



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

FOURTH SECTION

CASE OF PRODAN v. MOLDOVA

(Application no. 49806/99)

JUDGMENT

STRASBOURG

18 May 2004

FINAL

10/11/2004

*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 Prodan v. Moldova,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs V. STRÁŽNICKÁ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 7 January 2003 and on 27 April 2004,

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

PROCEDURE

1. The case originated in an application (no. 49806/99) 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, Mrs Tatiana Prodan, on 5 January 1999.

2. The applicant was represented by Mr Vitalie Nagacevski acting on behalf of the "Lawyers for Human Rights", a non-governmental organisation based in Chişinău.

3. The Moldovan Government ("the Government") were represented by their Agent, Mr Vitalie Parlog, of the Ministry of Justice.

4. The applicant alleged, in particular, that the failure to enforce a final judgment in her favour was incompatible with the Convention.

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

6. By a decision of 7 January 2003, the Court declared the application admissible.

7. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

9. By a letter dated 4 September 2003 the Government informed the Court of the adoption and entry into force of a new Civil Code and the

amendment of certain provisions of the Code of Civil Procedure and raised an additional preliminary objection in this connection.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1924 and lives in Chişinău.

11. In June 1946 the Soviet authorities nationalised the applicant's parents' house. In 1949 her parents were deported to Siberia.

12. On 8 December 1992 the Moldovan Parliament enacted Law No. 1225-XII “on the rehabilitation of the victims of the political repression committed by the totalitarian communist occupying regime”. The Law enabled the victims of the Soviet repression to claim their confiscated or nationalised property.

13. In 1997 the applicant lodged an action with the Centru District Court (*Judecătoria Sectorului Centru*) by which she sought the restitution of her parents' house. At the material time the disputed house consisted of six apartments: nos. 3, 6, 7, 8, 12 and 13. Since apartments nos. 3, 6, 7, 8 and 13 had been purchased by their former tenants, the applicant sought to declare null and void the contracts by which they had been purchased from the State. She also sought the eviction of all the occupants of the house.

14. On 14 March 1997 the Centru District Court found in favour of the applicant and ordered the restitution of the house. It declared null and void the contracts by which apartments nos. 3, 6, 7, 8 and 13 had been sold to their tenants. The court further ordered the Municipal Council to evict all the occupants, including those of apartment no. 12, and indicated that the Municipal Council was to provide all the tenants with alternative accommodation.

15. The Municipal Council and the occupants lodged an appeal with the Chişinău Regional Court (*Tribunalul Municipiului Chişinău*) against the judgment of the Centru District Court. On 17 October 1997 the Chişinău Regional Court allowed the appeal and quashed the judgment of the Centru District Court.

16. The applicant lodged an appeal in cassation against the judgment of the Chişinău Regional Court. On 31 March 1998 the Court of Appeal (*Curtea de Apel*) rejected the appeal in cassation and upheld the judgment of the Chişinău Regional Court.

17. Following a request by the applicant, the Procurator General's Office applied for annulment of the judgments of the Chişinău Regional Court and

the Court of Appeal with the Supreme Court of Justice (*Curtea Supremă de Justiție*).

18. On 19 August 1998 the Supreme Court of Justice quashed the judgments of the Chișinău Regional Court and of the Court of Appeal, and upheld the judgment of the Centru District Court of 14 March 1997 on the ground that both the Chișinău Regional Court and the Court of Appeal had failed to observe the provisions of Law no. 1225-XII of 8 December 1992 (see paragraph 30 below).

19. On an unspecified date in 1998, after having obtained the enforcement warrant, the applicant asked the Municipal Council to execute the judgment of 14 March 1997. In a letter of 14 January 1999, the Municipal Council informed the applicant that due to a lack of funds for the construction of apartments for the evicted tenants, it could not execute the judgment.

20. In 1999 the applicant lodged a request with the Chișinău Land Register (*Organul Cadastral Teritorial Chișinău*) to issue her a certificate of ownership for the disputed house. In a letter of 15 September 1999, the Land Register informed the applicant that it would issue the ownership title only on the basis of an “act of delivery and receipt of the house” (*act de predare-primire*) issued by the Municipal Council.

21. In October 1999 the applicant lodged an action with the Centru District Court against the Municipal Council seeking damages for the delay in enforcing the judgment of 14 March 1997. On 17 November 1999 the Centru District Court rejected the action as unfounded. The applicant did not lodge an appeal against that judgment and it became final.

22. In 2000 the applicant lodged an action with the Centru District Court seeking a partial change in the manner in which the enforcement of the judgment of 14 March 1997 was to be carried out. In particular, she claimed money from the Municipal Council in lieu of restitution of apartments nos. 3, 6, 7, 12 and 13. On 7 February 2000 the Centru District Court ordered that a valuation of the apartments be carried out by the experts of the Chișinău Land Register. Following a request from the applicant, on 24 February 2000 the Centru District Court ordered that the valuation be carried out by independent real estate experts.

23. On 3 October 2000 the Centru District Court decided partially to change the manner of enforcement of the judgment of 14 March 1997 and ordered the Municipal Council to pay the applicant 488,274 Moldovan Lei (MDL), the market value of apartments nos. 3, 6, 7, 12 and 13.

24. The Municipal Council lodged an appeal with the Chișinău Regional Court against the above judgment. On 10 January 2001 the Chișinău Regional Court rejected the appeal and upheld the judgment of the Centru District Court of 3 October 2000.

25. In 2001 the applicant asked the Housing Division of the Municipal Council to execute the judgment of 14 March 1997 in so far as it concerned

the eviction of the occupants of apartment no. 8. In a letter of 26 March 2001, the Municipal Council informed the applicant that due to a lack of funds for the construction of apartment buildings and available alternative accommodation for the evicted tenants, it could not enforce the judgment of 14 March 1997.

26. On 10 April 2001 the Centru District Court dismissed the Municipal Council's request seeking to stay the enforcement of the judgment of the District Court of 3 October 2000. On 19 June 2001 the Chişinău Regional Court, in its final judgment, rejected the Deputy Mayor's appeal against the above judgment.

