The European Court of Human Rights and the Property Act

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Issue 1/2010 of the ZOV (Zeitschrift für offene Vermögensfragen) documented two interesting interlocutory decisions by the ECHR. According to an editorial note, an interim ruling on the admissibility of a complaint to the ECHR is generally a sign of potential success when it comes to the justification of the complaint. This is interpreted to mean that the probability is relatively high that there will be a settlement between the complainants and the federal government. When there is an interim ruling on admissibility, the ECHR generally encourages an amicable settlement between the parties. And the federal government is usually willing to accept this option.

As a tax-paying citizen, I would be very disappointed to see an amicable settlement that would involve a payment of tax money. My reasons for this are explained below.

Regarding the ECHR decision from 13 October 2009 – 35023/04 (ZOV 1/2010 p. 11)

The decision first outlines the background of the case. According to this information, in 1938 there was a forced sale of land owned by two Jewish brothers to a German Aryanizer (Mr. D.). After 1945, a request for the return of the property was submitted. An administrator was named by the President of the State of Thuringia (GDR) on 28 February 1946 and an order was issued to transfer the property back to the Jewish owners or their heirs. (It should be noted here that the GDR did not exist in 1946.)

However, the property was not retransferred. Instead, the administrator reached a settlement with Mr. D.'s spouse, who was also his heir. According to this settlement, the two Jewish brothers would receive only one-third of the land and the remaining two-thirds would be assigned to Mrs. D. The settlement also specified that the brothers would waive their right to any compensation claims against Mrs. D.

The brothers argued against this settlement on the grounds that their case was never heard. (Since I have come across such scandalous 'settlements' in my law practice in the past, I can very well imagine that this actually happened.)

Apparently, until after 1990 the two brothers owned one-third, and Mrs. D.'s heirs held two-thirds of the property. One of these heirs sold part of the property to the complainant for DM 90,000 in April 1992. Worthy of note is the fact that the sales contract documented the complete chronological ownership of the property from 1904 to 1987 (assumed to be the last instance of inheritance).

It is at this point that the translation of the ECHR decision is not completely accurate. The original quotation cited here is the complainant “…is aware of the list that shows (sic) how the current ownership came to be and that this list begins on 22 April 1904 and ends on 25 September 1987.” The original document, however, quotes in German only the words "…how the current ownership came to be."

In other words, the complainant knew that the property was Jewish-owned until 1938. In January 1997, the complainant acquired a second portion of the property held by the community of heirs for an additional DM 90,000. Later in the same year, the complainant sold his two shares for DM 600,000 to a company in Liechtenstein. Thus an investment of DM180,000 was multiplied more than threefold. The parties involved released the notary of his obligation to examine the land register. The notary pointed out that the property rights of third parties were not excluded. And he was right. Because in 1992, the Jewish heirs requested the return of the two-thirds that had been withheld from them in 1946.

The statement of facts provided by the ECHR does not indicate whether the complainant had informed his Liechtenstein buyer about the possibility of a restitution claim. If this was the case, I would describe his behavior as fraudulent, since he would have known that the sales contract could not be fulfilled.

In October 1997, the Thuringia State Office for Unresolved Property Issues (LAROV) approved the request for return of title to the heirs of the original Jewish owners. Incidentally, this return of title apparently is not excluded by a "settlement concluded in the former GDR under the duress of expropriation and without the consent of those affected." (I would like to note that, according to my recollection, there was no GDR in 1946. Likewise, there was no duress resulting from the impending confiscation of private land. The settlement was not agreed in favor of state power and, in fact, was quite obviously contrary to the Thuringia state law on restitution. As the course of history shows, there was no expropriation of property up until the time of German reunification.)

The complainant, who had assumed the position of heir to an Arianizer after purchasing the inherited shares, received DM 1,250 for his lost shares. This amount was purportedly equivalent to the purchase price paid in 1938. (There is apparently something wrong here. Based on the currency exchange rate of DM 1 to RM 20 in 1938, this DM 1,250 in compensation would have been equivalent to only RM 25,000. In fact, the purchase price in 1938 was RM 256,000. Two-thirds of this amount would be RM 170,667, which would be equivalent to DM 8,533.35.)

The federal government denied the complainant’s claim that his property rights had been infringed upon. It was pointed out that the complainant entered into a speculative real estate transaction and was aware of the risk involved, in that restitution claims from the descendants of former Jewish property owners represented an encumbrance on the property. It would be unfortunate if the federal

government were to change its position. After all, the complainant is in the same position as any Aryanizer who returned property to the former Jewish owners and received the original purchase price based on the currency exchange rate. The complainant in this case is entitled to no additional rights based on his purchase of shares from the community of heirs in 1992 and 1997.

Regarding the ECHR decision from 13 October 2009 – 5631/05 (ZOV 1/2010, p. 12)

(This decision is erroneously listed in the ZOV as 2059/09)

This case also concerns a forced sale in 1938. Mr. A. and Mrs. B., both Jewish victims of Nazi persecution, owned shares in a limited partnership (KG), that held three properties with a total of 3,020 square meters located in what is now Potsdam-Babelsberg (then Nowawes). These properties were transferred to a Berlin company that sold them a year later to Mr. G.A. The nine complainants are Mr. G.A.'s heirs. In 1953, the land became state property. In the nineties, it was sold for DM 1,300,000 in line with the Precedence of Investment Act.

