

LAND REGISTRY & HUMAN RIGHTS BY THE ECHR

Brussels, 29/11/2018

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Judge - Court of Rovereto (Italy)

The ECHR has established three main principles applying to the protection of property (a 1 - p 1):

- The principle of lawfulness
- The principle of legitimate aim in the public interest
- The principle of fair balance

Principle of lawfulness

- The Court has reiterated that the most important requirement of article 1 of protocol 1 is that any interference by a public authority with the right to peaceful enjoyment of possessions should be lawful.
- The principle of lawfulness requires that each infringement upon the right to property have a basis in domestic law.
- This legal basis has to be accessible, sufficiently precise and foreseeable.

Principle of legitimate aim

- The interference with the right to property has to pursue a legitimate aim: according to the second sentence of article 1 of protocol 1 deprivations of property are only allowed if they are in the public interest; the second paragraph provides that the control of use of property has to be in accordance with the general interest.
- The Court ascertains on a case by case basis whether the interference with the right to property pursues a legitimate aim. Member states enjoy a wide margin of appreciation when deciding which aim is legitimate.

Principle of fair balance

- The principle of fair balance requires that the interests of the individual affected by the measure interfering with the right to property have to be pondered with the interests of the general public.
- The interference must not impose an excessive or disproportionate burden on the individual.

HUMAN RIGHTS AND INDEFEASIBILITY

A well known case in which the European Court of Human Rights had to deal with a possible violation of article 1 of protocol 1 of the Convention is **Pye v. United Kingdom**

The Pye case has highlighted that human rights definitely have a significant role to play in real property law, not only with regard to the close interaction between land registries and adverse possession, but also about the role of *indefeasibility*, which is a foundation stone of the **Torrens system**

Not surprisingly the issue of the relationship between human rights and indefeasibility is thoroughly investigated by scholars and courts of states that apply the Torrens system.

Howell noted, before the Pye case, that a *“right lost through failure to register may well be seen as an expropriation of a property interest without compensation”*.

The Scottish Law Commission's discussion paper on land registration (2004) sought to balance the conflict between Torrens system and human rights by suggesting that any indemnity given to the purchaser of a void transaction should not be by way of indefeasible title, but in monetary compensation.

Griggs (Possession, Indefeasibility and Human Rights, 2008)

*“as human rights jurisprudence continues to expand, **Torrens legislation needs to resolve the inherent tension that may arise between it and human rights.** As we move inexorably to a national conveyancing system in terms of process, any harmonisation of the substantive law should address the **dilemma posed by the interaction of possessory based principles to a system of title by registration.** The type of litigation encapsulated in *Pye* seems little to do with advancing human rights, yet it directly attacks a system of land registration ...*

.... In summary, the questions raised here will not be answered by mechanical formula, the application of economic theory, or by resort to historical reference. It is not about 'protection or redistribution; it is the protection of whom, and the distribution of what.' It is this which must be answered, and with land being in 'defined and limited supply', the answer that should be given, is a strong preference for the precepts, ideals and values provided within and by, the Torrens system of land registration".

- The compatibility between human rights and land registries could be similarly put under question in the German system, where the conclusiveness of the title is immediately assured in no less effective terms.
- The Austrian Grundbuch and the Italian Libro Fondiario – which are designed to protect the right of a *bona fide* purchaser after the short term of sixty days (three years in absence of notification) – appear to be safer from this point of view.

In any case it is important to stress out that *“in the context of Article 1 of Protocol No 1, the States are under a positive obligation to provide judicial procedures that offer the necessary procedural guarantees ... This means in particular that Article 1 of Protocol No 1 implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees ... In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures”* (ECHR, *Vontas and Others v. Greece*, 2009).

This statement is perfectly in line with the opinion expressed by the distinguished Italian scholar Nicola Coviello in 1924: *“The principle of public faith is very useful, if it is based on the principle of legality, but if it were accepted without this, would lead to pernicious consequences. The interest of third parties would be protected, and sacrificed instead the interest of the legitimate owners, the mentally incompetent persons, etc, who deserve equal protection”*.