27. Following a request by the Municipal Council, the Procurator General's Office applied to the Supreme Court of Justice for annulment of the judgments of the Centru District Court of 3 October 2000 and the Chişinău Regional Court of 10 January 2001.

28. On 12 September 2001 the Supreme Court of Justice dismissed the Procurator General's request for annulment.

29. On an unspecified date the applicant lodged a fresh request with the Municipal Council for the enforcement of the judgments of 14 March 1997 and 3 October 2000. In a letter of 23 October 2001, the Municipal Council informed the applicant that due to a lack of funds and alternative accommodation for the occupants of apartment no. 8, it could not enforce the judgment of 14 March 1997. As regards the enforcement of the judgment of 3 October 2000, the Municipal Council replied that the money would be paid after other court orders had been paid.

30. On 20 November 2002 the Municipal Council paid the applicant MDL 488,274 (the equivalent of EUR 29,238 at the time) in accordance with the judgment of 3 October 2000. The judgment of 14 March 1997 in respect of the eviction of the tenants from apartment no. 8 remained unenforced.

II. RELEVANT DOMESTIC LAW

31. The relevant provisions of Law no. 1225-XII of 8 December 1992, as amended on 23 November 1994, read as follows:

“Article 12. Restitution of property to persons who were subjects of repression

(1) Any citizen of the Republic of Moldova, who has been the subject of political repression and subsequently rehabilitated, shall have returned to him, at his request or at the request of his heirs, any property which was confiscated, nationalised or taken away from him in some other way. (...)

(5) Any act of sale-purchase or other form of transfer of houses, buildings or other constructions and goods confiscated, nationalised or taken away from a person who was the victim of repression, concluded after his rehabilitation, can be declared null through the courts following a request lodged by the victim of repression or his heirs.”

In 1998 a new paragraph was added to the above Article by virtue of Law No. 84-XIV of 8 July 1998, which reads as follows:

“(6) Any person to be evicted from a restituted house shall be provided upon his eviction with accommodation on a priority basis by the local public administration authorities, in accordance with the legislation.”

Article 426 of the Code of Civil Procedure, in force between 26 December 1964 and 12 June 2003, reads as follows:

“The creditor or the debtor against whom enforcement proceedings are pending may lodge an appeal against the acts carried out or the refusal to carry out such acts by a bailiff within the enforcement proceedings. (...)”

Article 478 of the Civil Code, in force between 26 December 1964 and 12 June 2003, reads as follows:

“Damage caused to a natural or legal person by the illegal actions of the criminal investigation organs, prosecution or the courts, shall be entirely repaired by the State, in the manner prescribed by law, regardless of the fault of any public servant from the criminal investigation organs, prosecution or the courts.”

On 12 June 2003 a new Civil Code entered into force. Article 1404 of the Civil Code reads as follows:

“(1) Damage caused by an unlawful administrative decision or as a result of a failure to act upon a request within a statutory time limit by a public authority or by a public official shall be compensated by the public authority (...).”

(2) Individuals shall be entitled to claim general damages caused as a result of the acts foreseen in paragraph 1 of the present Article. (...)”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion

32. In their memorials of 7 March 2003 and 4 September 2003 the Government raised for the first time the objection that domestic remedies had not been exhausted, on the ground that the applicant had not availed herself of the remedies provided by Articles 426 of the old Civil Procedure Code, Article 478 of the old Civil Code or by Article 1404 of the new Civil Code.

1. Article 426 of the old Civil Procedure Code and Article 478 of the old Civil Code

33. The Court recalls that pursuant to Rule 55 of the Rules of Court any plea of inadmissibility must be made by the respondent Party in its observations on the admissibility of the application, in so far as its character and the circumstances permit.

34. As far as Article 426 of the old Civil Procedure Code and Article 478 of the old Civil Code are concerned, the Court notes that these Codes were in force between 26 December 1964 and 12 June 2003.

35. The case was communicated to the Government on 27 November 2001 and the Government were requested to submit their observations as to the admissibility of the case before 8 January 2002. The Government did not, however, submit any observations on admissibility, and the case was declared admissible by the Court on 7 January 2003. The Government then submitted observations on admissibility and merits on 7 March 2003 and 4 September 2003.

36. As there are no particular reasons which would have absolved the Government from raising their objection as to the applicant's failure to make use of Article 426 of the old Civil Procedure Code and Article 478 of the old Civil Code in the proceedings on admissibility, they are stopped from doing so now (*Maurer v. Austria*, no. 50110/99, § 16, 17 January 2002).

37. Accordingly, the Government's preliminary objection relating to Article 426 of the old Civil Procedure Code and Article 478 of the old Civil Code must be dismissed.

2. Article 1404 of the new Civil Code

38. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaint and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX).

39. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (*Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX).

40. The Court does not consider that the present case is an exception to the above rule. It notes that Article 1404 of the new Civil Code provides a general declaratory principle of tort liability of State organs in cases where

damage has been “caused as a result of an unlawful administrative decision or as a result of a failure to solve a request within a statutory time limit”. In the present case there was neither an administrative decision involved nor a statutory time limit breached. Moreover, this Article does not provide for any specific legal or procedural remedy for cases of non-enforcement of final judgments.

41. The law invoked by the Government can, therefore, be distinguished from the Pinto Act in issue in the above mentioned *Brusco v. Italy* case, where the Italian law had been specially designed and brought into force to deal with the recurring problem of undue length of proceedings contrary to the Convention.

42. In the present case, the Court observes that the Government have simply invoked an Article from the new Civil Code which establishes the principle of liability of State organs. However, the Government have not stated on the basis of which legal provision the applicant could have obtained the enforcement of the judgments and reparation for the damage caused by years of non-enforcement; nor have they provided any examples of cases where the law has been successfully invoked to that effect. The Court does not consider that the Government have sufficiently established the effectiveness of the remedy in question, or that the applicant, at this late stage, should be required to go back to the national courts and attempt to make use of it.

