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

FIFTH SECTION

CASE OF KUSHOGLU v. BULGARIA

(Application no. 48191/99)

JUDGMENT

STRASBOURG

10 May 2007

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 Kushoglu v. Bulgaria,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 10 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 48191/99) against the Republic of Bulgaria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mrs Ayten Kushoglu and Mr Mehmet Kushoglu ("the applicants"), on 28 September 1998. The applicants have both Bulgarian and Turkish nationality.

2. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Karadjova, of the Ministry of Justice.

3. The applicants alleged, in particular, that through arbitrary judicial decisions they were denied their right to recover their property from third persons.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By a decision of 29 September 2005, the Court declared the application partly admissible and partly inadmissible.

6. The applicants and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants, Ms Ayten Kushoglu (alias Ayten Zeynal Ali) and Mr Mehmed Kushoglu (alias Mehmed Sali Ali), have Bulgarian and Turkish nationality. They were born in 1958 and 1956 respectively and live in Malkara, Turkey.

8. The applicants were born and lived in Bulgaria until the summer of 1989, when the communist regime in Bulgaria forced tens of thousands of ethnic Turks, among them the applicants, to emigrate.

9. Before leaving, on 24 July 1989 the applicants sold their two-storey house in Dulovo to the local municipality. At the relevant time, a person willing to sell real estate could only do so through the intermediary of the local municipality. The price was fixed at 19,288 Bulgarian levs ("BGL"), in accordance with an evaluation made by an expert at the municipality. The applicants received that amount.

10. On 12 February 1990 the municipality sold the house to two individuals, Ms A. and Mr N. The price was BGL 21,376.

11. On an unspecified date in 1991 the applicants brought an action against the Dulovo municipality for a declaration that the 1989 transaction between them was null and void as being contrary to the law or concluded in circumstances of urgent necessity and under obviously unfavourable terms.

12. On an unspecified date in 1993 the applicants brought another action against Ms A. and Mr N. claiming that the contract of 12 February 1990 between the Dulovo municipality as the seller and Ms A. and Mr N. as the buyers was also null and void as being contrary to the law. On that basis the applicants asked the court to order the defendants to "surrender the ownership and the possession" over the disputed house. The proceedings in the above two cases were joined on 19 February 1993.

13. On 2 March 1994 the Dulovo District Court gave judgment. It declared inadmissible, as having been submitted out of the relevant one-year statutory time-limit, the applicants' claim that the 1989 transaction had been concluded in circumstances of urgent necessity and under obviously unfavourable terms. It further rejected on the merits the applicants' claims that the 1989 and 1990 transactions were null and void as being contrary to the law.

14. Upon the applicants' appeal, on 8 June 1994 the Silistra Regional Court upheld the lower court's judgment. The applicants submitted a petition for review to the Supreme Court.

15. On 17 January 1995 the Supreme Court quashed the lower courts' judgments and declared with final effect the nullity of the 1989 transaction

between the applicants and the municipality. The transaction was null and void as it had been signed on behalf of the municipality by a person lacking the relevant power.

16. As to the applicants' claim that the 1990 transaction between the municipality and the third parties was also null and void, the Supreme Court found that the lower courts had not considered all relevant factors and referred this part of the case back to the Regional Court. It also referred for renewed examination the applicants' *rei vindicatio* claim, stating that it must be considered in the light of the outcome of the dispute about the validity of the 1990 contract.

17. On 19 April 1995, in the renewed examination of the remainder of the case, the Silistra Regional Court found that the 1990 contract was valid. It then went on to dismiss the applicants' *rei vindicatio* claim stating:

> "The binding directions given by the Supreme Court [in its judgment of 17 January 1995] appear to indicate that the outcome of the *rei vindicatio* claim depends on the outcome of the claim [that the 1990 contract was null and void]. The latter claim must be dismissed as there are no defects in the 1990 transaction. In this sense, the defendants Ms A. and Mr N. are in possession of the disputed property on existing grounds. It follows that one of the conditions for a successful *rei vindicatio* – that the defendant holds the property without valid grounds – has not been established. As there exists a valid contract between the municipality and Ms A. and Mr N., it cannot be considered that there is a lack of valid grounds. "

18. The applicants submitted a petition for review (cassation), claiming that they were entitled to recover the house from Ms A. and Mr N.

