



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF IPTEH SA AND OTHERS v. MOLDOVA

(Application no. 35367/08)

JUDGMENT
(merits)

STRASBOURG

24 November 2009

FINAL

07/04/2010

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 Ipteh SA and Others v. Moldova,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 35367/08) 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 Ipteh SA – a company incorporated in Moldova, Worldway Limited – a company incorporated in the United Kingdom, Kapital Invest SA – a company incorporated in Romania and Ion Rusu – a Romanian national, on 25 July 2008.

2. The applicants were represented by Ms J. Hanganu, a lawyer practising in Chişinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Grosu.

3. The applicants alleged, in particular, that they had been the victims of unfair civil proceedings and arbitrary deprivation of property.

4. On 9 October 2008 the President of the Fourth Section decided to give notice of the application to the Government. On the same date the Romanian and the United Kingdom Governments were informed of their right to intervene in the proceedings in accordance with Article 36 § 1 of the Convention and Rule 44 § 1(b), but they did not communicate any wish to avail themselves of this right. It was decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3). It was also decided, under Rule 54 § 2 (c) of the Rules of Court, to grant the case priority under Rule 41 of the same Rules.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Ipteh SA, is a company incorporated in Moldova. The other applicants are Worldway Limited (“the second applicant company”) – a company incorporated in the United Kingdom and holder of 35.29% of the shares of the first applicant; Kapital Invest SA (“the third applicant company”) – a company incorporated in Romania and holder of 49.63% of the shares of the first applicant; and Ion Rusu (“the fourth applicant”) – a Romanian national born in 1962, living in Iași and holder of 11.72% of the shares of the first applicant company.

6. At the end of the 1990s, Ipteh SA and a third company, I., were owners of a six-floor building located on the main boulevard of Chișinău (“the building”). Both companies were State-owned and had as their only asset different parts of the building.

7. In 1999 the State decided to privatise the companies and sold their shares to a private company, U.

8. In 2000 and 2001 the new owner of the companies transferred all parts of the building to the first applicant company.

9. Also in 2000 the former director of the first applicant company challenged the privatisation in the courts. However, his action was dismissed by a final judgment of the Economic Court of the Republic of Moldova of 11 July 2000, the courts having found that the privatisation had been legal in all respects.

10. In July 2001 the fourth applicant bought 141,772 shares in the first applicant company.

11. In August 2001 the second applicant company bought the rest of the shares of the first applicant company.

12. In August 2006 the first applicant company issued 510,000 new shares and sold them to the third applicant company.

13. On an unspecified date in 2002 the Prime Minister requested the Prosecutor General's Office to conduct an investigation into the lawfulness of the privatisation. On 17 February 2002 the Prosecutor General informed the Prime Minister that he had verified the lawfulness of the privatisation and had found it to be “in strict compliance with the legislation in force”. The Prosecutor General also informed the Prime Minister that the lawfulness of the privatisation had been thoroughly verified during the proceedings ending with the final judgment of 11 July 2000.

14. On an unspecified date in 2003 the President of Moldova requested the Prosecutor General's Office to examine the possibility of challenging the privatisation of 1999. In a letter of 26 June 2003 the Prosecutor General informed President V. Voronin that the transaction had been lawful and that

there were no grounds to challenge it. Moreover, he indicated that after the entry into force of the new Code of Civil Procedure on 12 June 2003 it had become impossible to bring an appeal in cassation against the final judgment of 11 July 2000.

15. On 19 April 2007 the Prosecutor General's Office instituted proceedings on behalf of the State in which it contested the lawfulness of the 1999 privatisation of the first applicant company and of company I. on the ground that two Government regulations concerning the sale of State-owned shares had been breached. In particular, the Prosecutor argued that the size of the down payment made by company U. was smaller than the one provided in the regulations and that the final price offered for the shares had been too low. The Prosecutor relied on Article 50 of the Civil Code as a legal basis for his action (see paragraph 16 below). As a consequence of the alleged illegality of the privatisation, the Prosecutor's Office also sought the annulment of all the subsequent transfers and issues of shares as a result of which the second, third and fourth applicants had become shareholders of the first applicant company.

16. The applicants opposed the action and argued, *inter alia*, that it was time-barred and contrary to the principle of legal certainty. They submitted that the provision of Article 86 of the old Civil Code exonerating the Prosecutor from observing the three-year time-limit when lodging actions in the interest of the State was contrary to Article 6 of the Convention and made reference to *Dacia SRL v. Moldova* (no. 3052/04, 18 March 2008). They also submitted that the lawfulness of the privatisation had been confirmed by a final judgment of 11 July 2000 with the power of *res judicata* and that they were *bona fide* buyers who had been discriminated against with respect to other companies which had obtained State property in similar conditions and whose privatisations had not been contested later by the State. They also challenged the presiding judge on grounds of lack of impartiality and argued that in the proceedings which had ended with the final judgment of 11 July 2000 he had been successfully challenged on such grounds. However, the challenge was dismissed.

