



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

FOURTH SECTION

CASE OF ISTRATE v. MOLDOVA

(Application no. 53773/00)

JUDGMENT

STRASBOURG

13 June 2006

FINAL

13/09/2006

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 Istrate 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 S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 23 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 53773/00) 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 Mr Andrei Istrate.

2. The Moldovan Government (“the Government”) were represented by their Agent, Mr Vitalie Pârlog.

3. On 23 April 2002 and 29 November 2005 the Court communicated 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1937 and lives in Chişinău. He is a pensioner.

5. In 1998 he lodged with the Râşcani District Court a civil action against a third person (“C.”) seeking compensation for alleged non-compliance with a contract between them.

6. Between February and July 1998 the court adjourned the hearings on six occasions due to C.’s failure to appear before it.

7. On 21 July 1998, the Râşcani District Court decided to hear the case in the absence of C., while finding that he had been legally summonsed. It

upheld the applicant's action and ordered C. to pay him 1,500 Moldovan lei (MDL) (the equivalent of approximately 287 euros (EUR) at the time).

8. Since neither of the parties appealed against the judgment within the legal time-limit of fifteen days, it became enforceable on 5 August 1998, when an enforcement warrant was issued.

9. After that date the applicant complained on numerous occasions to different State authorities about the non-enforcement of the judgment of 21 July 1998. In particular he complained to the Râșcani District Court, the Ministry of Justice and to the Superior Council of Magistrates.

10. On an unspecified date in 2000 the judgment was partially enforced, the applicant receiving from the bailiff MDL 500.

11. In their observations on the admissibility and merits of the case of July 2002, the Government informed the Court that after the communication of the case, the Chișinău Regional Court had examined an appeal allegedly lodged by C. on 10 December 1998 and had quashed the judgment of 21 July 1998. The Government also argued that the judgment of 21 July 1998 had been served on C. on 27 November 1998.

12. The domestic case-file, sent to the Court by the Government, contains an appeal signed by C., dated 10 December 1998 and bearing two entry stamps. The first stamp is of an unknown origin and has the date 10 December 1998 but no entry number. The second stamp is that of the Râșcani District Court and bears the date 15 May 2002 and the entry number 2304.

13. The domestic case-file does not contain any evidence as to why the appeal was not examined between 10 December 1998 and 11 June 2002 or to the effect that between those dates defendant C. had made any enquiries about his appeal.

14. In his appeal C. disputed the merits of the case and requested an extension of the legal time-limit for lodging the appeal. He argued that he only found out about the judgment of 21 July 1998 on 27 November 1998.

15. On 21 May 2002, C. lodged a request with the Chișinău Regional Court asking for a stay of the enforcement proceedings. He also argued that he had found out about the judgment of 21 July 1998 in December 1998.

16. Also on 21 May 2002, the President of the Chișinău Regional Court appointed Judge N. Traciuc to take charge of the case and decided that the first hearing was to take place on 4 June 2002.

17. On 4 June 2002 Judge N. Traciuc issued a certificate confirming the fact that the case of *Istrate v. C.* was on the role of the Chișinău Regional Court and that for that reason a stay of the enforcement proceedings of the judgment of the first-instance court had been ordered. The case-file does not contain any formal decision to stay the proceedings.

18. On 11 June 2002 the Chișinău Regional Court examined C.'s appeal in the absence of the applicant and upheld it. It quashed the judgment of 21 July 1998 and ordered the re-opening of the proceedings. It did not,

however, examine C.'s request for a prolongation of the time-limit for lodging the appeal.

19. It appears from the case-file sent by the Government that the applicant was sent a telegram informing him of the hearing of 11 June 2002; however, the file does not contain any copy of a recorded delivery receipt.

20. According to the applicant he found out about the appeal and the judgment of 11 June 2002 from the Government's observations of July 2002 when they were sent to him by the Court.

21. On 27 December 2002 the Râșcani District Court struck the case out of its list of cases due to the applicant's failure to appear.

II. RELEVANT DOMESTIC LAW

22. The relevant provisions of the Code of Civil Procedure in force at the material time, concerning enforcement, read as follows:

Section 338. The issuing of an enforcement warrant

An enforcement warrant shall be issued to the plaintiff by a court, after the judgment has become final...

