# Sloop illegaal gebouwde woning, eigendomsrecht, intensiteit proportionaliteitstoets art 8. EVRM versus art. 1 EP EVRM, margin of appreciation

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**INHOUDSINDICATIE**

Eigendomsrecht, Sloop illegaal gebouwde woning, Intensiteit proportionaliteitstoets art. 8 EVRM versus art. 1 EP EVRM, Margin of appreciation

**GA DIRECT NAAR**



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**SAMENVATTING**


Ivanova (klager 1) en haar partner Cherkezov (klager 2) verbouwen tussen 2005 en 2006 een huis in het dorp Sinemorets, op een stuk land dat Ivanova van haar moeder heeft geërfd. Zij verlieten hun eerdere woning in de stad Boergas omdat de kosten daar voor hen beweerdelijk te hoog waren. Ivanova heeft geen vaste baan; Cherkezov is sinds 2004 arbeidsongeschikt en ontvangt sinds 2005 een uitkering. Er ontstaat een conflict tussen Ivanova en de andere erflaters, die claimen dat zij eigenaar zijn van een groot deel van het land en van het huis dat daarop staat, en dat per 2005 door klagers wordt bewoond. In september 2011 leidt dit ertoe dat gemeenteambtenaren het huis inspecteren en vaststellen dat het zonder de daarvoor benodigde bouwvergunning is gebouwd. In september 2013 wordt het besluit genomen om het huis te slopen. Omdat Ivanova niet aannemelijk heeft gemaakt dat het huis niet illegaal zou zijn gebouwd is slopen conform de geldende regelgeving de enige gepaste sanctie, aldus de autoriteiten. In beroep stelt Ivanova dat eventuele sloop haar in aanzienlijke problemen zou brengen, aangezien dit haar enige huis is en zij niet in staat zou zijn om zich van een andere woning te voorzien. Dit bezwaar is in alle juridische procedures terzijde geschoven met een verwijzing naar de bestaande regelgeving. Alleen de Ombudsman brengt naar voren dat de formele rechtmatigheid van het sloopbevel er niet aan afdoet dat dit bevel disproportionele effecten zal hebben voor klagers. Dit advies wordt door de autoriteiten evenwel niet opgevolgd. Tot daadwerkelijke sloop van de woning is het op het moment dat het EHRM uitspraak doet nog niet gekomen.

Klagers beroepen zich op art. 8 EVRM en art. 1 Protocol 1 EVRM. Volgens vaste rechtspraak leidt sloop van een woning tot een

inmenging in de door art. 8 EVRM gewaarborgde rechten van de bewoners. Het Hof concludeert dat deze inmenging een legitiem doel heeft, te weten het bevorderen van ruimtelijke ordening en het economisch welzijn van het land. De nadruk komt daardoor te liggen op de vraag of de inmenging noodzakelijk en proportioneel is. Deze toets – zo geeft het Hof aan – is niet alleen materieel maar ook formeel van aard: het juridische kader voor het nemen en het toetsen van een sloopbesluit moet ruimte bieden voor het betrekken van de door art. 8 EVRM gewaarborgde belangen. De sloop van een woning kan niet proportioneel worden geacht indien het nationaal recht geen ruimte laat om rekening te houden met de persoonlijke omstandigheden van de betrokkenen. De rechterlijke toetsing voldoet volgens het Hof niet aan die maatstaf dat rekening gehouden dient te worden met de voornoemde persoonlijke omstandigheden, nu de nadruk daarin geheel lag op de vraag of de woning ten onrechte zonder een bouwvergunning is gerealiseerd. Evenmin voorziet het nationaal recht in een ander rechtsmiddel dat het mogelijk maakt om de proportionaliteit van het sloopbesluit te toetsen. Daarom oordeelt het Hof dat art. 8 EVRM is geschonden.

Het Hof toetst eveneens of het besluit om de woning te slopen proportioneel is in het licht van art. 1 Protocol 1 EVRM. Het concludeert dat dit artikel niet is geschonden. Ter onderbouwing van deze conclusie overweegt het Hof dat de staten grote beoordelingsruimte hebben bij het reguleren van eigendom in het kader van ruimtelijke ordening. Daarom vergt art. 1 Protocol 1 EVRM niet dat in situaties als het voorliggende geval een geïndividualiseerde toets wordt uitgevoerd.

UITSPRAAK

# I. Alleged violation of Article 8 of the Convention

45. The applicants complained that the demolition of the house in which they live would be in breach of their right to respect for their home. They relied on Article 8 of the Convention, which provides, in so far as relevant:

"1. Everyone has the right to respect for ... his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

# A. The parties' submissions

46. The Government submitted that the decision ordering the demolition of the house in which the applicants lived was lawful. It had been judicially reviewed and upheld. It was also necessary for the protection of public safety. The national authorities had a wide margin of appreciation to tackle the problem of illegal construction. The impossibility to legalise unlawful buildings had been put in place in view of the strong public interest to ensure the safety, hygiene and aesthetics of construction. The demolition of a building because it had been erected without a permit was a proportionate measure required in all cases and not capable of being eschewed at the discretion of the building control authorities. Those authorities had acted straight away when apprised of the illegality of the house inhabited by the applicants, and had not tolerated an illegal situation for a long time: the applicants had started inhabiting the house at the earliest in 2009 and the demolition procedure had started in 2011. The applicants had constructed the house knowing full well that they had not obtained the required permit. All such buildings, unless falling under the transitional amnesty provisions of the 2001 Act, were subject to demolition; the courts had inquired into that point in the applicants' case. The authorities had allowed the first applicant to comment on the intended demolition, and had invited her to comply with the demolition order of her own accord. In as much as she argued that she had no other place to live, it had to be noted that in June 2013, after the beginning of the demolition proceedings, she had donated a flat that she owned in Burgas and that, although the authorities did not have an obligation to provide the applicants, who did not belong to a particularly vulnerable group, with alternative accommodation, they had explored the possibility of settling them in a municipal flat. The second applicant was in receipt of a sufficiently high pension and the first applicant was able to work. They could thus afford to pay market rent in Sinemorets, and their personal circumstances were not as dire as they sought to paint them. The authorities had endeavoured to take all these matters into account when sending a social worker to interview the first applicant. It was equally possible to have the proportionality of the demolition reviewed in proceedings under Article 278 of the Code of Administrative Procedure 2006. The interference with the applicants' right to respect for their home was therefore proportionate. Article 8 of the Convention could not be construed as precluding the enforcement of the building regulations in respect of those who sought to flout them, or as requiring the authorities to provide persons in the applicants' situation with a place to live.

