WORKSHOP 1

ROUND-TABLE:

PROPERTY RESTITUTION/COMPENSATION: GENERAL MEASURES TO COMPLY WITH THE EUROPEAN COURT'S JUDGMENTS

organised with financial support from the Human Rights Trust Fund under the project "Removing obstacles to the enforcement of domestic court judgments/Ensuring an effective implementation of domestic court judgments"

Bucharest, Howard Johnson Hotel,
5-7 Calea Dorobantilor Dist. 1, Bucharest, 010551 Romania

Presentation prepared by Ms Marica Pirošíková, the Slovak Republic

The views expressed are those of the author only

RELEVANT CASE-LAW CONCERNING SLOVAKIA

(Marica Pirošíková, Government Agent of the Slovak Republic before the European Court of Human Rights)

With regard to restitution cases concerning Slovakia, the Court repeatedly noted that the applicants did not have a "legitimate expectation" where it could not be said that they had a currently enforceable claim that was sufficiently established for failure to meet one of the essential statutory conditions or where there was a dispute as to the correct interpretation and application of domestic law by the national courts.

In the case *Brežný and Brežný v. Slovakia* (no. 21131/93, Commission decision of 4 March 1996) the applicants complained, first, that the refusal to recognise their property right on the grounds of their residence abroad amounted to a disguised penalty. In this regard they invoke Article 7 § 1 of the Convention. Under Article 14 of the Convention, they complained that Law No. 87/1991 on Extrajudicial Rehabilitation introduced a form of discrimination against persons permanently domiciled abroad. They also alleged that Article 1 of Protocol No 1 has been violated, in that they claim to have no chance of obtaining restitution of their property, even though the confiscation decision was declared void *ex tunc*. They also considered that section 3 of Law No. 87/1991 was incompatible with the provisions of Constitutional Law No. 23/1991 on the Charter of Fundamental Rights and Freedoms and with the Constitution. Further, invoking Article 2 of Protocol No. 4 taken in conjunction with Article 14 of the Convention, the applicants alleged that restricting their place of residence to a particular territory was not necessary in a democratic society. Lastly, they invoked Articles 17 and 60 of the Convention, without giving their grounds for so doing. The Commission declared the application inadmissible. The Commision found *inter alia* that the applicants did not have a "legitimate expectation". The Commission particularly noted that Law No. 87/1991 granted the opportunity to claim restitution of property only to persons who had been judicially rehabilitated, who were of Slovak (or, previously, Czechoslovak) nationality and who were permanently resident within the territory of the Slovak Republic (or, formerly, the Czech and Slovak Federal Republic). Since the applicants did not fulfill the permanent residence condition, they were excluded, from the outset of the action, from obtaining either restitution of the property or compensation in lieu thereof. Indeed, the applicants were conscious of this fact and knew that their only chance of succeeding in their case was to claim, via the ordinary courts dealing with their restitution claim, that the legislative provision laying down that condition was unconstitutional. However, the Commission took the view that the fact that the national courts could have lodged a constitutional complaint with the Constitutional Court (under section 8 of Constitutional Law No 91/1991 on the Federal Constitutional Court) regarding the alleged incompatibility between the permanent residence condition for those claiming restitution and the Constitution or the Convention, was not in itself enough to allow the applicants to claim to have a "possession" within the meaning of Article 1 of Protocol No. 1. It follows that the applicants, who have, no doubt, long harboured the hope that the confiscated property would be restored to them, have not proved that they ever had a claim to redress. Consequently, neither the judgments of the national courts nor the application of Law No. 87/1991 to their case could have constituted an interference with their peaceful enjoyment of their possessions.

In the case *Jantner v. Slovakia* (no. 39050/97, 4 March 2003), the applicant's restitution claim was dismissed as the national courts found that he had not established his permanent residence in Slovakia within the meaning of the relevant law and practice. That finding was

contested by the applicant, who considered that he had met all the statutory requirements for his restitution claim to be granted. The Court held that under the relevant law, as interpreted and applied by the domestic authorities, the applicant had neither a right nor a claim amounting to a "legitimate expectation" within the meaning of the Court's case-law to obtain restitution of the property in question.