Section 343. The request for enforcement

The bailiff shall start the enforcement of a judgment upon the request of [one of the parties to the proceedings]...

Section 366. The termination of the enforcement proceedings

The enforcement proceedings shall be discontinued if

...

2) the defendant has no assets or income...;

[In this case] the bailiff shall draw up a decision which shall be verified and approved by a court decision.

23. The relevant provisions of the Code of Civil procedure in force at the material time, concerning appeals, read as follows:

Section 114. Extension of a time-limit

Where a person has failed to comply with a legal time-limit for reasons considered by a court to be plausible, that time-limit may be prolonged by the court.

A request for the extension of the time-limit shall be lodged with the court concerned and shall be examined within a court hearing....

A court judgment dismissing a request for extension of a time-limit may be challenged by way of an appeal.

Section 282. The time-limit for lodging an appeal

The legal time-limit for lodging an appeal is fifteen days if the law does not provide otherwise.

For persons who did not participate in the examination of the case, the time-limit starts to run from the date on which they receive a copy of the judgment....

Section 284. The extension of the time-limit

The time-limit for lodging an appeal may be extended in accordance with the provisions of Section 114 of the present Code. If a court does not have reasons to extend the time-limit, it shall dismiss the appeal as time-barred.

THE LAW

24. The applicant complained that the non-enforcement of the judgment of 21 July 1998 until 11 June 2002 and its subsequent quashing by the Chişinău Regional Court on the latter date, violated Article 6 § 1 of the Convention.

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. ...”

25. The applicant also complained that the non-enforcement and the subsequent quashing of the judgment of the Râşcani District Court of 21 July 1998 had the effect of infringing his right to peaceful enjoyment of his possessions as secured by Article 1 of Protocol No. 1 to the Convention, 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.

I. ADMISSIBILITY OF THE COMPLAINTS

A. Failure to exhaust domestic remedies

26. The Government submitted that the applicant had not exhausted remedies available to him under Moldovan Law, as required by Article 35 § 1 of the Convention. In particular, they submitted that the re-opened proceedings ended with the striking out of the applicant's case on the ground of his failure to appear at the hearing.

27. The applicant disagreed and argued that he had exhausted all the domestic remedies available to him.

28. The Court notes that there are two distinct though interrelated complaints in this case: one about the non-enforcement of the judgment of 21 July 1998 and another about the quashing of that judgment after the communication of the case to the Government.

29. In so far as the first complaint is concerned, the Court observes that a similar situation has already been examined in the cases of *Popov v. Moldova* (no. 1), no. 74153/01, 18 January 2005 and *Daniliuc v. Moldova*, no. 46581/99, 18 October 2005, in which the Court found that the fact of the quashing of a final judgment did not exclude the State's responsibility for a prior failure to enforce the judgment within a reasonable period and consequently did not call into question the final nature of the judgment in question. Although the final nature of the judgment may be open to doubt in view of the proceedings leading to its quashing, the judgment remained enforceable until June 2002 in the same way as a final judgment. Since the Government have failed to advance any grounds for distinguishing the present case in respect of the exhaustion requirement, the Court finds no reason to depart from its decision in the *Popov* and *Daniliuc* cases. Accordingly this submission fails.

30. As to the complaint about the quashing of the judgment of 21 July 1998 on 11 June 2002, the Court considers that the question of effective remedies is so closely bound up with the merits of the case that it is inappropriate to determine it at the present stage of the proceedings. The Court therefore decides to join this objection to the merits.

B. Alleged abuse of the right of petition

31. On 14 April 2005 the Court received a letter signed by the applicant and dated 1 September 2003. The letter was posted on 7 April 2005 and the applicant stated in it *inter alia* that he had previously been the victim of an attempted murder, that he was afraid for his life and that he sought the Court's protection. He had also stated that the letter had been given to a third person who had been instructed to post it in case of his disappearance.

32. The Court asked the Government to comment on the letter. In their comments of 29 April 2005 the Government informed the Court *inter alia* that an investigation of the applicant's alleged disappearance had been conducted by the police and it had been found out that nothing had happened to him and that he had left the city for a lengthy period of time without informing anybody as to his whereabouts. The report drawn up by the police was submitted to the Court.

33. The Government argued that the applicant's letter was abusive and that the Court should declare the application inadmissible for abuse of the right of petition.

