



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

SECOND SECTION

CASE OF BALAN v. THE REPUBLIC OF MOLDOVA (No. 2)

(Application no. 49016/10)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Substantial reduction in compensation award made in a final court judgment *via* a subsequent explanation by the Supreme Court of Justice concerning the manner of enforcing that judgment • Request for explanation by defendant an appeal in disguise • Explanation beyond the ordinary interpretation or correction of clerical or judicial errors and effect incompatible with legal certainty principle
Art 1 P1 • Unlawful interference with applicant's peaceful enjoyment of possessions • Explanation arbitrarily altered final situation and resulted in loss of part of award

STRASBOURG

29 November 2022

FINAL

28/02/2023

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

In the case of Balan v. the Republic of Moldova (no. 2),

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

Arnfinn Bårdsen, *President*,

Egidijus Kūris,

Pauliine Koskelo,

Saadet Yüksel,

Lorraine Schembri Orland,

Diana Sârcu,

Davor Derenčinović, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 49016/10) 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 Moldovan national, Mr Pavel Balan (“the applicant”), on 28 June 2010;

the decision to give notice to the Moldovan Government (“the Government”) of the application;

the parties’ observations;

Having deliberated in private on 8 November 2022,

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

INTRODUCTION

1. The present case concerns the alleged change of the award made in a final court judgment *via* a subsequent explanation of the manner of enforcing that judgment. It raises issues under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

THE FACTS

2. The applicant was born in 1938 and lives in Chişinău. The applicant was represented by Mr V. Zamă, a lawyer practising in Chişinău.

3. The Government were represented by their Agent at the time, Mrs R. Revencu.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE COURT’S PRINCIPAL JUDGMENT

5. In 1985 the applicant published the photograph ‘Soroca Castle’ in the album *Poliptic Moldav*. Between 1996 and 2000 that photograph was used as the background for identity cards issued by the Ministry of Internal Affairs of the Republic of Moldova, without the applicant’s consent. The applicant

asked for compensation for the unauthorised use of the photograph taken by him.

6. On 6 November 2001 the Chişinău Regional Court (*Tribunalul Chişinău*) awarded the applicant 180,000 Moldovan lei (MDL, the equivalent of approximately 15,650 Euros (EUR) at the time) in compensation for pecuniary damage and MDL 3,600 for non-pecuniary damage (approximately EUR 313 at the time). On 26 March 2002 the Chişinău Court of Appeal quashed that judgment and dismissed the applicant's claims. On 16 October 2002 the Supreme Court of Justice upheld the appellate court's judgment.

7. The applicant lodged an application with the Court concerning the matter. On 29 January 2008 it adopted a judgment (see *Balan v. Moldova*, no. 19247/03, 29 January 2008, "the principal judgment"), finding a breach of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention and awarding the applicant 5,000 euros (EUR) in compensation for the pecuniary and non-pecuniary damage caused to him and EUR 2,000 for costs and expenses (paragraphs 51 and 54 of the principal judgment). According to information from the Government, that award was paid to the applicant on 2 July 2008.

II. THE REOPENING OF THE DOMESTIC PROCEEDINGS

8. On 15 July 2008 the applicant asked the Supreme Court of Justice to reopen the proceedings in his case in view of the adoption of the principal judgment. On 12 November 2008 it accepted that request and annulled the judgment of the Chişinău Court of Appeal of 26 March 2002. It retained the case in order to conduct its own examination of the appeals lodged by the parties.

9. In a final decision adopted on the same date, the Supreme Court of Justice dismissed the parties' appeals as unfounded and fully upheld the judgment of the Chişinău Regional Court (*Tribunalul Chişinău*) of 6 November 2001; (the overall award of MDL 183,600 was the equivalent of approximately EUR 13,900 at that time). The defendant in that case, which was represented at the hearing, did not ask the court to deduct any sum from an eventual award made.

10. On 11 March 2009 the Ministry of Information Development ("the Ministry", which had been the defendant in the original proceedings) asked the Supreme Court of Justice to reopen the proceedings (*revizuirea*). It argued that had the Court found a breach of the applicant's rights without making an award in compensation for the damage caused to him, the domestic courts would have had a legal basis for awarding him compensation, along the lines of Article 41 of the Convention. However, since the Court had already made a monetary award in the principal judgment, no compensation could have been lawfully awarded by the domestic courts after the reopening of the

proceedings on 12 November 2008. In reply, the applicant submitted that the Supreme Court of Justice had adopted its decision while being aware of the principal judgment.

