



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

THIRD SECTION

**CASE OF DRAGOSTEA COPILOR - PETROVSCHI - NAGORNII
v. MOLDOVA**

(Application no. 25575/08)

JUDGMENT
(merits)

STRASBOURG

13 September 2011

FINAL

13/12/2011

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

In the case of Dragostea Copiilor - Petrovschi - Nagornii v. Moldova,
The European Court of Human Rights (Third Section), sitting as a
Chamber composed of:

Josep Casadevall, *President*,

Corneliu Bîrsan,

Alvina Gyulumyan,

Ján Šikuta,

Luis López Guerra,

Nona Tsotsoria,

Mihai Poalelungi, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 23 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 25575/08) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a company registered in Moldova, Dragostea Copiilor - Petrovschi - Nagornii (“the applicant company”), on 13 May 2008.

2. The applicant company was represented by Mr V. Gribincea, a lawyer practising in Chişinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Grosu.

3. The applicant company alleged, in particular, a breach of the right to a fair trial by a “tribunal established by law” on the ground that the judge rapporteur had been changed in disregard of the provisions of the law. The applicant company also complained that its right to a fair hearing and its right to the peaceful enjoyment of its possessions had been breached as a result of the wrongful quashing of a final judgment in its favour.

4. On 5 February 2009 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company, which runs a primary school in Chişinău, was party to civil proceedings in 2001. By a judgment of the Rascani District Court of 25 July 2001 the applicant company was ordered to pay Mr M. 78,400 United States dollars.

6. On an unspecified date in 2006 Mr M. applied to the Department for the Execution of Judgments for the enforcement of the judgment of 25 July 2001. However, his application was dismissed on the ground that it had been time-barred. In a letter dated 4 May 2006 Mr M. was informed that no enforcement warrant in respect of the judgment of 25 July 2001 had been lodged between 2001 and 2006.

7. On 22 May 2006 Mr M. lodged a request with the Rascani District Court asking for an extension of the three-year time-limit for requesting enforcement of the judgment in his favour. He argued, *inter alia*, that he had submitted a request for enforcement sometime in 2001 together with the enforcement warrant, but that it had allegedly been lost by the Department for the Execution of Judgments.

8. On 18 July 2007 the Chişinău Court of Appeal finally dismissed Mr M's request. It found, *inter alia*, that the enforcement of a judgment may be requested by an interested party to the proceedings within three years from the date when the judgment became final and enforceable. Since Mr M. had made such a formal request only some five years after the judgment of 25 July 2001 had become final, he had missed the deadline. The court found that Mr M. could not produce any plausible evidence justifying his missing the time-limit and could not prove his contention that he had submitted a request which had subsequently been lost by the Department for the Execution of Judgments.

9. On 20 July 2007 Mr M. lodged a request for review of the final judgment of 18 July 2007. He relied on Article 449 (c) of the Code of Civil Procedure (see paragraph 14 below) and argued that according to a letter dated 13 July 2007 sent to him by the Department for the Execution of Judgments in reply to a letter from him, an enforcement warrant had been registered with the Department on 31 July 2001 but had been returned to the Rascani District Court two days later.

10. On 22 August 2007 the Chişinău Court of Appeal refused Mr M.'s request for review because the ground relied on by him did not fall under Article 449 (c) of the Code of Civil Procedure, namely the letter from the Department for the Execution of Judgments had become known to him before the pronouncement of the judgment of 18 July 2007. Moreover, the enforcement warrant referred to in the letter of 13 July 2007 did not concern

the enforcement of the judgment of 25 July 2001 but the enforcement of a surety ordered by the first-instance court several months before the date on which the judgment of 25 July 2001 became enforceable. On 28 September 2007 Mr M. lodged an appeal on points of law against this decision.

11. On 24 October 2007 a Judge S.N. was appointed rapporteur in the case.

12. On 14 November 2007, a panel of three judges of the Supreme Court of Justice allowed Mr M.'s appeal, quashed the decision of 22 August 2007, granted Mr M.'s request for review and ordered a fresh examination of the case. The Supreme Court considered the letter of 13 July 2007 as a new document within the meaning of Article 449 (c) of the Civil Procedure Code and argued that Mr M. could have obtained it later than 13 July 2007. The court did not dispute the lower court's findings to the effect that the enforcement warrant referred to in the letter of 13 July 2007 did not concern the enforcement of the judgment of 25 July 2001 but the enforcement of a surety ordered by the first-instance court. Judge S.N., appointed rapporteur on 24 October 2007, did not participate in the examination of the appeal.

13. The reopened proceedings ended with a final judgment of the Supreme Court of Justice of 28 October 2008 in favour of Mr M. resulting in the enforcement of the judgment of the Rascani District Court of 25 July 2001 against the applicant company.

II. RELEVANT DOMESTIC LAW

14. The relevant provisions of the Code of Civil Procedure concerning the review of final judgments read as follows:

Article 449

"A request for review shall be granted when:

(c) after a judgment has been adopted, new documents have been discovered which were withheld by one of the parties to the proceedings or which could not have been submitted to the court during the proceedings because of circumstances beyond the control of the interested party;

Article 450

A request for review may be lodged:

...

