

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nußberger, and

Mr. Ledi Bianku

Having deliberated on the appeal of Mr. **Vasilj Timkov** in the case no. **AP-476/21**, at its session held on 13 July 2023, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Vasilj Timkov** is hereby granted.

A violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the Supreme Court of the Republika Srpska, no. 11 0 U 020761 18 Uvp of 19 November 2020, is quashed.

The case shall be referred back to the Supreme Court of the Republika Srpska, which is obligated to take a new decision in expedited proceedings in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Supreme Court of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within a time limit of three months from the delivery of this decision, of the measures taken to enforce this decision.

REASONING

I. Introduction

1. On 11 February 2021, Mr. Vasilj Timkov (the “appellant”) from Prnjavor, represented by Joint Law Office “Topić” from Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina (the “Constitutional Court”) against the judgment of the Supreme Court of the Republika Srpska (the “Supreme Court”), no. 11 0 U 020761 18 Uvp of 19 November 2020.

II. Procedure before the Constitutional Court

2. By the decision no. *AP-2545/17* of 15 November 2017 and decision no. *AP-5541/14* of 26 February 2015, the Constitutional Court partially granted the appeals lodged by the same appellant in the same case and found a violation of the appellant’s right to a fair trial within a reasonable time (available at www.ustavnisud.ba).

3. Pursuant to Article 23 of the Rules of the Constitutional Court, the Supreme Court, the County Court in Banja Luka (the “County Court”), the Administration for Land Survey and Property Affairs of the Republika Srpska in Banja Luka (the “Republic Administration”) were requested on 23 May 2022 to submit their responses to the appeal.

4. Having received all the responses to the appeal, on 14 June 2022, the Constitutional Court communicated them to the appellant for observations. The appellant failed to submit his observations on the responses within the given time limit.

III. Facts of the Case

5. The facts of the case, as they appear from the appellant’s assertions and the documents submitted to the Constitutional Court, may be summarized as follows.

Introductory remarks

6. By a ruling of 10 June 2013, the Republic Administration - Branch Office in Prnjavor (the “Branch Office”) - granted a proposal of the Republika Srpska for full expropriation of the appellant’s real property described in detail in the operative part of that ruling. By a ruling of 6

September 2013, the Republic Administration upheld the ruling of 10 June 2013. The appellant filed a lawsuit with the County Court against the second-instance ruling. By judgment no. 11 0 U 012826 13 U of 7 April 2015, the County Court granted the lawsuit and quashed the second-instance ruling. In the reasons for the judgment, the County Court noted that the real property could not be expropriated until the construction of a new road access to the appellant's real property.

7. By ruling no. 21.36/473-9-4/09 of 5 April 2017, issued in reopened proceedings, the Branch Office granted the proposal of the Republika Srpska and determined that a part of the appellant's real property, designated as pastures and meadows, would be fully expropriated for the purpose of the construction of the Banja Luka – Doboj highway, as described in the operative part of the ruling. By the same ruling, the appellant's request for full expropriation of the other part of his real property was partially granted, whereas his request for expropriation of the remaining real property designated as residential and commercial facilities, courtyard and arable land, of a total surface of 32,648 m², was dismissed. It was also determined in the ruling that the expropriation beneficiary would acquire the right to take possession of the expropriated real property on the date of the payment of compensation for the expropriated real property. Furthermore, according to that ruling, Republika Srpska was obliged to make it possible for the appellant and his family, through the investor and construction contractor, to use the current access road under the highway bridge during the construction of the overpass, which would be used as an access road. In the reasons for the ruling, the Branch Office noted that the issue of access road could not be resolved without additional expropriation of the lands of other persons. It further noted that the appellant kept the current access road to his property (the remaining real property of a total surface of 32,648 m², in respect of which the appellant's request for expropriation was not granted) under the highway bridge, the height of which was 3.2 m. It further observed that in order for the access to be regular, such as that of the overpass planned to be constructed, the height of current access road should be at least of 4.5 m². By ruling no. 21.05/473-217/17 of 28 April 2017, the Republic Administration dismissed the appellant's appeal against the first-instance ruling. The amount of compensation for the expropriated real property was not determined in the ruling granting the request for expropriation of certain parts of the appellant's real property, which the investor should have paid in accordance with the law in order to take possession of the real property.

