



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

SECOND SECTION

CASE OF LINDNER AND HAMMERMAYER v. ROMANIA

(Application no. 35671/97)

JUDGMENT

STRASBOURG

3 December 2002

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
6 April 2006**

*This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention. It may be subject to editorial revision.*

In the case of Lindner and Hammermayer v. Romania,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr Gaukur JÖRUNDSSON,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 November 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35671/97) against Romania lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Romanian nationals, Mr Alexandru Lindner and Ms Cristina Hammermayer ("the applicants"), on 9 April 1997.

2. The applicants were represented by Mr Adrian Vasiliu, of the Bucharest Bar. The Romanian Government ("the Government") were represented by their Agent, Mrs Cristina Iulia Tarcea, of the Ministry of Justice.

3. The applicants alleged in particular that the Bucharest Court of Appeal's finding, on 14 October 1996, that the courts had no jurisdiction to determine an action for recovery of possession was contrary to Article 6 of the Convention. They also complained that the Court of Appeal's judgment had had the effect of infringing their right to peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1.

4. The application was referred to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber which would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. The applicants and the Government each filed observations on the admissibility and merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants live in Frankfurt, Germany.

9. On 2 October 1939 the applicants' mother acquired title to a property in Bucharest composed of three flats. On 30 March 1948 she sold one of the flats to L.N. In 1975 she emigrated to Germany.

10. On 18 September 1975 the State took possession of the property pursuant to Confiscation Decree no. 223/1974. The applicants' mother was never informed of the grounds or legal basis for that confiscation.

Action for recovery of possession

11. On 27 July 1992 the applicants, as heirs, brought proceedings against Bucharest City Council and the managing company of State-owned housing, H., in the Court of First Instance of the first district of Bucharest to have the confiscation order against the property set aside. They argued that their mother had been the owner of the property and that the State had confiscated it pursuant to Confiscation Decree no. 223/1974, but that the deprivation of property had been unlawful because the administrative confiscation order had never been served on their mother. On 3 May 1994 the court delivered a judgement which was subsequently set aside by a decision of 19 April 1995 of the Bucharest County Court following a procedural flaw. The case was then remitted to the Court of First Instance.

12. In a judgment of 28 January 1995 the court granted the claim on the ground that the administrative confiscation order in favour of the State had not satisfied the statutory formal conditions. Accordingly, it held that the State had not lawfully acquired title to the property and that the applicants were the lawful owners. The court ordered the confiscation order to be set aside and the property to be returned to the applicants.

13. An appeal by Bucharest City Council was dismissed on 17 May 1996 by the Bucharest County Court on the same grounds as the Court of First Instance.

14. The City Council appealed to the Bucharest Court of Appeal. In a judgment of 14 October 1996 the court allowed the appeal and dismissed the applicants' action for recovery of possession. It found that the property in question had become State property pursuant to a valid legal title, namely the City Council's decision of 18 September 1975, and held that in order to secure its return or, if applicable, compensation, the applicants' only remedy was under the provisions of Law no. 112/1995 on the restitution of certain nationalised property.

15. On 20 December 1996 the State sold one of the remaining two flats to the former tenant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant domestic legislation and case-law are set out in the *Brumărescu v. Romania* judgment ([GC], no. 28342/95, §§ 31-44, ECHR 1999-VII).

17. The relevant provisions of Decree no. 223/1974 on the confiscation of certain real property read as follows:

Article I

“In the Socialist Republic of Romania title to real property, buildings and land can only vest in natural persons who are domiciled in the country.”

Article II

“Anyone who has applied for permission to leave the country with the intention of permanently settling abroad must first dispose of their real property in favour of the State and can do so up until the date of their departure Real property belonging to persons who have illegally left the county or have failed to return within the statutory time-limit shall become the property of the Romanian State with no compensation whatsoever. ...”