34. The applicant contacted the Court in June 2005 and protested against some expressions used in the report presented by the Government. He did not dispute, however, the fact that he had been away for a long period of time.

35. Having examined the report drawn up by the police, the Court considers that in the circumstances of the present case the applicant's letter cannot be considered abusive within the meaning of Article 35 of the Convention. Accordingly this objection should be dismissed.

C. Conclusion on admissibility

36. The Court considers that the applicant's complaints under Article 6 § 1 of the Convention and 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 3 above), the Court will immediately consider the merits of these complaints.

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

A. The Court's findings of facts and law

1. Concerning the non-enforcement of the judgment of 21 July 1998

37. The applicant complained under Article 6 § 1 of the Convention about the failure of the authorities to execute the judgment of the Râșcani District Court of 21 July 1998.

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

39. The Court recalls 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 the *Hornsby v. Greece* judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 510, § 40). That does not mean that a State could be held responsible for non-enforcement of a judgment due to the insolvency of the debtor (*Sanglier v. France*, 50342/99, § 39, 27 May 2003). However, when the authorities are obliged to act in order to enforce a judgment and they fail to do so, their inactivity can engage the State’s responsibility on the ground of Article 6 § 1 of the Convention (*Scollo v. Italy*, judgment of 28 September 1995, Series A no. 315-C, § 44).

40. It is true that in the present case the judgment of 21 July 1998 was quashed by the Chişinău Regional Court on 11 June 2002. This fact, however, does not call into question the enforceable nature of the judgment before that date. In this respect it is noted that an enforcement warrant was issued on 5 August 1998 (see paragraph 8 above) and that the applicant requested that the judgment be enforced (see paragraph 9 above).

Only following a request by C. lodged on 21 May 2002 did the Chişinău Regional Court order on 4 June 2002 the stay of the enforcement proceedings (see paragraph 17 above). Accordingly, the State was obliged to ensure enforcement of the judgment of 21 July 1998 between 5 August 1998 and at least 4 June 2002.

41. The Court notes that the judgment was partially enforced in 2000, and accordingly it cannot conclude that between 21 July 1998 and its partial enforcement in 2000 the State did not discharge its obligations to take steps to enforce the judgment.

42. In so far as the period of non-enforcement after 2000 is concerned, the Court notes that the Government did not argue that defendant C. was insolvent. Nor did they show that after that date the bailiff took any steps to enforce the judgment of 21 July 1998 or drew up a decision concerning the discontinuation of the enforcement proceedings in accordance with section 366 of the Code of Civil Procedure (see paragraph 22 above).

43. By failing to take adequate measures to enforce the judgment during a period of some two years when the judgment was enforceable, the Moldovan authorities prevented the applicant from fully enjoying the benefits of the judgment which had been rendered in his favour four years earlier. As it is argued by the Government that C. appealed against that judgment within the prescribed time-limit, with the consequence that the judgment did not become final, the Court considers that the non-execution of the judgment is closely connected with the subsequent appeal proceedings. Therefore the relevance of the non-execution will be taken into account in the overall assessment of the proceedings which culminated in the quashing of the judgment of 21 July 1998.

2. Concerning the quashing of the judgment of 21 July 1998

44. The applicant complained under Article 6 § 1 of the Convention about the quashing of the judgment of 21 July 1998 on 11 June 2002. He stated *inter alia* that the appeal dated 10 December 1998 was not genuine and had been invented by the Government and C. after 23 April 2002, when the present case was communicated to the Government. He also argued that according to the Code of Civil Procedure the legal time-limit for lodging an appeal was 15 days. Even assuming that C.'s appeal had been lodged on 10 December 1998, it should have been dismissed as time-barred. Moreover, the applicant submitted that he was not summonsed for the hearing of 11 June 2002 and pointed out that there was no postal receipt confirming the handing of the telegram to him.

45. The Government submitted *inter alia* that according to section 282 of the Code of Civil Procedure in force at the material time an appeal had to be lodged within 15 days of the date of the judgment appealed against. If a party was not present at the hearing at which the judgment was delivered, he or she was entitled to lodge the appeal within 15 days of the date on which he or she had found out about the judgment. Since C. found out about the judgment of 21 July 1998 only on 27 November 1998, he had been entitled to lodge his appeal within 15 days of that date, which he did. The Government concluded that C.'s appeal was lodged within the legal time-limit.

