



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

THIRD SECTION

CASE OF FLAVIU AND DALIA ȘERBAN v. ROMANIA

(Application no. 36446/04)

JUDGMENT

STRASBOURG

14 September 2010

FINAL

21/02/2011

*This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.*

In the case of Flaviu and Dalia Șerban v. Romania,

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 24 August 2010,

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

PROCEDURE

1. The case originated in an application (no. 36446/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Romanian nationals, Mr Flaviu Șerban and Ms Dalia Șerban (“the applicants”), on 21 September 2004.

2. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu.

3. On 23 April 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants, husband and wife, were born in 1966 and 1969 respectively and live in Brașov.

5. On 17 March 2000 the applicants lent 4,000 United States dollars to E.I. and G.I., at a 6,000,000 old Romanian lei (ROL) monthly interest. The deadline for returning the loan was 30 August 2000. Following refusal of payment by the third parties, the applicants brought court proceedings.

6. On 6 February 2001 the Baia de Aramă District Court (“the District Court”), by a final decision, ordered E.I. and G.I. to return the loan,

calculated at the date of payment, and to pay the applicants ROL 42,000,000 representing interest until 17 December 2000, as well as interest until effective repayment. It also ordered G.I. to pay the applicants ROL 8,150,000 for the costs of proceedings.

A. Attempts by the bailiff I.M. to enforce the judgment

7. On 29 May 2001 the applicants requested the bailiff I.M. to enforce the judgment. On the same day the District Court upheld the enforcement.

8. On 5 June 2001 the bailiff ordered E.I. to pay his part of the debt.

9. On 13 June 2001 the bailiff certified in an official record that G.I. had no movable or immovable assets to be seized. At an unknown date in the summer of 2001, G.I. left the country.

10. On 8 August 2001 the bailiff seized a bus belonging to E.I. He then scheduled the sale for 13 March 2002. However, in the absence of any potential buyer, the bailiff adjourned the sale for 20 March 2002.

11. On 26 November 2001 the applicants requested the bailiff to seize an apartment belonging to E.I. On 29 January 2002 the bailiff seized that apartment.

12. On 8 February 2002 the applicants requested replacement of the bailiff, alleging failure to enforce the judgment. However, on 11 February 2002 the District Court refused replacement. The applicants filed further complaints against the bailiff before the Bailiffs' Chamber, but received no answer.

13. The bailiff scheduled the sale of the apartment for 13 May 2002. However, in the absence of any potential buyer, the bailiff decided to postpone it until a new request by the applicants. On 23 July 2002 the applicants requested the bailiff to put the apartment on sale.

14. On 11 June 2002 the District Court dismissed an objection to execution by E.I.

15. On 10 September 2002 the bailiff requested an expert to evaluate the apartment. The expert report was finalized on 29 November 2002.

16. The sale of the apartment was scheduled for 6 January and then for 7 February 2003, when the applicants bought it. On 18 February 2003 the bailiff certified in an official record that the applicants became the new owners and that they had paid an amount of ROL 100,000,000 for that apartment, which was to be deducted out of the total debt. However, due to a mortgage held by a bank as a security for a loan of money, the apartment was later sold (see paragraph 29 below).

17. On 10 March 2003 the bailiff also put the bus on sale. On 26 March 2003 he received ROL 30,000,000 as the price of the bus, but collected that amount for his personal use.

18. On 12 June 2003 the applicants lodged an objection to execution against the bailiff, seeking from the court to order the bailiff to allocate

them ROL 35,000,000, approximately 920 euros (EUR) at that time, representing the price of the bus. On 10 July 2003 the District Court declared their request null and void for non-payment of the stamp duty. The stamp duty amounted to ROL 174,000, approximately EUR 5 at that time. In the absence of any appeal, that judgment became final.

19. Following several complaints lodged by the applicants, but also by other persons, on 16 July 2003 the Commission for Discipline of the Bailiffs' Chamber suspended the bailiff from office.

20. On 9 March 2006 the District Court convicted the bailiff of embezzlement and ordered him to pay the applicants ROL 30,000,000 representing the debt paid by E.I. and also ROL 30,000,000 for loss of profit or benefit. That judgment became final.

