife had been null and void *ab initio* because the sale of the property in 1968 had been flawed as three of the requisite documents, namely the initial decision to sell the property, its approval, and the sale contract, had not been signed by the mayor or, respectively, the mayor of the region, as required by law, but by their deputies.

12. In the meantime, on 15 March 2002 the heir of the former owner of the apartment brought a *rei vindicatio* action and an action for damages against the applicant who was still living in the apartment. In a judgment of 14 March 2006 the Sofia District Court allowed the claims and ordered the applicant to vacate the property. It found also that the applicant was liable for damages as his title had been found to be null and void *ab initio* and he had thus used the flat without any valid legal ground.

13. The domestic court noted that the former owner's rights to the apartment at issue had been restored *ex lege* by virtue of the Restitution Law's entry into force in February 1992. Therefore, the applicant's liability for damages for having used the apartment without any valid ground had arisen on that date. On that basis, the Sofia District Court ordered the applicant to pay to the former owner 1,807.50, Bulgarian levs (BGN), the equivalent of 927 euros (EUR), in damages for the period from February 1992 to March 2002. The applicant's liability was limited to the latter date because this was when the action for damages had been brought. Apparently, the applicant failed to rely on the rules of statutory limitation,

which under Bulgarian law was five years and could have led to the restriction of his liability to the period after March 1997. The applicant was also ordered to pay BGN 440, the equivalent of EUR 225, for the other party's expenses.

14. Upon appeal by the applicant, on 15 October 2007 the Sofia District Court's judgment was upheld by the Sofia City Court. Considering that he stood no chance in cassation, the applicant did not appeal against that judgment.

15. On 23 August 2006 the applicant and his daughter applied to receive compensation through bonds for the loss of the apartment. At the time of the applicant's latest communication to the Court of May 2010 the regional governor had not yet decided on the application for bonds.

16. In October 2006 the applicant vacated the apartment and was granted the tenancy of a municipally-owned dwelling.

II. RELEVANT BACKGROUND FACTS, DOMESTIC LAW AND PRACTICE

17. The relevant background facts, domestic law and practice concerning the effect of the restitution on Bulgaria on third parties have been summarised 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).

18. The relevant judicial practice concerning liability for damages of persons who lost their property pursuant to section 7 of the Restitution Law has been summarised in the judgment in the case of *Kayriakovi v. Bulgaria* (no. 30945/04, § 18, 7 January 2010).

19. Under Bulgarian law, the right to use a property, provided for in sections 56-62 of the Property Act of 1951, is considered a right *in rem*.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 CONCERNING THE APPLICANT'S DEPRIVATION OF THE RIGHT TO USE THE APARTMENT

20. The applicant complained that he had been deprived of the right to use his apartment arbitrarily and through no fault of his own. He relied on Article 1 of Protocol No. 1, which reads 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."

Admissibility

21. The Government asked the Court to dismiss the complaint as time-barred under Article 35 § 1 of the Convention.

22. Applying the approach set out in its judgment in the case of *Kayriakovi* (cited above, §§ 24-29), the Court considers that the six-month period in the present case started to run on 14 September 2005 when the two-month time-limit, as provided for in domestic law, for the applicant to seek compensation bonds expired. The present complaint was introduced on 19 April 2006, that is, more than six months later. It follows that it has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

23. In view of this conclusion, it is not necessary to examine another objection raised by the Government, namely that the applicant could not claim to be a victim of the alleged violation of Article 1 of Protocol No. 1, because he had not been the owner of the disputed property.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 IN THAT THE APPLICANT WAS FOUND TO BE RETROACTIVELY LIABLE FOR DAMAGES

24. The applicant further complained of a violation of Article 1 of Protocol No. 1 in that he had been ordered retroactively by the national courts to pay damages to the former owner of the flat, for a period preceding the judgment declaring his title null and void.

25. The Government considered the complaint inadmissible under Article 35 § 1 of the Convention for failure to exhaust domestic remedies because the applicant had failed to appeal in cassation against the Sofia City Court's judgment of 15 October 2007 (see paragraph 14 above).

26. The applicant contested this argument.

A. Admissibility

27. As to the Government objection for non-exhaustion of domestic remedies, the Court refers to its finding in the case of *Kayriakovi* (cited above, §§ 30-36), which concerned an identical situation, that a cassation

appeal would not have represented an effective remedy as the established practice of the domestic courts deprived any such appeal of prospects of success. The Court does not see a reason to reach a different conclusion in the present case and finds that the applicant was not required to resort to cassation appeal. Accordingly, the present complaint cannot be dismissed for non-exhaustion of domestic remedies.