47. The applicants submitted that they had lived in the house undisturbed for nearly seven years, even though the local authorities were fully aware that it had been constructed without a permit, as the applicants had paid taxes in respect of the house and had their address registration there, and as Sinemorets was a small village. It was moreover widely known that many buildings in villages and small towns in Bulgaria had been constructed without a permit. The Ombudsman of the Republic had commented on that, saying that the authorities did not systematically combat illegal construction and had to do so pre-emptively rather than *ex post facto*. In spite of that recommendation, the only way of dealing with illegal buildings envisaged by the law was their demolition. The applicants were particularly vulnerable because the second applicant was handicapped and had a small pension, and the first

applicant had been unemployed since 2003. The only illegality affecting the house was that it had been constructed without a permit; it otherwise fully complied with the applicable regulations. The public interest did not require its demolition, which would result in rendering two elderly persons with health problems homeless. The rules governing the demolition of buildings constructed without a permit, as interpreted by the Supreme Administrative Court, did not envisage any proportionality assessment or a procedure affording proper guarantees in that respect, and did not leave any discretion to the competent authorities, which were required to enforce them regardless of individual circumstances.

## B. The Court's assessment

### *1. Admissibility*

48. The complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on other grounds. It must therefore be declared admissible.

### *2. Merits*

49. Although only the first applicant has legal rights to the house, both applicants have in fact lived in it for a number of years (see paragraphs 8 and 11 above). It is therefore "home" for both of them (see, among other authorities, *Buckley v. the United Kingdom,* 25 September 1996, § 54, *Reports of Judgments and Decisions* 1996-IV; *Prokopovich v. Russia*, no. 58255/00, §§ 36-39, ECHR 2004-XI (extracts); *McCann v. the United Kingdom*, no. 19009/04, § 46, ECHR 2008; *Yordanova and Others v. Bulgaria*, no. 25446/06, §§ 102-03, 24 April 2012; and *Winterstein and Others v. France*, no. 27013/07, § 141, 17 October 2013), and the order for its demolition amounts to an interference with their right to respect for that home (see, *mutatis mutandis, Ćosic v. Croatia*, no. 28261/06, § 18, 15 January 2009; *Yordanova and Others*, cited above, § 104; and *Winterstein and Others*, cited above, § 143).

50. The interference was lawful. The demolition order had a clear legal basis in section 225(2)(2) of the Territorial Organisation Act 2001 (see paragraphs 12 and 26 above). It was upheld, following fully adversarial proceedings, by two levels of court (see paragraphs 14 and 16 above), and there is nothing to suggest that it was not otherwise "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

51. The Court is satisfied that the demolition would pursue a legitimate aim. Even if its only purpose is to ensure the effective implementation of the regulatory requirement that no buildings can be constructed without permit, it may be regarded as seeking to re-establish the rule of law (see, *mutatis mutandis, Saliba v. Malta*, no. 4251/02, § 44, 8 November 2005), which, in the context under examination, may be regarded as falling under "prevention of disorder" and as promoting the "economic well-being of the country". This is particularly relevant for Bulgaria, where the problem of illegal construction appears to be rife (see paragraphs 41-43 above).

52. Thus, the salient issue is whether the demolition would be "necessary in a democratic society". On this point, the case bears considerable resemblance with cases concerning the eviction of tenants from public housing (see *McCann*, cited above; *Ćosic*, cited above; *Paulic v. Croatia*, no. 3572/06, 22 October 2009; *Kay and Others v. the United Kingdom*, no. 37341/06, 21 September 2010; *Kryvitska and Kryvitskyy v. Ukraine*, no. 30856/03, 2 December 2010; *Igor Vasilchenko v. Russia*, no. 6571/04, 3 February 2011; and *Bjedov v. Croatia*, no. 42150/09, 29 May 2012), and cases concerning the eviction of occupiers from publicly owned land (see *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I; *Connors v. the United Kingdom*, no. 66746/01, 27 May 2004; *Yordanova and Others*, cited above; *Buckland v. the United Kingdom*, no. 40060/08, 18 September 2012; and *Winterstein and Others v. France*, no. 27013/07, 17 October 2013). An analogy may also be drawn with cases concerning evictions from properties previously owned by the applicants but lost by them as a result of civil proceedings brought by a private person, civil proceedings brought by a public body, or tax enforcement proceedings (see, respectively, *Zehentner v. Austria*, no. 20082/02, 16 July 2009 (proceedings brought by a creditor); *Brezec v. Croatia*, no. 7177/10, 18 July 2013 (proceedings brought by the true owner of the premises); *Gladysheva v. Russia*, no. 7097/10, 6 December 2011 (proceedings brought by a municipal body); and *Rousk v. Sweden*, no. 27183/04, 25 July 2013 (tax enforcement proceedings)).

53. Under the Court's well-established case-law, as expounded in those judgments, the assessment of the necessity of the interference in cases concerning the loss of one's home for the promotion of a public interest involves not only issues of substance but also a question of procedure: whether the decision-making process was such as to afford due respect to the interests protected under Article 8 of the Convention (see *Connors*, § 83; *McCann*, § 49; *Kay and Others*, § 67; *Kryvitska and Kryvitskyy*, § 44; and *Yordanova and Others*, § 118 (iii), all cited above). Since the loss of one's home is a most extreme form of interference with the right to respect for the home, any person risking this – whether or not belonging to a vulnerable group – should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under that Article (see, among other authorities, *McCann*, § 50; *Ćosic*, § 22; *Zehentner*, § 59; *Kay and Others,* § 68; *Buckland*, § 65; and *Rousk*, § 137, all cited above). The factors likely to be of prominence in this regard, when it comes to illegal construction, are whether or not the home was established unlawfully, whether or not the persons concerned did so knowingly, what is the nature

