



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

FOURTH SECTION

CASE OF ASITO v. MOLDOVA

(Application no. 40663/98)

JUDGMENT

STRASBOURG

8 November 2005

FINAL

08/02/2006

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

In the case of Asito 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 11 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 40663/98) against the Republic of Moldova lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the Moldovan incorporated insurance company Asito ("the applicant"), on 5 February 1998.

2. The applicant was represented by Mr Eugen Șlopac, the company's executive director. The Moldovan Government ("the Government") were represented by their Agent, Mr Vitalie Pârlog.

3. The applicant alleged, in particular, that the Prosecutor General intervened in a dispute between two private parties and that two final judgments favourable to it were quashed following the Prosecutor General's request for annulment.

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

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

6. By a decision of 10 July 2001, the Court declared the application partly admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). 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. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a Moldovan incorporated insurance company, with its seat in Chişinău.

1. Background

10. On 12 June 1991, a governmental order allowed the applicant company to enter "banking and investments operations", apart from its main insurance activity.

11. On 28 November 1991, the applicant company obtained from the National Bank of Moldova a licence to engage in banking operations. During a routine audit procedure, the company refused to disclose its books, claiming it did not perform any banking activities. On 13 October 1992, the applicant company's licence was withdrawn. The applicant company did not challenge this decision.

12. On 25 November 1994, the applicant company concluded a one-year contract ("the contract"), with company F., entitled "Joint Commercial Transaction". The applicant company made a capital contribution of 330,000 Moldovan lei (MDL) to company F., and in exchange it was to receive the sum of MDL 269,500, payable in monthly instalments. Company F. was also to reimburse the capital contribution in a lump sum by 25 November 1995. Non compliance with the terms of the contract gave rise to a penalty of 0,50% of the unpaid sum for each overdue day. By a collateral contract, company F. mortgaged its plant and equipment, as security.

13. By 23 April 1996, company F. had paid the applicant company MDL 420,750. Due to a slowdown in the national economy, company F. was, as of that date, unable to pay the balance in full and had no reasonable prospect of complying with the terms of the contract.

2. Proceedings A: for the execution of the contract

14. On 24 May 1996 the applicant company filed an application with the Arbitration Court of the Republic of Moldova for breach of contract and

requested that company F. be ordered to pay MDL 468,472, constituting the capital contribution and contractual penalties.

15. Company F. argued that the contract contained an implied obligation, arising from the nature and purpose of the contract, that the applicant company was to contribute to the expenses and losses of the joint venture. As the company had experienced losses, in spite of its good faith in performance, it asked for an adjustment or cancellation of the MDL 468,472 debt, invoking the Civil Code provisions on risk-sharing in joint ventures. As a subsidiary argument, it submitted that, in the absence of this implied obligation, the contract became a regular loan, for which the applicant company did not possess a licence.

16. On 1 August 1996 the Arbitration Court partially allowed the applicant company's application, but it reduced the contractual penalties by 50%, considering the claim to be disproportionate in relation to the actual damage experienced by the applicant company, and issued an order of payment for an amount of MDL 327,474.75 (the equivalent of 62,780.00 euros (EUR) at the time)).

17. On 20 August 1996, the Prosecutor General, who was not a party to the proceedings, lodged an ordinary appeal against the judgment of 1 August 1996.

18. On 28 November 1996 the "Law on Economic Courts" entered into force. It provided for the re-organisation of the part of the judiciary system dealing with economic disputes. The re-organisation process resulted in a suspension of the hearings for several months.

19. On 14 April 1997 the Prosecutor General withdrew his appeal against the judgment of 1 August 1996. The judgment of the Arbitration Court thus became final.

20. On 16 June 1997 the Prosecutor General lodged a request for annulment (*recurs în anulare*) under Article 38 § 3 of the Law on Economic Courts against the judgment of 1 August 1996, asking that the contract be declared null and void for non-compliance with the Law on Banks and Banking Activities.

21. On 23 September 1997 the Appeal on Points of Law Chamber of the Economic Court allowed the Prosecutor's request, quashed the judgment of 1 August 1996, and dismissed the applicant company's action.

22. On 24 December 1997, the Supreme Court of Justice rejected the applicant company's appeal against the above judgment. It found that the contract was a disguised credit operation and since the applicant company no longer possessed a banking licence, such a contract was illegal.

23. On 21 January 1998 the Supreme Court of Justice dismissed the applicant's extraordinary appeal (*contestație în anulare*) on the ground that the conditions for the re-opening of the case had not been fulfilled.

