



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

THIRD SECTION

CASE OF AGURDINO S.R.L. v. MOLDOVA

(Application no. 7359/06)

JUDGMENT

STRASBOURG

27 September 2011

FINAL

27/12/2011

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

In the case of Agurdino S.R.L. 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 6 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 7359/06) 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 Agurdino S.R.L. (“the applicant company”), a company incorporated in the Republic of Moldova, on 16 February 2006.

2. The applicant company was represented by Mr V. Nagacevschi and Mr I. Chibac, lawyers practising in Chişinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Grosu.

3. The applicant company alleged, in particular, 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 21 April 2008 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 is specialised in the production of chemical products in the Expo-Business-Chişinău Free Economic Zone.

6. On 15 October 2001 the State Tax Inspectorate (“the Inspectorate”) ordered the applicant company to pay value-added tax in the amount of

2,021,312 Moldovan lei (MDL) (approximately 126,000 euros (EUR)) and a fine of MDL 1,617,049 (approximately EUR 101,000) for failure to pay the aforementioned value-added tax. The applicant company disputed the tax assessment and argued that it was exempt from paying value-added tax in accordance with the Act establishing the Expo-Business-Chișinău Free Economic Zone (“the FEZ Act”). As the Inspectorate did not accept the applicant company’s arguments and its interpretation of the law, the applicant company instituted proceedings.

7. On 19 June 2002 the Supreme Court of Justice issued a final ruling on the case and found in favour of the applicant company. The applicant was cleared of the obligation to pay the sums imposed by the Inspectorate.

8. On 20 October 2005 Parliament adopted a bill on the interpretation of the FEZ Act (“the Interpretation Act”), giving the FEZ Act a different interpretation from that given by the applicant company and the courts.

9. On 2 November 2005 the Inspectorate applied for review of the judgment of the Supreme Court of 19 June 2002, on the basis of the new interpretation given to the law by Parliament.

10. On 14 November 2005 the applicant company was informed by telephone by the Registry of the Supreme Court that a hearing in the case would take place on 16 November 2005. The company’s chief executive officer applied for an adjournment, arguing that he would not be able to participate in the hearing.

11. On 16 November 2005 the Supreme Court of Justice held a hearing in the case, in the absence of the applicant company’s representative, and upheld the application for review lodged by the Inspectorate. It quashed the previous judgment and ruled in favour of the Inspectorate.

12. On 30 November 2006 the Constitutional Court declared the Interpretation Act unconstitutional. In view of that, on 12 December 2006 the applicant company lodged an application for review of the judgment of 16 November 2005 with the Supreme Court of Justice. However, the application was dismissed on 24 January 2007.

13. The parties disagree on whether the judgment of 16 November 2005 was enforced. According to the applicant company, it was partially enforced and it paid 42,906 Moldovan Lei (MDL). The rest of the sum sought by the Inspectorate could not be paid because the applicant company became insolvent. The Government dispute this submission and argue that the judgment of 16 November 2005 was never enforced.

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 [falling within] Article 449 (c);

....”

15. The relevant provision of the Legislation Act reads as follows:

Section 45. The retroactivity of interpretation acts

“An act interpreting another act cannot have retroactive effect...”

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

16. The applicant company complained that the quashing of the final judgment of the Supreme Court of Justice of 19 June 2002 had been wrongful and had violated Article 6 § 1 of the Convention.

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. ...”

A. Admissibility

17. The Court notes that 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.

B. Merits

18. The applicant company submitted that the quashing of the judgment of 19 June 2002 had violated its right to a fair trial as guaranteed by Article 6 of the Convention. The Interpretation Act had not been able to have retroactive effect and the use of it by the Supreme Court of Justice for the purpose of review of the final judgment of 19 June 2002 had been contrary to section 45 of the Legislation Act. The review procedure had in fact been an appeal in disguise.

19. The Government argued that 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 the adoption of a judgment. An application 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.

20. 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 its judgment.

21. The Government also cited a recommendation of the Committee of Ministers, according to which the Governments of the member States were advised to ensure the existence of a procedure for the review and reopening of cases.

22. The Court notes that the present case concerns proceedings in which the applicant company was found, following errors in its tax returns, liable to pay a fine of MDL 1,617,049. The assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head (see *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII). The issue therefore arises whether the proceedings in this case were “criminal” within the autonomous meaning of Article 6 and thus attracted the guarantees of Article 6 under that head.

