

BAD AND GOOD FAITH OF THE APPLICANT IN THE RESTITUTION PROCESS: THE CASE-LAW OF THE ECtHR

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The Article examines the case-law of the ECtHR related to the good or bad faith of the applicant in the context of the restoration of ownership rights to the property nationalized in the past.

Straipsnyje nagrinėjama Europos Žmogaus Teisių Teismo praktika bylose, kuriose keliamas pareiškėjo sąžiningumo ar nesąžiningumo nuosavybės teisių atkūrimo į praėityje nacionalizuotą nuosavybę kontekste klausimas.

Introduction

In cases related to the restoration of ownership rights to the property nationalized in the past (e.g., during the Communist regime), numerous issues, including the nature of the State interference as well as the conduct of the respondent State institutions and the applicant, can be important to the evaluation of the European Court of Human Rights (hereinafter – the ECtHR or the Court) of the State interference with the individual's property rights (in other words, whether the State interference is lawful, pursues a legitimate aim and is proportionate) under Article 1 of Protocol No. 1 (protection of property) to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention or the ECHR)¹.

The object of this contribution is the one of the aforementioned issues: the good and bad faith of the applicant (holder of the property) in the case-law of the ECtHR related to restoration of property rights. The Article studies the good or bad faith of former owners themselves /their heirs and the third persons who, for example, acquired the property at issue. The good and bad faith of the applicants is analyzed at the time they acquired the property.

The purpose of the contribution is to analyze the impact of good and bad faith of the applicant on the Court's assessment of the State interference with the applicant's property rights in the context of restoration of property rights. The paper seeks to outline the factors important for the ECtHR's evaluation while establishing the good or bad faith of the person in the context of restitution process; to establish whether the ECtHR upholds the position of the domestic authorities regarding the person's good and bad faith; to indicate the level of protection of the applicant acting in bad faith or good faith in such cases under the ECHR.

¹ Council of Europe. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952, ETS No. 009).

The study methods are as follows: linguistic, comparative and systematic. The Article presents the latest evolutions in the jurisprudence of the ECtHR in cases related to the applicant's good and bad faith in the restitution process in different Contracting States.

This Article is important seeking to establish the different models of the justification of the State interference with the applicant's property rights and the appropriate State measures which can depend on the good or bad faith of the applicant. First and foremost, the scholars analyze the conduct of State authorities. However, this Article looks at the question from another angle, namely, it considers the conduct (the good and bad faith) of another party – the applicant while acquiring the property. In the doctrine, it was focused on the issue of the legitimate expectations of the applicant and the good faith of the applicant was analyzed as a condition for arising and protection of legitimate expectations of the applicant². However, according to the knowledge possessed by the author of this Article, there are no publications either in Lithuania or abroad which would accent namely applicant's good and bad faith (the criteria relevant for the ECtHR while establishing the good or bad faith of the applicant, levels of protection depending on the good or bad faith of the applicant) in the case-law of the ECtHR related to the restitution process. The novelty of the Article may attract the scholars specializing in the case-law of the ECtHR. As one of the arguments raised by the respondent States before the ECtHR is the bad faith of the applicants, this article could also be of interest to the officials of the Governments representing their States before the ECtHR. The Article might provide some guidance to the domestic courts and the advocates addressing the similar cases in their States. The article is based on the case-law of the ECtHR.

1. The Factors Important for the Court Evaluation While Establishing the Good or Bad Faith of the Person in the Context of Restitution Process

Sometimes in the cases related to the restoration of ownership rights the Government of the respondent State uses the argument of the bad faith of the applicant as justification of certain restriction of the applicant's right under the Convention.

In case the domestic courts held the applicant a *mala fide* holder of the property and provided³ or did not provide⁴ any reasons as to the bad faith of the applicant or the domestic institutions did not consider explicitly that the applicant had acted in bad faith⁵ and the applicant's good faith concerning the acquisition was not disputed at the domestic level⁶, the Court undertakes its own initiative and evaluates the circumstances of the case. That evaluation can lead the Court to agree or disagree with the position of the domestic institutions. Therefore, it is important to indicate the main factors which are discussed by the Court while establishing the good or bad faith of the person in the context of restitution process.

² E.g., see GEDMINTAITĖ, A. *Teisėtų lūkesčių apsaugos principas viešojoje teisėje*. Daktaro disertacija. Vilnius, 2016; GEDMINTAITĖ, A. *Teisėtų lūkesčių apsauga Europos Žmogaus Teisių Teismo praktikoje*. *Teisė*, 2014, t. 91, p. 135–153.

³ ECtHR, *Osipkovs and Others v. Latvia*, no. 39210/07, 4 May 2017, § 84; ECtHR, *Špakauskas v. Lithuania* (dec.), no. 54909/13, 19 September 2017, §§ 13, 16.

⁴ ECtHR, *Albergas and Arlauskas v. Lithuania*, no. 17978/05, 27 May 2014, § 67.

⁵ ECtHR, *Žilinskiėnė v. Lithuania*, no. 57675/09, 1 December 2015, § 51; ECtHR, *Grigaliūniėnė v. Lithuania*, no. 42322/09, 23 February 2016, § 37.

⁶ ECtHR, *Tunaitis v. Lithuania*, no. 42927/08, 24 November 2015, § 38.

1.1. The Position of the Applicant as the Factor Indicating His/Her Good or Bad Faith

If the Court holds the person as an ordinary citizen who was not responsible for the irregularity while concluding the transaction (e.g., signing the contract by incompetent State official) or who could not change the standard terms of the transaction which was in the exceptional discretion of the State and which was based on the domestic laws which were applicable to all persons having the same status equally, such a position of the person is one of the factors which could urge the Court to hold the person acting in good faith⁷.

