



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

THIRD SECTION

CASE OF CORNIF v. ROMANIA

(Application no. 42872/02)

JUDGMENT

STRASBOURG

11 January 2007

FINAL

11/04/2007

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 Cornif v. Romania,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr C. BÎRSAN,

Mr V. ZAGREBELSKY,

Mrs A. GYULUMYAN,

Mr E. MYJER,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 7 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 42872/02) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Tiberiu Octavian Cornif (“the applicant”), on 4 December 2002.

2. The applicant, who had been granted legal aid, was represented by Mr R.V. Oprea, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Mr B. Aurescu, who was subsequently replaced by Mrs R. Rizoïu and lastly by Mrs B. Ramaşcanu from the Ministry of Foreign Affairs.

3. On 7 April 2004 the Court (Second Section) decided to communicate the complaints concerning the right to a fair hearing under Article 6 § 1 of the Convention and the right to the protection of property under Article 1 of Protocol No. 1, 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 1963 and lives in Bucharest.

5. On 21 May 1999, he signed a contract for services with the National Association of Securities Dealers, a private enterprise (“the Association”).

6. On 18 July 2000 he notified the Association of his intention to terminate the contract from 5 August 2000, invoking the Association's non-compliance with its contractual obligations.

7. On 13 November 2000, the applicant lodged with the Bucharest County Court an action against the Association seeking compensation for pecuniary damage caused by the latter's failure to fulfil its contractual obligations.

8. Before the County Court, the Association asked to have the contract declared null and void on the ground that the procedure for the validation of the contract had not been carried out in conformity with its own statutes, this having as result the fact that the contract was not legally binding on it. The applicant contested this argument.

9. In a judgment of 7 June 2001, the County Court found the contract to be valid and, based on an expert opinion, awarded the applicant 129,648 US dollars (USD) in compensation, USD 8,330 by way of penalties and 96,413,000 Romanian lei (ROL) for court fees.

According to the applicable law, this judgment was enforceable.

10. In a final decision of 5 November 2001, the Bucharest Court of Appeal dismissed the appeal lodged by the Association and confirmed the judgment.

11. On 22 January 2002, the applicant, who had instituted proceedings for the enforcement of the judgment of 7 June 2001, received ROL 440,000,000 from the Association.

This sum is still in the applicant's possession although proceedings for its recovery have been started by the Association in 2005 and are still pending with the domestic courts.

12. On 5 December 2001, the Procurator-General, at the Association's request, lodged an application with the Supreme Court of Justice to have both the judgment of 7 June 2001 and the final decision of 5 November 2001 quashed (*"recurs în anulare"*) on the ground that the two courts which decided on the case had committed a serious breach of the law when examining the legality of the parties' contract.

13. On 18 April 2002, the Supreme Court postponed the pronouncement of the final decision until 29 May 2002.

The decision was eventually adopted on 5 June 2002. The Supreme Court allowed the application, quashed the final decision of 5 November 2001 and sent the case back to the Bucharest Court of Appeal for a fresh examination on the merits, on the ground that the two courts had not examined whether the contract was valid and binding on both parties and whether the applicant's initial action could still be allowed in the light of the termination of the contract by the applicant on 5 August 2000.

14. In an interlocutory judgment of 13 November 2002, the Court of Appeal asked the applicant to supplement the court fees by ROL 18,231,600 which he did on 10 December 2002.

15. In a final decision of 12 March 2003, the Bucharest Court of Appeal allowed the Association's appeal, quashed the judgment of 7 June 2001 and dismissed the applicant's action on the ground that while the contract was valid, the conditions for engaging the Association's responsibility for paying damages were not met. It also ordered the applicant to pay the Association ROL 32,109,680 in court fees.

II. RELEVANT DOMESTIC LAW

16. The relevant articles of the Code of Civil Procedure read as follows:

Article 330

“The Procurator-General may, of his own motion or on an application by the Minister of Justice, apply to the Supreme Court of Justice for a final decision to be quashed on any of the following grounds: ...