New perspectives on LR: Contemporary Problems and Solutions (A. Goymour, S. Watterson, M. Dixon, 2018, p. 160)

- If all titles were good, the type of system of land registration would hardly matter. But in cases where titles are not good – where a person seeking to sell or burden land is not the land's owner or where the implementing deed is defective in some way – two difficult choices fall to be made by the law. One is who to protect; the other is how to protect. And while the questions are different and distinct, the answer to the one is likely to influence the answer to the other, making it of particularly importance to determine the order in which the questions are answered.

The choice of who to protect is a choice between the person seeking to acquire the property right and the person who owns the land; the choice of how to protect lies between protection which is automatic but defeasible and protection which is indefeasible but must be earned. Since the first is a matter of policy and the second, largely, one of technique, it seems obvious that technique should serve policy and not the other way around.

ECHR AND REVOCATION OF A BONA FIDE PURCHASER'S TITLE

- Gladysheva v. Russia *Application no. 7097/10 decision 6/12/2011*
- The applicant (Ms Gladysheva) bought a flat in Moscow in 2005. The flat had previously been owned by the City of Moscow before being acquired under a privatization scheme by another person (Ms Ye), who then sold it to a third party, who had then sold it to the applicant. In the same year Ms. Gladysheva's title to the flat was officially registered by the relevant registration authorities in Russia.

Since then she has been living in this flat with her teenage son.

In 2008 the Moscow Housing Department brought an action against the applicant claiming that the flat had been fraudulently acquired under a privatization scheme and requested the court to annul the privatization and all the ensuing transactions.

On 9 July 2009 the District Court found that the privatisation of the flat by Ye. had been fraudulent.

It established, in particular, that the civil act registration authority had found no record of a marriage between M. and Ye. and concluded that their marriage certificate had been forged.

Therefore Ye. had had no right to be registered at M.'s address or to privatise his flat after his death. In respect of the applicant, it found that she was a bona fide buyer, within the meaning of Article 302 of the Civil Code. However, it found that the flat, having been fraudulently privatised, had left the possession of the City of Moscow, its lawful owner, without that body having the intention to divest itself of it.

Thus, by application of Article 302 of the Civil Code and Constitutional Court ruling 6-P of 21 April 2003, the case fell under one of the two exceptions to the protection of a bona fide buyer's title, which required that precedence be given to the previous owner. The applicant's title to the flat was accordingly revoked and the City of Moscow declared the flat's lawful owner. The court ordered the applicant's eviction without compensation or an offer of alternative housing.

The applicant appealed. On 13 May 2010 the appeal against the judgment of 9 July 2009 was rejected in the final instance by the Moscow City Court.

- In 2010 Ms Gladysheva submitted her application to the ECHR claiming that she had been dispossessed of her flat contrary to Article 1 of Protocol No. 1 to the Convention and that she faced eviction in violation of Article 8 of the Convention
- The applicant alleged, inter alia, that the courts should not apply Article 302 of the Civil Code and grant the Moscow authorities' claim; she also considered the measures taken by the Russian authorities disproportionate, since “after paying the full market price for the flat she would be stripped of the property for no fault on her part and would have to pay for housing at the market rate.”

- The Government claimed that their actions pursued the legitimate aim to protect the rights of those who were eligible for social housing.
- They argued that the applicant's unfortunate situation had been caused by a private person, Ye., who had fraudulently privatised the flat and unlawfully sold it on to V.
- The privatisation had been carried out on the basis of forged documents and the flat had therefore left the possession of the Moscow Housing Department in the absence of that body's intention to divest itself of it.

- The City of Moscow, like any owner, was entitled under Article 302 of the Civil Code to recover its property from subsequent acquirers.
- They pointed out that action to reclaim property is rooted in *rei vindicatio* known in Roman law, and is a well-established procedure under Russian law.
- The Government claimed that A1P1 to the Convention was not applicable to the present case. They referred to the Court's case-law, which stated that that Article did not concern the regulation of civil-law rights between parties under private law.

- The domestic courts' decisions according to the rules of private law cannot be seen as an unjustified State interference with the property rights of one of the parties.
- The Government further expressed doubt as to whether the applicant had been a true bona fide buyer, as she had claimed throughout the domestic proceedings. They argued that one would suspect that a flat being resold so soon after its acquisition by V. would have some flaw in its provenance
- They also suggested the applicant to sue V., the seller of the flat, for damages.

THE COURT'S REASONING

- The ECHR assumed that the interference with the applicant's rights had been lawful and pursued the public interest in that it satisfied the needs of persons on the waiting list for social housing.
- However, it found a violation of both A1P1 (as it was not for the applicant to assume the risk that her ownership be revoked on account of defects that should have been identified when she submitted her title to registration to different state authorities) and Article 8.

