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

SECOND SECTION

DECISION

Application no. 37948/13
FINE DOO and Others
against North Macedonia

The European Court of Human Rights (Second Section), sitting on 17 May 2022 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Egidijus Kūris,
Branko Lubarda,
Pauliine Koskelo,
Gilberto Felici,
Saadet Yüksel,
Diana Sârcu, *judges,*
and Hasan Bakirci, *Section Registrar,*

Having regard to the above application lodged on 7 June 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having noted that Jovan Ilievski, the judge elected in respect of North Macedonia, withdrew from sitting in the case (Rule 28 of the Rules of Court) and that, accordingly, the President of the Section appointed Pauliine Koskelo to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 of the Rules of Court),

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix. The first applicant is a limited liability company. The second and third applicants are a married couple who owns the first applicant.

2. The Government of the Republic of North Macedonia were represented by their acting Agent, Ms D. Djonova.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Proceedings in respect of the commercial building's demolition and the changes to the construction permit and building project

4. After obtaining a construction permit from the municipality of Gazi Baba on 24 December 2010, the first applicant initiated the construction of a commercial building in Skopje.

5. On 30 and 31 May 2011 the building, which was then under construction, was subject to an inspection by the municipal building control department (*Одделение за урбанистично – градежна инспекција, Општина Гази Баба*), which commissioned an expert report from a private company to verify its findings ("the expert report").

6. On 15 July 2011 a certified building inspector (*овластен градежен инспектор*) from the building control department made a follow-up site inspection and drew up a report (*записник*), which stated that the building in question had been constructed in violation of the construction permit. In particular, the foundations of the building were 1.43 metres higher than permitted by the construction permit and, consequently, all the floors were 1.43 metres higher than originally planned. The investor had also added several concrete pillars and made other changes in violation of the permit. This was confirmed by the expert report and the follow-up site inspection.

7. On the same day the building control department issued two orders: one for the first applicant to demolish the building within five days, and another for the construction work to be brought to a complete halt. Both orders provided that an appeal could be lodged within fifteen days, but that this would not have suspensive effect.

8. On 20 July 2011 the first applicant lodged a request with the municipal authority for approval of the changes to the construction permit and the building project in view of the difference in the height of the building.

9. On 25 July 2011 the first applicant appealed against the two orders (see paragraph 7 above), arguing that the discrepancies noted between the permit and the actual building could be justified by the unexpected discovery of groundwater.

10. On 26 July 2011 the municipality upheld the demolition order of 15 July 2011 (see paragraph 7 above). The relevant decision specified that if the first applicant failed to demolish the building within the stipulated deadline, it would be forcibly demolished and all costs would be borne by the company.

11. Between 1 and 17 August 2011 the building was demolished by the building control department.

12. In the meantime, on 9 August 2011 the municipality dismissed the request of 20 July 2011 (see paragraph 9 above), as the proposed changes were contrary to the architectural urban plan (*архитектонско урбанистички план*), the urban plan (*урбанистички план*) and the decision on site conditions (*решение за локациски услови*). The said decision was upheld by the Minister for Transport and Communications. On 26 November 2012 the Administrative Court terminated the proceedings because the first applicant had withdrawn its administration action.

13. On 19 August 2011 the first applicant submitted another expert report to the second-instance administrative municipal commission, stating that the measurements taken as part of the initial expert report had been done using an inappropriate method. This subsequent expert report did not contain any new measurements.

14. On 23 and 24 August 2011 both appeals (see paragraph 9 above) were dismissed by the commission, *inter* alia, on the grounds that the first applicant had admitted that there were differences in height. The fact that it had requested changes to the construction permit also supported this assessment.

15. On 23 and 26 September 2011 the first applicant lodged two actions with the Administrative Court, challenging the demolition order and the order to stop the construction works respectively (see paragraph 7 above).

16. On 6 April and 4 May 2012 the Administrative Court dismissed both actions. It held that the building had indeed been constructed in violation of the construction permit and that the first applicant had not challenged the discrepancies but had attempted to justify them. Regarding the method used, it found that the department's findings were supported by the expert report compiled by the independent private company at its request. Lastly, it found that owing to the nature of the discrepancies between the building and the construction permit, rectification of the building work had been impossible.

17. The first applicant appealed against both decisions before the Higher Administrative Court. It contested the factual findings of the Administrative Court and the State institutions by relying on the expert report which it had submitted. It maintained that bringing the building in line with the construction permit had been possible but had never really been considered by the building control department. It submitted that it was the duty of all State bodies to apply the least damaging measure.

18. On 22 November 2012 the Higher Administrative Court dismissed both appeals, reiterating the reasoning of the Administrative Court. Both decisions were served on the first applicant on 13 December 2012.