and degree of the illegality at issue, what is the precise nature of the interest sought to be protected by the demolition, and whether suitable alternative accommodation is available to the persons affected by the demolition (see *Chapman*, cited above, §§ 102-04). Another factor could be whether there are less severe ways of dealing with the case; the list is not exhaustive. Therefore, if the person concerned contests the proportionality of the interference on the basis of such arguments, the courts must examine them carefully and give adequate reasons in relation to them (see *Yordanova and Others*, § 118 (iv) *in fine*, and *Winterstein and Others*, § 148 (d°) *in fine*, both cited above); the interference cannot normally be regarded as justified simply because the case falls under a rule formulated in general and absolute terms. The mere possibility of obtaining judicial review of the administrative decision causing the loss of the home is thus not enough; the person concerned must be able to challenge that decision on the ground that it is disproportionate in view of his or her personal circumstances (see *McCann*, §§ 51-55; *Ćosic*, §§ 21-23; and *Kay and Others*, § 69-74, all cited above). Naturally, if in such proceedings the national courts have regard to all relevant factors and weigh the competing interests in line with the above principles – in other words, where there is no reason to doubt the procedure followed in a given case – the margin of appreciation allowed to those courts will be a wide one, in recognition of the fact that they are better placed than an international court to evaluate local needs and conditions, and the Court will be reluctant to gainsay their assessment (see *Pinnock and Walker v. the United Kingdom* (dec.), no. 31673/11, §§ 28-34, 24 September 2013).

54. The Court cannot agree with the position, expressed by some Bulgarian administrative courts, that the balance between the rights of those who stand to lose their homes and the public interest to ensure the effective implementation of the building regulations can as a rule properly be struck by way of an absolute rule permitting of no exceptions (see paragraphs 26 and 37 above). Such an approach could be sustained under Article 1 of Protocol No. 1, which gives the national authorities considerable latitude in dealing with illegal construction (see paragraphs 73-76 below), or in other contexts (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106-09, ECHR 2013 (extracts), with further references). But given that the right to respect for one's home under Article 8 of the Convention touches upon issues of central importance to the individual's physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, the balancing exercise under that provision in cases where the interference consists in the loss of a person's only home is of a different order, with particular significance attaching to the extent of the intrusion into the personal sphere of those concerned (see *Connors*, cited above, § 82). This can normally only be examined case by case. Moreover, there is no evidence that the Bulgarian legislature has given active consideration to this balance, or that in opting for a wholesale rather than a more narrowly tailored solution it has taken into account the interests protected under Article 8 of the Convention (see, *mutatis mutandis, Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 89, ECHR 2013 (extracts), and contrast, *mutatis mutandis, Animal Defenders International*, cited above, §§ 114-16). On the contrary, the Ombudsman of the Republic has repeatedly expressed concern in that regard (see paragraphs 41-43 above).

55. Nor can the Court accept the suggestion that the possibility for those concerned to challenge the demolition of their homes by reference to Article 8 of the Convention would seriously undermine the system of building control in Bulgaria (see paragraph 37 above). It is true that the relaxation of an absolute rule may entail risks of abuse, uncertainty or arbitrariness in the application of the law, expense, and delay. But it can surely be expected that the competent administrative authorities and the administrative courts, which routinely deal with various claims relating to the demolition of illegal buildings (see paragraphs 26, 27, 34 and 37-39 above), and have recently showed that they can examine such claims in the light of Article 8 of the Convention (see paragraph 30 above), will be able to tackle those risks, especially if they are assisted in this task by appropriate parameters or guidelines. Moreover, it would only be in exceptional cases that those concerned would succeed in raising an arguable claim that demolition would be disproportionate in their particular circumstances (see, *mutatis mutandis, McCann*, § 54; *Paulic*, § 43; and *Bjedov*, § 67, all cited above).

56. The proceedings conducted in this case did not meet the above-mentioned procedural requirements, as set out in paragraph 53. The entire focus of those proceedings, in which the first applicant sought judicial review of the demolition order – the second applicant, not having any property rights over the house and not being an addressee of the order, would not have even had standing to take part in them (see paragraph 26 *in fine* above) – was whether the house had been built without a permit and whether it was nevertheless exempt from demolition because it fell within the transitional amnesty provisions of the relevant statute (see paragraphs 14 and 16 above). In her appeal, the first applicant raised, albeit briefly, the points that the applicants now put before the Court: that the house was her only home and that she would be severely affected by its demolition (see paragraph 15 above). The Supreme Administrative Court did not even mention, let alone substantively engage with this point (see, *mutatis mutandis, Brezec*, cited above, § 49). This is hardly surprising, as under Bulgarian law it is not relevant for the demolition order's lawfulness. Under the applicable statutory provisions, as construed by the Supreme Administrative Court, any building constructed without a permit is subject to demolition, unless it falls under the transitional amnesty provisions of the 2001 Act, and it is not open to the administrative authorities to refrain from demolishing it on the basis that this would cause disproportionate harm to those affected by that measure (see paragraphs 25-27 above).

57. The possibility, adverted to by the Government (see paragraphs 46 above and 78 below), to seek postponement of the enforcement of the demolition order under Article 278 of the Code of Administrative Procedure 2006 (see paragraph 31 above) could not have remedied that (see, *mutatis mutandis, Paulic*, § 44, and *Bjedov*, § 71, both cited above). All the applicants could have obtained in proceedings under that provision – which are conducted solely before the administrative enforcement authority rather than an independent tribunal, with no possibility for judicial review of the decisions taken in their course – would have been a temporary reprieve from the effects of the demolition order rather than a comprehensive examination of its proportionality (see

paragraph 32 above).

58. Nor does it appear that, as suggested by the Supreme Administrative Court in its judgment of 1 June 2015 in a similar case (see paragraph 30 above), it would have been possible, as matters stand, to obtain a proper examination of the proportionality of the demolition by seeking judicial review of the enforcement of the demolition order under Article 294 *et seq.* of the 2006 Code (see paragraph 35 above). Such examination could in principle be carried out in proceedings for judicial review of enforcement (see *J.L. v. the United Kingdom* (dec.), no. 66387/10, §§ 44-46, 30 September 2014). But the case-law under these provisions shows that the Bulgarian administrative courts generally decline to examine arguments relating to the individual situation of the persons concerned by the demolition. They do so either on the basis that the proper balance between their rights under Article 8 of the Convention and the countervailing public interest to combat illegal construction has been resolved at the legislative level and that demolition is the only means of tackling illegal construction, or that such points can only be examined in proceedings for judicial review of the demolition order itself (see paragraphs 37-39 above). The only court that appears to have shown some willingness to entertain such arguments in proceedings under Article 294 *et seq.* of the Code is the Pazardzhik Administrative Court, which however did so when imposing interim measures in such proceedings rather than when dealing with the merits of the cases (see paragraph 40 above). It is also unclear whether persons in the position of the second applicant, who is not the addressee of the demolition order and has no property rights over the house, would have standing to bring such a challenge (see paragraph 36 above).