46. 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 (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII).

47. 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 in a manner incompatible with Article 6. In both cases the Court held that the "losing" by a litigant of a final favourable judgment was incompatible with the Convention.

48. In the present case the applicant also "lost" a judgment favourable to him. The Court has already determined that that judgment was enforceable during the period between August 1998 and June 2002 (see paragraph 40 above). It falls to the Court to determine whether the procedure leading to the quashing of that judgment was within the limits of the standards set by Article 6 of the Convention.

49. The Court notes the dispute between the parties as to whether the appeal dated 10 December 1998 was lodged within the legal time-limit in the sense of section 282 of the Code of Civil Procedure. For the reasons set out below, the Court need not express an opinion on this question.

50. The appeal in question was examined almost four years after the date on which the first instance court adopted its judgment and the Government have not adduced any reasons to explain why the appeal was not examined earlier. During that period of time C., who allegedly lodged the appeal on 10 December 1998, not only failed to enquire about its fate (see paragraph 13 above), but also partially complied with the judgment of 21 July 1998 (see paragraph 10 above) as if no appeal proceedings were pending. The Court notes with particular concern that the appeal application allegedly lodged with the Râșcani District Court on 10 December 1998 bears an entry stamp of that court dated 15 May 2002 (see paragraph 12 above). The presence of such a stamp raises a question as to the genuine date of the document and, taken together with the other facts described above and the fact that the appeal was examined only after the communication of the case to the Government, would indeed be capable of giving the applicant reasonable doubts as to the genuineness of the appeal and as to the fairness of the proceedings.

51. Against this background, the Court also notes that C.'s appeal was examined by the Chișinău Regional Court in the absence of the applicant and thus that he was unable to defend himself. While the domestic case-file contains a copy of a telegram by which the applicant was allegedly informed about the hearing of 11 June 2002, it contains no trace of any delivery receipt, which would confirm that the applicant was indeed served with the telegram (see paragraph 19 above). This situation is consistent with the applicant's submission to the effect that he was unaware of the appeal proceedings and about the hearing of 11 June 2002 (see paragraph 20 above).

52. By contrast, the Court notes that the first instance court adjourned the hearing of the case on six occasions due to the absence of C., before deciding to hear the case in his absence (see paragraph 6 above).

B. Conclusion concerning the fairness of the proceedings

53. The Court reiterates that during a period starting in 2000 and ending in June 2002 the Moldovan authorities did not take adequate measures with a view to the enforcement of the judgment of 21 July 1998. This non-enforcement together with the subsequent quashing of the judgment meant that the applicant was deprived of most of the benefits of a judgment which was enforceable for the period of some four years in the same way as a final judgment. The quashing took place in the applicant's absence in proceedings following C.'s appeal which according to the Government was

lodged on 10 December 1998 but which was received by the Râșcani District Court only on 15 May 2002. Moreover, the Government have failed to show that contrary to his allegation the applicant was duly informed of the hearing of 11 June 2002 at the close of which the judgment of 21 July 1998 was quashed.

54. Having regard to all these circumstances and making an overall assessment of the proceedings, the Court concludes that they failed to meet the requirement of a fair trial contained in Article 6 § 1 of the Convention.

55. In the specific circumstances of the present case, there has accordingly been a violation of Article 6 § 1 of the Convention.

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

56. The applicant maintained that the failure of the authorities to execute the judgment of 21 July 1998 violated Article 1 of Protocol No. 1 to the Convention.

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

58. 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 *Prodan v. Moldova*, no. 49806/99, § 59, ECHR 2004-III (extracts)).

59. The Court notes that the applicant had an enforceable claim deriving from the judgment of 21 July 1998, which, after the partial enforcement of 2000, remained un-enforced. It follows that the impossibility for the applicant to obtain the execution of the judgment between 2000 and 4 June 2002, 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.

60. By failing to take the necessary steps to have the judgment of 21 July 1998 enforced the national authorities prevented the applicant from enjoying or using the money. The situation was perpetuated by the quashing of that judgment on 11 June 2002. Having regard to its findings concerning Article 6, the Court considers that the Moldovan authorities failed to strike a fair balance between the applicant’s interests and the other interests involved.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed EUR 2,285 for pecuniary damage suffered, arguing that the failure to enforce the judgment had adverse financial consequences for him.