19. On 8 February 1996 the Supreme Court rejected the petition for review (cassation), stating in the reasoning and operative parts of its judgment, that the Regional Court's conclusions had been correct. In the introductory part of its judgment, restating the procedure in the case, the Supreme Court mentioned that the Regional Court had decided that the 1990 contract was valid and "Ms A. and Mr N. were the owners of the property".

20. In 1996 the applicants sent complaints to the municipal authorities in Dulovo and other institutions. In reply, on 28 February 1997 the mayor of Dulovo advised them that following the Supreme Court's judgment of 17 January 1995 declaring null and void the 1989 contract, the applicants were considered its owners.

21. On 15 April 1998 the applicants brought a fresh *rei vindicatio* action against Ms A., Mr N. and the Dulovo municipality, stating that they based their new action on grounds different from those raised in the previous proceedings. In particular, they did not claim that the 1990 contract between the municipality and Ms A. and Mr N. was null and void but that it had never had any effect *in rem* since, in accordance with the basic principles of property law, ownership could only be acquired by dealing with the owner. Since the 1989 contract had been null and void *ab initio*, the Dulovo municipality had never become the owner of the disputed house and thus

could not validly transfer the title thereto. The applicants stressed that the courts in the first proceedings had not dealt with this ground for restitution.

22. On 20 July 1998 the Dulovo District Court terminated the proceedings on the basis that the dispute was a *res judicata*. It referred in particular to the judgment of the Supreme Court of 8 February 1996.

23. The applicants appealed, stating that the previous proceedings had been limited to the issue whether or not the 1990 transaction had been null and void. The courts had never dealt with the question who was the owner of the disputed property. Any other interpretation of the judgments in the previous proceedings was absurd, as it would run contrary to the basic principles of property law.

24. On 26 September 1998 the Silistra Regional Court dismissed the appeal in private. The applicants' ensuing appeal to the Supreme Court of Cassation was also dismissed in private, on 29 December 1998. The Supreme Court of Cassation stated:

> "The parties to the [previous] proceedings and the current proceedings are the same ... The dispute [in the previous proceedings] concerned the ownership of the [same house] ... The grounds invoked were the nullity of the 1989 transaction between the applicants and the municipality and, on that basis, the [alleged] nullity of the subsequent transaction [of 1990] between the municipality and [Ms A. and Mr N.].
>
> All matters have been decided and are *res judicata* ... "

25. In August 1998, the applicants requested the interpretation of the Supreme Court' judgment on 8 February 1996, stating that it was unclear. In their submissions, they averred that the courts had delivered arbitrary decisions, bringing about an absurd situation. In particular, the applicants criticised the courts' failure to explain on the basis of the relevant principles of property law who was the owner of the property and why.

26. By judgment of 11 June 1999 the Supreme Court of Cassation dismissed the request. In the introductory part, the impugned judgment of 8 February 1996 was described as having recognised that Ms A. and Mr N. were the owners of the disputed house. The Supreme Court of Cassation further stated that the judgment of 8 February 1996 was clear in so far as it upheld the Regional Court's judgment of 19 April 1995. As regards the clarity of the Regional Court's judgment, it was not possible to engage in its interpretation as that would be tantamount to a re-examination of the case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Under the Law on Obligations and Contracts, as interpreted by the courts, a contract that is null and void as being contrary to the law is considered null and void *ab initio*. It is considered to have never produced any legal effect. Each party can seek from the other restitution of all it has given under the void contract.