With respect to A1P1 the ECHR reasoned as follows:

According to the Court's case-law in order to comply with the general rule of A1P1, a State interference with the peaceful enjoyment of one's property must meet each of the following requirements: it must be lawful, pursue a legitimate aim and be reasonably proportionate to the aim sought to be realized.

The State interference at issue did not meet the third requirement of proportionality.

- The Court pointed out that Ms. Ye's title had been checked by the registration authorities at least three times during the legalization of three transactions with the flat. In this connection the Court stressed out that:
- nothing prevented the authorities in charge of Ye.'s registration, social tenancy and privatisation files from authenticating her documents before granting her requests. It was within the State's exclusive competence to define the conditions and procedures under which it alienated its assets to persons it considered eligible and to oversee compliance with those conditions.

Moreover, the subsequent transactions in respect of the flat were also subject to legalisation by the State, in this case by the Moscow Office of the Federal Authority for Registration of Property, a procedure specifically aimed at providing extra security to the title holder.

With so many regulatory authorities having granted clearance to Ye.'s title it was not for the applicant, or any other third-party buyer of the flat, to assume the risk of ownership being revoked on account of defects which should have been eliminated in procedures specially designed to do so. The authorities' oversight could not justify subsequent retribution against a bona fide buyer of the property in question.

- The Court also noted that the applicant was deprived of her title to the flat without any compensation or housing equivalent to her flat due to the mistake made by the State authorities during privatization of the flat by Ms. Ye.
- In this respect the Court pointed out that “the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned.”

With respect to Article 8 of the Convention the Court provided the following reasoning:

- According to the Court's case-law any interference with an applicant's right to respect for his or her home must be based on the law and be proportionate to the legitimate aim pursued.
- The Court accepted that the eviction was lawful (under a domestic law it is an automatic consequence of termination of ownership) and pursued a legitimate aim.

However, the eviction order did not meet the proportionality requirement.

- The Court noted as follows:

the guarantees of the Convention require that any interference with an applicant's right to respect for his or her home not only be based on the law but should also be proportionate, under paragraph 2 of Article 8, to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with the respondent State's obligations under the Convention

The Court held that Russia should ensure, by appropriate means, full restitution of the applicant's title to the flat and the annulment of her eviction order

§ 106. The Court reiterates that, normally, the priority under Article 41 of the Convention is *restitutio in integrum*, as the respondent State is expected to make all feasible reparation for the consequences of the violation in such a manner as to restore as far as possible the situation existing before the breach

- Consequently, having due regard to its findings in the instant case, and in particular having noted the absence of a competing third-party interest or other obstacle to the restitution of the applicant's ownership, the Court considers that the most appropriate form of redress would be to restore the applicant's title to the flat and to reverse the order for her eviction.
- Thus, the applicant would be put as far as possible in a situation equivalent to the one in which she would have been had there not been a breach of Art. 8 and A1P1
- The Court further awarded to Ms Gladysheva € 9,000 in respect of nonpecuniary damage

Despite a decision in favour of a citizen held in 2015 by the Supreme Court of the Russian Federation in a civil dispute between the Housing Department and a bona fide purchaser, the ECHR had to deal with some other cases.

Pchelintseva and Others v. Russia (nos. 47724/07, 58677/11, 2920/13, 3127/13, and 15320/13)

Strasbourg 17/11/2016 Final 24/04/2017

The applicants are ten Russian nationals who were born between 1960 and 2010. They live in Moscow and the Moscow region. The case concerned actions taken by city authorities to recover ownership of properties that had been purchased by the applicants. The applicants' apartments had historically been owned by the City of Moscow before being privatised. In each case, the properties had been acquired from the City, and then ultimately sold on to the applicants.

- However, the privatisation of the flats had been affected by various illegalities, including misuse of powers of attorney (47724/07 and 15320/13) and fraud (58677/11, 2920/13 and 3127/13).
- However, none of the applicants were implicated in these illegalities, and those applicants who took legal title (Ms Pchelintseva, Ms Dedik, Ms Dergacheva, Ms Polevoda, and Mr Karim) did so as bona fide purchasers.
- In each case, city authorities brought proceedings seeking title to the flats and orders for eviction, and were successful.

