



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

FOURTH SECTION

CASE OF BUJNIȚA v. MOLDOVA

(Application no. 36492/02)

JUDGMENT

STRASBOURG

16 January 2007

FINAL

16/04/2007

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 Bujnița 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 M. PELLONPÄÄ,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr J. ŠIKUTA, *judges*,

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

Having deliberated in private on 12 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 36492/02) 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 Artur Bujnița (“the applicant”) on 30 July 2002.

2. The applicant was represented before the Court by Mr Vitalie Iordachi from “Lawyers for Human Rights”, a non-governmental organisation based in Chișinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr Vitalie Pârlog.

3. The applicant alleged that his right to a fair hearing was breached as a result of the quashing of his acquittal on a rape charge.

4. On 22 March 2005 the Court decided to communicate the application to the Government under Rule 54 § 2 (b) of the Rules of Court. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

5. The applicant and the Government each filed observations on the admissibility and merits and on the claims for just satisfaction under Article 41 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lives in Chişinău.

7. On 26 June 2001 the applicant was acquitted of rape by the Râşcani District Court. The District Court examined the parties' statements, witnesses' declarations and medical reports. It found, in particular, that the applicant had not had sexual intercourse with the victim without the latter's consent, since on numerous occasions the victim could have refused intercourse with the applicant and could have alerted a police patrol which had stopped them on the way to the applicant's apartment. The victim could also have alerted the applicant's flatmates, who had been in the apartment during the alleged rape, as well as other persons. The District Court also found that the medical reports did not provide a clear answer to the question as to whether the applicant had had intercourse with the victim.

8. The prosecutor and the victim appealed. Their appeals merely stated that the verdict of the Râşcani District Court was unlawful and unreasoned.

9. On 14 August 2001 the Chişinău Regional Court upheld their appeal, quashed the judgment of the Râşcani District Court and found the applicant guilty of rape. The Regional Court found that the victim's statements, the witnesses' declarations and the medical reports indicated that there had been forced intercourse with the victim. It found that the victim had been depressed and forcibly taken to the applicant's apartment. The court sentenced him to five years' imprisonment. However, the Chişinău Regional Court applied an amnesty law of 10 August 2001 and relieved the applicant from the obligation to serve his sentence. The applicant lodged an appeal in cassation.

10. By a final judgment of 30 October 2001, relying on section 335/5 § 2 of the Code of Criminal Procedure (CCP) in force at the time (see paragraph 13 below), the Court of Appeal upheld the applicant's appeal in cassation and quashed the judgment of the Chişinău Regional Court. The Court of Appeal found that the Regional Court had not objectively assessed the evidence and had taken into consideration only the victim's statements, which appeared to be contradictory and in conflict with other evidence and the circumstances of the case. It also concluded that the victim's statements that she had been forcibly brought to the applicant's apartment were contradicted by the witnesses' declarations. The Court of Appeal concluded that the Râşcani District Court had objectively assessed the evidence and reached the conclusion that the applicant was innocent. It also stated that any doubts should be interpreted in favour of the accused. The Court of Appeal upheld the judgment of the Râşcani District Court of 26 June 2001.

11. On 20 December 2001 the Deputy Prosecutor General lodged with the Supreme Court of Justice a request for annulment of the judgments of the Râșcani District Court and the Court of Appeal. He argued that the Râșcani District Court and the Court of Appeal had unlawfully assessed the evidence and asked the Supreme Court to uphold the judgment of the Chișinău Regional Court of 14 August 2001.

12. On 26 February 2002 the Supreme Court of Justice upheld the Deputy Prosecutor General's request for annulment, quashed the above-mentioned judgments and upheld the judgment of the Chișinău Regional Court of 14 August 2001. The Supreme Court gave the same reasons for finding the applicant guilty of committing the rape as the Chișinău Regional Court had used in its judgment of 14 August 2001.

II. RELEVANT DOMESTIC LAW

13. The following are relevant extracts from the Code of Criminal Procedure of 1961 repealed on 12 June 2003.

Section 335/5 Judgment of the cassation instance

When ruling on an appeal in cassation, the cassation instance shall provide one of the following judgments:

...

2) it shall uphold the appeal in cassation and quash the appealed judgment and:

a) maintain the judgment of the first-instance court, if the appeal had been wrongly upheld.

