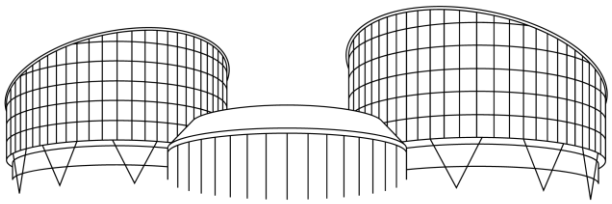

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIRST SECTION

CASE OF ZEHENTNER v. AUSTRIA

(Application no. 20082/02)

JUDGMENT

STRASBOURG

16 July 2009

FINAL

16/10/2009

This judgment may be subject to editorial revision.

In the case of Zehentner v. Austria**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Giorgio Malinverni,
George Nicolaou, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 25 June 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 20082/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Ms Bernardina Zehentner ("the applicant"), on 3 May 2002.

2. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs. The applicant was granted leave to present her own case (Rule 36 § 2 of the Rules of Court).

3. The applicant alleged that the judicial sale of her apartment violated her right to peaceful enjoyment of her possessions.

4. On 24 October 2005 the President of the First Section decided to communicate the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3). On 1 February 2007 the Chamber decided to re-communicate the application and to request the Government to submit further observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1944 and lives in Vienna.

A. The enforcement proceedings against the applicant, the judicial sale of her apartment and her eviction

6. On 4 August 1998 the Meidling District Court (*Bezirksgericht*), in summary proceedings, ordered the applicant to pay 102,330.48 Austrian schillings (ATS), approximately 7,440 euros (EUR) to G. for the cost of plumbing work carried out in her apartment (*Zahlungsbefehl*).

7. On 26 May 1999 the District Court granted G.'s request for the enforcement of the payment of this order and the costs of the proceedings in the amount of approximately EUR 2,150 by judicial sale (*Zwangsversteigerung*) of the applicant's apartment situated at S.-street 23/17, in the 12th district of Vienna. That address was used by the courts for serving this and subsequent decisions. A registered letter was sent to the applicant at the above address. As it could not be handed over to her personally, it was served on her on 8 June 1999 by deposition (*Hinterlegung*) in the post office.

8. On 27 July 1999 the Meidling District Court, referring to two further enforceable payment orders of 24 October 1995 and 15 June 1999 respectively (amounting to approximately EUR 2,100) and to the costs of the respective proceedings, granted another creditor, W., leave to accede to the judicial sale.

9. The applicant was informed of the date of the judicial sale by registered letter, which was again sent to her address at S.-street 23/17, and was served by deposition in the post office on 6 October 1999.

10. On 17 November 1999 the judicial sale took place. The applicant did not assist. The District Court sold the applicant's apartment (*Zuschlag*) for 812,000 ATS (approximately EUR 59,000) to H. GmbH, a limited liability company. The decision of sale was served on the applicant on 24 November 1999 by deposition in the post office.

11. By a decision of 14 January 2000 the District Court allocated shares of the proceeds to the creditors (*Meistbotsverteilungsbeschluss*).

12. In February 2000 the applicant was evicted from the apartment.

B. The appointment of a guardian for the applicant

13. In March 2000 the applicant had a nervous breakdown and stayed in a psychiatric hospital between 2 March 2000 and 12 April 2000. It cannot be established on the basis of the file where the applicant lived for the rest of the year 2000. It appears that in 2001 she was housed in a community owned apartment, where she is still living.

14. In connection with the applicant's stay in the psychiatric hospital, the Fünfhaus District Court instituted guardianship proceedings (*Sachwalterschaftsverfahren*) and, on 15 March 2000, appointed a provisional guardian for the applicant. In these proceedings a medical expert submitted

that the applicant had suffered from paranoid psychosis since 1994 and had since then not been able to make rational decisions, in particular as far as housing matters were concerned. On 15 May 2005 a permanent guardian was appointed for the applicant.

C. The attempts to have the enforcement proceedings suspended and the judicial sale of the apartment annulled

15. On 3 April 2000 the Meidling District Court served the decision of 17 November 1999 concerning the judicial sale of the applicant's apartment on the applicant's guardian. On 17 April 2000 the applicant, represented by her guardian, appealed against this decision. Referring to the guardianship proceedings, she submitted that the enforcement proceedings were null and void as she had not been capable of participating in the proceedings (*prozeßfähig*) either at the time of delivery of the respective payment orders or at the time of delivery of the decisions granting enforcement and summoning her to the judicial sale. She further requested that the enforcement proceedings be suspended.

