



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

THIRD SECTION

CASE OF TUDOR TUDOR v. ROMANIA

(Application no. 21911/03)

JUDGMENT

STRASBOURG

24 March 2009

FINAL

24/06/2009

This judgment may be subject to editorial revision.

In the case of Tudor Tudor v. Romania,

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

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Alvina Gyulumyan,

Egbert Myjer,

Luis López Guerra, *judges*,

and Stanley Naismith, *Deputy Section Registrar*,

Having deliberated in private on 3 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 21911/03) 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, Mr Tudor Tudor (“the applicant”), on 26 June 2003.

2. The applicant, who had been granted legal aid, was represented by Mr Florian Andreescu, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu, of the Ministry of Foreign Affairs.

3. On 10 April 2006 the Court decided to give notice of the application to the Government, under Articles 6 of the Convention and 1 of Protocol No. 1 to the Convention taken alone or together with Article 14. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

4. On 17 June 2008 the Chamber decided to ask the parties additional questions concerning the effectiveness of remedies in respect of the complaint raised under Article 1 of Protocol No. 1 to the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1944 and lives in Bucharest.

6. From 1973 he lived in an apartment rented from the State in a nationalised building. On 13 January 1997, under Law no. 112/1995 on the

legal status of certain residential property, the applicant bought that apartment from the State.

7. In a final decision of 23 May 1997 the Bucharest District Court allowed an action (*acțiunea în revendicare*) brought by the former owner against the State for recovery of possession of the building where the applicant's apartment was situated.

8. Based on that decision, the former owner lodged several actions for recovery of possession against the persons who had bought apartments in the building in similar conditions, including the applicant.

9. In a final decision of 28 January 2003 the Bucharest Court of Appeal ordered the applicant to surrender possession of the apartment to the plaintiff. The court found that the former owner's property title deed, as it had been confirmed by the final decision of 23 May 1997, prevailed over the applicant's purchase contract. It also considered that the applicant's *bona fides* in concluding the 13 January 1997 contract was relevant only in the event that the applicant lodged an action for compensation against the State.

10. Meanwhile, the same Court of Appeal did take into account the buyers' good faith in dismissing actions lodged by the former owner against other persons who had bought apartments in the same building. Thus, on 28 November 2002 the Court of Appeal dismissed the action against T.I. and T.A., who had bought their apartment on 12 December 1996; on 7 February 2003 it dismissed the action against I.E. and M.S. and on 20 June 2003 it dismissed the action against C.D., who had bought his apartment on 27 March 1997.

11. On 6 April 2006 the High Court of Cassation and Justice, acting on an application by the Procurator General (*recurs în anulare*), quashed the final decision of 28 November 2002 and sent the case back to the first-instance court. According to the information available to the Court, the proceedings are still pending with the domestic courts.

On 9 February 2006 the High Court allowed a similar application by the Procurator General and set aside the 20 June 2003 decision, thereby allowing the former owner's action against C.D.

A similar action by the Procurator General, lodged against the 7 February 2003 decision mentioned above, was allowed by the High Court on 14 February 2007. The case was sent back to the Bucharest County Court for re-examination of the appeal. The proceedings are still pending with that court.

12. As to the applicant, eviction proceedings lodged by the former owner against him are currently pending with the domestic courts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Action for recovery of possession (*acțiunea în revendicare*)

13. Under Romanian law, an action for recovery of possession is one of the principal remedies for the protection of a right of property. Such action is not governed by statute *per se* but has emerged from case-law. An action for recovery of possession can be defined as the bringing of proceedings to enforce a right *in rem* in which a dispossessed owner claims back his or her property from the person currently in possession of it. When both the plaintiff and the defendant have a title deed, the court must compare the two deeds and decide which one is preferred. The main outcome of such an action, if successful, is the acknowledgment by the court of the claimant's title to the property, with retrospective effect, thus obliging the defendant to return the property. If physical restitution is no longer possible, that obligation is replaced by an obligation to pay compensation on the basis of an equivalent sum (see *Străin and Others v. Romania*, no. 57001/00, § 26, ECHR 2005-VII).