2. that the decision in question has seriously infringed the law by giving a wrong solution on the merits of the case, or when the decision is manifestly ill-founded; ...”

Article 330¹

“The time-limit for lodging an appeal on the grounds provided for by Article 330 § 2 is one year from the date on which the decision became final.”

17. These provisions have been repealed by Article I § 17 of the Government's Emergency Ordinance no. 58 of 25 June 2003.

THE LAW

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

18. The applicant complained under Article 6 § 1 of the Convention that his right to a fair hearing had been breached by reason of the fact that the final decision of 5 November 2001 of the Bucharest Court of Appeal had been quashed and reversed by means of an extraordinary appeal (*recurs în anulare*), a procedure available only to the Procurator-General and not to the parties.

19. He also considered that his right to a fair hearing had been breached by the fact that the Supreme Court had not respected the procedural requirements concerning the extraordinary appeal, namely that it had not allowed the parties the possibility to discuss the grounds of its admissibility and it had not had a report of the judge rapporteur presented to it.

20. The applicant further maintained that the absence of an interlocutory judgment of 29 May 2002, by which the public pronouncement of the final decision of 5 June 2003 had been postponed, had violated the obligation imposed by Article 6 § 1 that judgments should be pronounced publicly.

21. Lastly, he complained of the non-enforcement of the final decision of 5 November 2001 and of the length of the proceedings instituted by him in this respect.

22. Article 6 § 1 reads as follows, in so far as relevant:

“1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal. Judgment shall be pronounced publicly ...”

A. Complaint concerning the quashing of the final decision of 5 November 2001

1. Admissibility

23. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

24. In so far as the quashing of the final decision is concerned, the Government contested that a violation of Article 6 § 1 occurred and contended that several aspects distinguished this case from that of *Brumărescu v. Romania* ([GC], no. 28342/95, ECHR 1999-VII) where the Court found that the same extraordinary appeal violated the applicant's right to a fair hearing. Accordingly, in the present case the lodging of the appeal was limited to a period of one year after the date on which the decision became final (they cite also *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 74, ECHR 2002-VII). They considered that the final decision had been quashed for having seriously infringed the law, therefore to correct judicial mistakes and miscarriages of justice, situation which had already been sanctioned by the Court (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX). Furthermore, the Procurator-General had not acted on his own initiative but at the request of the Association, which had been party to the initial proceedings. Lastly, the Government contended that if the final decision had not been quashed, the applicant would have received from the Association a sum of money that he did not deserve (unjust enrichment) and recalled that the case had been referred back to the ordinary courts and during the new trial all the procedural requirements of Article 6 § 1 had been observed.

25. The applicant contested these arguments. In particular, in the light of the *Ryabykh* case-law, he recalled that the only ground that the Supreme Court had used for allowing the extraordinary appeal had been that the ordinary courts had not examined the validity of the contract, which in his opinion was not more than a different view on the interpretation of the law, which could not legitimise the use of the extraordinary appeal.

26. The Court recalls that, under its settled case-law, the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 must be interpreted in the light of the Preamble to the Convention, which declares, among other things, 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, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question (*Brumărescu*, cited above, § 61).

27. In the case of *Brumărescu* cited above, the Court found a violation of Article 6 § 1 in that the extraordinary appeal was not open to the parties to the procedure but to the Procurator-General alone, the power to exercise the appeal was not subject to any time-limits and by allowing the application the Supreme Court of Justice set at naught an entire judicial process which had ended in a judicial decision that was *res judicata* and which had, moreover, been executed (see *Brumărescu*, cited above, § 62).

Furthermore, in the case of *SC Maşinexportimport Industrial Group SA v. Romania* (no. 22687/03, § 36, 1 December 2005) the Court considered that even in the new wording of the Code of Civil Procedure, which instituted a time-limit of one year for its introduction, this extraordinary appeal still infringed the principle of legal certainty since it preserved the other two elements criticised by the Court in the case of *Brumărescu*, cited above.

