



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

FOURTH SECTION

CASE OF MACOVEI AND OTHERS v. MOLDOVA

*(Applications nos. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03
and 31761/03)*

JUDGMENT

STRASBOURG

25 April 2006

FINAL

25/07/2006

*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 Macovei and others v. Moldova,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

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

Having deliberated in private on 28 March 2006,

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

PROCEDURE

1. The case originated in six applications (nos. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03 and 31761/03) 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 six Moldovan Nationals, Ms Galina Macovei, Ms Maria Socolov, Ms Svetlana Culicovschi, Mr Vladimir Morozov, Ms Galina Nagornî and Mr Valerii Chiuchin on 24 March 2003, 21 April 2003, 9 July 2003, 24 March 2003, 25 April 2003 and 21 July 2003 respectively.

2. All the applicants, except Mr Valerii Chiuchin who was unrepresented, were represented by Mr Vitalie Iordachi, acting on behalf of the "Lawyers for Human Rights", a non-governmental organisation based in Chişinău. The Moldovan Government ("the Government") were represented by their Agent, Mr Vitalie Pârlog.

3. The applicants complained about a breach of their right to a fair trial provided for by Article 6 § 1 of the Convention.

4. On 11 May 2004 the Court decided to communicate the applications to the Government. On 20 September 2005 it decided under the provisions of Article 29 § 3 of the Convention, to examine the merits of the applications at the same time as their admissibility.

5. On 28 March 2006 the Chamber decided to join the applications in accordance with Rule 42 § 1 of the Rules of the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

6. The applicants, all of whom are Moldovan citizens, live in the Republic of Moldova. They were born in 1961, 1946, 1939, 1946, 1946 and 1951 respectively.

7. In 1994 each applicant concluded a contract with ASITO (an insurance company incorporated in Moldova), according to the terms of which he or she paid an insurance premium in exchange for an annuity pension. The size of the monthly pensions varied between 200 Moldovan lei (MDL) and MDL 600 (between the equivalent of 45 United States dollars (USD) and USD 135 at the time).

8. On different dates between 1999 and 2001 ASITO stopped paying the pensions, in some cases, or refused to start paying them, in other cases, invoking a change in the interest rate of the National Bank of Moldova and calling for the termination of the contracts.

9. On unspecified dates in 2001, the applicants brought civil actions against ASITO, seeking the payment of the pension arrears to date and requiring the company to abide by the contracts of 1994.

10. All the applicants obtained final and enforceable judgments between 2001 and 2002, by which the domestic courts ordered ASITO to pay the pension arrears and to resume the execution of the contracts. The courts found the contracts to be valid and dismissed ASITO's requests to terminate them or to exempt it from abiding by them on the ground of *force majeure*, which in ASITO's view was constituted by the economic crisis, inflation and the change in the interest rate of the National Bank of Moldova. The Court was not presented with information on whether those judgments were complied with by ASITO.

11. On 14 December 2001 the Prosecutor General lodged an "appeal in the interest of the law" with the Supreme Court of Justice. According to the Prosecutor General, the appeal had the purpose of clarifying the controversy surrounding the contracts and of setting a uniform practice for all courts.

12. On 11 March 2002, the Plenary Supreme Court of Justice issued a judgment deciding the dispute between ASITO and the pension beneficiaries in favour of the former. In particular, it ruled that the economic crisis, inflation and the change in the interest rate of the National Bank of Moldova could be relied upon by ASITO in order unilaterally to avoid the annuity contracts. It also ruled that its judgment was binding on all the courts, although it could not, however, affect already existing judgments and it could not be used against the parties to proceedings which had already been decided.

13. Subsequently, on different dates, ASITO brought civil actions against the applicants asking for the termination of the contracts concluded in 1994. It relied on the same arguments as in the first sets of proceedings and also the judgment of the Plenary Supreme Court of 11 March 2002.

14. Between December 2002 and June 2003 ASITO obtained final favourable judgments against all the applicants. The courts dismissed the applicants' submissions to the effect that the matter of the unilateral denunciation of the contracts by ASITO on grounds of hardship had already been resolved by final judgments and found instead that the subject matter of the proceedings which had ended in final judgments favourable to the applicants had been different, because those proceedings had been concerned with the enforcement of the annuity contracts up to the moment of their termination, while the subject matter of the new proceedings was the termination of the contracts.

