Ontvankelijkheidsbeslissing. Eigendomsrecht. Er is geen sprake van gerechtvaardigde verwachtingen indien het besluit omtrent vergunningverlening niet onherroepelijk is. De onduidelijkheid van de wet- en regelgeving doet hier niet aan af. Klacht niet-ontvankelijk

Barkhuysen, T.; Emmerik, M.L. van

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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
17 december 2013, nr. 49893/07
(I. Ziemele, G. Nicolaou, L. Bianku, Z. Kalaydjieva, V.A. De Gaetano, P. Mahoney, R. Spano)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 6, 13 EVRM; art. 1 EP EVRM

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Ontvankelijkheidsbeslissing. Eigendomsrecht. Er is geen sprake van gerechtvaardigde verwachtingen indien het besluit omtrent vergunningverlening niet onherroepelijk is. De onduidelijkheid van de wet- en regelgeving doet hier niet aan af. Klacht niet-ontvankelijk.

Klagers in deze zaak zijn de Bulgaarse projectontwikkelaar Crash 2000, twee Bulgaarse burgers die dit bedrijf in eigendom en beheer hebben, alsmede 70 niet-Bulgaarse individuen die met het bedrijf voorovereenkomsten hebben gesloten voor de koop van appartementen. In april 2005 heeft Crash 16.000 m2 landbouwgrond gekocht in de gemeente Tsarevo met het doel daar appartementen te bouwen om deze vervolgens te verkopen aan buitenlandse toeristen. Tien jaar eerder, in januari 1995, heeft de minister voor Milieu en Water in een regeling (niet specifiek begrensde) delen van de gemeente Tsarevo aangemerkt als onderdeel van het als natuurgebied beschermde nationaal park 'Strandzha'. De minister heeft niet voorzien in een beheerplan voor dit gebied.

Crash heeft na de koop van de landbouwgrond de gemeente verzocht om de bestemming te wijzigen naar bebouwbare grond voor een vakantieresort. De hoofdarchitect van de gemeente en de gemeenteraad van Tsarevo hebben Crash geïnformeerd dat hiervoor toestemming is vereist van het ministerie. Hierna heeft Crash het ontwikkelingsplan ingediend bij de Regionale Inspectie van het ministerie. Deze heeft bevestigd dat de landbouwgrond binnen het beschermde natuurgebied is gesitueerd en dat de minister moet beslissen of een milieueffectrapportage nodig is. Het ministerie deelde in juli 2005 schriftelijk mee dat een milieueffectrapportage nodig was alvorens het project kon worden goedgekeurd. In oktober 2005 berichtte het ministerie echter dat geen milieueffectrapportage nodig was en dat het project van Crash was goedgekeurd. De burgemeester keurde in november 2005 het ontwikkelingsplan goed, waarna de bestemming van de landbouwgrond werd gewijzigd. De gemeente Tsarevo heeft in januari 2006 vergunningen afgegeven voor de bouw van tien gebouwen.

De bouw van de appartementen moest echter al snel weer stopgezet worden. Het bestuur van het nationaal park 'Strandzha', dat toezicht houdt op bouwactiviteiten in beschermde gebieden, beval in februari 2006 de bouw op te schorten. Crash heeft dit besluit aangevochten, eerst bij het staatsbosbeheer, vervolgens bij de regionale rechtbank en ten slotte bij de hoogste bestuursrechter. Een dag nadat het schorsingsbesluit was genomen, heeft het ministerie een derde brief gestuurd waarin is meegedeeld dat Crash toch een milieueffectrapportage moet uitvoeren. De Regionale Inspectie van het Ministerie heeft binnen één week de bouw opgeschort. Crash is ook tegen dit besluit in (hoger) beroep gegaan.

De regionale rechtbank oordeelde in november 2006 dat de bouwwerkzaamheden niet waren toegestaan onder de Wet beschermde gebieden 1998. Volgens de rechtbank betekende het feit dat er geen beheerplan bestond voor het park niet dat er een 'carte blanche' was om te bouwen. Dit oordeel bleef in hoger beroep overeind. De hoogste bestuursrechter oordeelde dat de verleende toestemming voor het ontwikkelingsplan van Crash niet kon worden begrepen als een toestemming om te bouwen. In de parallelle (hoger)beroepsprocedure tegen de Regionale Inspectie van het Ministerie oordeelde de hoogste bestuursrechter dat de bouw van de appartementen moest worden stopgezet totdat de wettelijk verplichte milieueffectrapportage uitgevoerd was.

