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Eigendomsrecht, Eerlijk proces, Misbruik van bevoegdheid bij onteigening, Algemeen belang of privaat belang, Margin of appreciation, Taxatiemethode.

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Eigendomsrecht, Eerlijk proces, Misbruik van bevoegdheid bij onteigening, Algemeen belang of privaat belang, Margin of appreciation, Taxatiemethode

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Samenvatting

Klagers Volchkova en Mironov zijn mede-eigenaren van een stuk grond en een huis in Lyubertsy, Rusland. In 2001 neemt

de gemeente een plan aan dat is gericht op het afbreken van verwaarloosde woningen. In mei 2002 ontwikkelt een commissie met overheidsfunctionarissen het plan om op het perceel van klagers flats te gaan bouwen. Om dit plan uit te voeren sluit het gemeentebestuur in september 2002 een investeringscontract met een staatsonderneming. In oktober 2002 wordt deze onderneming vervangen door een private projectontwikkelaar. Afgesproken wordt dat de gemeente 5% van de nieuw te bouwen woningen zou bezitten en de ontwikkelaar de resterende 95%. De vergoeding voor de te onteigenen woningen zou voor rekening van de investeerder komen. De investeerder bereikt echter geen overeenstemming met klagers, die de geboden bedragen en alternatieve woningen niet adequaat achten. Een eigen taxatierapport dienen zij echter niet in. In 2005 worden de woningen onteigend en krijgen klagers een alternatieve woning toegewezen.

Er volgen diverse nationale procedures waarin klagers trachten de onteigeningsbesluiten vernietigd te krijgen. Klagers betwisten dat met de onteigening een 'dwingend algemeen belang' is gediend, en stellen dat hun eigendom te laag is getaxeerd omdat ten onrechte geen rekening is gehouden met het toekomstige gebruik van het land, dat aantrekkelijk was gelegen in het centrum en reeds omringd was door flatgebouwen. Zij taxeren de waarde van hun eigendom op ruim vier keer het bedrag dat hen aangeboden is. Rechterlijke procedures leiden echter niet tot succes en in 2005 worden klagers uit hun woning gezet.

Voor het **EHRM** stellen klagers dat de procedure tot onteigening onrechtmatig en disproportioneel is geweest. Het Hof merkt op dat voor de nationale rechter veel is gesproken over de vraag of de gemeente wel bevoegd was tot de onteigening, maar het acht zich niet in de positie zich over de interpretatie van de relevante regels uit te spreken, noch ziet het dat de gemeente te kwader trouw heeft gehandeld. Ook verder zijn er geen directe aanwijzingen waaruit blijkt dat het aanvankelijke plan tot ontwikkeling van het stadsgebied niet wetmatig was. Daarbij merkt het Hof op dat het met de overwegingen van de nationale rechters wel rekening kan houden in zijn eigen oordeel, en dat het de staten niet verboden is om een hogere bescherming te bieden van de EVRM-rechten of om hogere eisen van rechtvaardiging te stellen. Voor wat de inhoud van de klacht stelt het Hof voorop dat staten een grote beoordelingsvrijheid hebben als het gaat om de vraag of een maatregel een legitiem belang dient, maar dit betekent niet dat zij een carte blanche hebben om tot onteigening over te gaan. Het enkele onteigenen ten behoeve van een financieel belang van een groep investeerders kan volgens het Hof ernstige repercussies hebben voor de eigenaren van de betrokken stukken grond en woningen. In het onderhavige geval is het duidelijk dat er weliswaar een ruimer plan was voor verbetering van de stadswijk, maar niet gezegd kan worden dat de onteigening van de woningen van klagers een duidelijk en zwaarwegend algemeen belang diende. Er is niets waaruit is gebleken dat klagers' woning daadwerkelijk vervallen was en dat het niet meer mogelijk was om erin te wonen. Op basis van een uitgebreide feitelijke toets is het Hof er niet van overtuigd geraakt dat er een voldoende basis was voor de besluiten tot sloop, noch dat in overeenstemming met het nationale recht is gesproken met de bewoners en is gezocht naar alternatieven. Evenmin is procedureel helemaal zorgvuldig gehandeld, onder meer doordat te weinig rekening is gehouden met de stellingen van klagers over de taxatie. Gelet op die omstandigheden is sprake van strijd met art. 1 EP.

Uitspraak

I. Joinder of the applications

74. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications because they concern the same properties and the same domestic proceedings.

II. Alleged violation of Article 1 of Protocol No. 1 to the Convention

75. The applicants complained that the expropriation of their properties had been unlawful and disproportionate, particularly on account of the derisory compensation that they had been awarded.

76. The first applicant also referred to the delay in the payment of the compensation award, demolition of the house prior to such payment and despite the pending supervisory review proceedings, and the alleged loss, damage to or destruction of the first applicant's belongings.

77. Article 1 of Protocol No. 1 to the Convention reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. The parties’ submissions

1. The Government

78. The Government argued that the courts’ refusal to assist the applicants in obtaining access to the town plan had not upset the principle of equality of arms. The town’s chief architect had informed the Town Court that the construction had been in line with the town plan and the construction guidelines for the district, and that the applicants’ land had fallen within the boundaries of the construction guidelines. The court had taken note of the fact that the town’s general plan had been classified as “confidential” as a document of “internal use with limited access”. Furthermore, it had considered that since the construction guidelines had been based on the town plan, there had been sufficient proof that the construction had been in line with it. The applicants could have objected that the available evidence had prevented examination of the case.

79. The court had examined the applicants’ argument concerning the alleged absence of “municipal needs” justifying the expropriation, thus by implication also dealing with the question of “exceptional circumstances” that were required for an expropriation. To that end, it had examined the construction guidelines for the district and the investment contract, and had concluded that the municipality would acquire title to 5% of the newly constructed blocks of flats, as well as title to the utilities and amenities. The latter would include a kindergarten for 114 children, an annex building for a school and other smaller premises amounting to 30% of the planned construction cost. That showed that the construction project had been for the good of the local population.

80. Article 49 of the Land Code at the time (see paragraph 59 above) did not require the absence of alternative locations for construction as a condition for expropriating land.

81. As regards the legality of the expropriation decisions, the Government argued that Russian law authorised municipal authorities to carry out expropriations. The applicable legislation provided that written notice had to be given of the public authorities’ preliminary decision to expropriate, while the matter of where the intended construction would be located was being decided. The information regarding the construction guidelines for the district had been published in August 2002.

82. As to the legitimate aims, the Government submitted that the construction project had been aimed at providing the local population with facilities having social and cultural functions, which was an important social consideration affecting interests of a large portion of economic actors.

