Sloop illegaal gebouwd huis. Respect voor woning. Recht op eigendom. Individuele belangenafweging is alleen noodzakelijk onder art. 8 EVRM en niet onder art. 1 Protocol 1 EVRM. Schending art. 8 EVRM

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

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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
21 april 2016, nr. 46577/15
(A. Nußberger, K. Hajiyev, E. Møse, F. Vehabović, Y. Grozev, C. Ranzoni, M. Mits)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 8, 13 EVRM; art. 1 Protocol 1 EVRM

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Sloop illegaal gebouwd huis. Respect voor woning. Recht op eigendom. Individuele belangenafweging is alleen noodzakelijk onder art. 8 EVRM en niet onder art. 1 Protocol 1 EVRM. Schending art. 8 EVRM.

Klagers, Mavruda Ivanova en Ivan Cherkezov, bouwden tussen 2005 en 2006 een huis in het dorp Sinemorets. Zij verlieten hun eerdere woning in de stad Burgas omdat de kosten daar voor hen te hoog waren. Ivanova heeft geen vaste baan en erfde een deel van grond waarop het huis is gebouwd. Cherkezov is sinds 2004 arbeidsongeschikt en ontvangt sinds 2005 een uitkering. Het huis werd echter gebouwd zonder de daarvoor benodigde bouwvergunning. Dit was een reden voor het bevoegde bestuursorgaan om te oordelen dat het afgebroken diende te worden. Tegen dit besluit procedeert Ivanova tot aan de hoogste rechter zonder succes. Deze oordeelt namelijk in zijn uitspraak van 17 maart 2015, net als de lagere rechters, dat het huis gesloopt dient te worden aangezien het in strijd met de wettelijke eis om eerst een bouwvergunning te krijgen is gebouwd. Op de persoonlijke omstandigheden van klagers slaan het bevoegde bestuursorgaan noch de rechterlijke instanties acht.

Klagers stellen dat de beoogde sloop van hun woning in strijd is met art. 8 EVRM en art. 1 Protocol 1 EVRM.

Het Hof overweegt ten eerste dat de sloop van het huis tot een inmenging in de door art. 8 EVRM beschermde rechten van klagers als bewoners leidt. Het Hof overweegt vervolgens dat de sloop van de woning een legitiem doel dient, namelijk het bevorderen van ruimtelijke ordening en het economische welzijn van het land. Volgens het Hof laat het Bulgaarse juridische kader echter in strijd met art. 8 EVRM geen ruimte voor een toets van de proportionaliteit van het besluit tot sloop van de woning. Het Hof concludeert dat de sloop van de woning in strijd is met art. 8 EVRM, indien deze doorgang vindt zonder dat de proportionaliteit van het sloopbesluit in het licht van de persoonlijke omstandigheden van klagers is getoetst.

Ten aanzien van de vermeende schending van art. 1 Protocol 1 EVRM overweegt het Hof dat staten een grote beoordelingsvrijheid hebben bij het reguleren van het eigendomsrecht in het kader van ruimtelijke ordening. Anders dan art. 8 EVRM vereist art. 1 Protocol 1 EVRM volgens het Hof daarom geen geïndividualiseerde toets van het sloopbesluit. Het Hof concludeert derhalve dat de sloop van de woning niet in strijd is met art. 1 Protocol 1 EVRM.

Ivanova en Cherkezov
tegen
Bulgarije

The law

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 preemptively 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, Ćosić 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; *Ćosić*, cited above; *Paulić 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); *Brežec 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; *Ćosić*, § 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 (δ) *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; *Ćosić*, § 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 dea-

ling 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; *Paulić*, § 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*, *Brežec*, 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, Paulić*, § 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 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 € 3,280 in respect of forty-one hours of work by their legal representative on the proceedings before the Court, billed at € 80 per hour, plus € 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 € 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, € 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.