8. In April 2013, during the procedure for expropriation of the appellant's real property, Tehnički institut d.o.o. Bijeljina (the "Technical Institute") carried out an environmental expert examination and delivered its expert findings and opinion, wherein it referred to the results of the

air quality measurement carried out in 2009. It concluded in the findings that the investor, in accordance with the Environmental Impact Assessment Study approved in a ruling of the Ministry for Urban Planning, Construction and Ecology of the Republika Srpska, of 21 March 2011, “has an obligation during the construction and exploitation of the highway to apply the measures preventing, reducing or neutralizing the adverse effects on the environment”. Furthermore, it noted in the findings that a “new condition” could be established only following the project execution by means of a survey of all environmental elements in the near vicinity of the appellant’s real property. In that manner, the “efficiency of the work of the determined equipment and devices, i.e. the facilities for protection of the environment” would be determined and additional protection would be proposed if the results were unsatisfactory.

9. By a ruling of 8 June 2017, the Government of the Republika Srpska (the “RS Government”) granted a request of the Republika Srpska to allow Republika Srpska, after the finality of the ruling on full expropriation, to take possession of the real property. The property was expropriated in accordance with the ruling of the Branch Office of 5 April 2017, although compensation for the expropriated real property had not been determined nor paid yet. Despite that fact, by a conclusion of 16 June 2017, the Branch Office allowed the enforcement of the Branch Office’s ruling of 5 April 2017. On 16 July 2017, the expropriation beneficiary took possession of the expropriated real property. By judgment no. 11 0 U 020875 17 U of 7 December 2017, the County Court, having considered a lawsuit filed by appellant against the RS Government’s ruling of 8 June 2017, granted the lawsuit and quashed the contested act by giving reasons that the compensation for the expropriated real property had not been determined nor paid. The Republika Srpska filed a request for extraordinary review of that judgement. Given the fact that the County Court quashed the act of the RS Government, on 22 January 2018, the Branch Office adopted a conclusion wherein it interrupted the procedure for re-enforcement (the appellant’s repossession of the real property) pending the proceedings for extraordinary review of the judgment. By judgment no. 11 0 U 020875 18 Uvp of 31 May 2018, the Supreme Court dismissed the request for extraordinary review. In the reasons given for its judgment, the Supreme Court noted that the requirements had not been met for the investor to take possession of the real property as the amount of compensation had neither been determined nor paid.

10. By a conclusion of 29 October 2019, the Branch Office dismissed the appellant’s request for re-enforcement of the ruling on expropriation (the appellant’s repossession of the real property) of the real property by giving reasons that the re-enforcement was impossible as the transport

infrastructure was already built on the expropriated real property and put into use. By decision *no. AP-4406/18* of 14 October 2020, the Constitutional Court partially granted an appeal filed by the appellant and found a violation of the appellant's right to a fair trial within reasonable time. By the same decision, the Court rejected the appellant's appeal filed with regard to the re-enforcement procedure completed by the Branch Office's conclusion of 29 October 2019, due to the changed circumstances. The Constitutional Court noted in that decision that the appellant also contested the proceeding for re-enforcement of the ruling on expropriation of the real property, which, at the time of filing the appeal, was interrupted in accordance with the conclusion of 22 January 2018. Thus, in the mentioned case, the circumstances changed with regard to the judgments existing at the moment of filing the appeal, which was the reason why the consideration of the appellant's allegations became irrelevant (see Constitutional Court, Decision on Admissibility and Merits, *no. AP-4406/18* of 14 October 2020, paragraphs 20-27, available at www.ustavnisud.ba).

11. On 17 August 2018, the Institution of Human Rights Ombudsman of BiH adopted recommendations that showed that the compensation for the expropriated real property had never been paid to the appellant. In addition, the real property at issue was still in possession of Republika Srpska, although by a judgment of 7 December 2017, the County Court had quashed the RS Government's ruling of 8 June 2017.