43. Consequently, the ground of the objection relating to Article 1404 of the new Civil Code cannot be upheld.

B. Victim status

44. The Government submitted that since the payment of the award on 20 November 2002 the applicant could claim to be a victim of a violation of her Convention rights only in respect of the value of apartment no. 8 from which the occupants had still not been evicted. The Government reasoned that the applicant's ownership of apartment no. 8 had been established in the judgment of 14 March 1997 and that it had not been contested since.

45. Before turning to the substance of the complaints, the Court must ascertain whether, and to what degree, the applicant continues to be a victim of the alleged breaches of the Convention.

46. The Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. In the light of this continuous obligation to redress violations, the question whether or not the applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *E. v. Austria*, application no. 10668/83, Commission decision of 13 May 1987, Decisions and Reports (DR) 52, p. 177).

47. The Court further notes that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, e.g., *Amuur v. France* judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

48. Turning to the facts of the present case, according to the information submitted by the Government and confirmed by the applicant, the authorities have paid the applicant the money awarded by the judgment of 3 October 2000. Nevertheless, the payment, which occurred only after the present application had been communicated to the Government, did not involve any acknowledgement of the violations alleged. Furthermore, the Court observes that, in respect of the eviction of the occupants from apartments nos. 3, 6, 7, 12 and 13, the judgment of 14 March 1997 remained un-enforced until 10 January 2001 and, in respect of apartment no. 8, it had still not been enforced by the date of adoption of this judgment.

49. In these circumstances, the Court considers that the applicant may claim to be a victim of a violation of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1 to the Convention.

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

50. The applicant complains that the non-enforcement of the judgments in her favour violated her right under Article 6 § 1 of the Convention.

51. Article 6 § 1 of the Convention, in so far as relevant, provides:

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

52. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part

of the “trial” for the purposes of Article 6 (see the *Hornsby v. Greece* judgment of 19 March 1997, *Reports* 1997-II, p. 510, § 40).

53. It is not open to a State authority to cite lack of funds and available alternative accommodation as an excuse for not honouring a judgment. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6 § 1 of the Convention (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V). In the instant case, the applicant should not have been prevented from benefiting from the success of the litigation, which concerned in the beginning the eviction of the occupants from all the apartments, and later the award of the market value of apartments nos. 3, 6, 7, 12 and 13 and the eviction of the occupants from apartment no. 8.

54. The Court notes that the Centru District Court's judgment of 14 March 1997 remained un-enforced in respect of apartments nos. 3, 6, 7, 12 and 13 for twenty-nine months and in respect of apartment no. 8 for sixty-three months (until the present date). In respect of the judgment of 3 October 2000, the Court notes that it remained un-enforced for twenty-two months. The Court also notes that it was enforced only after the present application had been communicated to the Government.

55. By failing for years to take the necessary measures to comply with the final judicial decisions in the instant case, the Moldovan authorities deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

56. 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

57. The applicant further complains that because of the non-enforcement of the judgments in her favour she was unable to enjoy her possessions, and thus her right to protection of property under Article 1 of Protocol No. 1 to the Convention was violated.

58. Article 1 of Protocol No. 1 to the Convention reads as follows:

“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.”

59. The Court reiterates that a “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention if it is sufficiently established to be enforceable (see the *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, § 59).

60. The Centru District Court's judgments of 14 March 1997 and 3 October 2000 became final and enforceable on 19 August 1998 and on 10 January 2001 respectively. But the applicant could not obtain the execution of these judgments as soon as they became enforceable. It follows that the impossibility for the applicant to obtain the execution of the judgment of 14 March 1997 until 10 January 2001 in respect of apartments nos. 3, 6, 7, 12 and 13, and until the present date in respect of apartment no. 8, constituted an interference with her right to peaceful enjoyment of her possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention. The impossibility for the applicant to obtain the execution of the judgment of 3 October 2000 in respect of the award of the market value of apartments nos. 3, 6, 7, 12 and 13 at least until 20 November 2002, must also be regarded as an interference with her right to peaceful enjoyment of her possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention.

61. By failing to comply with the judgments of the Centru District Court the national authorities prevented the applicant from receiving the money she could reasonably have expected to receive and from having the occupants evicted. The Government have not advanced any justification for this interference and the Court considers that lack of funds and of available alternative accommodation cannot justify such an omission (see, *mutatis mutandis*, *Ambruosi v. Italy*, no. 31227/96, §§ 28-34, 19 October 2000).

62. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

1. As regards losses incurred up to the present in respect of all apartments

64. The applicant claimed EUR 49,209.91 for pecuniary damage suffered as a result of the failure of the authorities to enforce the judgments of 14 March 1997 concerning all six apartments and 3 October 2000. She claimed that this amount would cover the loss of profit incurred as a result of the non-enforcement of the final judgments favourable to her.

65. In respect of the judgment of 14 March 1997 the applicant contended that she would have rented out the house had the judgment been enforced in due time, namely immediately after becoming enforceable on 19 August 1998. The applicant presented the results of a valuation of the house made by an independent expert according to which the rent per square metre would have been USD 1.2 per month. She multiplied the number of square metres by that price and then multiplied the result by the number of months she was unable to use the house. The applicant then stated that the rent would have been collected in advance on a yearly basis, according to local practice, and the money deposited with a commercial bank with a high interest rate.

66. As to the judgment of 3 October 2000, the applicant claimed that the money obtained thereby would also have generated interest if put in a commercial bank with a high interest rate.

67. The Government stated that the applicant had failed to prove her intention to rent out the house in the event that the judgment of 14 March 1997 had been enforced in due time. They further argued that even if she had had that intention, it was not excluded that she would not have found any tenants, at least for some period of time.

68. Concerning the applicant's contention as to the interest which would have been generated by the money if put in a commercial bank, the Government stated that it was very speculative, since between July 1998 and September 2002 eight commercial banks had gone bankrupt in Moldova. Moreover, the Government contested the practice of collecting rent in advance for a whole year.