16. On 26 April 2000 the District Court dismissed the applicant's request for the enforcement proceedings to be suspended. On 3 May 2000 it granted a part of the surplus of the judicial sale to another creditor, A. The applicant, referring again to her argument that the enforcement proceedings should be considered null and void, appealed against both decisions. She further submitted that she had paid all outstanding debts to G. in July 1999.

17. On 23 June 2000 the Vienna Regional Civil Court (*Landesgericht*) suspended the proceedings concerning the appeal against the judicial sale of the applicant's apartment and ordered the Meidling District Court to decide on the applicant's capacity to participate in the proceedings since June 1999, when the decision granting enforcement by judicial sale of her apartment had been served on her.

18. On the applicant's requests, the Meidling District Court, on 3 July 2000, found that the payment orders of 4 August 1998 and 15 June 1999 (see paragraphs 6 and 8 above) were not enforceable. Relying on section 7 § 3 of the Enforcement Act (*Exekutionsordnung*), it found that the applicant had not been capable of participating in the proceedings at the time of the delivery of the decisions at issue. For the same reasons the Hernals District Court, on 3 May 2001, referring to the expert opinion obtained in the guardianship proceedings and a further expert opinion, found that the payment order of 24 October 1995 (see paragraph 8 above) was not enforceable.

19. Referring to the first decision, the applicant, in October 2000, requested the District Court to discontinue the enforcement proceedings. On 12 January 2001 the District Court dismissed this request and noted that discontinuation was no longer possible as the decision allocating the

proceeds of the sale to the creditors had become final and the creditors had been paid.

20. In the meantime, on 28 December 2000, the Vienna Regional Civil Court resumed the proceedings concerning the applicant's appeal against the judicial sale. It dismissed the appeal, noting that under section 187 § 1 and section 184 § 1 (3) of the Enforcement Act only persons who had been present at the judicial sale or had erroneously not been summoned had a right to appeal within 14 days from the date of the auction. In contrast to the views expressed by legal writers, it was the Supreme Court's established case-law that this time-limit was absolute and, therefore, also binding in a case like the present one where the debtor had not been capable of participating in the proceedings and had not been represented. Consequently, the sale of the applicant's apartment had become final and it was no longer possible to claim the nullity of the proceedings. The court therefore revised its decision of 23 June 2000 (see paragraph 17 above) finding that the question of the applicant's capacity to participate in the enforcement proceedings was not relevant.

21. The applicant, represented by her guardian, requested the Vienna Regional Civil Court to allow an ordinary appeal with the Supreme Court (*Oberster Gerichtshof*). She argued that section 187 § 1 of the Enforcement Act setting an absolute time-limit for the filing of an appeal against a decision of sale in a judicial auction was unconstitutional and amounted to discrimination against disabled persons not capable of participating in legal proceedings. Such individuals could not be treated like persons with legal capacity, who were able to defend their interests in underlying civil proceedings and could later appeal against a decision granting enforcement. In the present case, the interests of the applicant in declaring the sale of her apartment null and void had to prevail over the interests of the purchaser and the creditors. On the one hand, the applicant had become homeless, having lost her apartment, which had been sold far below its market price in order to satisfy relatively minor claims. On the other hand, annulling the judicial sale of the apartment would not have caused serious or irreparable damage to the creditors or the purchaser.

22. By a decision of 12 January 2001 the Meidling District Court entered the purchaser of the applicant's apartment, the limited company H., as owner in the land register.

23. On 24 April 2001 the Vienna Regional Civil Court refused to grant an ordinary appeal. Qualifying the applicant's submissions as an extraordinary appeal, it transferred them to the Supreme Court.

24. On 30 January 2002 the Supreme Court (*Oberster Gerichtshof*) rejected the applicant's extraordinary appeal. It noted that the Regional Court's decision was in line with its constant case-law. As to the question regarding the constitutionality of the absolute time-limit for the filing of

appeals against a judicial sale, it referred to the necessary protection of the purchaser.

25. By decision of 12 April 2002 the Vienna Regional Civil Court dismissed the applicant's further appeals against a number of decisions of the District Court, including the decision entering the purchaser of the apartment as owner in the land register (see paragraph 22 above), a decision granting another part of the surplus of the judicial sale to creditor A., and decisions fixing further costs of the enforcement proceedings. It noted that the applicant's arguments were restricted to the allegation that the judicial sale had not become final and that, therefore, all subsequent decisions were null and void. However, according to the Supreme Court's decision, the judicial sale had become final.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Civil Procedure

26. Under Article 477 § 1 of the Code of Civil Procedure (*Zivilprozeßordnung*) a decision in civil proceedings is null and void and may be annulled if a party who is required to be represented has not been represented in the proceedings and the legal representative does not approve the conduct of the proceedings *ex post*. The party concerned may request annulment under section 529 of the Code of Civil Procedure. There is no specific time-limit for filing such a request.