Rond dezelfde periode — in november 2006 — zijn de bouwvergunningen, wegens strijdigheid met het recht en het ontbreken van een milieueffectrapportage vernietigd door de regionale toezichthouder voor bouw. Ook tegen deze beslissing is Crash tevergeefs in beroep en hoger beroep gegaan: er was geen milieueffectrapportage gemaakt en niet alle benodigde vergunningen waren verkregen ten tijde van de bouw van de appartementen. Het bevel van de regionale toezichthouder tot opschorting van de bouw hield stand bij de hoogste bestuursrechter.

Naast Crash is ook de gemeente Tsarevo naar de rechter gestapt. In december 2006 heeft de gemeente de hoogste bestuursrechter verzocht om de onduidelijke ministeriële regeling uit 1995 te vernietigen. Crash heeft zich bij deze zaak als mede-eiser gevoegd. Crash en de gemeente werden in het gelijk gesteld en de regeling werd in juni 2007 vernietigd. De minister ging echter in beroep bij de grote kamer. Een maand na deze uitspraak is de Wet op de beschermde gebieden 1998 gewijzigd. De nieuwe bepaling luidt dat alle besluiten omtrent nationale parken en beschermde gebieden die vóór 20 juni 2007 waren genomen niet meer appellabel zijn en dat alle lopende zaken hieromtrent afgesloten zouden moeten worden. Gelet hierop heeft de grote kamer van de hoogste bestuursrechter de uitspraak uit juni 2007 vernietigd en de zaak gesloten.

De klagers wenden zich tot het EHRM. Met betrekking tot ontzegging van de toegang tot de rechter door de wetswijziging van de Wet op de beschermde gebieden 1998 beroepen zij zich op artikel 6, eerste lid, EVRM in samenhang met artikel 13 EVRM. Zij beroepen zich ook op deze artikelen vanwege 'de oneerlijke schorsing' van de bouw door het bestuur van het nationaal park in februari 2006. Daarnaast voeren de klagers aan dat de beperking van hun bouwrechten in strijd is met artikel 1 EP EVRM.

Volgens het Hof zijn de beperkingen om te bouwen op de landbouwgrond geen schendingen van artikel 1 EP EVRM, omdat geen sprake is van eigendom in de zin van dat artikel. Het Hof overweegt dat er eigendom bestaat, indien de eigendomsrechtelijke claim is gebaseerd op gerechtvaardigde verwachtingen die een voldoende basis hebben in het nationale recht (die dus het recht om te bouwen van de klagers bevestigen). Er is echter geen sprake van gerechtvaardigde verwachtingen als er een geschil bestaat over de juiste interpretatie en toepassing van het nationale recht en de verzoeken van de klagers als gevolg daarvan zijn afgewezen door de nationale rechters. In concreto overweegt het Hof dat de situatie van de klagers anders is dan die in de arresten Pine Valley t. het VK en Stretch t. het VK waar de klagers konden afgaan op de juistheid van de bestuursbesluiten en niet konden voorzien dat deze besluiten met terugwerkende kracht zouden worden aangetast. De voorliggende situatie betreft echter geen onaantastbaar besluit omtrent de bouw op een beschermd grondgebied. De klagers waren bovendien bekend met de regels uit de ministeriële regeling 1995. De onduidelijkheid van de begrenzing van het beschermd grondgebied en het ontbreken van een beheerplan doen hier niet aan af. De klagers zijn immers uitdrukkelijk gewaarschuwd dat de uitvoering van het ontwikkelingsplan afhankelijk is van het oordeel van het ministerie over de vraag of de gekochte grond onder het beschermd gebied valt. Ook mag volgens het Hof van een competente ondernemer worden verwacht dat hij zich — alvorens hoge investeringen te doen — zekerheid verschaft over de rechtmatigheid van alle fasen van het project. De uitgaven die zijn gedaan, terwijl via diverse besluiten en uitspraken al bekend was dat de bouw van de appartementen onrechtmatig is, komt dus voor eigen rekening.