18. The position of the Supreme Court of Justice on this point can be summarised in the following way: on 20 November 2000 the full Supreme Court of Justice found that the courts did not have a common position on the subject of actions for recovery of possession by which applicants sought restitution, under the ordinary law, of real property confiscated under Decree no. 223/1974. It noted that some courts had held that such actions were inadmissible on the ground that the claims should have been brought under the special law enacted for that purpose, Law no. 112/1995, whereas others had held that they were admissible. The Supreme Court concluded that the courts did have jurisdiction to examine, under the ordinary law, actions for recovery of possession of property confiscated by the State pursuant to Decree no. 223/1974.

THE LAW

I. ADMISSIBILITY

A. Inadmissibility of the application on the ground of non-exhaustion

19. The Government submitted in substance that the application was inadmissible for failure to exhaust domestic remedies. They submitted that it was open to the applicants to bring proceedings under Law no. 10/2001, which had been passed on 8 February 2001.

20. The Court reiterates that the applicants have already brought an action for recovery of possession of the property, which is an existing and sufficient remedy under domestic law, and considers that the Government cannot rely on the applicants' failure to bring a fresh action for recovery of possession (see, *mutatis mutandis*, *Brumărescu v. Romania*, cited above, §§ 54-55).

21. Consequently, the Government's objection must be dismissed.

B. Alleged violation of Article 2 § 2 of Protocol No. 4 to the Convention

22. The applicants contended that the Bucharest Court of Appeal's judgment of 14 October 1996 infringed Article 2 § 2 of Protocol No.4 to the Convention, which provides:

“Everyone shall be free to leave any country, including his own.”

23. The applicants complained that the property had been confiscated under Decree no. 223/1974 because their mother had emigrated to Germany and that this amounted to an interference with her freedom of movement. They relied on Article 2 § 2 of Protocol No. 4 to the Convention.

24. The Court observes that the applicants' mother had left Romania for good in 1975, when the State appropriated her property. She subsequently died on an unknown date. There is no evidence that she personally complained of an infringement of her right to freedom of movement. In any event, the specific nature of this complaint in the circumstances of this case does not allow it to be regarded as transferable (see, *mutatis mutandis*, *Altun v. Germany*, no. 10308/83, Commission report of 7 March 1984, Decisions and Reports (DR) 36, p 236).

25. In so far as the question raised by the applicants may affect a general interest requiring continuation of the examination of this complaint, the Court reiterates that Romania ratified the Convention on 20 June 1994.

Accordingly, the complaint relating to the mother's freedom of movement in 1975 falls outside the Court's jurisdiction *ratione temporis*.

26. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

II. THE MERITS

27. The Court notes that the complaints of the alleged breaches of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1 to the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It notes further that no other ground for declaring them inadmissible has been established. This part of the claim must therefore be declared admissible.

A. Alleged violation of Article 6 § 1 of the Convention

28. According to the applicants, the Bucharest Court of Appeal's judgment of 14 October 1996 infringed Article 6 § 1 of the Convention, which provides:

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

29. In their memorial, the applicants submitted that the Court of Appeal's finding that the courts had no jurisdiction to determine an action for recovery of possession was contrary to the right to a court enshrined in Article 21 of the Romanian Constitution and to Article 3 of the Romanian Civil Code, which deals with denial of justice.

30. The Government contested the applicants' arguments. They contended that the Court of Appeal had not refused to examine the case, but had decided, albeit in succinct terms, that the property had been confiscated pursuant to a valid legal title, which, in their submission, constituted an examination on the merits.

31. The Court observes that the applicants brought an action for recovery of possession in the courts, alleging that the confiscation order had been unlawful, and that their application was dismissed merely because a confiscation order was found to have existed.

32. The Court reiterates that Article 6 § 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (see *Hiro Balani v. Spain*, judgment of 9 December 1994, Series A no. 303-B, pp. 29-30, § 27).

In the instant case it was not disputed that the City Council had ordered confiscation of the property. The subject of the dispute was whether the order had satisfied the substantive and formal requirements under the law in force at the time. The Court of Appeal did not consider that issue and did

not examine any of the applicants' arguments. It expressly indicated that they should contact the Administrative Board for a determination of their application for restitution of the property.

