Vincent Berger's role in developing case-law concerning Slovenia

*Ana Vilfan-Vospernik**

Vincent Berger has been present in my professional life since the early 1990s. I think it no exaggeration to say that he is among those law professors who have had a decisive influence on the course of my (professional) life.

In 1991, thanks to the fact that I was completing my studies at the University of Ljubljana with a paper on the Convention case-law and a fortunate combination of circumstances, I was among the first interns from Central and Eastern Europe in the Council of Europe, working with Andrew Drzemczewski in the Directorate of Human Rights. The European Court for Human Rights was on the same premises and thus it was that I first met Vincent. In the following year, he was my professor at the College of Europe in Brugge, Belgium, teaching a course on human rights.

However, at that time, Slovenia being in the process of separating from the then Socialist Federative Republic of Yugoslavia and in the midst of transition from socialism to democracy and market economy, the Council of Europe and the European Union seemed unattainable for us. Of course, I never had the least idea that I would one day be working in the Registry of the European Court of Human Rights, mostly on cases concerning the two processes of transition and succession in the aftermath of the dissolution of the former Yugoslavia. Even less did I realise at that time that Vincent would be the Registrar in a number of important cases with Slovenia as a respondent State and that I would one day finally have the privilege of joining the team of the Jurisconsult Vincent Berger.

Although Vincent played a major part in developing case-law in respect of Slovenia in more classical human rights fields, such as police

* Lawyer at the Reaserch Division and at the Jurisconsult's Service, Registry of the European Cour of Human Rights. Opinions expressed in the text are sole responsibility of the author and do not engage either the Court.

brutality (see *Matko v. Slovenia*, no. 43393/98, 2 November 2006), in this chapter I shall concentrate on transitional and succession issues.

The first case with a broad impact in Slovenia and in its neighbouring countries concerned the length of proceedings. Cases of this nature are on the whole considered somewhat downmarket, but, as we all know, the celerity of the legal process is often of crucial importance for the parties concerned and for the effectiveness of the judicial system as a whole. To deal with a chronic backlog requires an in-depth analysis of a number of factors of a historic, legal, administrative and cultural nature. It is therefore most important that the efforts of Strasbourg should be backed by domestic *savoir faire*.

Since Slovenia was one of the countries with a chronic backlog in their courts because of, *inter alia*, the transition and the reform of the Slovenian judiciary in the mid-90s, and with a large caseload[1] pending before the Strasbourg Court , the judgment handed down in the case of *Lukenda v. Slovenia* (no. 23032/02, ECHR 2005-X), was of great importance for it. This judgment, signed by Vincent as Registrar, with a finding of a systemic problem in domestic courts on account of protracted trials and a lack of effective remedies, is referred to as a quasi-pilot judgment.[2] Under Article 46 of the Convention, Slovenia was encouraged to amend the existing range of remedies or to add new ones capable of securing effective redress for violations of the right to a trial within a reasonable time.

In parallel, in September 2005, a few weeks before the *Lukenda* judgment was published, the Slovenian Constitutional Court also gave a ruling on the incompatibility of the existing legislation with the requirement of a speedy trial.

As a result, the Slovenian Government adopted in 2005 a Joint State Project on the Elimination of Court Backlogs, the so-called *Lukenda* Project. Its goal was the elimination of backlogs in Slovenian courts and prosecutors' offices, by providing for structural and managerial reforms of the judiciary, initially by the end of 2010 although the deadline was subsequently extended. In particular, the 2006 Act on the Protection of the Right to a Trial without undue Delay – the

[1] The first admissible length-of-proceedings case against Slovenia, in which Vincent was the Registrar, was *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001.

[2] P. Leach et al., *Responding to Systemic Human Rights Violations. An Analysis of "Pilot Judgments" of the ECHR and their Impact at National Level*, Intersentia, 2010, pp. 75-95 and 101-104.

Lukenda Act – was passed and amended in 2009; other legislative changes were also adopted. The Strasbourg Court has since found that the remedies introduced by the amended *Lukenda* Act (with the exception of proceedings before the Constitutional Court and in some other specific situations) are effective (see *Grzinčič v. Slovenia*, no. 26867/02, 3 May 2007; *Korenjak v. Slovenia* (dec.) no. 463/03, 15 May 2007; *Žunič v. Slovenia*, no. 24342/04, 18 October 2007; and *Nezirovič v. Slovenia* (dec.), no. 16400/06, 25 November 2008).