Het Hof oordeelt verder dat artikelen 6 en 13 EVRM in deze omstandigheden geen toepassing vinden. De klagers hebben geen burgerlijk recht verkregen en de beweringen van de klagers betreffen geen verdedigbare stelling ('arguable claim') terzake van een dergelijk recht. De 70 individuen zijn eveneens niet-ontvankelijk: zij hebben niet alle nationale rechtsmiddelen uitgeput.

Het Hof verklaart het verzoek van de klagers niet-ontvankelijk.

Crash 2000 OOD e.a.,
t.
Bulgarije.

(...)

The Law

A. Complaints under Article 1 of Protocol No. 1 to the Convention

52. All the applicants complained under Article 1 of Protocol No. 1 on a number of counts. Article 1 of Protocol No. 1 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."

1. Complaint about the effect of the 1995 ministerial order and the orders of 9 February 2006 and 14 November 2006

53. The applicants complained in the first place about a breach of their right to use their property as a result of the 1995 ministerial order. They claimed in particular that, because the order had been unclear about the exact territories covered by it, neither could the company peacefully use its agricultural land or build on it, nor could the seventy individual applicants buy and use their apartments.

54. The Court must first determine whether Article 1 of Protocol No. 1 is applicable in the instant case. It reiterates that this provision protects 'possessions', which 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. It does not, however, guarantee the right to acquire property (see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 61, ECHR 2007-…; *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). Where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a 'legitimate expectation' if there is a sufficient basis for the interest in national law, for

example where there is settled case-law of the domestic courts confirming its existence (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-…; and *Kopecký*, cited above, § 52). 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 (see *Anheuser-Busch Inc.*, cited above; *Kopecký*, cited above, § 50).

55. The Court must examine whether there was an interference with the peaceful enjoyment of the applicants' possessions. It observes that the situation in the present case is distinct from that in the cases of *Pine Valley Developments Ltd and Others v. Ireland* (judgment of 29 November 1991, Series A no. 222) and *Stretch v. the United Kingdom* (no. 44277/98, 24 June 2003), where the Court found that the applicants had acquired 'legitimate expectations' within the meaning of the court's case-law under Article 1 of Protocol No. 1. In both these cases the Court found that the persons concerned were entitled to rely on legal acts, which they could not expect to be retrospectively invalidated to their detriment. In contrast with these cases, in the instant case the applicants had acquired land, the allocation of which was subject to further proceedings concerning protected territory and there was no final legal act granting the company a right to build on it. This conclusion is supported by the findings of the Supreme Administrative Court in the proceedings in which 'Crash 2000' OOD challenged the suspension orders of 9 and 16 February 2006, namely that the company had not met all the conditions required in law for it to build lawfully (see paragraph 17 above); it is also supported by the court's findings in the proceeding quashing the permits as null and void (see paragraph 25 above).

56. The Court notes that, as in the case of *Harovschi v. Moldova*, (dec.), no. 33852/04, the applicant company's claim to a right to build, pursuant to the January 2006 permits issued by the municipality's chief architect, depended on the outcome of the proceedings contesting its lawfulness. In these circumstances it cannot be argued that the applicant company had obtained a legal ground for its claimed right to build on the land in question. Since the domestic courts found that the suspension of the permits had been lawful, the Court sees no reason to find otherwise. It is therefore not satisfied that the applicant ever acquired a right to build. Consequently, the order of 9 February 2006 did not represent an interference with the applicant's right to peaceful enjoyment of its possessions.

57. The Court then observes that in 2005 the applicant company acquired from private third parties agricultural land on which it intended to build. The Court notes that the fact of owning a piece of land does not in itself guarantee a right to build on it as the owner deems fit. According to the court's established case-law, the national authorities exercise inevitable discretion in their choice and implementation of planning policies and in that context they enjoy a wide margin of appreciation (see, for example, *Buckley v. the United Kingdom*, 25 September 1996, § 75, *Reports of Judgments and Decisions* 1996-IV; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 70, ECHR 2004-III; *Lay Lay Company Limited v. Malta*, no. 30633/11, § 83, 23 July 2013). The Court notes in that connection that, at the time the applicant company acquired the land, the ministerial order of 1995 had been in force for about ten years. At the time of purchase the company knew, or should have known, that the land it bought could have been part of the protected territory declared as such by the ministerial order. The company did not claim that there had been any obstacles before it which prevented it from clarifying the status of the land and in particular whether it had been possible to build on it before the purchase. Therefore, the Court finds that there was no interference with the property rights of the applicant company within the scope acquired by them when they bought the land. The applicant company does not allege that its land has been expropriated and it has been able at all times to use the property on the same conditions as when it bought it (see on that point *Łącz v. Poland* (dec.), no. 22665/02, 23 June 2009).