- The domestic courts applied exceptions to laws protecting bona fide purchasers.
- In two cases the applicants were evicted (47724/07 and 58677/11; eviction proceedings are pending in 3127/13). In two cases the City has since entered into social housing lease agreements with the applicants (58677/11 and 15320/13). In two cases the applicants succeeded in pursuing civil claims against various parties implicated in the illegalities (47724/07 and 2920/13), although the orders they obtained have not been enforced.

- Relying in particular on Article 1 of Protocol No. 1 the applicants complained about their deprivation of title and (where applicable) their evictions.
- **Violation of Article 1 of Protocol No. 1** – in respect of Ms Pchelintseva, Ms Dedik, Ms O. Polevoda, Ms Dergacheva and Mr F. Karim
- **Just satisfaction:** The Court held that Russia should ensure, by appropriate means, full restitution of the applicants' title to the flats and the annulment of their eviction orders or, in the alternative that Ms Pchelintseva, Ms Dedik, Ms O. Polevoda, Ms Dergacheva and Mr F. Karim receive an equivalent flat.

The Court further awarded to these applicants the following amounts: EUR 5,000 each to Ms Pchelintseva, Ms Dedik, Ms Dergacheva, Ms O. Polevoda, and Mr F. Karim in respect of non pecuniary damage; and EUR 2,075 each to Ms Pchelintseva, Ms Polevoda and Mr Karim, and EUR 2,093 to Ms Dedik in respect of costs and expenses.

DISSENTING OPINION OF JUDGE SAJÓ

- To my regret, I have to dissent in these cases for the reasons set out in the case of *Ponyayeva and others v. Russia* (no. 63508/11).
- I would just like to mention a few facts below which are particularly problematic.

1. In the case of *Pchelintseva and others v. Russia* (no. 47724/07) the fraudulent facts became public knowledge four years after the purchase. The applicant **was clearly aware of the risk she undertook**: she asked for a professional title check. A final judgment assigned responsibility to the company having checked the title. According to Government she recovered her loss but the Court found that the damages could not be enforced for reasons of insolvency.

2. In the case of *Dedik v. Russia* (no. 58677/11), the forgery became established after the conclusion of the purchase. The applicant was entitled to continue to reside in the apartment as social tenant. It is of relevance that **this “bona fide” purchaser bought the property below the market price.** Should that not be a consideration even for the majority which finds a violation in this case, at least as regards just satisfaction? Could someone who obtains property below the market price not assume that there are serious risks?

3. In the case of *Polevoda v. Russia* (no. 2920/13), the fraudulent transaction was authorised by the Moscow City Bar Association “Exchange”. The Court considered that the State authorities were responsible for the failure to check and discover the fraud. **Is the Court extending State responsibility to the acts of the Bar** (and in a number of cases to the Notary)? I assume (although this is not discussed at all in the judgment) that the “Exchange” service to some extent operates on the State’s behalf. However, this is not made clear, and even assuming that this is the case, the special responsibilities and the statutory duty of care are not specified.

It is highly problematic to attribute State responsibility to acts adopted by lawyers (and notaries) without further consideration and specification, even if their acts are a matter of public trust. In this case, the fraudulent vendor was ordered to reimburse the plaintiff, measures to safeguard the assets that could be used for recovery were taken by the bailiff, and the State's obligation in that regard was limited to assisting the creditor in enforcing the relevant court order. This matter is not even considered in the judgment. The Court noted that "a possibility to bring an action for damages ... could not deprive the applicant of victim status" (see paragraph 82).

What we have here, however, is no mere possibility: the applicant successfully lodged the claim with a court, and the reason given in a different context that recovery is impossible because the assets of the vendor were confiscated does not apply in this case.

4. As to the case of Ms Dergacheva (*Dergasheva v. Russia*, no. 3127/13), she worked at Moscow Housing Stock Department, like Mr Yo. who embezzled and sold the property to Ms Dergacheva. Mr Yo. was convicted for the crime. Ms **Dergacheva paid a price far below the market price** (which fact was contested by the applicant).