B. Attempts by the bailiff C.D. to enforce the judgment

21. In August 2003 the execution file was transferred to the bailiff C.D. According to the bailiff, but contested by the applicants, the latter did not submit any request for enforcement.

C. Attempts by the bailiff C.C. to enforce the judgment

22. On 10 February 2004 the Bailiffs' Chamber transferred the execution file to the bailiff C.C. On 25 February 2004 the bailiff invited the applicants to inform him whether they wanted to continue with the enforcement and whether they had received any money from the debtors.

23. On 1 April 2004 the applicants expressed their intention to continue with the execution and declared that they had not received any money. They also submitted a copy of the official record of 18 February 2003 in respect of the apartment bought at public auction from E.I.

24. On 21 April 2004 the applicants requested the bailiff to evict E.I. from that apartment. On 19 May 2004 the bailiff informed them that he had enjoined the debtors to pay the debt. The bailiff also acknowledged that the applicants had not recovered any money, nor were they in the possession of E.I.'s apartment, which had been put on sale by public auction again.

25. On 20 July 2004 the applicants lodged a criminal complaint against the bailiff. On 2 November 2004 the public prosecutor found no reasons to start criminal proceedings. The applicants did not contest that decision.

26. On 23 September 2004 the bailiff requested information from the Isverna town council in respect of G.I.'s movable and immovable property. The town council did not answer.

27. On 4 October 2004 the Bailiffs' Chamber informed the applicants that they should have registered in the Land Registry their right of property over the apartment bought on sale by public auction and if they wanted to benefit from that apartment they should pay the mortgage.

28. On 6 October 2004 the bailiff requested information from the Baia de Aramă town council in respect of E.I.'s movable and immovable property. On 26 November 2004 the town council informed the bailiff about E.I.'s assets, which included the above-mentioned apartment and a vehicle.

29. On 16 December 2004 the bailiff invited the applicants to his office in order to allocate them their share of E.I.'s apartment sold on public auction on 14 October 2004. Following refusal by the applicants, on 4 January 2005 the bailiff reiterated the invitation. On 26 January 2005 the applicants received ROL 24,488,982.

30. On 3 January 2005 the first applicant lodged an objection to execution against the debtors, against the bailiffs who had been in charge with the execution and against the Bailiffs' Chamber, seeking enforcement of the judgment of 6 February 2001 and appointment of another bailiff to continue with the execution. The court requested the applicant to pay a stamp duty in the amount of ROL 1,740,000, approximately EUR 45 at that time. The applicant invoked Article 6 of the Convention, claimed that the amount of the stamp duty was contrary to the law and requested recalculation. On 20 January 2005 the District Court declared his action null and void for non-payment of the stamp duty.

The first applicant appealed, alleging that the first-instance court had not taken account of his demand regarding the stamp duty and had violated Article 6 of the Convention. On 4 May 2005 the Mehedinți County Court, by a final decision, dismissed his appeal, considering that the law regarding the stamp duty had been correctly applied.

31. On 19 May 2005 the bailiff informed the applicants that he was searching to locate further assets belonging to the debtors.

32. On 6 June 2005 the first applicant requested from the bailiff a copy of the execution file. Following refusal by the bailiff, on 17 January 2006 the applicant sought from the court an order to compel the bailiff to send him that copy. On 21 February 2006 the Brașov County Court upheld his request.

33. On 26 April 2006 the bailiff requested information from the Baia de Aramă town council in respect of E.I.'s properties. On 8 May 2006 the town council replied that E.I.'s assets included a plot of 640 sq. m of land with two constructions on it and a vehicle.

34. On 13 July 2006 the applicants reiterated the request to the bailiff to continue with the execution.

35. On 9 August 2006 the bailiff requested again information from the Isverna town council in respect of G.I.'s movable and immovable property. On 30 August 2006 the town council informed the bailiff that G.I. had no assets and that he had left the country five years ago. On 12 March 2007 the bailiff reiterated his request.