64. The Government considered the amount claimed by the applicant to be excessive. They contested his method of calculation and the fact that he possessed a car.

65. The Court considers that the applicant must have suffered pecuniary damage as a result of the non-execution and quashing of the final judgment of 21 July 1998. However, it does not accept the applicant’s method of calculation. Taking into consideration the average interest rate as indicated by the National Bank of Moldova for the period in question (see *Daniliuc v. Moldova*, cited above, § 53) and the circumstances of the case under consideration, the Court awards the applicant the sum of EUR 258 for pecuniary damages.

B. Non-Pecuniary Damage

66. The applicant claimed EUR 63,990 for non-pecuniary damage invoking various acts by which the Government allegedly have harassed him.

67. The Government disagreed with the amount claimed by him.

68. While the reasons invoked by the applicant seem to have only a remote, if any, connection with the violations found above, the Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of those violations. Deciding on an equitable basis it awards him the total sum of EUR 1,500 for non-pecuniary damage.

C. Costs and expenses

69. The applicant also claimed EUR 194,440 for the costs and expenses incurred before the Court.

70. The Government did not agree with the amount claimed, stating that it was excessive and that the applicant had failed to prove the alleged representation expenses.

71. The Court notes that the applicant was unrepresented. However, it considers that he must have incurred secretarial expenses. Having regard to the circumstances of the case, the Court awards the applicant EUR 100 for costs and expenses.

D. 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

1. *Declares* the application admissible by a majority;
2. *Holds* by 6 votes to 1 that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* by 6 votes to 1 that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds* by 6 votes to 1
 - (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 258 (two hundred and fifty-eight euros) in respect of pecuniary damage, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage and EUR 100 (one hundred euros) for costs and expenses, 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;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
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.
T.L.E.

DISSENTING OPINION OF JUDGE PAVLOVSKI

In the present case the Chamber decided that there has been a violation of both Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

With all due respect to my fellow judges I regret that I am unable to agree with their conclusions which, in my opinion, were based on a misunderstanding of the civil procedure which existed at the material time in Moldova and on an examination of allegations which had not been made by the applicant or communicated to the Government of Moldova.

The Applicant's Complaints

According to the judgment, the applicant in fact complained of the failure to enforce the judgment of 21 July 1998 and the subsequent quashing of that judgment by the Chişinău Regional Court on 11 June 2002, which in his view violated Article 6 § 1 of the Convention.

He also complained that the non-enforcement and subsequent quashing of the judgment of the Râşcani District Court of 21 July 1998 had the effect of infringing his right to the peaceful enjoyment of his possessions, as secured by Article 1 of Protocol No. 1.¹

In order to examine the applicant's complaints properly it is crucial to determine whether he had a final judicial decision in his favour, which is the usual procedure followed by the Court in such cases².

Unfortunately, the Chamber, without giving any reasons, totally avoided the examination of this question and did not advance any argument in favour of finding that the judgment in question was final. Had it done so, it would have been open to the following counter-argument.

It is clear from the case-file that the judgment against Mr. C. – the applicant's procedural opponent – was delivered in his (Mr. C.'s) absence. All the Chamber's reasoning³ would have been relevant had the defendant lodged his appeal out of time, but he did not lodge it out of time: he lodged it within the time-limit prescribed by the rules of civil procedure. The Chamber, following the applicant's approach in trying to apply "out of time" requirements to a "within the time-limit" situation, confuses two different things: two different procedures.

There is no doubt that the defendant, Mr. C., was absent during the trial, being at that time on a mission in the Russian Federation. This is clear from the case-file and confirmed by some certificates. There is no doubt that the judgment was delivered in his absence, as was mentioned in the judgment

¹ See paragraphs 24 and 24 of the present judgment.

² See for instance, paragraphs 39 and 40 of the judgment in the case of *Wasserman v. Russia*, where the Court states: "...by failing for years...to comply with the final judicial decision in the present case, the Russian authorities deprived the provisions of Article 6 § 1 of its useful effect. There has accordingly been a violation of Article 6 § 1.."