15. On 25 October 2004, after the Court communicated the present cases to the Government, the Plenary Supreme Court of Justice upheld a revision request lodged against its judgment of 11 March 2002 by a group of ASITO pensioners who are not applicants in the present cases. The Supreme Court quashed its previous judgment while finding *inter alia* that ASITO could not rely on the economic crisis, inflation and the change in the interest rate of the National Bank of Moldova for avoiding its annuity contracts.

II. RELEVANT DOMESTIC LAW

16. The old Code of Civil Procedure in force between 26 December 1964 and 12 June 2003 read as follows:

Section 218. Reasons for discontinuation of the proceedings

...

3) the proceedings shall be discontinued if previously a final judgment has been adopted in a dispute between the same parties, regarding the same object and having the same scope ...

Section 331. The appeal in the interest of the law

In order to ensure a uniform application of the law in the entire territory of the country, the Prosecutor General can address *ex officio* to the Supreme Court of Justice an appeal, asking the court to give an opinion on questions of law which have been solved differently by the courts.

The Prosecutor General's appeal shall be examined in a hearing by the Plenary Supreme Court.

The judgments adopted by the Plenary cannot affect already existing judgments and they cannot be used against the parties to proceedings where judgments have been

delivered. The judgments adopted in respect of the appeals in the interest of the law shall be brought to the attention of the courts and shall be binding on them.

17. On 12 June 2003 a new Code of Civil Procedure entered into force. Section 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 have been known earlier;
- d) When, after the adoption of a judgment, new documents have been discovered, that were hidden by one of the parties to the proceedings or that could not have been presented to the court for reasons not imputable to the party who seeks revision;...
- f) When a court decision or a decision of another body on which a judgment is based, has been annulled... ”

18. Section 450, insofar as relevant, reads as follows:

“A revision request may be lodged:

...

- c) Within three months of 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, in cases provided by Section 449 (c);
- d) Within three months of the date on which the documents have been discovered, in cases provided by Section 449 (d);
- e) Within three months of the date on which the court decision or the decision of another body on which the judgment is based have been annulled, in cases provided by Section 449 (f)...”

THE LAW

19. The applicants complained in substance of a breach of the principle of legal certainty provided for by Article 6 § 1 of the Convention. All the applicants except Mr V. Cliuchin also complained that the proceedings were not fair because of a secret deal between ASITO and the Government (see paragraphs 22-23 below).

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. ...”

20. The applicants also complained that the final judgments favourable to ASITO had had the effect of infringing their right to peaceful enjoyment of their possessions as secured by Article 1 of Protocol No. 1 to the Convention, which, insofar as relevant, 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.”

21. All the applicants except Mr V. Cliuchin also complained under Article 13 of the Convention, which provides:

“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.”

I. ADMISSIBILITY OF THE COMPLAINTS

A. The complaint about the alleged secret deal between ASITO and the Government and the alleged abuse of the right of petition

22. All the applicants, except Mr Cliuchin, complained under Article 6 of the Convention that the proceedings had been unfair because of an alleged secret arrangement between ASITO and the Government. They claimed that ASITO had secretly agreed with the Government that it would withdraw its application to the Court (in which a judgment was subsequently adopted: *Asito v. Moldova*, no. 40663/98, 8 November 2005), in exchange for the Government’s assistance with the problem with the pensioners.

23. According to the applicants, as a result of that agreement the Government arranged for the appeal in the interest of the law by the Prosecutor General and the judgment of the Plenary Supreme Court of 11 March 2002, by which it was ruled that all the disputes between ASITO and the pensioners should have been decided in favour of ASITO.

24. The only evidence adduced by the applicants in support of their submission was the coincidence in time between the friendly settlement negotiations in the *Asito v. Moldova* case and ASITO’s attempted withdrawal of its application in that case, on the one hand, and the appeal in the interest of the law on the other.

25. The Government denied the applicants’ allegations, calling them “abusive insinuations”. They argued that the applicants’ allegations were

offensive and defamatory in nature and submitted that the Court should declare their applications inadmissible for abuse of the right of petition.

26. The Court considers that the applicants have failed to substantiate their submission concerning the alleged secret agreement. Accordingly, this part of the complaint under Article 6 must be dismissed for being manifestly ill-founded.

27. Insofar as the Government's objection concerning the abuse of the right of petition is concerned, 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 *Popov v. Moldova* (no. 1), no. 74153/01, § 49, 18 January 2005; *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 applicants have based their allegations on information which they knew to be untrue. Accordingly, this objection fails.

B. The applicants' victim status

28. The Government argued that the applicants could not claim to have standing as victims, since during the period of the validity of the annuity contracts, the applicants received pensions the amounts of which exceeded by five to ten times the amount of the insurance premiums paid by them in 1994.