58. The question which arises in the case is whether, in purchasing the land in question, the applicant company also acquired a proprietary interest, or any right to construct on the land, which could be said to have the nature of a claim in national law, obtained as a result of this transaction (see paragraph 54 above), or at some point after the purchase of the land (see *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, § 74(c), ECHR 2005-V, and *Kopecký*, cited above, § 35 (c)).

59. In this regard also the Court finds that the circumstances of the present case are clearly distinct from the ones in the cases of *Pine Valley* and *Stretch* (see paragraph 55 above) and in a series of cases against Poland (see *Skibińscy v. Poland*, no. 52589/99, 14 November 2006; *Rosiński v. Poland*, no. 17373/02, 17 July 2007; *Skrzyński v. Poland*, no. 38672/02, 6 September 2007; *Pietrzak v. Poland*, no. 38185/02, 8 January 2008 and *Buczkiewicz v. Poland*, no. 10446/03, 26 February 2008), in which the Court found a violation of Article 1 of Protocol No. 1 to the Convention where long-standing owners of plots of land were adversely

affected by subsequently adopted local development plans.

60. The Court observes that in 2005, when the applicant company bought the land with the aim of constructing on it, it was not clear what the precise boundaries of the protected territories subject to a special building regime were. While the borders were meant to be defined in the plan for the management of the park, no such plan was adopted, at least until the time when the applicant bought the land and sought to build on it. This situation involved uncertainty as to whether the applicant company could reasonably expect to carry out its investment plans.

61. The Court finds regrettable the lack of clarity about the exact boundaries of the territory designated as protected. In that context, it should be stressed that lack of clarity — be it legislative, administrative or arising from practices applied by the authorities — is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see *Beyeler v. Italy* [GC], no. 33202/96, §§ 110, 114 and 120, ECHR 2000-I; *Sovtransavto Holding v. Ukraine*, no. 48553/99, §§ 97-98, ECHR 2002-VII; *Broniowski v. Poland* [GC], no. 31443/96, § 151, ECHR 2004-V; *Plechanow v. Poland*, no. 22279/04, § 102, 7 July 2009; *Potomska and Potomski v. Poland*, no. 33949/05, § 66, 29 March 2011).

62. However, the Court notes from the documents submitted by the applicants that they were clearly aware of the order's existence and, consequently, of the legal conditions for lawful construction on the protected territory. The applicant company was explicitly warned of the legal position in respect of the property and the complications involved in obtaining lawful building permits on account of the designation of this land (see paragraphs 8, 9 and 11 above). Being aware of the fact that their investment plan for the acquired land was dependent on the clarification of whether or not this land was encumbered with restrictions pursuant to the ministerial order of 1995 at the time when they bought it, the applicant company cannot hold this uncertainty against the authorities (see, *mutatis mutandis, Allan Jacobsson v. Sweden (no. 1),* 25 October 1989, §§ 60–62, Series A no. 163; and, *Fredin v. Sweden (no. 1),* 18 February 1991, § 54, Series A no. 192).

63. In this regard the applicants rely on their attempts to obtain a right to build notwithstanding the Minister's order designating the territory as protected territory. This could not absolve the applicant company from the obligation to establish, in accordance with the applicable domestic law, what the pertinent regime for building on protected territory was and comply with it. It is the role of a competent entrepreneur to ensure that he or she is in possession of all relevant information before investing or conducting transactions, as well as to ensure that the transactions and investment are fit for purpose. The applicants' own responsibility in this respect cannot be transferred to the State, nor can their apparent failure to comply with the relevant legal framework. Before incurring heavy investment-related expenditure as they did, the applicants should have at all stages ensured that their actions were in full conformity with domestic law.

64. The applicants initiated, or were involved in, procedures for the reclassification of the land (see paragraph 8 and 13 above), for obtaining the Ministry's permission for the implementation of their project (see paragraphs 10 and 11 above), and for the exclusion of the land from the boundaries of the protected territory (see paragraph 10 above).