However, the situation of ordinary citizens, enjoying no special privileges, who had acquired their property under the ordinary legal rules, shall be distinguished from the cases of individuals who have taken advantage of their privileged position or have otherwise acted unlawfully to acquire property. The latter as well as their heirs cannot expect to keep their gain⁸. For instance, in the case of *Tesař and Others v. the Czech Republic* the applicants complained about the deprivation of the house which they had bought from the State, but which was later returned to the former owners on the basis of the domestic law on restitution as the domestic courts found that the applicants while purchasing the house from the State had taken advantage of their privileged position during the Communist regime⁹ and had acted unlawfully to acquire property from the State. In that case the Court referred to the general principles laid down in its case-law, namely, the persons who abused of their position cannot have benefit from that abuse and the State by returning the property to the former owners sought to mitigate the effects of past damage¹⁰. It seems that the argument of the abuse of the applicant's privileged position has most strength in case the domestic courts had established the privileged position of the applicant and based their reasoning on it. It appears that in case the domestic courts did not find the applicant to be acting in bad faith, a lack of the abuse of the privileged position of the applicant while acquiring the property is used just as an additional argument by the Court in order to establish the good faith of that person, but the alleged abuse of the privileged position as claimed by the Government before the Court is not enough on its own to prove the bad faith of the applicant. For example, in the case of *Pyrantienė v. Lithuania* where the good faith of the applicant was not disputed at the domestic level, the Court provided a lack of any privileged position on the part of the applicant as an additional argument for her good faith¹¹. In the case of *Padalevičius v. Lithuania* the Government of the respondent State tried to prove the applicant's bad faith stressing that the applicant had bought the previously nationalised plot of land under favourable conditions and owing to his privileged position as a vice-rector of the Lithuanian Academy of Agriculture. The Court emphasized that 'it is for the domestic courts to establish, on the basis of evidence adduced by the parties to the civil proceedings, whether or not there has been unlawful profiteering in a particular case'. As in that case the domestic courts had not made a finding as to the bad faith of the applicant, the Court concluded that

⁷ ECtHR, *Pincová and Pinc v. the Czech Republic*, no. 36548/97, 5 November 2002, § 59; ECtHR, *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, §§ 217–218, 223, 229–230, 238; ECtHR, *Pyrantienė v. Lithuania*, no. 45092/07, 12 November 2013, § 59; *Tunaitis <...>*, §§ 34–38; ECtHR, *Digrytė Klibavičienė v. Lithuania*, no. 34911/06, 21 October 2014, §§ 35, 37; *Albergas and Arlauskas <...>*, § 68; *Grigaliūnienė <...>*, § 37; ECtHR, *Paplauskienė v. Lithuania*, no. 31102/06, 14 October 2014, §§ 45–46; ECtHR, *Beinarovič and Others v. Lithuania*, nos. 70520/10, 21920/10 and 41876/11, 12 June 2018 (this judgment will become final in the circumstances set out in Article 44 § 2 of the Convention), § 144.

⁸ *Velikovi and Others <...>*, § 172.

⁹ The relative of the applicants was an active member of the Communist party at that time.

¹⁰ ECtHR, *Tesař and Others v. the Czech Republic*, no. 37400/06, 9 June 2011, §§ 70–73.

¹¹ *Pyrantienė <...>*, § 58.

the respondent Government could not ‘rely before the Court on *suppositions* in the opposite sense’. ‘Such an approach would run contrary to the principle of rule of law inherent in the Convention’¹².

1.2. The Time When the Applicant Was Aware or Should Have Been Aware of the Circumstances Precluding Him/Her from Acquiring the Property

The Court, while determining whether the applicant could be considered a *bona fide* holder of the property or not, also considers the time when the applicant was aware or should have been aware of the circumstances precluding the applicant from acquiring the property in question. To be more precise, the fact that the circumstances which show that the applicant was not entitled to receive the property came to light only many years after the applicant had acquired that property could also *inter alia* indicate the good faith of the applicant¹³.

On the contrary, the Court concludes that the applicants were acting in bad faith if they were aware or should have been aware before acquiring the property that they had no right to acquire it. For example, this is the case when the applicants did not satisfy clear and explicit statutory condition (they did not have certain documents in order to be entitled to restitution or they purchased the apartment which exceeded the relevant size limits for the purchase)¹⁴. The applicants can also be held to be acting in bad faith if they were aware of the proceedings related to the cancellation of the ownership of the third party (the seller of the property) meaning that the property could not be sold to the applicants¹⁵. The fact that the person acquired the possessions despite the clear awareness of certain legal barriers to do it even may induce the Court to disagree with the domestic courts which had found the person to be acting in good faith¹⁶.

As just emphasized, the bad faith of the person may be established given his or her awareness of the fact that he or she is violating clear legal requirements. However, the question arises whether in all cases the person who has acquired the property from the State in violation of the peremptory legal norms of the domestic law (e.g., to whom the ownership rights are restored unlawfully) could be held as acting in bad faith. What is important here is that the unlawful act (the restoration of the ownership rights, sale of the property, etc.) is conducted by the State authorities whose actions, as a rule, should not be questioned by the individuals. In the case of *Misiukonis and Others v. Lithuania* the domestic

¹² ECtHR, *Padalevičius v. Lithuania*, no. 12278/03, 7 July 2009, § 68, emphasis added. The Government’s “supposition” as regards the privileged position of the applicant was also dismissed in the case of *Velikovi and Others, Velikovi and Others* <...>, §§ 187–188.