28. Under the Property Act and the relevant judicial practice, a person who has bought a real estate from another does not become its owner if the seller's title was not valid. In such cases, if the original owner seeks *rei vindicatio* from the last buyer even after a chain of transactions, the validity of the last buyer's contract is immaterial as it does not produce effects *in rem*. The Supreme Court of Cassation has applied this practice in cases of two or more consecutive transfers where the first transaction was found to have been null and void *ab initio* and, therefore, none of the subsequent buyers could acquire title to the property, even if their contracts were valid. In such cases, each consecutive transaction is retrospectively considered as a sale of a real estate belonging to a third person (see judgment no. 1876 of 3.12.1998 in case no. 3515/96 of the Supreme Court of Cassation). The last buyer may only become the owner of the property through acquisitive prescription (*usucapion*) on the basis of undisturbed possession of five or ten years.

29. Where the owner has successfully recovered the property from the last buyer, the latter can seek from “his” seller recovery of the price paid.

30. Under section 108 of the Property Act and the relevant case-law, the plaintiff in *rei vindicatio* proceedings must prove two elements: 1) the validity of his title and 2) the fact that there are no legal grounds for the defendant to hold the property. Valid grounds to hold the property may be rights *in rem* such as ownership or a right to use the property, contractual rights such as tenancy or a right to withhold possession until the payment of a debt and other concrete rights.

31. Judgments of the civil courts are binding on the parties, their successors, the courts and all other State organs (Article 220 § 1 of the Code of Civil Procedure).

32. Final judgments preclude any re-examination of the same dispute between the same parties (Articles 221 and 224 of the Code). They are not conclusive, however, in respect of disputes on the same subject between different parties or between the same parties on a different subject matter.

33. The issue determined in a court's findings on the merits is a *res judicata.* In order to establish the content of the issue determined, regard must be had to the scope of the dispute and, therefore, to the court's reasoning. In addition, certain decisive findings on elements directly determinative of the disputed right or obligation may also be seen as *res judicata* (201-91-I, 987-90-I, 433-90-I, 30-64-OSGK).

34. The Law on Restitution of Real Property of Bulgarian Citizens of Turkish Origin Who Sought to Travel to Turkey or to Other Countries in the Period May - September 1989 provides for the restitution, under certain conditions, of property sold or transferred otherwise during the forced exodus of the Bulgarian Turks. The law only applies in respect of persons who settled back in Bulgaria before 1 March 1992. It does not exclude the application of the general rules of civil law in all other cases.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 OF THE CONVENTION

35. The applicants complained that they had been denied their right to recover their house despite the Supreme Court's judgment of 7 January 1995 recognising their property rights. In particular, their restitution claims had been rejected by way of arbitrary judicial decisions of 1995-1999. The Government did not reply within the relevant time-limit.

36. Article 1 of Protocol No. 1 provides:

> "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."

37. The Court must examine whether or not the applicants had a "possession" within the meaning of Article 1 of Protocol No. 1 and, if so, whether or not there had been an unlawful interference with their property rights, as claimed by them.

A. Whether the applicants had a "possession"

38. An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. A claim may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (*Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35 and 52, ECHR 2004-IX).

39. The Court observes that by judgment of 17 January 1995 the Supreme Court declared null and void the contract whereby the municipality had purchased the disputed house from the applicants in 1989. Although the proceedings continued on other issues, the nullity of the 1989 contract was determined with final effect on 17 January 1995 (see paragraph 15 above).

40. In Bulgarian law a contract that is null and void is considered invalid *ab initio* (see paragraph 27 above) and, therefore, the Supreme Court's

judgment of 17 January 1995 removed retrospectively any effect of the 1989 transfer of title between the applicants and the municipality. Therefore, the consequence of the January 1995 judgment was to establish with final effect that the applicants' title had never been transferred on to the municipality.

41. The Court also notes the practice of the Supreme Court of Cassation, according to which in similar cases the seller under a void sale may claim the property back from any successive buyer (see paragraph 28 above).

42. In these circumstances, the applicants' position that the January 1995 judgment entitled them to claim their house back from Ms A. and Mr N. had a sufficient basis in domestic law, as interpreted by the domestic courts.