36. On 31 August 2006, following an assessment of execution proceedings, the bailiff certified in an official record that the debtor E.I. had

paid an amount of 5,448.9 new Romanian lei (RON) out of the total of RON 56,837. Therefore the bailiff ordered the two debtors to pay the debt.

37. On 28 September 2006 the bailiff visited E.I.'s property and on 29 September 2006 he served notice to E.I. to pay the debt, informing him that in case of refusal his immovable assets were to be put on sale.

38. On 29 January 2007 the bailiff informed the applicants about the debtors' situation and invited them to pay the tax for an expert report in order to evaluate E.I.'s immovable property and then to put it on sale by public auction. In the absence of any answer by the applicants, on 23 March 2007 the bailiff reiterated the request for payment of that tax, but to no avail.

According to the file, that was the last action taken by the bailiff with a view to enforce the judgment in the applicants' favour.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. The relevant domestic law is described in *Topciov v. Romania* ((dec.), no. 17369/02, 15 June 2006) and *Elena Negulescu v. Romania* (no. 25111/02, §§ 20-22, 1 July 2008).

40. In support of their objection concerning the exhaustion of domestic remedies (see below), the Government submitted about sixty judgments delivered by domestic courts in proceedings concerning objections to execution. In their actions, those concerned complained against the bailiffs, either contesting the latter's refusal to carry out a certain act or, if the bailiff had brought the execution to a conclusion, requesting the court to order the bailiff to continue with the execution. When successful, the courts ordered the bailiff to continue with the execution or to perform the act.

41. In particular, by judgment no. 661 of 20 November 2006, which became final, the Aleșd District Court examined all the acts performed by the bailiff and considered that the latter's inactivity for four months represented a refusal to perform the enforcement. Therefore, it allowed the objection to execution by B.K. and B.I. and ordered the bailiff to continue with the execution until recovery of the entire debt.

42. By final decision no. 863 of 23 November 2004 the Suceava County Court dismissed a complaint by G.I. against the bailiff's delay and omissions in performing the enforcement, considering that the former had not proved the latter's culpability or refusal to carry out the execution.

43. By judgment no. 249 of 10 May 2007, which became final, the Săveni District Court dismissed a claim by which T.V. sought moral damage on the grounds that the bailiff had delayed the enforcement for eight months, considering that the bailiff's behaviour was not likely to produce moral damage to T.V.

44. By judgment no. 2787 of 27 February 2008, which became final, the Craiova District Court considered as being inadmissible an action by I.T.

company, which complained about a seven years' delay in enforcement. The court raised on its own motion an objection of incompatibility *ratione materiae* and held that that action was not within the competence of a court or of any organ with judicial activity, but was to be resolved exclusively administratively by the bailiff.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

45. The applicants complained that the non-enforcement of the judgment in their favour had infringed their rights guaranteed by Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

Article 6 § 1

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

A. Admissibility

46. The Government argued that the applicants had not exhausted domestic remedies since their two objections to execution (see paragraphs 18 and 30 above) were declared null and void for non-payment of the stamp duty. They submitted that the applicants should have insisted on performance by the bailiff of the acts of execution and, in case of refusal by the latter, they had the possibility to lodge an objection to execution against that refusal or against the bailiff's alleged inactivity. The Government considered the objection to execution as being an adequate, accessible, effective and sufficient remedy and submitted several examples of objections to execution examined on the merits by the domestic courts (see paragraphs 40-44 above).

47. The applicants considered the objection to execution as being ineffective when a bailiff delays the enforcement. Moreover, if an objection to execution was upheld by the courts, the court would only order the bailiff to perform the act that he had refused to carry out, which was to comply with his professional obligations, without imposing on him any other sanction.

48. The Court considers that the objection raised by the Government is very closely linked to the substance of the applicants' complaint under Article 6 § 1 of the Convention. It therefore considers it appropriate to join

this objection to the merits (*Constantin Oprea v. Romania*, no. 24724/03, § 31, 8 November 2007).