(d) within three months from the date on which the document was discovered – in cases concerning Article 449 (c);"

The relevant provisions of the Law on the Supreme Court of Justice read:

Section 8

“(1) The Civil and Administrative Division, and the Criminal and Commercial Divisions of the Supreme Court of Justice shall be headed by a president and a vice-president who shall have the following responsibilities:

(b) ... distribute cases among the members of the Division...”

The relevant part of the Code of Civil Procedure reads as follows:

Article 407

“The participation of the judge rapporteur in the examination of an appeal on points of law is obligatory. If the rapporteur is unable to participate, a new rapporteur should be appointed not later than three days before the date of the examination of the appeal.”

The relevant part of the Law on Judicial Organisation reads:

Section 6 §1. The principle of random distribution of cases

“(1) The work of the judiciary must be carried out in accordance with the principle of random distribution of cases, except when a particular judge is prevented from participating in the examination of a case on objective grounds.”

(2) Cases assigned to one panel cannot be assigned to another panel except within the limits of the law.

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

15. The applicant company complained that the quashing of the final judgment of the Court of Appeal of 18 July 2007 was wrongful and violated Article 6 § 1 of the Convention. It also complained about the change of rapporteur in the proceedings concerning its appeal on points of law before the Supreme Court of Justice (see paragraph 12 above) and argued that as a result of that change the Supreme Court of Justice was not a “tribunal established by law”.

The relevant part of Article 6 § 1 reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

16. The Government contested that argument.

A. Admissibility

17. The Court notes that the first part of the complaint under Article 6 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.

18. In so far as the second part of the complaint under Article 6 is concerned, the Government submitted that the applicant company had failed to exhaust domestic remedies and lacked victim status. However, in view of the findings below (see paragraph 36 below) the Court does not consider it necessary to reach a conclusion on these admissibility objections raised by the Government.

B. Merits

19. The applicant company submitted that the quashing of the judgment of 18 July 2007 had violated its right to a fair trial as guaranteed by Article 6 of the Convention. The letter of 13 July 2007 of the Department for the Execution of Judgments had not disclosed any “new and essential facts or circumstances which were unknown and could not have been known earlier” in the sense of Article 449 (c) of the Code of Civil Procedure. The applicant company stressed that the information in the letter of 13 July 2007 could have been obtained by the applicant at any time between 2001 and 2007. The applicant company concluded that the request for review had in essence been an appeal in disguise and breached the principle of legal certainty.

20. The Government argued that a review was an effective way of challenging a judgment where new facts were discovered after the judgment had become final. They gave the example of the International Court of Justice, which could review its judgments if new facts or circumstances of decisive importance were discovered after adoption of a judgment. The request for review had to be made within six months of the date on which the new facts or circumstances were discovered, but not later than ten years from the date of adoption of the judgment.

21. A similar situation could be found in the Rules of the European Court of Human Rights. If new facts concerning a case which had been concluded were discovered, and if those facts could have had a decisive effect on the outcome of the case and were unknown or could not reasonably have been known, a party could ask the Court, within a period of six months after that party had acquired knowledge of the fact, to review that judgment.

22. The Government also invoked a recommendation of the Committee of Ministers according to which the Governments of the member States

were advised to guarantee a procedure for the review and reopening of cases.

23. The Supreme Court of Justice considered the letter from the Department for the Execution of Judgments dated 13 July 2007 addressed to Mr M. as a new and essential fact or circumstance which had been unknown and could not have been known earlier in the sense of Article 449 (c) of the Code of Civil Procedure.

24. The Court reiterates that Article 6 § 1 of the Convention obliges courts to give reasons for their judgments. In *Ruiz Torija v. Spain* (9 December 1994, Series A no. 303-A), the Court found that the failure of a domestic court to give reasons for not allowing an objection that an action was time-barred amounted to a violation of that provision.

25. The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Roşca v. Moldova*, no. 6267/02, § 24, 22 March 2005).

26. Legal certainty presupposes respect for the principle of *res judicata* (see *Brumărescu*, cited above, § 62), that is, the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Roşca*, cited above, § 25).

27. The above conclusion in *Roşca* was drawn in connection with the procedure for annulment requests under which the Prosecutor General's Office could seek review of final judgments with which it disagreed. The Court held that this procedure, although possible under domestic law, was incompatible with the Convention because it resulted in a litigant's "losing" a final judgment in his favour.

28. As to the reopening of the proceedings owing to newly discovered circumstances, the Court observes that this issue was considered in *Popov v. Moldova* (no. 2) (no. 19960/04, 6 December 2005), where it found a violation of Article 6 § 1 on account of misuse of review proceedings. The Court held in that case that reopening was not, as such, incompatible with the Convention. However, decisions to review final judgments must be in

accordance with the relevant statutory criteria; and the misuse of such a procedure may well be contrary to the Convention, given that its result – the “loss” of the judgment – is the same as that of a request for annulment. The principles of legal certainty and the rule of law require the Court to be vigilant in this area (see *Popov (no. 2)*, cited above, § 46).