12. By ruling *no. 78 0 V 029072 18 V* of 15 February 2019, the Basic Court in Prnjavor (the "Basic Court") interrupted non-contentious proceedings for determination of the amount of compensation for the expropriated real property pending a decision on the preliminary issues by the competent authorities. In this connection, the court established that the proceedings would be resumed at the appellant's request and after the completion of the proceedings pending before the Supreme Court with regard to the extraordinary review of the judgment rendered by the County Court on 30 January 2018. Those proceedings were concluded with the judgments mentioned in paragraphs 14 and 15 of this decision, which are contested by the appeal in the present case.

As to the contested judgment of the Supreme Court

13. The appellant filed a lawsuit against the Republic Administration's ruling of 28 April 2017 (see paragraph 7 of this decision) with the County Court, claiming that an access road to his non-expropriated real property was not secured. In addition, the appellant alleged that the administrative authority had unlawfully dismissed his request for environmental, hydrological and geological

expert examination, which was the reason why it was impossible to determine whether a normal life was possible on the remaining real property.

14. By judgment no. 11 0 U 020761 17 U of 30 January 2018, the County Court dismissed the lawsuit. In the reasons given for its judgment, the court noted that none of the criteria for expropriation of the remaining real property that were prescribed in Article 11 of the Law on Expropriation had been fulfilled. In this connection, the court further noted that it was established during the proceedings that *the possibility of accessing the remaining real property is not of permanent character and that the expropriation beneficiary intends to build two access roads in accordance with the acts in force* (the Constitutional Court deems that the court made an obvious error in writing the “possibility” instead of the “impossibility”).

15. By judgment no. 11 0 U 020761 18 Uvp of 19 November 2020, the Supreme Court dismissed the appellant’s request for extraordinary review of the judgment of the County Court. In the reasons given for the judgment, the Supreme Court noted that the appellant claimed that an access road to the house was not built, that the conditions for further life on the remaining real property “were not determined and that they remained uncertain” and that a just compensation had not been paid to him. On the other side, in a response to the request, the expropriation beneficiary alleged that none of the criteria prescribed by Article 11 of the Law on Expropriation had been fulfilled and that the access road to the family house was built under the bridge via the current road. In this connection, the Supreme Court dismissed the appellant’s complaint by giving reasons that it appeared from a supplement to the findings of a court expert in the field of civil engineering that the access to the appellant’s real property was secured. The Supreme Court stressed that the administrative authorities had correctly established that the appellant was secured an access road from two directions. The first one via the overpass and the second one, the current one, under the highway bridge. Furthermore, the Supreme Court alleged that it deduced from the findings and opinion of an expert in the field of agriculture that the requirements for peaceful use of the remaining real property had been fulfilled. In this regard, it alleged that the findings stated that the non-expropriated real property was at a distance of 60-100 meters from the motorway and 60 meters from the expropriation line of the future highway route, that all the plots form an integral part of a total surface of 31,206 m² and that “they can be used, just as they have been used hitherto”.

16. Furthermore, the Supreme Court regarded as unfounded the appellant’s allegations that the expropriation beneficiary unlawfully possessed the expropriated real property, “given the fact that

the first instance-ruling decided that the expropriation beneficiary acquired the right of possession on the date of the payment of compensation for the real property at issue”. In this connection, the Supreme Court noted that the subject-matter in the case at hand was not the protection of the appellant’s right related to taking possession of the real property by the beneficiary of expropriation before the payment of compensation and that the appellant had claimed the protection of that right in another proceeding.

17. The Supreme Court found as unfounded the appellant’s complaint that he was denied the right to an expert examination, on which the application of Article 11 of the Law on Expropriation depended. In this connection, the Supreme Court noted that there was no need in the case at hand to carry out an environmental expert examination because the “disputed environmental issues had been considered in the preliminary proceeding”. Furthermore, the court concluded that there was neither need to carry out a hydrological expert examination with regard to the riverbed relocation, given the fact that the “such undertakings need an authorization by the competent authorities”. The Supreme Court stressed that the Tehnički Institut d.o.o. Bijeljina had given answers in its expert findings and opinion to all disputed environmental issues and gave the opinion that “there is no need to carry out a new expert examination because the results would be the same” (see paragraph 8 of this decision).