¹³ E.g., in the case of *Žilinskienė v. Lithuania* the Court noted that the fact that the third person (L.S.G.) did not have the right to restoration of title to the plot of land in question was established by the domestic court for the first time only eight years after the applicant Žilinskienė had entered into the agreement with L.S.G. See *Žilinskienė* <...>, § 51. See also *Albergas and Arlauskas* <...>, § 69; *Pincová and Pinc* <...>, § 59; *Pyrantienė* <...>, §§ 57–58; ECtHR, *Noreikienė and Noreika v. Lithuania*, no. 17285/08, 24 November 2015, § 35; *Tunaitis* <...>, § 38; *Grigaliūnienė* <...>, § 37; ECtHR, *Romankevič v. Lithuania*, no. 25747/07, 2 December 2014, § 42.

¹⁴ ECtHR, *Danailov and Others v. Bulgaria* (dec.), no. 47353/06, 10 February 2015, § 52; *Velikovi and Others* <...>, §§ 204–205, 211.

¹⁵ *Osipkovs and Others* <...>, § 84; ECtHR, *Vukušić v. Croatia*, no. 69735/11, 31 May 2016, § 66; *Špakauskas* <...>, § 45.

¹⁶ ECtHR, *Buceaş and Buciaş v. Romania*, no. 32185/04, 1 July 2014, §§ 40–46 (the case is not related to the restitution process). In that case the Court did not agree with the domestic court that the third person (the purchaser of property) had acted in good faith while acquiring it. The Court noted that the third persons (the purchaser and the seller of the property) were aware that the initial sale agreement (which was the title of the seller) could be annulled because the former owner (the relative of the applicants) had contested it in court. However, despite the fact that those third persons knew that the legal status of the property was uncertain, they concluded the new sale agreement, thus, according to the Court, they could not be held to be acting in good faith.

courts cancelled the previous restoration of the ownership rights to the applicants as that restoration was unlawful (first, more plots of land than the applicants were entitled to had been allocated to them and, second, the property rights had been restored in the order of priority, whereas the applicants did not have such a privilege). In that case the domestic courts held that the applicants should have known that ownership rights had been restored to them in violation of peremptory legal norms, irrespective of the fact that it was public authorities which had restored the property rights. However, the Court was unable to accept that argument of the Lithuanian courts. The incorrectness of the applicants' belief that they are entitled to acquire the property under the domestic law is not enough on its own to establish the bad faith of the applicants. The Court analyses whether such applicants' belief was 'manifestly unreasonable'; whether there were any reasonable grounds for the applicants to question the acts of the State institutions. It appears that establishing the applicant's bad faith regarding violation of domestic law depends on his/her position as an ordinary citizen, the legitimacy of conduct of the State institutions and, most importantly, the content, quality of domestic legal regulation and reasonableness of the decisions of the domestic courts. Thus in the abovementioned *Misiukonis and Others v. Lithuania* case, while taking note of the domestic courts' conclusions that ignorance of the law does not absolve anyone of responsibility and that in the restitution process the applicants had consulted their friend and relative who was a land specialist suspected of the criminal scheme, the Court, nonetheless, did not 'see sufficiently strong reasons to find that the applicants should have questioned the actions of competent public authorities instead of expecting the latter to take all measures to avoid mistakes in application of legislation – especially taking into account the complexity and technical nature of legal acts governing the process of restoration of land titles'. The Court also considered that 'the applicants' belief that as the family of a former deportee they were entitled to have their ownership rights restored in the order of priority, albeit incorrect, does not appear to be manifestly unreasonable in the light of the domestic legal acts which were applicable at the time when those rights were restored to them'¹⁷.

1.3. The Prosecution and Conviction of the Applicant as an Indication of His/Her Bad Faith

It is evident that the prosecution and conviction of the applicants in connection with the process of restoration of property rights can be an indication of bad faith on their part. For example, in the case of *Danailov and Others v. Bulgaria*, the fact that some of the applicants were prosecuted and convicted for document forgery and fraud in relation to the restitution procedure was held by the Court as an indication of the applicants' bad faith¹⁸. It seems that not only prosecution, but also at least suspicions with regard to the bad faith (unlawful acts) of the applicants themselves (e.g., the applicants' previous suspicion or accusation in the pre-trial investigation) could also indicate to the Court a lack of good faith of the applicants. The suspicions with regard to the third persons (friends, relatives) who acted in the benefit of the applicants while allocating the plot of land to the applicants, in particular, provided the pre-trial investigation did not establish whether any crime had been committed, are not enough for the Court to doubt the good faith of the applicants themselves. For instance, in the aforementioned *Misiukonis and Others v. Lithuania* case, the Government of Lithuania, trying to challenge the applicants' good faith, emphasised the fact that the applicants' representative V.M. (who was the first and second applicants' son and the third applicant's brother) acted together with his distant relative, land specialist E.K., who in his turn was one of the officials investigated on suspicion of participation

¹⁷ ECtHR, *Misiukonis and Others v. Lithuania*, no. 49426/09, 15 November 2016, § 60. See also *Beinarovič and Others* <...>, § 144.

¹⁸ *Danailov and Others* <...>, § 52.

in the criminal scheme. Under that scheme the plots of land were being allotted by State officials to close people (friends, acquaintances, relatives) by restoring their property rights in violation of the domestic law and then those persons immediately sold the plots they had received to the third persons. However, the Court, being ‘sympathetic to the Lithuanian Government’s efforts to ensure that individuals are not allowed to profit from criminal schemes designed to obtain property in violation of domestic law’, noted that in the present case the pre-trial investigation was discontinued as time-barred, without establishing whether any crime had been committed in the allocation of land to the applicants. The Court also emphasized that it could not be concluded that the applicants had abused their rights, especially since neither the applicants nor their representative V.M. were ever officially suspected or accused in that investigation¹⁹.