59. The applicants could not have obtained a proper examination of the proportionality of the demolition by bringing a claim for declaratory judgment under Article 292 of the 2006 Code either (see paragraph 33 above). The case-law under that provision, which is only intended to prevent the enforcement of administrative decisions where newly emerged facts militate against it, shows that in such proceedings the Bulgarian administrative courts just check whether facts which have come to pass after the issuing or the demolition order or its upholding by the courts – such as a lapse of the limitation period for enforcement or an intervening legalisation of the building – could preclude enforcement (see paragraph 34 above). There appears to be no case in which the courts have allowed such a claim, and thus blocked the enforcement of a demolition order, on the basis of arguments relating to the personal circumstances of those concerned. Moreover, in the applicants' case the enforcement proceedings started less than one month after the demolition order was upheld by the courts (see paragraphs 16 and 17 above).

60. The involvement of the social services, which only occurred after notice of the application had been given to the Government (see paragraph 21 above), could not make good the lack of a proper proportionality assessment. It did not take place within the framework of a procedure capable of resulting in a comprehensive review of the proportionality of the demolition (see, *mutatis mutandis, Yordanova and Others*, cited above, §§ 136-37). In any event, even though the first applicant stated that she was not interested in social services, the Government emphasised that the authorities had no obligation to provide the applicants with alternative accommodation and did not clearly explain in what way those services would have provided the applicants with a satisfactory solution.

61. In sum, the applicants did not have at their disposal a procedure enabling them to obtain a proper review of the proportionality of the intended demolition of the house in which they live in the light of their personal circumstances.

62. The Court therefore finds that there would be a breach of Article 8 of the Convention if the order for the demolition of the house in which the applicants live were to be enforced without such review.

## II. Alleged violation of Article 1 of Protocol No. 1

63. The first applicant further complained that the demolition of the house, part of which belonged to her, would be a disproportionate interference with the peaceful enjoyment of her possessions. She relied on 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. The parties' submissions

64. The Government submitted that the complaint was incompatible *ratione personae* with the provisions of Protocol No. 1 in so far as the second applicant was concerned, because only the first applicant had title to the house. Moreover, in as much as the house had been illegally constructed without being tolerated by the authorities for a long time, it could not be regarded as a "possession" within the meaning of Article 1 of Protocol No. 1. In the alternative, the Government submitted that the interference with the first applicant's possessions was justified. The demolition, which was a measure of control of property, was lawful and would not impose an excessive burden on the applicants as their financial situation, as evident from the property disposal transactions carried out by them, was not so dire, and as they had wilfully acted in defiance of the law. Moreover, the house did not exclusively belong to the first applicant; the other co-owners of the plot were entitled to a share of it, and some of them had

objected to its construction. The legitimate aim sought to be achieved by the demolition was to enforce the building regulations, which required a permit for each newly constructed building. In constructing the house without a permit, the applicants had knowingly acted in breach of the law and had disregarded the other co-owners' interests.

65. The applicants submitted that the complaint had only been raised by the first applicant, who had legal rights over the house even though it had been illegally constructed. It was therefore a "possession". Nothing would be achieved by demolishing it. It would not benefit the other co-owners of the plot, who had displayed no wish to take care of the property and whose interests would be better served if they were allotted a share of the house. Nor would it advance the public interest, which could be vindicated by less invasive measures, such as a financial penalty. The applicants had built the house to have a place to live when they grew old. In 2005 the first applicant had approached one of the other co-owners to obtain his assent to the construction, but he had tried to wring a disproportionate amount of money out of her in exchange for that. That was why the applicants had proceeded with the construction without obtaining a permit.

## B. The Court's assessment

### *1. Scope of the complaint ratione personae*

66. It should be noted at the outset that this complaint was only raised by the first applicant. It is therefore not necessary to rule on the Government's objection in relation to the second applicant.

### *2. Admissibility*

67. The parties have diverging views on whether the first applicant has a "possession" within the meaning of Article 1 of Protocol No.1 and whether that provision is thus applicable. But in this case it is more appropriate to examine this question on the merits (see, *mutatis mutandis, Depalle v. France* (dec.), no. 34044/02, 29 April 2008, and *Yordanova and Others v. Bulgaria* (dec.), no. 25446/06, 14 September 2010). The complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on other grounds. It must therefore be declared admissible.

### *3. Merits*

68. Since in Bulgaria it is settled law that illegal buildings can be the objects of the right to property, and since the Burgas Regional Court held that the first applicant is the owner of 484.43 out of the 625 shares of both the plot and the house built on it (see paragraph 9 above), there can be no doubt that she has a "possession" and that Article 1 of Protocol No. 1 is applicable.

69. The intended demolition of the house will in turn amount to an interference with the first applicant's possessions (see *Allard v. Sweden*, no. 35179/97, § 50, ECHR 2003-VII, and *Hamer v. Belgium*, no. 21861/03, § 77, ECHR 2007-V (extracts)). Being meant to ensure compliance with the general rules concerning the prohibitions on construction, this interference amounts to a "control [of] the use of property" (see *Hamer*, cited above, § 77, and *Saliba*, cited above, § 35). It therefore falls to be examined under the second paragraph of Article 1 of Protocol No. 1.

70. The demolition order had a clear legal basis in section 225(2)(2) of the Territorial Organisation Act 2001 (see paragraphs 12 and 26 above). It was upheld, following fully adversarial proceedings, by two levels of court (see paragraphs 14 and 16 above). The interference is therefore lawful for the purposes of Article 1 of Protocol No. 1.

71. It can also be accepted that the interference, which seeks to ensure compliance with the building regulations, is "in accordance with the general interest" (see *Saliba*, cited above, § 44). At the same time, it should be noted that the demolition order, although the product of a denunciation by the first applicant's co-owners (see paragraph 11 above), was not premised on the first applicant's failure to obtain their assent for the construction of the house. It cannot therefore be regarded as intended to protect their interests (contrast *Allard*, cited above, § 52). It follows that the weight of those interests is not a pertinent consideration in this case (contrast *Allard*, cited above, § 60).

72. The salient issue is whether the interference would strike a fair balance between the first applicant's interest to keep her possessions intact and the general interest to ensure effective implementation of the prohibition against building without a permit.