³ See paragraphs 39-43 and paragraphs 46-48 of the present judgment.

delivered by the national court. And, accordingly, we are bound to take these facts as the starting point of our analysis.

At the material time, the old Moldovan Code of Civil Procedure contemplated two principal situations concerning legal time-limits for the lodging of an appeal. The first was where the judgment was delivered in the parties' presence. In this situation time started to run on the date of delivery of the judgment. The second situation was where the judgment was delivered in one or both of the parties' absence, in which case time started to run on the date a copy of the operative part of the judgment was served on the party that had been absent during the delivery stage.

In the second situation there was no need for a formal extension of the time-limit for lodging an appeal if the appeal was lodged within 15 days after the applicant had received a copy of the judgment.

The law did not make any distinction between a justified absence and an unjustified absence. It spoke only about a situation of absence of one or both of the parties and explained:

"... for the parties, that have not participated in the trial, the time-limit for lodging an appeal shall start to run from the date they are handed **a copy of the operative part of the judgment...**"¹.

Since the defendant Mr. C. was not present at the court hearing, under the Moldovan legislation, the judgment delivered in favour of Mr. Istrati could not have become final and binding until 15 days after the date a copy of it was served on Mr. C., always provided that Mr. C. had not lodged an appeal.

A copy of the judgment was served on Mr. C. on **27 November 1998**.² Consequently, had he not lodged an appeal, that judgment would have become final and binding 15 days later, that is on **12 December 1998** (however, it did not because Mr. C. did lodge an appeal).

At the same time, as is mentioned in § 40 of the present judgment, the enforcement warrant was issued on **5 August 1998**, that is to say three and a half months before the date when the judgment, in theory, could have become final and binding. So, regardless of further proceedings, the issuing

¹ See Article 282 of the old Code of Civil Procedure of Moldova (26 December 1964)

² See the Government's observations 11.01.2006 nr. 06/144 where they write the following: "*...En l'espèce, si l'on examine l'appel introduit par l'appelant Gh. Călugărușul on pourrait observer qu'il a été présenté le 10.12.1998 au Tribunal Chișinău, invoquant le motif qu'il n'a pas participé à la séance de jugement lors du prononcé de l'arrêt respectif mais en a pris connaissance à peine le 27.11.98 (les éléments de l'affaire civile Istrati A. contre Călugărușul Gh. en restitution du préjudice moral et matériel ont été envoyés à l'attention de la Cour Européenne par la lettre du 21 mai 2004). De cette façon, à partir du 27.11.1998 (la date où l'appelant Călugărușul Gh. a pris connaissance de l'arrêt du tribunal du secteur Rîșcani du 21 juillet 1998), jusqu'au 10.12.1998 (la date où Gh. Călugărușul a introduit l'appel contre le jugement du 21 juillet 1998), se sont écoulés 13 jours, le requérant s'étant parfaitement encadré dans le délai de 15 jours prévu à l'article 282 du Code de procédure civile...*"

of an enforcement warrant in the present case was contrary to the provisions of the Moldovan legislation and, as a result, that enforcement warrant was null and void *ab initio*.

That is why I cannot share the Chamber's conclusion that: "...Since neither of the parties appealed against the judgment within the legal time-limit of fifteen days, it became enforceable on 5 August 1998..."¹ This statement denotes a total lack of knowledge of the Moldovan civil procedure. But such knowledge is indispensable, because when we speak about a judicial decision becoming effective, we are speaking first and foremost about the legal conditions stipulated in the domestic legislation, which govern this issue.

I am very sorry to have to point this out, but according to the Moldovan legislation the judgment of 21 July 1998 has never become final or enforceable because, as has been shown above, it was issued in the absence of the defendant and subsequently, once it had been served on Mr. C., it was appealed against and quashed.

If the judgment in favour of the applicant was not final and binding the Moldovan judicial authorities cannot be criticised for failing to enforce it and if the defendant lodged an ordinary appeal within the time-limit prescribed by law, the judicial authorities cannot be criticised for examining the appeal. Moreover, had the Moldovan judicial authorities failed to examine the appeal lodged by Mr. C., there could, in theory, have arisen the question of a violation of Mr. C.'s procedural rights.