3. *Proceedings B: for the annulment of the contract between the applicant company and company F.*

24. On 17 July 1996, pursuant to Article 5 (2) of the Code of Civil Procedure, the Prosecutor General filed an application with the Arbitration Court of Moldova, seeking the annulment of the contract concluded between the applicant company and company F. on 25 November 1994. According to the Prosecutor General, the contract was a disguised credit operation subject to a very high interest rate and the applicant company was not entitled to perform credit operations without a licence.

25. On 26 July 1996 the Arbitration Court dismissed the Prosecutor General's application. The court found, *inter alia*, that according to the Law on Insurance, insurance companies were allowed to provide commercial and financial services and that the provision of credit was also permitted under the Civil Code. The Arbitration Court did not examine the question of the need for a licence. Since no party appealed, the judgment became final.

26. On 16 June 1997 the Prosecutor General lodged under Article 38 § 3 of the Law on Economic Courts a request for annulment (*recurs în anulare*) of the judgment of 26 July 1996.

27. On 23 September 1997 the Appeal on Points of Law Chamber of the Economic Court of Moldova dismissed the request.

28. On 17 November 1997 the Prosecutor General lodged under Article 278/60 of the Code of Civil Procedure an appeal on points of law (*recurs*) against this decision.

29. On 24 December 1997, the Supreme Court of Justice quashed the judgments of 26 July 1996 and of 23 September 1997. It found in favour of the Prosecutor General and declared the contract between the applicant company and company F. null and void on the ground that it was a disguised credit operation for which the applicant company had no licence.

30. On 25 December 1997 the applicant company lodged an extraordinary appeal (*contestație în anulare*) against the decision of 24 December 1997.

31. On 21 January 1998 the Supreme Court dismissed the extraordinary appeal.

4. *Proceedings C: for confiscation of the money constituting the investment and the profit related to the contract of 25 November 1994*

32. On 2 February 1998 the Prosecutor General and the Ministry of Finance filed an application with the Economic Court of the Republic of Moldova for the confiscation of MDL 420,750 from the applicant company. The amount represented the profit obtained by ASITO as a result of the contract with company F., which had been declared null and void by the Supreme Court's judgment of 24 December 1997. In his application, the

Prosecutor General referred, *inter alia*, to the judgment of 23 September 1997 of the Appeal on Points of Law Chamber of the Economic Court and to the judgment of 24 December 1997 of the Supreme Court of Justice.

33. On 20 May 1998 the Prosecutor General requested that the amount to be confiscated be reduced. In this respect, the Prosecutor General pointed out that, according to the Law on Enterprises and Business Professions, an enterprise having exercised an illegal activity was accountable for the profit obtained and for a penalty equal to the profit. Since ASITO's profit amounted to MDL 90,750, the Prosecutor General requested that MDL 181,500 be confiscated.

34. On 2 February 1999, the Economic Court of the Republic of Moldova found in favour of the Prosecutor General and the Ministry of Finance and ordered ASITO to pay the State MDL 186,945.00 (the equivalent of EUR 18,765.00 at the time).

35. On 25 October 2000 the applicant's appeal was dismissed by a final judgment of the Appeal on Points of Law Chamber of the Economic Court of the Republic of Moldova.

5. Subsequent developments

36. On 16 July 2003 the applicant applied to the Supreme Court of Justice for revision of the judgments of 24 December 1997 and 21 January 1998. On 4 September 2004 the Supreme Court of Justice dismissed the applicant's request.

37. On 13 November 2003 the Prosecutor General's Office applied to the Supreme Court of Justice for revision of the judgments of 24 December 1997. On 16 September 2004 the Supreme Court of Justice dismissed the request.

II. RELEVANT DOMESTIC LAW AND PRACTICE

38. Law No. 970 of 24 July 1996 on Economic Courts, in so far as relevant, reads as follows:

Article 38 § 3

"The Prosecutor General and his deputies may lodge, within one year, with the Appeal on Points of Law Chamber of the Economic Court of the Republic of Moldova, a request for annulment (*recurs in anulare*) of any final decision of the Arbitration Court ... on the ground that the substantive or procedural law was violated ... They may also request a stay of execution of the decision of the Arbitration Court."

39. The relevant provision of Law No. 1550 of 25 February 1998 reads as follows:

Article III

“In Article 38 § 3 of the Law No. 970 of 24 July 1996 on Economic Courts the words ‘within one year’ shall be deleted.”

40. The relevant provisions of the Code of Civil Procedure in force until 12 June 2003, state:

Article 5 (2) e) and f)

“Courts may commence to examine a civil action ... at the prosecutor’s request, in cases relating to ... the State’s and the society’s interest regarding ...