43. In so far as the courts, in later decisions, refused to grant the applicants' *rei vindicatio* claims against Ms A. and Mr N., it is noteworthy that those claims were not rejected on the basis that the applicants had failed to prove the validity of their title but on the basis that, as stated by the Silistra Regional Court, the defendants had a valid contract with the municipality (see paragraph 17 above). While it is true that the judgment of 8 February 1996 mentioned Ms A. and Mr N. – not the applicants – as the owners of the disputed house, the Court observes that this was done in a passage contained in the summary of the case's facts and that the applicants' allegation that in 1996 and later the courts decided arbitrarily is at the heart of the present case (see paragraphs 19-26 and 35 above).

44. At all events, the applicants' property claims were based on a "reasonably justified reliance on a legal act" (see *Kopecký v. Slovakia*, cited above, § 47) and on the relevant law and its principles as reflected in case-law (ibid, § 52). In particular, the applicants had obtained a final judgment establishing that the municipality had never become the owner of the disputed house (see, by contrast, *Lupaş and Others v. Romania*, nos. 1434/02, 35370/02 and 1385/03, §§ 89-91, 14 December 2006) and their restitution claim against Ms A. and Mr N. had a sound basis in domestic law and practice (see *Păduraru v. Romania*, no. 63252/00, § 65, ECHR 2005-... (extracts)).

45. The Court finds it established, therefore, that after January 1995 the applicants had an "asset" and thus a "possession" for the purposes of Article 1 of Protocol No. 1.

B. Whether there has been interference

46. The applicants' complaint was that the judicial decisions in their case engaged the responsibility of the State as they affected their property rights unlawfully and without justification.

47. In cases involving litigation between individuals – as the present case –, the obligations of the State under Article 1 of Protocol No. 1 entail the taking of measures necessary to protect the right of property. In

particular, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law. In such cases, the question whether there has been a State interference with property rights is often inseparable from the question whether or not the decisions of the domestic courts were flawed by arbitrariness or otherwise manifestly unreasonable (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, §§ 83-87, 11 January 2007).

48. Therefore, the Court must examine as a whole the applicants' complaint that they were unable to recover their property owing to arbitrary decisions that did not have a basis in domestic law.

C. Alleged manifest unlawfulness

49. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). The requirement of lawfulness, within the meaning of the Convention, demands compliance with the relevant provisions of domestic law and compatibility with the rule of law (see *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42).

50. While it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the Convention (see, *mutatis mutandis*, *Miragall Escolano and Others v. Spain*, no. 38366/97, §§ 33-39, ECHR 2000-I). Therefore, even though it has only limited power to review compliance with domestic law, the Court may draw appropriate conclusions under the Convention where it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions (see the above cited *Anheuser-Busch Inc.* judgment, § 83, *Kuznetsov and Others v. Russia*, no. 184/02, §§ 70-74 and 84, 11 January 2007, *Păduraru v. Romania*, no. 63252/00, § 98, ECHR 2005-... (extracts), *Sovtransavto Holding v. Ukraine*, no. 48553/99, §§ 79, 97 and 98, ECHR 2002-VII, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I and, *mutatis mutandis*, *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, *Reports of Judgments and Decisions* 1997-III, §§ 59-63).

51. The applicants' first restitution action was rejected on the basis that they had failed to establish the absence of legal grounds for Ms A. and Mr N. to possess the disputed house. The fact that Ms A. and Mr N. had a valid contract with the municipality was characterised as "existing grounds"

for them to possess the house. The second action was dismissed as the matter was considered a *res judicata* (see paragraphs 17, 22 and 24 above).

52. The Court is struck by the ambiguity of the domestic courts' reasoning, in particular, as regards the meaning of the terms "existing grounds" and "valid grounds" and the legal conclusions reached in both proceedings (see paragraphs 17 and 24 above). According to the Court's established case-law reflecting a principle linked to the rule of law and, therefore, to the requirement of lawfulness, judgments of courts and tribunals should adequately state the reasons on which they are based, although that does not mean that a detailed answer to every argument is required (see, *mutatis mutandis*, *Suominen v. Finland*, no. 37801/97, § 36, 1 July 2003 and *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001).

53. In respect of the first proceedings (1991-1996), the Court considers that seen in the light of the relevant domestic law (see paragraphs 28-30 above), the domestic courts' finding that Ms A. and Mr N. held the property on "existing grounds" and "valid grounds" (see paragraph 17 above) was vague to the point of being arbitrary.