28. Lastly, the Court reiterates that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh*, cited above, § 52).

29. In the present case the Court is not convinced by the Government's argument that there has been a manifest violation of law by the ordinary courts which justified the recourse to an extraordinary appeal. It recalls that the said appeal was allowed on the sole ground that the lower courts had not examined whether the contract was valid and binding on both parties and whether the applicant's initial action could still be allowed in the light of the termination of the contract by the applicant on 5 August 2000. However, the

ordinary courts did give their view on the matter (see paragraphs 10 and 11 above). The Court concludes therefore that this is a typical case of two conflicting views on the same matter which in no case justifies the quashing of a final and binding decision that, moreover, had already been partially executed.

Moreover, nothing in this case, which is a contract law dispute between private parties, constitutes circumstances of a substantial or compelling interest that would justify the quashing of the final decision under the *Ryabych* principles (see *Ryabych*, cited above, § 52).

30. Against the Government's view, the Court considers that the fact that the Procurator-General acted upon the Association's request does not change the fact that the exercise of the extraordinary appeal was solely at his discretion (see also *Brumărescu* cited above, § 20).

31. As for the Government's argument concerning the unjust enrichment, the Court recalls that the applicant's right to receive the sums of money was recognised by a final and binding decision, that of 5 November 2001, at the end of proceedings whose fairness was not contested by either party.

32. Indeed, with the Government, the Court notes that the applicant was afforded a fresh opportunity to put forward his case before the Court of Appeal after the quashing of the final decision. However, in the end, the applicant's action was rejected.

Moreover, in the light of its constant case-law, it considers that judicial systems characterised by this type of extraordinary appeal are, as such, incompatible with the principle of legal certainty (see *Sovtransavto Holding*, cited above, § 77).

33. The foregoing considerations are sufficient to enable the Court to conclude that the quashing of the final decision of 5 November 2001 infringed the applicant's right to a fair hearing.

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

B. Other complaints under Article 6 § 1

34. Having regard to the findings under paragraph 34 above, the Court considers that it is not necessary to pursue the examination of the other aspects of the Article 6 § 1 complaint (see paragraphs 20 to 22 above).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

35. The applicant considered that the quashing by means of an extraordinary appeal of the final decision of 5 November 2001 whereby he had been awarded compensation violated his right to peaceful enjoyment of his possessions. He relied on Article 1 of Protocol No. 1, which reads as follows:

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

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

36. The Government contested that argument. In their view, the applicant could not claim to have a possession as his right to compensation had been illegally acquired in so far as the decision that granted him that right had seriously infringed the law.

Furthermore, they considered that the Supreme Court's decision of 5 June 2002 did not represent an interference with the applicant's rights but rather a measure meant to re-establish the legal order. Even if construed as interference, it was justified by the general interest which required that only the lawful decisions are enforced. Lastly, it did not place an excessive burden on the applicant.

37 The applicant considered that he had a possession and that he had suffered an unjustified interference with his property rights.

38. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

39. The Court reiterates that a judgment debt may be regarded as a “possession” for the purposes of Article 1 of Protocol No. 1. Furthermore, quashing such a judgment after it has become final and “irrevocable” will constitute a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (see *Brumărescu* § 77, and *Maşinexportimport Industrial Group SA*, § 44, both cited above).

40. A taking of property within this second rule can only be justified if it is shown, *inter alia*, to be “in the public interest” and “subject to the conditions provided for by law”. Moreover, any interference with the property must also satisfy the requirement of proportionality (see *Brumărescu*, cited above, § 78).

41. Turning to the present case, the applicant, who had received a part of the sum awarded on 7 June 2001, could no longer obtain the enforcement of the judgment for the rest of the award as the judgment had been quashed. However, the Court has already found that the proceedings that lead to this quashing were unfair and therefore could not justify the interference with the applicant's right. Moreover, the Government have not advanced any justification for it.

42. Even assuming that the interference could be justified as having served some public interest, the Court finds that a fair balance was upset and

that the applicant bore an individual and excessive burden (see *Brumărescu*, § 80, and *SC Maşinexportimport Industrial Group SA*, § 47, cited above).