83. Article 281 of the Civil Code required that expropriation compensation had to correspond to the market value of the property. The Government submitted that the Town Court had been provided with an assessment report issued by a private company estimating the value of the first and second applicants’ property as USD 24,488 and 73,463 respectively. In addition, the court had requested an expert report concerning the market value of the properties. The applicants had agreed to such a report being issued by the same private company. The experts had been warned about criminal liability for providing an intentionally false expert assessment (Article 307 of the Criminal Code). The new report had assessed the applicants’ property at USD 28,500 and 85,600 respectively. The applicants had then missed an opportunity to have a further expert assessment, and had failed to adduce evidence to substantiate their argument that their properties

should have been valued higher.

2. The applicants

84. The applicants argued that they had been deprived of their possessions unlawfully and for private interests. Firstly, Russian law at the time had not conferred expropriation powers on municipalities, except where there had been an express delegation of power on the part of a State authority by way of federal or regional statute. No such delegation had been made in their case.

85. They had been deprived of their possessions for the benefit of a private investor seeking profit from the sale of newly constructed housing. Under the investment contract, the municipality had agreed to acquire title to a mere 5% of the flats. The second applicant also argued that the investment project had not pursued any social purpose (for instance, making available social housing or housing for affordable prices) because in 2006 the municipality had resold to the investor the properties it had acquired under the investment contract. The investor had not built any infrastructure or other facilities which would become municipal property (see paragraph 14 above) and the new housing was sold at market value.

86. The construction project could have been carried out on various other available plots of land owned by the municipality.

87. Both applicants argued that the market valuation of their properties should have taken into account the prospective substantial increase in the value of the land as the planned location of a new block of flats, given the immediate proximity of the properties to Moscow, the developed and convenient transport links and other infrastructure.

88. The second applicant also argued that he had received inadequate compensation for his share in the house, and had had to move into a social housing flat due to its demolition (see paragraph 35 above).

B. The Court's assessment

1. Admissibility

(a) Expropriation decision

89. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Grievances relating to the enforcement stage of the expropriation proceedings (essentially regarding the first applicant)

90. The applicants complained about enforcement of the judgment of 13 April 2005 prior to actual payment of the expropriation compensation and despite the pending proceedings for supervisory review, and the alleged loss, damage to or destruction of the first applicant's belongings.

91. The Court notes that the judgment of 13 April 2005 became enforceable on 4 July 2005, that the compensation was credited on 26 August 2005 (of which the first applicant became aware on 29 August 2005), and that she did not receive the keys to the flat and the bank certificate until December 2006. Nothing suggests that that delay was attributable to the respondent State. It is further noted that the second applicant made no similar complaint to the Court.

92. As to the applicants' argument relating to the allegedly precipitate enforcement, the Court notes that Russian law requires that compensation should be "prior" to expropriation (see paragraphs 53 and 60 above). Indeed, at least as regards the first applicant, the Court finds it established that the house was demolished on 22 August 2005, several days

before she became aware that the compensation had been paid. Nevertheless, in the Court's view, nothing suggests that the measure was unlawful under national law, and it did not amount to a disproportionate interference under Article 1 of Protocol No. 1 since by 22 August 2005 compensation was secured to the applicant on the basis of the judgment that had become final.

93. It appears that both the eviction and demolition of the house under the judgment of 13 April 2005 were carried out on 22 August 2005 while the first applicant's request for supervisory review dated 18 August 2005 was pending. Recourse to supervisory review did not and could not suspend enforcement in the absence of certain circumstances listed in the Code of Civil Procedure (see paragraph 73 above).

94. The Court has previously considered, in the context of Article 35 § 1 of the Convention, that the supervisory review procedure (as in force prior to 2008) was not a remedy that had to be used. While it was available to the parties within a one-year time-limit, the proceedings, once launched, could last indefinitely at a number of levels of jurisdiction (see paragraphs 38-43 above). In the Court's view, such a situation created an uncertainty that would render the six-month rule nugatory (see *Denisov v. Russia*, (dec.), no. 33408/03, 6 May 2004). However, what matters in the context of the present complaint is that the applicant had the benefit of appeal proceedings against the judgment of 13 April 2005. Following the appeal decision, it became final and enforceable under Russian law. There was no ascertainable date after which it could have been safely concluded that the judgment was no longer amenable to review. Thus, even though it appears that the applicants had in fact lodged an application for review without delay after the appeal decision, there are no convincing circumstances which would have called for a suspension of the enforcement to enable a reviewing court at one or several levels of jurisdiction to have another look at the expropriation case.

95. Lastly, as regards the loss of or damage to the first applicant's belongings after the eviction and demolition of the house, the Court notes that the applicant did not substantiate her allegations.

96. Accordingly, the above complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Merits

(a) Interference and scope of the complaint

97. The applicants complained about the expropriation decisions of 18 March and 19 May 2003 and the judgment of 13 April 2005.

98. It is undisputed by the Government that the matters relating to the expropriation of the applicants' house and land amounted to an "interference" under Article 1 of Protocol No. 1 to the Convention, that a municipality is part of the "State" within the meaning of the Convention and that, despite the context and requirements of the investment project carried out by a private company, the "interference" in question originated from an expropriation order issued by a municipality (see paragraphs 14 and 20 above).

99. The Court reiterates that Article 1 of Protocol No. 1 contains three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions and the third rule, stated in the second paragraph, recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest. These rules are not, however, unconnected: the second and third concern particular instances of interference with the right to the peaceful enjoyment of possessions and are therefore to be construed in the light of the principle laid down in the first rule (see *Vistiņs and Perepjolkins v. Latvia* [GC], no. 71243/01, § 93, 25 October 2012). In the present case, it is not in dispute that there has been a "deprivation of possessions" within the meaning of the second sentence of Article 1 § 1 of Protocol No. 1.

100. The Court must therefore ascertain whether the impugned deprivation was justified under Article 1 of Protocol No. 1 to the Convention. To be compatible with that provision an expropriation measure must fulfil three conditions: it must be carried out "subject to the conditions provided for by law", which excludes any arbitrary action on the part of the national authorities, must be "in the public interest", and must strike a fair balance between the owner's rights and the interests of the community. The Court will examine whether each of those three conditions has been fulfilled in the present case.

(b) Justification of the deprivation of possessions

(i) Subject to the conditions provided for by law

101. The applicants' principal argument was threefold:

(i) the municipality had had no competence under Russian law to issue a decision on expropriation;

(ii) expropriation was unlawful in the absence of a properly approved town plan; and

(iii) the municipality had failed to comply with the statutory rules requiring them to prove that there were no alternative locations for the construction project and that there were exceptional circumstances justifying the expropriation.

