



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

FOURTH SECTION

CASE OF POPOV v. MOLDOVA

(Application no. 74153/01)

JUDGMENT

STRASBOURG

18 January 2005

FINAL

18/04/2005

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 Popov v. Moldova,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr J. BORRERO BORRERO,

Mr J. ŠIKUTA, *judges*,

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

Having deliberated in private on 14 December 2004,

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

PROCEDURE

1. The case originated in an application (no. 74153/01) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Moldovan national, Mr Serghei Popov ("the applicant"), on 28 June 2001.

2. The applicant was represented by Mr V. Jereghi of the Moldovan Helsinki Committee. The Moldovan Government ("the Government") were represented by their Agent, Mr V. Pârlog.

3. The applicant complained under Article 6 § 1 of the Convention that, because of the non-enforcement of the judgment of 5 November 1997, his right to have his civil rights determined by a court had been violated and that he had been unable to enjoy his possessions, and thus his right to protection of property under Article 1 of Protocol No. 1 to the Convention was violated. The applicant also relied on Articles 3 and 13 of the Convention.

4. The application was allocated to the Fourth Section. On 7 January 2003 a Chamber of that Section decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. It also decided to give priority to the case under Rule 41 of the Rules of Court in view of the applicant's advanced age and poor state of health.

5. On 3 December 2003 the President of the Fourth Section decided to approve Mr Vanu Jereghi as the representative of the applicant in accordance with Rule 36 (4) (a) of the Rules of the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1925 and lives in Chişinău.

7. In 1941 the Soviet authorities nationalised the house owned by his parents. In the same year his family was deported to Russia and to Uzbekistan.

8. 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 restitution of their confiscated or nationalised property.

9. In 1997 the applicant lodged an action with the Centru District Court (*Judecătoria Sectorului Centru*) by which he sought the restitution of his parents' house. As the former tenants of the house had purchased it from the State, the applicant sought a judicial ruling declaring the purchase contracts null and void. He also requested the eviction of all the occupants of the house.

10. On 25 June 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 the house had been sold to the tenants. The court further ordered the Municipal Council to evict all the occupants, and indicated that the Municipal Council was to provide them with alternative accommodation.

11. The Municipal Council, the Ministry of Privatization and the occupants lodged an appeal with the Chişinău Regional Court (*Tribunalul Municipiului Chişinău*) against the judgment of the Centru District Court. On 5 November 1997 the Chişinău Regional Court dismissed the appeal and upheld the judgment with some textual amendments. Since nobody lodged an appeal in cassation, the judgment of 5 November 1997 became final.

12. In 1999, 2000 and 2001 the bailiff assigned to the case brought proceedings against the Municipal Council for failure to comply with the judgment of 5 November 1997 along with twenty-six similar judgments.

On 28 December 1999 the Centru District Court issued a decision by which a fine of 18 Moldovan lei (MDL) (the equivalent of EUR 1.53 at the time) was imposed on the Head of the Housing Division of the Municipal Council for failure to comply with the judgments.

On 25 August 2000 the same court issued a decision by which it imposed a fine of MDL 1,800 (the equivalent of EUR 161 at the time) on the

Municipal Council. The court found *inter alia* that the shortage of funds and the lack of available apartments could not be relied upon by the Municipal Council to justify the failure to comply with the above judgments.

The Municipal Council lodged an appeal against that decision and on 24 January 2001 the Chişinău Regional Court quashed it on the ground that the shortage of funds and the lack of available apartments had objectively impeded the Municipal Council from complying with the judgments.

On 23 February 2001 the Centru District Court issued a decision by which it imposed a fine of MDL 1,800 on the Municipal Council.

13. Between 1997 and 2002 the applicant lodged numerous complaints about the non-enforcement of the judgment of 5 November 1997 with the Municipal Council, Centru District Court and the Ministry of Justice. In their replies, the Municipal Council and the Ministry of Justice informed the applicant that due to the lack of funds for the construction of apartment buildings and due to the lack of available alternative accommodation for the evicted persons, the judgment of 5 November 1997 could not be complied with.

14. In April 2004 four occupants of the applicant's house lodged with the Chişinău Court of Appeal a request for revision of the judgments of 25 June 1997 and 5 November 1997. Relying on Article 449 of the new Code of Civil Procedure (see paragraph 21 below) they argued in their request that new information have become known to them. They also asked the court to extend the deadline for lodging the request in view of the fact that the new information had been obtained by them from the National Archives in April 2004.

On 26 May 2004 the Court of Appeal found in favour of the occupants, quashed the judgments of 25 June 1997 and 5 November 1997 and ordered the re-opening of the proceedings in the light of the newly discovered facts. The court also decided to extend the time limit for lodging the request.

The new facts relied upon by the Court of Appeal in its judgment were an issue of the Municipal Official Gazette of 1940, and a few certificates from the National Archives and from the Land Register dated April and May 2004. According to these documents, due to a change of numbers of the houses on the street, it was unclear whether the house provided for in the final judgments or another house belonged to the applicant's family. The Court of Appeal did not specify in its judgment whether Article 449 of the new Code of Civil Procedure had a retroactive effect; nor were reasons given for extending the time limit for the lodging of the revision request.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

“Section 12. Restitution of property to persons subjected to repression

(1) Any citizen of the Republic of Moldova who has been subjected to 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 deed of sale and purchase or other form of transfer of a house, building or other construction or goods that have been confiscated, nationalised or taken away from a person who has been a victim of repression may, when made after his rehabilitation, be declared null and void by the courts on an application by the victim or his heirs.”

16. 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 evicted from a house that is the subject of a restitution order shall be provided upon his eviction with accommodation on a priority basis by the local public administration authorities, in accordance with the legislation.”

17. Article 325 of the Code of Civil Procedure, in force between 26 December 1964 and 12 June 2003 “the old Code of Civil Procedure”, reads as follows:

Final judgments ... can be revised in the following cases:

1) the discovery of new facts or circumstances, that were unknown and could not be known earlier by the parties to the proceedings;

Article 426, insofar as relevant, reads as follows:

“The creditor or the debtor against whom enforcement proceedings are pending may lodge an appeal against any action which the bailiff takes or refuses to take in the enforcement proceedings. ...”