B. Action for compensation provided for in the Civil Code: responsibility for eviction (*garanția pentru evicțiune*)

14. Articles 1337-1351 of the Civil Code institute the seller's responsibility for eviction. They provide for the evicted buyer to claim reimbursement of the price and also the payment of costs and damages, regardless of the seller's good or bad faith. The buyer can either join the seller to the proceedings instituted against him by the third party or lodge a new action against the seller after having been evicted. In the latter case, if the seller proves that he could have won the case against the third party had he been joined to the proceedings, he will be exempted from compensating the buyer (Article 1351 of the Civil Code).

A *bona fide* buyer continues to enjoy the benefits of the property until he is no longer considered *bona fide*, that is at the latest when the action for eviction is lodged against him, at which time enjoyment of the property reverts to the rightful owner. However, the buyer may still claim compensation for his loss from the seller.

C. Actions for compensation available under Law no. 10/2001

15. At the date of the facts of the present case, Article 51 of Law no. 10/2001 on the rules governing immovable property wrongfully seized by the State between 6 March 1945 and 22 December 1989, as amended by the Government's Emergency Ordinance no. 184 of

12 December 2002 (“Law no. 10/2001”), prescribed that an action for recovery of the purchase price, indexed to take account of inflation, brought against the State by a buyer whose contract had been declared null and void, was not subject to court fees. It also provided that the indexed price was to be paid by the Ministry of Finance from a special fund.

D. Case-law on compensation

16. At the Court’s request, the Government submitted case-law on the different actions for compensation when property is lost in conditions similar to those of the case at hand.

17. Of the seventeen relevant decisions adopted between 2005 and 2008 by courts all over the country, nine concerned actions lodged against the State authorities by persons who lost their property in actions for recovery of possession. The courts applied the Civil Code and awarded them the indexed purchase price and, in most of the cases, damages and the costs reasonably incurred for the upkeep of the house. Most of the courts considered that Law no. 10/2001 was not applicable to actions for recovery of possession when the sale contract was not declared null and void in such proceedings.

18. When such contracts are cancelled, however, the decisions submitted to the Court indicate that the courts consistently apply Law no. 10/2001 and award the buyer the indexed purchase price.

E. Recent developments favourable to the tenants

19. In a decision no. 520/C of 3 December 2007 the Constanța Court of Appeal found in favour of the buyer in an action for recovery of possession lodged by the former owner of a nationalised apartment against the person who in good faith had bought the apartment from the State in 2000. The court decided that the restitution of the apartment to the former owner was no longer possible and, based on the Court’s case-law on Article 1 of Protocol No. 1 (in particular: *Pincová and Pinc v. the Czech Republic*, no. 36548/97, ECHR 2002-VIII; *Raicu v. Romania*, no. 28104/03, 19 October 2006 and *Păduraru v. Romania*, no. 63252/00, ECHR 2005-XII (extracts)), it compelled the State to pay the market value of the apartment in compensation to the former owner. In the court’s view, although the plaintiff had not asked for compensation, in the circumstances of the case the monetary award was the only solution to the action for recovery of possession.

20. In a similar decision of 12 December 2007 the High Court of Cassation and Justice found in favour of the buyer in an action for recovery of possession lodged by the former owner. The High Court took account of the fact that the buyer’s title had been confirmed by the courts in an action

in nullity of the sale contract lodged against him by the former owner whereas the former owner's title had not been upheld by a court. It further considered that dispossessing the buyer regardless of the circumstances, in order to surrender the property to the former owner, would create disproportionate new wrongs in the attempt to attenuate old injuries. It also considered, in a general statement, that the reimbursement of the indexed purchase price under Law no. 10/2001 could not compensate the buyer as it did not reflect the property's market value.

21. In a decision no. 1055 of 9 October 2008 the Constitutional Court declared Article 47 of Law no. 10/2001 unconstitutional in so far as it breached the buyer's property title. Under the provision concerned, persons whose actions based on the Civil Code had been dismissed before the entry into force of Law no. 10/2001 could use this Law in order once again to seek the restitution of their property. The Constitutional Court considered that persons whose title to property had been confirmed by a court decision could not be compelled to surrender that property where there was no serious justification for such a measure, based on public order, under Article 44 § 3 of the Constitution.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14

22. The applicant complained under Article 6 § 1 taken alone and in conjunction with Article 14 of the Convention that the proceedings giving rise to the final decision of 28 January 2003 were unfair, in particular in so far as the same Court of Appeal adopted conflicting decisions in identical cases brought against other buyers of apartments situated in the same building.