2. Does the ECtHR Uphold the Position of the Domestic Authorities as to the Person’s Good and Bad Faith?

The Court reiterates that ‘it is for the domestic authorities to establish that an applicant has not acted in good faith’²⁰. However, when the argument that the property was acquired in bad faith is at stake before the Court, the Court assesses how reasonable and adequate the evaluation of the domestic institutions as regards the applicant’s conduct is²¹. It should be stressed that even if the Court agrees with the domestic institutions as regards the bad faith on the part of the applicants, the Court does not limit itself with the argumentation of the domestic courts and can provide some additional arguments²². In case the domestic court held the applicant as acting in bad faith, the Court does not uphold such a view if the finding of that domestic court is not based on any reasons explaining that bad faith of the applicant²³. In addition, a lack of consistence of the domestic courts’ position on the bad faith of the applicant may also induce the Court to disagree with the conclusion of the domestic court as to the bad faith. For instance, in the case of *Albergas and Arlauskas v. Lithuania*, the Court noted that the Supreme Court of Lithuania indicated that the applicants had acted in bad faith when purchasing the disputed plot of land (which had to be returned in *natura* to the former owners instead), but gave no reasons in the decision to explain the first applicant’s bad faith, whereas in accordance with the case-law of the Court the judgments of national courts should adequately provide the reasons on which they are based. In addition, the Court noted that in that case the lower courts at two instances had accepted that the applicants had acted in good faith and in accordance with the domestic laws applicable at the material time. Thus the Court found the assertion of the cassation court (the Supreme Court) even more surprising²⁴. In case the domestic courts did not provide sufficient reasons as to the bad faith of the applicant, it seems the Government of the respondent State still has the possibility to fill this gap as it falls within the Government’s responsibility to prove that the applicant was not acting in good faith²⁵.

As a rule the Court does not question the good faith of the applicant if the good faith was consistently established by the domestic courts whose findings were not manifestly unreasonable. Even if the Court

¹⁹ *Misiukonis and Others* <...>, § 61. In this connection see also *Žilinskienė* <...>, § 51. In the latter case the Court mentioned that to date it was not established whether any crime had actually been committed in awarding property rights to the third person L.S.G., who later transferred those rights to the applicant Žilinskienė. According to the Court, that circumstance also could be relevant in determining whether the applicant could be considered a *bona fide* owner of the property.

²⁰ ECtHR, *Dzirmis v. Latvia*, no. 25082/05, 26 January 2017, §§ 81–82.

²¹ *Osipkovs and Others* <...>, §§ 83–84.

²² *Osipkovs and Others* <...>, § 84.

²³ *Beinarovič and Others* <...>, § 144.

²⁴ *Albergas and Arlauskas* <...>, §§ 66–67.

²⁵ *Albergas and Arlauskas* <...>, § 67.

has some doubts regarding the good faith of the applicant, it agrees with the finding of the domestic courts which recognized the applicant as acting in good faith. For instance, in the case of *Žilinskienė v. Lithuania*, the Court acknowledged that the applicant's good faith could be called into question in view of the fact that the applicant's agreement with the third person L.S.G. did not indicate any payment for the land, though subsequently they both claimed that a certain sum had been paid. However, the Court emphasized that the domestic courts which examined the case had not considered that the applicant had acted in bad faith, and the Court saw no reason to doubt their conclusion²⁶.

Thus it is extremely difficult for the Government to prove before the Court the bad faith of the applicant after the domestic institutions at all instances had explicitly recognized the applicants as acting in good faith during the domestic proceedings²⁷ or in case the good faith of the applicants was never disputed before the domestic proceedings notwithstanding the right of the domestic authorities to contest the good faith in accordance with the domestic law and the applicants were formally recognized as the owners of the property by the respondent State authorities²⁸. It seems that only the exceptional circumstances showing, for instance, the applicant's clear awareness of the legal obstacles to acquire the property, might encourage the Court to agree with the Government as to the bad faith of the applicant irrespective of the opposite finding of the domestic courts.

It may be concluded that the Court is more inclined to recognize that the applicant was acting in good faith rather than in bad faith as it raises higher level of substantiation for the domestic courts and the respondent Government to prove the applicant's bad faith rather than the good faith.

3. The Bad Faith and Good Faith of the Applicant: the Impact on the ECtHR's Assessment of the State Interference

According to the case-law of the Court, in case the property rights had been restored in breach of the domestic law or the property was assigned by the State to the person disregarding the right of the former owners to restore the property rights to that property, the State authorities generally should not be prevented from correcting occasional mistakes by taking that unlawfully allocated property from the person. Holding otherwise 'may lead to a situation which runs contrary to the public interest' or 'would be contrary to the doctrine of unjust enrichment'²⁹. In addition, the Court was dealing with some cases wherein the States sought to restore the rule of law by depriving the individual of the property (which was assigned to him/her during the totalitarian regime) in order to return it to the former owners (whose property was nationalized during the totalitarian regime). The case-law of the Court shows that such deprivation of property in the context of the process of restoration of property rights is generally considered to be the interference with the applicant's right to the peaceful enjoyment of his/her property. As it can be seen from the case-law of the Court, the State authorities are entitled to take measures of deprivation of the property irrespective of the good faith or bad faith of the applicant, on condition some ECHR standards are observed.

It should be recalled that the State interference with the peaceful enjoyment of possessions can be justified and accordingly no violation of Article 1 of Protocol No. 1 to the Convention is found if that interference meets three requirements of Article 1 of Protocol No. 1: first, any interference by a public authority with the peaceful enjoyment of possessions should be lawful, second, pursue a legitimate aim and, third, must strike a fair balance between the demands of the general interest of the community

²⁶ *Žilinskienė* <...>, § 51.

