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Decision no. 872/2012

Application

Applicant, Status

Eythan D., Recommendation

Renee-Anna G., Recommendation

Public owner

Stadtgemeinde Schwechat

Type of property

immovable

Real estate in

KG Schwechat (05220), Schwechat, Niederösterreich | [show on map](#)

Decision

Number

872/2012

Date

17 Dec 2012

Reasons

Outside the jurisdiction of the Arbitration Panel or the scope of application of the GSF Law

"Extreme injustice" pursuant to Sec. 32 (2) item 1 of the GSF Law

No seizure as defined by the GSF Law

Type

substantive

Decision in anonymous form

Entscheidung 872 2012 (PDF, 150.64 KiB)

Related decision

Decision no. 872a/2013

Press release

Press Release Decision No. 872/2012

Lower Austria, Schwechat

On 17 December 2012, the Arbitration Panel for In Rem Restitution recommended an application for restitution of properties in Schwechat. The subject of the application is a property, one half of which had been owned by the Jewish lawyer Dr. Arthur D. in 1938. He sold his share after the Anschluss. The son of Arthur D., who was murdered in the Shoah, did not file any claims for restitution after 1945 which resulted in the collection agencies undertaking investigations into the property. In 1960, however, they waived the restitution. The Arbitration Panel recognized the sale of the one half share of the property as a seizure and considered the waiver by the collection agencies to be an extreme injustice in the meaning of the Entschädigungsfondsgesetz ("General Settlement Fund Law" – GSF Law). For this reason, it recommended the in rem restitution of one half of the property, as long as it had been owned by the Municipality of Schwechat on the cut off day, 17 January 2001.

On 12 March 1938, the requested property with an area of 13,205 m<sup>2</sup>, on which a factory had previously been situated, had been under the sole ownership of Arthur D., who had belonged to the Jewish religious community. On 14 June 1938, the property was subdivided into several development plots; an area of 1,191 m<sup>2</sup> was partitioned off into public property for the construction of a road. On 20 June 1938, Arthur D. and his friend Karl K. concluded a contract in which the former recognized the latter's ownership of one half of the property as he was merely acting as trustee for Karl K. in this regard. At the same time, Arthur D. sold the other half of the property to Karl K. The overwhelming majority of the proceeds from the sale of 4,999.24 Reichsmark were used to pay Arthur D.'s debts; the balance was paid in cash. It was noted in the purchase contract that Arthur D. was Jewish and Karl K. "aryan". Arthur D. and his wife Renée were deported from Vienna to Litzmannstadt (Polish: Łódź) and later murdered. Their son Ludwig Richard D. had succeeded in fleeing to Palestine in 1938.

Ludwig Richard D. did not assert any restitution claims regarding the property in Schwechat after 1945. The collection agencies – which were established on the basis of the State Treaty and disposed of unclaimed property which had been seized during the National Socialist era and remained "heirless" after the war, using the profits to benefit the victims of National Socialism – approached Karl K. in early 1960 and informed him that they were entitled to assert restitution claims but wanted to gauge the possibility of reaching a settlement. Subsequently, Karl K.'s lawyer submitted that the sale of one half of the property in June 1938 had not constituted a seizure: Karl K. had, in fact been trustor of the entire property. His client and Arthur D. had been friends for decades. The fact that the transfer of the property to Karl K. had been dressed up in the form of a purchase contract had predominantly been for tax reasons. In order to avoid restitution proceedings, Dr. L. offered the collection agencies a payment of 10,000 Schilling.

The competent caseworker at the collection agencies informed Dr. L. on 23 November 1960 that no restitution claims would be asserted. The head of the collection agencies was also informed and gave his approval. The collection agencies received no consideration in exchange for this waiver. On 1 January 1963, the assessed value of the property amounted to 427,000 Schilling.

The heir of Karl K. sold the property to the Municipality of Schwechat in 1990. In the subsequent years, a large number of property parcels were partitioned off. A new register number was opened for them, which was privately-owned on 17 January 2001. Further areas were also transferred into the public property of the Municipality of Schwechat. The remainder of the property parcel was also owned by the Municipality on the cut off day and is designated grassland.

The two applicants, children of Ludwig Richard D., who died in 2002, submitted that the requested property had been seized and had subsequently never been the subject of proceedings before a court or administrative body or settled by agreement. It was therefore to be returned.

In its statement, the Municipality of Schwechat argued that a recommendation for restitution was not appropriate as the historical property (with dimensions as at 12 March 1938) was not publicly-owned in its entirety on 17 January 2001. This was, however, a requirement for restitution pursuant to the GSF Law.

In its juridical appraisal, the Arbitration Panel first discarded the submission of the Municipality regarding public property. It also sufficed if only a part of the historical property was publicly-owned on the cut off day.

Furthermore, the Arbitration Panel considered it proven that one half of the property had been seized. The Arbitration Panel did not find Dr. L.'s statements to the collection agencies, according to which the trusteeship between Arthur D. and Karl K. had related to the entire property, to be credible. It was rather Arthur D.'s persecution by the National Socialist regime which was causal for the sale. On the other hand, both Arthur D.'s property notice and the agreement of 20 June 1938 indicated the existence of a trusteeship regarding the other half of the property. Regarding this half, the existence of a seizure was to be denied. The 1,191 m<sup>2</sup> which was transferred into public property on 14 June 1938 was also not to be considered seized. This transaction had already been prepared prior to the Anschluss and would have occurred regardless of Arthur D.'s persecution.

In contradiction to the submissions made by the applicants, the Arbitration Panel considered the waiver by the collection agencies in 1960 to constitute a settlement by agreement. It therefore had to examine whether the settlement constituted an extreme injustice. The Arbitration Panel reached the conclusion that it did: firstly, there had been a considerable discrepancy in value between the outcome of the waiver and that of a hypothetical decision of the Restitution Commission, to the detriment of the collection agencies. With reference to its decision no. 27/2005, the Arbitration Panel then reached the conclusion that by waiving the restitution of the property, the collection agencies had not acted in the same way as restitution claimants pursuing their interests would have acted – they would have at least accepted the 10,000 Schilling offered by Dr. L. In such a case, the settlement by agreement reached by the collection agencies – the waiver of the claim – could not be ascribed to the present applicants. This, together with the considerable discrepancy in value, warranted the evaluation of the settlement as an extreme injustice in the meaning of the GSF Law.

Therefore, in rem restitution was recommended.

This recommendation relates, firstly, to one half of the historical property which still exists, less those areas which were only assigned to it after the seizure. This constitutes an area of 2,138 m<sup>2</sup>.

Secondly, in accordance with the recommendation, a one half share of the areas which originate from the historical property but have since been transferred into the public property of the Municipality of Schwechat or into the railway register are to be restituted. This area comes to 1,848 m<sup>2</sup>. A restitution in rem is not possible in this case, as it concerns a public road and train tracks. For this reason, the Arbitration Panel will determine a comparable asset as compensation in a supplementary decision.

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For further inquiries contact: [presse@nationalfonds.org](mailto:presse@nationalfonds.org)