CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF POPOV v. MOLDOVA (No. 1)

(Application no. 74153/01)

JUDGMENT
(Just satisfaction)

STRASBOURG

17 January 2006

FINAL

17/04/2006

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 Popov v. Moldova (no. 1),

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. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 13 December 2005,

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. In a judgment delivered on 18 January 2005 ("the principal judgment"), the Court held that there has been a violation of the applicant's rights provided by Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention on the account of non-execution of the judgment of 5 November 1997 until 26 May 2004 (see *Popov v. Moldova*, no. 74153/01, 18 January 2005).

3. Under Article 41 of the Convention the applicant sought just satisfaction of 125,689 euros (EUR) for pecuniary damage.

4. Since the question of the application of Article 41 of the Convention was not ready for decision as regards pecuniary damage, the Court reserved it and invited the Government and the applicant to notify the Court of any agreement that they might reach.

THE LAW

5. 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

6. The applicant claimed EUR 125,689 for pecuniary damage suffered as a result of his inability to use his house and the adjacent plot of land between 5 November 1997 and 26 May 2004.

7. He contended that he would have rented out the house and 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 United States 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.

8. 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.

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

10. The Court considers it clear that the applicant must have suffered pecuniary damage as a result of his lack of control over his house from 5 November 1997 until 26 May 2004 (see *Prodan v. Moldova*, no. 49806/99, § 71, ECHR 2004-...).

11. It is noted that the applicant already had accommodation and therefore it is reasonable to surmise that he would have attempted to let the house. As to the adjacent land, the Court does not consider it necessary to

take it into consideration, because the judgment of 5 November 1997 did not contain any reference thereto.

12. The Court considers reasonable the general approach proposed by the applicant for assessing the loss suffered as a result of quashing of the judgment. However, it is not ready to accept the amount of the monthly rent of USD 10 presented by him. In contrast to position in the *Prodan v. Moldova* judgment (cited above), the price relied upon by the applicant has not been calculated on the basis of a valuation of the applicant's house, but is the average rental price in the neighbourhood, where, according to the estate agents relied upon by the applicant, prices vary from USD 3 to USD 20 per square metre. In the absence of any more detailed evidence as to local rents and the value of the property, the Court will take as a basis for its calculation the lowest price presented by the estate agencies, namely USD 3 per square metre.

13. In making its assessment, the Court takes into account the fact that the applicant would inevitably have experienced certain delays in finding suitable tenants and would have incurred certain maintenance expenses in connection with the house and with taxation.

14. Having regard to the above circumstances, and deciding on an equitable basis, the Court awards the applicant the total sum of EUR 14,840 for pecuniary damage suffered until 26 May 2004 as a result of non-enforcement of the judgment of 5 November 1997.

B. Default interest

15. 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. *Holds* by a majority

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 14,840 (fourteen thousand eight hundred and forty euros) in respect of pecuniary damage, plus any tax that may be chargeable;

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

2. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2006, 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 PAVLOVSCHI

As a dissenting judge in the cases of *Popov v. Moldova* (no. 1) and *Popov v. Moldova* (no. 2), I am also unable to agree with the granting of what it is described in the judgment as "pecuniary damage".

I see no need to repeat the general reasons for my disagreement with the finding of a violation in the *Popov* (no. 1) case, which have already been expressed in my dissenting opinion in that case and which, in turn, make it impossible for me, as a matter of principle, to agree on the just satisfaction issue.

In this dissenting opinion I should like to state my arguments against the general approach taken by the majority in the instant judgment.

I have already tried to express my vision of the situation before us in my dissenting opinion in *Prodan v. Moldova*, where, partly and in so far as Article 41 was concerned, similar issues were at stake, but I perceive that there is a need for some additional clarification. To some extent this necessity can be explained by the fact that the applicant in *Prodan* had a valid final judicial decision in her favour, whereas the applicant in the instant case does not have such a decision, as it has been quashed by way of revision proceedings.

This leads me to the conclusion that a ruling on just satisfaction in this case is premature, in that domestic judicial proceedings have not yet been finalised and we do not know what final decision will be delivered by the Moldovan judicial authorities. Yet this decision is extremely important for the present case.

In my opinion, the importance of the Moldovan courts' judgment for correct resolution of this case lies in the fact that it could potentially contain a final finding concerning the main issue, namely whether Mr Popov:

(a) is the owner of the apartments that he has previously claimed; or,

(b) he is not the owner.

The latter would mean that he has claimed apartments which have never belonged to his family, by submitting to the domestic courts and to the ECHR misleading or false information.

Allow me, briefly, to analyse both scenarios.