29. The applicants disagreed with the Government and argued that they had not lost their victim status.

30. The Court notes that the subject matter of the present case is the termination of pension contracts as a result of proceedings which were allegedly unfair and contrary to the principle of legal certainty. According to the contracts, and to the judgments in their favour, the applicants were entitled to receive pensions for the rest of their lives, no matter how long they lived or how much money was paid to them. In such circumstances the termination of the contracts in the course of their lives, without their consent, constitutes an interference with their proprietary interests. Accordingly, the Court cannot accept the Government's argument.

31. It follows that the Court rejects the Government's second preliminary objection.

C. Failure to exhaust domestic remedies

32. In their letters of 20 June and 18 November 2005 the Government submitted that, since the quashing of the judgment of the Plenary Supreme Court of Justice of 11 March 2002, on 25 October 2004, a new remedy had become available to the applicants. In particular, they argued that it had

become possible for them to lodge revision requests under Section 449 (c, d and f) of the new Code of Civil Procedure (see paragraph 17 above) with the Supreme Court of Justice and request the re-opening of the proceedings which had ended with final judgments favourable to ASITO. The Government submitted the example of a case similar to the present. In that case the pensioner's revision request under Article 449 (f) of the Code of Civil Procedure was upheld by the Supreme Court of Justice, the final judgment favourable to ASITO was quashed and the re-opening of the proceedings before the second instance court was ordered.

33. The applicants disagreed with the Government and, relying on *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII, argued that it would be too onerous to require them to seek the re-opening of the proceedings and that in any event the redress obtained from such proceedings would not be full. Mr V. Cliuchin also submitted that the Government had passed over in silence the fact that according to Section 450 of the new Code of Civil Procedure (see paragraph 18 above) any such revision request might be time-barred if lodged more than three months after the adoption of the judgment of the Supreme Court of 25 October 2004.

34. The Court recalls that under Article 35 § 1 of the Convention normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 66).

35. In the present case it appears that the revision requests suggested by the Government might be time-barred since normally they could have been introduced within three months from the adoption of the judgment of the Supreme Court of 25 October 2004 (see paragraph 18 above). Moreover, even assuming that a revision request would not be time-barred, the Court notes that in the case cited by the Government, the Supreme Court of Justice did not redress the applicant's situation but merely ordered the re-opening of the proceedings brought by ASITO against him.

36. Lastly, the Court notes that even assuming that the outcome of the re-opened proceedings would be favourable to the applicants, they would not receive full redress in respect of the alleged breaches of the Convention. In particular, the scope of the re-opened proceedings would be confined to ASITO's civil actions to terminate the annuity contracts (see paragraph 13 above). For any compensation in respect of the alleged breaches of Article 6 and Article 1 of Protocol No. 1, the applicants would have to institute new domestic proceedings against the Government, after obtaining favourable judgments in the re-opened proceedings.

37. In view of the above, the Court concludes that the applications cannot be declared inadmissible for non-exhaustion of domestic remedies and accordingly the Government's objection must be dismissed.

D. Conclusion on admissibility

38. The Court considers that the applicants' complaints under Articles 6 (concerning legal certainty), 13 and 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

39. Under Article 6 and 13 of the Convention, the applicants complained about a breach of the principle of legal certainty due to the repeated examination by the domestic courts of a dispute which previously had ended in final judgments favourable to them.

40. The Government argued that there was no violation of the applicants' rights provided for by Article 6 of the Convention.

41. 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 (*Brumărescu v. Romania*, cited above, § 61).

42. Legal certainty presupposes respect for the principle of *res judicata* (ibid., § 62), 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.

43. In *Roșca v. Moldova*, no. 6267/02, 22 March 2005, the Court found that the request for annulment procedure, under which a final judgment could be challenged indefinitely by the Prosecutor General, was in breach of the principle of legal certainty. A violation was found on the same grounds in *Popov v. Moldova (no. 2)*, no. 19960/04, 6 December 2005, where a final judgment was quashed following an abusive revision procedure. In both

cases the Court held that the “loss” by a litigant of a favourable judgment was incompatible with the Convention.

44. In the present case, the final judgments favourable to the applicants were never quashed, as was the case in *Roşca and Popov (no. 2)*. However, the subsequent judgments favourable to ASITO, in which the courts repeatedly examined ASITO’s plea for the legality of its unilateral denunciation of the contracts on exactly the same grounds as had been rejected in the first set of proceedings, deprived them of any effect. This amounted, exactly as in *Roşca and Popov (no. 2)*, to a “losing” by the applicants of favourable judgments.