65. However, the fact that after the applicant company had purchased the land the local authorities allowed the reclassification of the land did not change the applicable legal requirements for building in protected territories (see paragraph 8 above). At the time when the local authorities issued the acts falling within their competence, they repeatedly signalled to the applicant company that the lawfulness of its building depended on the findings of the national authorities as to whether the possibility of construction on the land in question still required the approval of the central government bodies.

66. The applicant company further relies on the letter of a deputy minister stating that it was not necessary to carry out an environmental impact assessment for the investment project (see paragraph 12 above) and on the subsequent steps of the local municipality authorities to issue building permits for this project (see paragraph 13 above). In this respect the Court notes that the letter in question did not in itself repeal the ministerial order of 1995 so as to remove the uncertainty as to the exact boundaries and territory of the national park, nor was this impact assessment the only necessary permission required for valid and lawful permits for construction in protected territories (see paragraph 11 above). Furthermore, the issued permits had no final nature and were not only open to contestation, but were in fact contested, *inter alia,* on the grounds that they were issued in the absence of further approvals required for their validity (see paragraph 23). The Court notes that the letter of the Deputy Minister of 17 October 2005 was followed by another one — issued on 10 February, confirming the need of an environmental impact assessment (see para-

graph 17) and that the issued permits were followed by the almost immediate reaction of the Directorate of the 'Strandzha' national park, contesting these permits on such grounds. As a result of these reactions, these permits were quashed by final decisions of the Supreme Administrative Court of 2008 and 2009 (see paragraph 25 above), resulting in the demolition of the already carried out constructions by the applicant company, upheld by the Supreme Administrative Court in final decisions of 2012.

67. The Court is struck by the fact that in the meantime and despite the orders to suspend the enforcement of the issued permits, the applicant company continued to invest, apparently in the hope that, where confronted with a *fait accompli*, the permits issued by the local authorities would be approved by a final decision despite the lack of approval by all competent central authorities. However, the national courts declared them unlawful and this Court is not competent to hold otherwise.

68. In these circumstances the Court concludes that the applicant company had not obtained a right to construct on the acquired land in accordance with the applicable domestic law, which was capable of characterising such a right as a 'legitimate expectation' within the meaning of Article 1 of Protocol No. 1 of the Convention either at the moment of acquisition of the property, or at any subsequent moment.

69. The applicants' own responsibility in carrying out construction in the absence of valid permits cannot be transferred to the State, nor can their apparent failure to comply with the relevant legal framework be seen as a matter attracting State responsibility. Before incurring heavy investment-related expenditure as they did, the applicants should have at all stages ensured that their actions were in full conformity with domestic law. The company cannot therefore claim that any losses it may have subsequently incurred were the result of intervention by the authorities.

70. In conclusion, the Court finds that neither the purchase of the land nor its subsequent reclassification, or the permits issued by the local authorities and lawfully annulled (see paragraph 25 above), were sufficient to create for the applicant company a right to build determined in accordance with the applicable domestic law, or a 'legitimate expectation' to do so within the meaning of Article 1 of Protocol No. 1 to the Convention.

71. It follows that the complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

72. The same findings apply as regards the identical complaints brought by the two individual applicants who own and manage the company.

73. As to the identical complaints under Article 1 of Protocol No. 1 brought by the seventy individuals in their personal capacity, the Court notes that Article 35 § 1 of the Convention provides:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

74. It is a fundamental principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to first use the remedies provided for by the national legal system (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, Reports 1996-IV; and *Demopoulos and Others v. Turkey* (dec.) [G.C.], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, § 69, 1 March 2010).

75. The Court observes that the seventy individual applicants did not claim that they had even attempted to assert their rights, in as much as those arise out of the preliminary contracts they had concluded with the applicant company, at the national level before turning to the Court. Bulgarian law provides for the possibility of claiming damages for breach of contract which the individual applicants could have done. In any event, in the light of its finding that the applicant company did not have a right to build on the plots in question, the Court concludes that the responsibility of the State cannot be engaged under Article 1 of Protocol No. 1 as a result of the acts or omissions of the applicant company vis-à-vis the seventy individual applicants.

