

THE CASE OF THE CZECH REPUBLIC VERSUS LIECHTENSTEIN

The dispute between Czech and Liechtenstein side has been visible since 2014. One part already landed at Strasbourg, the other is now travelling from one District Court to another. Can you explain what is – legally – the state of the dispute?

The ECtHR in Strasbourg has to handle an interstate application against the Czech Republic. The Principality of Liechtenstein resorted to this exceptional remedy for various and good reasons. The starting point is that a Czech administrative authority had decided to sue the Prince of Liechtenstein Foundation. Seemingly they had screened the land register and disapproved that based on the final decision of a Czech court ownership to property of the late Prince Regnant Franz Josef II was registered for the POLF. But why screen the land-register and then sue the ? Because an alleged confiscation in 1945 based on the further allegation that the late Prince would have been German in the meaning of the Presidential decrees should have more legal relevance than a recent registration. It would still today serve as ground for the Prince's heir not to be acceptable as a landowner in the Czech land register. The Czech Courts granted the action brought by the administrative authorities without considering the Foundation's defence – thereby breaching fundamental rights under the European Convention on Human Rights. Art. 6, 8, 13 and 14 and Art 1 of the First Protocol have been invoked by the Principality in the interstate application.

Due to a recent amendment the Czech Civil Law Code now provides the legal institute of extraordinary prescription. Accordingly also the possessor without title can acquire ownership – through mere passage of time. We can show that the Czech Republic has no legal title to Liechtenstein property. But as of 1.1.2019 the Czech Republic would eventually have had the option to resort to the defence of extraordinary prescription as mentioned above – should not possession bona fide be required from a state. To cut off that potential argument persons adversely affected by this new legislation had to actively invoke their rights in court. This is what happened in roughly two dozens of cases. Moreover Czech administrative authorities in the last several years clandestinely tried to remove the Liechtensteins as the land owners from the cadastre; their practice was found unlawful by the final ruling of the Supreme Court in 2021. Given that the Czech Republic operated these unfriendly legal steps systematically and at the same time refused any talks with the Liechtenstein side the concerned Liechtenstein citizens, the Foundation and the Prince Regnant being among them, had no other choice but to defend themselves in court.

What are the core legal arguments of POLF?

Two of the corner stones are the following: First there is no confiscation. Second the Prince Regnant of Liechtenstein is not a German, also according to the Czech post war legislation. Confiscation is the passing of ownership to the state without compensation. Expropriation is the same transfer but with compensation. Given the necessary criteria are met anyone's property can be expropriated. Confiscation of foreign property though is impossible under international law unless the foreigner is an affiliate of an enemy state. This is why the Presidential Decrees address the 3rd Reich, Hungary and Czech citizens who supported the two then enemy states. But the Decrees do of course not catch allied or neutral States and their citizens. Therefore for instance Austrian, Swiss, UK and US citizens whose property on Czech territory was taken after WWII were compensated by the Czech side.

The Principality of Liechtenstein was neutral during WWII. They withstood Nazi threats and just a fortnight after the Germans had invaded Prague they fended off an attempted coup by Nazis who tried to oust the Prince and make the Principality a part of the 3rd Reich.

So already the first step in the legal analysis shows: there is no Czech law that would provide in compliance with international law) for the confiscation of property owned by a citizen of a neutral foreign state like Liechtenstein is. So there is no legal basis that would ever have transferred ownership of Liechtenstein

property to the state. Establishing mere physical control over property does not mean transfer of ownership. So there is simply no confiscation.

But why then is the narrative that the Prince's property was confiscated under the Presidential Decrees so present in the Czech public? The reason is that in 2014 some Czech civil servants screened the cadastre in light of the registered owners' ethnicity, came, without any evidence, to the conclusion that the Foundation's legal predecessor was of German ethnic origin and the State brought the Foundation to court in order to deprive it of its registered ownership. Still today, the State has no evidence of such confiscation. The only piece of 'evidence' it relies on is a grey, uncertified copy of an ancient paper issued decades ago by a not even lawfully established provincial body. That paper – organised by some communists – had wrongfully stated the Prince Regnant would allegedly be a German in the meaning of the Presidential Decree 12/45. Hence his property in certain districts would be confiscated. No competence for issuance, no reasoning for the classification made, no serving of the Paper to the Prince, no procedures on the qualification as "German", purposeful suppression of the evidence showing that the statements made were untrue – a textbook example for a legal nullum. But from 2014 onwards some Czech institutions use this paper in courts to portray the Prince as German, to claim that his property was confiscated. That is peculiar. Already in President Benes's chancellery the head of the legal service had concluded that this document cannot make up for the lacking basis for confiscation. In 1947 the Supreme Administrative Court in Bratislava came to the same conclusion but was hindered by the communists to issue its ruling. And in 2021 the Supreme Court ruled that this paper is not sufficient to simply eradicate the still existing cadastral registrations for the late Prince Regnant as was asked for by some authorities. It is quite obvious that this paper is a nullum also with view to international law. A foreign head of state is not subject to a third countries jurisdiction. That is the concept of immunity. It is inconceivable that on such personal matters like his ethnicity any third countries district authority could issue any document of relevance. A head of state is representing his people. A foreign district authority cannot state that he is member of another people or whatsoever. Replace the Prince Regnant of Liechtenstein by any other European President or Monarch and then ask the question what the legal relevance of third country district authority's statements on his ethnicity would be. Absolutely zero.