27. Article 6a of the Code of Civil Procedure provides that if there is any indication that a party is not capable of effectively participating in the proceedings, they have to be suspended and the case has to be transferred to the competent court to conduct guardianship proceedings.

B. Enforcement Act

28. Enforcement proceedings are instituted by a request by the creditor, who indicates the mode of enforcement (section 54). In enforcement proceedings a debtor can oppose enforcement, claiming deficiencies in the underlying claim (*Oppositionsklage*, *Oppositionsgesuch*; sections 35 and 40) or can request a stay of execution (*Impugnationsklage*, *Impugnations-gesuch*, section 36) on account of deficiencies in the decision granting enforcement. Furthermore, the court may, of its own motion or at the request of a party concerned, declare that a judicial decision or payment order is not enforceable if enforcement would be erroneous or unlawful (section 7 § 3). Upon such a decision enforcement proceedings are in principle discontinued (section 29 § 1) or suspended (section 42 § 2).

29. Enforcement by way of judicial sale (*Zwangsversteigerung*) of a debtor's real estate is granted by a decision (*Exekutionsbewilligung*). Subsequently, the court orders the valuation of the property by an expert (section 140). Both parties to the proceedings, debtor and creditor, are summoned to the respective inspection of the real estate. At the time of the events, the value of the real estate was determined by a decision of the enforcement court which was subject to appeal (section 144).

30. The date of the judicial sale is communicated by official notification (*Versteigerungsedikt*) which is served on the debtor and creditor (section 171). The decision to sell (*Zuschlag*) real estate in a judicial sale constitutes an act of public law by which the purchaser obtains the property. Under sections 184 § 1 (3) and 187 § 1 such a decision can be appealed against within 14 days from the date of the judicial sale, *inter alia*, by a person who has erroneously not been summoned to the judicial sale.

31. According to the Supreme Court's constant case-law, after expiry of this time-limit the decision of judicial sale becomes final. It is then no longer possible to take the eventual nullity of underlying decisions into account, even if the debtor had not been capable of participating in the proceedings due to a lack of legal capacity at the time when enforcement had been granted. The Supreme Court holds that only this approach is compatible with the aims of the proceedings leading to a judicial sale and the protection of the *bona fide* purchaser. A debtor can remedy unlawful acts of the party having instituted enforcement proceedings by claiming compensation (*Schadenersatz*) and unlawful acts of the courts by instituting official liability proceedings (*Amtshaftung*) (see for example 3 Ob 133/88, and also 2 Ob 128/72, 3 Ob 114/83, 3 Ob 165/01p).

32. After the judicial sale becomes final, the enforcement court allocates the proceeds of the sale to the creditors and any eventual surplus subsequently to the debtor. Once the purchaser has fulfilled all the conditions, the court transfers the real estate and enters him as the owner in the land register.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 AND OF ARTICLES 6, 8 and 13 OF THE CONVENTION

33. The applicant complained that the judicial sale of her apartment deprived her of her possessions. She relied on Article 1 of Protocol No. 1, which 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."

34. The Court reiterates that, since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the applicant. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see, for instance, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I).

35. Having regard to the circumstances of the present case, the Court considers it appropriate, in addition to Article 1 of Protocol No. 1 to the Convention, to examine the applicant's complaint first and foremost under Article 8 of the Convention, which provides as follows:

"1. Everyone has the right to respect for his private ... life, 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."

36. In addition, the applicant's complaint may be seen as raising an issue of access to court under Article 6 § 1 of the Convention and possibly also as raising the question whether she had an effective remedy as required by Article 13 of the Convention.

Article 6, in so far as relevant, reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 13 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. Admissibility

1. Applicant's standing

37. The Government submitted that the applicant did not have legal standing to conduct the proceedings before the Court. They asserted that she was under guardianship because she had been unable for many years to make decisions, in particular as far as housing matters were concerned. The present application concerned matters relating to the applicant's apartment

and had not been approved by her guardian. Consequently, it appeared that the applicant did not have standing to file the present application.