²⁷ *Misiukonis and Others* <...>, § 61.

²⁸ ECtHR, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25 October 2012, § 120; see also *Pyrantienė* <...>, § 57.

²⁹ *Romankevič* <...>, § 38; *Osipkovs and Others* <...>, § 78; *Danailov and Others* <...>, § 53.

and the requirements of the protection of the applicant's fundamental rights. Generally, the Court recognizes that the State interference meets the first two aforementioned requirements, i.e. lawfulness and seeking a legitimate aim. In other words, as a rule, the Court finds that the contested State measure is based on the provisions of the domestic law³⁰ and pursues a legitimate aim (such as, for example, to attenuate the effects of the infringements of property rights that occurred under the past totalitarian (e.g., the Communist) regime³¹ or to correct authorities' mistakes made during the transition from the totalitarian regime to democracy and to defend the interests of former owners of property by restoring their property rights in *natura*³² or to correct authorities' mistakes by ensuring that land was not transferred to persons who did not have the right to the restoration of title to such property and, accordingly, returning the property to the State³³ or to the other private person (the owner of that property)³⁴). Indeed, the Court reiterates that 'because of their direct knowledge of society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest'. Therefore, the State authorities enjoy a certain margin of appreciation in this regard. However, where the problems arise is the third requirement – the proportionality between the means employed and the aim pursued. According to the case-law of the Court, a fair balance will not be struck where the applicant has to bear an individual and excessive burden. In order to assess the burden borne by an applicant, the Court examines the particular circumstances of each case, such as the conditions under which the disputed property was acquired (good faith and bad faith, the position of the persons concerned, a possible abuse or disregard of the rules on their part, the responsibility of the State institution for the sufferings of the applicant) and the compensation that was received by the applicant in exchange for the property (e.g., whether the compensation suggested by the State affords the applicants to buy another dwelling to live in; whether the applicants were awarded some compensation for the non-pecuniary damage they sustained as a result of being deprived of their only property, etc.), as well as the applicant's personal and social situation (such as the age of the applicants when they lost their title to the property; whether the applicants were disabled at that time; for what purposes the property was used by the applicants and whether that use (e.g., for agriculture) was one of the main sources of the applicants' income; whether the property at issue was the applicants' only housing available; how long the applicants were living there at the time of its loss)³⁵.

Indeed, discussing the conditions under which the disputed property of the applicant was acquired, first and above all, the Court analyzes what impact the acts/inaction of the State authorities had on the situation (e.g., sale of the property to the applicant, restoration of ownership rights to the property to the applicant) which was erroneous/unlawful and, accordingly, had to be corrected later, in particular, whether the applicant had any opportunity to influence that situation or, on the contrary, this was within the State's exclusive competence and, accordingly, it is the State authorities which were, therefore, under an obligation to verify the conformity of the acts with the procedures and laws in force³⁶. On

³⁰ E.g., *Velikovi and Others* <...>, § 162; *Digrytė Klībavičienė* <...>, § 29; *Žilinskienė* <...>, § 42; *Grigaliūnienė* <...>, § 29.

³¹ E.g., *Pincová and Pinc* <...>, §§ 47–51; *Tesař and Others* <...>, § 68.

³² E.g., *Pyrantienė* <...>, §§ 44–48; *Digrytė Klībavičienė* <...>, § 30.

³³ E.g., *Žilinskienė* <...>, §§ 43–44; *Danailov and Others* <...>, § 53; *Misiukonis and Others* <...>, § 57; *Beinarovič and Others* <...>, §§ 135–137.

³⁴ E.g., see *Paplauskienė* <...>, § 40.

³⁵ E.g., *Pyrantienė* <...>, §§ 51, 62; *Noreikienė and Noreika* <...>, § 30; *Tunaitis* <...>, § 33; *Velikovi and Others* <...>, §§ 181, 190; *Tesař and Others* <...>, § 69; *Pincová and Pinc* <...>, §§ 59–64; *Žilinskienė* <...>, § 48; *Grigaliūnienė* <...>, § 33.

³⁶ *Pyrantienė* <...>, §§ 54–56; *Misiukonis and Others* <...>, §§ 58–62.

the basis of the abovementioned analysis it can be answered whether the applicant had reasons to act in one or another way while acquiring his/her property from the State (e.g., to sell certain plots of land, to which the property rights were restored by the State, believing that the administrative decision granting that property rights would not be annulled). It is also important when (before or only after acquiring the applicant's property) the applicant became aware or should have been aware of certain circumstances (e.g., the errors made in the process of the restoration of property rights) which had to have precluded the acquisition of the property by the applicant. All these factors can be relevant not only while establishing the good or bad faith of the applicant³⁷, but also the proportionality of the interference of the State with the applicant's right to the peaceful enjoyment of his/her property. Therefore, in the context of the proportionality of the effects of the State interference, finding the existence of the applicant's bad faith or good faith becomes extremely relevant. It should be studied in more detail what differences in balancing and protection provided under the Convention to the *bona fide* and *mala fide* applicants are.

3.1. Protection of Bona Fide Holders of the Property

It is evident that where the State authorities interfere with the *bona fide* applicant's right to the peaceful enjoyment of the property, *bona fide* holders of property enjoy particular protection under the Convention. The Court reiterates that the domestic law 'should make it possible to take into account the particular circumstances of each case, so that individuals who have acquired their possessions in good faith are not made to bear the burden of responsibility. The risk of any mistake made by a State authority must be borne by the State, and errors must not be remedied at the expense of the individual concerned'³⁸.