1. Mr Popov is not the owner of the apartments that he has claimed

If Mr Popov is found not to be the owner of the apartments he has claimed, this would mean that he was not entitled to rent out the apartments (which did not belong to him). Consequently, he would not be entitled to claim loss of the "expectation interests" which he could presumably have received by letting out the apartments in issue. Claiming this type of "damages" would clearly mean claiming a form of "unjust enrichment", which would never be granted by any judicial authority in the world, as it would be in contradiction with one of the basic principles of civil law,

which states that "**no one ought to derive any benefit from his own wrongdoing**".

In this case, the majority's decision to award Mr. Popov "pecuniary damage" amounting to EUR 14,840 would, in practical terms, mean not compensation for any "damage", but rather a form of compensation for the "loss of opportunity" to have been "unjustly enriched".

My legal knowledge is perhaps insufficient, but I have never heard of a loss of "unjust enrichment" being treated as a form of "pecuniary damage" which must be compensated by way of judicial decision.

This approach would, in my opinion, represent a very questionable "contribution" to the civil-law doctrine and would open the Court's judgment to criticism.

By acting in this way, the majority has, to all intents and purposes, opened the infamous "Pandora's box"; as I see it, applicants in each and every case would be entitled from now on to lodge claims for compensation of their "loss of unjust enrichment".

I genuinely hope that this will not be the case and that, sooner or later, this utterly misguided approach will be reconsidered and changed. Or perhaps the Moldovan judicial authorities will find that Mr Popov was the owner of the apartments in issue and, by reaching this conclusion, they would help to rid us of the prospects described above.

2. Mr Popov is the owner of the apartments that he has claimed

If one presumes that Mr Popov is found by the Moldovan courts to be the owner of the apartments in issue, then of course there would be no problem of "unjust enrichment". Instead, however, a host of other problems would arise.

In such a situation, the main challenge for me would be to ascertain which principles should be applied – those of the law of tort or those of the law of contracts.

Personally, I would be in favour of applying the principles and criteria of tort law to the present situation, because I fail to see any relation of a contractual nature between Mr Popov and the Moldovan State, either with regard to non-enforcement of a final judicial decision or to quashing of this judicial decision by way of revision proceedings initiated by private persons. Moreover, neither Mr Popov nor his learned representative ever claimed the existence of such a relationship.

In my view, non-enforcement of a final judicial decision or quashing of this judicial decision by way of revision proceedings could instead be seen as a "wrong" done to Mr Popov by the State, but the impossibility of regaining possession of the apartments claimed could be seen as "harm" caused to his legitimate interests. A direct causal link between the "wrong" done and the "harm" caused could be found. Thus, all the classical elements

of a tort could be seen in Mr Popov's case, if, of course, he is the owner of the apartments.

Unfortunately, as in the *Prodan v. Moldova* case, the majority preferred to take another approach, namely the "contractual" one, that is, an approach based on selective usage of the rules governing breach of contract, in a situation where no contractual rights and obligations are at stake.

My conclusion that the majority has based its decision concerning "just satisfaction" on a "contractual" approach is demonstrated by the following arguments.

In paragraph 9 of the present judgment we read:

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

The last passage, namely that **"...In the present case the reparation should aim at putting the applicant in the position in which he would have found himself had the violation not occurred..."** closely resembles a slightly modified version of the breach-of-contracts rule which originally read as follows: **"...The goal is to put the injured party in the position he or she would have been in if the contract had been performed according to its terms..."**[1]

A similar rule is to be found in the book "Introduction to the law and legal system of the United States", under the sub-title 'Remedies for Breaches of Contracts'. I quote:

> "...The most common kind of relief that is awarded in a suit for breach of contract is "compensatory damages". This type of damages is also referred to as "expectation damages" since such damages seek to repair the expectations of a party by awarding an amount of money that **will put the aggrieved party in the same position he would have been if the contract had been performed**..." [2]

(All emphasis added)

The existence of this "law of contracts" rule can be traced back to 1854, when the Court of Exchequer stated in *Hadley v. Baxendale*:

> "...the plaintiffs are entitled to be put in the same situation as they would have been in, if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by the non-performance of the defendant's contract..."

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[1] See: Peter Hay "Law of the United States" (Verlag C.H. Beck, Munich, 2002), page 134

[2] See: William Burnham "Introduction to the Law and Legal System of the United States" (West Publishing Co. St.Paul, Minn. 1995), page 394

At the same time, it should be noted that, in the same judgment *(Hadley v. Baxendale)* the Court of Exchequer introduced additional *conditio sine qua non* for the compensation of so-called "expectation damages", namely:

> "...the loss of profits ... cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants..."[1]

Since 1854 the rule that expectation damages could be compensated to the extent that these were foreseeable at the time the contract was concluded has become a generally recognised element of the expectation damages theory.[2]

Recovery of such kind of damages is limited to losses that are ascertainable to a "reasonable certainty".