69. The Government also contested the accuracy of the exchange rate and the average interest rate claimed by the applicant.

70. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 72). In the present case the reparation should aim at putting the applicant

in the position in which she would have found herself, had the violation not occurred.

71. The Court considers it clear that the applicant must have suffered pecuniary damage as a result of her lack of control over her possessions and the denial to her of the possibility to use and enjoy it (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, ECHR 1999-V). These losses were incurred as a result of the non-execution of the two final judgments. The judgment of 14 March 1997 was not executed for a period of twenty-nine months in respect of five apartments (nos. 3, 6, 7, 12, 13) and for a period of sixty-seven months (to date) in respect of one apartment (no. 8). As regards the judgment of 3 October 2000, it was not executed for a period of twenty-two months.

72. It is noted that the applicant already had accommodation and therefore, contrary to the Government's submissions, the Court considers it reasonable to consider that she would have attempted to rent out the apartments and invest the sum of money awarded on 3 October 2000.

73. The Court considers reasonable the general approach to assessing the loss suffered as a result of non-enforcement of the judgment of 14 March 1997 with reference to the monthly rent payable on the assumption that the apartments had been let out, as proposed by the applicant. The monthly rent of USD 1.2 presented by her was not contested by the Government. It shall therefore be taken as a reference point by the Court.

At the same time, the Court is not ready to accept the approach taken by the applicant, (i.e. that she would have invested the money in a commercial bank with a high interest rate) in assessing the loss suffered as a result of non-enforcement of the judgment of 3 October 2000, which it considers rather speculative. Bearing in mind the fragile position of the commercial banks in Moldova, the Court considers it more realistic to use as a reference point the average interest as indicated by the National Bank of Moldova for the period in question.

74. There are other factors which must realistically be taken into account by the Court in any assessment.

Firstly, in the absence of market evidence to the contrary, the applicant would inevitably have experienced certain delays in finding suitable tenants and would have incurred certain maintenance expenses in connection with the apartments.

Secondly, it must also be borne in mind that the value of the five apartments was notionally less than it would have been if they had been free of tenants. Accordingly, allowances must be made for the likelihood that the Centru District Court would have taken into account the fact that the property had been rented out in assessing the value of the apartments in its judgment of 3 October.

Finally, she would also have been subjected to taxation on any revenue.

75. Having regard to the above circumstances, and deciding on an equitable basis, the Court awards the applicant the total sum of EUR 11,000 for pecuniary damage suffered to date as a result of non-enforcement of the judgments of 14 March 1997 and 3 October 2000.

2. As regards apartment no. 8

76. The Court observes that, although it has taken into account in its above assessment of compensation the losses incurred concerning apartment no. 8, the judgment of 14 March 1997 in so far as it concerns this apartment continues not to be enforced. In such a situation, the Court considers that the apartment should either be returned to the applicant or that she should receive the current market value for it. Since the Court does not have any information at its disposal regarding the actual market value of this property, it considers that the application of Article 41 in this respect is not ready for decision and must be adjourned.

B. Non-pecuniary damage

77. The applicant claimed EUR 49,210 for the non-pecuniary damage suffered as a result of the refusal of the authorities to enforce the judgments of 14 March 1997 and 3 October 2000.

78. She argued that the failure of the authorities to execute the judgments caused her suffering because the disputed house represented not only a material value but also an emotional value to her since it used to be the house of her parents and of her childhood.

79. Moreover, the applicant argued that she was humiliated and treated disdainfully during the years she had to beg the public servants and wait in front of their offices in order to obtain the enforcement of the judgments.

80. She also claimed to have suffered from the poverty she was exposed to by having to live on a state pension of only MDL 210 per month (EUR 13.62 as of March 2003) and not being able to lead a decent life based on the proceeds of renting her house.

81. The Government disagreed with the amount claimed by the applicant, arguing that it is excessive in light of the case-law of the Court. They stated that in some cases the mere fact of finding a violation is considered to be just satisfaction. The Government further cited the case of (*Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, ECHR 2001-I), where the applicant was awarded USD 15,000 for non-pecuniary damage, stating that in the present case the amount should be smaller since the right of property over the house is not disputed by the Government.

82. The Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of the non-enforcement of the judgments. It awards the applicant the total sum of EUR 3,000 for non-pecuniary damage.

C. Costs and expenses

83. The Court notes that it has granted the applicant legal aid under the Court's legal-aid scheme for the submission of her observations and additional comments and secretarial expenses. The applicant submitted no claim for additional legal expenses. Accordingly, the Court is not required to make an award under this head.

D. Default interest

84. 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

1. *Dismisses* unanimously the Government's preliminary objections as to non-exhaustion of domestic remedies;
2. *Holds* unanimously that the applicant may claim to be a “victim” for the purposes of Article 34 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. *Holds* by six votes to one, in respect of the losses incurred to date,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 11,000 (eleven thousand euro) in respect of pecuniary damage and EUR 3,000 (three thousand euro) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

6. *Holds* by six votes to one, concerning the continuing situation as regards the failure to restore apartment no. 8 to the applicant, that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
 - (a) reserves it in that respect;
 - (b) invites the Government and the applicant to submit, within the forthcoming three months, their observations on the market value of apartment no. 8 and, to notify the Court of any agreement they may reach, bearing in mind the Court's observations in paragraph 75 above;
 - (c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English, and notified in writing on 18 May 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring and partly dissenting opinion of Mr Pavlovski is annexed to this judgment.

N.B.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE PAVLOVSKI

I agree that in the present case there has been a violation of both Article 6 § 1 and Article 1 of Protocol No.1.

At the same time I regret very much the fact that I could not say the same as far as the conclusions drawn by the majority regarding the application of Article 41 are concerned. I am not able to share the position taken by the majority for the following reasons.

A. GENERAL COMMENTS

In my opinion, in the present case there is no single piece of evidence which would prove the fact that the applicant actually suffered any pecuniary damage in the form claimed by her and her lawyers.