In the case *Kopecký v. Slovakia* (no. 44912/98, Grand Chamber judgment of 28 September 2004, to be published in ECHR 2004-...). the Court concluded that in the context of his restitution claim the applicant, who had failed to show where the property to be restored had been at the moment when the Extra-Judicial Rehabilitations Act of 1991 became operative, as laid down in section 5(1) of this Act had no "possessions" within the meaning of the first sentence of Article 1 of Protocol No. 1 (see also the case *Bzdúšek v. Slovakia*, no. 48817/99, decision of 16 November 2004).

In the case *Rosival and Others v. Slovakia* (no. 17684/02) the applicants complained about the unfairness of the proceedings with regard to their claim for restitution of 1,500 hectares of forest land. Notably, retroactive legislative interference with the applicants' case meant that they were only allotted a maximum of 250 hectares. They relied on Article 6 § 1, Article 1 of Protocol No. 1 and Article 14. In its admissibility decision from 13 February 2007 the Court noted that the applicants' restitution claim was based on the provisions of the Act as in force at the time the claim was made. It was concrete and had a sufficient basis in national law as it met all the statutory requirements and that fact has never been disputed. On the contrary, both the Land Office and the Regional Court acknowledged on several occasions that all the applicable conditions had been fulfilled, and the claim was finally allowed. The sole reason for allowing it only up to the limit of 250 hectares set by the 1993 amendment and not in full was the amendment itself. In these circumstances, the Court found that the applicants must be regarded as having had at least a "legitimate expectation" that their restitution claim would be realised. The claim thus constituted a "possession" and attracted the protection of Article 1 of Protocol No. 1. The Court declared admissible, without prejudging the merits, the applicants' complaints under Article 6 § 1 of the Convention concerning the alleged unfairness of the proceedings in respect of the claim for restitution of land in excess of 250 hectares; under Article 1 of Protocol No. 1 concerning those proceedings and their outcome, which was allegedly predetermined by the 1993 amendment (including the proceedings on the applicants' constitutional complaint and their outcome); and under Article 14 of the Convention concerning the alleged discrimination in respect of the complaint under Article 1 of Protocol No. 1. Subsequently, the case has been struck out following a friendly settlement in which the Slovakian Government undertook to restore to the applicants property as specified in the agreement and to pay them, jointly, EUR 35,000 in respect of any pecuniary and non-pecuniary damage and costs and expenses.

In the case *Valová, Slezák et Slezák v. Slovakia* (no 44925/98) the applicants alleged, in particular, that their right to a public hearing before a tribunal and to the peaceful enjoyment of their possessions had been violated, relying on Articles 6 § 1 and 1 of Protocol No. 1 to the Convention. The applicants particularly submitted that their property rights had been violated as a result of the decision to reopen the original proceedings and the subsequent disapproval of the agreement on restitution of property concluded on 13 November 1992. In its judgment of 1 June 2004 the Court held that there had been a violation of Article 1 of Protocol No.1 and no violation of Article 6 § 1. The Court noted that on 26 November 1992 the Topoľčany Land Office approved the decision on restitution of the property in question to the applicants. The Land Office's decision became final on 18 December 1992. The applicants became owners of

that property and exercised property rights in respect thereof. Subsequently the competent administrative authority decided to reopen the proceedings leading to the decision of 26 November 1992 and disapproved the restitution agreement. As a result, the applicants lost their title to the property. The Court therefore found that the interference complained of amounted to a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. Subsequently it came to the conclusion that the decision to reopen the original restitution proceedings cannot be regarded as having been "subject to the conditions provided for by law", thus there has been a violation of Article 1 of Protocol No. 1. The Court further held that question of the application of the decision of just satisfaction under Article 41 was not ready for decision. By the Court's judgment of 15 Februry 2005 the case has been struck out following a friendly settlement.