38. The applicant did not file any submissions in this connection.

39. The Court observes that the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve purposes different from those contemplated by Article 34 of the Convention and, whilst those purposes may sometimes be analogous, they need not always be so (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 139, ECHR 2000-VIII). The Court notes that the appointment of a guardian under domestic law prevents a person lacking legal capacity from validly entering into contracts or conducting proceedings. Thus it serves, *inter alia*, to protect the person concerned from disposing of his or her rights or assets to their own disadvantage. In Convention proceedings the need for a person lacking legal capacity to be represented by a guardian is less obvious. In certain circumstances it may therefore be justified to allow a person lacking legal capacity under domestic law to conduct Convention proceedings in his or her own right. Indeed, under Article 34 of the Convention the Court may receive applications from any person claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. There is no obligation in general, or for persons lacking legal capacity in particular, to be represented at the initial stage of the proceedings.

40. In the present case, the applicant filed an individual application with the Court on 3 May 2002, setting out in a sufficiently substantiated manner the subject matter of her complaint. Following communication of the application to the Government, the applicant's guardian informed the Court by letter of 12 April 2006 that she had not approved the institution of the proceedings and did not wish to pursue the application. Meanwhile, in March 2006, the applicant had requested the Court to proceed with the examination of her case. She stated that she did not wish her guardian to represent her before the Court, but was unable to appoint another representative. On 3 May 2006 the President of the Chamber granted leave to the applicant to present her own case pursuant to Rule 36 § 2 of the Rules of Court.

41. Having regard to the above considerations, the Court finds that the applicant has standing to pursue the present application and that the Government's objection must be dismissed.

2. Non-compliance with the requirements of Article 35 § 1 of the Convention

42. The Government submitted that the applicant did not assert her right to respect for her home and to an effective remedy in this respect either in the domestic proceedings or in the proceedings before the Court. Nor did

she raise this complaint within the six-month time-limit. Thus, this complaint cannot be examined for failure to comply with Article 35 § 1 of the Convention.

43. The Court reiterates that under Article 35 § 1 of the Convention normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. It also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (*Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports* 1996-IV).

44. In the present case the applicant, represented by her guardian, requested leave to lodge an appeal on points of law against the Vienna Regional Court's decision of 28 December 2000, by which it had dismissed her request to have the judicial sale annulled. She made it sufficiently clear that the apartment at issue had been her place of residence and that she had not only lost her property but had lost her home as a result of the judicial sale and the subsequent eviction (see above, paragraph 21). She even advanced an argument on the lack of proportionality of the interference with her rights on the one hand and the creditors' and purchaser's interests on the other hand. In her application to the Court, although relying on Article 1 of Protocol No. 1, she also mentioned not only that she had lost her property but that she had been left without an apartment as a result.

45. The Court therefore finds that the applicant raised the point now at issue before the domestic courts, thus enabling them to redress the violation at issue. The way in which she set out the facts and complaints in her application is also sufficient to encompass the aspect that the apartment subject to judicial sale was her “home”. In sum, the Court finds that the requirements of Article 35 § 1 have been complied with.

3. Conclusion

46. The Court considers that this part of the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits of the complaint under Article 8

1. The parties' submissions

47. The applicant complained that she lost her apartment as a result of the judicial sale proceedings and that she was left without any defence against that.

48. The Government argued that it was not sufficiently clear whether the apartment which had been subject to judicial sale had actually been the applicant's "home" within the meaning of Article 8. Referring to the applicant's submissions in respect of just satisfaction, they argued that she had apparently intended to let the apartment.

49. Furthermore, the Government asserted that the mere fact of a judicial sale did not directly affect the applicant's right to respect for her home. The judicial sale brought about a change of ownership but not a change in her living situation at that point. This was only the case once eviction proceedings were carried out in which, however, legal protection was available.

50. Even assuming that Article 8 was applicable, the interference with the applicant's right to respect for her home was justified. The forced sale of the apartment had a legal basis and served the legitimate aim of protecting the rights of others, namely the applicant's creditors. The applicant's subsequent eviction served to protect the purchaser's rights.

51. As to the necessity of the interference, the Government asserted that States enjoyed a wide margin of appreciation in matters of social policy. As regards the procedural guarantees implied in Article 8, they observed that all documents relating to the enforcement proceedings had been served on the applicant, who had failed to react. There had been no indication for the judge that the applicant lacked legal capacity. That had not become apparent at the time of her eviction either, but had only been discovered some five months after the judicial sale. The rules of Austrian law, which contained a strict 14-day time-limit for challenging a judicial sale of real estate with the consequence that the decision could not be reviewed even if it turned out that the person concerned had lacked legal capacity, were nevertheless proportionate. They were not only justified to protect the *bona fide* purchaser but also served to protect the interests of debtors or creditors in general, as property would not achieve normal or close-to-market prices at judicial sales if the law permitted the sale to be challenged without a time-limit. More generally, the absolute time-limit served the interests of the efficient administration of justice and of preserving legal certainty.