Instead of determining the legal nature of the judgment of 21 July 1998, as the Court has done in other cases concerning the non-enforcement or quashing of a final judicial decision, the majority tried to replace the notion of a "final" judgment with the notion of an "enforceable" judgment. That approach is totally wrong and has nothing to do with the legal interpretation of law.

If we look at the part of the present judgment which contains some information on the Moldovan rules of civil procedure, we find a reference to Article 338 of the Code of Civil Procedure – "The issuing of an enforcement warrant" which stipulates:

"...An enforcement warrant shall be issued to the plaintiff by a court after the judgment has become final..."²

Accordingly, it runs counter to both elementary logic and Moldovan civil procedure to state that in the present case the judgment was not "final", but was nevertheless "enforceable".

I regret very much that the majority really failed to establish a causal link between these two notions, in general, or to determine whether such a link existed in the case under consideration, in particular.

¹ See paragraph 8 of the judgment.

² See the "Relevant domestic law" part of the present judgment

So, summing up what has been said above, in view of the fact that the judgment of 21 July 1998 was not final, I fail to see in the present case any sign of a violation of Article 6 § 1 on account of the failure to enforce that judgment or of the subsequent quashing of that judgment by the Chişinău Regional Court.

Accordingly, there has been no violation of Article 1 of Protocol No. 1 either.

Allegations Examined and Violations Found

Despite the fact that the applicant did not complain about the issue of the general fairness of the proceedings, the majority decided to find a violation of Article 6 § 1 on the ground that the proceedings failed to meet the requirement of a fair trial contained in Article 6 § 1 of the Convention¹, while at the same time leaving unanswered the allegations made by the applicant in his applications.

Unfortunately, in their reasoning the majority do not make it sufficiently clear to which set of proceedings they are referring. They mention only the following: "... It falls to the Court to determine whether the procedure leading to the quashing of that judgment was within the limits of the standards set by Article 6 of the Convention..."²

It is quite difficult to understand what this sentence, on which the whole judgment is based, is supposed to mean.

One may presume that the majority are seeking to question the fairness of the appeal proceedings because, following the examination of Mr. C.'s appeal, the judgment in favour of the applicant was quashed.

If so, I should say the following:

(a) As has been shown above, the applicant never complained of unfairness in the appeal proceedings as such in his case, referring instead to the "non-enforcement of the judgment" and the "quashing of the judgment" arguments in combination with an alleged violation of his property rights.

(b) The "unfairness of the appeal proceedings" allegation, has never been communicated to the Moldovan Government and the Government have never been asked to provide their observations concerning the fairness of the appeal proceedings in the applicant's case. However, the principles of adversarial procedure require the parties to be given the opportunity to submit their observations on all the allegations which the Court intends to examine and on which it intends to rule.

To determine which complaints were communicated to the Government, let me describe in brief the chronology of events.

¹ See paragraph 54 of the judgment.

² See *ibid*, paragraph 48.

On 23 April 2002 the Court communicated to the Government of Moldova the applicant's complaint concerning the alleged failure to enforce the judgment of 21 July 1998, putting the following questions and I quote:

"...The observations should deal with the following questions:

1. Is the **failure to enforce the judgment** of 21 July 1998 compatible with the requirements of Article 6 § 1 of the Convention under its civil head?

2. Has there been an interference with the applicant's rights to peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1 to the Convention, resulting from the **non-enforcement of the judgment** of 21 July 1998? If so, was that interference justified in accordance with Article 1 of Protocol No. 1 to the Convention?..."¹

On 30 November 2005 the Court, after examining the applicant's complaint concerning the quashing of the judgment of 21 July 1998, decided to communicate it to the Government putting the following questions and I quote again:

"...Was there a breach of the applicant's rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention, **as a result of the re-opening** of his case by the Chisinau Regional Court on 11 June 2002?

Was the appeal leading to the quashing of the judgment of 21 July 1998 lodged within the legal time limit (c.f. Section 283 of the Code of Civil Procedure)."²

So, as is clearly shown by the above-quoted letters, the issue of general unfairness of the appeal proceedings in the applicant's case has never been communicated to the Government.

Moreover, in the judgment, the majority continually make other allegations which have not been communicated to the Government either.