11. On 27 May 2009 the Supreme Court of Justice dismissed the request for revision as unfounded, finding that the circumstances relied on did not render the judgments unlawful.

12. On 1 December 2009 the Ministry lodged a request with the Supreme Court of Justice under Article 251 of the Code of Civil Procedure, seeking an explanation as to the manner of enforcement of its judgment of 12 November 2008. The Ministry noted that the judgment did not clearly specify whether the award should be adjusted to take into account the EUR 5,000 already paid while enforcing the principal judgment, or whether the Supreme Court of Justice had intended to award the entire sum of money in addition to the sum mentioned in the principal judgment.

13. On 11 March 2010 the Supreme Court of Justice accepted the request and explained its judgment of 12 November 2008, confirming that it had not indicated the manner of enforcement in view of the existence of the principal judgment. It therefore explained that the judgment of 6 November 2001, as upheld by the judgment of 12 November 2008, was to be enforced by deducting the sum of EUR 5,000 awarded to the applicant in the principal judgment.

According to the Government, the judgment of 12 November 2008, as interpreted by the judgment of 11 March 2010, was enforced on 26 December 2010. The applicant was thus paid MDL 105,242 (approximately EUR 8,900).

III. THE RESOLUTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

14. On 14 November 2018, that is after the reopening of the proceedings concerned by the principal judgment, the Committee of Ministers of the Council of Europe, in its 1329th session, concluded its examination of the execution of the Court's judgment of 29 January 2008 (see paragraph 7 above) by adopting Resolution ResDH(2018)414, the relevant parts of which read:

“The Committee of Ministers, ...

Having examined the action report provided by the government indicating the measures adopted to give effect to the judgment, including the information provided regarding the payment of the just satisfaction awarded by the Court ...

DECLARES that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and DECIDES to close its examination.”

RELEVANT LEGAL FRAMEWORK

15. The relevant part of Article 251 of the Code of Civil Procedure reads as follows:

“Article 251. Explanation of the judgment

(1) If an explanation is needed as to the meaning, extent or application of the operative part of a judgment or if the judgment contains contradictory provisions, the court which adopted the judgment may, at the request of the parties or the enforcement authority, explain the operative part or exclude the contradictory provisions, without modifying the contents of the judgment.

...”

THE LAW

I. PRELIMINARY ISSUE

16. The Court must verify, of its own motion, whether it has jurisdiction *ratione materiae* to examine the present application, notably regarding the application of Article 46 of the Convention.

17. In this connection, it refers to its case-law concerning the execution of its judgments and its competence to examine a new issue undecided by the previous judgment (see, for instance, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, §§ 33 and 34, ECHR 2015; *Egmez v. Cyprus* ((dec.)), no. 12214/07, §§ 48-56, 18 September 2012; and *Kudeshkina v. Russia* (dec.), no. 28727/11, §§ 52-68, 17 February 2015).

18. It reiterates that complaints of a failure either to execute the Court’s judgments or to redress a violation already found by the Court fall outside its competence *ratione materiae* (see, for instance, *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX, and *Bochan (2)*, cited above, § 35), and that execution is supervised by the Committee of Ministers under Article 46 of the Convention.

19. The Court does have jurisdiction to examine complaints concerning situations where the domestic authorities have carried out a fresh domestic examination of the case by way of implementation of one of the Court’s judgments whether by reopening of the proceedings or by the initiation of an entire new set of domestic proceedings (see *Bochan (no. 2)*, cited above, with further references).

20. In the present case, it is clear that following the adoption of the principal judgment the domestic courts reopened the proceedings and examined the substance of the applicant’s claims, adopting a new judgment in his favour (see paragraph 9 above). The complaints under Article 6 § 1 of the Convention regarding the unfairness of the judicial proceedings leading to the alleged amendment of the judgment of 12 November 2008 *via a*

subsequent explanation of the manner of enforcing it, and under Article 1 of Protocol No. 1 to the Convention about the loss of a part of the sum originally awarded, therefore concern a situation distinct from that examined in the principal judgment and contains relevant new information relating to issues undecided by that judgment.