102. In accordance with its case-law on the interpretation and application of domestic law, while the Court's duty under Article 19 of the Convention is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 190, ECHR 2006-V). Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (ibid.).

103. The Court observes that the first-instance court in the applicants' case did examine in a sufficiently thorough manner the undoubtedly crucial argument that the municipality had had no competence to issue a decision on expropriation (see paragraph 35 above). The Court finds no reason to call into question the domestic courts' interpretation of the relevant provisions, nor does it find any evidence demonstrating that they acted in bad faith or neglected to apply correctly the legislation regarding the competence of municipalities to issue expropriation decisions. No question arises in the present case as to the quality of the legislation in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V, and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). The domestic court clarified the apparent contradictions within the Land Code and between that and the Civil Code (see paragraphs 58, 59 and 65 above) by specifying, with reference to Article 3 of the Land Code, that it was *lex specialis* in matters relating to land (see, in the same vein, the similar position taken by the Supreme Commercial Court and the Constitutional Court in paragraph 63 above).

104. Furthermore, the Court does not see any particular rules of domestic law or judicial practice suggesting that the matter of a properly approved and accessible general plan (or a development plan) or the matter of some compatibility between that plan and an investment project or construction guidelines for the district, for instance, disclosed at the material time such importance as to have had a bearing on an assessment of the lawfulness of an expropriation (see, conversely, paragraph 67 above for a decision taken by a commercial court). In any event, the matter was dealt with by the first-instance court that provided reasons for dismissing the argument (see paragraph 35 above). It was ascertained, with reference to other evidence, that construction works affecting the applicants' land were officially being planned. The Court has no convincing arguments at its disposal to which could cast doubt on that assessment.

105. As to the requirement under Article 49 of the Land Code concerning the absence of alternative locations, the Court agrees with the respondent Government that a court of general jurisdiction could have legitimately considered in 2005 that expropriation in the context of an investment contract with a private company for the construction of blocks of flats

fell under subparagraph 3 of Article 49 § 1 of the Land Code, which did not contain the same requirement as in subparagraph 2 (see paragraph 59 above; see, conversely, paragraph 69 above for a more recent example from a commercial court).

106. As regards the requirement of "exceptional circumstances" under the same provision, the Court was not provided with any material suggesting that it was considered or should have been considered at the time to be an essential element pertaining to the legality of an expropriation (see, *mutatis mutandis*, albeit in a different context, *Frumkin v. Russia*, no. 74568/12, § 150, ECHR 2016 (extracts), and *Gusinskiy v. Russia*, no. 70276/01, §§ 63-65, ECHR 2004-IV). It does not appear that the applicants raised an argument to that effect before the domestic courts.

107. The above considerations of domestic law may be taken into account, in so far as relevant, for the assessment of the legitimate aim pursued and for analysis of the proportionality of the impugned deprivation of possessions under Article 1 of Protocol No. 1. The Court would also reiterate in this connection that the Contracting States are not prohibited from setting higher standards for protection of the freedoms and rights set forth in the Convention and its Protocols, or for permitting interferences on the part of public authorities with these rights and freedoms.

(ii) "In the public interest" requirement and the requirement of "fair balance" between private and public interests

(α) General principles

108. As regards the existence of a "public interest", the Court reiterates that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest" (see *Vistiņš and Perepjolkins*, cited above, § 106). Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to whether a problem of public concern exists warranting measures of deprivation of property (ibid.).

109. The Court reiterates that a deprivation of property effected for no other reason than to confer a private benefit on a private party cannot be "in the public interest" (see *James and Others v. the United Kingdom*, 21 February 1986, § 40, Series A no. 98). Nevertheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. The Court stated in 1986 in *James and Others* that even where the texts in force employed expressions like "for the public use", no common principle could be identified (at the time) in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties (ibid.). The expression "in the public interest" does not mean that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking (ibid., §§ 41 and 45, in the context of legislative measures involving the compulsory transfer of property from one individual to another).

110. Indeed, the Court adopted a stringent test regarding challenges concerning a "public interest" in relation to deprivations of property arising from enactment of laws, in particular, in the context of profound societal changes (see *James and Others*, cited above, § 46; *Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 87-88, ECHR 2000-XII; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI) or general measures of economic or social strategy, for instance for the protection of the environment or of a country's historical or cultural heritage (see, as a recent authority, *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 179, 15 November 2016). Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court stated that it would respect the legislature's judgment as to what is "in the public interest" unless that judgment was "manifestly without reasonable foundation" (see, among other authorities, *Kozacioglu v. Turkey* [GC], no. 2334/03, § 53, 19 February 2009, and *Vistiņš and Perepjolkins*, cited above, §§ 106-07).

111. The same test was mentioned by the Court in *Tkachevy v. Russia*, no. 35430/05, §§ 37-39 and 50, 14 February 2012 concerning an expropriation order issued by a court, allegedly on safety grounds, for converting a building into non-residential premises while it eventually became a privately-owned set of luxurious residential premises for sale.

112. Also, in *Farrugia v. Malta* (dec.), no. 67557/10, § 22, 6 March 2012 while noting that the system of expropriation initiated at the request of third parties in Maltese domestic law was novel, the Court did not consider it unreasonable for the authorities to take into account the interests of third parties when adopting such measures. The Court concluded that the construction of a road which would give access to a housing complex, even though private, had been "in the public interest".

113. As regards the requirement of a "fair balance", the relevant general principles were recently summarised in the case of *Vistiņs and Perepjolkins* (cited above) as follows:

"108. Even if it has taken place 'subject to the conditions provided for by law' – implying the absence of arbitrariness – and in the public interest, an interference with the right to the peaceful enjoyment of possessions must always strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions ...

109. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question ... Nevertheless, the Court cannot abdicate its power of review and must therefore determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions, within the meaning of the first sentence of Article 1 of Protocol No. 1 ...

110. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. The Court has already held that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference. In many cases of lawful expropriation, such as a distinct taking of land for road construction or other 'public interest' purposes, only full compensation may be regarded as reasonably related to the value of the property ... [T]he Court cannot equate a lawful expropriation, complying with domestic law requirements, with a constructive expropriation that seeks to confirm a factual situation arising from unlawful acts committed by the authorities ...

111. Moreover, the Court reiterates that, where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation ... As to the amount of the compensation, it must normally be calculated based on the value of the property at the date on which ownership thereof was lost. Any other approach could open the door to a degree of uncertainty or even arbitrariness ..."

(b) Application of the principles in the present case

114. The Court considers that the matters relating to the "public interest" and the proportionality assessment in the present case are closely intertwined. Thus, it will examine them together.