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

“Full redress shall be provided by the State in the manner prescribed by law for damage caused to a natural or juristic person by the illegal action of the criminal-investigation organs, the prosecution service or the courts, regardless of whether a public servant from one of those bodies has been at fault.”

19. According to the Review of the Supreme Court of Justice of the Republic of Moldova (*Buletinul Curții Supreme de Justiție a Republicii Moldova*) for February 2003 (page 17), Article 478 of the old Civil Code, along with other relevant provisions of the Moldovan Law, was applicable in the following situations:

illegal detention, illegal arrest, illegal indictment, illegal conviction;

illegal search, seizure or distraint of goods within criminal proceedings;

illegal administrative arrest, illegal fining;

illegal operative investigative measures;

illegal seizure of accounting documents, money, stamps, blocking of accounts.

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

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

21. On 12 June 2003 a new Code of Civil Procedure entered into force. Article 449, insofar as relevant, reads as follows:

Grounds for revision

Revision may be requested:

c) When new and essential facts or circumstances have been discovered, that were unknown and could not be known earlier;

Article 450, in so far as relevant, reads as follows:

A revision request may be lodged:

c) within three months from the date on which the concerned person has come to know the essential circumstances or facts of the case which were unknown to him/her earlier and which could not have been known to him/her earlier....

THE LAW

22. The applicant complained under Article 3 of the Convention that the non-enforcement of the judgment of 5 November 1997 for many years amounted to inhuman and degrading treatment. Article 3 reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

23. He further complained that his right to have his civil rights determined by a court had been violated by the authorities' failure to enforce the judgment of 5 November 1997. He relied on Article 6 § 1, which in so far as relevant, reads as follows:

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

24. He also stated that he had no effective domestic remedies against the non-enforcement of the judgment of 5 November 1997, contrary to Article 13, which states:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

25. Finally he complained that because of the non-enforcement of the judgment in his favour he was unable to enjoy his possessions, and thus that his right to protection of property under Article 1 of Protocol No. 1 to the Convention had been violated. Article 1 of Protocol No. 1 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.”

I. ADMISSIBILITY OF THE COMPLAINTS

A. Alleged violation of Article 3 of the Convention

26. The applicant complained that the failure over many years to enforce the judgment of 5 November 1997 amounted to a violation of Article 3 of the Convention. The applicant claimed that, being an elderly person, he endured severe humiliation by having repeatedly to ask the authorities to execute the judgment.

27. The Court notes that the applicant has failed to substantiate this head of claim. Moreover, it does not appear that the suffering that he might have experienced due to the non-execution of the judgment was sufficient to amount to inhuman and degrading treatment under Article 3 of the Convention (*Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 162).

28. Therefore, this head of claim must be declared inadmissible as being manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Other complaints

1. *Non-exhaustion of domestic remedies*

29. In their memorials of 21 February 2003, 21 July 2003 and 5 August 2003 the Government raised the objection in respect of the remaining complaints that domestic remedies had not been exhausted, on

the ground that the applicant had not availed himself of all the remedies available under domestic law.

(a) Article 426 of the old Code of Civil Procedure

30. The Government submitted that the applicant had failed to sue the bailiff by way of an action provided for in Article 426 of the old Code of Civil Procedure (see paragraph 17 above).

31. 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).

32. The Court notes that the applicant does not complain about any failure on the part of a bailiff but about the refusal of the local authorities to act upon the court's and bailiff's orders. Moreover, the Court notes that the bailiff had a very active role in trying to persuade the Municipal Council to execute the judgment (see paragraph 12 above). Therefore, an action to complain about the bailiff's refusal to act would not have served the applicant's interest in obtaining the execution of the favourable court judgment. Moreover, even assuming that the applicant could have brought an action against the bailiff and obtained a decision confirming that the non-execution had been unlawful in domestic law, such an action would not have achieved anything new, the only outcome being the issue of another warrant enabling the bailiff to proceed with the execution of the judgment of 5 November 1997. Consequently, the Court concludes that such an action would have been ineffective and that the application cannot be rejected for non-exhaustion of the remedy provided for in Article 426 of the old Code of Civil Procedure (see *Jasiūnienė v. Lithuania* (dec.), no. 41510/98, 24 October 2000).

(b) Article 478 of the old Civil Code

33. The Government claimed that the applicant had failed to exhaust the remedy provided for in Article 478 of the old Civil Code (see paragraph 18 above).

34. The applicant contended that Article 478 did not provide for an effective remedy within the meaning of Article 35 § 1 of the Convention. In support of this assertion the applicant drew the Court's attention to the practice of the domestic courts on the matter, summarised in the Review of the Supreme Court of Justice of the Republic of Moldova (see § 19 above), according to which Article 478 of the old Civil Code, along with other

relevant provisions of the Moldovan Law, was applicable only in cases of abuse on the part of the criminal investigation organs and police.

35. The Government have not provided any evidence to show that the provision could be used in a case of non-enforcement of a civil judgment. In light of the above, the Court does not find it established that Article 478 of the old Civil Code constituted an effective remedy within the meaning of Article 35 § 1 of the Convention for the applicant's complaint about non-execution.

(c) Article 1404 of the new Civil Code and Article 449 of the new Code of Civil Procedure

36. The Government submitted that the applicant had failed to exhaust the remedies provided for in Articles 1404 and 449 of the new Civil and Civil Procedure Codes, which entered into force on 12 June 2003 (see paragraphs 20 and 21 above).

37. The Court reiterates that 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).

38. Even assuming that the present case was an exception to the general rule, the Court 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 decide upon 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. As far as Article 449 of the new Code of Civil Procedure is concerned, the Court notes that it enumerates the grounds on which cases where a final judgment has been adopted can be re-opened.