Noot

1. Deze uitspraak ondersteunt de in de jurisprudentie van bestuursrechters waarneembare tendens om de intensiteit van de toetsing van de proportionaliteit van een besluit mede te laten afhangen van de zwaarte van het belang dat in het geding is (vgl. E.M.H. Hirsch Ballin, *Dynamiek in de bestuursrechtspraak*, VAR-Preadvies, Den Haag 2015; T. Barkhuysen, Een revolutie in het bestuursrecht?, *NJB* 2015/1137 met verwijzingen). Kort en goed oordeelt het Hof dat wanneer een zeer fundamenteel recht als het recht op een woning als bedoeld in art. 8 EVRM in het geding is, er steeds een individuele proportionaliteitstoets (ook in geval de betrokkenen niet behoren tot een kwetsbare groep) door een onafhankelijke instantie moet plaatsvinden. Dit in contrast met het eigendomsrecht van art. 1 Protocol 1 EVRM dat in zaken als de onderhavige, die de gedwongen sloop van illegaal gebouwde woningen betreffen, wel ruimte laat voor een algemene regel waarop geen uitzonderingen mogelijk zijn inhoudende dat er hoe dan ook gehandhaafd moet worden. Deze uitspraak past ook bij de tendens van het afleiden van procedurele rechten uit materiële bepalingen (in casu art. 8 EVRM), die zich in een groeiende populariteit mag verheugen. Dit impliceert wel dat het Hof in deze uitspraak geen uitsluitsel geeft over de vraag of de sloop nu al dan niet is toegestaan. Dat is uiteindelijk aan de Bulgaarse autoriteiten (het huis was hangende de procedure nog niet gesloopt).
2. Interessant is in dat laatste verband dat het Hof in r.o. 53 een serie met niet limitatief bedoelde gezichtspunten meegeeft voor de betrokken nationale instantie die een rol moeten spelen bij die individuele toets: of de woning al bij de oprichting illegaal was, of de illegale oprichting al dan niet bewust gebeurde, de aard en zwaarte van het illegale karakter, het belang dat is gemoeid met sloop, of er geschikte alternatieve woonruimte beschikbaar is en of er minder vergaande alternatieven voor sloop aanwezig zijn. Deze factoren moeten door de betrokken instantie zorgvuldig onderzocht worden en van een gemotiveerde reactie worden voorzien waarbij algemene handhavingsregels niet bepalend mogen zijn en persoonlijke omstandigheden meewegen. Als er langs deze lijnen een zorgvuldige toets door de nationale instantie plaatsvindt, geldt ten aanzien van de uitkomst daarvan een ruime beoordelingsvrijheid wanneer het EHRM deze toetst. Het Hof verwerpt de tegenwerping van de Bulgaarse regering dat daarmee de effectiviteit van de handhaving wordt ondergraven. Het louter vanwege het illegale karakter besluiten tot sloop kan aldus niet door de beugel, er moet een nadere

afweging in het individuele geval van genoemde gezichtspunten plaatsvinden.

3. Voor het Nederlandse bestuursrecht kan deze uitspraak relevant zijn bij de invulling van de evenredigheidsuitzondering op de beginselplicht tot handhaving (vgl. ABRvS 27 februari 2013, ECLI:NL:RVS:2013:BZ2533, *AB* 2013/154, m.nt. Vermeer). Als het om sloop van woningen gaat (en daarmee het huisrecht van art. 8 EVRM in het geding komt), zouden de voorgaande gezichtspunten daarbij door het betrokken bestuursorgaan in acht genomen moeten worden en zou de rechter daarop intensief moeten toezien. In de nationale beginselplichtjurisprudentie betreffen de aanvaarde uitzonderingen vooral gevallen waarin concreet zicht op legalisatie bestaat (zie Michiels in *AB Klassiek* 2016/31 met nadere verwijzingen) en voor zover het gaat om de evenredigheidsuitzonderingen hebben wij het beeld dat die bij uitstek aan de orde zijn in gevallen van kleine afwijkingen van de relevante bouwregels en niet zozeer vanwege de zeer ernstige gevolgen voor betrokkene. De hier opgenomen uitspraak voegt als gezegd enkele gezichtspunten toe aan de te maken evenredigheidsafweging in het individuele geval. Op deze wijze kunnen betrokkenen bij een handhavingsverzoek ten aanzien van een illegale woning over de band van het huisrecht van art. 8 EVRM meer bescherming genieten dan via het eigendomsrecht van art. 1 Protocol 1 EVRM, dat bij een dergelijk handhavingsverzoek geen individuele afweging vergt.

