



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

THIRD SECTION

CASE OF VISAN v. ROMANIA

(Application no. 15741/03)

JUDGMENT

STRASBOURG

24 April 2008

FINAL

24/07/2008

This judgment may be subject to editorial revision.

In the case of Visan v. Romania,

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Egbert Myjer,

Ineta Ziemeļe,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 27 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 15741/03) 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, Mrs Constanta Visan (“the applicant”), on 8 April 2003.

2. The applicant was represented by Mr M.L. Draghici, her son. The Romanian Government (“the Government”) were represented by their Agent, Mr. R.-H. Radu, of the Ministry of Foreign Affairs.

3. On 18 May 2005 the Court decided to communicate the complaint concerning the alleged lack of access to a court 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 1949 and lives in Bucharest.

A. Criminal proceedings against the applicant

5. In a final decision of 28 June 1993, the Bucharest County Court convicted the applicant of fraud, sentenced her to six years’ imprisonment

and awarded damages to the victim. The court did not address the argument that the offence had been pardoned by Decree no. 11/1988.

6. On 5 August 1993 the applicant was placed in detention, where she remained until 22 July 1994.

7. In a final decision of 3 October 1995, the Supreme Court of Justice acting on an application of the Procurator General (*recurs în anulare*), quashed the final decision of 28 June 1993 and ended the criminal trial against the applicant on the ground that the offences committed had been pardoned. It upheld the remainder of the decision.

B. Proceedings for compensation for wrongful conviction

8. On 6 March 1998 the applicant lodged an action with the Bucharest County Court, under Articles 998-999 of the Civil Code, seeking compensation from the State for the damage caused by the “severe miscarriage of justice which had led to her illegal detention for almost one year”. She claimed 200,000,000 Romanian lei (ROL).

9. The case was tried by ten courts, corresponding to three levels of jurisdiction. The courts examined the case either under Article 504 of the Code of Criminal Proceedings (“CCP”) or under the Civil Code. In her pleas the applicant invoked the Civil Code supplemented by the CCP provisions above.

10. In a final decision of 28 January 2003 the Supreme Court of Justice rejected the applicant’s action. It considered that the facts of the case allowed for the application of Article 504 of the CCP as interpreted by the Constitutional Court’s decision no. 45 of 10 March 1998 (see paragraph 18 below). However, it considered, for the first time, that the applicant should have brought her claims within one year from the date on which her conviction had been quashed (Article 505 of the CCP). As she failed to do so, her action was time-barred.

11. On 17 February 2003 the Supreme Court of Justice delivered an attestation informing the applicant that her action had been rejected as time-barred.

12. On 7 November 2003 the applicant obtained a copy of the final decision of 28 January 2003, after several unsuccessful attempts and complaints lodged with the Ministry of Justice and the Supreme Court of Justice concerning the unreasonable delay in the drafting of the court decision.

II. RELEVANT DOMESTIC LAW

A. Provisions on the pardon

13. Decree no. 11/1988 on the pardon of certain criminal offences and the reduction of various sentences reads as follows, in so far as relevant:

Article 1

“Criminal offences for which a sentence of up to ten years’ imprisonment has been imposed shall be pardoned.”

14. The relevant provision on the pardon in the Criminal Code reads as follows:

Article 119

“(1) The pardon extinguishes the criminal responsibility for the act committed...”

(2) The pardon does not affect ... the rights of the victim.”

B. Provisions concerning the action for damages

15. The relevant Articles of the Civil Code state as follows:

Article 998

“Any act committed by a person which causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it.”

Article 999

“Everyone shall be liable for damage he has caused not only through his own act but also through his failure to act or his negligence.”

16. According to the provisions of Article 3 of Decree no. 167/1958 the general time-limit for lodging an action for compensation is three years from the date when the damage occurred.

17. The relevant Articles of the CCP prescribe:

Article 504

“Anyone who has been convicted by means of a final decision is entitled to compensation from the State for any loss or damage sustained where after a retrial it is held in a judgment against which no appeal lies that he did not commit the offence in question or that no offence was committed.

