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

CASE OF KOPECKÝ v. SLOVAKIA

(Application No. 44912/98)

JUDGMENT

STRASBOURG

28 September 2004

In the case of Kopecký v. Slovakia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mrs H.S. GREVE,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mr K. HAJIYEV, *judges*,
and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 7 April and 30 August 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44912/98) against the Slovak Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Juraj Kopecký ("the applicant"), on 25 August 1998.

2. The applicant, who had been granted legal aid, was originally represented by Ms R. Smyčková. He subsequently appointed Ms L. Krnčoková, a lawyer practising in Bratislava, to represent him in the proceedings before the Court. The Government of the Slovak Republic ("the Government") were represented by their Agent, Mr P. Vršanský, who was succeeded by Mr P. Kresák on 1 April 2003.

3. The applicant alleged, in particular, that his right to the peaceful enjoyment of his possessions had been violated as a result of the dismissal of the claim for restitution of his late father's property.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 February 2001 the application was declared partly admissible by the said Chamber, composed of Mr A.B. Baka, President, Mr G. Bonello, Mrs V. Strážnická, Mr M. Fischbach, Mrs M. Tsatsa-Nikolovska, Mr A. Kovler, Mr E. Levits, judges, and Mr E. Fribergh, Section Registrar.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1). In a judgment delivered on 7 January 2003, a Chamber of that Section, composed of Sir Nicolas Bratza, President, Mr M. Pellonpää, Mrs E. Palm, Mrs V. Strážnická, Mr M. Fischbach, Mr J. Casadevall, Mr R. Maruste, judges, and Mr M. O'Boyle, Section Registrar, found a violation of Article 1 of Protocol No. 1 (four votes to three). The dissenting opinion of Sir Nicholas Bratza, Mr Pellonpää and Mrs Palm was annexed to the judgment.

8. On 4 April 2003 the Government requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention and Rule 73 of the Rules of Court. A panel of the Grand Chamber accepted this request on 21 May 2003.

9. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

10. The Government filed observations on the question of a violation of Article 1 of Protocol No. 1.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 April 2004 (Rule 71).

There appeared before the Court:

(a) *for the Government*
Mr P. KRESÁK, *Agent*,
Ms M. PECNÍKOVÁ, *Co-Agent*,
Ms K. SUPEKOVÁ, *Adviser*;

(b) *for the applicant*
Mrs L. KRNČOKOVÁ,
Mr M. VALAŠÍK, *Counsel*.

The Court heard addresses by Mr Valašík and Mr Kresák as well as their replies to questions from the Court. The Court authorised the parties to submit written observations in reply to these questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. On 12 February 1959 the applicant's father was convicted of keeping, contrary to the regulations then in force, 131 gold coins and 2,151 silver coins of numismatic value. He was sentenced to one year's imprisonment. He was also fined, and the coins were confiscated.

13. On 1 April 1992, in the context of judicial rehabilitation provided for by the Judicial Rehabilitation Act 1990, the Supreme Court of the Slovak Republic (*Najvyšší súd*) quashed the judgment of 12 February 1959 and all consequential decisions, and discharged the applicant's late father.

14. On 30 September 1992 the applicant claimed the restitution of his father's coins under the Extra-Judicial Rehabilitations Act 1991 ("the 1991 Act").

15. On 19 September 1995 the Senica District Court (*Okresný súd*) granted the action and ordered the Ministry of the Interior to restore the coins to the applicant. The court established, with reference to the relevant records, that the coins had been taken away from the applicant's father on 21 November 1958 and transmitted to the Regional Administration of the Ministry of the Interior in Bratislava on 12 December 1958. On 19 December 1958 the coins had been examined by an expert and inventoried on the premises of the Regional Administration in Bratislava.

16. The relevant part of the District Court's judgment reads as follows:

> "It is true that the law requires that a person claiming restitution of movable property should indicate and show where such property is. However, in the present case the plaintiff undoubtedly has no possibility of inspecting the premises or safes of the former Public Security Regional Administration in Bratislava as he is not allowed to enter those premises. By insisting that the applicant should show that the coins are at the last known place, the Court would impose a burden of proof on him which it is practically impossible to fulfil. On the contrary ... the Ministry of the Interior neither showed that the former Public Security Regional Administration in Bratislava had transferred the coins to a different authority nor did it propose to take evidence to that effect ...
>
> The Court has established that the last time [their exact location was known] the coins ... had been held on the premises of the Public Security Regional Administration in Bratislava to which the Ministry of the Interior is a successor, and it has not been

shown that the coins were not on those premises when the Extra-Judicial Rehabilitations Act became operative, that is, on 1 April 1991."

17. On 1 December 1995 the Ministry of the Interior appealed. Its representative argued that all relevant documents had been destroyed and that the onus of proof as to where the coins had been deposited lay on the applicant.

18. On 29 January 1997 the Bratislava Regional Court (*Krajský súd*) ruled in favour of the Ministry of the Interior. It found, with reference to sections 4(1), 5(1) and 20(1) of the 1991 Act, that the applicant had failed to show where the coins had been deposited when that Act had become operative on 1 April 1991.

19. In the judgment, the Regional Court admitted that the applicant had limited possibilities of locating his father's property. It had therefore taken further evidence on its own initiative. In particular, the Regional Court noted that, in accordance with the relevant practice, the confiscated property should have been handed over to the public prosecutor and, after the relevant judgment had became final, to the financial department of the competent local government authority. The Regional Court therefore examined the criminal file concerning the case of the applicant's father. It further established that the archives of the Senica District Office, the Ministry of the Interior, the National Bank of Slovakia and the State Regional Archives in Bratislava contained no document relating to the coins in question. The Regional Court also heard a witness who had worked at the Myjava District Office of the Ministry of the Interior in 1958; the latter had no knowledge of the case, however. It did not consider it necessary to hear two other persons, one of whom had been present when the coins were inventoried and taken over by the Regional Administration, as those persons had been dismissed from service in 1958 and in 1960 respectively. Their statements would not, therefore, make it possible to establish the relevant facts of the case.

