



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

THIRD SECTION

CASE OF BERCARU v. ROMANIA

(Application no. 8870/02)

JUDGMENT

STRASBOURG

16 September 2008

FINAL

26/01/2009

This judgment may be subject to editorial revision.

In the case of Bercaru v. Romania,

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

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Corneliu Bîrsan,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 26 August 2008,

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

PROCEDURE

1. The case originated in an application (no. 8870/02) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ms Maria Bercaru (“the applicant”), who has both Romanian and Canadian nationality, on 29 June 2001.

2. The applicant was represented by Ms Anca Angelica Andrei, a lawyer practising in Constanța. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu.

3. On 23 May 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1942 and lives in Montreal.

5. On 27 August 1993 the applicant’s mother lodged a civil action against her niece, A.M., to have set aside a sale contract concerning a flat entered into on 3 April 1986 between the applicant’s parents and A.M. On 9 September 1993 the applicant’s mother died and the applicant pursued the application.

6. On 14 September 1993 the bailiff certified the existence of an action regarding the flat, and on 13 October 1993 the applicant notified A.M. not to enter into the flat, as it contained the goods inherited from her parents.

7. In 1994, on an unknown date, she also filed a criminal complaint against A.M. According to the applicant, she had not received any answer to her letters from the prosecuting authorities.

8. On 9 November 1994 the applicant supplemented the civil action, seeking to have the sale contract set aside for vitiated consent. She alleged that A.M. had deluded her parents into thinking that she would take care of them until their death and had thus persuaded them to sell her their flat.

9. On 21 December 1994 the Câmpina Court of First Instance rejected the applicant's action as being brought by a person with no capacity to take part in court proceedings.

10. The applicant appealed. The five hearings held between 22 March 1996 and 29 May 1998 were adjourned on account of the lack of an acknowledgment of receipt in respect of summonses served on the applicant in Canada. Between 26 June 1998 and 31 May 1999 the proceedings were stayed for unjustified absence of the parties.

11. On 31 May 1999 the applicant requested resumption of the proceedings. According to the applicant, on 17 December 1999 the proceedings were stayed again and on 13 October 2000 she requested resumption of proceedings. The applicant expressed her wish to be summoned at her address in Canada.

12. On 19 April 2001 the judges entrusted with the archives informed the President of the Prahova Regional Court of the disappearance of the file and of the necessity to reconstruct it. Of the seven hearings held between 4 May 2001 and 6 March 2002 for the reconstruction of the file, two were adjourned at the applicant's request.

13. On 25 April 2002 the Prahova Regional Court upheld the applicant's appeal and quashed the judgment of the first-instance court, keeping the case for retrial. This ruling was upheld on 12 September 2002 by a final decision of the Ploiești Court of Appeal.

14. During retrial, of the seventeen hearings held between 22 May 2002 and 27 June 2003 three were adjourned at the applicant's request.

15. On 30 June 2003 the Prahova Regional Court allowed in part the applicant's action and declared the sale contract partly null and void. As to the plea of limitation, the court considered that the three-year time-limit had to be calculated from 1993, when the applicant's mother died, and not from the date of the sale contract, as the applicant had heard of this contract only in 1993.

On the merits, the court considered that the lack of discernment of the applicant's father, when executing the sale contract, had been certified by a medical report, whereas there was insufficient medical data of a psychiatric

nature to establish the mental capacity of the applicant's mother in understanding the legal content and consequences of the contract.

16. On 16 September 2003 the Ploiești Court of Appeal by a final decision allowed A.M.'s appeal and therefore rejected the applicant's action as time-barred. In so doing, it noted that according to Articles 3 and 9 of Decree no. 167/1958 the limitation period for the annulment of the sale contract had expired, at the latest, three years after a period of eighteen months following the date when the contract had been executed.

17. The applicant used two extraordinary remedies, lodging applications for the setting-aside and review of the final decision of 16 September 2003, but on 10 December 2003 and 27 February 2004, respectively, the Ploiești Court of Appeal rejected those applications as groundless.

18. On an unknown date, A.M. notified the applicant at least twice to delegate a person in Romania to take her possessions out of the flat, as the applicant had been evicted from it, or otherwise A.M. would have to sell them and to pay the applicant according to their value.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

19. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

20. The Government contested that argument, considering the case rather complex, in particular as the applicant had chosen to be summoned in Canada, which increased the time allowed for appearance to about six months, and as medical reports concerning her deceased parents had to be produced.

21. The applicant disagreed.

22. The period to be taken into consideration began on 20 June 1994, when Romania ratified the Convention. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of the proceedings at the time.

The period in question ended on 16 September 2003. It thus lasted nine years, two months and twenty-seven days for three levels of jurisdiction.

A. 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.

B. Merits

24. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

25. The Court does not consider the subject matter of the case to be complex and observes the substantial periods of inactivity for which the Government have not submitted any satisfactory explanation and which are attributable to the domestic courts. It took them up to fifteen months to fix hearings (see paragraph 10 above).