2. The Court's assessment

52. The Court has noted on a number of occasions that whether or not a particular habitation constitutes a "home" which attracts the protection of

Article 8 § 1 will depend on the factual circumstances (see, for instance, *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports* 1996-IV, §§ 52-54 and, as a recent authority, *McCann v. the United Kingdom*, no. 19009/04, § 46, 13 May 2008).

53. The Court observes that the apartment subject to judicial sale was situated at S.-street 23/17 in Vienna. It appears that the courts considered it to be the applicant's residence, as it was at that address that the decision authorising the judicial sale and the summons informing the applicant of the date of the auction were served in June and October 1999, respectively. Moreover, it is not in dispute that following the judicial sale which took place in November 1999 the applicant was evicted from the apartment, in February 2000. Consequently, the Court sees no reason to doubt that the apartment subject to the judicial sale was at the material time the applicant's "home" within the meaning of Article 8 of the Convention.

54. The Court considers that the judicial sale of the applicant's apartment and her eviction interfered with her right to respect for her home. In contrast to the Government's view, the Court finds that the judicial sale and the applicant's eviction are to be seen as a whole. The judicial sale deprived her legally of her home, and was a necessary pre-condition for the eviction, which factually deprived her of her home.

55. The interference at issue will be in violation of Article 8 unless it is justified under the second paragraph of that provision. In the present case the interference was in accordance with the law, being based on the relevant provisions of the Enforcement Act, and served the legitimate aim of protecting the rights and freedoms of others: the proceedings as a whole served the interests of the creditors to obtain payment of their claims. In addition, the eviction and the refusal to annul the judicial sale served to protect the purchaser of the apartment.

56. The Court reiterates that an interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see *Connors v. the United Kingdom*, no. 66746/01, § 81, 27 May 2004, and *Buckley*, cited above, § 74).

57. In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be

narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where general social and economic policy considerations have arisen in the context of Article 8, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (see *Connors*, cited above, § 82 with further references).

58. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Connors*, cited above, §83, and *Buckley*, cited above, § 76).

59. In this context the Court has already held that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude 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 Article 8 of the Convention (see *McCann*, cited above, § 50, 13 May 2008).

60. The Court recalls that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *J.B. v. Switzerland*, no. 31827/96, § 63, ECHR 2001-III). It is therefore not called upon to review the legislation at issue in the abstract, namely the relevant provisions of the Enforcement Act on the judicial sale of property, but will examine the specific circumstances of the applicant's case. Having regard to the crucial nature of the interference with the applicant's right to respect for her home, the Court attaches particular weight to the procedural safeguards.

61. The Court notes at the outset that the judicial sale of the applicant's apartment was authorised on the basis of a payment order which had been issued in summary proceedings. While this may be in the interest of efficient enforcement proceedings, the Court has doubts as to whether the debtor's interests are adequately taken into account where such a payment order, moreover for a comparatively minor sum, can be the basis for the judicial sale of a debtor's "home" within the meaning of Article 8. While the Court does not have to examine this system in the abstract, it notes that in the circumstances of the present case it was particularly detrimental to the applicant. It appears from the expert opinion provided in the guardianship proceedings that by the time the judicial sale of her apartment took place she had lacked legal capacity for years. As a result she had not been in a position either to object to the payment order underlying the decision authorising the judicial sale or to make use of the remedies available to the debtor under the Enforcement Act (see paragraph 28 above).

62. It is true, as the Government pointed out, that the courts were not and could not have been aware of the applicant's lack of legal capacity when conducting the proceedings at issue. However, the Court attaches weight to the fact that once the applicant's lack of legal capacity had been established and a guardian had been appointed for her, she was left without any means of obtaining a review of her case due to the absolute nature of the time-limit for appealing against a judicial sale laid down in section 187 § 1 of the Enforcement Act.

63. The Court notes the Supreme Court's and the Government's arguments that the said time-limit served to protect the *bona fide* purchaser and the general interests of an efficient administration of justice and of preserving legal certainty. Nevertheless, persons who lack legal capacity are particularly vulnerable and States may thus have a positive obligation under Article 8 to provide them with specific protection by the law (see, *mutatis mutandis*, *Connors*, cited above § 84). While generally there may be good reasons for having an absolute time-limit for lodging an appeal against a judicial sale of real estate, specific justification would be required where a person lacking legal capacity is concerned. The Court notes that the Supreme Court has not given any such justification and has not carried out any weighing of the conflicting interests at stake, namely the interests of the *bona fide* purchaser on the one hand and the debtor lacking legal capacity on the other hand.