Section 369/1 Request for annulment

The General Prosecutor and his or her deputies may, on their own initiative or at the request of the parties, file a request for annulment with the Supreme Court of Justice in respect of any judgment which has become final after all the ordinary means of appeal have been exhausted.

Section 369/2 Grounds for a request for annulment of a judgment

Final judgments in criminal cases shall be subject to requests for annulment through cassation procedure in the following instances:

...

2. Instances where a request for annulment is made only in favour of a convicted person:

- a. the provisions governing jurisdiction *ratione materiae* or jurisdiction *ratione personae* had not been observed;
- b. the composition of the court did not correspond to the legal requirements, or if the provisions of sections 19, 20 and 22 of the present Code were violated;
- c. the judicial hearing was not public, with the exception of those cases where the law provides otherwise;
- d. examination of the case took place without the participation of the prosecution service, the defendant, the counsel for the defence and an interpreter, where their participation was compulsory under the law;
- e. examination of the case took place without due notification of the parties;
- f. no forensic-psychiatric examination of the defendant was conducted, in cases provided for in section 66 (3) of the present Code;
- g. the court permitted procedures for appeal or for annulment which were not in accordance with the law, and permitted a request for annulment or an appeal where the prescribed time-limit had expired;
- ...
- i. an international court found that there has been a breach of human rights and fundamental freedoms, which could be remedied by a re-hearing.

Other judgments which have become final shall be subject to a request for annulment only in instances where they contradict the legislation.

Section 369/3 Time-limits for lodging a request for annulment

A request for annulment in favour of the convicted person or a person in respect of whom criminal proceedings have been closed may be submitted at any time, including after that person's death, in respect of the part concerning the criminal case as a whole and, in respect of the part concerning the civil action, only where its resolution affects the criminal case as a whole.

In remaining cases a request for annulment may be submitted only within one year of the date on which that judgment becomes final, if some significant error in the previous procedure has influenced the impugned decision.

...

Section 369/4 Lodging and withdrawal of a request for annulment of a judgment

A request for annulment of a judgment shall be lodged with the court in written form, with an indication of the grounds for annulment and inclusion of as many copies as there are participants in the proceedings.

From the beginning of the proceedings, the General Prosecutor shall be entitled to withdraw the request for annulment, indicating the reasons for that withdrawal.

Section 369/5 Examination and resolution of a request for annulment

Requests for annulment with regard to judgments of the Criminal Division and the Enlarged Division of the Supreme Court of Justice shall be examined by the Plenum of the Supreme Court of Justice, and requests for annulment of other judgments shall be examined by the Criminal Division of the Supreme Court of Justice.

A request for annulment shall be examined and dealt with in accordance with the provisions of Chapter 30 of the present Code, which shall be applied in the appropriate manner and completed by the provisions of the present chapter.

A request for annulment which is to the detriment of the convicted person, an acquitted person or a person in respect of whom the proceedings have been closed, shall be examined following the summoning of the parties. Where a request for annulment is submitted in the convicted person's favour, the Supreme Court of Justice shall have discretion in deciding whether to summon the parties.

Where the request for annulment is granted in respect of a convicted person who is serving a sentence, and where a judgment is quashed and the case is remitted to the courts for re-examination, the Supreme Court of Justice shall also decide on any preventive restrictions that should be imposed.

...

14. The following are relevant extracts from the Code of Criminal Procedure of 12 June 2003.

Section 452 Request for annulment

The General Prosecutor, his or her deputies or the parties mentioned in section 401 & 2)-4) [the applicant] may lodge a request for annulment with the Supreme Court of Justice in respect of any judgment which has become final after all the ordinary means of appeal have been exhausted.

Section 453 Grounds for a request for annulment of a judgment

Final judgments in criminal cases shall be subject to requests for annulment (...) in the following instances:

...

d. an international court found that there has been a breach of human rights and fundamental freedoms, which could be remedied by a re-hearing.

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

15. The applicant complained that the annulment proceedings conducted after his final acquittal had constituted a violation of his right to a fair trial. He relied on Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal...”

16. The Government maintained that the quashing of the final judgment was carried out in order to remedy the wrongful assessment of the evidence by the lower courts and to ensure the guarantees of a fair trial to the victim.