The Court has numerously recognized that 'within the context of revoking ownership of a property transferred erroneously, the good governance principle may not only impose on the authorities an obligation to act promptly in correcting their mistake, but may also necessitate the payment of *adequate compensation or another type of appropriate reparation* to the former *bona fide* holder of the property'³⁹. Indeed that prompt and adequate compensation or another type of appropriate reparation becomes especially important in such circumstances⁴⁰.

The Court does not indicate the respondent State on what basis the domestic courts should assess the amount of compensation payable to the *bona fide* applicant or which year they should take into account for the valuation of the property which was deprived⁴¹. Nevertheless, as a rule, under Article 1 of Protocol No. 1 to the Convention the *bona fide* holder of the property should be provided with the compensation related to the value of that property at the time when the property was taken⁴² and only the exceptional circumstances could justify the total lack of compensation. Thus in the case of *Turgut and Others v. Turkey*, a violation of Article 1 of Protocol No. 1 to the Convention was found as the applicants (who took possession of the property in good faith as stressed by the Court) received no

³⁷ See section 1 of this paper.

³⁸ *Pincová and Pinc* <...>, § 58; *Romankevič* <...>, § 39; *Žilinskienė* <...>, § 46; *Grigaliūnienė* <...>, § 32; ECtHR, *Dickmann and Gion v. Romania*, nos. 10346/03 and 10893/04, 24 October 2017, § 96; ECtHR, *Palevičiūtė and Dzidzevičienė v. Lithuania*, no. 32997/14, 9 January 2018, § 57.

³⁹ *Žilinskienė* <...>, § 47; *Romankevič* <...>, § 37; *Beinarovič and Others* <...>, § 140, emphasis added.

⁴⁰ *Dzirnīs* <...>, §§ 76, 80.

⁴¹ *Pincová and Pinc* <...>, § 60.

⁴² The provision of Article 1 to Protocol No. 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate "public interest" objectives may call for reimbursement of less than the full market value. See *Pyrančienė* <...>, § 40; *Pincová and Pinc* <...>, § 53.

compensation for the transfer of their property to the State and the Government had not relied before the Court on any exceptional circumstance in order to justify the total lack of compensation⁴³.

In cases where the applicant did not suffer any uncertainty and negative consequences because of the State interference and did not ask for the pecuniary compensation, no financial compensation to the *bona fide* applicant could be required if the other type of appropriate reparation was provided by the State to the applicant within a reasonable time. For instance, in the case of *Romankevič v. Lithuania*, the State authorities detected that the plot of land was returned in *natura* to the applicant unlawfully as the plot did not appertain to the applicant's father before the Soviet nationalization. The Court held the return of the land plot of the same size in *natura* (i.e. the plot of land the applicant was entitled to as a heir of his father, the former owner) to the applicant within a reasonable time⁴⁴ as an adequate compensation for the applicant's loss (taking the plot of land given to him by mistake before), in particular, given that the applicant had not tried to raise the question of the pecuniary compensation before the domestic authorities and no negative consequences related to the late reattribution of the plot or to the uncertainty during the period when the applicant's title was challenged were proven⁴⁵.

Nevertheless, in some cases a violation of the Convention was found due to the inadequate (not sufficient) financial compensation for the deprivation of the *bona fide* applicant's property. According to the Court, the balance is generally achieved when compensation paid to the person whose property has been taken reasonably relates to its market value as determined at the time of the expropriation (the loss of the property). The Court has regard to the particular circumstances of each case, including the amounts received and losses incurred by the applicant. For example, in the case of *Grigaliūnienė v. Lithuania*, the Court paid attention to the fact that the applicant for taking her property received back the nominal price of that property of 1995 (the date of buying the property), however, the market value of the land in 2009 when the final judgment of the last-instance court was adopted and the property was taken from the applicant considerably exceeded the nominal price paid by the applicant in 1995, and the sum of money (the nominal price of 1995) returned to the applicant had obviously suffered considerable devaluation and could not be reasonably related to the value of the land fourteen years later. The Court found that the compensation paid to the applicant was clearly insufficient for the purchase of a new comparable plot of land. Thus the Court could not find that a fair balance was struck between the interests of the community and the applicants' fundamental rights as the disproportion between the land's market value and the compensation awarded was too high⁴⁶. According to the Court, such disproportionate compensation (where, for example, the market value of the property exceeds almost eighty times the compensation awarded) does not take account of the applicant's personal and social situation, nor does it reflect the real value of the property or the fact that it had been acquired by the applicant in good faith⁴⁷.

The fact that the applicants acquired the land for free or for a concrete monetary payment⁴⁸ or the fact that the applicants paid only a preferential price for the property in question⁴⁹ is immaterial for the

⁴³ ECtHR, *Turgut and Others v. Turkey*, no. 1411/03, 8 July 2008, §§ 89–93; see also ECtHR, *N.A. and Others v. Turkey*, no. 37451/97, 11 October 2005, §§ 39–43 (the cases are not related to the restoration of property process).

⁴⁴ Approximately two years after the last-instance domestic court had established the mistake and the plot was returned from the applicant to the State.

⁴⁵ *Romankevič* <...>, § 46.

⁴⁶ *Grigaliūnienė* <...>, §§ 39–42; see also, *mutatis mutandis*, *Pincová and Pinc* <...>, §§ 61–64; *Pyrantienė* <...>, §§ 63–73; *Tunaitis* <...>, §§ 40–43; *Noreikienė and Noreika* <...>, §§ 37–40; *Velikovi and Others* <...>, §§ 217–222, 224–228, 238–242, 246–249.

⁴⁷ *Pyrantienė* <...>, § 71.

⁴⁸ *Žilinskienė* <...>, § 50.