64. Turning to the Government's argument that the absolute time-limit served the general interest of preserving legal certainty, the Court reiterates its established case-law in the context of Article 6 § 1. It has repeatedly stated that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue their ruling should not be called into question (see, among many others, *Brumărescu v. Romania*, judgment of 28 October 1999, *Reports* 1999-VII, § 61). Nevertheless, the Court has held that departures from that principle may be justified when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX). The Court has not considered Article 6 § 1 to have been violated where the quashing of a final and enforceable decision was aimed at correcting a fundamental defect (see, for instance, *Protsenko v. Russia*, no. 13151/04, §§ 30-34, 31 July 2008).

65. In the present case, neither the protection of the *bona fide* purchaser nor the general interest of preserving legal certainty are sufficient to outweigh the consideration that the applicant, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts. It follows that, because of the lack of procedural safeguards, there has been a violation of Article 8 of the Convention in the instant case.

C. Merits of the complaint under Article 1 of Protocol No. 1

1. The parties' submissions

66. The applicant maintained that the judicial sale of her apartment had unjustly deprived her of her property.

67. The Government argued that Article 1 of Protocol No. 1 did not apply, since the judicial sale of the property had not reduced the applicant's assets. The rules governing the enforcement proceedings ensured that the property was sold at a fair price. The proceeds of the sale were used to satisfy the creditors' claims, which meant that the applicant was relieved of her liabilities. The remaining surplus of the proceeds had been allocated to the applicant.

68. In any case the judicial sale was provided for by law, namely by the Enforcement Act, and served the public interest in an effective administration of justice. Furthermore, it was justified in the interest of legal certainty and proportionate that an appeal against the decision to sell the property was limited in scope and that no reinstatement was allowed in respect of the 14-day time-limit for lodging that appeal. In that respect, the Government referred in essence to their submissions under Article 8.

69. In addition, the Government asserted that despite the impossibility to have the judicial sale annulled the applicant was not left without any procedural protection. Having obtained the finding that the payment orders underlying the judicial sale were not enforceable due to her lack of legal capacity, she was in a position to obtain a review of the proceedings on the merits. In the event that they resulted in her creditor's claims being dismissed, she would be able, by invoking unjust enrichment under Article 1435 of the Civil Code, to reclaim the amounts which had been paid to them from the proceedings of the judicial sale. Any damage going beyond these amounts could be claimed if caused by unlawful acts of her creditors.

2. The Court's assessment

70. The Court refers to its established case-law on the structure of Article 1 of Protocol No. 1 and the manner in which the three rules contained in that provision are to be applied (see, among many other authorities, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 52, ECHR 2007-.., and *Jokela v. Finland*, no. 28856/95, § 44, ECHR 2002-IV).

71. In line with that case-law, the Court considers that the judicial sale of the applicant's property falls to be considered under the so-called third rule, relating to the State's right “to enforce such laws as it deems necessary to control of the use of property in accordance with the general interest” set out in the second paragraph of Article 1 of Protocol No. 1. It constitutes an

interference with the applicant's property, since she was no longer able to dispose of her apartment. The Government's argument that the judicial sale did not reduce the applicant's assets is not decisive in this context.

72. Any interference with the right to peaceful enjoyment of possessions must 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 (*J.A. Pye*, cited above, § 53). In respect of interferences which fall under the second paragraph of Article 1 of Protocol No. 1, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect States enjoy 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 (*J.A. Pye*, cited above, § 55).

73. Moreover, the Court reiterates that although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must afford the individual a reasonable opportunity of putting his or her case to the relevant authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, the Court takes a comprehensive view (see, for instance, *Jokela*, cited above, § 45).

74. The Court notes that the interference with the applicant's right to peaceful enjoyment of her possessions was based on the relevant provisions of the Enforcement Act and served the legitimate aims of protecting the creditors and the purchaser of the apartment (see paragraph 55 above for similar considerations in respect of Article 8).

75. The Court does not overlook the fact that the present case concerned proceedings between private parties, namely the applicant and her creditors on the one hand and the applicant and the purchaser of the apartment on the other hand. However, even in cases involving private litigation the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-.., and also *J.A. Pye*, cited above, § 57). The present case raises an issue regarding the applicant's procedural protection in the proceedings at issue.