It follows that the above complaints must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Other complaints under Article 1 of Protocol No. 1

76. The applicant company also complained under Article 1 of Protocol No. 1 that it could not deliver on its contractual undertaking vis-à-vis ninety-three individuals with whom it had concluded preliminary contracts for the sale of apartments.

77. The Court notes that the applicant company had signed preliminary contracts for the

sale of apartments with many of the ninety-three individuals before it bought the land, and before any application had been made for converting the land from agricultural to land for building. In any event, the facts complained of were not the result of an exercise of governmental authority, but concerned exclusively relationships of a contractual nature between private individuals, namely the applicant company and the potential buyers of apartments. In the court's opinion, any repercussions on the applicant's ability to deliver on its contractual undertaking that might have been caused as a result of its business decisions were not such as to bring Article 1 of Protocol No. 1 into play (see *Gustafsson v. Sweden*, 25 April 1996, § 60, *Reports of Judgments and Decisions* 1996-II).

78. The applicant company finally complained under Article 1 of Protocol No. 1 that it had no effective domestic remedy for obtaining compensation for the damage it sustained as a result of the impossibility for it to build. In that vein, the applicants also relied on Article 14, read in conjunction with Article 1 of Protocol No. 1.

79. The Court considers that the above complaints would be best examined under Article 1 of Protocol No. 1 and that no separate issue arises under Article 14. It then notes that, as it can be seen from the national courts' practice, a remedy exists at national level for obtaining compensation in cases in which building permits have been revoked. The Court cannot speculate as to the outcome of such a potential claim by the applicants.

80. In conclusion, it follows from the above that the remaining complaints under Article 1 of Protocol No. 1 must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Complaints under Article 6 § 1 of the Convention

1. Complaint concerning paragraph 7 (a) of the transitional and concluding provisions of the Protected Territories Act

81. All applicants complained that, as a result of the introduction of paragraph 7 (a) of the Transitional and Concluding Provisions of the Protected Territories Act 1998, they were deprived of access to a court in order to protect their property rights from the arbitrary limitations imposed with the ministerial order of 1995. They relied on Article 6 § 1, the relevant parts of which read as follows:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing … by a … tribunal" …

82. The Court observes that the 1995 ministerial order which declared 'Strandzha' national park protected territory concerned matters of general policy in the public interest of environmental protection. This order was the source of restrictions on construction and generated uncertainty as to the applicant company's prospective possibilities lawfully to carry out its investment plans. In 2006 it was challenged in court by the municipal authority, joined by the applicant company in the proceedings. These proceedings were discontinued before their finalisation as a result of the adoption of the above-mentioned legislative amendments (see paragraph 28 above), leaving the said ministerial order valid at all times throughout the period examined by the Court.

83. The Court reiterates the finding in its settled case-law that the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In matters of urban and regional planning policies the domestic policy-maker is afforded a particularly broad margin of appreciation in the taking of its decisions (see paragraph 57 above). Similarly, the Court has often reiterated that environmental conservation policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake (see *Depalle v. France* [GC], no. 34044/02, § 84, ECHR 2010 and, *mutatis mutandis, Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 70, ECHR 2004-III; *Alatulkkila and Others v. Finland*, no. 33538/96, § 67, 28 July 2005; *Valico S.r.l. v. Italy* (dec.), no. 70074/01, ECHR 2006-III; and *Lars and Astrid Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008).

84. In that context, the Court notes that the Convention does not guarantee access to a court to challenge policy decisions *per se*; it requires that applicants be given access to a court to protect their interests in cases involving interference with a particular and established individual civil right, in respect of which they have an arguable claim that there has been an unlawful interference (see, *mutatis mutandis, Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 54, ECHR 2000-IV). The Court recalls its finding above under Article 1 of Protocol No. 1 to the Convention that the applicants did not have any established right or legitimate expectation to consider themselves eligible to build on the territory in question at any time and that, therefore, the ministerial order issued ten years prior to the acquisition of their land did not interfere with such a right. It then observes that the legislative amendment of July 2007 had, *inter alia*, the effect of removing the possibility of challenging in court existing

administrative acts, including ministerial orders concerning protected territories, such as the one in issue. While it might have given the impression of interfering with pending judicial proceedings, the fact remains that it is for the State to choose the means by which it puts into effect its national policies in such matters. It is important to note in this regard that the new amendment was a general policy measure which sought to achieve the essential purpose of protecting the environment. It did not specifically target any particular pending judicial proceedings, although inevitably such proceedings were affected. Moreover, in contrast with the situation in the cases of *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 50, Series A no. 301-B, in the present case this amendment did not adversely affect any right of the applicant company established prior to the legislative changes.