But nevertheless and surprisingly the senate at the Constitutional Court presided by Mr. Suchanek accepted the odd argumentation of the acting administrative authorities thereby giving in 2020 effect to this fake news paper of communist origin. Making an absolute void ethnic declaration of an (under the relevant organisational laws not even existing) district body on a foreign head's of state ethnicity the bases to extend the scope of a law beyond its wording and limits under international law is nothing less than ethnic discrimination.

This senate followed by some other courts try to conceal what they are doing by using certain excuses. One is that they could not judge on events taking allegedly place before 1948. But that is incorrect of course because this is exactly what they do. Categorizing facts according to legal rules is judging. And stating that property was confiscated in 1945 is nothing less than delivering a legal qualification – in other words judging. So if you want to qualify property as "confiscated" you have to check whether it was confiscated or not. That inevitably means you will have to find out i) whether a confiscatory law is applicable and ii) if so whether the legal criteria for confiscation were met. Stating that physical control over property has changed does not involve legal analysis. But a statement on confiscation – which is the transfer of ownership – requires legal analysis and is a legal judging operation. The Czech courts performed neither of the two necessary tests – which both would show that the POLF's position is correct. So most obviously arguing some property would have been confiscated but refusing to make an appropriate analysis of facts and law is clearly contrary to the right to a fair trial.

Another argument is that the Decrees would work ex lege once somebody was qualified as German. But that qualification could not be challenged because the Decrees would work ex lege. That's a grotesque and cynical circular argument.

Yet another attempt is to argue that the courts could not make findings on the nullity of the relevant administrative decision. Seriously?

So today's Czech courts cannot recognize that a provincial body's statement on a foreign head of state's personal matters made against his will is legally meaningless – a nullum? Replace Franz Josef II of Liechtenstein by any other European Head of a neutral or allied country and ask the same question. Would anybody take it seriously that a minor district committee in whereabout qualifies with any legal effect the ethnicity of any given foreign President or Monarch in Europe? Inconceivable – not only for heads of state. In the 1930 and 1940 Europe was flooded with documents handed out by German authorities on allegedly objective racial qualifications of people. These declarations are not worth the paper they are printed on. A declaration on ethnicity requires that it is made in person. Exactly this is provided by the Presidential Decrees. Nobody can substitute such declaration unless a due procedure is followed. Nothing like that happened in the case of Franz Josef II of Liechtenstein. And still Czech courts base the confiscation of his property on such null and void paper – arguing they could not judge on it.

And quite telling – but also quite alarming – is the recently introduced last line of defence of the at present deciding senates of Czech highest courts. According to this reasoning even null and void acts would suffice to turn (unlawful) possession of the state to lawful ownership. First of all it's untrue. A null and void act is legally in-existent. And it cannot be brought into existence even by a ruling that overlooks the nullity. But what is happening here is dangerous. The courts turn state possession ipso iure into state ownership. If the state exercises factual control this already means ownership even if void acts are the basis for the state's control. A rule of law state should give the best example how to live up to the legal standards. Seizing physical control over foreign property on the basis of a void act is not a trifle. And courts explaining that for the state it does not matter if he has no proper but a void title to property – what example sets this?

In summary it is simple: There is no title to the property for the Czech Republic. The Presidential Decrees do not catch Liechtenstein citizens. There was no confiscation. The communists arranged the seizure and then fake documents and proceedings, or they did not bother even with that. The state as present possessor could eventually become owner by mere passage of time only in accordance to the new Civil Code – but this is not the case because the pending actions were brought before the end of 2018. So the suing state bodies and the Czech courts try to generate a title now by giving legal effects of confiscation to factual possession without title so turning possession to ownership. This is unlawful de facto taking of the property without compensation happening today on the basis of ethnic discriminatory legislation and a flagrant breach of international law.

Can you see different approach at some District Courts, or are they arguing the same?