Anyone against whom a preventative measure has been taken, and in whose favour a decision to discontinue proceedings or of acquittal has been given for the reasons listed in the preceding paragraph, also enjoys a right to compensation for damage sustained...”

Article 505

“... The claim [for compensation] must be lodged within one year from the date of the final acquittal or from the order discontinuing the proceedings.”

18. In a decision of 10 March 1998, published on 18 May 1998 in the Official Journal, the Constitutional Court, to which an objection had been submitted alleging that the first paragraph of Article 504 of the CCP was unconstitutional, ruled as follows:

“Under Article 48 of the Constitution, the State is liable for damage caused by miscarriages of justice committed in criminal proceedings. It follows that the principle of the State’s liability towards victims of a miscarriage of justice in a criminal trial must be applied to all victims of such a miscarriage. ... The Court notes that the legislature has not brought the provisions of Article 504 of the Code of Criminal Procedure into conformity with those of Article 48 § 3 of the Constitution. ... Consequently, bearing in mind that Article 504 of the Code of Criminal Procedure provides for only two cases in which the State’s responsibility for miscarriages of justice committed in criminal proceedings may be engaged, it follows that this restriction is unconstitutional, since Article 48 § 3 of the Constitution does not allow for any such limitation.”

THE LAW

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

19. The applicant complained under Article 6 § 1 of the Convention that she had not had access to a court in so far as her claims for compensation had been rejected as time-barred by virtue of a law which had not been applicable at the date on which she had lodged her action.

Article 6 § 1 reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Admissibility

20. 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.

B. Merits

1. The parties' submissions

21. The Government contended that determination of the legal basis of an action by the court and the time-limits for lodging an action are among the permitted limitations of the right to a court (see *Pérez de Rada Cavanilles v. Spain*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3255, §§ 43-45).

22. The Government also contended that, due to the active role of the local judges and the margin of appreciation of the State in the matter, the domestic courts had the power to determine the applicable law based on the facts of the case and irrespective of the determination made by the plaintiff. They pointed out that the applicant herself had referred to both the Civil Code and the CCP articles in her pleas before the courts.

23. Furthermore, the Government considered that the time-limit imposed by Article 504 had not been too short (see, *a contrario*, *Pérez de Rada Cavanilles*, cited above, § 47) and had already been met when the applicant lodged her action, its application not being thus imputable to the length of the proceedings themselves (see, *a contrario*, *Yagtzilar and Others v. Greece*, no. 41727/98, § 27, ECHR 2001-XII).

24. Lastly, the Government contended that the procedure instituted by Articles 504 and 505 of the CCP had constituted an effective remedy for the applicant's grievances.

25. The applicant contested the arguments put forward by the Government and reiterated that Article 504 had not been applicable to her situation at the date when she had lodged her action.

2. The Court's assessment

26. The Court refers to the principles established in its case-law regarding the "right to a court", of which the right of access is one aspect, in particular that this right is subject to limitations which should not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see, for instance, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 43-50, ECHR 2001-VIII; *Yagtzilar*, cited above, § 22; *Brualla Gómez de la Torre v. Spain*, judgment

of 19 December 1997, *Reports* 1997-VIII, p. 2955, § 31-33; *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, *Reports* 1998-I, p. 290, § 33-34; *Pérez de Rada Cavanilles*, cited above, §§ 43-45; and *Lungoci v. Romania*, no. 62710/00, §§ 34-36, 26 January 2006).

27. The Court notes that the applicant lodged her action for compensation on 6 March 1998. At that date, Article 504 of the CCP, *lex specialis* in the matter of compensation for wrongful conviction, did not cover the applicant's situation. It follows that at that date the Civil Code was the only effective remedy at the applicant's disposal. It was only on 18 May 1998 that the Constitutional Court's decision widening the applicability of Article 504 became public.