As to the other transitional issues, since one of the characteristics of Communist rule in Central and Eastern Europe was the widespread taking of private property into public ownership or control, either through expropriation or as a sanction in the context of criminal proceedings, it comes as no surprise that one of the first reforms undertaken in Slovenia after its independence in June 1991 was the restitution of property to its previous owners by the enactment of the 1991 Act on Denationalisation. This Act provided for either restitution in kind or compensation in State bonds. Although the deadline for submitting requests expired as long ago as 1993, the whole process has not yet come to an end in Slovenia and has given rise to considerable litigation both in domestic courts and in Strasbourg.

However, as the Court has held, Article 1 of Protocol No. 1 does not guarantee the right to acquire property and there is no general obligation on States to return property to previous owners. Moreover, States are entirely free to lay down conditions on the return of property, such as Slovenian nationality, thus excluding certain categories of former owners from the return of their former property (see *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, ECHR 2002–VII). The Strasbourg Court thus could not disregard conditions laid down by domestic legislation. Accordingly, no violation was found as to property rights in the Slovenian restitution cases, the sole ground for violation in such cases being the protracted length of proceedings.

As none of the Slovenian restitution cases involved an unlawful seizure of property during the Communist rule, no continuous situation of taking of property could be established. In addition, under the Act on Denationalisation, the return of property in kind was provided for only if the State was still the owner of the property in issue. Therefore, situations with conflicting interests of different

private parties were not commonplace. However, there is currently a case pending before the Court involving rights of tenants occupying flats which have been returned to previous owners (*Berger-Krall and Others*, no. 14717/04).

Some of the decisions on restitution were nevertheless quite important for Slovenia since they showed the limits of the Strasbourg supervision and the subsidiary role of the Court in these matters, while at the same time stating that wrongs committed under the preceding Communist regime were incompatible with the principles of a democratic society, or examined a particular restitution issue. Many of these were signed by Vincent as Registrar (see, for instance, *Sirc v. Slovenia* (dec.), no. 44580/98, 16 May 2002 and 22 June 2006; and *Krisper v. Slovenia* (dec.), no. 47825/98, 25 April 2002).

In general, it is fair to say that after the accession of the Central and Eastern European countries to the Council of Europe one of the most important developments in protecting property under European human rights law can be found in the Court's way of dealing with so-called restitution cases.[3] However, the fears of those who thought that ex-socialist countries would change the existing property case-law were unfounded. It was more the complexity of issues and the difficulty of disentangling socialist conceptions and understanding several different layers of fundamental changes, not all of them properly recorded by the authorities, which were novel in these cases. Frequently, it was more a matter of returning as far as possible to the *status quo ante*.

There have been other property-related applications involving complex transitional issues pending against Slovenia but these have for the most part been declared inadmissible for non-fulfillment of basic admissibility conditions.

The transition in Slovenia was rendered even more difficult on account of the problems related to the traumatic break-up of the former Yugoslavia, the fratricidal armed conflict in the region and the lack of political will on the part of those involved to settle the outstanding issues.

[3] D. Popović, *Protecting Property in European Human Rights Law*, Eleven International Publishing, Utrecht, 2009, p. 67.

The origins of the crisis were by no means recent. The former Yugoslavia had been in a state of political and economic crisis since the beginning of 1980s. In 1989, just before the break-up of the Socialist Federative Republic of Yugoslavia, several reforms were undertaken in preparation for transforming the socialist planned economy into a market-oriented system. In June 1991, with Slovenia and Croatia declaring independence, the process of disintegration of the former Yugoslavia began. The whole process was spread out over several months, as the various republics proclaimed their independence. Because of the impossibility of negotiating a succession treaty, several legal issues were left open, leaving individuals having to cope with difficulties resulting from unresolved situations and bogged down in a legal morass.