115. The applicants' central argument was that the expropriation had not pursued a genuine and compelling public interest. They argued, in substance, that the private investor had been its only actual beneficiary, and that the expropriation procedure had been used as a legal means of conferring a disproportionate benefit. The Government submitted that the expropriation was aimed at providing the town population with facilities having social and cultural functions, which was "an important social consideration affecting interests of a large portion of economic actors".

116. The Court notes that the matter of effective protection of private property underlying complaints under Article 1 of Protocol No. 1 to the Convention is not necessarily confined to the question of compensation, which is indeed material to the assessment of expropriation under Article 1 of Protocol No. 1 both in related domestic proceedings and before the Court (see *Vistiņš and Perepjolkins*, cited above, § 110). Nor should the above – undeniably stringent – criteria relating to the "public interest" (see paragraphs 109-110 above) be taken as a *carte blanche* for recourse to expropriation measures, irrespective of their contexts.

117. In the Court's view, beyond the evident pecuniary element, expropriations relating to one's housing (dwellings) for the sake of fostering pecuniary interests of a group of investors or beneficiaries may have serious repercussions on the private owners whose property is being expropriated.

118. Turning to the present case, the Court notes that it concerns individual administrative decisions issued by a municipality rather than enactment and application of laws expropriating property with regard to special considerations of political, economic and social policies or contexts that could be present, for instance, in the cases cited in paragraph 110 above. The Court also observes that, even though it was related to a larger town planning scheme (see paragraph 18 above) it cannot be said that the expropriation of the applicants' land sought to address any important general problem. The relevant administrative decision referred to the aims of "improving the architectural appearance of the town and the resettlement of inhabitants from housing that no longer [met] sanitary requirements". There is nothing to suggest that the applicants' house was dilapidated so as to become unsuitable for living in it, in which case it might be subject to the demolition procedure for decrepit housing instead of the expropriation procedure used in this case (see paragraph 19 above). At least one of the available valuations clearly stated that the house was habitable, although it required some superficial repairs (see paragraph 27 above). As to the aesthetic element of the town planning scheme in question, there is nothing in the available material or the Government's submissions to substantiate the preference in favour of replacing individual residential houses with blocks of flats or to address the precedence of this consideration over the legitimate interests that the owners' of these houses had.

119. The Government argued before the Court that the municipality needed the expropriated land for a specific construction project. This project concerns construction of housing, namely blocks of flats with the effect of creating new stock at the market of housing.

120. It is true that from a formal point of view, recourse to the expropriation procedure was linked to the municipal policies, which might be interpreted as aiming at improving the town's appearance as well as at renewing and expanding residential housing opportunities (see paragraphs 11 and 18 above). However, having examined the requirements of the investment contract and the other pertinent factors, the Court is not satisfied that it was convincingly shown by the domestic administrative and judicial authorities that the reasons for using the expropriation procedure had a proper reasonable basis and were compelling (compare *Tkachevy*, cited above, § 50).

121. It has not been substantiated that the choice of land for the impugned construction project was discussed in an adequate manner with the local population, including the applicants, as required by Russian law (see paragraphs 12, 25, 55 and 56 above) or that various alternative locations were considered or that it was concluded that no such alternatives were available (see paragraphs 13 and 25 above). The material before the Court does not clearly establish any particular problem relating to the shortage of housing in the relevant geographic area. The Court also considers that the allegedly compelling nature of the public interest was, at the very least, undermined by the remaining doubts relating to the adoption of the main document concerning the town planning, as confirmed by the Moscow Region Prosecutor's Office (see paragraph 33 above). It is also noted that the municipality received title to 5% of the newly built housing space. The respondent Government have not substantiated the submission that it was classified as social housing.

122. In order to assess the conformity of the State's conduct with the requirements of Article 1 of Protocol No. 1, the Court must conduct an overall examination of the various interests in issue, having regard to the fact that the Convention is intended to guarantee rights that are "practical and effective", not theoretical or illusory. It must go beneath appearances and look into the reality of the situation at issue, taking account of all the relevant circumstances,

including the conduct of the parties to the proceedings, the means employed by the State and the implementation of those means (see *Vistiņs and Perepjolkins*, cited above, § 114).

123. While bearing in mind the State's wide margin of appreciation in the context of expropriation, the Court retains doubts as to whether in the particular circumstances of the present case the deprivation of possessions for the sake of collective housing construction sought to achieve a compelling public interest.

124. In any event, the Court has taken note of the Government's arguments relating to the compensation matter, namely that the applicants dismissed more advantageous offers from the investor and did not apply to the court to exercise its discretion to order another expert assessment, if they were dissatisfied with the methodology and/or conclusions of the expert report issued in February 2005.

125. Undoubtedly, it was the applicants' choice not to accept the offers made at the preliminary non-judicial stage of the proceedings. However, such conduct does not amount to a "waiver" of their entitlement to adequate compensation neither in terms of domestic law nor under Article 1 of Protocol No. 1 to the Convention. The expropriation procedure under Russian law provided that where parties failed to reach an agreement on the compulsory purchase price, the matter would be determined by the courts. It thus remained incumbent on the courts to determine the compensation that would be up to the actual market value of the properties.

126. The available material before the Court does not disclose that the applicants properly voiced any objections or counterarguments regarding the expert report in the course of the proceedings before the first-instance court. The Court accepts that by not using the opportunity of seeking another expert valuation, the applicants placed themselves in a disadvantageous position. However, it observes that Russian law did not prevent them from disputing the expert report by other means, which were not limited to another expert assessment (compare *Vrzic v. Croatia*, no. 43777/13, §§ 113-14, 12 July 2016). The applicants did make submissions in their statement of appeal and some calculations and related explanations, contesting the expert report and putting forward a different valuation of the property (see paragraph 36 above). In particular, the first applicant argued that the expert should have used the "method of prospective use" for determining the value of the house and land. Furthermore, she argued that the expert valuation was based on the premise that the land's use was for a summer cottage use rather than for the use relating to multi-storey blocks of flat; this premise was inappropriate, given that the property was already surrounded by similar blocks of flats. Those submissions do not appear to be devoid of substance or substantiation. It was thus incumbent on the domestic court to assess the counterarguments and provide reasons for dismissing them in so far they were directly related to the subject matter of the case, namely the market value of the properties to be expropriated.

127. The Court is not satisfied that the judicial valuation of the land took due account of the elements mentioned above.

128. The above considerations have led the Court to conclude that there has therefore been a violation of Article 1 of Protocol No.1 to the Convention in the present case.

III. Alleged violations of Article 6 of the Convention

129. The applicants complained that the expropriation proceedings had been unfair in that (i) they could not obtain access to an essential piece of evidence, the general plan; and (ii) the courts had not provided sufficient reasons in relation to the key aspects of the case.