76. In that respect, the Court refers in essence to the considerations set out above (see paragraphs 61-62 above). It has doubts as to whether the debtor's interests are adequately taken into account where a payment order for a comparatively minor sum issued in summary proceedings can serve as a basis for the judicial sale of real estate of considerable value. As has already been noted above, the applicant, due to her lack of legal capacity, was unable to object to the payment order underlying the decision

authorising the judicial sale of her apartment or to make use of the remedies available to the debtor under the Enforcement Act. Nor could she obtain an annulment of the judicial sale due to the absolute nature of the time-limit for appealing against a judicial sale laid down in section 187 § 1 of the Enforcement Act.

77. However under Article 1 of Protocol No. 1 the Court is examining the judicial sale of the applicant's apartment not from the point of view that it was the applicant's "home" but from the point of view of property rights. In that context the Government's argument that the applicant had alternative means to protect her pecuniary interests needs to be examined. The Government pointed out that the applicant, represented by her guardian, had obtained a finding that the payment orders underlying the judicial sale were not enforceable due to her lack of legal capacity. Subsequently, she would be able to obtain a review of the proceedings on the merits and, if they resulted in her creditor's claims being dismissed, she could claim reimbursement of the amounts which had been paid to them from the proceeds of the judicial sale (see paragraph 69 above).

78. However, the Court is not convinced that this procedural mechanism, which requires conducting a number of consecutive sets of proceedings against each of the applicant's creditors, offers adequate protection to a person lacking legal capacity. It therefore refers to its above considerations dismissing the Government's argument that the strict time-limit for appealing against a judicial sale was justified in the interests of protecting the *bona fide* purchaser and in the general interests of an efficient administration of justice and of preserving legal certainty. In sum the Court does not find any reasons to come to a different conclusion under Article 1 of Protocol No. 1.

79. Consequently, there has been a violation of Article 1 of Protocol No. 1.

D. Articles 6 § 1 and 13 of the Convention

80. The applicant did not make specific submissions.

81. The Government contended that Article 6 § 1 was not applicable to the enforcement proceedings at issue. Even assuming applicability of Article 6 § 1, they argued that the applicant's right to access to court had not been unduly restricted. In respect of Article 13 they submitted that it was open to doubt whether there was a need to examine the issue separately given the procedural requirements already inherent in the substantive Articles at issue.

82. Having regard to its conclusions in respect of the procedural requirements inherent in Article 8 of the Convention and in Article 1 of Protocol No. 1, the Court considers that no separate issue arises under

Article 6 § 1 (see *Connors*, cited above, § 103) or under Article 13 of the Convention).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

83. Furthermore, the applicant complained about the guardianship proceedings and alleged shortcomings of her guardian without relying on any specific Convention right. However, she did not substantiate her complaint.

84. 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 this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

85. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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

87. The applicant claimed 191,575 euros (EUR) in respect of pecuniary damage. She referred to the loss of her apartment, the damage caused by the plumber, Mr. G, damage as a result of loss of furniture and jewellery, costs of transport and storage of furniture, loss of income since "before the events at issue" she had intended to let the apartment, damage allegedly caused by her guardian, costs associated with the move, and medical and legal costs.

88. Furthermore the applicant claimed EUR 81,000 in respect of non-pecuniary damage, in particular, distress and anxiety suffered.

89. The Government commented that some of the items listed under the head of pecuniary damage were linked to the applicant's complaint about the representation by her guardian. For other items, such as work done in the apartment at issue before the judicial sale, damage or loss of furniture or loss of rental income, there was no causal link between the damage claimed and the alleged violation of the Convention.

90. In respect of transport and storage costs, for which the applicant claims EUR 3,000, the Government accepted that there was a causal link with the alleged violation, but noted that the claim was not substantiated and

appeared excessive. The same applied to any costs connected with the applicant's move.

91. In respect of non-pecuniary damage the Government argued that the amount claimed by the applicant was excessive.

92. The Court does not discern any causal link between the violations found and the pecuniary damage claimed by the applicant, with the exception of the items listed by the Government. However, the applicant has not substantiated her claim relating to transport or storage costs or any other costs associated with her move, nor has she submitted proof in respect of the amount claimed. The Court therefore makes no award under the head of pecuniary damage.