2. Proceedings for damages initiated by company X

19. On 21 February 2012 company X, the contractor for the demolished commercial building, owned by the third applicant, instituted civil proceedings against the municipality of Gazi Baba seeking compensation for certain equipment destroyed or damaged during the demolition. On

7 June 2013 the first-instance court dismissed its claim, which was upheld by the Skopje Court of Appeal on 14 January 2015. Although possible, X did not make use of an appeal on points of law to the Supreme Court.

3. Criminal proceedings concerning the demolition

20. On 21 April 2016 the Special Public Prosecutor's Office, which had been established on 15 September 2015 with a view to investigating and prosecuting criminal offences related to and arising from the content of unlawfully intercepted communications that in 2015 were obtained and disclosed in public by the biggest opposition party at the time, opened an investigation into the demolition in question (see paragraph 11 above). The first applicant submitted audio material and related transcripts to the Court of alleged intercepted conversations between certain defendants concerning the demolition of the building in question, which the applicants claimed had been politically motivated.

21. On 25 January 2016 the third applicant and the manager of the first applicant were questioned before the Special Public Prosecutor's Office. They stated, *inter alia*, that they had suffered significant pecuniary damage as a result of the unlawful demolition. On request by the Special Public Prosecutor's Office on 2 February 2016 the manager submitted to that Office an expert report specifying the exact amount of damage suffered by the first applicant.

22. On 29 June 2017 the Special Public Prosecutor's Office indicted seven people (including the former Prime Minister and Minister of Transport and Communications, the former mayor of the municipality where the commercial building was situated and the certified building inspector that prepared the orders for the demolition and for the complete halt of the construction work (see paragraph 6 above) for abuse of office and authority for the impugned demolition alleged to have been unlawful. Some were also indicted in relation to the improper measurement of the height of the commercial building, which had led to a decision that the building was higher than in the approved projects, and which had resulted in its demolition, causing the first applicant significant pecuniary damage. The latter was established on the basis of an expert report commissioned by the Special Prosecutor's Office. On 13 November 2017 the Skopje Trial Court accepted the indictment. The proceedings are currently ongoing.

B. Relevant domestic law

1. Criminal Proceedings Act

23. Pursuant to section 114(2), if a defendant is found guilty, the court rules partially or in full on the property-related claim, and instructs the injured party to pursue the remainder of such a claim through civil proceedings. If

the evidence in the criminal proceedings is insufficient for a full or partial ruling in this regard, and if collecting additional evidence might mean an unjustified delay in those proceedings, the court shall refer the injured party to civil proceedings. Under section 114(3) it is provided that when the court delivers a judgment by which the defendant is acquitted of the charges or by which the indictment is dismissed or when, by decision, it stays the criminal proceedings, it shall instruct the injured party to pursue his or her compensation claim in civil proceedings.

2. Civil Proceedings Act

24. Under section 11(3) civil courts are bound by judgments given by criminal courts finding an accused guilty, in respect of the commission of the offence and the convicted person's criminal liability.

COMPLAINT

25. The applicants complained under Article 1 of Protocol No. 1 to the Convention that the demolition of their commercial building had been unlawful, had not served a legitimate aim and had been disproportionate.

THE LAW

26. The applicants relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' arguments

27. The Government submitted that the application was premature as the criminal proceedings, which were decisive for establishing the lawfulness of the demolition in question, and which lay at the core of the applicants' complaint, were still pending. Moreover, in the same proceedings the first and third applicants submitted a compensation claim which overlapped with their monetary claim before the Court. In their comments to the applicants' observations, the Government added that the aim of the criminal proceedings was, *inter alia*, to enable the injured parties to obtain compensation for any wrongdoing by the defendants. Lastly, the applicants had never initiated separate compensation proceedings before the domestic courts.

The Government also submitted that there had been an abuse of the right of individual application because the applicants had failed to inform the Court of the ongoing criminal proceedings and the terminated compensation proceedings initiated by company X (see paragraph 19 above). Lastly, the second and third applicants lacked victim status, as all the administrative decisions had been rendered in respect of the first applicant alone.

28. The applicants claimed that they had exhausted all the effective legal remedies. As the Special Public Prosecutor's Office had been established long after they had lodged their application with the Court, they had not been required to exhaust that remedy, which had been neither theoretically nor practically available at that time. In the criminal proceedings they were only an injured party with limited rights and limited access to the proceedings. The second applicant had never even been called to give a statement in those proceedings. The defendants might not be found guilty or the proceedings might become time-barred, which would prevent the applicants from seeking compensation in civil proceedings. In any event, where the domestic law provided for several legal avenues, the applicants had the right to choose one of them.

The applicants also denied that they had abused their right of individual application. In the criminal proceedings, as already stated, they were only an injured party, and the compensation proceedings had been instituted by company X, which was not an applicant in the present case.

B. The Court's assessment

29. The relevant general principles regarding who can claim victim status pursuant to Article 34 of the Convention and who can allege a violation of Article 1 of Protocol No. 1 to the Convention are summarised in *Ankarcrona v. Sweden* ((dec.), no. 35178/97, 27 June 2000) and *Eliseev and Ruski Elitni Klub v. Serbia* ((dec.) no. 8144/07, §§ 32-33, 10 July 2018)).