20. On 27 January 1998 the Supreme Court dismissed the applicant's appeal on points of law. It shared the Regional Court's view that the applicant had failed to produce evidence that the defendant Ministry was in possession of the coins, as required by section 5(1) of the 1991 Act.

21. In the judgment, the Supreme Court further stated:

"The allegation that the movable property in question had been taken over by an employee of the Public Security Regional Administration in Bratislava on 12 December 1958 and that ... it had been examined there by an expert on 19 December 1958 cannot suffice. Since then, a considerable period has lapsed, during which the gold and silver coins in question could have been alienated, destroyed or lost. The legislator, however, explicitly included in section 5(1) of the Extra-Judicial Rehabilitations Act the obligation to show where the movable property in question was at the time of the entry into force of that Act.

... It follows from a logical and systematic interpretation of section 5(1) of the Extra-Judicial Rehabilitations Act that a restitution claim can only concern the same property which was taken over by the State and not a different object of the same kind. Only movable property which can be individually identified by specific features which mean that it cannot be confused with other objects is therefore liable to restitution ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Judicial Rehabilitation Act 1990

22. Law no. 119/1990 on judicial rehabilitation (*Zákon o súdnej rehabilitácii*) came into force on 1 July 1990. The relevant provisions read as follows:

Section 1

"The aim of the Act is to authorise the quashing of convictions for offences where such convictions are incompatible with the principles of a democratic society respecting the political rights and freedoms enshrined in the Constitution and set out in international instruments, ... to ensure social rehabilitation and adequate material compensation for the persons [so] convicted ..."

Section 23

"...

(2) The conditions under which the provisions of this Act shall apply to claims resulting from the quashing of confiscation decisions ... as well as the manner of redress and the scope of such claims shall be defined in a special law."

B. The Extra-Judicial Rehabilitations Act 1991

23. Law no. 87/1991 on extra-judicial rehabilitations (*Zákon o mimosúdnych rehabilitáciách* – "the 1991 Act") came into force on 1 April 1991. Its preamble states that it was enacted with the aim of mitigating the consequences of certain infringements of property and other rights which occurred between 25 February 1948 and 1 January 1990. The relevant provisions of the 1991 Act read as follows:

Part 1 – General aim

Section 1

"(1) This Act aims at the mitigation of the consequences of certain infringements ... which occurred between 25 February 1948 and 1 January 1990 ... and which are

incompatible with the principles of a democratic society respecting the rights of citizens as enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights and the ensuing international covenants on civil, political, economic, social and cultural rights.

(2) This Act also lays down the conditions for submitting claims resulting from the quashing of convictions by which property was confiscated ... as well as the manner of redress and the scope of such claims."

Part 2 – Civil and administrative law

Section 3

"(1) Entitled persons [namely, persons entitled to file a claim under this Act] are all natural persons whose property passed into State ownership in the circumstances referred to in section 6 provided that they are nationals of the Czech and Slovak Federal Republic and have their permanent residence within its territory.

(2) In cases where the person whose property passed into State ownership in the circumstances referred to in section 6 has died ... the following natural persons are entitled [to claim restitution] provided that they are nationals of the Czech and Slovak Federal Republic and have their permanent residence within its territory ...

(a) the testamentary heir ... who has acquired the whole estate;

..."

Section 4

"(1) Persons obliged [to restore the property] shall comprise the State or legal persons having confiscated property in their possession on the date of entry into force of this Act ...

(2) Any natural person who [unlawfully] acquired property from the State shall also be obliged to restore such property ..."

Section 5

"(1) A person obliged [to make restitution] shall restore the property upon a written request provided that the person [claiming the property] proves that he or she is entitled to have the property restored and shows the manner in which it was taken by the State. When claiming restitution of movable property [the person concerned] is further required to show where the property is ..."

Section 13

"(1) Financial compensation may be granted to the person concerned only in respect of real property which cannot be restored ...

(2) Where the State acquired, on the basis of a judicial decision which was quashed under the Judicial Rehabilitation Act (Law no. 119/1990) ..., the entire property of a citizen and where such property did not comprise real property, the person concerned is entitled to compensation in the amount of 60,000 Czechoslovak korunas ..."

Part 3 – Criminal law

Section 19

"(1) Entitled persons are persons who were rehabilitated under Law no. 119/1990 who meet the conditions set out in section 3(1) or, where such persons are dead ... , persons set out in section 3(2) [of the Extra-Judicial Rehabilitations Act 1991]."

Section 20

"(1) The persons obliged [to restore confiscated property] shall comprise any legal person referred to in section 4(1), any natural person referred to in section 4(2) who acquired such property from the State where the State itself obtained it as a result of a judicial decision, and the competent central government authority.

(2) The persons obliged to restore confiscated property shall do so in accordance with sections 5, ... of the Act; where it is impossible to restore the property the persons concerned are entitled to claim compensation in accordance with section 13 of [this] Act."