It is a generally recognised principle in all democratic jurisdictions, if not common ground, that the fact of the pecuniary damage claimed forms part of the circumstances which need to be proved “beyond a reasonable doubt” in each and every case where the question of compensation for pecuniary damage is posed. In my humble view there is a clear distinction, from the angle of formal logic, between the notion of a proven “fact” and that of a “supposition”.

According to “The New Oxford Dictionary of English” and I quote “fact is a thing that is indisputably the case”. The same dictionary defines a supposition in the following way: “supposition – an uncertain belief: they were working on the supposition that his death was murder”. And one more definition from this dictionary: “suppositious – based on assumption rather than fact: most of the evidence is purely suppositious”.

In order to be compensated, pecuniary damage must have been established by the Court at the level of a proven “fact” and not at the level of a “supposition”. I regret very much that the Chamber failed to make this distinction and took a “supposition” for a clearly established and proven legal “fact”.

Moreover, speaking about damage in this particular case the Chamber failed to indicate what kind of damages it had granted. Both civil law and the law of tort recognise different types of damages: general damages, special damages, compensatory damages, punitive damages, nominal damages etc. All of them are of a pecuniary nature. What kind of damages are we speaking about in this particular case?

B. FACTUAL CIRCUMSTANCES OF THE CASE AND WAIVER BY THE APPLICANT OF SOME OF HER RIGHTS

Let me now pass to the factual circumstances of the case.

On 19 August 1998 the Court of Appeal found in favour of the applicant and ordered the restitution of six apartments – nos. 3, 6, 7, 8, 12 and 13 – which had belonged to the applicant's relatives more than 40 years ago.

In 2000 the applicant, on her own initiative, lodged an action with the Centru District Court seeking a partial change in the manner in which enforcement of the judgment of 19 August 1998 was to be carried out. In particular, she claimed money from the Municipal Council in lieu of the restitution of five apartments (nos. 3, 6, 7, 12 and 13).

On 10 January 2001 the Court of Appeal, having examined the applicant's request, granted it and ordered the Municipal Council to pay the applicant MDL 488,274, the market value of five apartments (nos. 3, 6, 7, 12 and 13).

The applicant's demand to be paid money in lieu of five apartments, from the legal point of view, means, that she deliberately, on her own initiative, waived her right to claim restitution of five of the apartments (nos. 3, 6, 7, 12 and 13), choosing to receive instead their monetary equivalent of MDL 488,274. On 20 November 2002 she received her money.

C. THE APPLICANT'S CLAIMS

1. The applicant's position

Before this Court the applicant claimed EUR 49,209.91 for pecuniary damage as well as EUR 49,210 for the non-pecuniary damage suffered as a result of delays in enforcement of the judgments of 14 March 1997 and 3 October 2000 favourable to her.

In respect of the judgment of 14 March 1997 the applicant contended that she would have rented out the house, had the judgment been enforced in due time, namely immediately after becoming enforceable on 19 August 1998. The applicant presented the results of a valuation of the house made by an expert, according to which the market rent per square metre would have been USD 1.2 per month. She multiplied the number of square metres by that price and then multiplied the result by the number of months she was unable to use the house. The applicant then stated that the rent would have been collected in advance on a yearly basis, according to a local practice, and the money deposited with a commercial bank with a high interest rate.

As to the judgment of 3 October 2000, the applicant claimed that the money obtained thereby would also have generated interest if deposited with a commercial bank with a high interest rate.

2. Analysis of the applicant's claims and position

According to the Oxford Dictionary of Current English a waiver means “waiving of a legal right etc”, but the verb to waive means “refrain from insisting on or using (a right, claim, opportunity, etc)”. These formulas perfectly suit the applicant's situation.

After the above-described events led, on the applicant's initiative, to the waiver of her rights to recover possession of five apartments and to changes in the way a judicial decision was to be enforced it is wrong to accept the arguments of the applicant and her lawyer that had she recovered possession of all the apartments (which she previously had given up), found tenants, and rented them all out, then she might possibly have received some profit. Every specialist in law must recognise that this affirmation is not a clearly established and proven legal “fact”. This is just a “supposition”, which, moreover, can amount to a “bad will claim” which cannot and must not be accepted either as “pecuniary damage” or as the legal basis for any compensation whatsoever.

Initially, the applicant did not have any apartment whatsoever, so there was nothing to rent out, and later on she gave up even her right to receive five of them. What the applicant had, was just a judicial decision, entitling her at some point in the future, to receive them after eviction of the occupants on the basis of an “act of delivery and receipt of the house” issued by the Municipal Council. As a matter of fact she cannot be considered the owner of apartments nos. 3, 6, 7, 12 and 13 because no steps had been taken towards transforming her “entitlement” into an “ownership title”. The applicant did not enter into ownership rights as far as these apartments are concerned and later decided to give these rights up in favour of their monetary equivalent.

Here it is necessary to mention the following. Only those who are legal owners, only those who are able to dispose of the property, in practical terms, are able to conclude contracts and to rent out their property.

In this particular case one problem of a conceptual nature appears. Was the applicant the owner of the 5 apartments? Is she the owner of the sixth apartment now? Discussing property rights issues, we primarily speak about domestic legislation regulating ownership relations in the member States. As far as the Republic of Moldova is concerned, in order to have property rights publicly recognised, they need to be registered in the way provided for by the legislation. In this sense and in so far as real estate is concerned the Law on the Register of Real Estate is relevant (Law no. 1543-XIII of 25 February 1998).

In so far as it is relevant to the present case, Law no. 1543-XIII provides:

“Article 1:

The present law establishes the arrangements for setting up and keeping the register of real estate, by which public recognition of a property right is ensured...”

“Article 3:

The register of real estate, hereinafter “register” is:

(c) a system for the protection of persons having patrimonial rights over real estate.”

“Article 4 § 2:

The objects of the registration are real estate, property rights over it, and other patrimonial rights.”

“Article 4 § 3:

Real estate includes:

...

(c) apartments and other isolated premises.”

“Article 4 § 5:

The real estate listed in Article 4 §§ 2, 3 and 4 is subject to mandatory registration.”