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

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

Article 14 of the Convention reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

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

1. The parties' submissions

24. The Government submitted that the proceedings had been fair and that the courts that had dealt with the applicant's case had given a well reasoned decision. In their view, the mere fact that the courts had reached opposing decisions in similar cases did not trigger a violation of the Convention. They pointed out that the controversial issue in these cases was the interpretation given by the courts to the notion of "good faith", but that the conflicting decisions were justified by a different interpretation of the relevant facts in each case.

25. The applicant disagreed with the Government's position and reiterated that the Court of Appeal had reached opposing decisions in identical cases.

2. The Court's assessment

26. The Court considers that while the Convention does not impose an obligation on States to restore confiscated assets, let alone to dispose of them in accordance with the elements of the right of property, once a solution has been adopted by a State, it must be implemented with reasonable clarity and coherence in order to avoid, in so far as possible, uncertainty and ambiguity for the persons concerned by the measures to implement it. In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is an important factor to be taken into account in assessing the State's conduct (see *Broniowski v. Poland* [GC], no. 31443/96, § 151, ECHR 2004-V; *Păduraru*, cited above, § 92 and *Beian v. Romania* (no. 1), no. 30658/05, § 33, ECHR 2007-... (extracts)).

27. The Court notes that, in the particular context of the restitution of nationalised properties in Romania, the lack of legislative coherence and the conflicting case-law on the interpretation of certain aspects of the restitution laws created a general climate of lack of legal certainty (see *Păduraru*, §§ 99, 109, cited above).

28. The same uncertainty appeared in the instant case: the same Court of Appeal gave opposing interpretations of the relevance of the buyers' good

faith in concluding sale contracts with the State (see paragraphs 9-11 above).

29. While certain divergences in interpretation could be an inherent consequence of any judicial system which, like the Romanian one, is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, the Court notes that in the case at hand the conflicting interpretations stemmed from the same jurisdiction which, in addition, was the court of last resort in the matter. Moreover, no effective mechanism was available for the Supreme Court to resolve conflicts between decisions of the lower courts (see *Păduraru*, §§ 99 and 109, and *Beian*, § 37, cited above, and, *mutatis mutandis*, *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008). In the instant case, when assessing the Procurator General's application (see paragraph 11 above) the High Court of Cassation and Justice was not called to settle conflicting interpretation but rather to examine particular applications of the law in individual cases; in addition, its intervention in the case was only possible by means of an extraordinary appeal that contradicts in itself the principle of the legal certainty (see *Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII; *SC Maşinexportimport Industrial Group SA v. Romania*, no. 22687/03, § 36, 1 December 2005).

30. Lastly, the Court observes that seven years after the adoption of Law no. 10/2001, the interpretation of essential aspects of the restitution law is still changing at the first-instance level, through individual decisions (see paragraphs 19-21 above), and there is still no definitive settlement of the interpretation given by the courts to various aspects of the restitution laws.

While it does not contest the domestic courts' power to change their practice, the Court notes that, in the particular context of restitution in Romania, this new trend in interpretation favourable to former tenants could prove to be nothing more than another temporary change in the case-law.

31. The Court considers that, in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty (see, *mutatis mutandis*, *Păduraru*, cited above, § 98).

32. In the case at hand this uncertainty deprived the applicant of a fair trial before the Court of Appeal.

There has consequently been a violation of Article 6 § 1 on this account.

33. Having regard to this finding of a violation, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 14 taken together with Article 6 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14

34. The applicant complained that the fact that the domestic courts had preferred the former owner's property title deed to his own made it impossible for him at present to exercise his property rights over the apartment, in violation of Article 1 of Protocol No. 1 to the Convention. He also complained of discrimination, under Article 14 taken together with Article 1 of Protocol No. 1, in so far as the same Court of Appeal adopted contrasting decisions in identical cases brought against the buyers of apartments situated in the same building.

Article 1 of Protocol No. 1 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."