21. As a consequence, in the present case the “new issue” the Court is competent to examine, without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention, concerns the alleged unfairness of the proceedings for the explanation of the judgment of 12 November 2008, as opposed to the proper execution of the Court’s judgment of 29 January 2008 (see *Bochan (2)*, cited above, § 38).

The Court thus has jurisdiction *ratione materiae* to examine these complaints.

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

22. The applicant complained that the explanation of the final judgment in his favour had resulted in a breach of Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

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

B. Merits

24. The applicant argued that by explaining – and effectively changing – the final judgment of 12 November 2008 the Supreme Court of Justice had breached the principle of legal certainty.

25. The Government submitted that the judgment of 12 November 2008 had not clearly specified the manner of enforcement (see paragraph 12 above). By explaining it, the Supreme Court of Justice had acted in accordance with the domestic law and had not affected the fairness of the proceedings.

26. The Court reiterates that 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, the relevant part of which 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 *Roșca v. Moldova*, no. 6267/02, § 24, 22 March 2005).

27. Legal certainty presupposes respect for the principle of *res judicata*, that is, the principle of the finality of judgments. This principle provides 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 (see *Macovei and Others v. Moldova*, nos. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03 and 31761/03, § 42, 25 April 2006). The review should be exercised to correct judicial errors and miscarriages of justice, not to carry out a fresh examination. It should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not grounds for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Roșca*, cited above, § 25).

28. In the present case, the Court notes that the Supreme Court of Justice never mentioned in its explanation of the judgment of 12 November 2008 that it was correcting a miscarriage of justice. In fact, that court had previously dismissed a request for revision of the judgment of 12 November 2008 (see paragraph 11 above), finding that the domestic courts' award of compensation, in addition to that already awarded in the principal judgment, had not undermined the lawfulness of the proceedings. Therefore, it is apparent that the Supreme Court of Justice itself did not find any miscarriage of justice in the present case.

29. In this connection, rather than revising its judgment of 12 November 2008, the Supreme Court of Justice chose to provide an explanation concerning the manner of its enforcement. However, when doing so, it did not refer to any new circumstances other than those which were part of the case file when the judgment was adopted. Furthermore, that same court, when adopting its decision of 12 November 2008 (see paragraph 9 above), did not find it necessary to deduct any sum from the amount of compensation in the applicant's favour, even though it was aware of the award previously made in the principal judgment.

30. Moreover, it is clear that the defendant in the domestic proceedings, while being represented at the hearing of 12 November 2008 and being aware of the principal judgment, did not ask for the deduction from an eventual award of EUR 5,000 already paid as part of enforcing that judgment (see paragraph 9 above). Accordingly, allowing it (or any of its successors) to raise this argument after the judgment became final constituted, in the Court's view, an appeal in disguise (see, for instance, *Agurdino S.R.L. v. Moldova*, no. 7359/06, § 26, 27 September 2011; compare and contrast *ASITO v. Moldova* (No. 2), no. 39818/06, §§ 12 and 28, 13 March 2012, in which no

breach of Article 6 was found in respect of a part of the domestic courts' supplementary judgment concerning claims which had been properly submitted during the main proceedings and in respect of which the courts had failed to decide).

31. The Court lastly notes that the explanation in question substantially affected the sum awarded to the applicant (from EUR 13,900, see paragraph 9 above, to EUR 8,900, that is a reduction of approximately 36% of the award). It therefore went beyond the ordinary interpretation or correction of clerical or judicial errors and had an effect which was incompatible with the principle of legal certainty as guaranteed by Article 6 of the Convention, frustrating the applicant's reliance on a binding judicial decision.

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

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

32. The applicant complained of a violation of right to the peaceful enjoyment of his possessions as a result of the explanation of 11 March 2010. He relied on Article 1 of Protocol No. 1, which reads as follows:

Article 1 of Protocol No. 1

"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."

A. Admissibility

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

B. Merits

34. The applicant complained under Article 1 of Protocol No. 1 that the situation created by the explanation of 10 March 2010 had amounted to a violation of his right to the peaceful enjoyment of his possessions. In particular, the sum originally awarded to him in the judgment of 12 November 2008 had been reduced by EUR 5,000.