C. Relevant domestic practice

24. In judgment no. 1 Cdo 27/94 of 25 May 1994, the Supreme Court upheld the lower courts' conclusion that movable property which could not be individually identified could not be restored under the 1991 Act. In the proceedings in question, the plaintiffs claimed restitution of a gold brick, several gold coins and banknotes which had been transferred to the State in 1950. The relevant part of the Supreme Court's judgment reads as follows:

"... on the basis of a logical and systematic interpretation of section 5(1) of the Extra-Judicial Rehabilitations Act, as amended, and after comparing that provision with other provisions [of that Act], the Court of Cassation concluded that only movable property which can be individually identified by specific features which mean that it cannot be confused with other objects is liable to restitution ... The appellants' view that objects identified by their kind but not individually may also be restored is incorrect as it is contrary to the nature and purpose of the Extra-Judicial Rehabilitations Act, the aim of which is to mitigate the consequences of certain (that is, not all) infringements of property and other rights ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

25. The applicant complained that, as a result of the dismissal of his claim, he had been prevented from peacefully enjoying his father's property. He alleged a violation of Article 1 of Protocol No. 1, which provides 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. Arguments before the Court

1. The applicant

26. The applicant argued that he had complied with all the statutory requirements for restitution of his father's property. As to the obligation under section 5(1) of the Extra-Judicial Rehabilitations Act 1991 ("the 1991 Act") to show where the property was, he produced documentary evidence indicating that the coins had been taken away from his late father and deposited on the premises of the Regional Administration of the Ministry of the Interior on 12 December 1958.

27. At the relevant time there had been no legal provision obliging the Ministry of the Interior to transfer the coins to another authority, and it had neither been shown nor argued that the Ministry of the Interior had transferred them to a different person in a lawful manner.

28. The argument that the Ministry of the Interior no longer possessed the coins was a mere allegation. In the absence of any reliable proof as to how the coins had been transferred from the Ministry's premises, that allegation could not rebut the evidence submitted by the applicant. Accepting the argument that the Ministry of the Interior no longer possessed the coins or requesting the applicant to show that, as might have been the case, the coins had been alienated from the premises of the Ministry in an

unlawful manner would in such circumstances impose an excessive burden on him, contrary to his rights under Article 1 of Protocol No. 1.

29. The applicant pointed out that the 1991 Act did not explicitly provide that it exclusively covered individually identifiable movable property or that, in cases where the property in question was sufficiently identified, restitution of movable assets of the same nature was precluded. In this context, he submitted that an expert had examined the coins on 19 December 1958 and had drawn up a detailed inventory of them, which was sufficient to identify the property in question.

30. The applicant concluded that he could legitimately expect to obtain effective enjoyment of the property claimed. He therefore had a "possession" within the meaning of Article 1 of Protocol No. 1. The dismissal of the applicant's claim amounted to an interference with his rights under Article 1 of Protocol No. 1 and failed to strike a fair balance between the public interest and the protection of his individual rights.

2. The Government

31. The Government submitted that the purpose of the 1991 Act was to mitigate the consequences of certain infringements of property rights which had occurred between 25 February 1948 and 1 January 1990. That period had ended prior to 18 March 1992, when the Convention had come into force with respect to the former Czech and Slovak Federal Republic, to which Slovakia was one of the successor States.

32. As regards movable property in particular, under the 1991 Act it could only be restored *in natura*, subject to the conditions laid down in that Act. The possibility of restoring other property of the same kind or of granting compensation for movable property was excluded.

33. The applicant's claim had been dismissed because of his failure to comply with the formal requirements laid down in the 1991 Act. In particular, the applicant had failed to show where the property taken away from his late father had been at the time that Act had come into force in 1991, as required by its section 5(1) read in conjunction with section 4(1). This shortcoming had not been remedied despite the fact that the appellate court had taken additional evidence with a view to tracing the coins. The respondent State could not be held liable under the Convention for any misappropriation of the coins which might have occurred prior to the entry into force of the Convention with respect to Slovakia.

34. As the applicant's claim fell short of the statutory requirements and since Article 1 of Protocol No. 1 did not guarantee the right to acquire property, the applicant did not have a "possession" for the purposes of Article 1 of Protocol No. 1. There had therefore been no interference with his rights under that provision. The Government considered it irrelevant that the Senica District Court had granted the applicant's action at first instance,

as that judgment had subsequently been overturned by higher courts without having acquired legal force.

B. The Court's assessment

1. Recapitulation of the relevant principles

35. The following relevant principles have been established by the practice of the Convention institutions under Article 1 of Protocol No. 1.

(a) Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right" (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, with further references).

(b) Article 1 of Protocol No. 1 does not guarantee the right to acquire property (see *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 23, § 48, and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II).

(c) An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82-83, ECHR 2001-VIII, and *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII).

(d) Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners (see *Jantner v. Slovakia*, no. 39050/97, § 34, 4 March 2003).

In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No. 1 (see, among other authorities, *Gratzinger and Gratzingerova*, cited above, §§ 70-74).

On the other hand, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the Contracting State's ratification of Protocol No. 1 (see *Broniowski v. Poland* [GC], no. 31443/96, § 125, ECHR 2004-V).

2. Application of the relevant principles to the present case

(a) General considerations

36. The Court first takes note of the general context in which the relevant legislation was adopted. Like several other States which passed over to a democratic system of government from the late 1980s onwards, the legal predecessor of Slovakia adopted a series of rehabilitation and restitution laws with a view to providing redress for certain wrongs which had been committed under the preceding communist regime and which were incompatible with the principles of a democratic society.

37. The enactment of laws providing for rehabilitation, restitution of confiscated property or compensation for such property obviously involved comprehensive consideration of manifold issues of a moral, legal, political and economic nature. In a different context, the Court has held that the national authorities of the Contracting States have a wide margin of appreciation in assessing the existence of a problem of public concern warranting specific measures and in implementing social and economic policies (see *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII).