93. On the other hand, the Court accepts that the applicant has suffered considerable non-pecuniary damage, in particular feelings of anxiety, distress and humiliation as a result of the eviction from her home and the lack of procedural protection against the judicial sale of her apartment. It awards the applicant EUR 30,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

94. The applicant also claimed EUR 2,000 for the costs and expenses incurred in the proceedings without specifying whether the claim relates to the domestic proceedings, to the Convention proceedings, or to both. She mentions costs for photocopying, telephone calls and mail and compensation for time spent on the case.

95. The Government did not comment.

96. 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.

97. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses insofar as it may relate to the domestic proceedings. Turning to the Convention proceedings, the Court notes that the applicant was granted leave to present her own case. It accepts that she must have incurred expenses for mail and photocopying and considers it reasonable to award the sum of EUR 200 in respect of the proceedings before the Court, plus any tax that may be chargeable on that amount.

C. Default interest

98. The Court considers it appropriate that the default interest 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 complaint relating to the judicial sale of the applicant's apartment admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 of the Convention;

4. *Holds* unanimously that no separate issue arises under Article 6 § 1 or under Article 13 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 30,000 (thirty-thousand euros) in respect of non-pecuniary damage and EUR 200 (two-hundred euros) in respect of costs and expenses, plus any tax that may be chargeable on these amounts;
   (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;

6. *Dismisses* by five votes to two the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partially dissenting opinion of Judge Malinverni, joined by Judge Kovler is annexed to this judgment.

C.L.R.
S.N.

PARTLY DISSENTING OPINION OF JUDGE MALINVERNI JOINED BY JUDGE KOVLER

(Translation)

I voted against point 6 of the operative provisions as I am of the opinion that the applicant in the present case suffered pecuniary as well as non-pecuniary damage.

The reason invoked by the majority for refusing any award in respect of the pecuniary damage sustained by the applicant is that it "does not discern any causal link between the violations found and the pecuniary damage claimed by the applicant" (see paragraph 92).

Again in the view of the majority, the lack of a causal link between the violation of Article 1 of Protocol No. 1 and the compensation claimed for pecuniary damage stems from the fact that the breach of the applicant's property rights was of a procedural nature (paragraph 65):

> "In the present case, neither the protection of the *bona fide* purchaser nor the general interest of preserving legal certainty are sufficient to outweigh the consideration that the applicant, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts. It follows that, because of the lack of procedural safeguards, there has been a violation of ... the Convention..."

I am not wholly persuaded by the distinction thus drawn between the legal consequences of a substantive violation of Article 1 of Protocol No. 1 and those of a procedural violation. Furthermore, the majority itself appears to concede that the procedural violation was accompanied by a substantive violation, when it states (paragraph 76):

> "It has doubts as to whether the debtor's interests are adequately taken into account where a payment order for a comparatively minor sum issued in summary proceedings can serve as a basis for the judicial sale of real estate of considerable value."

Moreover, the Court in the end finds a violation of Article 1 of Protocol No. 1, without specifying whether it is substantive or procedural in nature (paragraph 79).

According to the Court's settled case-law, any violation of the right to peaceful enjoyment of one's possessions calls in principle for reparation to be made in the form of *restitutio in integrum*. As it has reiterated on several occasions, the most appropriate means of redress for a violation of Article 1 of Protocol No. 1 is for the victim to have his or her ownership rights restored (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B); see also, for example, *Vontas and Others v. Greece*, no. 43588/06, § 50, 5 February 2009).

In the present case, the difficulty of implementing the principle of *restitutio in integrum* lies in the fact that the applicant's apartment was sold almost ten years ago, on 17 November 1999. Is this sufficient reason not to award the applicant compensation for pecuniary damage?

The Court has always maintained that "[i]f the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it ... If, on the other hand, national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate" (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 33, ECHR 2000-XI).

I am of the view that, in the present case, the victim should have been awarded just satisfaction for pecuniary damage, irrespective of whether the violation of Article 1 of Protocol No. 1 was substantive or procedural in nature.

In order to repay the applicant's debts to her creditors, totalling a little over EUR 10,000 (see paragraphs 6 to 8), the domestic authorities organised the compulsory sale of the apartment she owned in Vienna, with a surface area of 115 square metres, at the ridiculously low price of approximately EUR 59,000 (see paragraph 10).

Admittedly, it is difficult for the Court to assess the pecuniary damage sustained by the applicant, nor is it its task to do so. One way forward might therefore have been to reserve the question of application of Article 41 until such time as the parties had arrived at a fair and mutually acceptable solution.

One thing is certain – the award of EUR 30,000 for non-pecuniary damage (see point 5 (a) of the operative provisions) is not – by any means – sufficient to redress the injustice suffered by the applicant.