...

e) ... the nullity of contracts infringing the State’s interest ...;

f) ... and for the annulment of acts and activities of corruption and protectionism.”

Article 278/60

“The parties, ... [and] the Prosecutor General ... may, either on their own motion or on an application by one of the parties, lodge with the Supreme Court an extraordinary appeal (*recurs*) against any final judicial decision of the Economic Court of the Republic, on the following grounds:

(1) where the judgment has no legal basis or is contrary to the law or the law was wrongly applied ...”.

41. Between 1989 and 1999, the Prosecutor General made little use of Article 5(2), and the courts interpreted it in a restrictive manner. An application for termination of a contract was rejected, as relating neither to the categories of persons protected under the provision, nor to the State’s interest (Court of Appeal of Moldova, judgment Nr. 2r-523 of 15 January 1998). In a demand for the annulment of an apartment sale for non-compliance with the residence permit, the Supreme Court acknowledged the State’s interest, but rejected the case on the merits (The Supreme Court of Justice, plenary judgment Nr. 4r/a-17/99 of 8 November 1999).

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

42. The applicant company complained that the judgments of 23 September 1997 and 24 December 1997 of the Appeal on Points of Law

Chamber of the Economic Court and of the Supreme Court of Justice respectively (Proceedings A and B), which set aside two final judgments in its favour, had violated Article 6 § 1 of the Convention. It also alleged that the filing of the application of 17 July 1996 by the Prosecutor General on the basis of Article 5 (2) of the Code of Civil Procedure (Proceedings B) violated its right to a fair hearing.

The relevant part of Article 6 § 1 reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

A. Prosecutor General’s requests for annulment under Article 38 § 3 of the Law on Economic Courts

43. The Government contended that Article 38 § 3 was a transitional rule enabling the merger of the “quasi judicial” arbitration system with the system of ordinary courts.

44. The applicant company denied the existence of a transitional period for the re-organisation of the judiciary.

45. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (*Roşca v. Moldova*, no. 6267/02, § 24, 22 March 2005).

46. Legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts’ power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (*ibid.*, § 25).

47. In the present case the Court notes that the request for annulment was a procedure by which the Prosecutor General could challenge any final decision. The procedure was provided for in Article 38 § 3 of the Law on Economic Courts (see paragraph 38 above). Until 25 February 1998, the Prosecutor General could exercise this prerogative only within one year;

however, any new final decision which resulted from such an exercise was likewise susceptible of being challenged with a request for annulment by the Prosecutor General. After that date, however, his power became unlimited in time (see paragraph 39 above).

48. The Court further notes that, by allowing the request lodged by the Prosecutor General under that power, the Appeal on Points of Law Chamber of the Economic Court and the Supreme Court of Justice set at naught two entire judicial processes which had ended in final and enforceable judicial decisions.

49. In applying the provisions of Article 38 § 3, the Appeal on Points of Law Chamber of the Economic Court and the Supreme Court of Justice infringed the principle of legal certainty. That action breached the applicant company's right to a fair hearing under Article 6 § 1 of the Convention (see *Brumărescu v. Romania* [GC], no. 28342/95, §§ 61 and 62, ECHR 1999-VII).

50. The Court does not attach decisive importance to the fact that at the time of the quashing of the final judgments, the Prosecutor General's power was limited in time because the time limit did not prevent him from repeating his challenge against any new judgment. Moreover, even that time limit was later abolished. In such circumstances, the system based on Article 38 § 3 cannot be regarded as being compatible with the rule of law.

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

B. Prosecutor General's intervention on the basis of Article 5 (2) of the old Code of Civil Procedure

52. The Government argued that the power to intervene under Article 5(2) of the old Code of Civil Procedure was a part of the Prosecutor General's role in supervising legality and securing matters of public interest (see paragraph 40 above).

53. The applicant company pointed out that such a civil application had no relevance in the present case.

54. The Court notes that according to Article 5 (2) of the Code of Civil Procedure in force at the material time, the prosecutor could have initiated civil proceedings, *inter alia*, for the protection of the State's interest, or for annulment of acts and activities of corruption and protectionism. In the present case it can be argued that the State could have had an interest in the protection of small commercial enterprises from abuse by large companies. It would therefore appear that the Prosecutor General's application was in conformity with domestic law. Furthermore, there is no indication that the Prosecutor General enjoyed a dominant position in the proceedings (see paragraphs 24-31 above). The action introduced by him was subject to the same procedural provisions as any other action introduced by a private or legal person; it was subject to full judicial scrutiny and the applicant

company could present its case in conditions that did not place it at a disadvantage vis-à-vis its opponent. It was only the Prosecutor General's subsequent intervention by way of a request for annulment that placed the applicant at disadvantage (see paragraphs 43-51 above).