IV. Appeal

a) Allegations in the appeal

18. The appellant claims that the contested judgment has been in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”). In addition, it has been in violation of the right to private and family life, home, and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, and the right to an effective legal remedy under Article 13 of the European Convention.

19. The appellant complains of a violation of the right to a fair trial within a “reasonable time” given that almost 11 years have elapsed since the first ruling on expropriation.

As to the allegations related to the non-expropriated real property

20. The appellant alleges that an appropriate access to his property in the manner stipulated in the planning documentation has not been secured yet. He asserts that in the contested judgment the Supreme Court noted that the expropriation beneficiary had proved that an access road to the appellant's property had been secured from two directions, the first one under the highway and the second one via the overpass. However, the appellant alleges that although the access road under the highway has been built, only the small cars can have access to his property. Furthermore, the second road via the overpass has never been built. Thus, unlike the conclusion of the Supreme Court, there has been no permanent solution to the access road yet. According to the appellant, the access to one's property does not include only the access for small cars and pedestrians but also the access for large vehicles and machinery, notably in the case of a rural estate. As an example, the appellant alleges that in case of fire or some other disaster, or major construction work, there is no access road for large vehicles or machines that could be necessary in the major construction work or rescue of the appellant, his family or his property. Thus, he concludes that he has had a restricted access to his property since the expropriation of his real property and construction of the highway, and that the situation is still uncertain for him when it comes to the full access.

As to the allegations related to the expropriated real property

21. In addition to the aforesaid, the appellant alleges that the compensation for the expropriated real property has not been paid to him yet, although the highway has been constructed on his expropriated property. In this connection, the appellant alleges that the ruling on expropriation clearly stated that the expropriation beneficiary acquired the right of possession of the expropriated real property on the date of the payment of compensation for that real property, as prescribed by the Law on Expropriation.

22. Furthermore, the appellant alleges that the issue of unlawful possession and illegal deprivation of the appellant's possession was the subject matter of consideration by the Ombudsman for Human Rights and that the Ombudsman clearly found a violation of the appellant's rights. In this connection, the appellant alleges that the decision of the RS Government, wherein it allowed the expropriation beneficiary to take possession of the appellant's real property, was quashed by the Supreme Court's judgment of 31 May 2018. However, despite that fact, the appellant has not been afforded any effective protection or satisfaction. The appellant further alleges that this means that the legal remedies he availed himself of and the court's decisions regarding the illegal dispossession of his real property produced no effect. Thus, although the highway has already been built on his real property, the compensation for the expropriated real property has never been paid to him.

As to the allegations related to the right to home

23. The appellant complains of a violation of his right to home and peaceful family life, including the right to healthy life, right to certainty as to the necessities for life and right to quiet enjoyment of home. The appellant requested during the expropriation procedure that a hydrological and environmental expert examination is carried out, that the protection from noise and water supply is secured, given the fact that it could be interrupted due to the highway construction work. The issues that relate to health and quality of life of the appellant and his family were not discussed either before the administrative authorities or before the courts. However, the appellant “does not have the right to claim any compensation or protection in this regard”. In the contested judgment, the Supreme Court apparently accepted the findings and opinion of the court expert in the field of transportation, who noted that “the channels, shoulders will be built and that the riverbed of the Lišnja river will be relocated, as it was a done deal”. However, he further alleges that there is no another access road at the location at issue, just as there were no channels, shoulders, noise protection. Furthermore, the appellant alleges that there is no information about harmful substances from the highway affecting his remaining real property. The appellant further asserts that there is no concrete protection of his remaining real property from the floods, given the fact that the highway is now a physical barrier preventing the natural flow of water from the appellant’s real property. He argues that the first-instance authority refused the hydrological and environmental expert examination for determination of the issues whether the natural watercourse was cut and whether the relocation of the riverbed would have an effect on floods and water sources on his real property. In addition, they refused examination for determination whether, and to which extent, there is a risk of the floods occurring on his real property and whether the water on his property would be fit to drink. He further asserts that the ecological expert examination was arbitrary and not serious as it referred to the measurements carried out in 2009. The appellant further points to the uncertainty by asserting that all basic necessities for life issues remained unsolved, that “he is forbidden from presenting evidence with regard to these issues” and that the promised protection against noise, flood, pollution of soil and water has never been implemented. He alleges that for these reasons he is forced to request expropriation of his entire property, given that his survival on that property has been ultimately uncertain and the quality of his life has been put in jeopardy.