49. The Court concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

50. The Government argued that neither the bailiffs nor the authorities were at fault for the non-enforcement. They submitted that the bailiff I.M. had been penalized for his abuse, that during the bailiff C.D.'s terms of office the applicants had not taken any action, that the bailiff C.C. had acted diligently to enforce that judgment and to identify the debtor's assets, but was prevented from continuing the execution by the applicants' refusal to pay the tax for an expert report.

The Government also pointed that G.I. had no assets and considered that it was the applicants' obligation to inform the bailiff about G.I.'s new address.

51. The applicants disagreed. In particular, they submitted that the bailiff had mistakenly put on sale by public auction an apartment that was already mortgaged, that he had not seized a vehicle belonging to E.I. and that the authorities had not taken any action to enjoin G.I. to pay the debt after he had left the country. They further considered that the debtors were jointly liable for the whole debt and alleged that the legal situation of the immovable property for which the bailiff requested them to pay an expert report was uncertain, due to some shortcomings in its official registration.

52. The Court reiterates that execution of a judgment given by any court must be regarded as an integral part of the “trial” for the purposes of Article 6 of the Convention (*Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). However, the right of “access to court” does not impose an obligation on a State to execute every judgment of civil character without having regard to particular circumstances of a case (*Sanglier v. France*, no. 50342/99, § 39, 27 May 2003). The State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay (*Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005). When the authorities are obliged to act in order to enforce a judgment and they fail to do so, their inactivity can engage the State's responsibility on the ground of Article 6 § 1 of the Convention (*Scollo v. Italy*, 28 September 1995, § 44, Series A no. 315-C).

53. The Court is not called upon to examine whether the internal legal order of the State is capable of guaranteeing the execution of judgments given by courts. Indeed, it is for each State to equip itself with legal

instruments which are adequate and sufficient to ensure the fulfilment of positive obligations imposed upon the State (*Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003). The Court's only task is to examine whether the measures applied by the Romanian authorities in the present case were adequate and sufficient. In cases such as the present one, which necessitate actions by a debtor who is a private person, the State, as the possessor of the public force, has to act diligently in order to assist a creditor in execution of a judgment (*Fociac v. Romania*, no. 2577/02, § 70, 3 February 2005).

54. In the present case the Court notes that the applicants were entitled to recover a certain amount of money from two private persons, E.I. and G.I. The applicants have not recovered so far the entire amount of money to which they were entitled and thus the judgment of 6 February 2001 remains unenforced. Therefore, the Court will examine whether the authorities have acted diligently in order to assist the applicants in execution of that judgment.

55. The Court first notes that G.I. left the country in 2001 and that the applicants have not taken any steps to find his new address. In that respect, the Court reiterates that under Romanian law a bailiff has no obligation to identify the place of residence of a debtor who had disappeared (*Topcirov*, cited above).

56. The Court also notes that the applicants made no response whatever to the call by the bailiff in January and then in March 2007 to pay the tax for an expert report in order to evaluate E.I.' immovable property (see paragraph 38 above). In the absence of such an expert report, the bailiff had not taken any further action with a view to enforce the judgment in the applicants' favour. Having regard to the fact that the applicants remained passive, the Court considers that the authorities bear no responsibility for the interruption of the execution after that date. Therefore, it will examine whether the authorities have acted diligently in order to assist the applicants until January 2007.

57. The Court points to the shortcomings in the execution carried out by the bailiff I.M. On the one hand, that bailiff sold some of one debtor's assets and collected the money for his personal use, being subsequently convicted of embezzlement (see paragraphs 17 and 20 above). On the other hand, he sold an apartment belonging to the same debtor, which was already mortgaged by a bank (see paragraph 16 above). As a result, the applicants, who had bought that apartment on account of their debt, were prevented from recovering the corresponding amount and collected only what remained after a second sale of that apartment and after payment of the mortgage (see paragraph 29 above). The Court concludes that the applicants bear no responsibility for those actions by that bailiff.

58. The Court notes certain delays in the bailiff I.M.'s activity in putting the apartment on sale and also the fact that he had evaluated that apartment

only after he had scheduled a first sale (see paragraphs 11, 13, 15 and 16 above). It further notes the delay of seven months between the seizure of the bus and the moment when scheduled it for sale by public action and also the delay of one year until he scheduled another sale (see paragraphs 10 and 17 above). This cannot be considered diligent in the circumstances.