⁴⁹ *Pyrantienė* <...>, § 60; *Grigaliūnienė* <...>, § 38; *Tunaitis* <...>, § 39; *Noreikienė and Noreika* <...>, § 36; *Digrytė Klībavičienė* <...>, § 36.

Court in terms of the applicants' rights of ownership if they had acquired the property in good faith. Therefore, even if the applicant acquired the property free of charge or for only a preferential price, the good faith of that applicant still has influence on the right to compensation for pecuniary and non-pecuniary damages sustained due to the deprivation of the property in issue. However, in case the *bona fide* applicant acquired the property for a very low price in the past, the State authorities are in principle justified in deciding not to compensate for the full market value of the property which is taken from the applicant later⁵⁰. In case the *bona fide* applicant had acquired the property free of charge, the compensation for the deprivation of the property could still be required as the applicant could have legitimate expectation of being able to enjoy his/her possession and, accordingly, had some expenses related to the maintenance of the property as well as sustained non-pecuniary damage⁵¹.

Compensation for the deprivation of property which is awarded to the *bona fide* holders should be not only proportionate (sufficient in amount), but also prompt enough as unreasonable delay may reduce its value and the applicant (due to his/her personal and social situation) may bear the negative consequences because of the delay in redress⁵². In case the property rights had already been restored and later had to be annulled because of the mistakes made by the State authorities in the restitution process, the State correcting that mistake attributable exclusively to the State authorities shall have regard to the individual situation of such a *bona fide* applicant and not to subject him/her to the additional lengthy process of correction that mistake (the lengthy repeated restitution process)⁵³. The *bona fide* applicant should not be required to institute separate proceedings against another *bona fide* individual (e.g., the seller of the property) or required to bring a case against public entities liable for damages in case their identification is problematic⁵⁴.

The Court was also dealing with a case wherein the burden of the applicants obliged to pay to the State the market value of the land, given to them unlawfully before, was at stake. Herein the good faith of the applicants was taken into account while evaluating the proportionality of the State interference. In the case of *Misiukonis and Others v. Lithuania*, the domestic courts cancelled the allocation of land plots to the applicants as the restoration of ownership rights to them was in violation of the peremptory legal norms⁵⁵. However, as the applicants had already sold those land plots to third parties and, accordingly, could not return the land to the State, the domestic courts ordered the applicants to return to the State the sums of money which the applicants would have received had they sold the plots in accordance with market prices. As the amount of money the applicants had to return to the State (each applicant – approximately EUR 62,560) was significantly higher than the amount they had received from selling the land (each applicant – approximately EUR 7,241), the applicants alleged that they had to bear an individual and excessive burden. The Court found a violation of Article 1 of Protocol No. 1 to the Convention in that case. One of the main issues considered by the Court was whether the decision of the applicants to sell the plot of land for the price which was significantly below the market value of the plots could be considered manifestly unreasonable or not. It appears that here again the good faith of the applicants was at stake. The Court recalled that the applicants had a legitimate expectation that the land which had been allocated to them by public authorities would not be subsequently taken away. The Court further observed that the applicants who at that time had

⁵⁰ *Grigaliūnienė <...>*, § 41; *Noreikienė and Noreika <...>*, § 39.

⁵¹ *Žilinskienė <...>*, §§ 52–63; see, *mutatis mutandis*, *Vistiņš and Perepjolkins <...>*, § 121.

⁵² *Paplauskienė <...>*, §§ 51–56.

⁵³ *Beinarovič and Others <...>*, §§ 145–154, 156.

⁵⁴ *Dzirmis <...>*, §§ 89–96; ECtHR, *Pešková v. the Czech Republic*, no 22186/03, 26 November 2009, § 43.

⁵⁵ The peremptory legal norms of the domestic law of Lithuania were violated as the applicants had been given more plots of land than they had the right to restore and their ownership rights had been restored in an order of priority to which the applicants were not entitled.

been recognised as the legitimate owners of the land were not under an obligation to sell it at market value or for any other specific price, and the price which they received from the buyers could not be considered manifestly unreasonable⁵⁶.

However, the Court does not automatically recognize any interference with the *bona fide* applicant's right to be disproportionate. Even if the reimbursement of the purchase price to the *bona fide* applicant, who was deprived of his purchased property in the context of correction of a State mistake made during the restitution process, could not be reasonably related to the value of that property, some other factors⁵⁷ may induce the Court to arrive at the conclusion that such State interference with the individual's rights was proportionate⁵⁸. However, in case the mistakes for which the State authorities are solely responsible are not corrected for a long period of time (*bona fide* applicants have not received any compensation), the burden of remedying the mistakes is excessive and in such a case "it is immaterial for the assessment of the burden borne by the applicants how long they had owned the property in question before it was taken from them, or how much other property had been restored to them and not annulled"⁵⁹.

3.2. Protection of Mala Fide Holders of the Property

As regards the *mala fide* holders of the property, it is evident that their protection is not so wide under the Convention. The applicants who acted in bad faith while acquiring the property are not automatically deprived of any protection laid down in the Convention; nevertheless, the bad faith of the applicants is taken into account against them while balancing the interference with their property rights⁶⁰.

It seems that in case the applicant was acting in bad faith, the State, having regard to the individual circumstances of the case, can have no obligation to establish such high (related to the market value of the property) compensation as is in case of the *bona fide* applicant. Thus after the Court agreed with the domestic courts that the applicants had abused their privileged position during the Communist regime or otherwise violated the substantive provisions of the domestic law, while unlawfully acquiring the property from the State, and, accordingly, that property had to be returned to the former owners, the Court observed that such deprivation of property was not only lawful and sought legitimate aim, but was also proportionate. In the context of proportionality, the Court *inter alia* accepted that the aim of deprivation of property (to mitigate the effects of past damage, to restore the rule of law) justified the amount of compensation, to which the applicants were entitled under the domestic law, which in its turn was not sufficient to obtain a new dwelling at the time of their dispossession. In addition, the Court took account of the long period of time (about thirty years) the applicants who acquired the property unlawfully benefited from the use of that property, and who did not live in that property at the time when they were ordered to vacate it⁶¹.