24. Furthermore, the appellant claims that “he has forcibly been dispossessed of his property, despite the ruling on expropriation and without having been paid the compensation, in violation of Article 33 of the Law on Expropriation, based on an unlawful decision of the RS Government”. The

appellant further alleges that he “understand[s] that the construction of the highway constitutes a public interest” but cannot accept the fact that he bears the entire burden of expropriation, and so in a proceeding “which is unreasonably lengthy”, that the burden between the public and private interests is completely disproportionate, given the fact that “he has been sustaining the expropriation and the consequences thereof without protection of his human rights and compensation for the expropriated real property, for thirteen full years”. The appellant also claims the payment of compensation for the costs of the appeal.

I. Responses to the appeal

25. The Supreme Court alleged that it remained supportive of the reasons for the contested judgment. In its view, the appellant’s allegations on the violation of the rights complained of are unfounded.

26. The County Court alleged that its judgment had not been in violation of the rights complained of in the appeal.

27. The Republic Administration alleged that the appellant’s allegations were unfounded as the appellant had availed himself of ordinary and extraordinary legal remedies, that the relevant authorities had dealt with them and rendered decisions within a reasonable time.

V. Relevant law

28. The **Law on Expropriation** (*Official Gazette of the Republika Srpska*, 112/06, 37/07, 66/08 – Corrigendum, 110/08, 106/10 – Decision of the Constitutional Court of RS, 121/10 – Decision of the Constitutional Court of RS, 2/15 – Decision of the Constitutional Court of RS and 79/15). An official revised text drafted by the Constitutional Court of BiH is used for the purpose of this decision, reading as follows:

Article 11

(1) At a request of the owner, the remaining part of the immovable property will be expropriated if it is established during the expropriation of one part of the immovable property that the owner has no economic interest in using the remaining part, i.e. if, due to that, the hitherto existence of the remaining part is made impossible or essentially jeopardised or if the normal utilisation of the remaining part of immovable property is hindered.

(2) *The official that leads the expropriation procedure is obliged to notify the owner that he/she may submit a request for the purposes of paragraph 1 of this Article. That notification shall be entered in the written record of the hearing.*

(3) *The request for expropriation of the remaining part of immovable property may be submitted until the adoption of the first instance ruling on expropriation.*

(4) *The expropriation of the remaining part of the immovable property may be requested by the owner in the appellate proceeding if he/she was not notified in accordance with Article 2 of this Article.*

Article 33, paragraphs 2, 3, and 4

In Article 33, paragraph 1 is deleted.

(2) *The expropriation beneficiary shall acquire the right of possession of the expropriated immovable property on the day of the finality of the ruling on expropriation if the Government paid compensation for the expropriated immovable property to the former owner or gave another appropriate immovable property to the former owner, or else on the day of payment of compensation or giving possession of another appropriate immovable property, unless otherwise agreed by the former owner and expropriation beneficiary.*

(3) *Exceptionally, in case of construction of infrastructure facilities, the Government may, at the request of the expropriation beneficiary that provided valid reasons warranting the need for urgent entry into possession of the immovable property, decide to surrender the immovable property into possession of the expropriation beneficiary if it finds that it is necessary because of the urgent nature of the case or in order to prevent considerable damage.*

(4) *Evidence proving the condition and value of the expropriated immovable property (findings and opinion of an expert and other relevant evidence related to the appraisal of the expropriated immovable property) must be provided before rendering the ruling referred to in the previous paragraph.*

Article 71

The procedure for the determination of compensation for the expropriated immovable property is urgent.