A. The parties' submissions

35. In their submissions of 13 August 2008, the Government contended that the applicant had not exhausted the domestic remedies, in so far as he had not lodged an action for responsibility for eviction against the State authorities under the Civil Code. This action would have allowed him to recover from the State the indexed purchase price and damages.

36. The applicant averred that there had been no need for him to join the State in the proceedings lodged against him, in so far as the court of first instance and the appeal court had found in his favour. He also considered that as the interference with his property rights had been caused by the 28 January 2003 decision, if he had lodged a new action against the State he would have missed the six-month time-limit provided for in Article 35 § 1 of the Convention.

B. The Court's assessment

37. The Court recalls that under Article 35 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice,

failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

38. In the present case, the domestic courts compared the title deeds presented by the applicant and the former owner and decided to give preference to the former owner's deed. In so doing the Court of Appeal did not set aside or declare null and void the applicant's title deed, nor did it award him any compensation for his loss.

However, the applicant, who can no longer validly use his title deed, may seek compensation from the seller, under the Civil Code, for eviction, either by joining the State in the proceedings lodged against him or by lodging a separate action to that end. The case-law submitted by the Government indicates a consistent domestic practice of awarding damages in cases similar to the present one. The remedy is therefore available both in theory and in practice.

39. It remains to be determined whether the amount of compensation that can be awarded by the national courts is sufficient to afford redress in respect of the breaches alleged. In this context, the Court notes that the case at hand stems from the application of the laws on the restitution of nationalised properties. While acknowledging the particularly difficult context of compensation for property nationalised during the communist regime, the Court has expressed the view that it is necessary to ensure that the attenuation of those old injuries does not create disproportionate new wrongs (see *Pincová and Pinc*, cited above, § 58, and *Velikovi and Others v. Bulgaria*, nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02, §§ 178-179, 15 March 2007).

40. The case-law provided by the Government indicates that persons in the applicant's situation would have been awarded at least the indexed purchase price, and possibly damages up to the property's current market value, as well as the reimbursement of any costs reasonably incurred for the upkeep of the house.

41. Although the Court cannot speculate in this case what the outcome of the proceedings for compensation would have been should the applicant have chosen to use them, it notes that the awards made by the domestic courts in similar situations are significantly higher than those in the case of *Pincová and Pinc*, where the Court found a violation of Article 1 of Protocol No. 1 in so far as the applicants, who were in a similar situation to that of the applicant in the instant case, were only granted the purchase price as compensation for the lost property (see *Pincová and Pinc*, cited above, §§ 61-64; see also *Velikovi and Others*, cited above, §§ 140-141, and *Kalinova v. Bulgaria*, no. 45116/98, § 76, 8 November 2007).

42. Lastly, although the restitution law does not provide for a specific action against the State for persons in the applicant's situation (see, *mutatis mutandis*, *Velikovi and Others*, § 127, and *Kalinova*, § 77, cited

above), the Court is satisfied that this remedy, afforded by the Civil Code, is sufficient to provide redress in the applicant's situation.

43. The applicant should thus have exhausted this remedy before lodging his complaint with the Court.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage, representing the value of his apartment, and EUR 5,000 in respect of non-pecuniary damage.

46. The Government did not comment on these claims.

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

48. The applicant also claimed EUR 3,000 and 100,000,000 Romanian lei (RON) for costs and expenses incurred before the domestic courts and before the Court. He sent invoices for RON 1,059.95 representing translation costs, and ROL (old Romanian lei) 9,000,000, RON 500 and EUR 1,500 for lawyers' fees.

49. The Government considered that the claims were unjustified and exorbitant.

50. 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 the above criteria, the Court considers it reasonable to award the sum of EUR 2,200 covering costs under all heads.

C. Default interest

51. 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 Article 6 taken alone and together with Article 14 admissible;
2. *Declares* the complaint under Article 1 of Protocol No. 1 to the Convention taken alone and in conjunction with Article 14 inadmissible for non-exhaustion;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there is no need to examine the complaint under Article 14 together with Article 6 of the Convention;
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, the following amounts to be converted into the respondent State's national currency at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and
 - (ii) EUR 2,200 (two thousand two hundred euros) for costs and expenses, plus any tax that may be chargeable to the applicant;

(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 24 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Deputy Registrar

Josep Casadevall
President