38. A similar approach is *a fortiori* relevant as regards rehabilitation and restitution laws adopted in the above context, such as the 1991 Act. In particular, the Court reiterates that the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention. Similarly, Article 1 of Protocol No. 1 cannot be interpreted as restricting the freedom of the Contracting States to choose the conditions under which they agree to return property which had been transferred to them before they ratified the Convention (see paragraph 35 above).

39. The fact that the scope of restitution under the 1991 Act is limited and that restitution of property is subject to a number of conditions does not therefore, as such, infringe the applicant's rights under Article 1 of Protocol No. 1.

40. This does not mean that the implementation by the national authorities of the relevant legal provisions in a particular case cannot give rise to an issue under Article 1 of Protocol No. 1. However, before considering whether the way in which the relevant law was applied to Mr Kopecký interfered with his rights as guaranteed by Article 1 of Protocol No. 1, the Court must determine whether his claim for restitution amounted to a "possession" within the meaning of that provision.

(b) Whether there was an "existing possession"

41. The applicant based his restitution claim on the provisions of the 1991 Act. It was not suggested that title to the property he sought to recover vested in him without the intervention of the courts. The proprietary interest relied on by the applicant was therefore in the nature of a claim and cannot accordingly be characterised as an "existing possession" within the meaning of the Court's case-law. This was not disputed before the Court.

(c) Whether the applicant had an "asset"

42. It therefore remains to determine whether that claim constituted an "asset", that is whether it was sufficiently established to attract the guarantees of Article 1 of Protocol No. 1. In this context, it may also be of relevance whether a "legitimate expectation" of obtaining effective enjoyment of the coins arose for the applicant in the context of the proceedings complained of (see paragraph 35 above).

43. In the Chamber judgment, the majority distinguished the applicant's position from that of applicants in cases where they were excluded from the very beginning from the possibility of having the property restored in so far as it was obvious either that they failed to meet the relevant requirements or that their claim clearly fell outside the relevant law (see *Gratzinger and Gratzingerova*, cited above). In the majority's view, the finding of the Senica District Court (see paragraphs 15 and 16 above) indicated that the applicant could claim, at least on arguable grounds, that he met the relevant requirements for the restitution of his father's property. There thus existed a "genuine dispute". The applicant's claim was not therefore unsubstantiated or devoid of any prospect of success, and the applicant had a "legitimate expectation" of having his claim satisfied which justified considering it as a possession within the meaning of Article 1 of Protocol No. 1 (see paragraphs 28 and 29 of the Chamber judgment referred to above).

44. The Chamber majority's finding of the existence of a "genuine dispute" was therefore decisive for its conclusion that the applicant had a "legitimate expectation". It is consequently first necessary to examine the content of the latter notion according to the Court's case-law.

(i) The notion of "legitimate expectation"

45. The notion of "legitimate expectation" within the context of Article 1 of Protocol No. 1 was first developed by the Court in *Pine Valley Developments Ltd and Others v. Ireland* (judgment of 29 November 1991, Series A no. 222, p. 23, § 51). In that case, the Court found that a "legitimate expectation" arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was "a component part of the applicant companies' property".

46. In a more recent case, the applicant had leased land from a local authority for a period of twenty-two years on payment of an annual ground rent with an option to renew the lease for a further period at the expiry of the term and, in accordance with the terms of the lease, had erected at his own expense a number of buildings for light industrial use which he had sub-let. The Court found that the applicant had to be regarded as having at least a "legitimate expectation" of exercising the option to renew and this had to be regarded, for the purposes of Article 1 of Protocol No. 1, as "attached to the property rights granted to him ... under the lease" (see *Stretch v. the United Kingdom*, no. 44277/98, § 35, 24 June 2003).

47. In the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the "legitimate expectation" is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights.

48. Another aspect of the notion of "legitimate expectation" was illustrated in *Pressos Compania Naviera S.A. and Others v. Belgium* (judgment of 20 November 1995, Series A no. 332, p. 21, § 31). The case concerned claims for damages arising out of accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the domestic rules of tort, such claims came into existence as soon as the damage occurred. The Court classified the claims as "assets" attracting the protection of Article 1 of Protocol No. 1. It then went on to note that, on the basis of a series of decisions of the Court of Cassation, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.

The Court did not expressly state that the "legitimate expectation" was a component of, or attached to, a property right as it had done in *Pine Valley Developments Ltd and Others* and was to do in *Stretch* (see references in paragraphs 45 and 46 above). It was however implicit that no such expectation could come into play in the absence of an "asset" falling within the ambit of Article 1 of Protocol No. 1, in this instance the claim in tort.

The "legitimate expectation" identified in *Pressos Compania Naviera S.A. and Others* was not in itself constitutive of a proprietary interest; it related to the way in which the claim qualifying as an "asset" would be treated under domestic law and in particular to reliance on the fact that the established case-law of the national courts would continue to be applied in respect of damage which had already occurred.

49. In a line of cases the Court has found 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. In a case against the Czech Republic where the applicants' claim for restitution of their property under the 1991 Act failed because they had not met one of the essential statutory conditions (nationality of the respondent State), the claim was not sufficiently established for the purposes of Article 1 of Protocol No. 1. There was a difference, so the Court held, between a mere hope of restitution, however understandable that hope may be, and a "legitimate expectation", which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (see *Gratzinger and Gratzingerova*, cited above, § 73).

50. Similarly, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts. In *Jantner* (cited above, §§ 29-33), 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.

51. In *Gratzinger and Gratzingerova* and *Jantner*, which concerned claims for restitution of property, it may be considered that what was in fact in issue was not so much a "legitimate expectation" according to the principles defined in *Pine Valley Developments Ltd and Others* (see paragraphs 45-47 above), but rather whether or not the applicants had a claim amounting to an "asset" as defined in *Pressos Compania Naviera S.A. and Others* (see paragraph 48 above). In the two above-mentioned restitution cases, it could not be said that the applicants had any property rights which had been adversely affected by their reliance on a legal act. Moreover, as they failed to fulfil a statutory condition for the restitution of property, there was, unlike the situation in *Pressos Compania Naviera S.A. and Others*, no sufficiently established proprietary interest to which a "legitimate expectation" could be attached.