In the case *Urbárska Obec Trenčianske Biskupice v. Slovakia* (no. 74258/01) the Court has dealt with the specific problem concerning owners of land which were under the communist regime in Czechoslovakia in most cases obliged to put their land at the disposal of State-owned or cooperative farms. They formally remained owners of the land but in practice had no possibility of availing themselves of the property. Some of the land in question was, for various reasons, not cultivated by the farms. It was the State policy to promote the use of such land for gardening. For that purpose allotment gardens were established, mainly in the vicinity of urban agglomerations. Individual plots of land were put at the disposal of persons belonging to the Slovakian Union of Allotment and Leisure Gardeners, who were allowed to cultivate the land as a past time activity for their individual needs. In the context of Czechoslovakia's transition to a market-oriented economy following the fall of the communist regime, the Parliament adopted the Land Ownership Act 1991, the purpose of which was to mitigate certain wrongs and to improve the care of agricultural and forest land. Under the Land Ownership Act 1991 the plots of land on which allotment gardens had been established were not to be restored *in natura* to the original owner where ownership of the land had passed from the original owners to the State or a legal person. In such cases the original owners were entitled to compensation in kind or in pecuniary form. In this category of cases the legislator gave precedence to legal certainty for the existing users of the property, as the use of land for gardening was considered to be of greater public interest than restoring the land *in natura* to its original owners. In the second category of cases, where the original owners maintained their ownership rights, albeit in name only (*nuda proprietas*), the Land Ownership Act 1991 established conditions enabling the owners to enjoy their property rights to a greater extent. In particular, it provided for the land to be let to the existing users, with a notice period expiring on the date when the temporary right to use the land came to an end. The tenants were, however, entitled to have the lease extended by ten years unless an agreement to the contrary was reached between the parties. The landowners were also entitled to request, within three years of the coming into effect of the 1991 Act, the exchange of their property for a different plot of land owned by the State. The above approach, permitting the owners to recover full possession of their land after the expiry of the ten years for which the tenants had the right to have the lease extended, was modified with the adoption of Act 64/1997. As a result, owners have only a limited possibility of terminating the lease, mainly on the grounds of the tenants' failure to comply with their obligations. The position of the tenants has been strengthened in that they are entitled to acquire ownership of the land they use for gardening. As to the owners, Act 64/1997 gives them the right to obtain either a different plot of land or pecuniary compensation. In introducing Act 64/1997 the legislator abandoned the philosophy of giving general priority to the rights of the owners of plots of land on allotment sites and took the position that it was in the general interest that the rights of persons who had been using the land for gardening should prevail.

In the proceedings before the Court, the applicant, an association of landowners in Trenčín (Slovakia), complained that the compulsory letting of its members' land and the subsequent transfer of the land to the tenants had been contrary to Article 1 of Protocol No. 1. In its judgment of 27 November 2007, the Court held that there had been a violation of Article 1 of Protocol No. 1 as regards both the transfer of the applicant association's land to members of a gardening association and, preceding that transfer, the compulsory letting of their property at a rent which was below the applicable property tax. The Court was not persuaded that the declared public interest in pursuing proceedings under Act 64/1997 was sufficiently broad and compelling to justify the substantial difference between the real value of the applicant's land and that of the land which it obtained in compensation. The effects produced by application of Act 64/1997 to the present case thus failed to strike a fair balance between the interests at stake. As a consequence, the applicant association had to bear a disproportionate burden contrary to its right to peaceful enjoyment of its possessions. The Court also concluded that the compulsory letting of the land of the applicant association on the basis of the rental terms set out in the applicable statutory provisions was incompatible with the applicant's right to peaceful enjoyment of its possessions. At the time of delivery of the judgment (27 November 2007), the Court held that the question of the application of Article 41 was not ready for decision. By its judgment of 27 January 2009 the Court held that the respondent State is to pay the applicant EUR 200,000 in respect of pecuniary damage; 7,000 in respect of non-pecuniary damage and EUR 12,000 in respect of costs and expenses.