33. It cannot therefore be deduced from the wording of the Court of Appeal's judgment, namely that the property had been confiscated pursuant to a "valid legal title", that it had undertaken an examination on the merits of the validity of the confiscation order. It follows that the Court of Appeal excluded the applicants' action for recovery of possession from the courts' jurisdiction, which is in itself contrary to the right of access to a court as guaranteed by Article 6 § 1 of the Convention.

34. Accordingly, there has been a violation of Article 6 § 1.

B. Alleged violation of Article 1 of Protocol No. 1 to the Convention

35. The applicants complained that the Bucharest Court of Appeal's judgment of 14 October 1996 had had the effect of infringing their right to peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1, which 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.

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."

36. The applicants submitted that the Court of Appeal's judgment had had the effect of wrongfully depriving them of their property. Firstly, the judgment did not pursue an aim of public interest since the lower courts had not encroached on the legislature's domain, but had merely determined a civil dispute regarding recovery of possession. Lastly, the applicants submitted that there had been a breach of Article 1 of Protocol No. 1 in that they had been deprived of their property without any compensation.

37. The Government submitted that the applicants' complaint was incompatible *ratione materiae* with the provisions of Article 1 of Protocol No. 1. They referred to the Convention institutions' case-law according to which the Convention did not guarantee the right to have property returned, since Article 1 of Protocol No. 1 protected only a person's existing possessions and did not guarantee the right to acquire possessions.

In the Government's contention, the issue whether the nationalisation of the property of the applicants' mother had or had not been lawful could only be established by a final judicial decision. In its decision of 14 October 1996 the Bucharest Court of Appeal had not determined that matter.

Accordingly, the Government considered that the applicants did not have a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

38. The Court must therefore examine whether the courts' refusal to determine the dispute relating to the said part of the nationalised property amounted to an interference with the applicants' property rights as guaranteed by Article 1 of Protocol No. 1.

39. In that connection the Court reiterates, firstly, that it can examine applications only to the extent that they relate to events which occurred after the Convention entered into force with respect to the relevant Contracting Party. In the instant case the property in question was confiscated in 1975, that is, before 20 June 1994, when the Convention entered into force with regard to the Romania. Therefore, the Court does not have jurisdiction *ratione temporis* to examine the circumstances of the confiscation or the continuing effects produced by it up to the present date.

40. The Court reiterates its established case-law according to which a deprivation of ownership or other right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right" (see, for example, *Lupuleț v. Romania*, application no. 25497/94, Commission decision of 17 May 1996, D.R. 85-B, p. 126). The applicants' complaint is therefore incompatible with the provisions of the Convention insofar as it can be construed as challenging, as such, the measures taken pursuant to Law no. 223/1974) regarding the property prior to the entry into force of the Convention in respect of Romania.

41. The applicants can therefore allege a violation of Article 1 of Protocol No. 1 only insofar as the proceedings of which they complained related to their "possessions" within the meaning of that provision.

In that connection the Court reiterates that the concept of "possessions" under Article 1 of Protocol No. 1 can cover "existing possessions" (see *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 23, § 48) and pecuniary assets, such as debts, by virtue of which the applicant can claim to have at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see *Pine Valley Developments Ltd. and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51, and *Pressos Compania Naviera S.A. v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 21, § 31).

However, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1 (see *Malhous v. the Czech Republic* (dec.), no. 33071/96, ECHR 2000-XII), nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see *Mario de Napoles Pacheco v. Belgium*, application no. 7775/77, Commission decision of 5 October 1978, DR 15, p. 143, and *Lupuleț*, cited above, p. 133).

42. In the instant case the applicants brought proceedings before the appropriate national authorities for the recovery of possession of the property. In bringing that action they sought to establish a right of ownership which, at the time of lodging the originating application, was no longer theirs. Consequently, the proceedings did not relate to an “existing possession” of the applicants.