39. The laws invoked by the Government must, 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.

40. In the present case, the Court observes that the Government have simply invoked two articles from the new Civil Code and the new Code of Civil Procedure which establish the principle of liability of State organs and the grounds for re-opening cases. However, the Government have not indicated 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 these provisions have 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.

41. Consequently, the ground of the objection relating to Article 1404 of the new Civil Code and to Article 449 of the new Code of Civil Procedure cannot be upheld.

2. First alleged abuse by the applicant

42. In a letter of 2 June 2004, the Government informed the Court that on 26 May 2004 the Court of Appeal had quashed the judgment of 5 November 1997 (see § 14 above).

43. The Government contended that the applicant had acted in bad faith by intentionally submitting to the Court erroneous information that the house in question belonged to his family while in fact it did not. In this respect they considered the application to be abusive under Article 35 § 3 of the Convention and asked the Court to declare it inadmissible.

44. In his letters of 7 and 24 June 2004, the applicant stated that the decision of the Court of Appeal of 26 May 2004 did not involve a finding on the merits and that accordingly the court had not found that the house did not belong to him. The Court of Appeal had merely re-opened the proceedings in view of the newly discovered facts. The applicant alleged that the re-opening of the proceedings was a form of pressure put on him by the Government (see § 46 below) and asked the Court to continue the examination of his complaints relating to the non-enforcement of the final judgment of 5 November 1997. He also expressed his intention to introduce a new application in regard of the breach of the principle of legal certainty due to the quashing of the final judgment of 5 November 1997 after almost seven years.

45. The Court agrees with the applicant in that the Government's contention does not appear to have any support since there is no final judgment establishing that the house at issue did not belong to the applicant's family and that the applicant knew of this. By its decision of 26 April 2004 the Court of Appeal merely re-opened the proceedings and that re-opening is now the subject of a new complaint which the Court will examine in a separate application. It does not find any evidence of bad faith on the part of the applicant and dismisses this objection.

3. Second alleged abuse by the applicant

46. In his letter of 7 June 2004 the applicant stated that on 20 May 2004, the Government Agent had offered him for signature an agreement according to the terms of which he would consent to withdrawing his

application to the Court and waiving his right to any compensation in exchange for receiving his house. According to the applicant, the Agent allegedly suggested that in the event of his refusal the Court of Appeal would examine the revision request lodged by the defendants and would quash the final judgment of 1997 and keep the proceedings unresolved for a long time. According to the applicant, he refused to sign the agreement and consequently on 26 May 2004 the final judgment was quashed. After the proceedings, on 26 May 2004, the Government Agent allegedly told the applicant that, had he consented to sign the agreement, the revision proceedings and the subsequent quashing and re-opening would not have taken place.

The applicant expressed his concern about the alleged pressure put on him by the Government; however, he did not submit a complaint under Article 34 of the Convention.

47. The Government denied the applicant's allegations, calling them "erroneous and untrue". Relying on Article 38 § 2 of the Convention and on Rule 62 § 2 of the Rules of Court, the Government argued that given the confidential character of friendly settlement negotiations in proceedings before the Court, the applicant was precluded from relying on any written or oral communication made within the framework of such negotiations. Moreover, the Government argued that the applicant's allegations were offensive and defamatory in nature. They submitted that the Court should thus declare the application inadmissible for abuse of the right of petition.

48. The Court reiterates the importance of the principle that friendly settlement negotiations are confidential and that communications made by the parties within the context of such negotiations are not to be relied upon in contentious proceedings. Moreover, it cannot be excluded that a breach of the principle could, in certain circumstances, justify the conclusion that an application is inadmissible on grounds of abuse of the right of petition. However, this principle cannot be interpreted in such a manner as to allow improper coercion by any of the parties to the proceedings. Nevertheless, this being said, since the applicant has made no complaint under Article 34 of the Convention that he has been hindered in the presentation of his complaint, the Court sees no reason to pursue the issue of its own motion and thus leaves open the question whether or not the allegation of improper coercion is well founded.

49. As to the Government's submission concerning the alleged abuse, the Court considers that an application would not normally be rejected as abusive under Article 35 § 3 of the Convention on the basis that it was "offensive" or "defamatory" unless it was knowingly based on untrue facts (see the *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X or *Rehak v. the Czech Republic*, (dec.), no 67208/01, 18 May 2004). However, on the basis of the material in its possession, the Court is unable to conclude that

the applicant has based his allegations on information which he knew to be untrue. Accordingly, this submission fails.

50. The Court considers that the applicant's complaints under Articles 6 § 1 and 13 of the Convention and under Article 1 of Protocol No. 1 to the Convention raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits, and no other grounds for declaring them inadmissible have been established. The Court therefore declares these complaints admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

51. Under Articles 6 § 1 and 13 of the Convention, the applicant complained about the refusal of the authorities to execute the judgment of the Centru District Court of 5 November 1997. He stated that he had no effective domestic remedy against the non-enforcement of the judgment.

52. The Government did not submit observations on the merits of these complaints.

53. 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 of Judgments and Decisions* 1997-II, p. 510, § 40).

54. 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 the eviction of the occupants from his house.

55. It is true that the judgment of 5 November 1997 was the subject of revision proceedings culminating in the decision of the Court of Appeal of 26 May 2004 to re-open the proceedings. This fact, however, does not call into question the final nature of the judgment of 5 November 1997 which remained un-enforced during a period of almost seven years up to the commencement of the revision proceedings.

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

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

58. The Court does not consider it necessary to rule on the complaint under Article 13 of the Convention because Article 6 § 1 is the *lex specialis* in relation to non-execution. The requirements of Article 13 in this context are absorbed by those of Article 6 § 1.

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

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

60. The Government did not submit observations on the merits of this complaint.

61. 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).

62. The Court notes that the applicant had an enforceable claim deriving from the judgment of 5 November 1997 until 26 May 2004, when the Court of Appeal quashed the judgment. It follows that the impossibility for the applicant to obtain the execution of the judgment between 5 November 1997 and 26 May 2004, constituted an interference with his right to peaceful enjoyment of his possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention.