VI. Admissibility and Merits

29. The Constitutional Court has established that the appeal meets the requirements under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(1) of the Rules of the Constitutional Court, that it was lodged within the given time limit and that it meets other admissibility requirements under Article 18(3) of the Rules of the Constitutional Court. In addition, it established that it is not manifestly (*prima facie*) ill-founded for the purposes of the provision of Article 18(4) of the Rules of the Constitutional Court.

30. The appellant contests the judgment of the Supreme Court by claiming that it has been in violation of his rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, and Article 13 of the European Convention.

Right to a property

31. Article II(3) of the Constitution of Bosnia and Herzegovina, so far as relevant, reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

k) The right to property

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

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

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

33. The Constitutional Court recalls that the Constitutional Court's decision *no. AP-4406/18* of 14 October 2020 (see paragraphs 9 and 11 of this decision) has no effect on this decision, as the appellant did not contest the re-enforcement procedure, i.e. the restitution of the expropriated real property. The appellant alleges in his appeal that his request for expropriation of the remaining real property was dismissed although the expropriation beneficiary failed to provide a normal access road to his real property and although it was not established that he could use them without major difficulties when it comes to the necessities for life. Despite the fact that this was not the subject matter of the proceedings that resulted in the contested decisions, the appellant alleges that the expropriation beneficiary has never paid him a compensation for the expropriated real property although the beneficiary took possession of them and, meanwhile, constructed the highway.

34. The Constitutional Court notes that the first issue that the Court should answer is whether the appellant has a property guaranteed by Article 1 of Protocol No. 1 to the European Convention. In this connection, the Constitutional Court observes that it is undisputed in the case that the appellant is owner of the real property that, in his view, should have been expropriated. It therefore follows that that the proceedings concerned related to possessions for the purposes of Article 1 of Protocol No. 1 to the European Convention.

35. The Constitutional Court notes that the essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference with the peaceful enjoyment of his or her possessions. However, as noted by the European Court, by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the European Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see ECtHR, *Broniowski v. Poland*, judgment of 22 June 2004, no. 31443/96, ECHR 2002-X, paragraph 143, with further references). Although the boundaries between the State's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition, the applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty of the State or in terms of an interference by a public authority, which needs to be justified, the criteria to be applied do not

differ in substance. In both contexts, regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. It also holds true that the aims mentioned in that provision may be of some relevance in assessing whether a balance between the demands of the public interest involved and the applicant's fundamental right of property has been struck. In both contexts, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see ECtHR, *Beyeler v. Italy*, judgment of 5 January 2000, no. 33202/96, paragraph 114).

36. The Constitutional Court holds that, in the present case, there has been an interference with the appellant's peaceful enjoyment of possessions as his request for expropriation of the remaining real property was dismissed without making it possible for him to have an appropriate access to his immovable property and to peacefully use it in his everyday life (see Constitutional Court, Decision on Admissibility and Merits, no. AP-501/07 of 14 October 2009, paragraph 27, available on the webpage of the Constitutional Court at www.ustavisud.ba).

37. Furthermore, the Constitutional Court observes that the administrative authorities and the courts referred to the adequate provisions of the Law on Expropriation. The Constitutional Court therefore holds that the interference was prescribed by the law and pursued a legitimate aim. The Constitutional Court will therefore examine whether the interference with the appellant's right struck a fair balance between the general interests in constructing the highway and the appellant's right to property.