Of course I can only draw my conclusions from the files, the way judges organise hearings and from the judgements. But all that makes it very apparent that the courts are seriously struggling with the problems described above. No surprise. It is evident that so far they feel bound by the present restrictions imposed by senior Czech courts preventing them to conduct the proceedings in a way respecting the fair-trial guarantees. There are statements that we look at obvious injustices and there are indications that judges reason about the international component of the case which would be beyond the domestic courts realm and might once be solved differently. I would not be surprised if one or the other younger judge would already realize that this would be necessary and helpful. Some younger judges tried to depart from the views of the senior courts, producing remarkable high-quality decisions, but those were subsequently quashed. Sooner or later international law and international procedural standards will prevail and I would not be surprised should one or the other judge or senate see the necessity to safeguard this already now and without waiting for an international court's decision.

There were reports in the press that POLF is not undermining Benes Decrees. How is this to be understood when you want to escape them and maybe open the avenue for other claimants? Do you think Czech Republic can afford it?

Your question is pointing to a very common concern. The answer is simple: The Prince was never subject to the Decrees. Someone outside the scope of the Decrees cannot undermine them. So from a clarification by the courts that the Prince was not subject to the Decrees and therefore his property was not confiscated (only physically occupied) no one who is subject to the Decrees can derive any conclusions for his position. The Liechtenstein cases are among the very few open cases and internationally the last of relevance. Honestly from a very personal view: I do not understand why the Czech Republic takes the risk of a renewed debate on the Decrees by broadening now their scope to include on a merely ethnic basis people who were not targeted in 1945 (except by radicals and communists) instead of simply clarifying that non-enemy-state-affiliates were never targeted, that the Decrees are not a matter of ethnic discrimination and that all issues are closed. The Liechtenstein case would be the paradigmatic opportunity to do so by clarifying that for that reasons the Liechtenstein properties were not confiscated. So the Liechtenstein side making the point that they have nothing to do with the Decrees does not harm those Decrees. It is the present Czech attempt to broaden the Decrees' scope so to also include on mere ethnic criteria citizens and the head of a neutral state that now casts doubt about the Decrees.

After recent decisions, spokesperson of POLF said that every other dismiss of the Liechtenstein's evidence before the Czech Courts will strengthen your position in Strasbourg. But from the Czech legal point of view, the approach of the CZ Courts sound lawful...

The dismissal of evidence is part of a much broader, systematic breach of the right to a fair trial. But really, the purposeful one-eye-blind strategy of the Czech courts is ever more apparent the more courts take recourse to it. For just one example: It will be in my view very difficult for Czech representatives to convince on the international level that Czech courts cannot recognize the nullity of a district level fake newspaper qualifying a foreign head's of state very personal matter like his ethnicity against his will when just that same paper is not only the alleged basis for the alleged confiscation but even broadened in its territorial scope by including districts that are not mentioned in that paper. At the same time declining to accept and scrutinize the evidence that this paper purposefully uses false allegations makes it even harder to explain that this is due and fair procedure at present European standard. And in first place: How will Czech representatives convince the European public and courts that the Presidential Decrees would cover citizens of neutral states because of their alleged ethnicity? It does not sound very profound in 2022.

Why did POLF sue and did not ask for the off court conflict resolution?

POLF did not only ask for an out of court approach to the pending issue. POLF even made elaborated proposals for an Memorandum of Understanding to develop a tailor-made solution to the benefit of both sides. To our regret at least the former administration was not interested in such different mechanisms of conflict resolution but pointed to the courts. This is why POLF had to sue – as I elaborated in more detail above.

How far would be the Liechtenstein side willing to go if the compromise were on the table?

The Prince of Liechtenstein always held the firm conviction that a negotiated solution is the best way to overcome the longstanding open issues. This is still true today, despite the ongoing legal proceedings. In negotiations interests of both sides can be best explored and taken into account, tailor-made solutions can be worked out.

The LI family has deep roots in the Czech lands, these are by no means forgotten. The LI family is convinced that there is much to build on and to be commonly developed. I am particularly thinking of the vast experience the LI family has in the field of the preservation of national heritage, art exhibitions, preservation of nature, forestry and winery, banking and in the field of philanthropy.

Liechtenstein and the Czech Republic are both successful European democracies deeply anchored in the western community of values. Both countries are likeminded with respect to promoting a strong European common market, a liberal economic system, low debts and a strong and modern industrial sector. There is much to be gained by a close cooperation of both countries and much to be lost by letting unresolved questions of the past block a rich and unique common heritage to unfold again.

Source:

Lawyers & Business

Type of media:

Magazine on current topics in the business and legal sectors – issued 10 times per year

Term:

7/03/22

Link:

<https://lawyersandbusiness.cz/kauza-stoleti-cr-versus-lichtenstejnici/>