63. By failing to comply with the judgment of the Centru District Court the national authorities prevented the applicant from having the occupants evicted and from enjoying the possession of his house. The Government

have not advanced any justification for the non-enforcement and the Court considers that the 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). Nor does the fact that on 26 May 2004 the Court of Appeal decided to re-open the proceedings provide a justification for the non-enforcement of the judgment before that date.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 125,689 euros (EUR) for pecuniary damage suffered as a result of the refusal of the authorities to enforce the judgment of 5 November 1997. He claimed that this amount would cover the loss of profit incurred as a result of his inability to use the house and the adjacent plot of land.

67. The applicant contended that he would have rented out the house and the adjacent plot of land had the judgment been enforced in due time, namely immediately after becoming enforceable on 5 November 1997. In support of his claims, the applicant presented letters from several estate agents, according to which the rent per square metre in the neighbourhood where the house was located would have varied between 3 US dollars (USD) and USD 20 per month. The applicant submitted that he could have obtained USD 10 per square metre. He multiplied the number of square metres by that price and then multiplied the result by the number of months he was unable to use the house.

68. The Government argued that the amount claimed by the applicant was excessive, without however proposing a different amount which would have been more realistic in their view and without disputing the price of rent submitted by the applicant. Neither did they dispute the surface area of the house. They finally stated that *restitutio in integrum* would be sufficient just satisfaction.

69. In the light of the re-opening of the proceedings following the decision of the Court of Appeal of 26 May 2004, the Court considers that

the issue of the application of Article 41 of the Convention in respect of the compensation for pecuniary damage is not ready for decision. Consequently, it decides to reserve it.

B. Non-pecuniary damage

70. The applicant claimed EUR 50,000 for the non-pecuniary damage suffered as a result of the refusal of the authorities to enforce the judgment of 5 November 1997 for a period of more than six and a half years, up to the decision of the Court of Appeal of 26 May 2004.

71. He argued that the failure of the authorities to execute the judgment caused him suffering because the disputed house represented not only a material possession but was also of emotional value to him, since it used to be the house of his parents and of his childhood.

72. Moreover, the applicant argued that he had been humiliated and treated disdainfully during the years he had had to beg the public servants and wait in front of their offices in order to obtain the enforcement of the judgment.

73. The Government disagreed with the amount claimed by the applicant, arguing that it was 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.

74. 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 judgment for such a lengthy period, the more so given his advanced age. It awards him EUR 5,000 for non-pecuniary damage.

C. Costs and expenses

75. The applicant also claimed EUR 1,610 for the costs and expenses incurred before the Court, of which EUR 1,492 were representation fees and the rest expenses for translation of documents from English to Romanian and miscellaneous secretarial work.

76. The Government did not agree with the amount claimed, stating that the applicant had failed to prove the alleged representation expenses.

77. The Court recalls that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-...).

78. In the present case, regard being had to the itemised list submitted by the applicant, the above criteria, the complexity of the case and the fact that

part of the complaints were declared inadmissible, the Court awards the applicant EUR 1.000 for incurred costs and expenses.

C. Default interest

79. 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. *Declares* unanimously inadmissible the complaint under Article 3 of the Convention.
2. *Declares* by six votes to one the remainder of the application admissible.
3. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* unanimously that it is not necessary to consider Article 13 of the Convention;
5. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
6. *Holds* by six votes to one
 - (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 5000 (five thousand euros) in respect of non-pecuniary damage and EUR 1,000 (one thousand euros) in respect of costs and expenses, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Holds* unanimously, that the question of the application of Article 41 of the Convention in respect of pecuniary damage is not ready for decision; accordingly,
 - (a) reserves it in that respect;
 - (b) invites the Government and the applicant to keep the Court informed within six months of the date of this judgment, of any developments in the re-opened proceedings or of any agreement they might reach;
 - (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 January 2005, 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 Pavlovschi is annexed to this judgment.

N.B.
M.O'B.

DISSENTING OPINION OF JUDGE PAVLOVSKI

To my great regret, I am not able to subscribe to the conclusions reached by the majority in the present case.

I would like to declare that I have deep sympathy for the applicant Mr Popov, who had to suffer considerably along with many other people, as a result of illegalities committed by the totalitarian Stalinist regime. I do have respect for his quite advanced age. But these feelings of sympathy and respect must not predominate over questions of law. Nor may they disburden his legal representative from submitting evidence.

1. AS TO ADMISSIBILITY

Regarding the admissibility of the case, I am not convinced by the reasoning given by the majority for rejecting the Government's preliminary objections. In my view, it is not a good way of proceeding to reject the High Contracting Party's position without having verified the arguments adduced.

Meanwhile, the position taken by the Moldovan Government seems to me not as groundless as is made out to be in the judgment. Here, I am speaking about the abuses of the right of petition clearly committed by the applicant's representative. I leave it open whether or not these abuses were so serious as to render the application inadmissible (although in my opinion they were), because their gravity should have been a matter for consideration by the Chamber. The Chamber should at least have acknowledged and condemned them, even if it did not declare the application inadmissible.

The failure to act in this way may create a false impression that the majority tacitly support the insulting and offensive language used by the applicant's representative against the respondent Government and also accept the representative's submission of false and misleading information.

Let me demonstrate some facts of the case which, to my mind, prove the above statement.

In the second paragraph of his letter dated 1 September 2004 the applicant's representative writes:

“...at the moment when the application by Mr Popov was at a sufficiently advanced stage before the Court, when the Government were obliged to inform the Court about the possibility of a friendly settlement of the case, the Government initiated the revision proceedings in the case.”

In paragraph 6 of the same letter he also writes:

“...during a period of three months when there was every possibility of execution of the final decision, the Government attempted some dubious negotiations with the applicant, making a very clear proposal to the applicant to withdraw his application to the Court, failing which revision proceedings would be initiated.”

And in the next paragraph of the letter the applicant's representative concludes:

“...The applicant refused to withdraw his application to the Court, and as a result of this fact the revision proceedings were initiated.”