38. The Constitutional Court refers to the European Court's view, according to which the court must establish in each case involving an alleged violation of Article 1 of Protocol No. 1 to the European Convention whether the interference by the State entailed a disproportionate and excessive burden on the applicant. In some cases, the fair balance test must include the examination of the issue whether the State took into account to a sufficient extent particular circumstances of the case, including the issue whether the expropriation of a part of the immovable property has had an impact on the value or advantages of the non-expropriated part belonging to the applicant (see ECtHR, *Azas v. Greece*, judgment of 19 September 2002, no. 50824/99, paragraphs 51-53). If the State did not do so, a violation of Article 1 of Protocol No. 1 could occur in the cases where the nature of the construction in the near vicinity of an applicant's property had evidently contributed more directly to the substantial depreciation of the value of the remaining property. This will be the case, for example, in the event of construction of public roads or other infrastructural facilities in the near vicinity of the remaining real property (see ECtHR, *Werra Naturstein GmbH & Co KG v.*

Germany, judgment of 19 January 2017, no. 32377/12, paragraph 48, with further references). Furthermore, the Constitutional Court recalls that in the *Ouzounoglou v. Greece* judgment, the European Court found that the motorway built in the near vicinity of an applicant's house (approximately 15 meters) limited the use of his house and that the nature of the construction had evidently contributed more directly to the substantial depreciation of the value of the remaining property (see ECtHR, *Ouzounoglou v. Greece*, judgment of 24 November 2005, no. 32730/03, paragraph 30). Furthermore, in the *Bistrović* judgment, the European Court found that the national authorities had failed to take into account the factors concerning the effects of the motorway construction on the applicants' remaining property, such as the decrease in the value of their estate, the possibility of selling it and the applicants' interest in further use of the remaining estate (see ECtHR, *Bistrović v. Croatia*, no. 25774/05, judgment of 31 May 2007, paragraph 43).

39. The answer to the question whether the dismissal of the appellant's request for expropriation of the remaining real property is proportionate to the public interest depends on the answer to the question whether the appellant was "prevented from using normally the remaining real property", as prescribed by Article 11 of the Law on Expropriation. The Constitutional Court observes that the Supreme Court took the position in the reasons for the contested judgment that it followed from the established facts that an access road from two directions was made available for the appellant to use: the first one over the overpass and the second one, the current access road, under the highway bridge. Unlike the Supreme Court, the appellant claims that the overpass has not been built at all. The Constitutional Court examined carefully the reasons given by the administrative authorities that established the facts. However, none of the reasons given by the administrative authorities contain clear arguments to conclude that an access road via the "overpass" has actually been secured for the appellant. The only conclusion that could be drawn therefrom is that the investor "intends to build an access road via the overpass", and not that that road has really been built. In addition, the Constitutional Court cannot determine either from the reasons given in the contested judgments or from the response to the appeal, how the courts reached the conclusion that the access road via the overpass was built. The Constitutional Court therefore holds that the Supreme Court's reasons to the effect that the access road from "two directions" was secured for the appellant were insufficient and arbitrary.

40. Furthermore, it is not disputed that the appellant has an access to the "non-expropriated part of his real property under the highway bridge at a height of 3.2 m". However, the Constitutional Court observes that the administrative authority's ruling states that in order for the appellant to have

an appropriate access, the height of the bridge should be at least 4.5 m (see paragraph 7 of this decision). Given the aforementioned and the reasons given in the County Court's judgment of 7 April 2017 (see paragraph 6 of this decision), the Constitutional Court holds that the Supreme Court's conclusion that the requirements for utilization of the remaining land have been fulfilled, is also arbitrary. It is arbitrary as there is a contradiction between the administrative authorities' findings and the mentioned conclusion of the court as to whether the access is appropriate (see paragraph 15 of this decision). In this connection, the Constitutional Court observes that the Supreme Court did not deal at all with the issue whether the appellant's big agricultural vehicles have an access to the appellant's the remaining real property, although the land at issue is agricultural, or whether fire-fighting and emergency vehicles have an access, as alleged by the appellant. In addition, the courts failed to examine the issue of possible depreciation of the value of the non-expropriated real property of the appellant. They also failed to examine the issues whether and how the highway built at a distance of 60 meters from the remaining real property affects not only the value of that real property but also the quality of the appellant's life on that real property in general. Furthermore, the courts dismissed the appellant's request for hydrological and environmental expert examination for clarifying these issues, and they only referred to the results of the air quality measurements from 2009 without giving reasons as to why that was relevant to the given situation, given the fact that the highway was already built and they decided upon it.