130. The first applicant also complained of a violation of Article 6 of the Convention on account of the delay in paying her the compensation awarded under the judgment of 13 April 2005, and uncertainty concerning any procedural or substantive decisions regarding the proceedings she had initiated against the bailiff service in August 2005.

131. Article 6 of the Convention reads as follows:

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a

reasonable time ...”

A. The parties’ submissions

1. The Government

132. The Government submitted that the trial court had undertaken to ascertain that the planned construction works had been in line with the town plan, by referring to the district guidelines (based on it) and the statement from the town’s chief architect. The applicants had thus not been placed at a disadvantage because the plan had not been examined by the trial court. The Government further submitted that the courts had specifically addressed the matter, as well as the issues relating to the municipality’s competence to order expropriation or the actual legitimate aims pursued by it.

133. The Government submitted that on 26 August 2005 the compensation had been credited into a bank account opened for the applicant and that she had been informed accordingly, without delay. However, she had not received the relevant bank certificate (providing access to the bank account) until December 2006.

134. As regards the length of the proceedings against the bailiffs, the Government submitted that the applicant had sued the bailiff service in August 2005, her claim concerning the unlawfulness of the bailiff’s actions being determined in the judgment of 5 September 2007. As to her pecuniary claim arising from such a finding of unlawfulness, she had (re)submitted it in February 2007 as a separate action. The length of the proceedings between 2005 and 2007 had been justified. In any event, the applicant could have sued the State under the 2010 Compensation Act.

2. The applicants

135. The applicants maintained their complaints.

B. The Court’s assessment

136. First of all, having regard to the facts of the case, the submissions of the parties and the scope of the Court’s findings under Article 1 of Protocol No. 1 to the Convention concerning the expropriation decision, it is not necessary to give a separate ruling on the admissibility and merits of the complaints relating to issues of fairness in the expropriation proceedings (see, for the approach, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

137. As to the enforcement of the judgment of 13 April 2005, the Court observes that the expropriation compensation, the decision for which became enforceable on 4 July 2005, was credited into the relevant bank account on 26 August 2005, and that the first applicant was made aware of its availability soon thereafter. The first applicant was therefore afforded an effective and timely opportunity to use the money. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

138. Furthermore, as has become clear from the Government’s submissions in relation to the first applicant’s case against the bailiffs, on several occasions in 2005 and 2006 she lodged claims which were not accepted for various reasons. Even assessing all those failed attempts cumulatively (which would amount to no less than two years, while deducting some periods of inactivity by the applicant between various attempted actions), the Court considers that the “reasonable time” requirement was respected. The main thrust of the applicant’s complaint being that there was no judicial decision regarding her claim, the Court observes that the decisions were taken in 2007 and the applicant was eventually made aware of them. She did not raise any particular complaint regarding issues adversely affecting her access to a court in relation to her claims against the bailiff service. Accordingly, this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. Alleged violation of Article 8 of the Convention (as regards the first applicant)

139. Repeating her arguments under Article 1 of Protocol No. 1 to the Convention, the first applicant complained that her eviction from her house had disclosed a violation of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

140. The Government may be understood to be submitting that the applicant had not lived in the house at all or for some time, despite formally having the house as her registered address since 2001. The part owned by the applicant (some 20 sq. m of which 12 sq. m was living space) had been disconnected from water, gas and electricity in 2003. Since 2001 her actual permanent residence had been in Moscow at the address she had indicated in her application form to the Court. In any event, she had received adequate compensation for her property and had been given a social tenancy contract for a flat measuring 30 sq. m (with 18 sq. m of living space). She had previously dismissed several, arguably more attractive, resettlement offers. Aspects relating to her emotional attachment to the house and amenities and her comfort there had meant to have been taken into consideration in the expropriation compensation. She had not raised that aspect before the courts in the expropriation case or in separate proceedings.

141. The applicant argued in substance that the expropriation decision had interfered with her private and family life, in that it had adversely affected her comfort and, in a way, her quality of life. She and her husband had enjoyed living in the house since 1969, where she had had a garden, and had made many technical improvements (gas, electricity, water and sewage installations).

B. The Court’s assessment

142. It appears that the applicant’s concerns expressed under this heading were, in substance and at least in part, taken into account in the expert assessment and the compensation awarded by the court in its judgment of 13 April 2005 and its decision requiring the municipality to provide the applicant with social housing, comparable to what she had been able to enjoy in the house as owner. The applicant did not claim in any proceedings, and has not argued before the Court, that it was legally impossible for her to seek additional compensation on account of non-pecuniary damage in respect of the considerations she had raised before the Court under Article 8 of the Convention, if she thought that any such compensation was necessary. However, the Court does not need to examine any further these and other matters relating to Article 8 of the Convention, in particular whether at the material time the house was the applicant’s “home” within the meaning of this Article or whether the applicant’s “private life” was adversely affected on account of the expropriation decision.

143. Having regard to the facts of the case, the submissions of the parties and the scope of the Court’s findings under Article 1 of Protocol No. 1 to the Convention concerning the expropriation decision, it is not necessary to give a separate ruling on the admissibility and merits of the complaint raised under Article 8 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 156; see also *Kirillova v. Russia*, no. 50775/13, § 44, 13 September 2016).

V. Other alleged violations of the Convention

144. The Court has examined the remaining issues as submitted by the applicants. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3

(a) and 4 of the Convention.

VI. Application of Article 41 of the Convention

145. 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

146. The first applicant claimed 314,677 euros (EUR) in respect of pecuniary damage as “a fair market price for her private property in 2005”; increased by EUR 286,606 to account for inflation between 22 August 2005 and end of 2009, and EUR 60,000 in respect of non-pecuniary damage.

147. The second applicant claimed EUR 2,569,896 and EUR 50,000 for pecuniary and non-pecuniary damage respectively.

148. The Government considered the non-pecuniary claim excessive. The Government also contested the pecuniary claim, reiterating in substance their arguments relating to the merits of the complaint under Article 1 of Protocol No.1.

149. As regards the claim in respect of non-pecuniary damage, the Court accepts that the applicants sustained a degree of non-pecuniary damage on account of the violation found, such that an award on that basis may be regarded as justified (see *Vistiņs and Perepjolkins v. Latvia* (just satisfaction) [GC], no. 71243/01, § 47, ECHR 2014). Ruling on an equitable basis, the Court awards each applicant EUR 3,000, plus any tax that may be chargeable on this amount.

150. As to the alleged pecuniary damage, the Court considers that the question of just satisfaction in this part is not yet ready for decision. It should therefore be reserved to enable the parties to reach an agreement (Rule 75 §§ 1 and 4 of the Rules of Court).