In respect of Slovenia, the Court has thus dealt with litigation relating to pension rights and flats of former military personnel (see *Tričković v. Slovenia*, no. 39914/98, 12 June 2001; *Predojević and Others v. Slovenia* (dec.), nos. 43445/98 et al., 9 December 2004; and *Bunjevac v. Slovenia* (dec.), no. 48775/99, 19 January 2006). These questions were subsequently mostly resolved within the framework of succession negotiations or by domestic legislation of the successor States.

Although an Agreement on Succession Issues was signed in Vienna in 2001 by the then Republic of Bosnia and Herzegovina, Croatia, the then Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia and Slovenia and entered into force on 2 June 2004, some very difficult problems have still not been resolved. There are leading cases pending before the Strasbourg Court in respect of two important issues, namely "frozen" foreign-currency deposits and the question of the "erased".

As regards the former question, a judgment was recently given by Section IV in the case of *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* (no. 60642/08, 6 November 2012), finding a violation of Article 1 of Protocol No. 1 to the Convention in respect of Serbia and Slovenia and ordering general measures but the case has been referred to the Grand Chamber at the request of two respondent parties.

The question of bank deposits emerged in the case-law of the ECHR as a remnant of the previous authoritarian socialist regimes. Bank savings of the population were formally guaranteed by the

authoritarian governments and the banks in such economic systems were not based on private initiative but were State owned financial institutions, entirely influenced and controlled by the governments. The particularity of the former Yugoslavia was that the bank deposits were guaranteed by the former Federation and that savers were attracted by unrealistically high interest rates to deposit foreign currency. However, owing to the severe monetary crisis, access to foreign-currency deposits was blocked already before the dissolution of the former Yugoslavia. Such bank deposits are referred to as "old" or "frozen" foreign-currency savings.[4]

The successor States took over liability for these "old" foreign-currency savings to varying degrees. The unresolved question of the redistribution of the former Federation's liability for those savings has created extremely difficult financial situations for hundreds of thousands of savers and has burdened Governments, legislators and the judiciary of all the successor States, as well as their inter-State relations and succession negotiations and, finally, negotiations for accession to the European Union. More than eight thousand applicants have lodged applications with the Strasbourg Court.

In respect of Slovenia, the Court has dealt with two cases involving "old" foreign-currency savings: *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, 3 October 2008, and the above-mentioned *Ališić and Others* case. The former concerned Croatian savers who held accounts in the Zagreb branch of the Ljubljana Bank (*Ljubljanska Banka*) (i.e. in Croatia) whereas the latter concerned savers of the Sarajevo branch of the Ljubljana Bank and the Tuzla branch of Investbanka (i.e. in Bosnia and Herzegovina). Before the break-up, the Ljubljana Bank was one of the strongest banks in the former Yugoslavia. Further to the 1989/90 banking reforms, the Sarajevo branch of the Ljubljana Bank lost its legal personality and became dependent on its headquarters in Slovenia whereas Investbanka became an independent bank, with its headquarters in Serbia and a number of branches in Bosnia and Herzegovina (see *Ališić and Others*, cited above, § 14).

Vincent was the Registrar in the case of *Kovačić and Others* when it was in Section III. After thoroughly examining the background of the

[4] *Ibid.*, pp. 113 and 116.

cases, the Section III Chamber decided to strike the applications out of its list. So too, after the case was referred to it, did the Grand Chamber, as two of the three applicants had recovered their savings in full, with interest on immovable assets in Croatia, and the third applicant had brought proceedings in Croatian courts which at the material time were still pending. Given the magnitude of the problem, the Grand Chamber in an *obiter dictum* called upon all States concerned to find a solution in the framework of succession negotiations. The Croatian Government acted as intervening third party in the case.

In the *Ališić and Others* case, the Chamber noted in particular that the former Yugoslav State guarantee for the "old" foreign-currency could only be activated at the request of a bank, which had not happened here, and found that liability had not shifted from the banks to the now-defunct Federation. Consequently, the Ljubljana Bank Ljubljana, based in Slovenia, and Investbanka, based in Serbia, had remained liable for "old" foreign-currency savings in their branches, irrespective of their location, until the dissolution of the former Yugoslavia. As to the period after its dissolution, the Chamber found that there were sufficient grounds, in the special circumstances of the cases, to deem Slovenia liable for the "old" foreign-currency savings deposited with the Sarajevo branch of the Ljubljana Bank, and Serbia for the "old" foreign-currency savings deposited with the Tuzla branch of Investbanka, as it was clear that Slovenia and Serbia respectively controlled these banks.