45. By upholding ASITO’s civil actions for the termination of the annuity contracts, in circumstances in which the same question had previously been resolved by final and binding judgments, the domestic courts infringed the principle of legal certainty and the applicants’ “right to a court” under Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Roşca*, cited above, § 28).

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

47. 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 the applicants’ complaint. 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

48. The applicants complained that the final judgments favourable to ASITO had had the effect of infringing their right to peaceful enjoyment of their possessions as secured by Article 1 of Protocol No. 1 to the Convention.

49. The Court considers that the applicants’ entitlement to annuity pensions obtained by virtue of the final judgments favourable to them amounted to judgment debts. It 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). Furthermore, quashing such a judgment, or as in the present case, rendering it ineffective, after it has become final and unappealable will constitute an interference with the judgment beneficiary’s right to the peaceful enjoyment of that possession (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 applicants were required to bear an individual and excessive burden (cf. *Brumărescu*, cited above, §§ 75-80).

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicants claimed the following amounts for pecuniary damage suffered as a result of the breach of their Convention rights: Ms Galina Macovei – 771 euros (EUR), Ms Maria Socolov – EUR 918, Ms Svetlana Culicovschi – EUR 716, Mr Vladimir Morozov – EUR 716, Ms Galina Nagornii – EUR 1,775 and Mr Valerii Cliuchin – EUR 18,184.

53. All the applicants except Mr Valerii Cliuchin claimed the amounts which they did not receive from ASITO from the termination of their annuity contracts (see paragraph 14 above) to date, to which they added a penalty of 0.3 percent interest per day calculated for the last six months prior to their submitting their just satisfaction claims. The penalty of 0.3 percent was provided for in the annuity contracts and the six-months limit was provided for by the domestic law.

54. Mr Cliuchin used a different method of calculation. He multiplied the equivalent in US Dollars of his monthly pension as of 1994 by 13.4 years, which according to him represented the number of years between the termination of his annuity contract (see paragraph 14 above) and his reaching the age of 64.4 years (the average life expectancy for males in Moldova).

55. The Government disagreed with the amounts claimed by the applicants and argued that they were not entitled to any compensation under this head of Article 41.

56. The Court considers that the applicants must have suffered pecuniary damage as a result of the breach of their Convention rights. The Court considers acceptable the method of calculation employed by Ms Galina Macovei, Ms Maria Socolov, Ms Svetlana Culicovschi, Mr Vladimir Morozov and Ms Galina Nagornii and awards them the respective sums claimed by them in respect of pecuniary damage.

57. At the same time, the Court does not consider reasonable the approach proposed by Mr Valerii Cliuchin. Deciding on an equitable basis it awards him the total sum of EUR 2,000 for pecuniary damage.

B. Non-pecuniary damage

58. The applicants claimed the following amounts for non-pecuniary damage: Ms Galina Macovei, Ms Maria Socolov, Ms Svetlana Culicovschi, Mr Vladimir Morozov and Ms Galina Nagornîi – EUR 6,761 each and Mr Valerii Cliuchin – EUR 70,000.

59. The Government disagreed with the amounts claimed and argued that the applicants had not adduced any evidence of having suffered any stress and anxiety.

60. The Court takes the view that the applicants have suffered some non-pecuniary damage as a result of the violations found which cannot be made good by the Court's mere finding of a violation. The particular amounts claimed are, however, excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicants EUR 2,000 each.

C. Costs and expenses

61. Ms Galina Macovei and Ms Maria Socolov each claimed EUR 1,500 for the costs and expenses incurred before the Court, of which EUR 1,450 represented representation fees and EUR 50 secretarial expenses.

62. Mr Valerii Cliuchin claimed EUR 63 for secretarial expenses and the rest of the applicants did not make any claims under this head of Article 41.

63. The Government did not agree with the amounts claimed, stating that the applicants had failed to prove the alleged representation and secretarial expenses.