17. The Court reiterates that a request for annulment of a final judgment in a criminal case is an extraordinary appeal in that it is not directly accessible to the defendant and its application depends on the discretion of authorised officials. The Court has, for example, not accepted that an extraordinary appeal is an effective domestic remedy in either the civil or the criminal contexts and it has found that the quashing of a final judgment on supervisory review can create problems as to the legal certainty to be afforded to that judgment (see *mutatis mutandis Nikitin v. Russia*, no. 50178/99, § 39, ECHR 2004-VIII). Therefore, the Court considers that the complaint under Article 6 § 1 of the Convention raises serious questions of fact and law, the determination of which requires an examination of the merits. The Court concludes, therefore, that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

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

18. The applicant complained under Article 6 § 1 of the Convention about the quashing by the Supreme Court of Justice of the final judgment of the Court of Appeal of 30 October 2001 following a request for annulment lodged by the Prosecutor General’s Office.

19. The Government pointed out that the request for annulment in the present case had been made in accordance with the procedure prescribed by law. They further maintained that the applicant had had the necessary procedural safeguards during the request for annulment proceedings. Therefore, in the Government’s opinion, there had been no violation of Article 6 § 1 of the Convention.

20. The Court reiterates that the right to a fair hearing under Article 6 § 1 of the Convention presumes respect for the principle of the rule of law.

One of the fundamental aspects of the rule of law is legal certainty, which requires that where the courts' judgments have become final their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). This principle underlines 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 v. Russia*, no. 52854/99, § 52, ECHR 2003-IX).

21. However, although a mere possibility to re-open a criminal case is *prima facie* compatible with the Convention, including the guarantees of Article 6, certain special circumstances may reveal that the actual manner in which such a review was used impaired the very essence of the right to a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct the request for annulment proceedings were exercised by the authorities so as to strike, as far as possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice (see, *mutatis mutandis*, *Nikitin*, cited above, §§ 54-57).

22. In the instant case, the request for annulment was initiated by the Deputy Prosecutor General. In the opinion of the Prosecutor General's Office, the first-instance and cassation courts had not observed the provisions of the CCP and had wrongly assessed the evidence and thereby reached the conclusion that the applicant had not had forcible intercourse with the victim.

23. The Court notes that the grounds for the re-opening of the proceedings were based neither on new facts nor on serious procedural defects, but rather on the disagreement of the Deputy Prosecutor General with the assessment of the facts and the classification of the applicant's actions by the lower instances. The Court observes that the latter had examined all the parties' statements and evidence and their original conclusions do not appear to have been manifestly unreasonable. In the Court's view, the grounds for the request for annulment given by the Deputy Prosecutor General in the present case were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy to that end. The Court, therefore considers, as it has found in similar circumstances (see, for instance, *Savinskiy v. Ukraine*, no. 6965/02, § 25-27, 28 February 2006), that the State authorities failed to strike a fair balance between the interests of the applicant and the need to ensure the effectiveness of the criminal justice system.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. Article 41 of the Convention provides:

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

A. Damage

26. The applicant claimed 10,000 euros (EUR) for non-pecuniary damage. He alleged that the request for annulment proceedings and the subsequent quashing of the judgment acquitting him had resulted in severe stress and frustration. He alleged that the fact that he had been found guilty of committing a sex offence resulted in his being ostracised from social circles. Moreover, since he did not have a clean record, he could not obtain employment.

27. The Government were of the view that there was no causal link between the violation complained of and the amounts claimed by the applicant. They further submitted that the applicant's claims were excessive and unsubstantiated and should therefore be rejected.

28. The Court recalls that the breach of the Convention found in the instant case was caused by the quashing of the applicant's acquittal. Notwithstanding the final nature of the judgment acquitting him, he was convicted in breach of the principle of legal certainty. 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 judgment of 30 October 2001. The particular amount claimed is, however, excessive. Making its assessment on an equitable basis, it awards the applicant EUR 2,000 for non-pecuniary damage.

29. However, the Court also notes that the applicant continues to be subject to the consequences of the quashing of the judgment of 30 October 2001. It considers that the most appropriate form of redress for this continuing situation would be for the applicant's final acquittal of 30 October 2001 to be confirmed by the authorities and his conviction in breach of the Convention to be erased with effect from that date.

B. Costs and expenses

30. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court claiming that his lawyer had spent thirty-six hours on the case. He submitted a detailed time-sheet and a contract according to which the lawyer's hourly rate was EUR 60. He also claimed EUR 50 for secretarial expenses.