30. Turning to the present case, notwithstanding the fact that the first applicant was the sole party to the administrative proceedings mentioned above (see paragraphs 4-18 above), the Court notes that the second and third applicants, members of the same household, are its founders and co-owners (see paragraph 1 above). Thus, having regard to the absence of competing interests which could create difficulties, and in the light of the circumstances of the case as a whole, the Court considers that the applicants are so closely identified with each other that it would be artificial to distinguish between them in this context. Therefore, the second and third applicants can also reasonably claim to be victims within the meaning of Article 34 of the Convention (see, *Albert and Others v. Hungary* [GC], no. 5294/14, §§ 135--137, 7 July 2020, and *mutatis mutandis*, *KIPS DOO and Drekalović v. Montenegro*, no. 28766/06, §§ 86-87, 26 June 2018).

31. The Court considers that it is not necessary to examine the preliminary objection in respect of abuse of the right of individual application by the applicants, as the present case is in any event inadmissible for the following reasons.

32. The relevant principles as regards the exhaustion of domestic remedies are set out in *Vučković and Others v. Serbia* ((preliminary objection) [GC], no. 17153/11 and 29 others, §§ 69-77, 25 March 2014)).

33. The Court recognises that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 116, ECHR 2015; *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 116, ECHR 2015; and *Akdivar and Others v. Turkey*, 16 September 1996, § 69, Reports of Judgments and Decisions 1996 IV). In this respect, the Court observes that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, as it has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 87, ECHR 2010, with further references).

34. Turning to the present case, as regards the applicants' complaint under Article 1 of Protocol No. 1, the Court notes that the administrative proceedings provided a forum in which the administrative, followed by judicial authorities, addressed the issue of the alleged unlawful demolition of the building, but that no compensation claim was introduced at the time. However, the Court cannot but note that in addition to this, the Special Prosecution's Office lodged an indictment and that criminal proceedings are pending before the trial court against several defendants on the ground that the demolition in question had been unlawful (see paragraph 22 above). In this respect, notwithstanding the fact that criminal proceedings may not generally be the primary remedy in the context of Article 1 of Protocol No. 1, the Court notes that in the present case the pending criminal proceedings concern public officials who are suspected of having deliberately, by the exercise of their powers in an official capacity, caused significant pecuniary damage to the applicants as a result of the demolition of the commercial building in question (see paragraph 22 above). Thus, taking into account the subsidiary character of its role and the particular circumstances of the present case, the Court considers that the exception to the rule of exhaustion of the domestic remedies applies here for the following reasons.

35. Firstly, the criminal proceedings were initiated after new evidence (see paragraph 20 above), which had not been available at the time of the administrative proceedings, was brought to light. The criminal proceedings can lead to relevant findings as to whether there was any wrongdoing or an abuse of power by the persons concerned, rendering the demolition in question unlawful. Accordingly, it seems that those proceedings may have a direct bearing on the determination of the lawfulness of the demolition in question, and it is for the domestic authorities to assess this issue before the Court does. Providing a conclusion on the merits of the case could entail prejudging the outcome of the ongoing criminal proceedings. Secondly, the Court notes that a compensation claim has already been introduced within the said criminal proceedings (see paragraphs 21 and 22 above) and will be dealt with in accordance with the Criminal Proceedings Act (see paragraph 23 above). Such an action on the part of the applicants aims to provide them with a monetary redress for the alleged breach of their property rights. The criminal courts can decide the compensation claim unless the circumstances require that such a claim be referred, by those courts, to be decided in civil proceedings. For these reasons it cannot be taken against the applicants that they did not bring a separate compensation claim before the civil courts. Lastly, although not explicitly argued by the Government, the available case-law in respect of the respondent State suggests that the outcome of the criminal proceedings is not decisive for the prospect of success of the applicants' compensation claim (see, *mutatis mutandis*, *Koceski v. the former Yugoslav Republic of Macedonia* (dec.), 41107/07, §§ 26-27, 22 October 2013; *Popovski v. the former Yugoslav Republic of Macedonia*, no. 12316/07, § 43, 31 October 2013; *Sulejmani v. the former Yugoslav Republic of Macedonia*, no. 74681/11, § 42, 28 April 2016; and *Delovski v North Macedonia* (dec.), no. 56148/15, § 25, 7 July 2020).

36. Thus, having regard to the circumstances of the present case, the Court finds the applicants' complaint under Article 1 of Protocol No.1 to be premature.

37. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 June 2022.

Hasan Bakırcı Registrar	Jon Fridrik Kjølbro President

Appendix

No.	Applicant's Name	Year of birth/registration	Place of registration/residence	Representative
1.	FINE DOO	2003	Skopje	Valentin Pepeljugoski
2.	Nedjibe CANOSKA	1961	Struga	
3.	Fijat CANOSKI	1960	Struga	