“Article 28 § 1

The registration of a right over a piece of real estate is effected on the basis of the following documents:

(d) decisions delivered by courts of law...”

“Article 33 § 3:

A refusal to register is to be announced in writing to the applicant and it can be contested before a court of law...”

All these legal provisions unambiguously show that, the applicant having waived her rights to five apartments in exchange for their monetary equivalent, these apartments were not registered as her property and cannot be so registered now or, to use the wording of the above law, she did not obtain “public recognition of a property right” over these apartments. That being so, from the legal point of view she cannot be regarded either as their former or their present owner, so that she was not entitled to let them out or receive rent for them, even theoretically speaking.

In so far as the sixth apartment is concerned, it has not been registered either, so the applicant has not entered into her ownership rights. The

judicial decision, which the applicant has, can be considered only “an entitlement” giving her rights to have the property claimed registered, so that she can become its legally recognised owner. This avenue still remains open to her. I am not trying to raise here the question of non-exhaustion since it was not raised by the Government. I am pointing out this aspect merely in order to make manifest the applicant's lack of “owner status” and the fact that she had only “an entitlement” in relation both to the first five apartments and to the sixth one, not publicly recognised ownership.

It is quite plain that “an entitlement” cannot be rented out, and consequently it cannot generate any profit. In such circumstances, I find the calculation of loss of “income” proposed by the applicant and her lawyer to be totally groundless and misleading (i.e. the multiplication of USD 1.2 by the surface area of the apartments, which she had given up, and by the number of months that had elapsed after the adoption of the judicial decision in her favour).

As to the alleged pecuniary damage in the form of the lost opportunity of depositing money with a bank and receiving dividends, I would like to mention the following circumstances. The applicant received compensation for five apartments in the sum of MDL 488,274 on 20 November 2002. So, after that, if we apply here again the laws of formal logic, had the applicant had the intention to deposit the money with a bank, she should have deposited MDL 488,274. That would have given her an opportunity to get interest for a period of one year and five months and would have proved also the “fact” that she did indeed previously intend to do this. Unfortunately, the applicant failed to produce any evidence to this effect. In all these circumstances it is impossible, from the point of view of logic, to accept as proven beyond a reasonable doubt the “fact” of her intention to deposit money in the past when she has not done so despite all the necessary conditions being satisfied in the present.

I do understand that applying the laws of formal logic is not the best way of approaching judicial cases, but in this particular situation of the lack of any strong evidence to the contrary, their application could have helped the Chamber to take a correct decision.

D. CONDITIONS FOR COMPENSATION FOR PECUNIARY DAMAGE

On numerous occasions, and absolutely rightly, this Court has stated that applicants should prove the pecuniary damage for which they seek compensation and that they cannot be compensated for damage not actually suffered (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 162-165, ECHR 2000-XI; *Treial v. Estonia*, no. 48129/99, §§ 67-70, 2 December 2003; *Lisiak v. Poland*, no. 37443/97, § 52, 5 November 2002; *Piechota v. Poland*, no. 40330/98, § 49, 5 November 2002; *Koral v. Poland*,

no. 52518/99, § 62, 5 November 2002; *Nowicka v. Poland*, no. 30218/96, § 82, 3 December 2002 and many, many others).

When one discusses the process of proving any legally relevant fact, including pecuniary claims, theoretically speaking the following standards of proof should be considered as applicable: “... clear and convincing evidence ...”, “... beyond a reasonable doubt ...” or “... preponderance of the evidence ...”. If the evidence is not sufficiently conclusive, a general rule says that the ruling should be directed against the party who had the burden of proving the fact and failed to do so. From the above-cited jurisprudence it is precisely clear that “applicants should prove the pecuniary damage for which they seek compensation and that they [can] not be compensated for damage not actually suffered”. It is needless to say that, although the burden of proof was hers, none of the above-mentioned standards have been met by the applicant, despite the fact that all the necessary conditions for her to do so were satisfied, as she had been granted legal aid paid by the Court.

Again, when one discusses the problem of pecuniary damage, first of all one must bear in mind that pecuniary damage means deterioration of a claimant's financial, material, pecuniary situation. To put it more plainly, pecuniary damage means the result of a certain illegal act was a deterioration of the situation which existed before this illegal act. In order to be entitled to compensation, a claimant must prove that his or her financial situation became worse than it used to be before a certain illegal act. The deterioration of the applicant's situation is the first and the main condition for raising the question of “pecuniary damage”.

The applicant, as I have already mentioned, did not submit any evidence, which would prove the fact of the deterioration of her financial situation as a result of the violation found. So, she failed to prove the actual rather than the presumed character of her financial losses.

So, if the Chamber says that in this particular case the applicant suffered pecuniary damage as a result of the non-enforcement of the judgments, it needs to have satisfied itself that the financial situation of the applicant immediately after delivery of the judgments was better than it is now, and that this deterioration can be explained by non-execution of the above-mentioned judicial acts. But to state that her financial situation now is worse than it used to be after the delivery of the judgments is simply not true, especially taking into consideration the fact that she has received from the Moldovan authorities compensation in the sum of MDL 488,274.

It is absolutely clear that in the present case the applicant did not suffer any pecuniary damage in the form claimed by her and her lawyers and this is the answer to the question why she fails to submit proof.

I consider that the Chamber, in the absence of proof from the applicant, should not have involved itself in considerable guesswork and speculated on what profits (if any) she would have received had the provisions of the Convention not been violated. It is not the Chamber's task to take the place

of the applicant's lawyers and try to make up for what by definition cannot be made good – lack of proof – by various very questionable formulas.

I regret very much the fact that the Chamber preferred to take a diametrically opposed approach. Instead of accepting proof the Chamber started making use of different “suppositions”, a fact which is confirmed by the wording used in the judgment, like “the applicant contended that she would have rented out the house”, “the rent would have been collected in advance”, “would have deposited the money with a commercial bank”, “the money obtained thereby would also have generated interest” etc. After all these “suppositions” the Chamber draws the conclusion:

“The Court considers reasonable the general approach to assessing the loss suffered as a result of non- enforcement of the judgment.”