B. Costs and expenses

151. The first applicant claimed EUR 170 for postal and various expenses incurred at the national level and before the Court. The Government contested this claim as substantiated in part. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court awards EUR 100 to the first applicant, plus any tax that may be chargeable.

152. The second applicant made no claim for costs and expenses, therefore the Court makes no award.

C. Default interest

153. 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, unanimously,

1. *Decides* to join the applications;

2. *Declares* admissible the complaint under Article 1 of Protocol No. 1 to the Convention concerning the expropriation decision;

3. *Decides* that it is not necessary to examine separately the admissibility and merits of the complaints under Articles 6 and 8 of the Convention concerning the expropriation decision;

4. *Declares* the remainder of each application inadmissible;

5. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention as regards the expropriation decision;

6. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) to the first applicant: EUR 3,000 (three thousand euros), plus any tax that may be chargeable on this amount, in respect of non-pecuniary damage; EUR 100 (one hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(ii) to the second applicant: EUR 3,000 (three thousand euros), plus any tax that may be chargeable on this amount, in respect of non-pecuniary damage;

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

7. *Holds* that, as regards pecuniary damage resulting from the violation found, the question of just satisfaction is not ready for decision and accordingly:

(a) *reserves* this question;

(b) *invites* the Government and the applicants to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on this question and, in particular, to notify the Court of any agreement that they may reach;

(c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix it if need be;

8. *Dismisses* the remainder of the applicants' claim for just satisfaction on account of non-pecuniary damage and costs and expenses.

Noot

1. In deze zaak draait het om de onteigening van twee woningen en de bijbehorende grond ten behoeve van de aanleg van verschillende flats houdende 352 appartementen, waarvan er dertig in eigendom van de gemeente zouden komen. De vraag is in het bijzonder of met de onteigening een *compelling public interest* is gediend. Die vraag beantwoordt het Hof in verreweg de meeste onteigeningszaken positief. Na de uitspraak *Tkachevy* t. *Rusland* (**EHRM** 14 februari 2012, 35430/05, ECLI:CE:ECHR:2013:0404JUD003543005, **«EHRC» 2012/86** m.nt. Tjepkema) is dit echter opnieuw een voorbeeld van een zaak waarin het beroep van klagers op het ontbreken van dit belang slaagt. In deze zaak speelt, net als in de *Tkachevy*-zaak, in het bijzonder de vraag of onder een dun laagje 'algemeen belang' privébelangen feitelijk de boventoon hebben gevoerd.

2. Eerst nog even de theorie. De toets aan het 'algemeen belang' keert in verschillende fasen bij de toets aan art. 1 EP terug. Ten eerste dient de voorgenomen onteigening zelf 'in het algemeen belang' te zijn. Het is aan de verwerende partij om dat aan te tonen, maar die zal daar over het algemeen snel in slagen. Het is immers standaardrechtspraak sinds het

arrest *James e.a.* t. *Verenigd Koninkrijk* (**EHRM** 21 februari 1986, nr. 8793/79, ECLI:CE:ECHR:1986:0221JUD000879379, par. 40) dat de nationale autoriteiten beter dan het **EHRM** in staat zijn om te beoordelen of een onteigening in het algemeen belang is, gelet op hun kennis van de lokale omstandigheden en de behoeften die daar bestaan. Zij dienen derhalve in eerste instantie te bepalen of er een probleem speelt van publieke aard (*a problem of public concern*, zie *Jahn e.a.* t. *Duitsland*, **EHRM** 30 juni 2005 (GK), nr. 46720/99, ECLI:CE:ECHR:2005:0630JUD004672099, **«EHRC» 2005/83** m.nt. Kiiver, par. 91) dat onteigening vergt. De nationale autoriteiten beschikken hierbij over een zekere *margin of appreciation*. Die *margin* vloeit niet alleen voort uit het 'better placed'-argument, maar is ook inherent aan het begrip algemeen belang zelf. Immers, wat de nationale autoriteiten in het algemeen belang nodig achten vergt bij uitstek een afweging van tal van politieke, sociale en economische gezichtspunten. Zij moeten noodzakelijkerwijs een ruime *margin* hebben om aan de betrokken belangen het door hen gewenste gewicht toe te kennen. Deze ruime *margin* impliceert dat het **EHRM** slechts bij uitzondering tot de conclusie zal komen dat het algemeen belang niet is aangetoond; een handboek noemt de aanwezigheid van het algemeen belang bij onteigening 'almost an assumption' (Jacobs, White & Ovey, *The European Convention on Human Rights*, OUP 2014, p. 506). Is het 'algemeen belang' van de onteigening gegeven, dan speelt het vervolgens nog een rol bij de *fair balance*-toets, waarbij het Hof – om slechts één voorbeeld te noemen – bij excessief langdurige onzekerheid over de vraag of een onteigening doorgang zal vinden, tot de conclusie kan komen dat er geen goede balans tussen het algemeen belang van de gemeenschap en het individuele belang van klager is gevonden (**EHRM** 2 juli 2002, Motais de Narbonne t. Frankrijk, nr. 48161/99, ECLI:CE:ECHR:2002:0702JUD004816199, **«EHRC» 2002/71**, m.nt. Schokkenbroek). Het 'algemeen belang' kan, tot slot, nog een rol spelen bij de vraag naar de omvang van de schadevergoeding. Deze dient bij een ontneming van eigendom in beginsel de *full market* value te bedragen, maar het algemeen belang kan met zich brengen dat een lager bedrag wordt vergoed (zie bijv. *Papachelas* t. *Griekenland*, **EHRM** 25 maart 1999, nr. 31423/96, ECLI:CE:ECHR:1999:0325JUD003142396, par. 48). Een te zeer van de marktwaarde afwijkende vergoeding dient echter gepaard te gaan met een 'goed verhaal', bij gebreke waarvan het Hof soms oordeelt dat art. 1 EP geschonden is (*Urbárska Obec Trencianske Biskupice* t. *Slowakije*, **EHRM** 27 november 2007, nr. 74258/01, ECLI:CE:ECHR:2007:1127JUD007425801, par. 115).