ECHR AND THE SAFEGUARD OF LEGAL CERTAINTY

The ECHR considers essential also the **safeguard of legal certainty**. In the above mentioned case *Vontas vs Greece*, the Court declared that, with specific regard to land registries, “*a system of title deeds exists in order to ensure legal certainty as to the ownership of land. Subsequently, these titles can be relied upon by owners as proof that a piece of land belongs to them. The fact that in the present case ... the applicants were unable to prove events which took place in the distant past was in the Court’s view and in the circumstances of this case contrary to the principle of legal certainty* » (§ 41).

Fener Rum v. Turkey (no. 14340/005)

Another violation of the principle of lawfulness was found by the ECHR in the decision by the Turkish authorities to void - after a considerable amount of time - a title to an immovable, against the interest of a good-faith third party (the Ecumenical Patriarchate, an Orthodox church in Istanbul).

The Court considered that the striking out by the Turkish courts of the applicant foundation's property title and its removal from the land registers, 38 and 44 years after the acquisition of the properties in question, had amounted to an interference in its right to the peaceful enjoyment of its possessions.

The Turkish courts had based their decisions on the fact that foundations made up of religious minorities - whose constitutive documents did not contain a statement that they had capacity to acquire immovable property - were precluded from acquiring such property by any means. However, the applicant foundation's acquisitions had been validated by a certificate from the provincial governor's office and entered in the land register. The applicant foundation was thus certain of having acquired the properties lawfully.

For 38 and 44 years the applicant foundation had been able to enjoy its property as a legitimate owner, paying the various taxes due in respect of its assets. Thus, the interference in its right to the peaceful enjoyment of its possessions seemed incompatible with the principle of the rule of law. The Court noted that the legislation governing the constitutive documents of foundations had been amended in 2002 and that they could now acquire immovable property; however, the applicant foundation had not benefited from that change in the law. In those circumstances, the Court concluded that there had been a violation of A1P1

Zehentner v. Austria (no. 20082/02)

Another interesting decision of the ECHR on the topic of enforcement proceedings which could have a strong impact also on land registries is **Zehentner v. Austria**, in which the Court found a violation of both article 1 protocol 1 and article 8 of the Convention.

The Court stated that, while generally there may be good reasons for having an absolute time-limit for lodging an appeal against a judicial sale of real estate, specific justification would be required where a person lacking legal capacity is concerned. In the case at question, neither the protection of the bona fide purchaser nor the general interest of preserving legal certainty are sufficient to outweigh the consideration that the applicant, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts.

Buj v. Croatia (no. 24661/02)

- In this decision the Court sanctioned the excessive duration of the procedure for the registration of the title to a piece of land property.
- In 1994 the applicant's mother died and inheritance proceedings were started. In 1999 in a decision issued by the Municipal Court, the property was distributed between the applicant and his brother. Ownership of the property was to be registered after the decision became final. An appeal lodged by the applicant's brother was declared inadmissible and was served on the applicant's representative in 2002. The applicant's ownership of the inherited property had at the date of the proceeding not been recorded in the land register.

- The applicant complained about the excessive length of the proceedings and the lack of an effective remedy in relation to that grievance. He further alleged that the length of proceedings had infringed his right to the peaceful enjoyment of his possessions as guaranteed by A1P1.
- The ECHR considered that the length of the proceedings was excessive and held unanimously that there had been a violation of A. 6 § 1 and 13. Having regard to its finding of a violation of the mentioned articles of the Convention, the Court also held unanimously that it was not necessary to examine whether there had been also a violation of A1P1.

Ipol study 2016 Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens

Recommendation 6-F – Hidden mortgages

EU action is required to prevent a repetition of the ridiculous situation that has arisen in Cyprus with hidden mortgages, which appears to breach the provisions of the European Convention on Human Rights guaranteeing the quiet enjoyment of possessions.

7. Notorious problems encountered by purchasers in Spain involved issues of abuse of governmental powers and should have fallen within the remit of human rights protection; however the case law of the European Court of Human Rights has been too deferential to national property systems.

CONCLUSIONS

An overall analysis of the jurisprudence of the ECHR on the topic of real property law and land registries (Petrelli, 2014) clearly demonstrates that a great importance is given to the principle of legitimate expectation and to the safety of real property transactions, always in the perspective of finding the necessary proportionality and balance between private and public interests.

We can therefore conclude that, the achievement of the mentioned principles and objectives – which is clearly connected to the principle of lawfulness - demands a land registration system that is able to guarantee the completeness and the accuracy of the land registry, of course within the limits of the laws applied in the single contracting States.