In his letter of 4 June 2004 the applicant's representative writes:

“...the Government have not resolved the case by way of a friendly settlement but have proceeded to play a very dirty game.”

Later on, while describing revision proceedings, the applicant's lawyer again calls them “...a dirty game of the Government”.

In my view, the statement made by the applicant's representative that “...the Government initiated revision proceedings in the case.” is knowingly untrue, in other words intentionally false.

The false character of this information, officially submitted to the European Court of Human Rights by the applicant's representative is clear from the evidence before us.

This evidence shows that the representative knew very well that it was not the Government that had initiated revision proceedings, but those persons who had lost ownership of three disputed apartments and who had run a real risk of being evicted from these apartments - Leonid Muntean, Nina Muntean, Gregore Demciuc and Tatiana Demciuc.

The reality of the risk of these persons being evicted is confirmed by the eviction notices issued by the authorities in their names, which may be found in our case file.

The fact that the representative knew for sure that the Government were not involved in the revision procedure follows from the representative's own letter, sent to the Court on 4 June 2004, in which, speaking about the quashing of the final decision, he wrote:

“...the decision was issued on the basis of an application for revision lodged by the persons living in the immovable property belonging to my client.”

Quite contrary to these words of his, in the above-mentioned letter dated 1 September 2004 the applicant's lawyer made the following accusation against the Moldovan Government:

“...the applicant refused to withdraw his application to the Court (i.e. the ECHR), and as a result of this fact the revision proceedings were initiated.”

This precise assertion is, in my view, intentionally false because of the following reasons.

In his above-mentioned letter dated 4 June 2004 the applicant's representative made the following accusations against the Moldovan Government:

“On 20 May 2004 the representative of Mr Popov, Ivan Turceac, in discussion with the Agent of the Moldovan Government before the ECHR, was asked to sign an agreement by which the Government undertook to allow Mr Popov access to his

property, but the applicant was to withdraw his application to the ECHR. ... Mr Popov's representative had refused to sign any such agreement. ... after 6 days, on 26 May 2004, the Court of Appeal delivered a decision quashing the decision of 1997.”

From this letter it clearly follows that the discussion between the Agent and Mr I. Turceac took place on 20 May 2000. At the same time, in a copy of the decision delivered by the Court of Appeal on 26 May 2004 and submitted to the Court, it is indicated that the revision proceedings were initiated on the basis of the applications lodged by G. Demciuc, T. Demciuc, N. Muntean and L. Muntean on 14 April 2004.

So it is impossible that the revision proceedings were initiated after the refusal by the applicant's representative to sign a friendly-settlement agreement, because those proceedings had started on 14 April 2004, while the alleged discussion between the representative of the applicant and the representative of the Government took place (if at all) on 20 May 2004, that is chronologically more than a month later.

Only one conclusion can follow from all these facts: the information sent by the applicant's representative to the ECHR in which he tried to mislead the Court by alleging that the revision proceedings had been initiated as a form of pressure by the Government because of the refusal by the applicant's representative to sign an agreement is intentionally false.

All these manipulations of the facts and legal material, which are clearly disparaging and defamatory to the Moldovan Government, distorted the real situation. Unfortunately, despite that, they have remained without any consideration and even without any reflection in the judgment.

And this is despite the Moldovan Government's direct and clear position on this point. Let me quote a part of the Government's observations.

“...We therefore consider that the applicant's representative is making violent accusations against the national authorities. The Government regard his accusations as offensive. Furthermore, in the case-law of the Commission, applications where the applicant had made defamatory statements about the Government were rejected as being an abuse of the right of petition. For that reason, we would ask the Court to take into account this information, which provides the Court with every reason to declare the application inadmissible, in line with the decision of 30 September 1968 in the similar case of *X and Z v. the Federal Republic of Germany*.”

According to the Court's case-law, an application can be rejected on the ground that it constitutes an abuse of the right of petition. This may be the case where the terms used in relation to the respondent Government are regarded as 'offensive', 'defamatory' or 'excessive' (*Rafael v. Austria*, no. 2424/65, Commission decision of 24 May 1966, Yearbook 9, p. 427).

An application will also be rejected as being an abuse of the right of petition if it appears either that the applicant's claims are knowingly based on false allegations or that he has intentionally provided erroneous information with the aim of misleading the Court. The same applies where he is able to produce only specious arguments.”

In my view this position is not totally irrelevant.

In its decision of 24 May 1966, in the case of *Rafael v. Austria* (application no. 2424/65), the Commission, speaking about the applicant's allegations directed at the Austrian Government and their representatives, stated that it considered them “clearly defamatory in regard to the Austrian Government” and further observed “the Applicant's remarks are directed against persons who represent the Government in the present proceedings and who should enjoy a special protection against defamatory statements concerning the manner in which they exercise these functions.” The Commission concluded that “the Applicant has abused the right of petition”.

Whether or not in the present case the accusations levelled by the applicant's representative against the representatives of the Moldovan Government are based on real facts or merely on groundless inventions should have been examined by the Court according to the rule “*Verba fortius accipientur contra proferentum*” (words are to be taken most strongly against him who uses them). But that was not the case.

I fail to understand why the representatives of the Moldovan Government should enjoy a lesser degree of protection than the representatives, for instance, of the Austrian Government as referred to in the above-mentioned decision.

Unfortunately the judgment does not provide us with any answer to this question.

Instead, the majority have proposed to take another and, in my view, incorrect approach, leaving this limb unexamined. In paragraph 48 of the judgment it is stated:

“...since the applicant has made no complaint under Article 34 of the Convention that he has been hindered in the presentation of his complaint, the Court sees no reason to pursue the issue of its own motion and thus leaves open the question whether or not the allegation of coercion is well founded.”

Unfortunately, I cannot subscribe to the majority's conclusion that the applicant has not made any complaint that he was hindered in the presentation of his complaint. The applicant did submit such a complaint, mentioning the exertion of pressure on each and every occasion.