52. In the light of the foregoing, it can be concluded that the Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. The Court is therefore unable to follow the reasoning of the Chamber's majority on this point. On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.

(ii) The position in the present case

53. In the present case, no concrete proprietary interest of the applicant has suffered as a result of his reliance on a specific legal act. He cannot therefore be said to have had a "legitimate expectation" as defined in *Pine Valley Developments Ltd and Others*, cited above. In the light of the above analysis of the case-law, the Court has still to consider whether there was nevertheless a sufficient legal basis in support of the applicant's claim to warrant its being regarded as an "asset" in the *Pressos Compania Naviera S.A. and Others* sense.

54. Accordingly, the principal question for the Court is whether there was a sufficient basis in domestic law, as interpreted by the domestic courts, for the applicant's claim to qualify as an "asset" for the purposes of Article 1 of Protocol No. 1. In this respect, the only point in dispute is whether the applicant could be said to have satisfied the requirement that he show "where the property [was]", as laid down in section 5(1) of the 1991 Act. For his part, the applicant considered that, contrary to the findings of the Bratislava Regional Court and of the Supreme Court, he had fulfilled that requirement by showing when and how the property had been transferred to the State, as the competent authority was unable to explain what had subsequently happened to the coins.

55. In their respective decisions, the Bratislava Regional Court and the Supreme Court held that section 5(1) of the 1991 Act included an obligation to show where the movable property in question had been on 1 April 1991, when the Act had come into force. The Supreme Court further found that a claim for restitution of movable property under section 5(1) of the 1991 Act could only concern the very property which had actually been taken over by the State, and not different objects of the same nature. This decision was consistent with its earlier finding on a similar claim (see paragraph 24 above). The Regional Court and the Supreme Court held that the evidence submitted by the applicant and the further evidence taken by the Regional Court itself did not constitute sufficient proof that in 1991 the Ministry of the Interior still possessed the coins which had been taken away from his late father in 1958.

56. Having regard to the information before it and considering that it has only limited power to deal with alleged errors of fact or law committed by the national courts, to which it falls in the first place to interpret and apply the domestic law (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 540, § 59), the Court finds no appearance of arbitrariness in the way in which the Bratislava Regional Court and the Supreme Court determined the applicant's claim. There is therefore no basis on which the Court could reach a different conclusion on the applicant's compliance with the requirement in issue.

57. The Court accepts that, in the light of the wording of the relevant provisions of the 1991 Act and in the particular circumstances of the case, the applicant may not have known for certain whether or not he fulfilled the above condition for obtaining restitution. In this sense he can be said to have been in a different position from that of the applicants in *Gratzinger and* Gratzingerova, cited above, whose claims clearly fell outside the relevant law in that they were not nationals of the respondent State.

58. However, this difference is not decisive for determining the point in question. In particular, the Court notes that the applicant's restitution claim was a conditional one from the outset and that the question whether or not he complied with the statutory requirements was to be determined in the ensuing judicial proceedings. The courts ultimately found that that was not the case. The Court is therefore not satisfied that, when filing his restitution claim, it can be said to have been sufficiently established to qualify as an "asset" attracting the protection of Article 1 of Protocol No. 1.

59. It is true that the Senica District Court, which decided the case at first instance, found that it was practically impossible for the applicant to fulfil the condition concerning the precise location of the property and ordered the coins to be restored to him. The first-instance judgment was subsequently overturned, in the context of the same proceedings and without having acquired legal force, by higher courts at two levels of jurisdiction. Thus, the judgment delivered by the Senica District Court did not invest the applicant with an enforceable right to have the coins restored (see, *mutatis mutandis*, *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 59). That judgment was therefore not sufficient to generate a proprietary interest amounting to an "asset".

60. In these circumstances, the Court finds that in the context of his restitution claim the applicant did not have a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1. The guarantees of that provision do not therefore apply to the present case.

61. Accordingly, there has been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

Holds by thirteen votes to four that there has been no violation of Article 1 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 September 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Ress joined by Mrs Steiner and Mr Borrego Borrego;

(b) dissenting opinion of Mrs Strážnická.

L.W.
P.J.M.

DISSENTING OPINION OF JUDGE RESS JOINED BY JUDGES STEINER AND BORREGO BORREGO

1. When, on 1 April 1992, in the context of judicial rehabilitation, the Supreme Court of the Slovak Republic quashed the judgment of 12 February 1959 and all consequential decisions, and discharged the applicant's late father, the confiscation of the coins was annulled. The legal status quo ante was restored, and the applicant again became the owner of the coins as his father's heir. In so far as section 23 of the Judicial Rehabilitation Act of 1990 provided that the conditions under which this Act was to apply to claims resulting from quashed confiscation decisions, the manner of redress and the scope of such claims were to be defined in a special law, such a law had to observe at least as a minimum the existence of property as a consequence of the annulment of confiscations. One cannot interpret section 23 as giving *carte blanche* for any conditions in such a special law. This limitation has a direct consequence for the interpretation of the Extra-Judicial Rehabilitations Act of 1991. Since this Act lays down the conditions for submitting claims resulting from quashed convictions by which property was confiscated, as well as the manner of redress and the scope of such claims, it has to be presumed that it was deemed to respect as thoroughly as possible the existence of the property in question. This line of interpretation leads to the conclusion that, under the 1991 Act taken in conjunction with the 1990 Act, there existed for the applicant a legitimate expectation that he could not only claim in theory the return of the coins but also receive in practice any support from the State authorities in this respect.