85. Consequently, the fact that the applicants had no access to a court at national level to challenge the 1995 ministerial order at any moment does not raise an issue under Article 6 § 1. Insofar as the applicants have not acquired any civil right protected either by the Convention, or by domestic law, the fact that it was possible to undertake proceedings to challenge the order of 1995 during a certain period of time does not change the principle that Article 6 is not applicable to these circumstances.

86. Insofar as the applicants refer to the effect of the same legislative changes on the lawfulness of the rights allegedly acquired pursuant to the building permits issued in 2006, the applicant company had ample opportunities to have access to a court for the purposes of its protection from arbitrary or unlawful interference (see paragraphs 17 and 25 above). In fact, the subject matter of these proceedings was precisely to determine the compliance of these orders with the law. The suspension of these orders pursued the legitimate interest of preventing unnecessary losses, or damages occurring during pending proceedings.

87. The same findings apply as regards the identical complaints brought by the two individual applicants who own and manage the company.

88. As regards the identical complaints brought by the seventy individual customers of the applicant company, the Court observes that they were not party to the domestic proceedings and they had no actual rights to be determined in the related domestic proceedings.

89. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Other complaints under Article 6 § 1

90. The Court notes that the applicants also complained under Article 6 § 1 about the unfairness of the court proceedings brought by the applicant company against the order of 9 February 2006, suspending the construction, and against the orders of 2 and 6 July 2007, prohibiting access to those constructions.

91. The Court finds that the applicants essentially challenged the domestic courts' findings of fact and their interpretation of the law. The Court emphasises that it is not a court of appeal for decisions of national courts (see, as a recent authority, *Yordanova and Toshev v. Bulgaria*, no. 5126/05, § 65, 2 October 2012) and it is not its function to deal with errors of fact or law allegedly committed by those courts, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *Csősz v. Hungary*, no. 34418/04, § 33, 29 January 2008, and *Stoyanova-Tsakova v. Bulgaria*, no. 17967/03, § 26, 25 June 2009).

92. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 13 of the Convention

93. Finally, all applicants also complained that they had not had effective remedies at their disposal in connection with all their complaints examined above.

94. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

95. The Court finds that, as the applicants have no arguable claims under Article 6 § 1 and under Article 1 of Protocol No. 1, Article 13 does not apply. This part of the application should therefore be rejected pursuant to Article 35 §§ 3 and 4 as being incompatible *ratione materiae* with the provisions of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Noot

1. Deze ontvankelijkheidsbeslissing laat zien dat het eigendomsrecht van artikel 1 EP EVRM niet de gevestigde Nederlandse jurisprudentie doorbreekt dat iemand die bouwt op basis van een niet onherroepelijke vergunning dit op eigen risico doet (Hoge Raad 29 april 1994, *NJ* 1997/396, m.nt. M. Scheltema). Het Hof bereikt

deze conclusie via een niet altijd even strakke redenering, waarvan de oorzaak mede is gelegen in het feit dat de Bulgaarse overheid gedurende de diverse relevante procedures ook de nodige steken heeft laten vallen. Kernpunt in de redenering van het Hof is dat — ondanks de kritiek die men kan hebben op de onduidelijke begrenzing van het natuurgebied en de mogelijk tegenstrijdige signalen over de bouwmogelijkheden — het aan een prudente ondernemer is om pas te investeren in een project en te beginnen met bouwen als met voldoende zekerheid vaststaat dat dit is toegestaan. Het Hof benadrukt nog eens dat het eigendomsrecht met betrekking tot een stuk grond niet inhoudt dat de eigenaar daarmee mag doen wat hem goeddunkt. Het Hof rekent het de klagende onderneming in het bijzonder aan dat zij met bouwen is begonnen, terwijl er op dat moment geen zekerheid bestond over de bouwmogelijkheden, nu de noodzakelijke vergunningen niet onherroepelijk waren en er nog rechterlijke procedures liepen. Bovendien ging de onderneming door met investeringen terzake van het stuk grond, ondanks orders daarmee te stoppen, blijkbaar in de hoop de autoriteiten daarmee voor een *fait accompli* te stellen. Al met al concludeert het Hof dat de klager geen 'legitimate expectation' op verwerving van een eigendomsrecht in de zin van artikel 1 EP kon doen gelden. Daar komt nog bij dat de staat juist op het terrein van stedelijke en regionale planning een zeer ruime beleidsvrijheid ('margin of appreciation') geniet. De meer algemene overwegingen van het Hof (r.o. 54 e.v.) zijn overigens nuttig omdat zij nog eens inzicht bieden in de jurisprudentie over de vraag wanneer sprake is van een beschermd eigendomsrecht.