35. The Government argued that the applicant had in fact claimed double compensation for the same damage caused to him: once in the principal

judgment and once in the domestic judgments. They noted that in the principal judgment the Court had not distinguished between compensation for pecuniary and non-pecuniary damage, and had instead awarded him an overall amount. In such circumstances, the domestic courts had been entitled to examine the situation and to reduce the award made in order to prevent unjust enrichment. Moreover, they had not been obliged to reopen the proceedings following the adoption of the principal judgment, since the Court had already both found a breach of his Convention rights and awarded him sufficient just satisfaction.

36. The Court notes that by virtue of the final judgment of 12 November 2008 the applicant had a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention (see *Roșca*, cited above, § 31). Following the explanation of the manner of enforcing that judgment, he lost a part of those possessions, namely the sum of EUR 5,000. Accordingly, there was an interference with his property right.

37. It considers that there is merit in the Government’s argument that the applicant may have been compensated twice for the same period when his rights had been breached. However, it notes that the Supreme Court of Justice had all the elements of the file before it, including the principal judgment and the award made therein, and decided not to deduct any sum from the award it made in favour of the applicant. In the absence of any sign of a miscarriage of justice, the finality of that determination must be observed.

38. The Court refers to the principles concerning legal certainty (see paragraph 27 above) and to its finding in paragraphs 28 to 31 above that the use of Article 251 of the Code of Civil Procedure to request an explanation of the judgment of 12 November 2008 amounted in the present case to an appeal in disguise. In upholding that request the Supreme Court of Justice upset the principle of legal certainty. The explanation of 10 March 2010 altered a final legal situation in an arbitrary manner and resulted in a loss of property by the applicant. In such circumstances, the Court finds that the interference with the applicant’s right to the peaceful enjoyment of his possessions cannot be regarded as being “lawful” within the meaning of Article 1 of Protocol No. 1 to the Convention (see, *mutatis mutandis*, *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II, and *Belvedere Alberghiera S.r.l. v. Italy*, no. 31524/96, § 56, ECHR 2000-VI).

For these reasons, the Court finds that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant claimed EUR 10,084 in respect of pecuniary damage, consisting of EUR 5,000 he had lost as a result of the Supreme Court of Justice’s explanatory judgment of 11 March 2010, and interest for the period during which he had not been able to use that amount. He also claimed EUR 2,000 in respect of non-pecuniary damage.

41. The Government argued that having been awarded sufficient just satisfaction once by the Court and a second time by the domestic courts, the applicant could not claim any additional compensation. In any event, the sums claimed were clearly exaggerated.

42. The Court notes that the applicant lost a part of the sum originally awarded by the domestic courts as a result of the interpretation of the final judgment in his favour. At the same time, it is apparent that when he asked for the reopening of the proceedings on 15 July 2008, he had already received the award made by the Court in the principal judgment. Moreover, the claim for compensation now made before the Court refers to the reduction of the award made by the domestic courts for unlawfully using, prior to 1 May 2000, the photo he had made (see *Balan*, cited above, § 45). In its principal judgment, the Court has already awarded him compensation for the breach of his rights during that period of time. The overall consequence of the various decisions adopted in respect of the applicant, including the impugned interpretation of the final judgment in his favour, was that, instead of EUR 5,000 awarded by the Court in the principal judgment, he eventually obtained the equivalent of approximately EUR 13,900 for the same period of unauthorised use of the photo he had taken. That being so, the Court considers that no award for pecuniary damage is required.

43. However, the Court found breaches of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention. It therefore considers that the applicant must have been caused a certain amount of stress and frustration as a result of the Supreme Court of Justice’s decision to amend the final judgment. Ruling on an equitable basis, it awards him EUR 1,500 in compensation for the non-pecuniary damage caused.

B. Costs and expenses

44. The applicant also claimed EUR 400 for the costs and expenses incurred before the Court.

45. The Government argued that the sum claimed was excessive.

46. Regard being had to the documents in its possession and to its case-law (see, for instance, *Arzamazova v. the Republic of Moldova*, no. 38639/14,

§ 67, 4 August 2020 and *Ziaunys v. the Republic of Moldova*, no. 42416/06, § 47, 11 February 2014), the Court awards the amount claimed in full.

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*
 - (a) that the respondent State is to pay the applicant, 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 Moldovan lei at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 400 (four hundred euros), plus any tax that may be chargeable to the applicant, 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;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 29 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Arnfinn Bårdsen
President