4. Deze uitspraak is ook verschenen in *EHRC* 2016/151, m.nt. Tjepkema.

T. Barkhuysen en M.L. van Emmerik

AB 2017/36

RECHTBANK DEN HAAG
17 februari 2016, nr. C/09/482313 / HA ZA 15-155
(Mrs. J.W. Bockwinkel, W.A.G.J. Ferenschild, I. Brand)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 8 EVRM; art. 3:310 BW

ECLI:NL:RBDHA:2016:1579

Onrechtmatige overheidsdaad. Identiteitsfraude. Schending art. 8 EVRM. Geslaagd beroep op verjaring schadevergoedingsvordering.

In de onderhavige procedure stelt eiser de Staat aansprakelijk op grond van onrechtmatige overheidsdaad. Meer in het bijzonder stelt eiser, met verwijzing naar de door hem gevorderde verklaringen voor recht en de daarbij gegeven toelichting, dat het Openbaar Ministerie onrechtmatig jegens hem heeft gehandeld, zowel waar het heeft geacteerd op basis van enkel de gegevens uit het kentekenregister […], als in het kader van de tenuitvoerlegging van de gijzeling […]. Daarnaast zou de Staat 'als registerhouder van het kentekenregister' onrechtmatig jegens hem hebben gehandeld door niet te waarborgen dat het register de juiste gegevens bevat, door deze gegevens vervolgens zonder verificatie aan andere overheidsinstanties te verstrekken en bovendien te weigeren tot correctie van dat register (met terugwerkende kracht) over te gaan.

De Staat beroept zich op verjaring van de vordering van eiser tot schadevergoeding. Dit beroep slaagt.

Ingevolge artikel 3:310 lid 1 BW, hier van toepassing, verjaart een rechtsvordering tot vergoeding van schade door verloop van vijf jaren na de aanvang van de dag, volgende op die waarop de benadeelde zowel met de schade als met de daarvoor aansprakelijke persoon bekend is geworden.

Met het oordeel van het EHRM dat Nederland artikel 8 EVRM heeft geschonden, is de schending van een fundamenteel rechtsbeginsel gegeven, met het gevolg dat de Staat, mits aan de overige eisen voor onrechtmatige daad is voldaan, aansprakelijk is jegens eiser. In de stellingen van eiser ligt besloten dat het onrechtmatig handelen van de Staat mede is gelegen in een schending door de rechter (de Afdeling) van artikel 8 EVRM (onrechtmatige rechtspraak). In het licht van het door de Staat opgeworpen verjaringsverweer moet […] eiser geacht worden met de schade en de aansprakelijke persoon bekend te zijn geweest op het moment dat de Afdeling uitspraak deed. […] Dat betekent dat in dat geval de verjaring is aangevangen op 8 december 2005 en geacht moet worden te zijn gestuit bij de in 2.27 genoemde brief van 22 augustus 2008. […] Op 22 augustus 2008 is een nieuwe verjaringstermijn van vijf jaar aangevangen, die afliep op 22 augustus 2013. De eerste brief waarin opnieuw aan de Staat wordt bericht dat aanspraak wordt gemaakt op schadevergoeding, dateert echter van 17 april 2014. De vordering was toen al verjaard.

De conclusie van het voorgaande is dat de vordering van eiser tot schadevergoeding is verjaard en zal worden afgewezen.

Vonnis in de zaak van:
Eiser, adv.: mr. H.F.M. Struycken te Amsterdam,
tegen
De Staat der Nederlanden (Ministerie van Veiligheid & Justitie), te Den Haag, gedaagde, adv.: mr. G.C. Nieuwland te Den Haag.

1 De procedure

1.1. Het verloop van de procedure blijkt uit:
— de dagvaarding van 12 januari 2015,
— de conclusie van antwoord, met 15 producties,