There has accordingly been a violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

43. Lastly, under Article 13 of the Convention, the applicant complained that he had not had an effective domestic remedy to challenge the final decisions of 5 June 2002 and of 12 May 2003 for breach of the Convention.

44. Having regard to the finding relating to Article 6 § 1 (see paragraph 34 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 13, in so far as its requirements are less strict than, and are here absorbed by, those of Article 6 § 1 (see, among other authorities, *British-American Tobacco Company Ltd. v. the Netherlands*, judgment of 20 November 1995, Series A no. 331, p. 29, § 91).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 209,337 euros (EUR) in respect of pecuniary damage, that is the equivalent of the USD 129,648 and USD 8,330 awarded by the judgment of 7 June 2001, and penalties for late payment calculated from 7 June 2001 to 1 August 2004. He presented in details his method of calculation.

47. The Government considered that the applicant had no basis for being granted the pecuniary damages sought. In any case, they considered the claims to be excessive and unsubstantiated. They also recalled that the applicant had already received ROL 440,000,000 which they estimated at EUR 16,115 and that to date, he still has possession of this sum.

48. The Court recalls at the outset 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 *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 19, ECHR 2001-I).

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.

49. The Court also reiterates that it found in the instant case that the quashing of the final decision of 5 November 2001 that awarded certain sums of money to the applicant violated the latter's right to a fair hearing and constituted a deprivation of property in so far as he could no longer receive the said sums from the debtor. However, it recalls that the applicant was paid ROL 440,000,000 and, although proceedings for its return had been started, he is still in possession of this sum (see also *SC Maşinexportimport Industrial Group SA*, cited above, § 52)

50. Having regard to the above circumstances, in particular to the sums awarded by the domestic courts but never received by the applicant, and deciding on an equitable basis, the Court awards him EUR 150,000 for pecuniary damage suffered to date as a result of the quashing of the final decision of 5 November 2001.

B. Non-pecuniary damage

51. The applicant claimed EUR 130,000 in respect of non-pecuniary damage.

52. The Government considered that there was no causal link between the facts examined by the Court and the claims for non-pecuniary damage and asked the Court to reject them as manifestly ill-founded.

53. The Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of the quashing of the final decision of 5 November 2001. It awards him EUR 7,000 for non-pecuniary damage (see, *mutatis mutandis*, *SC Maşinexportimport Industrial Group SA*, cited above, § 57).

C. Costs and expenses

54. The applicant also claimed EUR 11,956 for the costs and expenses incurred before the domestic courts, of which EUR 3,939 representing the costs awarded by the judgment of 7 June 2001, EUR 779 in bailiff's fee, EUR 534 for the supplementary court fees paid before the Bucharest Court of Appeal on 10 December 2002, EUR 894 the costs that he was ordered to pay to the Association by the final decision of 12 March 2003 and EUR 5,810 in respect of lawyers' fees.

Lastly, he claimed EUR 3,174 for costs and expenses incurred before the Court.

He sent justifications for payment of the domestic courts' and the bailiff's fees. However, he adduced no evidence of the payment of lawyers' fees and the costs awarded to the Association on 12 March 2003.

55. The Government requested that the claims unsupported by evidence be dismissed.

56. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,252 for costs and expenses in the domestic proceedings.

As for the proceedings before the Court, on 9 December 2004, the applicant has received EUR 198 in legal aid. He did not justify having incurred any other expenses. The Court will thus reject the claim related to the proceedings before it.

D. Default interest

57. 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* the applicant's complaints concerning his right to a fair hearing and his right to the peaceful enjoyment of his possessions admissible;
2. *Holds* that there is no need to examine the other complaints;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
5. *Holds*
 - (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 150,000 (one hundred and fifty thousand euros) in respect of pecuniary damage, EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage and EUR 5,252 (five thousand two hundred and fifty two euros) in respect of 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;

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

Done in English, and notified in writing on 11 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President