3. De problematiek inzake de vermenging van private en publieke belangen doet zich ook in de nationale onteigeningsregimes geregeld voor, zo blijkt uit de recente landenstudie *Expropriation law in Europe* (J.A.M.A. Sluysmans, S. Verbist & E. Waring (red.), Deventer: Wolters Kluwer 2015). De redacteuren van deze bundel noemen de afwezigheid van het algemeen belang een veelgebruikt argument om een onteigening aan te vechten. Binnen de bestudeerde landen is er een consensus dat ook private partijen mogen profiteren van een onteigening naar aanleiding van een project dat wordt uitgevoerd met een publiek doel; een zekere mate van overlap tussen het algemeen en het private belang, waarbij beide van het te realiseren project profiteren, is dus geoorloofd (p. 10-11). Het is niet altijd makkelijk om beide 'belangensferen' goed van elkaar te scheiden, zo blijkt uit een blik op de verschillende landen. Zo heeft de Franse rechter uitgemaakt dat een 'direct en zeker' voordeel voor een privaat bedrijf niet afdoet aan het algemeen belang van de onteigening, zolang dat laatste belang een 'dwingende' (zogezegd 'overheersende') rol speelt (p. 160). In Duitsland lijkt een iets meer stringente lijn te worden aangehouden, nu private bevoordeling door onteigening is toegestaan, onder voorwaarde dat het private bedrijf een taak vervult die in het algemeen belang is: denk aan bedrijven die zich bezighouden met energielevering en telecommunicatie (p. 181). In Hongarije bepaalt de wet limitatief ten behoeve van welke algemene belangen (nationale defensie, bescherming van erfgoed, stedelijke ontwikkelingen) onteigend mag worden en is het 'algemeen belang' in beginsel gegeven als het tot een van die wettelijke doelen kan worden herleid (p. 238 e.v.). In Italië is er een heel juridisch debat over de precieze terminologie, waarbij de termen 'algemeen belang' synoniem wordt geacht te zijn met 'publieke doelen', nu het er in beide gevallen om gaat dat er belangrijke gemeenschapsbelangen met onteigening worden gediend. Dat staat niet in de weg aan de mogelijkheid dat naast het te dienen algemeen belang ook een privaat belang wordt gediend, bijvoorbeeld bij de bouw van een nieuw hotel of de uitbreiding van bestaande hotels. Hoewel de bouw van een hotel niet op zichzelf een 'publiek doel' is, kan het bestuur wel verklaren dat de werken een publiek doel dienen op basis van een vergelijkende waardering van alle betrokken belangen (p. 321). Dat lijkt ook de lijn te zijn in Polen, waar het algemeen belang gegeven is als een project voorziet in publieke behoeften en toegankelijk is voor publiek gebruik, zelfs als niet alle leden van de gemeenschap er daadwerkelijk gebruik van willen of zullen maken (p. 415).

4. Dit korte rechtsvergelijkende uitstapje laat zien dat het niet makkelijk is om een scheiding aan te brengen tussen het algemene en het private belang. Dat is ook lastig nu de door onteigening te realiseren werken vaak door (private) projectontwikkelaars worden uitgevoerd, terwijl die werken zelf zeker niet altijd een publieke functie hebben of deze, zoals in het voornoemde voorbeeld van een hotel, maar voor een select groepje burgers daadwerkelijk van betekenis zullen zijn. Die realiteit brengt met zich dat het **EHRM** kiest voor een pragmatische benadering. Deze klonk voor het eerst door in de voornoemde uitspraak *James e.a.* t. *Verenigd Koninkrijk* (par. 40-45) en wordt hier in par. 109 herhaald. Volgens deze lijn is een onteigening niet 'in het algemeen belang' als zij enkel en alleen wordt geëffectueerd om één private partij voordeel te bieden. Het Hof hanteert als lijn – terecht, gelet op het voorgaande – dat de nationale rechtsstelsels geen steun geven aan de gedachte dat het 'algemeen belang' in de weg staat aan een gedwongen overdracht van eigendom tussen private partijen (vgl. par. 109). Ook is het niet nodig dat het te realiseren werk de gehele gemeenschap baat of zelfs substantiële onderdelen daarvan. Met deze overwegingen kan men het moeilijk oneens zijn. Het probleem is echter dat het voor de onteigende partij niet altijd makkelijk zal zijn om hard te maken dat voor de overheid feitelijk de behartiging van een privébelang doorslaggevend is geweest. Het is immers altijd mogelijk een algemeen belang te 'vinden', terwijl het politieke karakter van het algemeen belang intensieve rechterlijke controle bemoeilijkt. Daar komt voor wat betreft het **EHRM** nog bij dat de sterke nadruk op de *margin of appreciation* klagers niet bepaald aanmoedigt om een onteigeningsbesluit op deze grond aan te vechten. Dit arrest laat zien dat dit onder omstandigheden toch de moeite waard kan zijn.

5. Het arrest blinkt niet uit in helderheid van structuur. De oorzaak is terug te voeren op par. 114, waarin het Hof overweegt dat er een zodanige verwevenheid is tussen de 'algemeen belang'- en de *fair balance*-toets dat ze gezamenlijk worden onderzocht. Het is daardoor uiteindelijk een wirwar aan materiële en procedurele gezichtspunten die tot het oordeel leiden dat art. 1 EP EVRM geschonden is. Globaal hebben de par. 115-123 vooral betrekking op de 'algemeen belang'-toets, terwijl de daarop volgende par. 124-127 op de omvang van de compensatie zien (als onderdeel van de *fair balance*-toets). Het is een beetje gissen waarom het Hof het nodig vindt beide elementen gezamenlijk te behandelen. Wellicht was het Hof van oordeel dat het op basis van het voorliggende materiaal geen harde uitspraak kon doen over de vraag of er echt sprake was van misbruik van bevoegdheid. Vergelijken we de bewoordingen van *Tkachevy* met de onderhavige zaak, dan is er op dit punt wel een verschil: in *Tkachevy* overwoog het Hof dat het algemeen belang 'was not clearly and convincingly shown', terwijl het Hof in deze zaak iets minder stellig is: het heeft daarover 'twijfels'. Wellicht was er wel een algemeen belang, maar dit was niet *compelling*, aldus het Hof (par. 123). Omdat de autoriteiten ook voor wat betreft de compensatie steken hebben laten vallen – door niet in te gaan op de stelling van klagers dat de *market value* niet goed was bepaald – zou het kunnen dat het Hof dat aanvullende argument nodig had om te kunnen oordelen dat art. 1 EP geschonden is. Wat hiervan ook zij, uiteindelijk haalt het Hof vier hoofdargumenten aan om te oordelen dat het 'algemeen belang' niet overtuigend is aangetoond. Van belang is ten eerste dat de onteigening niet voortvloeide uit een wetgevende maatregel, maar uit een administratieve beschikking. Die individuele aard van de onteigening is voor het Hof een indicatie dat de autoriteiten niet een belangrijk *algemeen* probleem het hoofd hebben willen bieden (par. 118). Ten tweede wijst het Hof erop dat ook de aangevoerde argumenten om te onteigenen niet steekhoudend zijn. De onteigening was gerelateerd aan een sloopprogramma, dat tot doel had om de architectonische kwaliteit van de stad te verbeteren en om inwoners van woningen die niet langer aan essentiële woonkwaliteitseisen voldeden te 'herplaatsen' (par. 18). Echter, de woningen waren, in weerwil van de stelling dat zij geen goed woonklimaat meer hadden, in een taxatierapport als 'bewoonbaar maar lichte reparaties nodig' aangemerkt. Ook de aangevoerde esthetische redenen kunnen het Hof niet overtuigen; het is niet duidelijk waarom de bouw van flats vanuit een esthetisch oogpunt de voorkeur zou moeten hebben boven individuele woonhuizen. Verder toont het Hof zich evenmin overtuigd door het argument dat de flats nodig waren om in nieuwe woningbehoefte te voorzien. Het wijst erop dat dit argument pas in de procedure voor het **EHRM** zelf naar voren is gebracht, en niet in de nationale procedure door de nationale autoriteiten (par. 120). Ook kan het Hof uit het beschikbare materiaal niet afleiden dat er ter plekke een woningtekort speelde. Een derde reden is dat het beweerdelijk dwingende karakter van de onteigening werd ondermijnd door het feit dat een belangrijk onderdeel van het bestemmingsplan dat aan de onteigening gelieerd was niet op de voorgeschreven wijze tot stand was gekomen, zoals ook door de autoriteiten was erkend. Als vierde en laatste argument wijst het Hof erop dat de gemeente slechts 5% van de ter beschikking komende woonruimte zou benutten; de stelling dat de flats nodig zouden zijn voor sociale woningbouw was niet nader gemotiveerd. Het Hof komt dan ook tot de