54. In particular, if the courts meant ownership, it is noteworthy that their judgments lacked even the most succinct reasoning on this point. According to the relevant domestic law and practice, where the sale of a real estate was found to have been null and void *ab initio*, subsequent buyers cannot acquire title to the property even if their contract is valid because in such cases the second transaction is a sale of a real estate belonging to a third person (see paragraph 28 above). Also, it had never been alleged that Ms A. and Mr N. had acquired the property through *usucapion* and, in any event, the period during which they had possessed it undisturbed – from 1990 till 1991 – had been too short.

55. Against the background of those established facts and domestic law and practice and in the absence of reasoning, a finding that Ms A. and Mr N. had acquired title to the house by virtue of the 1990 transaction between them and the municipality cannot but be characterised as untenable, being fully unreasoned and in manifest contradiction with the Property Act and the relevant practice of the Bulgarian courts.

56. If, on the other hand, legal grounds other than ownership were meant by the expressions "existing grounds" and "valid grounds", the lack of any indication about their nature is sufficient to consider the outcome of the proceedings manifestly unreasonable.

57. The Court further finds that the authorities' failure to afford the applicants judicial procedures of effective and fair adjudication in accordance with the applicable law continued in 1998.

58. In particular, the reasons provided by the courts for their refusal to examine the applicants' second action was that the applicants had based it again on the alleged nullity of Ms A. and Mr N.'s 1990 contract. However,

that was manifestly in contradiction with the applicants' second claim, in which they did not challenge the validity of the contract in question but claimed restitution on other grounds. Since the validity of the 1990 contract had been decisive for the outcome of the first proceedings (1991-1996), the courts' failure in 1998 to explain why the second action was not different was unreasonable (see paragraphs 17 and 22-24 above).

59. Finally, the Court observes that in the proceedings before it the respondent Government failed to provide a convincing explanation of the events.

D. The Court's conclusion

60. In sum, the Court considers that the legal acts which denied the applicants' *rei vindicatio* claims and precluded any further action by them to recover the possession of the house did not meet the Convention requirements of lawfulness and did not have a clear basis in domestic law. It follows that there has been an unlawful interference with the applicants' property rights, contrary to the requirements of Article 1 of Protocol No. 1 to the Convention.

61. As to the nature of the interference, the Court notes that the present case does not concern a deprivation of property but a situation in which by way of unlawful decisions the authorities failed to assist the applicants in recovering their property from third persons.

62. The Court thus finds that there has been a violation of the general rule of peaceful enjoyment of possessions, enshrined in the first sentence of Article 1 § 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

63. The applicants complained also under Article 6 § 1 that the courts had decided arbitrarily.

64. In view of its conclusions under Article 1 of Protocol No. 1 above, the Court does not find it necessary to examine essentially the same complaint also under Article 6.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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."

66. The applicants stated that they wanted their house back or, if that was not possible, its current value. They also wished to be compensated for loss of gain for the period after January 1995 and for the distress and suffering they had endured.

67. In respect of costs, the applicants submitted receipts for expenses made in "old" Bulgarian levs in the domestic proceedings (between 1991 and 1998), without indicating the total amount claimed.

68. The Government stated that under Article 41 of the Convention the applicants could not seek to recover property belonging to third persons. The Government also stated that the applicants could have sought restitution under the Law on Restitution of Real Property of Bulgarian Citizens of Turkish Origin Who Sought to Travel to Turkey or to Other Countries in the Period May - September 1989, if they met the relevant conditions. The Government further stressed that the applicants had failed to state the precise sums claimed.

69. In the circumstances of the case, the Court considers that the question of the application of Article 41 is not ready for decision and reserves it, due regard being had to the possibility that an agreement between the respondent State and the applicants will be reached (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that it is not necessary to examine separately the complaint under Article 6 of the Convention;

3. *Holds* that the question of the application of Article 41 is not ready for decision;
   accordingly,
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicants to submit, within six months from the date on which the judgment becomes final in

accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 10 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK	Peer LORENZEN
Registrar	President