59. The Court also observes the delays in the acts of execution performed by the bailiff C.C. Thus, it took him more than four months from the date when he found that the applicants had not recovered any money until he requested information from authorities in respect of the debtors' assets (see paragraphs 24, 26 and 28 above). Then, it took him almost six months from the date when he knew about those assets until the moment when he decided to locate further assets (see paragraphs 28 and 31 above), without doing any act of execution in that period. Moreover, it took him almost one year in order to request information as to those assets (see paragraphs 31 and 33 above), again without doing any activity during that time. Finally, it took that bailiff almost five months to take action and to evaluate one of the debtor's assets (see paragraphs 33 and 37 above).

60. Therefore, the Court concludes that the two bailiffs did not act diligently in order to assist the applicants in execution of the 2001 judgment. In that respect, it notes that the Government have not provided examples from the domestic practice in respect of complaints about belated acts of execution by a bailiff. On the contrary, the domestic courts dismissed complaints about delay in enforcement (see paragraphs 42 and 43 above) and even considered such a complaint as being incompatible *ratione materiae* (see paragraph 44 above). The Court therefore finds no reason to depart from its conclusion in similar cases that, to date, the Government have not demonstrated that the objection to execution would be an effective remedy (*Elena Negulescu*, cited above, § 43; and *Constantin Oprea*, cited above, § 41). It therefore dismisses the Government's objection concerning the exhaustion of domestic remedies.

61. The Court finally points to further shortcomings in the execution. Thus, it observes that the Isverna town council did not respond to the bailiff's request in respect of G.I.'s movable and immovable property (see paragraph 26 above). It also notes that the bailiff C.C. did not seize a vehicle belonging to E.I. (see paragraph 28 above).

62. In the light of the foregoing, the Court considers that the authorities did not act diligently and in due time in order to assist the applicants in execution of the judgment in their favour.

63. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

64. The applicants further complained that as a result of the non-enforcement of the judgment in their favour they had been deprived of their property and suffered pecuniary losses in violation of Article 1 of Protocol No. 1.

65. Having regard to the findings in the paragraphs 54-63 above, the Court concludes that this complaint must be declared admissible, but that it is not necessary to examine it on the merits (see, *mutatis mutandis*, *Laino v. Italy* [GC], no. 33158/96, § 25, ECHR 1999-I; *Canea Catholic Church v. Greece*, 16 December 1997, § 50, *Reports* 1997-VIII, and *Ruianu*, cited above, § 75).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

67. The applicants claimed 121,702.98 new Romanian lei (RON) in respect of pecuniary damage, representing the updated value of the remaining debt. They also claimed RON 120,000 in respect of non-pecuniary damage.

68. The Government contested the applicants' calculations and considered that the finding of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage which the applicants might have suffered. In any event, they considered that the amount claimed in that connection was too high.

69. The Court notes that the judgment in favour of the applicants has been partially enforced (see paragraph 36 above). However, it reiterates its findings in paragraph 56 above and will not make an award under this head.

70. The Court considers that the interference with the applicants' right of access to a court caused moral prejudice to the applicants. Making an assessment on an equitable basis, as required by Article 41 of the Convention, it awards them jointly 4,800 (euros) EUR in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicants also claimed RON 4,550.57 for the costs and expenses incurred in the proceedings in the domestic courts and before this Court, representing lawyer's fees, postal service, notary's taxes and stamp duties. They submitted invoices.

72. The Government contested these claims.

73. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession, to the above criteria and to the fact that the present case is of a repetitive nature which does not raise any complex issues, the Court considers it reasonable to award the sum of EUR 300 covering costs under all heads.

C. Default interest

74. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objection concerning the exhaustion of domestic remedies and *dismisses* it;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there is no need to examine on the merits the complaint under Article 1 of Protocol No. 1;
5. *Holds*
 - (a) that the respondent State is to pay jointly the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 4,800 (four thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 300 (three hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President