17. On 10 June 2008 the Chişinău Economic Court ruled in favour of the Prosecutor General's Office in the absence of the third and fourth applicants, who had not been summoned. The court dismissed the applicants' objection concerning the existence of a final judgment of 11 July 2000. The court did not dispute the applicants' submission that the proceedings of 2000 had had a similar subject matter; however, it dismissed the objection on the ground that that judgment had been adopted in proceedings in which the Prosecutor General's Office had not been involved. The court also dismissed the applicants' objection concerning the Statute of Limitations, arguing that according to Article 86 of the Civil Code an action by the Prosecutors in the interest of the State could not be time-barred.

18. The applicants appealed on the basis of the same arguments which were put before the first-instance court. They also complained that not all of them had had the possibility to take part in the proceedings and that the judge had lacked impartiality.

19. On 28 August 2008 the Supreme Court of Justice heard the applicants' appeal. During the proceedings, the applicants challenged judge N.M. from the panel and expressed doubts as to the manner in which the President of the Supreme Court, Judge I.M., had composed the panel. On the same day, the Supreme Court dismissed the appeal and upheld the judgment of the first-instance court.

20. The Supreme Court relied on provisions of the old Civil Code in order to dismiss the applicants' objection concerning their status as good faith buyers. In particular, the court argued that according to the old Civil Code property obtained unlawfully from the State could be claimed back irrespective of the fact that it had been obtained by a *bona fide* buyer. However, when examining the problem of the Statute of Limitations, the Supreme Court agreed with the applicants' objection concerning Article 86 of the old Civil Code (see paragraph 16 above). Nonetheless, the court stated for the first time in the proceedings that since the Prosecutor had introduced his action after the entry into force of the new Civil Code, the rules concerning limitations in time contained in that Code should apply. The Supreme Court expressed the opinion that the Prosecutor's action concerned the declaration of the absolute nullity of the privatisation and that therefore, in accordance with the provisions of Article 217 of the new Civil Code, it could not be limited in time. The Supreme Court also dismissed the objection concerning the existence of a final judgment in respect of the same problem on the same grounds as the first-instance court and dismissed the objection concerning the non-participation of some of the applicants in the proceedings.

21. On 3 October 2008, the Government decided to privatise the building again and an auction for the sale of the building was scheduled for 5 November 2008. It appears that the building was not sold on that date and the Court has no information as to the subsequent development of the events.

22. It does not appear from the facts of the case, as submitted by the parties, that the applicants have been repaid the value of their initial investment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. The relevant provisions of the Civil Code, in force at the moment of the privatisation, provide:

“Article 50. Nullity of contracts that are not in conformity with the law

A contract which is contrary to the law shall be null and void ...

When a contract is declared null and void, each party must return to the other party everything received from it on the basis of the contract ...

Article 74

The general limitation period for protection through a court action of the rights of a [natural] person is three years; it is one year for lawsuits between State organisations, collective farms and any other social organisations.

Article 78

The competent court ... shall apply the limitation period whether or not the parties request such application.

Article 83

Expiry of the limitation period prior to initiation of court proceedings constitutes a ground for rejecting the claim.

If the competent court ... finds that the action has not commenced within the limitation period for well-founded reasons, the right in question shall be protected.

Article 86

The limitation period does not apply:

...

(2) to claims by State organisations regarding restitution of State property found in the unlawful possession of ... other organisations ... and of citizens;”.

24. The relevant provisions of the new Civil Code, in force after 12 June 2003, read as follows:

“Article 6. The action in time of the civil law

(1) The civil law does not have a retroactive character. It cannot modify or suppress the conditions in which a prior legal situation was constituted or the conditions in which such a legal situation was extinguished. The new law cannot alter or abolish the already created effects of a legal situation which has extinguished or is in the process of execution.

Article 217. The absolute nullity of a legal act

(1) The absolute nullity of a legal act can be invoked by any person having an interest. The court can invoke it on its own motion...

(3) An action to declare the absolute nullity is not limited in time.”

25. In a judgment of 20 April 2005 (case nr. 2ra-563/05) the Supreme Court of Justice dismissed the plaintiff's contentions based on the provisions of the new Civil Code on the ground that the facts of the case related to a period before the entry into force of the new Civil Code and that, therefore, the provisions of the old Civil Code were applicable.

THE LAW

26. The applicants complained that the proceedings were unfair, contrary to Article 6 § 1 of the Convention, which in so far as relevant provides:

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

27. The applicants also complained that their rights as guaranteed under Article 1 of Protocol No. 1 to the Convention had been violated as a result of the outcome of the proceedings. Article 1 of Protocol No. 1 to the Convention provides:

“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.”

I. ADMISSIBILITY OF THE COMPLAINTS

28. The Court considers that the applicants' complaints raise questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and no other grounds for declaring them inadmissible have been established. The Court therefore declares the application admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider its merits.