28. The Court finds also that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

29. The Court recalls that it examined an identical complaint in the case of *Kayriakovi* (cited above, §§ 38-50).

30. As in that case, the Court notes that the Restitution Law, applied in conjunction with the relevant law on contracts, had the effect of automatically exposing the applicant to retrospective liability for having lived in his apartment after 1992. Furthermore, for an initial period of several years the Restitution law was subject to highly uncertain interpretation (see *Kayriakovi*, cited above, §§ 43-44). Nevertheless, the applicant was in practice placed in a situation where he could have only avoided liability for damages by abandoning his flat immediately after the adoption of the Restitution Law in February 1992. In the Court's view, he could not have reasonably be required to do so (ibid., § 45). Moreover, in the case at hand the action under section 7 of the Restitution Law was brought against the applicant in December 1997, that is more than five years after the adoption of the Restitution Law (see paragraphs 8 and 10 above). The applicant could not have reasonably been expected to foresee that and to act accordingly so as to avoid liability.

31. Furthermore, the Court notes that the applicant's title was found to have been null and void because requisite documents related to the apartment's sale in 1968 had not been signed by the officers with whom the relevant power had been vested, but by their deputies (see paragraph 11 above). These deficiencies are attributable to the State authorities, not the applicant (see, for example, *Velikovi and Others*, cited above, §§ 218 and 223, and *Panayotova v. Bulgaria*, no. 27636/04, § 21, 2 July 2009). The Court accepts that after the action under section 7 of the Restitution Law was brought against him in the end of 1997 the applicant must have been aware of the possibility that he might lose the apartment (see *Kayriakovi*, cited above, § 47). Nevertheless, in the Court's view, the automatic application of retrospective liability for damages to *bona fides* owners like him squares poorly with the requirements of Article 1 of Protocol No. 1 of proportionality, foreseeability and fair balance (ibid.).

32. The Court notes that in the proceedings for damages the applicant failed to rely on the rules of statutory limitation, which could have led to the restriction of his liability to a period a five years, that is from March 1997 to March 2002 (see paragraph 13 above). However, although this will fall to be taken into account under Article 41, it cannot affect the Court's conclusion in the paragraph above that the applicant's automatic and retrospective liability for damages was in breach of the principles of proportionality, foreseeability and fair balance. Most notably, even if he had relied on the rules of statutory limitation, the applicant would still be found liable for a period preceding the final judgment in the proceedings under section 7 of the Restitution Law when, for all legal purposes, he was considered to have had a valid title *in rem*.

33. As in *Kayriakovi* (cited above, § 50), the Court finds therefore that the interference with the applicant's rights under Article 1 of Protocol No. 1 was disproportionate and thus not justified. It follows that there has been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

1. Pecuniary damage

35. For pecuniary damage arising out of the domestic courts' finding that he was liable to pay damages to the flat's former owner, the applicant claimed BGN 1,807.50, the equivalent of EUR 927, which was the amount he had been ordered to pay (see paragraphs 13-14 above).

36. The Government urged the Court to dismiss this claim.

37. The Court considers that the applicant has suffered pecuniary damage as a result of having been ordered retroactively to pay damages to the apartment's former owner. As to the amount to be awarded, it refers to its finding above (see paragraph 31) that after December 1997 the applicant must have been aware of the possibility that he might lose the apartment. Furthermore, it recalls that the applicant failed to restrict his liability by relying on the rules of statutory limitation (see paragraphs 13 and 32 above). On the basis of these considerations and having regard to the circumstances of the case, the Court awards the applicant EUR 460 in respect of the

pecuniary damages suffered as a result of the national courts' finding him liable for damages.

2. Non-pecuniary damage

38. The applicant also claimed non-pecuniary damage, averring that he had suffered frustration and distress as a result of the violations of his rights. He left the determination of the exact amount of damages to the Court.

39. The Government urged the Court to dismiss the claim.

40. The Court considers that the applicant has undoubtedly suffered anguish and frustration as a result of the violation of his property rights. Having regard to the circumstances of the case and deciding on an equitable basis, it awards him EUR 3,000 under this head.

B. Costs and expenses

41. The applicant also claimed EUR 950 for the legal fees charged by his lawyer, Mr Terziyski, for the proceedings before the Court. In support of this claim he presented a time-sheet and requested that any sum awarded be paid directly into the bank account of Mr Terziyski. The applicant also claimed BGN 440, the equivalent of EUR 225, for the costs and expenses incurred by him in the domestic proceedings for damages, as stipulated in the Sofia District Court's judgment of 14 March 2006 (see paragraph 13 above).

42. The Government considered these claims to be excessive.

43. 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 were reasonable as to quantum. In the present case, regard being had to the fact that it found one of the complaints raised by the applicant to be inadmissible (see paragraph 22 above), the Court awards EUR 475 for the legal fees charged by Mr Terziyski, to be paid directly into Mr Terziyski's bank account.

44. As to the remaining costs and expenses, amounting to EUR 225, the Court, having regard to the circumstances of the case, finds that they were actually and necessarily incurred and are reasonable as to quantum. Therefore, it awards them in full.

C. Default interest

45. 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. *Declares* the complaint that the applicant was found to be liable to pay retroactively damages to his apartment's former owner admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

3. *Holds*
   (a) that the respondent State is to pay the 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 3,460 (three thousand four hundred and sixty euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
      (ii) EUR 700 (seven hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, EUR 475 (four hundred seventy-five euros) of which to be paid directly into the bank account of the applicant's 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;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 2 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Peer Lorenzen
Deputy Registrar	President