2. It is true that a State which decides to return property which was confiscated during the communist period is free to establish the legal conditions for the restitution. The Convention does not oblige a State to return property which was confiscated at a time before the Convention came into force. If the State decides to provide for restitution, it may lay down conditions for such restitution. Nevertheless, if the person in question has already acquired a legitimate expectation as regards the return of his property, the State is not completely free in respect of these conditions. It must then observe the basic requirements of proportionality (balance between private and public interest) inherent in Article 1 of Protocol No. 1.

In the present case, the State created a legitimate expectation that the property would be returned after the annulment of the confiscation decision. The rules on the manner of redress and the scope of claims must be interpreted in the sense that they should not hinder redress and restitution more than necessary. One cannot convincingly argue that the 1991 Act provides for restitution only in exceptional cases. This is a presumption which fails to respect the very concept of rehabilitation. My argument is not that the 1991 Act did not respect this concept of rehabilitation, but that the interpretation by the courts did not fully take into account the consequences

of the fact that the annulment of the confiscation had already created a property right. The annulment is a legal act which in every respect fulfils the condition which the Court has laid down for recognition of the existence of a legitimate expectation.

3. If one is prepared to follow this interpretation of the two legal acts (for the time after the ratification of the Convention on 18 March 1992), section 5, which is relevant for the restitution of confiscated goods, has to be viewed in the light of the principle of proportionality, which encloses within the balance between private and public interests also elements of equality of arms. A burden of proof rule which ignores the fact that it is *de facto* impossible for the claimant to show where the property is because he has no possibility of inspecting the premises or safes of the former public security regional administration in Bratislava can scarcely stand the test of procedural fairness which to that extent is also inherent in Article 1 of Protocol No. 1.

If one admits that there was a legitimate expectation, then the case comes very close to the case of the Greek monasteries (see *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A). There, the Court held that the imposing of a considerable burden of proof on the applicants was not proportionate and did not preserve the fair balance between the various interests as required by Article 1 of Protocol No. 1. The creation of a presumption of State ownership shifted the burden of proof onto the monasteries in such a way as "to transfer full ownership to the State" (pp. 32-33, §§ 58 and 61 of that judgment). This situation is similar to our case, where the impossibility for the applicant to indicate where the goods are to be found would lead *de facto* to a loss of property.

4. I come to the conclusion that there was a genuine dispute because according to the Supreme Court judgment of 1992 the confiscation was annulled and the property rights restored even under the conditions of the 1991 Act. The annulment had legal force and therefore there was a legitimate expectation for the applicant that he would have a fair chance to get the coins back.

The rules on the burden of proof must be interpreted in the light of the requirements of proportionality inherent in Article 1 of Protocol No. 1 so as to make it not *ex ante* impossible for an entitled person to recover his property. Since it is not disputed that the coins came into the possession and sphere of the respondent State, the State has, in imposing such a "burden of proof", an obligation to participate by an effective and intensive investigation. One could argue that the Regional Court itself investigated, but it only had documents and one witness at its disposal. It seems obvious that no inspection of the State archives and safes took place. Furthermore, can it really be excluded that these coins have found their way into the coin collection of some museum? I have doubts whether the investigation by the Regional Court justifies the conclusion that the respondent State, in the

framework of its obligation in relation to the "burden of proof", has itself done everything necessary to show that the coins really could not be traced. Of course, there is no general responsibility of the State under the law for these movable properties but there is at least a procedural requirement inherent in Article 1 of Protocol No. 1 which the State has to fulfil. In my view, the courts of the respondent State did not fully comply with these procedural requirements.

DISSENTING OPINION OF JUDGE STRÁŽNICKÁ

To my regret, I cannot agree with the conclusion of the majority of the Court that there has been no violation of Article 1 of Protocol No. 1.

In my view, the applicant in the present case did have a "legitimate expectation" of having his restitution claim satisfied, for the following reasons.

1. The legislation on restitution was adopted with the clear intention of remedying injustices committed in the period between 25 February 1948 and 1 January 1990 ("the relevant period"). It was reflected in the purpose of the Judicial Rehabilitation Act of 1990 "...to authorise the quashing of convictions for offences where such convictions are incompatible with the principles of a democratic society respecting the political rights and freedoms enshrined in the Constitution and set out in international instruments, ... to ensure social rehabilitation and adequate material compensation for the persons [so] convicted ...". The Extra-Judicial Rehabilitations Act was adopted subsequently in 1991 with the aim of mitigating "the consequences of certain infringements of property and other rights which occurred [in the relevant period]". This Act also laid down the conditions for submitting restitution claims stemming from the quashing of convictions resulting in imprisonment and confiscation of property, and the manner and scope of redress in respect of such claims.

The legislature's intention "to satisfy restitution claims mainly in the form of restoration of the movable and immovable property *in natura* or in the form of pecuniary compensation" was also clearly expressed in the preparatory work for the above two restitution laws. If restitution of the property was not possible or if the relevant documents were not available or had been destroyed, compensation by payment of a general sum of money was envisaged. The possibility of claiming damages under the State Liability Act of 1969 was not excluded (see http://www.psp.cz/).

The restitution laws are interrelated in defining important principles for re-establishing democratic values in the former Czechoslovakia, including the rule of law and the legal protection of private property. The principle of the rule of law is one of the fundamental principles of a democratic society and is inherent in all Articles of the Convention. It presupposes, *inter alia*, that national law has to be accessible, foreseeable as to effect and precise in order to ensure legal certainty for those involved. Although it is not the Court's primary task to interpret and apply domestic law, it is certainly called upon to verify whether the way in which domestic law is interpreted and applied is consistent with the Convention.