Ms. E.F., the daughter of Mrs. B., emigrated in 1939 to the U.S. and was granted U.S. citizenship in 1951. Based on an American law on claims against the GDR passed on 18 October 1976, she submitted a claim for restitution of the expropriated properties. In a decision from 1980, the Foreign Claims Settlement Commission noted that Ms. E.F. *had a claim for compensation* in the amount of $5,500 plus interest for the years since 1951. The italicized words are important in this case, because it is mentioned several times later in the case, that Ms. EF *received compensation* in 1980. Germany's Supreme Constitutional Court also stated that the claims regarding the disputed properties had been "fulfilled in 1980."

In fact, it was still unclear in 1980 whether, and when, such compensation would be paid. The U.S. demanded that the GDR pay the total amount of compensation claimed. This demand was not within the financial means of the GDR. Only after the accession of the GDR to the Federal Republic of Germany did the government take over negotiations with the U.S. This eventually led to the agreement dated 13 May 1992, by which the Federal Republic of Germany undertook to pay a lump sum of $190 million. Despite approval by the FCSC, the claim was, up until this point, left hanging in the air.

According to the agreement, U.S. citizens entitled to compensation for property lost in former East Germany would be given a chance to choose whether they wanted to forgo compensation and submit a claim in accordance with Germany's Property Act. This offer expired on 31 December 1992. If they chose compensation, their claims were transferred to the Federal Republic of Germany.

In 1990 the complainant applied for restitution of the properties expropriated in 1953. As mentioned above, these properties were sold in 1992. The Brandenburg State Office for Unresolved Property

Issues (LAROV) dismissed the restitution claim and determined that the proceeds from the sold properties should go to the Federal Republic of Germany.

The ECHR decision deals with the complainant's arguments that the FRG has no right to a claim, because it had not submitted an application to the responsible property office prior to the deadline at the end of 1992. The complainant challenged the LAROV decision and brought the case before the Potsdam Administrative Court. The case was dismissed in a ruling from 28 November 2002. The court fully agreed with the LAROV decision. The appeal submitted by the complainant was rejected in a Federal Administrative Court ruling from 21 January 2004. The complainant filed a constitutional complaint, but the case was rejected for a decision by the Supreme Constitutional Court on 14 August 2004.

At this point, I would like to address the arguments of the Federal Administrative Court and the Supreme Constitutional Court. The Federal Administrative Court agreed that the Federal Republic of Germany had, in fact, not submitted an application for restitution before December 31 1992. However, this oversight was remedied by the amendment to § 30a para. 1 of the Property Act. The Supreme Constitutional Court sees no shortcoming that needs to be rectified, but instead regards the supplement to § 30a para. 1 as nothing more than a clarification.

It is astonishing to see the courts having to deal with the question of whether the federal government submitted a valid application before the registration deadline. What would have been the basis for this? The Federal Republic of Germany had not suffered any financial loss for which it could have submitted a claim. The land in question was already state owned and now had become the property of the federal government. Not until Mrs. E.F.'s decision to choose compensation in line with the FCSC decision was it possible to transfer her claim to the Federal Republic of Germany. In other words, not before the end of the period specified in the decision, which coincided with the expiry of the application period. And it wasn't until 1993 that the U.S. could tell the Federal Republic who had opted for the A List (compensation in the U.S.) or would be treated as if they had.

The documentation of the ECHR decision does not indicate whether Mrs. E.F. actually decided, or whether, in the absence of a decision, she was treated as if she had opted for compensation. In late 1992, the FCSC notified all applicants who were granted compensation and told them in writing that they would now have the opportunity to pursue their claims in Germany. However, many of the letters were returned because the recipients had since died or had moved their place of residence. The agreement made provisions for these cases by establishing a legal presumption.

From a financial standpoint, the decision to opt for $5,500 in compensation was extremely unfortunate. The case does not specify what percentage of the property Mrs. B. actually owned in 1938. But if one assumes that her share was 50 percent, the claim in Germany would have been

equivalent to half of the sales proceeds, or DM 650,000. On the other hand, the Federal Republic ended up with a fantastic deal as a result of the German-American agreement. For $5,500 plus interest amounting to approximately $14,000, the government received the equivalent of DM 650,000.

As subsequent victims, the complainants were entitled to compensation, providing they submitted applications on time. The question as to whether compensation was applied for as an alternative in 1990 is disputed by the parties. In this respect, there appears to be unanswered questions that need clarification.

The JCC is mentioned several times in the decision. In its ruling from 21 January 2004, the Federal Administrative Court indicated that, since Mrs. E.F. received compensation (!) in 1976, the JCC, which had also submitted an application for restitution, could not claim the property. The complainants would have remained subsequent victims in any case, because the JCC also submitted claims for restitution within the statutory period. Had the JCC been successful, these claims would have taken precedence over those submitted by the complainants.

Although it is not part of the proceedings, the question as to what happened to Mr. A.’s claim to the property he lost in 1938 remains open. Did his heirs fail to submit an application for restitution? Did Mr. A. not have any heirs? In either case, the JCC would have assumed his legal position.

Here's a note on the translation: The end of subsection b. § 30a paragraph 1 of the Property Act mentions that American nationals have the option to make a choice. It says that they must decide "between a settlement and the invocation of a German *court.”* The original French version clearly includes the invocation of state authorities and adds that, before someone approaches the courts, they must first contact the Office for the Settlement of Unresolved Property Issues (AROV). In article 3, paragraph 9, sentence 2 of the German-US agreement, "statutory succession" is mentioned. The original version refers to "succession légale," which is a legal succession.