⁵⁶ *Misiukonis and Others* <...>, § 62.

⁵⁷ E.g., a rather short period (approximately two months), when the applicant could have reasonably considered himself as an undisputed owner of the land; the right of the applicant to make use of the land plot at the time his property rights were contested and having no obligation to return the fruits of the plants to the lawful owners of that land; the fact that the applicant was not placed in a particularly vulnerable situation as he had another dwelling, had not built a house on the plot of land at issue; the fact the applicant never raised before the domestic courts the question of the adequacy of the compensation for the plot of land he was deprived of.

⁵⁸ *Padalevičius* <...>, §§ 62–74.

⁵⁹ *Beinarovič and Others* <...>, § 144.

⁶⁰ *Osipkovs and Others* <...>, § 85.

⁶¹ *Tesař and Others* <...>, § 73; *Velikovi and Others* <...>, §§ 198, 206–210, 212–216.

The Court's attitude to the domestic legal regulation obliging the applicant to institute separate proceedings in order to receive redress for his or her losses differs depending on whether the applicant was *bona fide* or *mala fide*. As already mentioned, in view of the Court, a requirement for the *bona fide* applicant to bring separate compensation proceedings against former owners is considered to be too formalistic and excessive burden⁶². On the contrary, in case the applicant is recognized to be acting in bad faith, an obligation to bring separate proceedings with a claim for compensation will not constitute an excessive burden on the applicants⁶³. Even more, the Court holds that the imposition of interim measures on the *mala fide* applicants, who were not entitled to restoration of property rights, but received the property in violation of the domestic law, as well as granting the actions for unlawful enrichment against such applicants do not run contrary to the protection provided for by Article 1 of Protocol No. 1 to the Convention⁶⁴.

Conclusion

1. Albeit the ECtHR recalls that it is for the domestic authorities to establish the bad faith of the applicant, the case-law of the Court shows that the Court can agree or disagree with the evaluation made by the domestic institutions as regards the good or bad faith of the applicant in the context of process of restoration of ownership rights.
2. The following criteria are relevant for the ECtHR while establishing the good or bad faith of the applicants: the position of the applicants while acquiring the property (the position of ordinary citizens who had no privileges and were not responsible for the irregularity while concluding the transaction or who could not change the State standard terms of the transaction; the privileged position of the individuals who acted unlawfully to acquire property) and the awareness of the applicants of the circumstances precluding them from acquiring that property; the prosecution, conviction or at least suspicions with regard to the unlawful acts of the applicants.
3. In its analysis the ECtHR pays a great attention to the domestic courts' substantiation as regards applicants' good or bad faith. It seems that even if the Court is provided with the arguments of the respondent Government which shed some doubts regarding the applicant's good faith, the Court is inclined to recognize that the applicant was acting in good faith rather than in bad faith if the decisions of the domestic courts lacked substantiation as to the bad faith of the applicant, did not contest the good faith of the applicant at all or, on the contrary, established explicitly the good faith of the applicant. Only the exceptional circumstances showing, for instance, the applicant's clear awareness of the legal obstacles to acquire the property, might encourage the Court to agree with the Government as to the bad faith of the applicant irrespective of the opposite finding of the domestic courts.
4. It is important to establish the good or bad faith of the applicants as the conditions under which the disputed property was acquired usually influence the evaluation of the proportionality of the State interference with the individual's property rights. Both the *bona fide* and *mala fide* applicants enjoy protection of their property rights under the Convention, however, the level of that protection is higher in case the applicant was acting in good faith. The good or bad faith of the applicants while acquiring the property has an impact on the Court's assessment whether the compensation for the deprivation of that property was adequate or not; whether the burden imposed by the State on the applicants by requiring them to comply with certain obligations (e.g., the obligation of the person

⁶² See n. 54.

⁶³ *Osipkovs and Others* <...>, §§ 86–88.

⁶⁴ *Danailov and Others* <...>, § 55.

to institute separate proceedings seeking redress or the obligation to compensate for the property the applicants were not entitled to by paying to the State the market value of that property) is excessive or not. In the context of the proportionality of the State interference with the property rights, some factors related to the applicants' personal and social situation (e.g., the long period of time the applicant was living in the apartment taken from him/her) are evaluated differently (in favour of or against the applicant) depending on the fact whether the applicant was *bona fide* or *mala fide*.

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PAREIŠKĖJO SĄŽININGUMAS IR NESĄŽININGUMAS RESTITUCIJOS PROCESE: EUROPOS ŽMOGAUS TEISIŲ TEISMO PRAKTIKA

Nika Bruskina

S a n t r a u k a

Straipsnyje nagrinėjama EŽTT praktika bylose, kuriose keliamas pareiškėjo sąžiningumo ar nesąžiningumo nuosavybės teisių atkūrimo į praeityje nacionalizuotą nuosavybę kontekste klausimas. Visų pirma straipsnyje apibūdinami veiksniai, reikšmingi EŽTT nustatant asmens sąžiningumą ar nesąžiningumą nuosavybės įgijimo metu. Toliau tiriama, ar EŽTT palaiko nacionalinių institucijų poziciją vertinant pareiškėjo sąžiningumą tokiose bylose. Galiausiai straipsnyje palyginama sąžiningų ir nesąžiningų pareiškėjų teisių apsauga pagal Žmogaus teisių ir pagrindinių laisvių apsaugos konvenciją.

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