73. According to the Court's settled case-law, the second paragraph of Article 1 of Protocol No. 1 must be read in the light of the principle set out in the first sentence of the first paragraph: that an interference needs to strike a fair balance between the general interest of the community and the individual's rights. This means that a measure must be both appropriate for achieving its aim and not disproportionate to that aim (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98). However, the High Contracting Parties enjoy a margin of appreciation in this respect, in particular in choosing the means of enforcement and in ascertaining whether the consequences of enforcement would be justified (see, as a recent authority, *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010). When it comes to the implementation of their spatial planning and property development policies, this margin is wide (see *Saliba*, cited above, § 45, with further references).

74. For that reason, unlike Article 8 of the Convention, Article 1 of Protocol No. 1 does not in such cases presuppose the

availability of a procedure requiring an individualised assessment of the necessity of each measure of implementation of the relevant planning rules. It is not contrary to the latter for the legislature to lay down broad and general categories rather than provide for a scheme whereby the proportionality of a measure of implementation is to be examined in each individual case (see *James and Others*, cited above, § 68, and *Allen and Others v. the United Kingdom* (dec.), no. 5591/07, § 66, 6 October 2009). There is no incongruity in this, as the intensity of the interests protected under those two Articles, and the resultant margin of appreciation enjoyed by the national authorities under each of them, are not necessarily co-extensive (see *Connors*, cited above, § 82). Thus, although the Court has in some cases assessed the proportionality of a measure under Article 1 of Protocol No. 1 in the light of largely the same factors as those that it has taken into account under Article 8 of the Convention (see *Zehentner*, §§ 52-65 and 70-79; *Gladysheva*, §§ 64-83 and 90-97; and *Rousk*, §§ 108-27 and 134-42, all cited above, as well as *Demades v. Turkey*, no. 16219/90, §§ 36-37 and 44 46, 31 July 2003), this assessment is not inevitably identical in all circumstances.

75. In the first applicant's case, the house was knowingly built without a permit (contrast *N.A. and Others v. Turkey*, no. 37451/97, § 39 *in fine*, ECHR 2005-X, and *Depalle*, cited above, § 85), and therefore in flagrant breach of the domestic building regulations. In this case, regardless of the explanations that the first applicant gave for this failure, this can be regarded as a crucial consideration under Article 1 of Protocol No. 1. The order that the house be demolished, which was issued a reasonable time after its construction (contrast *Hamer*, cited above, § 83), simply seeks to put things back in the position in which they would have been if the first applicant had not disregarded the requirements of the law. The order and its enforcement will also serve to deter other potential lawbreakers (see *Saliba*, cited above, § 46), which must not be discounted in view of the apparent pervasiveness of the problem of illegal construction in Bulgaria (see paragraphs 41-43 above). In view of the wide margin of appreciation that the Bulgarian authorities enjoy under Article 1 of Protocol No. 1 in choosing both the means of enforcement and in ascertaining whether the consequences of enforcement would be justified, none of the above considerations can be outweighed by the first applicant's proprietary interest in the house.

76. The implementation of the demolition order would therefore not be in breach of the first applicant's rights under Article 1 of Protocol No. 1.

## III. Alleged violation of Article 13 of the Convention

77. The applicants complained that they did not have an effective domestic remedy in respect of their complaint under Article 8 of the Convention. They relied on Article 13 of the Convention, which provides 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."

## A. The parties' submissions

78. The Government submitted that the applicants could have sought postponement of the enforcement of the demolition order under Article 278 of the Code of Administrative Procedure 2006 on the basis of arguments relating to their financial situation and the impossibility to obtain alternative accommodation. That did not of course mean that the authorities had an unconditional obligation to provide them such accommodation. That said, there was no evidence that the applicants had taken steps to be settled in a municipal flat.

79. The applicants submitted that a request under Article 278 of the 2006 Code was not an effective remedy. All it could achieve was a short postponement of the enforcement. The law did not envisage any way of dealing with unlawful construction other than its demolition, regardless of the degree or nature of the illegality, or the effects of the measure on the personal situation of those affected by it.

## B. The Court's assessment

80. The complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on other grounds. It must therefore be declared admissible.

81. However, in as much as the finding of a breach of Article 8 of the Convention was premised on the absence of a procedure in which the applicants could challenge the demolition of the house on proportionality grounds (see paragraphs 56-61 above), no separate issue arises under Article 13 of the Convention (see, *mutatis mutandis, Stanková v. Slovakia*, no. 7205/02, § 67, 9 October 2007, and *Yordanova and Others*, cited above, § 152).

## IV. Application of Article 41 of the Convention

82. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

## A. Damage

83. The applicants jointly claimed 2,000 euros (EUR) in respect of the distress experienced by them as a result of the alleged breaches of Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1.

84. The Government submitted that the claim was exorbitant.

85. In this case, the award of compensation can only be based on the breach of Article 8 of the Convention. However, that breach will only take place if the decision ordering the demolition of the house in which the applicants live were to be enforced, which has for the time being not happened (see paragraph 22 above). The finding of a violation is therefore sufficient just satisfaction for any non-pecuniary damage suffered by the applicants (see *Yordanova and Others*, cited above, § 171).

## B. Costs and expenses

86. The applicants claimed EUR 3,280 in respect of forty-one hours of work by their legal representative on the proceedings before the Court, billed at EUR 80 per hour, plus EUR 13.73 for postage. They requested than any award made under this head be made payable to the BHC, with which their legal representative worked (see paragraph 2 above). In support of this claim, the applicants submitted two agreements between them, their legal representative and the BHC in which it was stipulated that the applicants did not have to pay any remuneration to their representative up-front but that the representative would claim her fees, plus any related expenses, in the event of a successful outcome of the case; that, in the event of a successful outcome, the fees would in fact be paid by the BHC; and that the representative agreed that any award in respect of costs and expenses could be made payable to the BHC. The applicants also submitted a time-sheet and postal receipts.

87. The Government disputed the number of hours spent by the applicants' legal representative on the case, saying that they were excessive in view of its low complexity and the length of the submissions that she had made on the applicants' behalf. The sum claimed in that respect was many times higher than those envisaged for similar work in domestic proceedings and out of tune with economic realities in the country. The Government also pointed out that there was no evidence, such as an invoice or a payment document, showing that the BHC had actually paid any remuneration to the applicants' representative.