As in *Prodan*, the applicant in the present case claims that, had the judgment been properly enforced, he would have obtained the apartments. Had he obtained the apartments he would have rented them out, and had he rented them out, he would have obtained a certain income. He then multiplies the number of square metres of the surface of the apartments by the average rent per month/square metre and by the number of months elapsed.

In my opinion, there is no direct causal link between the fact of non-enforcement of the judgment and the indirect "pecuniary damages" claimed by the applicant.

There is one more aspect worth mentioning, namely that letting out apartments is treated in Moldova as a form of taxable individual business activity. In order to conduct such an activity individuals must obtain a business licence.

Needless to say, the applicant failed to prove his intention to let out the apartments; at any rate, the case file does not contain a business licence.

In any event, losses of profits from new businesses that have not yet gone into operation are not usually recoverable because they are too speculative. The aggrieved party would be compensated for expenditure made in preparing to perform the contract and in ensuring part performance of the contract.[3]

As I have already mentioned, "expectation" damages theory forms part of the law of contracts and, more precisely, of breach-of-contract law. It is applicable under certain conditions, the first of which is the existence of a

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[1] See: www.kentlaw.edu/classes/rwarner/remedies/contract_lawhardley_v_baxendale.htm
[2] See: Peter Hay "Law of the United States" (Verlag C.H. Beck, Munich, 2002), page 134
[3] See: William Burnham "Introduction to the Law and Legal System of the United States" (West Publishing Co. St.Paul, Minn. 1995), page 395

contract concluded in a written form. “Expectation” damages resulting from the breach of a contract orally concluded can be granted only where the defendant has agreed to them. Another condition is that “expectation” damages must be foreseeable, so as to enable the parties to a contract to identify the legal and financial consequences of the breach of their contractual obligations, and to enable parties to decide what is more convenient for them – to continue to incur extra expense resulting from the fulfilment of their contractual obligations, or to breach them and pay the other party the financial compensation provided for by the contract. Thus, “expectation” damages should be of such a nature as to provide the parties with the clear possibility of calculating their financial losses in the event of a breach of contract.

It goes without saying that the applicant has never informed the authorities of his plans to rent out apartments or of the “damages” he has been experiencing or expecting, so that no one is in a position to confirm the foreseeable character of his financial claims.

The conditions described above were listed by the Kansas Court of Appeals in *MLK, Inc. v. University of Kansas (1997)*:

> “...To recover lost profit damages, the lost profits must have been contemplated at the time of contracting, must proximately result from a breach or termination of the contract, and must be shown with a reasonable degree of certainty.
>
> Breach of contract damages are limited to those damages which may fairly be considered as arising in the usual course of things or from the breach itself, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of a breach.
>
> Damages claimed which were not the proximate result of a breach of contract and those which are remote, contingent, and speculative in character cannot serve to support a judgment.
>
> Reliance damages, as with any other type of damages, must be the proximate result of a breach of contract...”[1]

My conclusion is as follows: in making use in the present case of breach-of-contracts law and, more specifically, expectation damages theory, the majority ought to have taken into consideration not merely one rule, but all the relevant rules and, first and foremost, the rule on the foreseeable character of damages, which, unfortunately, and I regret to say it, was not the case.

I am genuinely sorry for having described in detail some elements of the law of contracts here. The only reason that prompted me to reproduce the elements mentioned above and the rules governing breach of contracts

[1]See: MLK, Inc. v. University of Kansas
http://www.kscourts.org/kscases/ctapp/1997/19970228/74515.htm

(which is part of the law of contracts) was the need to demonstrate fully the inapplicability of their selective use in the cases such as the present one.

Thus, I find the "contractual" approach to the present case a defective one for four main reasons.

(1) No contractual rights and obligations between the applicant and the State are at stake.

(2) No written or oral contract has ever existed between the applicant and the Moldovan State,

(3) Even were one to perceive here the existence of various "contractual rights and obligations" which were breached by a party to the "contract" (presumably the Moldovan State), all the relevant rules governing breach of contract should have been applied, not only selected ones.

(4) I doubt very much that the "expectation damages" theory could apply to the present situation, in which the condition of the foreseeable character of the claimed damages has not been respected.

There is one more matter which I consider worth mentioning.

Article 41 of the Convention stipulates that:

> "...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..."

No word is said in the Convention about any kind of compensation for "damages". The Convention operates with the notion of "just satisfaction". My feeling is that, if the Chamber is in doubt with regard to the means of reparation for a violation found, the safest way to proceed would be to use the wording of the Convention and to avoid using inappropriate notions and formulating quite ambiguous and vague rules, which, in my opinion, are clearly inapplicable to the present type of cases and are capable of raising quite serious criticism on the part of civil law specialists.

This is where I respectfully disagree with my fellow judges.