The relevant provisions of the Extra-Judicial Rehabilitations Act laying down conditions for the restitution of property to entitled persons (section 5) are not sufficiently clear and precise as far as movable property is concerned.

It thus remains to be examined whether the interpretation and application of these provisions by the national courts was compatible with the legislature's initial intention not to exclude nationals of the country permanently residing there from restitution.

In my opinion it is contrary to the purpose of the restitution laws, on the one hand, to declare the existence of a remedy in respect of infringements of the law which took place in the relevant period and, on the other hand, to eliminate the legitimate interest of the entitled person by burdening him or her with requirements that are impossible to fulfil.

2. Having regard to the purpose of the restitution laws and the definition of an entitled person in sections 3 and 19 of the Extra-Judicial Rehabilitations Act, the present case is clearly distinguishable from the previous restitution cases of *Brežny v. Slovakia* (no. 23131/93, Commission decision of 4 March 1996, Decisions and Reports 85-B), *Malhous v. the Czech Republic* ((dec.)[GC], no. 33071/96, ECHR 2000-XII), *Gratzinger and Gratzingerova v. the Czech Republic* ((dec.) [GC], no. 39794/98, ECHR 2002-VII) and *Jantner v Slovakia* ((dec.), no. 39050/97, 4 March 2003). Firstly, those cases concerned claims for restitution of immovable property. Secondly, in those cases, obviously and from the very outset the restitution claimants had been outside the legal definition of an entitled person or the property in issue had been excluded from the scope of the restitution laws. Thirdly, in those cases, compliance with the statutory conditions for restitution (namely, citizenship and permanent residence) depended mainly on the claimants and they had a fair chance to comply with them.

However, in the instant case, the applicant clearly had the standing of an entitled person under the legal definition of section 3 of the Extra-Judicial Rehabilitations Act. This was acknowledged by the national courts at all levels.

It is my opinion that the applicant also complied with the other conditions, set out in sections 5 and 19 of the Extra-Judicial Rehabilitations Act, for having the coins restored to him.

The applicant based his restitution claim on the Supreme Court's judgment of 1992 in which his father had been fully rehabilitated. This rehabilitation included annulment of the decision on confiscation of the coins in issue.

The legal effect of rehabilitation under the Judicial Rehabilitation Act is the reinstatement of the rehabilitated person to his or her former position. Where property has been confiscated, this entails the rehabilitated person's reinstatement as the owner, who then has a claim for restitution of the property in question.

In the present case, the applicant assumed the legal position of his father under the Extra-Judicial Rehabilitations Act. He thus acquired his father's right to have the coins restored. This is one of the reasons why I cannot share the opinion of the majority of my colleagues that the rehabilitation

laws and the applicant's standing as an entitled person under the Extra-Judicial Rehabilitations Act did not suffice to generate a legitimate expectation on his part of having his claim satisfied. This claim had, after all, been accepted by the District Court as the court of first instance and was not devoid of further prospects of success.

3. The crucial point in dispute in the present case is whether the applicant fulfilled the condition of "showing where the property [was]". This condition is legally defined in a general way, without determining the point in time to which it refers.

When determining whether the applicant complied with this requirement, the Regional Court as the court of appeal and the Supreme Court as the court of cassation disregarded the fact that he had lodged his action in 1992 claiming restitution of the coins that had been confiscated in 1958, and that he was in the specific factual position of not having any knowledge of what had happened to the coins after their confiscation.

In support of his action, the applicant submitted documentary evidence showing that the coins had been transferred to the premises of the Public Security Regional Administration of the Ministry of the Interior in Bratislava. He also submitted a detailed inventory of the coins signed by two employees of the institution in question and by a sworn expert who had precisely identified the individual coins and their numismatic value. It is more than clear that the applicant had no access to the Ministry's premises with a view to tracing the coins. He therefore could not be responsible for their further movement. Similarly, as in *Vasilescu v. Romania* (judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III), the coins remained for a long period of time within the exclusive competence of the public authority responsible for storing them. Up until the findings of the Regional Court and the Supreme Court in their respective judgments of 1997 and 1998, the applicant could legitimately assume that the coins were deposited with a State institution.

As a matter of fact, the national courts accepted the applicant's standing as a person entitled to restitution and also admitted that his possibilities of locating the coins were limited. Nevertheless, in determining the case, the Regional Court and the Supreme Court interpreted the relevant law strictly and with extensive formalism and dismissed the action on the ground that the applicant had failed to comply with the condition of showing where the movable property in question was. They linked the non-fulfilment of this condition to the moment of entry into force of the Extra-Judicial Rehabilitations Act and held that only movable property which could be identified individually was available for restitution. The Regional Court and the Supreme Court thus overturned the judgment at first instance which had been in the applicant's favour. In that judgment, the District Court had, *inter alia*, pointed out: "By insisting that the applicant should show that the coins are at the last known place, the Court would impose a burden of proof on

him which it is practically impossible to fulfil. On the contrary... the Ministry of the Interior neither showed that the former Public Security Regional Administration in Bratislava had transferred the coins to a different authority nor did it propose to take evidence to that effect ...”

In my opinion, the District Court rightly concluded that the fact that the applicant had shown with which State authority the coins had been deposited at the time of their confiscation was, in the particular circumstances of the case, sufficient to consider that he had complied with the legal requirement in issue.

Furthermore, the Regional Court found that the applicable official procedure for handling confiscated property had not been complied with and that, for reasons which were attributable to the public authorities, the applicant had been unable to trace the property after it had been deposited with the Ministry. The applicant was thus deprived of any possibility of complying with the said legal requirement.