In paragraph 46 of the judgment it is stated quite precisely enough:

“the applicant stated that on 20 May 2004 the Government Agent had offered him for signature an agreement according to the terms of which he would consent to withdrawing his application from the Court and waiving his right to any compensation in exchange for receiving his house. According to the applicant, the Agent allegedly suggested that in the event of his refusal the Court of Appeal would examine the revision request lodged by the defendants and would quash the final judgment of 1997 and keep the proceedings unresolved for a long time. According to the applicant, he refused to sign the agreement and consequently on 26 May 2004 the final judgment was quashed. After the proceedings, on 26 May 2004, the Government Agent allegedly told the applicant that had he consented to sign the agreement, the revision proceedings and the subsequent quashing and re-opening would not have taken place.

The applicant expressed his concern about the alleged pressure put on him by the Government.”

What is this if not a complaint?

It is true that the applicant did not attribute any legal characterisation to his allegations and that he did not mention expressly Article 34, but in accordance with the Court's jurisdiction he was not under an obligation to do so. It is a court's task to attribute any legal characterisation which it feels to be proper to the facts submitted to it.

In its judgment in the case of *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no 56, pp. 15-16, § 44, the Court stated:

“The institutions set up under the Convention nonetheless do have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In the performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to be established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner; furthermore, they have to take account not only of the original application but also of the additional documents intended to complete the latter (see, for example, the above-mentioned *Guzzardi* judgment, Series A no. 39, pp. 22-23, §§ 62-63, and the *Ringeisen* judgment of 16 July 1971, Series A no. 13, pp. 40-41, § 98, as compared with p. 34, § 79, and pp. 39-40, §§ 96-97).”

Unfortunately this case-law has not been taken into consideration. This fact led to a situation where extremely important and serious allegations were not given any consideration. Moreover, all non-verified material submitted by the applicant's lawyer was used in the judgment in a way which created an illusion of the Government's possible involvement in the revision proceedings as a form of illegal pressure on the applicant, despite the fact that no evidence had been submitted by the applicant to that effect.

It is worth mentioning also that in the Republic of Moldova illegal interference with the administration of justice is a criminal offence provided for by Article 303 of the Criminal Code. Such an interference, when committed by a person using his or her official position, is considered by the legislature as a crime committed with aggravating circumstances, punishable by 2 and 5 years' imprisonment. So, in alleging that the representatives of the Government have interfered with the examination by the Court of Appeal of the applications lodged by the persons listed above, the applicant's representative is in practical terms, accusing them of carrying out a criminal activity and having committed a criminal act provided for by Article 303 § 3 of the Criminal Code.

In its decision of 18 May 2004 in the case of *Řehák v. the Czech Republic* (Application No. 67208/01) the Court declared the application inadmissible on the grounds of the abuse of the right of petition by the applicant. This abuse, in the view of the Court, consisted of allegations of criminal activity on the part of certain representatives of the Registry and of their membership of the security services. The Court stated:

“...the applicant's allegations are intolerable, exceeding the bounds of normal criticism, albeit misplaced, and amount to contempt of court. Such conduct by the applicant – even supposing that his original application would not be deemed manifestly ill-founded – is contrary to the purpose of the right of individual petition ...”

I perfectly understand the position taken by the Court in the above case, namely that groundless allegations of criminal activity are “intolerable”. What I cannot understand is why such kind of allegations should be tolerable when they are made against certain representatives of a High Contracting Party.

In my view, in this kind of situation the Court, operating on the basis of “the facts of the case, as found to be established on the evidence before [it]”, should ask for evidence from those who make allegations.

One of the maxims of law says: “*Ei incumbit probatio qui dicit, non qui nega*”. In English this could be translated as “The burden of proof lies upon him who affirms, not him who denies”.

And if no evidence was submitted, the Chamber should express the opinion that the relevant part of the application is ill-founded (unless it declares the application inadmissible as being an abuse of the right of petition) and should not leave the question open to speculation as to whether the representatives of the Government have or have not used means of illegal constraint in relation to the applicant or illegally intervened in the administration of justice.

In his letters addressed to the Court the applicant's lawyer, acting as a representative of the Helsinki Committee (see paragraph 2 of the judgment), referring to revision proceedings, calls them, as I have quoted, “dirty games of the Government”. In my view, this expression is clearly offensive and defamatory. It is not clear in what way, in view of the lawyer, the Government could have precluded Leonid Muntean Nina Muntean, Gregore Demciuc and Tatiana Demciuc, who were running the real risk of being evicted from their homes, from lodging an application initiating revision proceedings.

A person claiming to be a lawyer should know that a Government may not in any way limit its citizens' access to a court. Coming back to the present case, the Moldovan Government should not in any way prevent the above-mentioned persons either from having access to a court, or from using their rights provided for by the law.

There is one more issue I would like to raise here. In accordance with Rule 62 § 2 of the Rules of Court, all friendly-settlement negotiations are confidential:

“...In accordance with Article 38 § 2 of the Convention, the friendly-settlement negotiations shall be confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings...”

In breach of the above provisions the applicant's representative has disclosed the friendly settlement negotiations, making them public. Acting in this way, in practical terms he has waived his right to rely in future disputes on the “confidentiality of negotiations” clause and has opened the way for the representatives of the Government to protect their dignity by means of libel and defamation proceedings before the national judicial authorities. This sort of unprofessional behaviour has created a possible danger of confidential proceedings becoming a matter for consideration by the Moldovan judicial authorities, which in my opinion is inadmissible because of the possible conflict between national and international courts.

On several occasions the European Commission of Human Rights examined the issue of the breach of the confidentiality clause by the applicants. For instance, in the case of *Drozd v. Poland* (Application No. 25403/94, decision of 5 March 1996), the Commission stated: “...the applicant made public confidential information...”, “...the applicant must have been aware of the confidentiality of the proceedings as he had been informed thereof...” “...the parties are obliged to respect the confidentiality of its proceedings...” and “...the applicant's conduct constitutes a serious breach of confidentiality...”. In the light of all these findings the Commission decided to strike the application out of its list of cases.