The Chamber further considered that the applicants' continued inability to dispose freely of their savings despite negotiations in the Bank for International Settlements under the Agreement on Succession Issues, as well as a lack of any meaningful negotiations concerning this issue thereafter, constituted violations of property rights in respect of the two respondent States. The Court applied the pilot-judgment procedure in this case and ordered general measures to be undertaken within six months. As already stated, a request for the referral of the case by Serbia and Slovenia has been accepted. Thus the final outcome remains, for the present, uncertain.

In the Grand Chamber judgment of 26 June 2012 in the case of *Kurić and Others v. Slovenia* ([GC], no. 26828/06, ECHR 2012), the Court dealt with the question of the "erased". The applicants were

citizens of both the former Yugoslavia and one of its constituent republics, other than Slovenia, who had acquired permanent residence in Slovenia. Following Slovenia's independence, they had either failed to request Slovenian citizenship or had had their application refused. On 26 February 1992, pursuant to the newly-enacted Aliens Act, their names were deleted from the Register of Permanent Residents and they became aliens without a residence permit. Some 25,000 other people were affected in this way.

None of the applicants was ever notified of the "erasure". It was discovered only at a later stage, when, for instance, they attempted to renew their identity documents and discovered that they had in fact become aliens. The applicants had therefore not been given the opportunity to challenge the "erasure" before the competent domestic authorities or to give explanations as to the reasons for their failure to apply for Slovenian citizenship. The "erasure" of their names from the Register had serious and enduring negative effects on their situations; some of the applicants also became stateless and some were deported from Slovenia.

In spite of two leading decisions of the Constitutional Court declaring the "erasure" and the existing legislation unconstitutional, one from 1999 and the other one from 2003, it took Slovenian authorities more than ten years to pass legislation rectifying the situation of the "erased".

Six of the applicants had filed requests for residence permits and received them while the proceedings were pending before the Grand Chamber. However, owing to the widespread human-rights concern created by the "erasure" and the fact that this situation had lasted for some twenty years, the Court held that the applicants had not lost their victim status since the prospects of receiving compensation in Slovenia were too remote to have any relevance.

Most importantly, the applicants' right to private and/or family life under Article 8 of the Convention was found to have been breached. Having regard to the questionable foreseeability and accessability of the measure, the Court found that the interference was not "in accordance with the law". Even though the measure pursued a legitimate aim (of creating a "corpus of Slovenian citizens" and thus protecting the interests of the country's national security), the absence of State regulation on this point and the prolonged impossibility of obtaining

valid residence permits upset the fair balance which ought to have been struck between the legitimate aim and an effective respect for the applicants' right to private and/or family life. The legal vacuum in the independence legislation had deprived the applicants of the legal status which had previously given them access to a wide range of rights and had thus had severe adverse consequences for them.

The Court adopted a pilot–judgment procedure and ordered general measures to be implemented, including the setting up of an *ad hoc* compensation scheme in order to compensate other potentially effected persons within a period of one year expiring at the end of June 2013. The Slovenian Government recently adopted an action plan in view of the implementation of the judgment. This judgment, this time a Grand Chamber judgment with Vincent as Registrar, has therefore the potential to correct the situation of several thousand people.

Given that all applicants who had requested a residence permit were granted one before the Grand Chamber and that under the amended legislation in 2010 statelessness was no longer an impediment to receiving one, the even more vulnerable position of the stateless was not addressed by the Grand Chamber. At the Chamber stage, however, one applicant was denied a permanent residence permit on account of the fact that he was stateless given that he was not at the material time a citizen of any of the successor States that had emerged from the former Yugoslavia. Also in the light of relevant international-law standards aimed at the avoidance of statelessness, especially in situations of State succession, the Chamber held that the applicants' Article 8 rights had been breached.

According to UNHCR data, there are currently more than 4,000 stateless "erased" living in Slovenia. The improved possibility of receiving permanent residence permits under the amended legislation will increase the possibility for the "erased" eventually to receive Slovenian nationality if they so wish. The right to a nationality *per se* falls outside the Court's jurisdiction.