64. 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, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

65. In the present case, regard being had to the itemised list submitted, the above criteria, the complexity and the importance of the case, the Court awards Ms Galina Macovei and Ms Maria Socolov EUR 1,200 each and Mr Valerii Cliuchin the entire amount claimed.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* inadmissible the complaint under Article 6 of the Convention concerning the existence of a secret arrangement between the Government and ASITO;
2. *Declares* the remainder of the application admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
5. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
6. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention:
 - to Ms Galina Macovei – EUR 771 (seven hundred and seventy-one euros) for pecuniary damage, EUR 2,000 (two thousand euros) for non-pecuniary damage and EUR 1,200 (one thousand and two hundred euros) for costs and expenses,
 - to Ms Maria Socolov – EUR 918 (nine hundred and eighteen euros) for pecuniary damage, EUR 2,000 (two thousand euros) for non-pecuniary damage and EUR 1,200 (one thousand and two hundred euros) for costs and expenses,
 - to Ms Svetlana Culicovschi – EUR 716 (seven hundred and sixteen euros) for pecuniary damage and EUR 2,000 (two thousand euros) for non-pecuniary damage,
 - to Mr Vladimir Morozov – EUR 716 (seven hundred and sixteen euros) for pecuniary damage and EUR 2,000 (two thousand euros) for non-pecuniary damage,
 - to Ms Galina Nagornîi – EUR 1,775 (one thousand seven hundred and seventy-five euros) for pecuniary damage and EUR 2,000 (two thousand euros) for non-pecuniary damage,
 - to Mr Valerii Cliuchin – EUR 2,000 (two thousand euros) for pecuniary damage, EUR 2,000 (two thousand euros) for non-pecuniary damage and EUR 63 (sixty-three euros) for costs and expenses;
 - (b) that the above amounts shall 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;

(c) 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. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 25 April 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 concurring opinion of Mr Garlicki joined by Mr Pavlovschi is annexed to this judgment.

N.B.
M.O'B.

CONCURRING OPINION OF JUDGE GARLICKI JOINED BY JUDGE PAVLOVSKI

The problem in this case is how to end an annuity contract concluded for the life of a beneficiary. I believe that there may be extraordinary situations (in particular, resulting from economic crises and inflation) in which a State's decision allowing such termination would not be, per se, incompatible with the Convention. While, as in respect to all interferences with property rights, the State has to preserve a fair balance between the interests of both parties, it does not mean that the State is not allowed to act at all.

The most appropriate instrument for the State action is, at least within the Continental tradition, a legislative intervention. But, in most legal systems, a precedential ruling of the Supreme Court may have the same effect and not offend against the "prescribed-by-law" requirement. The principle of legal certainty requires that such a ruling has only prospective effect and, in any case, it must not affect earlier judgments and decisions in individual cases. But, like a new law, such a ruling can bring a change into the legal system and can oblige all courts to follow it in their future judgments.

This was what happened in the Macovei case. The 2002 judgment of the Supreme Court opened the possibility of terminating, unilaterally, existing annuity contracts. It did not quash judgments that had been adopted earlier in individual cases; those judgments remained valid and enforceable in respect to ASITO's obligation to pay the pension arrears and to continue the execution of the contracts. What changed was that ASITO was allowed to institute new judicial proceedings in order to have the contracts terminated. But such termination could have only a prospective effect.

That is why I am not persuaded that the majority's reliance on Brumarescu (and, in consequence, also on Rosca and Popov) was really appropriate. Brumarescu dealt with the "extraordinary appeal" procedure whereby it was possible to quash (with an *ex tunc* effect) a final judgment to the detriment of a party who had already "won" the case. In the present case, the Supreme Court intervention had an impact on the final judgments in individual cases, but only that it permitted termination of the existing contracts. This could give rise to problems under Article 1 of Protocol No. 1, but it was less objectionable under Article 6 § 1 of the Convention. A final judicial decision may protect contracts against any retroactive modifications. It cannot, however, offer to such contracts a perpetual immunity against regulatory interventions, providing the "fair balance" requirements have been observed by the State.

Those requirements were not observed in the Macovei case. Even if there had been sufficient grounds to terminate the existing contracts, the domestic authorities could have adopted solutions offering more protection to the applicants. The extinguishment of contracts could have been extended in

time, the State could elaborate a friendly settlement scheme and, if the ASITO company was genuinely unable to meet its obligations, bankruptcy proceedings could be instituted. None of those possibilities, however, has been explored. Instead, the authorities chose the “simplest solution”, that put the entire burden on the applicants and absolve the company from any liability.

To conclude: I am in full agreement with the majority’s finding of a violation of Article 1 of Protocol No. 1. I am less impressed by the majority’s interpretation of Article 6 § 1, in particular, its failure to distinguish this case from the Brumarescu precedent. This case offered a good opportunity to go beyond Brumarescu and to clarify another important aspect of legal certainty.