The above-mentioned decision leads me to the conclusion that the proposal by the Moldovan Government to take a similar approach in the present case is not, in my view, groundless and deserved more careful examination.

I am really very surprised and sorry to note that a representative of such a respectable non-governmental organisation (NGO) as the Helsinki Committee gives the impression of a person lacking in elementary legal and professional ethics. In my view, this kind of behaviour should call for some sort of reaction from the Court. As a matter of fact, the applicant's representative is not a practising lawyer, he is just a jurist working for the above NGO. His participation in the case was authorised by the Court in accordance with Rule 36 §4 (a) of the Rules of Court (see paragraph 5 of the judgment). My personal conclusion is the following. The Court should be much more vigilant about approving the participation of such persons in proceedings before it, in order to avoid getting into somewhat ambiguous situations like the present one.

There is one more thing which deserves to be mentioned. In paragraph 44 of the judgment reference is made to the applicant's intention to lodge a new complaint, and I quote:

“...he also expressed his intention to introduce a new application in regard of the breach of the principle of legal certainty due to the quashing of the final judgment.”

At the same time, in the next paragraph (45) the Court now states that the reopening of the proceedings is the subject of a new complaint, and I quote again:

“... the Court of Appeal merely reopened the proceedings and that reopening is now the subject of a new complaint which the Court will examine in a separate application.”

The information quoted above about new complaints is irrelevant to the case concerning non-enforcement of a final judicial decision. There are two possible ways of proceeding in such situations: either to communicate a new complaint if it really exists, or not to mention it at all in a judgment in which a wholly different matter is under consideration and which has nothing to do with “a new complaint which the Court will examine in a separate application”.

In paragraph 49 the Court observes: “...an application would not normally be rejected as abusive under Article 35 § 3 of the Convention on the basis that it was 'offensive' or 'defamatory' unless it was knowingly based on untrue facts”. Reference is made to *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X and *Řehák v. the Czech Republic* (cited above).

Let us take first the *Varbanov v. Bulgaria* judgment. I cannot agree with this reference and the selected quotation. In the present judgment only part of paragraph 36 of the *Varbanov* judgment has been quoted. The second part, where the Court speaks about the “knowingly based on untrue facts” criterion, contains the following conclusion:

“...The Court does not consider that such is the case, the applicant's complaints that his rights under the Convention were violated being based on real facts some of which are, indeed, undisputed by the Government”.

This is not the case in our situation, where the Government strongly denies any involvement in the alleged acts, unlike in the *Varbanov* case, where the conclusion was based on facts “...undisputed by the Government...”. Here a question arises as to who should prove what in the proceedings before this Court. If we accept the above-mentioned legal principle “*Ei incumbit probatio qui dicit, non qui negat*”, it becomes clear that the burden of proof rests with the applicant. In my opinion, it is the applicant's task to prove that his allegations are based on real facts, and not the Government's task to prove that they are not guilty. It goes without saying that neither the applicant nor his representative have submitted any piece of evidence to substantiate their words.

In the second case (*Řehák v. Czech Republic*), as I have already mentioned, the Court declared the application inadmissible because of the applicant's unfounded allegations of illegal activity against certain representatives of the Court.

So, both of these quotations should be used in favour of declaring the application inadmissible rather than to support a finding to the contrary.

2. AS TO THE MERITS

It is true that the Government have failed to submit observations concerning the merits of the case (see paragraph 52 of the judgment), but in any event, regardless of this fact, I believe that the Court should analyse the legal situation under consideration.

In my opinion the present case is clearly distinguishable from the leading case of *Prodan v. Moldova*, as well as from other “non-enforcement”-type cases.

The features distinguishing this case from other non-enforcement-type cases are determined by the fact that the Moldovan judicial authorities quashed the final decision as a result of the revision proceedings. Accordingly there is now no valid final judicial decision in favour of the applicant, meaning that there is nothing to be enforced.

In the *Prodan* case there was such a valid final judicial decision in favour of the applicant. And this is the main difference - a difference of principle.

I very much doubt that the Court could blame the national authorities for non-enforcement of a legally quashed judicial decision. I very much doubt it that the applicant could be considered to have assets in the form of legal expectations based on a legally quashed judicial decision. And I very much doubt that a quashed judicial decision could give rise to any legal expectation in terms of possessions. On the contrary, we do not know what decision will be taken by the Moldovan judicial authorities following a fresh examination of Mr. Popov's claims.

I accept that Mr Popov should be given back his property confiscated by the totalitarian Stalinist regime and there should be no doubt about this. But he should be given back his own property and not that belonging to other people. In my opinion it was and it still is his responsibility to show that the property he is claiming as his own is his parents' former property.

In paragraph 45 of the judgment it is stated that

“... there is no final judgment establishing that the house at issue did not belong to the applicant's family and that the applicant knew about it”.

I agree that there is no such judgment; at the same time, there is no final judgment to the contrary. So the legal situation is not that simple. On the other hand, it seems to me inconceivable that the applicant did not know where his own house was situated. Let me remind you that the applicant had spent about 16 years in that house before his parents were expropriated (see paragraphs 6 and 7 of the judgment). It is difficult to believe that he could not identify the building where he had spent all his childhood. In my mind, if the national judicial authorities decide that the house he is claiming to be

his belonged to another person, this would automatically lead to the conclusion that he knowingly submitted false information to the Court.

As far as the revision proceedings are concerned, let me remind you that the Rules of Court contain a similar provision. Rule 80 provides:

“A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment...”

I hardly think that our Court, in a case of revision of a judgment in accordance with Rule 80 of the Rules of Court, would have asked the Government of a High Contracting Party to execute a previous judgment and subsequently to also execute the revised judgment, the outcome of which, theoretically speaking, could be diametrically opposed to the outcome of the first judgment.