I am sorry to say that I am unable to accept this line of logic, which is far from the general standards of the theory of proof.

There are some other passages which provoke my doubts.

For instance, in § 70 of its judgment the Chamber states and I quote:

“The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 72). In the present case the reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred.”

I agree entirely with the Court's findings in the *Former King of Greece* case and namely that the respondent State has:

“a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach”.

At the same time I find it incorrect and contrary to the laws of logic to transform the above rule in the present judgment into:

“The reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred.”

Literally speaking, the rule contained in the *Former King of Greece* case is composed in its turn of the following three linked elements:

- i. a legal obligation to put an end to the breach;
- ii. reparation for its consequences;
- iii. this reparation to be made in such a way as to restore as far as possible the situation existing before the breach.

And these three very clear and logical elements are now transformed into an ambiguous formula – “the reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred”.

It is absolutely unclear to me in what way the national authorities can take steps to “put the applicant” somewhere and what is that “position, in which she [i.e. the applicant] would have found herself, had the violation not occurred”? Unfortunately, the judgment does not provide us with any answer, leaving this polyvalent situation vague and susceptible to different misinterpretations.

Now let me pass to the next subject, wrongly named “loss of profits”.

If the applicant's claims are analysed under the title of “loss of profits”, in my opinion, the following should be taken into consideration.

In principle, in my view, in other situations, it is possible to ask for compensation for the “loss of profits”. However, this compensation should take place subject to the following main, but not exhaustive, conditions:

- i. the applicant should prove that he or she used to receive this profit and should prove the amount of this profit;
- ii. the applicant should prove that he or she has lost this profit; and
- iii the applicant should prove that the loss of profit which he or she used to have is attributable to the State.

It is quite obvious that one cannot lose what one has never had. To put it in other way, one cannot claim compensation for “loss of profits” in a situation where one has never received the profits for the loss of which one claims compensation. Applying these criteria in the present case, we must satisfy ourselves that the applicant had previously received the income the loss of which she claimed, and that the State is to be held liable for this loss.

It goes without saying that in the present case the applicant had not submitted any evidence which would prove that the above criteria were met. Failure to back her claims of the existence of any type of pecuniary damage in practical terms excludes any compensation.

Accordingly, the applicant's claim for compensation for unsubstantiated “loss of profits” should not have been accepted. Unfortunately, the Chamber preferred not to enter into detailed analyses of the legal situation and decided to grant money claimed in compensation for damage which had not been suffered by the applicant.

It seems to me that in the present case the Chamber decided to grant the applicant so-called “expectation” damages. I am led to this presumption by the general rule of the “expectation” damages theory, which runs approximately as follows: “The court tries to put the plaintiff in the position he would have been in had the contract been performed by the defendant”, in contrast to reliance damages, the general rule of which runs: “The court tries to put the plaintiff in the position he would have been in had the contract never been made”.

The above general rule of the “expectation” damages theory practically coincides with the formula used by the Chamber in the *Prodan* judgment, that is “the reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred”.

I am fully aware of the existence of the “expectation” damages theory, where the standard of proof is very low – at the level of “reasonable certainty”. But I think that this theory is absolutely unacceptable in the present case. The “expectation” damages theory forms part of the breach-of-contract law specific to common-law legal systems and is applicable under certain conditions, the first of which is the existence of a contract concluded in a written form. The “expectation” damages resulting from the breach of an orally concluded contract can be granted only where the defendant has agreed to them. Another condition is that “expectation” damages must be foreseeable, so as to enable parties to a contract to identify the legal and financial consequences of the breach of their contractual obligations, to enable parties to decide what is more convenient to them – to continue to incur extra expense resulting from the fulfilment of their contractual obligations or to breach them and pay the other party the financial compensation provided for by the contract. So the “expectation” damages should be of such a nature as to provide the parties with the clear possibility of calculating financial losses in the situation of a breach of contract.

In his book “Law of the United States” (Verlag C.H. Beck, Munich, 2002, page 134) Professor Peter Hay writes: “If a party does not perform its contractual obligation, the other may claim damages for breach of contract. This claim will lie for non-performance, defective performance, or in cases of anticipatory repudiation. ... The goal is **to put the injured party in the position he or she would have been in if the contract had been performed according to its terms** [emphasis added]. ‘Damages’ encompass the actual damage suffered as a consequence of the breach of contract (general damages) as well as further damages resulting from that breach (special or consequential damages) **to the extent that these were foreseeable at the time the contract was concluded**”.

It goes without saying that the applicant has never informed the authorities about her plans to rent out apartments or to deposit money with a bank, or about the “damages” she has been expecting, so nobody can confirm the foreseeable character of her financial claims.

Even this very superficial presentation of the “expectation” damages theory, in the light of the present case, clearly shows that it is inapplicable to our situation.

E. CONCLUSIONS

My view of the possible solutions to the present legal situation may be formulated in the following way.

It is generally recognised that the execution of final judicial decisions is part of a “trial”.

In the *Hornsby v. Greece* case the Court rightly pointed out that the execution of a judgment given by any court must be regarded as an integral

part of the “trial” for the purposes of Article 6 (judgment of 19 March 1997, *Reports* 1997-II, p. 510, § 40).

Accordingly, it is logical to say that delays in the process of execution of judgments must be regarded, in their turn, as delays in the process of “trial”. And if this is the case, and if we accept the laws of logic, in the present situation, we are bound to follow previous judgments relating to this issue.

In this respect, I feel it necessary to point out that this Court has in many cases treated damage caused by delays in procedure as “non-pecuniary damage” (expressed in the form of distress and frustration) resulting from the protracted length of proceedings. I fail to see any particular reason why the Chamber should depart from this general approach in this particular case.

On the other hand, one cannot exclude the possibility that the applicant suffered, as a result of the potential effects of the violation found, a loss of opportunities of which account must be taken, even if the prospects of realising them were questionable (see, the *Sporrong and Lönnroth v. Sweden* (Article 50) judgment of 18 December 1984, Series A no. 88, p. 13, § 25).