88. According to the Court's settled case-law, costs and expenses are recoverable under Article 41 of the Convention if it is established that they were actually and necessarily incurred and are reasonable as to quantum.

89. The first point in dispute was whether the costs claimed by the applicants were actually incurred. The applicants made an agreement with their representative and the BHC that is comparable to a contingency fee agreement whereby a client agrees to remunerate his lawyer only in the event of a successful outcome of the case. If legally enforceable, such agreements may show that the sums claimed are payable and therefore actually incurred (see *Kamasinski v. Austria*, 19 December 1989, § 115, Series A no. 168). This being the case in Bulgaria (see paragraph 44 above, and compare *Saghatelyan v. Armenia*, no. 7984/06, § 62, 20 October 2015, and contrast *Dudgeon v. the United Kingdom* (Article 50), 24 February 1983, § 22, Series A no. 59, and *Pshenichnyy v. Russia*, no. 30422/03, § 38, 14 February 2008), the Court accepts that the costs claimed were actually incurred by the applicants, even if for the time being no payments have taken place.

90. The second disputed point was whether the costs were reasonable as to quantum. The Court is not bound by domestic scales or standards in that assessment (see *Dimitrov and Others v. Bulgaria*, no. 77938/11, § 190, 1 July 2014, with further references). It simply notes that the hourly rate charged by the applicants' representative is comparable to that charged in a recent case against Bulgaria involving similar issues (see *Yordanova and Others*, cited above, § 172). It can thus be regarded as reasonable. However, having regard to the submissions made on behalf of the applicants, the Court finds that the number of hours claimed is excessive.

91. Taking into account all these points and the materials in its possession, the Court awards the applicants a total of EUR 2,013.73, plus any tax that may be chargeable to them.

92. As requested by the applicants, this sum is to be paid directly to the BHC, with which their representative works. The Court's practice has been to accede to such requests (see *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, § 309, 27 January 2015, with further references).

## C. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## For these reasons, the Court,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there would be a violation of Article 8 of the Convention if the order for the demolition of the house in which the applicants live were to be enforced without a proper review of its proportionality in the light of the applicants'

personal circumstances;

3. *Holds*, unanimously, that there would be no violation of Article 1 of Protocol No. 1 if the order for the demolition of the house were to be enforced;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds*, by six votes to one,

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,013.73 (two thousand thirteen euros and seventy-three cents), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid to the Bulgarian Helsinki Committee;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

## Partly dissenting opinion of Judge Vehabovic

I regret that I am unable to subscribe to the view of the majority that there has been a violation of Article 8 in this case.

In short, I cannot accept the approach taken by the majority that the applicants can obtain protection under Article 8 of the Convention when it appears from the facts that one of the applicants had an apartment, which was donated to her daughter only in 2013, and that the land on which the applicants had reconstructed a cabin and converted it into a solid one-storey brick house without any permission from the authorities was the subject of a property dispute between one of the applicants and other members of her family.

I disagree with the majority that the State is obliged in all circumstances to carry out a detailed review of the proportionality of each and every demolition order, even in circumstances such as these in which it is clear that the second applicant cannot prove any of his allegations and nor can he prove that either he or he and the first applicant had established a long lasting and strong connection with the premises in issue to be regarded as their home within the scope of Article 8 of the Convention. Furthermore, they could not prove that they had acted *bona fide*.

This area is *par excellence* an area in which the State enforces laws to control the use of property in the public interest (see *Depalle v. France* [GC], no. 34044/02, § 87, ECHR 2010) and in which a wide margin of appreciation applies (ibid., § 84).

It is hard to imagine the implications for the enforcement of planning regulations in other States if this judgment is to be understood as requiring a detailed proportionality review in each individual case. In this connection the Court, in the recent case of *Garib v. the Netherlands* (no. 43494/09, §§ 125-26, 23 February 2016, not yet final), found that the respondent party was, in principle, entitled to adopt the relevant inner-city housing legislation and policy. In finding thus, the Court appeared to cite with approval the existence of (and demonstrated reliance upon) a hardship clause.

This judgment does not sufficiently distinguish the facts of the present case from earlier cases concerning the enforcement of demolition orders for planning offences, which were examined under Article 1 of Protocol No. 1 and in which no violation was found, notably *Hamer v. Belgium* (no. 21861/03, ECHR 2007-V (extracts)), which concerned a building in existence for twenty-seven years before the planning offence was recorded and for a further ten years before it was demolished, and the more recent (Grand Chamber) case of *Depalle* (cited above), which concerned a family home near a public beach that had been in existence since 1969 on the basis of authorisations limited in time and which ceased with the enactment of specific coastal planning laws following which an order to demolish was made (no separate issue under Article 8).

**NOOT**

1. Na het spraakmakende arrest *Yordanova e.a.* t. *Bulgarije* (EHRM 24 april 2012, nr. 25446/06, «EHRC» 2012/149 m.nt. Henrard) is dit opnieuw een arrest waarin Bulgarije op de vingers wordt getikt in verband met de moeilijke positie van slachtoffers van maatregelen die beogen een einde te maken aan illegale bewoning. Pijnpunt in deze zaak is opnieuw, net als in *Yordanova*, het feit dat de autoriteiten bij die maatregelen te weinig ruimte laten om de bijzondere omstandigheden van de benadeelden mee te wegen. Daarmee zijn deze maatregelen in strijd met het in art. 8 EVRM gewaarborgde recht op respect voor een woning. Alhoewel de overwegingen van het Hof over art. 8 EVRM niet echt nieuw zijn, is deze zaak toch een annotatie waard, in het bijzonder omdat het Hof enkele principiële overwegingen wijdt aan de verhouding van art. 8 EVRM tot art. 1 EP EVRM.