29. In the present case the Court notes that the review procedure provided for by Articles 449-53 of the Code of Civil Procedure does indeed serve the purpose of correcting judicial errors and miscarriages of justice. The Court’s task, exactly as in *Popov (no. 2)*, is to determine whether this procedure was applied in a manner which was compatible with Article 6 of the Convention, and thus ensured respect for the principle of legal certainty. In doing so, the Court must bear in mind that it is in the first place the responsibility of national courts to interpret provisions of national law (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).

30. It is noted that, under Article 449 (c) of the Moldovan Code of Civil Procedure, proceedings can be reopened “when new and essential facts or circumstances have been discovered, that were unknown and could not have been known earlier”. Under Article 450 of the same Code, a request for review can be lodged “within three months from the date on which the person concerned has come to know essential circumstances or facts of the case which were unknown to him or her earlier and which could not have been known to him or her earlier”.

31. The decision of the Supreme Court of Justice of 14 November 2007 cited as grounds for reopening the proceedings the letter of 13 July 2007 from the Department for the Execution of Judgments addressed to Mr M. in reply to his letter, in which the former stated that an enforcement warrant had been registered with the Department on 31 July 2001 (see paragraph 9 above).

32. The Court notes in the first place that in dismissing the request for review in its judgment of 22 August 2007 the Court of Appeal found that the enforcement warrant referred to in the letter of 13 July 2007 did not concern the enforcement of the judgment of 25 July 2001, which was not final and enforceable at that date. In overturning the Court of Appeal’s decision, the Supreme Court of Justice did not contradict this important finding.

33. The Court further notes that there is no indication in the Supreme Court’s judgment of 14 November 2007 whether the letter from the Department for the Execution of Judgments contained “information” that could not have been obtained earlier by Mr M. Nor is there any indication that Mr M. unsuccessfully tried to obtain such “information” earlier than 13 July 2007. In such circumstances the Court considers that it cannot be said that the letter from the Department for the Execution of Judgments of 13 July 2007 qualified as “new facts or circumstances that were unknown and could not have been known earlier” by the parties to the proceedings.

Moreover, there is no mention in the Supreme Court's judgment of the three-month time-limit for requesting a review or of any ground found by the Supreme Court to justify extending the time-limit (see, *mutatis mutandis*, *Ruiz Torija*, cited above).

34. Accordingly, the Court considers that the review proceedings at issue was in essence an attempt to re-argue the case on points which Mr M. could have but apparently did not raise during the proceedings which ended with the final judgment of 18 July 2007. It was in effect an "appeal in disguise" whose purpose was to obtain a fresh examination of the matter rather than a genuine review as provided for in Articles 449-453 of the Code of Civil Procedure.

35. By granting Mr M.'s request for review the Supreme Court of Justice infringed the principle of legal certainty and the applicant's "right to court" under Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Roşca*, cited above, § 28). Moreover, by not giving any reasons for extending the time-limit within which the defendant could request a review, the Court of Appeal breached the applicant's right to a fair hearing (see paragraph 24 above).

36. In the light of the above the Court considers that there has been a violation of Article 6 § 1. In the circumstances, it does not consider it necessary to examine, additionally, whether other aspects of the proceedings did or did not comply with that provision.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

37. The applicant company complained that the Supreme Court's judgment of 14 November 2007 had had the effect of infringing its right to peaceful enjoyment of its possessions as secured by Article 1 of Protocol No. 1 to the Convention. Article 1 of Protocol No. 1, in so far as relevant, provides:

"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...."

38. The Government disagreed with the applicant and argued that there was no violation of Article 1 of Protocol No. 1 to the Convention.

A. Admissibility

39. The Court notes 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

40. The Court considers that the applicant company had a “possession” for the purposes of Article 1 of Protocol No. 1, namely the amount of money which it had been absolved of returning to Mr M. by virtue of the Court of Appeal’s judgment of 18 July 2007. Quashing such a judgment after it has become final and unappealable constitutes an interference with the judgment beneficiary’s right to the peaceful enjoyment of that possession (see *Brumărescu*, cited above, § 74). Even assuming that such an interference may be regarded as serving a public interest, the Court finds that it was not justified since a fair balance was not preserved and the applicant company was required to bear an individual and excessive burden (compare *Brumărescu*, cited above, §§ 75-80).

41. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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.”

43. The applicant company submitted that it was not prepared to present any just satisfaction claims because the company was in the process of bankruptcy and that it preferred to leave this question for a later examination. The Government did not object.

44. The Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved and a further procedure fixed, with due regard to the possibility of an agreement being reached between the Moldovan Government and the applicant company.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds* that the question of the application of Article 41 in the instant case is not ready for decision and accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant company to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 13 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President