For instance, in § 50 a careful reader may find the following allegation and I quote:

"The appeal in question was examined almost four years after the date on which the first instance court adopted its judgment and the Government have not adduced any reasons to explain why the appeal was not examined earlier."³

I am really puzzled by this statement, because this argument is clearly of a "length of proceedings" nature which, again, has never been the subject of complaint by the applicant. Nor has the Court ever decided to examine this issue *ex officio*.

In any event, in dozens of cases against other countries the Court has always examined the "length of proceedings" issue separately, and has properly communicated the complaints to the Governments, as well as ruling on them.

¹ See communication letter of 23 April 2002.

² See communication letter of 30 November 2005.

³ See paragraph 50 of the judgment.

Let me show you just some examples, which confirm the above statement.

In the case of *Sikora v. Poland*, application no. 64764/01, the Court found that:

“...in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1...”¹

In the case of *Fojcik v. Poland*, application no. 57670/00 the Court decided to declare “the complaint concerning the length of proceedings admissible...” and to find “...a violation of Article 6 § 1 of the Convention on account of the length of the proceedings...”²

In the case of *Maria and Andrzej Korbel v. Poland*, application no. 57672/00, the Court ruled that the “...requirement of the “reasonable time” laid down in Article 6 § 1 of the Convention was not complied with in the present case. There has accordingly been a violation of that provision...”³

Of course, this list could be continued. Anyway, it goes without saying that in all the above cases, as well as in all other similar cases, the length of proceedings issue was examined after a complaint had previously been communicated to the Government.

Unfortunately, this did not happen in the present case where the allegation concerning the length of time it took to examine Mr. C.’s appeal was never communicated to the Government of Moldova. Nor were the Government asked for the reasons for such a lengthy examination of the appeal.

In this kind of situation, where an applicant does not complain of a particular violation, where – contrary to Rule 54-2 – the Government were not given notice of the allegation, or a chance to submit written observations on the allegation on which the Court intends to rule, and where the Court even fails to raise the issue *ex officio*, I find it very questionable – if not wrong from a procedural point of view – to rule that there has been a violation.

In a similar vein, in § 50 of the judgment, the majority gives as a reason for its findings and I quote:

“...The Court notes with particular concern that the appeal application allegedly lodged with the Râșcani District Court on 10 December 1998 bears an entry stamp of

¹ See judgment in the case of *Sikora v. Poland*, application no. 64764/01, paragraphs 22 and 23.

² See operative provisions of the judgment in the case of *Fojcik v. Poland*, application no. 57670/00.

³ See paragraph 46 of the judgment in the case of *Maria and Andrzej Korbel v. Poland*, application no. 57672/00.

that court dated 15 May 2002 (see paragraph 12 above). The presence of such a stamp raises a question as to the genuine date of the document...”¹

Of course, I am not the proper person to teach my learned colleagues, but in my view, if there is a “question”, the best procedure is to seek an “answer” to it by putting the question to the parties rather than indulging in speculation such as:

“...The presence of such a stamp ...taken together with the other facts described above and the fact that the appeal was examined only after the communication of the case to the Government, would indeed be capable of giving the applicant reasonable doubts as to the genuineness of the appeal and as to the fairness of the proceedings...”²

Hinting at the possible falsification of judicial documents by the Râșcani District Court or the Chișinău Regional Court, the Court makes some extremely serious accusations against the Moldovan judiciary, accusations which have not been proven or even verified.

Personally, I find such a “*modus operandi*” absolutely inadmissible as it raises some very delicate and serious questions.

Just to conclude, in so far as the law part is concerned, it is very difficult for me to accept a situation in which:

(a) complaints made by the applicant are not properly examined, analysed and given a legal characterisation, in accordance with the previous case-law; and

(b) allegations which have neither been made by the applicant nor communicated to the Government for observation are used to find a violation.

Damages

As far as pecuniary and non-pecuniary damage are concerned, I consider it worth mentioning that the applicant claims no compensation for non-pecuniary damage caused by the violations that have been found. It has been this Court’s longstanding practice not to award anything which has not been the subject of a claim by the applicant. I do not think that the present case is one in which we should start changing our case-law in order to grant an applicant something which clearly exceeds his financial claims. The same comment applies in equal measure to the issue of pecuniary damage.

These are the points on which I respectfully disagree with my colleagues.

¹ See paragraph 50 of the present judgment.

² See *ibid*, paragraph 50.