4. It should also be noted that, when seeking redress before the Slovakian courts, the applicant primarily claimed restitution of his father’s coins. In the alternative, he sought damages under the State Liability Act and under the general provisions of the Civil Code. The domestic courts, however, examined and finally dismissed his action under the restitution laws only. These laws provided for no alternative form of compensation in respect of movable property which had been taken away by the State but whose restitution *in natura* was impossible. Thus, after quashing the District Court’s judgment, the Regional Court did not determine the applicant’s alternative claim for damages under the State Liability Act, which provided for compensation in cases of maladministration. Nor did the Regional Court take any decision on the applicant’s alternative claim for damages under the general provisions of the Civil Code on unjustified enrichment. As a result, the applicant obtained no redress at all. This not only raises the question of the real effect of the restitution laws in so far as movable property is concerned, but raises an additional issue under Article 1 of Protocol No. 1 as “a total lack of compensation can be considered justifiable only in exceptional circumstances” (see *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 35, § 71).

5. The main issue in the present case concerns the question whether the applicant’s claim amounted to a “possession” within the meaning of the Court’s case-law and whether he could have had any “legitimate expectation” of realising this claim.

I cannot agree with the conclusion of the majority in paragraph 53 of the judgment that in the present case no concrete proprietary interest of the applicant has suffered as a result of his reliance on a specific legal act and that he cannot therefore be said to have had a “legitimate expectation” as defined in the Court’s consistent case-law. The notion of possession in the case-law has been extended also to claims over goods that do not amount to

ownership (security right *in rem* in *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B), and to civil claims which have not been determined (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, and *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V).

In my opinion, the applicant had a legal entitlement to recovery of the confiscated property on the basis of the Supreme Court judgment rehabilitating his father. That judgment sufficiently established a concrete proprietary interest originating from the reinstatement of the property right of the applicant's father to the confiscated coins. The applicant based his restitution claim on the restitution laws and supported it amply with the documents available. In view of the object and purpose of the restitution laws, he was entitled to believe that he had satisfied all the applicable requirements. He could not have foreseen the extent to which the Regional Court and the Supreme Court would place the onus of proof on him in the proceedings.

The applicant thus had a "legitimate expectation", within the meaning of the Court's case-law, of having his restitution claim satisfied. The dismissal of this claim amounted to an interference with his rights under Article 1 of Protocol No. 1. This interference was neither necessary, nor did it satisfy the requirement of proportionality.

6. The Court has repeatedly emphasised that the concern to achieve a fair balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole (see *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26 § 69) and that the requisite balance would not be found if the person concerned had to bear an individual and excessive burden (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 34, § 50, and *The Holy Monasteries*, cited above, p. 47, § 71).

It is in dispute whether in the present case the burden of proof could be placed exclusively on the applicant, who had legitimately relied on the public-law liability of the State authority with which the confiscated coins had been deposited. Although the national courts made an effort to find evidence of the movement of the coins in the sphere of the State's competence, I still have doubts as to whether the Ministry took sufficient and adequate steps within the meaning of the Convention with a view to tracing them.

The present case obviously features public as well as individual interests, which both appear legitimate. In my view there is, however, no way of achieving a fair balance between them if the conditions for restitution are impossible to fulfil, either as a consequence of how the legislature defined them or as a consequence of how the national courts interpreted and applied them.

7. The application of the relevant provisions of the restitution laws by the national courts shows how the State assessed the competing interests. Even accepting that the State had a wide margin of appreciation in the case, the need to maintain a fair balance means that promotion of the general interest must not impose an excessive burden on a restitution claimant.

The strict requirement by the national courts that the applicant show where the coins were located at the time of the entry into force of the Extra-Judicial Rehabilitations Act was formalistic and excessive. It was contrary to the object and purpose of the rehabilitation laws and imposed an individual and insurmountable and thus disproportionate burden of proof on the applicant, which resulted in his action being dismissed even without any material decision on the applicant's alternative claim for damages under the State Liability Act.

Thus, the object and purpose of the restitution law was not achieved in the present case. On the contrary, new infringements occurred in respect of the applicant – the humiliation suffered as a result of the unjustified frustration of his legitimate hope, and the distress caused by the litigation and the final dismissal of his claim.

On the basis of several judgments submitted by the Government after the hearing before the Grand Chamber, no consistency in the case-law of the national courts in similar cases can be established. In some of the cases referred to, movable property recorded or inventoried in State cultural institutions such as museums, galleries or libraries was restored to the entitled persons, mainly on the basis of a restitution agreement between the claimant and the State institution in question. It appears that the courts have not always insisted on the requirement of individually identifiable items as they did in the present case. It should also be noted that there are features distinguishing the present case from the case cited in paragraph 24 of the judgment (see "Relevant domestic law and practice"). In that case, the entitled persons did not identify the State institution to which the property in question was transferred, the manner of its transfer or the movable property as such.

In the Court's case-law from 2000 onwards, a tendency may be discerned to subject the application of national law to supervisory review by the Court. As regards the primary role of the national authorities in resolving the problems of interpretation of national legislation, the Court has noted that a particularly formalistic and strict interpretation cannot be compatible with the principles of the Convention (see *Platakou v. Greece*, no. 38460/97, § 43, ECHR 2001-I; *Jokela v. Finland*, no. 28856/95, § 65, ECHR 2002-IV; and *Běleš and Others v. the Czech Republic*, no. 47273/99, §§ 51 and 60, ECHR 2002-IX).

In view of these considerations, it is my opinion that the interference with the applicant's rights under Article 1 of Protocol No. 1 did not achieve a fair balance between the demands of the general interest and the

requirements of the protection of his individual fundamental rights.