Written observations of the applicant
Application no. 4597/20 Reykhert v. Russia

Admissibility of the application

The application was lodged with the Court on 28 December 2019. As a general rule (see, for example, *Anikeyev and Yermakova v. Russia*, nos. 1311/21 and 10219/21, § 25, 13 April 2021) - and the Government did not substantiate in any way the existence of any grounds for derogation from it, and did not even indicate the need to do so - an assessment of whether domestic remedies have been exhausted is to be made with reference to the day when the application was lodged. Accordingly, the Government's reference to the provisions of Chapter 10.1 of the Federal Law no. 218-FZ, which contains one article - 68.1 (see §§ 21-24 of the written observations of the Government), does not make any sense, since this chapter was introduced by the Federal Law of 2 August 2019 no. 299-FZ, which entered into force, as expressly provided for in its Article 3, on 1 January 2020, i.e. after lodging the application with the Court.

For the period up to 1 January 2020, the Government have in fact claimed the effectiveness - as a remedy - of recourse to the provisions of Article 31 § 1 of the Federal Law no. 122-FZ which, as they themselves indicated, were to be applied (see §§ 25 and 26 of their written observations): "compensation ... shall be paid if, for reasons beyond the control of the said persons [the owner of the residential premises, who is not entitled to claim it from a *bona fide* purchaser, or a *bona fide* purchaser from whom the residential premises have been claimed], in accordance with a court judgement, which has entered into legal force, on compensation for the damage caused by loss of the property mentioned in this Article, recovery under an enforcement document has not been made within one year from the date of start of calculation of the period for submitting this document for execution".

Thus, the condition for obtaining the said compensation is to bring - someone - to civil liability in court for harm caused as a result of the loss of

property, and then a long attempt to recover from this "someone" compensation for the harm caused.

Moreover, this "someone" cannot be a state body for registration of rights to real estate. This follows from the findings of the Constitutional Court, which stated in its judgement of 4 June 2015 no. 13-P (to another part of which the Government also refer in § 15 of their written observations) as follows: "The provisions of this Article ... by virtue of their purpose do not require the establishment of circumstances indicating that unlawful acts have been committed by registration authorities - such acts entail liability for damage caused by state bodies, local government bodies and their officials in the relevant civil law proceedings. It is also not supposed to investigate the question of lawful actions of the registering authority which resulted in the loss by the owner (*bona fide* purchaser) of the residential premises and, accordingly, Article 16.1 of the Civil Code of the Russian Federation regulating compensation for lawful actions of state and local authorities is not applicable in this case. Thus, the state in the said case acts not as a party in the relations of legal liability, not as one who caused damage (that would require full compensation for the damage caused) and not as a debtor under a tort obligation, but as a public authority arranging a system of compensation at the expense of the Russian Federation to owners of residential premises which cannot reclaim it from *bona fide* purchasers and *bona fide* purchasers from whom the premises have been reclaimed.

However, any remedy is such if it is - both in theory and in practice - capable of leading, firstly, to a recognition, and secondly, to rectification of the violation. But in this case, recourse to the provisions of Article 31 § 1 of the Federal Law no. 122-FZ cannot constitute a remedy for the violation which is being considered by the Court. It lies in the fact that the flat was claimed from the applicant without compensation and with the imposition on her of an excessive individual burden of responsibility for the mistakes of the authorities themselves. These mistakes consisted in the fact that the state, represented by the real estate registration authority, did not detect fraud, which consisted in selling the flat of the deceased E.

by a criminal who used a fake passport. Moreover, the state, represented by the named authority, failed to do so twice: in September 2015, when the transaction in which the fraudster sold the flat to M. (also expressly recognised by the court as a *bona fide* purchaser - see p. 4 of the District Court's judgment on p. 12 of the appendices to the application lodged with the Court) and then in September 2016 when M. sold the flat to the applicant. Despite the fact that the record of E.'s death was drawn up by the relevant state body back in April 2015, as the authorities themselves indicated in § 2 of their written observations. That is how the subject matter of the complaint in this part was formulated in the application lodged with the Court: "the applicant considers the interference [with the right to respect for property] disproportionate as nothing prevented the authorities responsible for the state registration of property rights ... from checking whether [E.] was alive before registering the title firstly for [M.] and then for the applicant ...". However, as it was indicated above, the compensation provided for in Article 31 § 1 of the Federal Law no. 122-FZ is not to be paid at all for such a violation. Moreover, it absolutely cannot be paid for such a violation. And it is not a remedy for any violation by the state at all. Consequently, recourse to it cannot be a means of correcting the violation described above: it cannot, in principle, be recognized as a result of applying for such compensation.