2. Bijzonder is dat het Hof in zijn maag lijkt te zitten met de klacht onder artikel 6 EVRM dat relevante wetgeving hangende een rechterlijk procedure is gewijzigd om daarmee de uitkomst daarvan te beïnvloeden. Volgens vaste jurisprudentie is dit onder artikel 6 EVRM niet toegestaan (zie bijv. EHRM 9 december 1994, *Stran Greek Refineries & Stratis Andreadis t. Griekenland*, *NJ* 1996/592, m.nt. E.J. Dommering). Het Hof ontkomt echter ten gronde aan deze conclusie in het onderhavige geval door aan te nemen dat artikel 6 EVRM toepassing zou missen. Van de rechten waarover de procedure ging, zou immers in de visie van het Hof niet kunnen worden gezegd dat zij op verdedigbare gronden bestaan, nu er ook geen 'legitimate expectation' op een eigendomsrecht in de zin van artikel 1 EP EVRM bestaat. Mogelijk ligt daarin ook de verklaring dat het Hof de klacht onder artikel 1 EP EVRM afdoet met een kennelijke ongegrondheidsbeslissing, hetgeen gelet op de feiten en gelet op de betrokkenheid van een kamer van zeven rechters niet meteen voor de hand lag. Het Hof benadrukt nog wel dat de relevante wetswijziging algemene milieudoelstellingen nastreefde en niet specifiek gericht was op enige lopende rechterlijke procedure, alhoewel dergelijke procedures er ongetwijfeld door beïnvloed werden. Bovendien overweegt het Hof dat er anders dan in de genoemde zaak *Stran Greek Refineries* in casu door de wetswijziging geen enkel vóór de wetswijziging bestaand recht van de klagende onderneming wordt aangetast.

3. Ten slotte onderstreept deze zaak (zie r.o. 61) de bijzondere aandacht voor beginselen van 'good governance'. Onder deze noemer heeft het Hof toch ook kritiek op de Bulgaarse overheid die gedurende het hele proces niet altijd tijdig, gepast en consistent heeft geopereerd. Met name het gebrek aan duidelijkheid over de begrenzing van het natuurgebied wordt door het Hof betreurd. Daaraan worden echter geen consequenties verbonden. De toepassing van de beginselen van 'good governance' leidde in andere zaken overigens wel tot resultaat voor klagers (zie bijv. EHRM 15 september 2009, *Moskal t. Polen*, *EHRC* 2009/120, m.nt. F.J.L. Pennings; EHRM 2 oktober 2012, *Czaja t. Polen*, *AB* 2013/29, m.nt. T. Barkhuysen en M.L. van Emmerik).

4. Deze uitspraak is ook gepubliceerd in *EHRC* 2014/91, m.nt. J.A.M.A. Sluysmans.

T. Barkhuysen en M.L. van Emmerik

AB 2015/21

HOGE RAAD (CIVIELE KAMER)
10 oktober 2014, nr. 13/02931
(Mrs. F.B. Bakels, A.M.J. van Buchem-Spapens, A.H.T. Heisterkamp, G. Snijders, T.H. Tanja-van den Broek; A-G mr. F.F. Langemeijer)
m.nt. S. Philipsen[*] en J.C. de Wit[**]

Art. 8 World Health Organization Framework Convention on Tobacco Control (WHO FCTC, Kaderverdrag van de Wereldgezondheidsorganisatie inzake tabaksontmoediging; Genève, 21 mei 2003); art. 94 Grondwet

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JWB 2014/362
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[*] Promovendus Onderwijsrecht aan Erasmus School of Law.
[**] Universitair hoofddocent Bestuursrecht aan Erasmus School of Law.