23. The Court observes in this respect that the Government did not contest the applicability of Article 6 of the Convention to the proceedings in the present case. It also notes that the fine imposed on the applicant company had been intended as a punishment to deter reoffending rather than a pecuniary compensation. In such circumstances, and in so far as the proceedings concern the fine imposed, the Court is prepared to consider that Article 6 applies under its criminal head in the present case (*cf. Jussila v. Finland* [GC], no. 73053/01, §§ 31-39, ECHR 2006-XIII).

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 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 the 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 16 November 2005 cited the Interpretation Act adopted by Parliament on 20 October 2005 as grounds for reopening the proceedings (see paragraph 9 above).

32. The Court notes in the first place that according to section 45 of the Legislation Act a law interpreting another law cannot have retroactive effect and that, therefore, the new interpretation given by Parliament to the FEZ Act on 20 October 2005 could not ordinarily have affected the status of a dispute ended by a final judgment some three years earlier.

33. However, even assuming the contrary, the Court notes that there is no indication in the Supreme Court’s judgment of 16 November 2005 whether the Interpretation Act contained “information” that could not have been obtained earlier by the Inspectorate. Nor is there any indication that the Inspectorate unsuccessfully tried to obtain such “information” earlier. In such circumstances, the Court considers that it cannot be said that the Interpretation Act qualified as a “new [...] fact or circumstance that [was] 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 were, in essence, an attempt to re-litigate the case on points which the Inspectorate could have but apparently did not raise earlier. 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 449-53 of the Code of Civil Procedure.

35. By granting the Inspectorate’s request for review, the Supreme Court of Justice infringed the principle of legal certainty and the applicant company’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 Inspectorate could request a review, the Supreme Court 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.

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 16 November 2005 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 which, 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....”

A. Admissibility

38. 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

39. The Government argued that there has been no breach of Article 1 of Protocol No. 1 to the Convention.

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 from paying to the Inspectorate by virtue of the Supreme Court’s judgment of 19 June 2002. 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 the public interest, the Court finds that it was not justified, as 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. OTHER COMPLAINTS

42. In its initial application, the applicant company had also complained under Articles 6 § 3 and 7 of the Convention and under Article 4 of Protocol No. 1 to the Convention. However, in its observations on the admissibility and merits, it asked the Court not to proceed with the examination of these complaints. Therefore and in the absence of any special circumstances regarding respect for the rights guaranteed by the Convention or its Protocols which would require the continued examination of this part of the application, the Court considers that it is no longer justified to continue the examination of this part of the application within the meaning of Article 37 § 1 (a) of the Convention.

43. Accordingly this part of the application should be struck out.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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.”

45. The applicant company claimed EUR 5,840.50 for pecuniary damage suffered as a result of the abusive quashing of the judgment of 22 June 2002. This amount, calculated as of the date on which the applicant company submitted its claims under Article 41 of the Convention, included the amount claimed by the applicant to have been paid to the Inspectorate following the judgment of the Supreme Court of 16 November 2005 and default interest calculated in accordance with Moldovan legislation. The applicant company also claimed EUR 2.14 per day, to be calculated after the date on which it submitted its claim for just satisfaction until such date as the Court would determine the issue of just satisfaction in the case.

46. The applicant company also claimed EUR 10,000 for non-pecuniary damage and EUR 1,795 for costs and expenses.

47. The Government disputed the amounts claimed by the applicant company and submitted that the judgment of 16 November 2005 had never been enforced and that, therefore, the applicant company was not entitled to any pecuniary damage. As to the rest of the applicant company's claims, the Government submitted that they were excessive and unfounded.

48. The Court notes the dispute between the applicant company and the Government concerning the enforcement of the judgment of 16 November 2005. The documents submitted by the applicant company prove the payment of MDL 42,906 to the Inspectorate. However, it is not entirely clear from those documents whether the entire amount represented a payment in connection with the judgment of the Supreme Court of Justice of 16 November 2005. Accordingly, 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 complaints under Article 6 and under Article 1 of Protocol No. 1 to the Convention admissible;
2. *Decides* to strike out the remaining complaints;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. *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 27 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President