slotconclusie dat – wat er ook zij van de *margin of appreciation* – er twijfels blijven bestaan over de vraag of de onteigening ten behoeve van de aanleg van flats een *compelling public interest* diende.

6. Van deze argumenten is mijns inziens vooral het tweede argument bepalend om tot een schending van art. 1 EP te komen. Kort gezegd hebben de Russische autoriteiten een gebrek aan consistentie tentoongespreid in hun overwegingen om te onteigenen: zo werden in verschillende fasen esthetische overwegingen en veiligheidsargumenten naar voren gebracht en uiteindelijk ook de noodzaak om in (sociale) woningen te voorzien. Voor de geloofwaardigheid van het Russische standpunt pleit evenmin dat het argument dat sociale woningbouw nodig was pas ten overstaan van het **EHRM** zelf werd ingebracht. Het enkele feit dat de onteigening niet uit wetgeving voortvloeide is mijn inziens minder doorslaggevend, maar houdt hiermee wel verband. Verwacht mag immers worden dat in het wetgevingsproces uitdrukkelijk aandacht zal worden besteed aan de vraag waarom het algemeen belang onteigening gebiedt, en in die context zal een beweerdelijk misbruik van bevoegdheid niet makkelijk aannemelijk kunnen worden gemaakt. Niet voor niets benadrukt het Hof in par. 110 dat het eventuele betwistingen van het algemeen belang bij onteigeningen die voorvloeien uit wetgeving aan een strenge toets zal onderwerpen, waarbij het Hof alleen bij evidente willekeur ingrijpt. De toetsingsintensiteit in deze uitspraak is een heel andere: het Hof gaat over tot een zeer precieze feitelijke toets van de voorliggende taxatierapporten, wetgeving en andere documenten om de stellingen van klagers te toetsen. Die precieze werkwijze moet worden toegejuicht, maar het Hof zou naar mijn idee nadrukkelijker moeten verklaren waarom het deze precieze benadering kiest en waarom het zich in dit geval zo weinig aan de *margin* gelegen laat liggen. Daarbij zou het Hof nog steeds, zoals het ook doet in par. 108-110, voorop kunnen stellen dat er in beginsel een *margin of appreciation* geldt bij de vraag of een onteigening in het algemeen belang geboden is. Vervolgens zou het Hof duidelijk kunnen maken dat dit anders is als op basis van het dossier serieuze twijfels zijn gerezen over de vraag of een algemeen belang werd gediend. In dat geval, zo zou het Hof kunnen stellen, moet het overgaan tot een indringender onderzoek, dat zich vooral richt op de vraag naar 'the reality of the situation at issue, taking account of all the relevant circumstances' (zie thans par. 122). Het is evident dat een dergelijk onderzoek zich niet met een *margin of appreciation* verhoudt. Een appreciatiemarge is in dat verband ook niet gepast, omdat het niet gaat om een afweging van belangen, maar om de vaststelling van feiten. Door op deze wijze scherper te onderscheiden tussen de toetsing aan belangenafwegingen enerzijds en de vaststelling van feiten anderzijds kan het toepassingsbereik van de *margin* aan scherpte winnen. Thans blijft dit bereik nog wat diffuus; zo stelt het Hof in par. 123 vast dat er 'in the context of expropriation' een ruime *margin* geldt, maar is ook duidelijk dat het zich in de omstandigheden van dit geval van die *margin* maar heel weinig heeft aangetrokken. Daarvoor is een verklaring beschikbaar (namelijk een differentiatie tussen verschillende soorten toetsen in die ruimere context), maar het Hof laat na die te bieden.

7. Met deze voor hen positieve uitspraak krijgen klagers hun woning niet terug. Zij wonen er al sinds 2005 niet meer en de eerste klager heeft pas na lang dralen de sleutels van een nieuwe flat en de gegevens over de bankrekening met de onteigeningsvergoeding geaccepteerd (par. 45). Een kwestie die partijen nog verdeeld houdt is de taxatiemethode. Klagers betogen dat de autoriteiten de methode van het toekomstig gebruik hadden moeten hanteren om de waarde van het huis en het land te taxeren. Dat maakt in dit geval veel uit: de autoriteiten stelden dat het land gebruikt kon worden voor de bouw van een zomerhuisje, terwijl klagers stelden dat het – ook gelet op de structuur van de omgeving – meer voor de hand lag om het als grond te beschouwen waarop flats kunnen worden gebouwd. Het Hof laat zich over dit argument niet uit, conform zijn rechtspraak waarin het de autoriteiten bij onteigening de nodige vrijheid laat om hun waarderingsmethode te kiezen (zie nader J.A.M.A. Sluysmans en R. de Graaff, 'Ontwikkelingen in het eigendomsbegrip onder artikel 1 Eerste Protocol', *NJCM Bulletin* 2014, p. 265 e.v.). Wel stelt het dat de autoriteiten ten onrechte niet zijn ingegaan op de door klagers aangedragen argumenten om een andere taxatiemethode te kiezen. Wellicht is dit een punt waarover partijen in het kader van de vaststelling van een *just satisfaction* nog overeenstemming zullen bereiken.

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