41. In addition, the appellant alleges that a compensation for the expropriated real property still has not been paid to him, although the highway over his expropriated land has been built and that the expropriation beneficiary has unlawfully possessed the real property. The Constitutional Court reminds that the Supreme Court noted in the contested judgment that the appellant's allegations were unfounded "as the first instance ruling decided that the expropriation beneficiary acquired the right of possession on the day of the payment of the compensation for the real property at issue (see paragraph 16 of this decision). The Supreme Court noted that the issue of payment of compensation for the expropriated real property had not been the subject matter of the claim decided on in the contested decisions. However, the Constitutional Court observes that this was indeed a relevant issue in order to assess whether a fair balance was struck between the competing interests in the present case. Namely, the appellant alleged before the courts and in the appeal that, due to the dismissal of his request, he bore an excessive and disproportionate burden. This was so not only because the courts had failed to carefully examine all the circumstance with regard to his request for expropriation of the remaining real property but also because the compensation for the expropriated real property had never been determined nor paid to him. In this connection, the Constitutional

Court notes notably that the County Court, by the final judgment of 8 June 2017, quashed the RS Government's ruling, whereby the RS Government allowed the defendant to take possession of the expropriated real property, exactly because the amount of compensation for the expropriated real property had not been determined. Thus, the defendant is beyond any doubt in unlawful possession of the real property at issue. The conclusion of the Supreme Court is therefore arbitrary. In addition, although the subject-matter of the proceedings that resulted in the contested decisions was not the payment of compensation for the expropriated real property, the Constitutional Court notes that the appellant has been deprived of a part of his real property. The Constitutional Court also notes that compensation has never been paid to him, that the expropriation beneficiary (the public authority) took possession of the expropriated real property in an unlawful manner and that the restitution of the expropriated real property is actually impossible as the highway is built. These are the circumstances that should have been taken into consideration in the present case, including an excessive burden placed on the appellant without affording him protection. The arbitrary dismissal of his request for expropriation of the remaining real property and the failure to take into consideration all the factors pertaining to the determination of the disputed issue have even added to the burden, as already concluded by the Constitutional Court.

42. Bearing in mind the above, the Constitutional Court holds that the appellant's allegation are founded that "the whole burden of expropriation of the real property has been shifted" to him. Hence, although there is an unquestionable public interest in construction of the highway, the interference with the appellant's property has not met the standards of proportionality under Article 1 of Protocol No. 1 to the European Convention.

43. In view of all the aforementioned, the Constitutional Court concludes that in the present case the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has been violated.

Other allegations

44. The appellant also complains that his right to private and family life, home, and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has been violated. However, in view of the Constitutional Court's conclusion on the violation of the right to property, the Constitutional Court does not find it necessary to examine separately the complaints of the violation of the right to home.

45. Furthermore, the Constitutional Court will not examine separately the appellant's complaints of a violation of the right to a decision within a reasonable time for the purposes of Article 6(1) of the European Convention as the Constitutional Court already decided that issue in its decision *no. AP- 4406/18* of 14 October 2020. The Constitutional Court will not examine the appellant's complaints of a violation of the right to an effective legal remedy under Article 13 of the European Convention, as the appellant did not separately specify his arguments in this regard.

Costs of preparing the appeal

46. As to the appellant's request that the Constitutional Court pay him the costs of drafting the appeal, the Constitutional Court notes that the Rules of the Constitutional Court do not stipulate the possibility of obligating anyone to bear the costs of the appeal and that these costs rest exclusively on the appellant.

VII. Conclusion

47. The Constitutional Court concludes that the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has been violated. The violation was found as the dismissal of the appellant's request for expropriation of the remaining real property has not met the proportionality requirements, given that the courts failed to give relevant and reasonable reasons with regard to all circumstances that should have been taken into account in striking a fair balance between the public interest and the appellant's right. Notably, they should have taken into account the fact that the compensation for the expropriated part of the real property was never determined nor paid to the appellant, and the expropriation beneficiary (the public authority) took possession of the real property and built a highway on it.

48. Pursuant to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

49. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