The theoretical possibility of obtaining compensation under Article 31 § 1 of the Federal Law no. 122-FZ also does not in fact affect the amount of compensation by the state for the violation of the applicant's rights as described above. The reason for this is obvious and lies in the fact that compensation under the Federal Law no. 122-FZ is paid by the state itself (and not by any private individuals). Consequently, even if it had been received by the applicant, this should simply have been taken into account in determining the amount of compensation for the violation. When it is not received, it is simply not taken into account - as not affecting the amount, scope of compensation for the violation.

As for the theoretical possibility of bringing claims against the perpetrators of the crime, the Government in no way indicated on what basis the applicant should

have expected to successfully recover damages from them (see, for example, *Olkhovsky v. Russia*, no. 53716/17, § 29, 9 July 2019). And the authorities themselves have not attempted to recover damages from the perpetrators. They chose to pursue the claims against the applicant even though the very same body that had acted as plaintiff in her case, the administration of the Moskosvkiy District of St Petersburg, had been recognised as a victim in the criminal case, the judgement on which the Government mentioned in § 60 of their written observations. Moreover, the judgement, as that Government themselves pointed out, had been passed on 24 July 2018, i.e. even before the decision of the Moskovskiy District Court of St Petersburg of 15 October 2018 to reclaim the applicant's flat from her possession. In any case, if the Government believe that there are real prospects for recovering damages from criminals, then the authorities are not deprived of the opportunity to try to exercise them - after the applicant has been compensated for the damage caused to her by their inaction, or even before that.

As for the theoretical possibility of the applicant bringing claims against M., from whom she purchased the flat, it is in fact a question of shifting the burden of responsibility from one *bona fide* purchaser to another *bona fide* purchaser, which would in no way improve the balance between the public interest and the need to protect individuals' rights, the upsetting of which is the subject of the case before the Court (see *Gladysheva v. Russia*, no. 7097/10, § 81, 6 December 2011). Whereas as regards the theoretical possibility of recovery of damages from criminals by *bona fide* purchaser M., there applies exactly the same reasoning as ones concerning the applicant herself: if the Government believe that there are reasonable prospects of success, they are not deprived of the opportunity of exercising them, using the full power of their machinery, which private individuals do not have.

Merits

Answer to the questions by the Court

The applicant does not dispute the formal compliance with the law and the existence of a permissible purpose when interfering with the right to respect for her property. However, as stated above, she complains that the state has placed on her an excessive individual burden of responsibility for their own mistakes made by the state body for registration of rights to real estate, which is precisely intended to provide protection against such omissions: ownership of the flat was registered twice by it - after conducting the legally prescribed checks - despite the state having information (available through the system of inter-agency cooperation) that on the date of the first of the contracts of sale, the seller was dead (and by the time of the check in the first case this information should have been available for 5 months, and in the second - plus another year), - claiming the flat from the applicant without providing her with any kind, not to mention adequate, compensation. In other words, this is a typical violation which has been recognised by the Court on many occasions (see, for example,*Gladysheva v. Russia*, §§ 64-83; *Alentseva v. Russia* , no. 31788/06, §§ 55- 77, 17 November 2016, which the Court itself referred to when raising its questions).

It should be noted, however, that the Government not only failed to substantiate in their written observations that no such violation had occurred, but they did not even mention it, or even the registration authority against which the claims were made. Instead, the Government consistently justified in their written observations that the administration of the Moskovskiy district of St Petersburg - against which no claims were made - had committed no wrongdoing. Accordingly, the Government, in particular, failed to explain why the registering authority had failed to detect the forgery of E.'s passport and why it had registered the title twice, despite having available, in advance, information that E. was dead at the time of her alleged entering into the sales contract submitted for registration (cf., for example, *Frenkel and Others v. Russia*, nos. 22481/18 and 38903/19, § 15, 6 April 2021; *Zadorozhnyy and Others v. Russia*, nos, 55025/18 and 12185/19, § 16, 6 April 2021;

Olkhovskiy v. Russia, no. 53716/17, § 28, 9 July, 2019). Nor can such explanations be found in the judicial acts in the case (copies of which are annexed to the application lodged with the Court). The Russian courts, like the Government in their written observations, considered only whether the administration of the Moskovskiy District of St Petersburg had acted in a timely manner, whether it had exercised reasonable care and diligence and whether it had committed errors or unlawful omissions that had made the applicant's purchase of the flat possible.

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