55. There has thus been no violation of Article 6 § 1 of the Convention in this respect.

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

56. The applicant company complained that the judgments of 23 September 1997, 24 December 1997 and 25 October 2000 of the Appeal on Points of Law Chamber of the Economic Court, the Supreme Court of Justice and the Appeal on Points of Law Chamber of the Economic Court respectively, had the effect of infringing its right to peaceful enjoyment of its possessions as secured by Article 1 of Protocol No. 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

57. The Government pointed out that on 24 December 1997 the contract was declared null and void by the Supreme Court of Justice, and that this decision had to be accepted with all the consequences it entailed.

58. The applicant company contended that the annulment of final judgments favourable to it and the subsequent confiscation of MDL 186,945 amounted to a deprivation of its possessions, unjustified on any public interest ground and without a fair compensation.

59. In so far as concerns the judgment of 1 August 1996 which was quashed following the Prosecutor General's request for annulment (Proceedings A, see paragraphs 14-23 above), the Court reiterates that a judgment debt may be regarded as a “possession” for the purposes of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III, and the cases cited therein).

60. As to the judgment of 26 July 1996 which was quashed following the Prosecutor General's request for annulment (Proceedings B, see paragraphs 24-31 above), the Court notes that the applicant company had a legitimate expectation of receiving a profit of MDL 269,500 from the contract of 25 November 1994, concluded with company F. The Court is of the opinion that the contractual right to this amount was a possession within

the meaning of Article 1 of Protocol No. 1 to the Convention (see *Association of General Practitioners v. Denmark*, App. No. 12947/87, 62 D.R. 226).

61. The quashing of these judgments after they had become final and unappealable constitutes an interference with the applicant's right to the peaceful enjoyment of its possessions (see *Brumărescu*, cited above, § 74). Even assuming that such an interference may be regarded as serving a public interest, the Court finds that it was not justified since a fair balance was not preserved and the applicant was required to bear an individual and excessive burden (cf. *Brumărescu*, cited above, § 75-80).

62. As regards the judgment of 25 October 2000 (Proceedings C), by which the applicant company's profit from the contract of 25 November 1994 was confiscated and a penalty was imposed on it (see paragraphs 32-24 above), the Court notes that that was only possible due to the requests for annulment in Proceedings A and B and their subsequent outcome. Having regard to the findings above in respect of Proceedings A and B, the Court concludes that this judgment also had the effect of infringing the applicant company's right to peaceful enjoyment of its possessions.

63. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

65. The applicant company claimed MDL 28,356,349.75 (the equivalent of EUR 2,388,949 at the date of submitting its observations on just satisfaction) for pecuniary damage suffered as a result of the quashing of the final judgments of 1 August 1996 and 26 July 1996 (Proceedings A and B). The applicant company submitted that this amount would cover the losses suffered as a result of the negative image it suffered after losing, in the domestic proceedings, the amount awarded by the final judgment of 1 August 1996, adjusted for inflation and lost interest.

66. The applicant company did not claim any compensation in respect of the judgment of 25 October 2000 (Proceedings C) or any non-pecuniary damage.

67. The Government considered that the applicant's claims were inappropriate given that there had been no violation of any provision of the Convention in this case.

68. The Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Moldovan Government and the applicant.

B. Costs and expenses

69. The applicant also claimed EUR 237 for the costs and expenses incurred in respect of the proceedings before the domestic courts and before the Court. In support of its claims the applicant company has presented to the Court copies of relevant receipts.

70. The Government made the same submission as in respect of the pecuniary and non-pecuniary damage.

71. The Court is satisfied that the costs and expenses were actually and necessarily incurred in order to obtain redress for or prevent the matter found to constitute a violation of the Convention and were reasonable as to quantum. In accordance with the criteria laid down in its case law, it awards the applicant the totality of the sum claimed under this head.

C. Default interest

72. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention as a result of the use of Article 38 § 3 of the Law on Economic Courts;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention as a result of use by the Prosecutor General of Article 5 (2) of the old Code of Civil Procedure;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 237 (two hundred

and thirty seven euros) in respect of costs and expenses plus any tax that may be chargeable on the above amount;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Holds that the remaining questions concerning the application of Article 41 of the Convention are not ready for decision; and consequently,

(a) reserves the said questions;

(b) invites the Moldovan Government and the applicant to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may 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 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President