Since the foregoing elements of damage do not lend themselves to a process of precise calculation, the Court normally takes them together on an equitable basis, as is required by Article 50 (now Article 41) (see the *Colozza v. Italy* judgment, Series A no. 89, p. 17, § 38, and the above-mentioned *Sporrong and Lönnroth* judgment, p. 14, § 32).

I would agree that in this particular case, owing to delays in the enforcement of judicial decisions, the applicant missed some opportunities and must be fairly compensated for their loss. But in no wise, from the legal point of view, can compensation for damage, be it damage of a pecuniary or non-pecuniary nature, be treated as “putting the applicant in the position in which she would have found herself, had the violation not occurred”. Just as it is not possible to enter the same river twice, it is not possible to return to a past situation and even less possible to place the applicant there.

To sum up, I consider that, on account of the breaches found in this judgment, the applicant suffered a loss of opportunities and undeniable non-pecuniary damage (see among other authorities, *F.E v. France*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII) but not direct pecuniary damage or pecuniary damage in the form of loss of profits (or income).

F. AS TO THE EXCESSIVE CHARACTER OF THE COMPENSATION GRANTED AND FAILURE TO SETTLE THE ISSUE OF THE SIXTH APARTMENT

Nor can I agree on the amount of money granted by the Chamber to the applicant (11,000 + 3,000 euros), because of its absolutely unjust and exaggerated nature.

The arguments which have led me to this conclusion are the following.

The applicant receives pension in the amount of MDL 210 per month (see paragraph 80 of the judgment), which makes MDL 2520 per year. The sum granted in compensation, i.e. 14,000 euros, when recalculated in MDL (x 15.4) amounts to MDL 215,600. This in its turn is the equivalent of 85 years' pension (215,600 divided by 2520).

This simple calculation shows the exaggerated character of the proposed amount of compensation, which is equal to the applicant's revenue for a period of 85 years. This sum, in my opinion, exceeds reasonable limits. The most appropriate sum would be 5,000 Euros. Unfortunately, and I state it with regret, my position has not been accepted by the majority. Does that mean that similar proportions (that is paying compensation in cases concerning procedural delays, in amounts equal to the applicant's earnings for 85 years) will be applied in all further cases?

Secondly, in her application the applicant complained of the non-execution of two judicial decisions. One of them concerned compensation for five apartments and the other the failure to return to her the sixth apartment. The first limb of the complaint was exhausted when the Moldovan authorities paid her the amount of money she sought and now she may be compensated just for delays in this payment. But the second limb of her complaint, that is the failure to return the sixth apartment, still remains valid. Without answering this question we could not even speak about settling the merits of the case, quite apart from the Article 41 issues. I am absolutely sure that the Court should have required the Moldovan authorities either to return the apartment, within 3 to 4 months perhaps, or to pay its financial (monetary) value. That approach was taken by the Court in the *Popescu Nasta v. Romania* case where it was stated in the operative part of the judgment, and I quote:

“[la Cour] ...

6. *Dit* que l'État défendeur doit restituer au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, l'immeuble litigieux et le terrain sur lequel il est sis ;

7. *Dit* qu'à défaut d'une telle restitution, l'État défendeur doit verser au requérant, dans les mêmes trois mois, 900000 EUR (neuf cent mille euros), pour dommage

matériel à convertir en monnaie nationale de l'État défendeur au taux applicable à la date du règlement..." (judgment of 7 January 2002, application no. 33355/96).

It is worth mentioning that the above-indicated amphibology (if not outright illogicality), i.e. "the reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred" presents an English-language modification of the formula used by the 2nd Section in the *Popescu Nasta v. Romania* case, where it is written, and I quote again:

"...la restitution du bien litigieux, telle qu'ordonnée par le jugement définitif du tribunal de première instance de Bucarest du 3 novembre 1993, placerait le requérant autant que possible dans une situation équivalant à celle où il se trouverait, si les exigences de l'article 1 du Protocole n° 1 n'avaient pas été méconnues..." (judgment of 7 January 2002, application no. 33355/96, § 56).

The *Popescu Nasta* formula in my view is entirely accurate because restitution of confiscated property to some extent, to use the wording of the above judgment "*autant que possible*", or to use the wording of the *Former King of Greece* judgment "as far as possible" can be considered a kind of reparation for the consequences of the breach found or, metaphorically speaking, "placing" the applicant in the situation prior to the violation.

Unfortunately, I cannot say the same about the above-mentioned English-language modification of this formula used in the *Prodan* case.

Just to conclude, what is good for the situation of restitution of property is not acceptable for the situation where the Chamber departs from the general case-law, granting money for non-existent "pecuniary damage" which has not been suffered by the applicant, without giving any particular reason for that departure.

I welcome the insertion in paragraph 76 of the judgment, where the Chamber, speaking about apartment no. 8, recognised "that the apartment should either be returned to the applicant or that she should receive the current market value for it", but I cannot agree that we are not able to rule on this issue now. Prices for apartments situated in different districts of Kishinev, in different houses, new ones, old ones, etc. are generally accessible on the "LARA" Internet site (the organisation which issued the certificate concerning the rent for 1 sq. m. of the house in question). The average price for 1 sq. m. is approximately USD 350. We know the area of the apartment, so there would be no problem in calculating the price. On the other hand, the market price cannot be determined in exact terms, because it is formed as a compromise between demand and supply and is always a result of negotiations between a seller and a buyer. But, as a matter of fact the price is not so important in this particular situation, because the Chamber was required to rule on restitution of the property and the price could come into play only in a situation where, because of some extraordinary circumstances, such restitution was impossible. So, in my

opinion there is no need or justification for postponement of the final ruling relating to the last apartment.

The restitution of property (i.e. apartment no. 8) in the *Prodan* case should have been the crux of the matter in the applicant's situation. Unfortunately, and I regret it very much, in the present judgment the Chamber failed to ensure that that was the case.