2. De genoemde zaken maken duidelijk dat het de Bulgaarse wetgever menens is in de strijd tegen illegaal gebouwde woningen. De Territorial Organisation Act bepaalt in dit verband dat gebouwen die zonder vergunning zijn gebouwd dienen te worden gesloopt, tenzij zij vallen onder een overgangsregeling. Het gaat hier om een gebonden bevoegdheid, die bestuursorganen derhalve geen vrijheid laat om anderszins te besluiten en waarbij legalisatie niet tot de mogelijkheden behoort. Het op nationaal niveau starten van een rechterlijke procedure tegen sloopbevelen is, zoals deze zaak laat zien, al even zinloos. De hoogste bestuursrechter overwoog dat het strikte 'in beginsel slopen'-uitgangspunt laat zien dat de wetgever het belang van veiligheid, hygiëne en esthetiek van woningen hoog aanslaat en dat de mate waarin een woning niet conform de voorschriften is gebouwd irrelevant is, aangezien alle woningen die zonder vergunning zijn gebouwd sloopwaardig zijn (par. 26; zie ook par. 58). Ook andere bevoegde bestuursrechters zagen geen ruimte om de bijzondere omstandigheden van klagers mee te wegen bij hun oordeel over de

rechtmatigheid van de sloopbevelen: argumenten die zagen op de slechte gezondheid, de financiële positie van klagers en het feit dat het hun enige huis betrof, werden als irrelevant terzijde geschoven (par. 37-39). Op nationaal niveau waren daarbij ook al de art. 6 en 8 EVRM in stelling gebracht, maar de rechters zagen met deze artikelen geen strijd, wederom wijzend op de illegaliteit van de bouw en het feit dat andere maatregelen dan sloop geen goed alternatief zouden zijn om dergelijke bouw tegen te gaan. Alleen de Bulgaarse Ombudsman wees op de noodzaak van een indringende(r) proportionaliteitstoets bij sloopbevelen en op de noodzaak van preventieve controle in plaats van repressieve handhaving. Dit kon appellanten echter niet baten.

3. Het Hof neemt, net als in *Yordanova*, aan dat het sloopbevel op zichzelf rechtmatig is en een legitiem doel dient. Het enkele feit dat Ivanova wel en Cherkezov niet juridisch eigenaar was van de woning, doet er niet aan af dat er voor beiden sprake is van een 'huis', gelet op het feit dat ze er al jaren in wonen (zie eerder *McCann* t. *Verenigd Koninkrijk*, EHRM 13 mei 2008, nr. 19009/04, «EHRC» 2008/83, par. 46 e.v.). Ook was de inbreuk rechtmatig, nu het sloopbevel een duidelijk legitieme basis had in de Territorial Organisation Act, en dient de inbreuk een op zichzelf legitiem doel: het herstellen van de *rule of law*, wat een bijdrage kan leveren aan het economisch welzijn van het land. Dit is belangrijk in Bulgarije, waar het probleem van illegale bouw van woningen groot is, zo onderstreept het Hof (par. 51). Uiteindelijk komt het derhalve neer op de vraag of het sloopbevel noodzakelijk is in een democratische samenleving, in welk verband het Hof van Bulgarije een vrij indringende proportionaliteitstoets verlangt. Het Hof kiest ervoor om geen algemene overwegingen aan de *margin of appreciation* te wijden, zodat het zinvol is om op dit punt de zaak *Yordanova* in herinnering te roepen. Daarin stelde het Hof dat de lidstaten in beginsel een ruime *margin* wordt gelaten bij het nemen van maatregelen in de sfeer van maatregelen op het terrein van de ruimtelijke ordening. Dat geldt echter niet wanneer de maatregelen die in die context worden genomen het effectieve genot van een *key right* als het onderhavige recht op respect voor een woning te zeer beperken. Aangezien het verlies van een woning een extreme inbreuk onder art. 8 EVRM is, dienen aan het individu procedurele waarborgen ten dienste te staan die hem in staat stellen om de proportionaliteit en redelijkheid van de maatregel te laten toetsen door een onafhankelijke rechter. Wanneer het individu relevante argumenten naar voren brengt in de nationale procedure, dan moeten de betrokken rechters die argumenten in detail en beargumenteerd onderzoeken. Het oordeel van het Hof ziet dan ook veeleer op tekortkomingen in de nationale procedure dan dat zij een oordeel over de proportionaliteit zelf is. Deze procedurele insteek zagen we ook al in *Yordanova*, par. 118 sub iii en *Winterstein e.a.* t. *Frankrijk*, EHRM 17 oktober 2013, nr. 27013/07 m.nt. Henrard, par. 148 sub c, al zullen we hierna zien dat zij ook een materiële kant heeft.

4. Tegen deze achtergrond verbaast het niet, dat de onderhavige sloopmaatregelen geen stand kunnen houden. In de nationale procedures was voortdurend de nadruk gelegd op de illegaliteit van de bouw en de vraag of klagers onder de overgangsregeling respijt kon worden geboden (*quod non*). Onder art. 8 EVRM kan in de visie van het Hof van een *fair balance* tussen het algemeen belang en de rechten van het individu niet geacht worden sprake te zijn wanneer de effectieve implementatie van bouwvoorschriften de vorm krijgt van een absoluut verbod, waarop geen uitzonderingen mogelijk zijn. In par. 53 geeft het Hof in dit verband een opsomming van gezichtspunten die bij de beoordeling van de proportionaliteit van een sloopbevel relevant kunnen zijn, waaronder de vraag of de bebouwing op illegale wijze heeft plaatsgevonden, de aard en de omvang van de onrechtmatigheid, de wetenschap dat het bouwen niet rechtmatig was, de aard van de door de sloop aangetaste belangen en de beschikbaarheid van alternatieve accommodatie. Het Hof wijst er verder op dat de autoriteiten aan een toets aan deze factoren niet kan ontkomen met de stelling dat een individuele toets van een sloopbevel het bouwtoezicht zou ondermijnen, nu van de bevoegde autoriteiten en rechters verwacht mag worden dat zij dat risico kunnen vermijden, zeker als zij eigen richtlijnen trachten te formuleren. Bovendien, zo stelt het Hof, zal een voorgenomen sloop slechts in uitzonderlijke omstandigheden disproportioneel zijn (par. 55). Zo zien we dat het Hof, door specifieke eisen te stellen aan de door de nationale autoriteiten te maken afwegingen, een procedurele eis ook sterk materieel inkleurt. Zie over die materiële dimensie van procedurele eisen in de sfeer van het huisrecht ook A.E.M. Leijten, *Core Rights and the Protection of Socio-Economic Interests by the European Court of Human Rights*, diss. Leiden 2014, p. 339 e.v., in het bijzonder p. 341.