31. The Government did not agree with the amount claimed, stating that the applicant had failed to prove the alleged representation expenses. According to them, the amount claimed by the applicant was too high in the light of the average monthly wage in Moldova. The Government also contested the number of hours spent by the applicant's representative on the case in general and on research of the case-law of the Court in particular.

32. 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).

33. In the present case, regard being had to the itemised list submitted by the applicant, the above criteria and the complexity of the case, the Court awards the applicant EUR 1,250 for costs and expenses.

C. Default interest

34. 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* unanimously the application admissible;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* by six votes to one
 - (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 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 1,250 (one thousand two hundred and fifty euros) in respect of costs and expenses, to 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;
(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;

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

Done in English, and notified in writing on 16 January 2007, 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 dissenting opinion of Mr Pavlovschi is annexed to this judgment.

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE PAVLOVSKI

Like my fellow Judges I have voted in the present case in favour of finding a violation of Article 6 § 1.

Indeed, the quashing of the applicant's final acquittal presents - if I may put it this way - a "classic" violation of the principle of legal certainty, which can be considered one of the most important elements of the notion of a fair trial.

At the same time I decided to vote against making any award for non-pecuniary damage in this case and now, in order to avoid any misinterpretation of my position, I would like to explain my reasons for that decision.

It has been a long-held view of this Court that the best kind of redress could be considered to be "*restitutio in integrum*", and if this type of restitution is not possible for one reason or another the Court should award compensation.

The case before us raises the following question - what kind of redress can be considered "*restitutio in integrum*"? In my view, such redress could consist in the total removal of the consequences of the quashing of the judgment of 30 October 2001. And, in this sense, I am really satisfied with the formula used by the Court in paragraph 29, namely that "...the most appropriate form of redress...would be for the applicant's final acquittal of 30 October 2001 to be confirmed by the authorities and his conviction in breach of the Convention to be erased with effect from that date...". I cannot but agree that such action would be a real "*restitutio in integrum*" in the applicant's case, and that being so there was no need to award an additional EUR 2,000 for non-pecuniary damage.

Of course, it would have been even better to order, in the operative part of the judgment, the removal of all negative consequences of the applicant's illegal conviction, but, because the applicant failed to ask the Court to rule on this issue it would have been contrary to the Court's practice to do this "*proprio motu*".

In any event, according to Moldovan legislation (Law No. 1545 of 25 February 1998), once acquitted the applicant will have the right to submit a claim for pecuniary and non-pecuniary damage, and to seek the elimination of other negative consequences of his illegal conviction.

According to Article 41 of the Convention the Court is entitled to afford "just satisfaction" only where "the internal law of the High Contracting Party concerned allows only partial reparation to be made".

In the case before us, neither the applicant nor the Court claimed or suggested that the national legislation of Moldova allowed only "partial reparation".

And, indeed, Law No. 1545 provides for full compensation for illegal conviction. To illustrate this let me mention, by way of example, the case of

*Duca v. Moldova*¹ where the applicant, after having been acquitted, was awarded by the Moldovan courts MDL 150,000 (the equivalent of EUR 10,289 at the time). As that case clearly showed, Moldovan legislation cannot be regarded as allowing “only partial reparation to be made”. If so, the Court has clearly exceeded its powers as stipulated in Article 41 of the Convention.

Moreover, in theory, granting the applicant compensation for non-pecuniary damage might prevent him from submitting a claim in respect of the same non-pecuniary damage with the Moldovan authorities, as it might allow the Moldovan courts to reject the applicant’s claims (if lodged) on the grounds that an award for non-pecuniary damage has already been made by our Court. Here I am referring to the *Baybaşın* case, where the Court ruled that “... once the necessary general and individual measures have been taken to put an end to the violation found and provide redress for its effects – any additional awards over and above those made by the Court are at the discretion of the competent domestic authorities...” (*Baybaşın v. the Netherlands*, no. 13600/02, § 76, 6 July 2006). This situation, in my view, may damage the applicant’s interests because, in principle, he could have received from the Moldovan authorities a higher amount in respect of non-pecuniary damage than that awarded by our Court.

Just to sum up, in my judgment, both from the point of view of the Court’s powers as stipulated in Article 41 and from the point of view of the applicant’s interests, making an award for non-pecuniary damage in the present case was a wrong step.

¹ See *Duca v. Moldova* (no. 1579/02), partial admissibility decision, 11 April 2006