43. It remains to be examined whether they could have a “legitimate expectation” of securing the return of the property. They could have secured the return of the actual property if the courts had decided, in assessing the circumstances of the case, that their mother's property had been unlawfully confiscated. It falls first and foremost to the domestic courts to determine that question. The Court cannot speculate as to what the outcome of the proceedings would have been if the Bucharest Court of Appeal had determined the dispute. Although the Court of First Instance and the County Court found for the applicants, the case remained pending before the Romanian courts pending a final decision, and the action for recovery of possession did not in itself give rise to any right to a debt in the applicants' favour, but only to the possibility of securing payment of such a debt (see *Ouzounis and Others v. Greece*, no. 49144/99, § 25, 18 April 2002). It follows that the applicants have failed to establish a “legitimate expectation” of having the property returned to them.

44. Accordingly, there has not been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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. Pecuniary damage

46. As their main claim the applicants sought restitution of the property at issue, composed of two flats, two garages and two thirds of the land. Should restitution not be granted, they claimed a sum equivalent to the current value of the property – namely, according to the expert report they submitted to the Court, 181,497 US dollars (USD).

47. The Government submitted that any award for pecuniary damage would be unjust as the applicants did not have title to property for the purposes of the Convention case-law and, in any event, their claim to the property in the domestic courts could still succeed. In any event, the

maximum sum which could be awarded was USD 74,459, which represented, according to the expert report they submitted to the Court, the market value of the property in question.

48. The Court notes that the sums claimed for pecuniary damage correspond to the value of the property confiscated by the State. Having regard to the fact that the Court has not found a violation of Article 1 of Protocol No.1, the only complaint giving rise to the finding of a violation is the one relating to the lack of access to a tribunal within the meaning of Article 6 § 1 of the Convention. The Court states once again that it cannot speculate as to what the outcome of the proceedings for recovery of possession would have been if the Bucharest Court of Appeal had dealt with the applicants' claim.

49. In these circumstances the Court finds that the applicants failed to establish a causal link between the pecuniary damage they have alleged and the violation of Article 6 § 1 of the Convention found by the Court. Consequently, the claim for pecuniary damage must be dismissed.

B. Non-pecuniary damage

50. Under the head of non-pecuniary damage, the applicants sought USD 50,000 for the loss sustained on account of the Bucharest Court of Appeal's refusal to determine the dispute relating to recovery of possession of the property and which deprived them of their right to enjoy their property.

51. The Government resisted that claim, submitting that no non-pecuniary damage could be taken into account.

52. The Court considers that the events in question entailed serious interferences with the applicants' right of access to a court in respect of which the sum of 5,000 euros (EUR) would represent fair compensation for the non-pecuniary damage sustained.

C. Costs and expenses

53. The applicants sought reimbursement of USD 770, which they broke down as follows in a detailed account they submitted:

(a) USD 500 in fees for work done by their lawyers in the proceedings before the Court, both on the merits and in connection with the question of just satisfaction;

(b) USD 20 in translators' fees;

(c) USD 150 in experts' fees;

54. The Government did not object to the reimbursement of the costs incurred, provided that vouchers were submitted.

55. The Court notes that only part of the application gave rise to a finding of a violation of the Convention. In these circumstances it considers

it appropriate to award the applicants EUR 400, together with any tax that may be payable under this head.

D. Default interest

56. 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. *Declares* the application admissible regarding the applicants' complaints about lack of access to a court and their right to peaceful enjoyment of their possessions;
2. *Declares* the remainder of the application inadmissible.
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention by reason of the refusal of the right of access to a court;
4. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 5,000 (five thousand euros) for non-pecuniary damage;
 - (ii) EUR 400 (four hundred euros) for costs and expenses, plus any sum which may be payable in tax;
 - (b) that these sums are to be converted into the national currency of the respondent State at the rate applicable on the date of settlement.
 - (c) that, from the expiry of the above-mentioned three months until settlement, simple interest shall accrue on the above-mentioned amounts at a rate equal to the marginal lending rate of the European Central Bank applicable during that period, to which should be added three percentage points;
6. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 3 December 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. Costa
President