5. Bulgarije zal er hoe dan ook niet aan kunnen ontkomen zijn wetgeving aan te passen en de toetsing aan de genoemde gezichtspunten mogelijk te maken. Het is echter de vraag of dat voor klagers uiteindelijk het gewenste effect zal sorteren. De kern van de schending zit hem immers in het feit dat Bulgarije in strijd met art. 8 EVRM zou handelen wanneer de sloop van de woning zou worden bevolen zonder dat de proportionaliteit van dit bevel door de nationale instanties is getoetst. Dit is vooral een procedureel gebrek: het Hof dringt erop aan *dat* de Bulgaarse wetgeving een proportionaliteitsafweging beter mogelijk maakt. Bij de vraag hoe die toets uiteindelijk zal uitvallen, laat het Hof de nationale autoriteiten en rechters echter een *margin of appreciation*, aangezien zij 'better placed' zijn dan een internationaal Hof als het EHRM om de lokale behoeftes in te schatten (par. 53, slot). Er dient, met andere woorden, na dit arrest nog steeds te worden vastgesteld of een eventueel sloopbevel klagers onevenredig zou treffen. De vraag hoe die afweging zal uitpakken is bij gebrek aan feitelijke gegevens lastig te beantwoorden. Enerzijds hebben klagers gesteld armlastig te zijn en hebben zij erop gewezen dat het hun enige woning is, dat zij geen goede gezondheid hebben en dat het handhaven van het sloopbevel zou resulteren in het dakloos maken van twee mensen op leeftijd (par. 47). Anderzijds zijn zij op dit punt in vrij algemene termen blijven steken (vgl. par. 15) en stelt het Hof duidelijk vast dat zij volledig op de hoogte waren van het feit dat ze een vergunning nodig hadden en dus niet te goeder trouw waren (par. 75). Voorts hebben klagers de stelling van de regering dat zij over alternatieve huisvesting hadden kunnen beschikken onweersproken gelaten (par. 46). Evenmin kunnen klagers wijzen op een lange periode van ongestoord woongenot, in welk verband zich een hechte gemeenschap had gevormd, een punt dat in *Yordanova* wel een rol speelde en dat met zich bracht dat de autoriteiten in die zaak veel meer aandacht hadden moeten hebben voor het risico van een dakloos bestaan voor klagers. De proportionaliteitstoets vergde in dit verband dat de autoriteiten in hun beslissingen tot ontzetting van de Roma hadden moeten bezien wanneer en op welke manier zij

dat zouden doen en daarbij ook aan de mogelijkheden voor alternatieve huisvesting hadden moeten denken (par. 133). Hoewel ook in de onderhavige zaak ruimte zal moeten zijn voor een preciezere proportionaliteitstoets, is het met name in het licht van de kwade trouw van klagers de vraag of een eventuele sloop van de woning uiteindelijk niet 'gewoon' de toets aan art. 8 EVRM zal kunnen doorstaan. Zie over de vraag hoe het risico van dakloosheid zich verhoudt tot art. 8 EVRM nader A. Remiche, 'Yordanova and Others v. Bulgaria: the Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home', *Human Rights Law Review* 2015, p. 797-800.

6. Het restant van de uitspraak is voor klagers al evenmin hoopgevend, nu het Hof in klare bewoordingen duidelijk maakt dat art. 1 EP EVRM hen weinig te bieden heeft. Dit artikel is slechts door Ivanova (klaagster 1) ingeroepen, nu alleen zij een eigendomsrecht op het huis kan doen gelden. In eerdere rechtspraak is van een samenloop van art. 1 EP EVRM en art. 8 EVRM ook sprake geweest. In de – ook door het Hof zelf geciteerde – zaken liep het oordeel over een eventuele schending van beide artikelen telkens niet uiteen: zo was sprake van een schending van zowel art. 1 EP EVRM als art. 8 EVRM in *Zehentner* t. *Oostenrijk*, EHRM 16 juli 2009, nr. 20082/02, «EHRC» 2009/109 m.nt. Fernhout, *Rousk* t. *Zweden*, EHRM 25 juli 2013, nr. 27183/04, «EHRC» 2013/222, terwijl in *Chapman* t. *Verenigd Koninkrijk*, EHRM 18 januari 2001 (GK), nr. 27238/95 noch art. 8 EVRM, noch art. 1 EP EVRM geschonden was. De invulling van de toetsingscriteria onder art. 8 EVRM en art. 1 EP EVRM loopt dus vaak parallel (vgl. D. Sanderink, *Het EVRM en het materiële omgevingsrecht*, Deventer: Kluwer 2015, p. 349). In deze zaak zien we echter dat het oordeel over een schending van beide artikelen uiteenloopt. Het Hof maakt duidelijk dat de toets aan de onder 4 genoemde factoren onder beide artikelen kan verschillen, met name tegen de ruime *margin* die bij de regulering van eigendom wel geldt, maar die bij sommige inbreuken onder art. 8 EVRM niet geldt. Bij art. 1 EP EVRM is de *margin* een ruime, zoals het Hof in dit arrest sterk – wellicht iets te sterk – benadrukt: het is de wetgever toegestaan om een effectieve implementatie van bouwvoorschriften te verzekeren door 'absolute regels die geen uitzondering mogelijk maken' te formuleren (par. 54) dan wel om met brede en algemene categorieën van gevallen te werken, in plaats van een praktijk waarin elke individuele beslissing onderworpen moet kunnen worden aan een proportionaliteitstoets. Ook de wijze waarop wordt gehandhaafd en de afweging welke gevolgen van een handhavingsbesluit nog proportioneel zijn en welke niet laat het Hof over aan de nationale autoriteiten (par. 75). Deze 'strenge' overwegingen zijn op zichzelf in lijn met vaste rechtspraak van het Hof, die laat zien dat art. 1 EP de illegale bouwer als regel weinig te bieden heeft (zie bijv. *Saliba* t. *Malta*, EHRM 8 november 2005, nr. 4251/02). Aan de andere kant kan ook op rechtspraak worden gewezen die laat zien dat zelfs in situaties van illegale bebouwing discussie kan bestaan over een eventuele schending van art. 1 EP EVRM, zoals in zaken waarin illegale situaties langdurig gedoogd zijn (*Hamer* t. *België*, EHRM 27 november 2007, nr. 21861/03, «EHRC» 2008/21). Dat ook in dat soort – toegegeven: extreme – zaken een absolute, geen enkele uitzondering toestaande nationale handhavingsregel zonder meer een toegestane regulering van eigendom zou zijn staat naar mijn idee niet vast. In zoverre zal zelfs de reguleringsparagraaf van art. 1 EP EVRM onder omstandigheden een proportionaliteitstoets vergen.

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