28. It is true that the applicant could have challenged the constitutionality of the CCP provisions herself. She could have thus lodged her action for compensation under Article 504 within one year of the date of the final decision in her case, that is, before October 1996, and filed an objection of non-constitutionality of those provisions with the courts. However, the Court considers that so long as the applicant had at her disposal a remedy with more prospects of success, namely the action under the general tort law, it would be excessive to expect her to make use of a remedy with a less predictable outcome.

29. The Court, like the Government, does not deny the domestic courts' power to determine the legal basis of an action. However, it notes that in doing so in the present case, the courts examined the action under provisions which were not applicable at the date the action was lodged, and which followed different procedural rules than the general tort law, in particular different time-limits for lodging the action. The applicant was therefore expected to foresee the eventual change in the legislation and to comply with it before this change actually took place.

30. For this reason, the Court considers that the degree of access afforded by the national legislation was not sufficient to secure the applicant's right to a court (see *Yagtzilar*, cited above, § 26).

31. Furthermore, the Court cannot but notice that none of the courts that dealt with the applicant's case under Article 504, except for the Supreme Court of Justice in the last resort, considered the action to be time-barred. It reiterates that the fact that the applicant was told that her action was statute-barred at such a late stage of the proceedings deprived her once and for all of any possibility of asserting her right to compensation (see *Yagtzilar*, cited above, § 27).

32. The above conclusion makes it unnecessary for the Court to examine the Government's assertions on the quality of the new remedy (see paragraph 24 above).

33. The foregoing considerations are sufficient to enable the Court to conclude that in examining the applicant's action under a legal provision

that was not known to be applicable at the date of the lodging of that action, the domestic courts infringed the applicant's right to a court.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

34. The applicant complained under Article 6 § 1 of the Convention that the courts that had dealt with her case had not been impartial and that she had not had a fair trial. She also considered that her claims for compensation had not been decided within a reasonable time by the courts and that the final decision had not been pronounced publicly, as it had taken more than eight months for her to get a copy of that decision.

35. Under Article 34 the applicant complained that the refusal of the authorities to deliver her a copy of the final decision of 28 January 2003 prevented her from completing her application to the Court for several months.

36. Lastly, the applicant considered that the courts had violated her right to receive compensation for miscarriage of justice, guaranteed by Article 3 of Protocol No. 7 to the Convention.

37. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed 1,000,000 euros (EUR) in respect of non-pecuniary damage caused by the alleged violation of Article 3 of Protocol No. 7 and EUR 1,050,000 in respect of non-pecuniary damage caused by the alleged violations of Article 6.

40. The Government considered that there was no causal link between the alleged violations and the amounts sought and that the applicant's claims were excessive. In their view, a finding of a violation of the Convention, in itself, constitutes sufficient just satisfaction for the purposes of Article 41.

41. The Court reiterates that it has found a violation of the applicant's right of access to a court due to the application of the time-limits, and it can only award reparation in connection with these facts. It therefore awards the applicant EUR 5,000 in respect of non-pecuniary damage.

42. The Court also reiterates that when a violation of Article 6 § 1 of the Convention is found, the applicant should as far as possible be put in the position he or she would have been in had the requirements of Article 6 not been disregarded, in particular, the reopening of the proceedings should be made possible (see *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12; *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Tahir Duran v. Turkey*, no. 40997/98, § 23, 29 January 2004; *Somogy v. Italy*, no. 67972/01, § 86, 18 May 2004; *Metaxas v. Greece*, no. 8415/02, § 35, 27 May 2004; *Caloglu v. Turquie*, no. 55812/00, § 30, 29 July 2004; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; and *Lungoci*, cited above, §§ 55-56).

B. Costs and expenses

43. The applicant did not make any claims for costs and expenses. Therefore, no award is made under this head.

C. Default interest

44. 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 complaint concerning the right of access to a court under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *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 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the respondent State's national currency at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 24 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President