Quite similar provisions are contained in the Code of Civil Procedure of the Republic of Moldova. Article 449 (c) and Articles 450 (c) provide that a revision request may be lodged by an applicant when new and essential facts or circumstances are discovered that had been unknown and could not have been known to the applicant earlier. Such a request may be lodged within 3 months from the date on which the person concerned has acquired knowledge of these essential circumstances or facts.

Practically the same legal provisions are contained in the legislation of many other States.

If we accept that the revision procedure is a legal, fair and permissible means of changing final judicial decisions in very specific and exceptional circumstances, we are also bound to accept the consequences of this procedure in the present case. But these consequences are the following:

1. As a result of the quashing of the final judicial decision entitling the applicant to acquire property, all the legal consequences have ceased to exist; in other words, he has now lost all his entitlements. In practical terms this means that he is no longer entitled to the three apartments in question and, as a result, there is no violation of Article 1 of Protocol No.1.

2. As a result of the quashing of the final judicial decision there is nothing to be enforced. If there is nothing to be enforced, there can be no violation of Article 6 § 1 of the Convention on account of a failure to enforce a final judicial decision.

3. AS TO THE APPLICATION OF ARTICLE 41 OF THE CONVENTION

Neither can I agree on the amounts awarded in respect of non-pecuniary damage and for costs and expenses.

(a) Damage

First of all, I would like to say that I welcome the Court's finding that “the question of the application of Article 41 of the Convention in respect of pecuniary damage is not ready for decision” (see § 6 of the operative part of the judgment). This conclusion is logical and emerges from the fact that the circumstances of the case are not clear enough to make a decision. In practical terms it means that the whole case is not ready for the consideration. In an indirect way the majority has recognised the fact that, without a final decision given by national judicial authorities in Mr. Popov's case, it is not possible to rule in the present case either. What I fail to understand is how the same case could be ready for the consideration of non-pecuniary damages and at the same time not be ready for the consideration of pecuniary damage. In my view, in such a situation the entire Article 41 issue should have been postponed pending the final decision of national judicial authorities in the case of Mr. Popov.

Instead, the majority decided to award Mr. Popov EUR 5000 in respect of non-pecuniary damage.

Even if we take as a basis the questionable means of calculation applied in the Prodan case, the amount should be halved, because in the Prodan case the applicant claimed six apartments, while the applicant in the present case claimed only three. In the Prodan case there was a valid final judgment in favour of the applicant, while in the present case there is no such judgment.

In the Prodan case the applicant's lawyer's calculations were based on the following line of reasoning: had the applicant received the apartments, found tenants, rented the apartments out and received payment, she would have deposited money with a bank and earned an interest. In the present case the applicant did not claim any bank interest.

Even leaving the Prodan case to one side, I should say that the amount of award granted in the present case exceeds reasonable limits and is excessively high.

Let me recall that the period of non-execution in the present case was about 6 years and 6 months.

It is generally recognised that the execution of final judicial decisions is part of the “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 (see *Hornsby v. Greece* judgment of 19 March 1997, *Reports of Judgments and Decisions* 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, in the present situation, we are bound to follow previous judgments relating to this issue.

When one tries to compare the award granted in the present case with the compensations granted in some other “excessive length of proceedings” type cases, the difference is really striking.

Let me prove my previous conclusion with some examples.

The *Krol v. Poland* case (see *Król v. Poland*, no. 65017/01, 28 September 2004): length of proceedings - 10 years and 5 months. Award granted – EUR 4500.

The *Przygodzki v. Poland* case (see *Przygodzki v. Poland*, no. 65719/01, 5 October 2004): length of proceedings- 7 years and 6 months. Award granted – EUR 2500.

The *Nowak v. Poland* case (see *Nowak v. Poland*, no. 27833/02, 5 October 2004): length of proceedings - 7 years and 7 months. Award granted – EUR 3600.

The *Wiatrzyk v. Poland* case (see *Wiatrzyk v. Poland*, no. 52074/99, 26 October 2004): length of proceedings - 8 years and 6 months. Award granted EUR 3000.

The *Kusmieriek v. Poland* case (see *Kuśmieriek v. Poland*, no. 10675/02, 21 September 2004): overall length of proceedings - 9 years and 6 months (out of which 8 years and 4 months within the Court's jurisdiction). Award granted EUR 4000.

The *Kreuz v. Poland* case (see *Kreuz v. Poland (no. 2)*, no. 46245/99, 20 July 2004): length of proceedings - 9 years and 3 months. Award granted EUR 3600.

The *Pasnicki v. Poland* case (see *Paśnicki v. Poland*, no. 51429/99, 6 May 2003): length of proceedings - 12 years and 9 months (out of which 9 years and 9 months within the Court's jurisdiction). Award granted EUR 4500.

And this list could be continued.

In my view the approach applied in the above cases should be applied in the “non - enforcement” type cases, too. The reasons that lead me to this conclusion are the following.

When we are speaking about non-pecuniary damages, first of all we are speaking about a form of financial compensation for the suffering incurred by an applicant. I am sure that from the objective point of view for an applicant it makes no difference at which stage of a “trial” – first instance examination, appeal proceedings, cassation proceedings, enforcement proceedings - a state fails to comply with its obligations. What really counts here is the period of time during which an applicant has been awaiting satisfaction of his or her legal demands.

As a matter of principle, awards granted should be similar in the cases where the similar periods of delays were found, perhaps with some adjustments depending on the economic situation and standard of living existing in each and every Member-State.

(b) Costs and Expenses

According to Rule 60 § 2, when claiming just satisfaction “...Itemised particulars of all claims made, together with the relevant supporting documents or vouchers, shall be submitted, failing which the Chamber may reject the claim in whole or in part...”.

On many occasions the Court has stated that only expenses actually incurred should be reimbursed.

In the judgment (see paragraph 83) it is stated that “...regard being had to the itemised list submitted by the applicant...” the Court awards the applicant EUR 1,000.

In the present circumstances of the case when not a word is said about the existence of any documents supporting the claims, as required by rule cited above, I very much doubt that awarding costs and expenses in the present case was in compliance with the Rules of Court.