26. In respect of the disappearance of the file, the Court considers that the responsibility rested entirely with the authorities. Moreover, it took the courts at least one year to reconstruct the file (see paragraph 12 above).

27. The Court further notes a delay of approximately two years and three months caused by the court's inability to properly summon the applicant in Canada. It has been the Court's constant approach that an applicant cannot be blamed for taking full advantage of the resources afforded by national law in the defence of his interests (see, *mutatis mutandis*, *Yağcı and Sargin v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 66). However, it is true that this delay may have been imputable partly to the applicant who had insisted on being summoned in Canada, although she had been represented in proceedings by lawyers residing in Romania. Together with the Government, the Court notes that when the applicant chose to be summoned in Romania, the periods of notice for hearings were significantly shorter.

28. The Court considers, therefore, that while the applicant bore responsibility for delays of several months, the delay accumulated between 1994 and 2003 was in most part imputable to the authorities.

29. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above).

30. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having

regard to the foregoing considerations and to its case-law on the subject, the Court considers 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.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

31. The applicant complained under Article 13 of the Convention that she had not received any answer from the prosecuting authorities regarding her criminal complaint lodged with the Câmpina Prosecution Office in 1994 against A.M. and that the courts had lost her file. On 14 December 2007, in her observations in response to the Government’s observations, she also complained of the lack of domestic remedies by which to complain of the unreasonable length of the proceedings.

32. The Court considers that the complaint concerning the loss of the file should be addressed from the standpoint of Article 6 § 1 of the Convention and, as it was also raised under that Article, it will be examined below.

33. As regards the applicant’s allegations in respect of the criminal complaint lodged in 1994 against A.M., the Court is of the opinion that, assuming that there were no effective remedies in the present case, although she could have challenged the lack of an answer before the competent superior prosecutor, the applicant must be considered to have been aware of the lack of any effective criminal investigation long before she lodged the application with the Court on 29 June 2001 (see *Bayram and Yildirim v. Turkey* (dec.), no. 38587/97, 29 January 2002). If the applicant had not become aware of this situation until 2001, the Court considers that that was a result of her own negligence. Furthermore, the applicant has failed to substantiate the existence of specific circumstances which might have prevented her from observing the time-limit laid down in Article 35 § 1 of the Convention.

34. As regards the lack of domestic remedies in respect of the length of the proceedings, the Court notes that the complaint refers to the proceedings which ended on 16 September 2003. It was therefore raised more than six months after the situation complained of had ended.

35. It follows that this part of the application is outside the six-month time-limit and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

36. The applicant complained under Article 6 § 1 that she had not had access to a court, as her case had not been judged on the merits and as the courts had lost her file. She also complained that the proceedings and the solution had been unfair, that the domestic courts had not been independent

and impartial, had failed to assess the facts correctly, and had misinterpreted the domestic law, that she had never been summoned, that the Prahova Regional Court had not examined the witnesses on her behalf, and that the same two judges had ruled on the two extraordinary remedies.

37. The applicant further alleged a violation of Article 3 in respect of her parents, of Article 8 on account of the deprivation of her domicile in Romania in her parents' flat, of Article 14 on account of the deprivation of that flat in view of the fact that she had married in Canada and that her parents had been very ill, and of Article 1 of Protocol No. 1 in so far as the proceedings had not allowed her to recover the flat and all her possessions, inherited from her parents, which had eventually been stolen by A.M.

The applicant also relied on Articles 7, 17 and 34 of the Convention, and on 14 December 2007 she relied on Article 2 of Protocol No. 4, Article 3 of Protocol No. 7, and Article 1 of Protocol No. 12.

38. Having carefully considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

39. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 40,000 euros (EUR) in respect of pecuniary damage, representing half the value of the flat and of the property inherited from her parents. She also claimed EUR 20,000 in respect of non-pecuniary damage.

42. The Government contested the claim in respect of pecuniary damage on the ground that no causal link between that damage and the alleged unreasonable length of proceedings could be found. Further, they considered that the amount claimed in respect of non-pecuniary damage was too high.

43. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it considers that the applicant must have sustained non-pecuniary damage in respect of the violation found. Ruling on an equitable basis, it awards a total sum of EUR 2,000 under that head.

B. Costs and expenses

44. The applicant also claimed EUR 3,300 for costs and expenses, broken down as follows: EUR 3,033.87 for lawyers' fees and EUR 239.68 for postal fees. She submitted invoices for payment of fees to several lawyers and for expert reports, as well as for postal expenses.

45. The Government contested these claims on the ground that no causal link between the payment of fees to five lawyers and the present case could be found, that the applicant had not submitted the contracts of judicial assistance entered into with these five lawyers, and that the contracts of judicial assistance entered into with another two lawyers had not been signed by the latter.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of 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 to the above criteria, and making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,000 in respect of costs and expenses.

C. Default interest

47. 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 excessive length of the proceedings 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 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (b) that the respondent State is to pay the applicant, within the same three months, the amount of EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
- (c) that the aforementioned amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
- (d) 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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President