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

29. The applicants submitted that the proceedings were unfair because the domestic courts had failed to apply the Statute of Limitations in

accordance with the provisions of the old Civil Code. As a result, the Prosecutor General was able to successfully challenge the privatisation after almost eight years in disregard of the principle enunciated in Article 6 of the new Civil Code (see paragraph 24 above). Moreover, the applicants stated that the case-law of the Supreme Court of Justice was contradictory regarding the interpretation and application of the Statute of Limitations.

30. According to the applicants, the principle of legal certainty was also breached by the domestic courts because they failed to take into consideration the fact that a similar challenge to the lawfulness of the privatisation had already been dismissed by a final judgment of 11 July 2000. The applicants finally argued that the proceedings had been unfair also because not all of the applicants had had the possibility to participate in them and to defend their rights and because the judges who examined the case had not been independent and impartial.

31. The Government argued that according to Article 217 § 1 of the new Civil Code, the absolute nullity of an act can be invoked by any person without any limitation in time. According to them, the absolute nullity of the privatisation was an essential premise for the admission of the Prosecutor General's action and the upholding of those actions after the expiry of the general time-limit did not breach the principles of fairness guaranteed by Article 6 of the Convention. The Government also rebutted the applicants' contention about the lack of independence and impartiality of the judges involved in the proceedings and that the courts should have paid attention to the judgment of 11 July 2000.

32. The Court refers to its previous case-law in which it has stated that the observance of admissibility requirements for carrying out procedural acts is an important aspect of the right to a fair trial. The role played by limitation periods is of major importance when interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States (see *Dacia SRL v. Moldova*, no. 3052/04, § 75, 18 March 2008).

33. The Court reiterates that it is not its task to take the place of the domestic courts in interpreting domestic legislation. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation. This applies in particular to the interpretation by courts of rules of a procedural nature such as the prescribed time-limit for instituting court actions. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention in general and with the principle of legal certainty, guaranteed by its Article 6, in particular (see, *mutatis mutandis*, *Platakou v. Greece*, no. 38460/97, § 37, ECHR 2001-I).

34. In the present case the Court notes that the time-limit for challenging the privatisation of 1999 provided for by the Civil Code in force at the material time expired in 2002. This was indirectly confirmed by the

Supreme Court of Justice, which accepted the applicants' objection concerning Article 86 of the old Civil Code (see paragraph 20 above). Nevertheless, the Supreme Court of Justice chose not to dismiss the Prosecutor General's action in accordance with the provisions of the old Civil Code but to apply the provisions of the new Civil Code, which entered into force in 2003, that is, approximately one year after the expiry of the time-limit.

35. The Court does not contest the State's power to enact new legislation regulating time-limits in civil proceedings. However, it does not follow, as the Government argue, that it is compatible with the Convention to apply those new rules in a manner which would unsettle legal situations which have become final due to the application of the limitation period before the enactment of such legislation. To admit the contrary would amount to admitting that a State is free to disregard a time-limit and challenge a final legal situation simply by making use of its power to enact new legislation after the expiry of the time-limit in question. The Court notes that the above conclusion appears to be consistent with Article 6 of the new Civil Code which states that the new Code cannot have retroactive effect and cannot “modify or suppress the conditions in which a prior legal situation was constituted or the conditions in which such a legal situation was extinguished”.

36. In the light of the above and having regard in particular to the acceptance by the Supreme Court that there were no compelling circumstances such as those foreseen in Article 86 of the old Civil Code for displacing the three year limitation period, the Court considers that there has been a violation of Article 6 § 1 of the Convention as a result of the upholding, in breach of the principle of legal certainty, of the Prosecutor General's action for the annulment of the privatisation. In the circumstances, the Court does not consider it necessary to examine, additionally, whether other aspects of the proceedings did or did not comply with that provision.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

37. The applicants complained that the judgments by which the Prosecutor General's action for annulment of the privatisation was upheld had had the effect of infringing their right to peaceful enjoyment of their possessions as secured by Article 1 of Protocol No. 1 to the Convention. The Government disputed the applicants' contention and argued that the privatisation of 1999 had been carried out with serious breaches of the legislation and that, therefore, there has been no breach of Article 1 of Protocol No. 1 to the Convention.

38. The Court considers that the applicants had a “possession” for the purposes of Article 1 of Protocol No. 1. The Court found in paragraph 36

above that the upholding of the Prosecutor General's action after the expiry of the general time-limit, and in the absence of any compelling reasons, was incompatible with the principle of legal certainty. In such circumstances the Court cannot but find that the upholding of the Prosecutor General's actions constituted an unjustified interference with the applicants' right to property, because a fair balance was not preserved and the applicants were required to bear and continue to bear an individual and excessive burden (see, *mutatis mutandis*, *Brumărescu v. Romania* [GC], no. 28342/95, §§ 75-80, ECHR 1999-VII). As in *Dacia SRL* (cited above), the domestic courts did not provide any justification whatsoever for such interference. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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.”

40. The applicants submitted that since they had encountered difficulties in obtaining all the necessary documents, they were unable to present any observations concerning just satisfaction. Accordingly, they asked the Court to reserve the question of just satisfaction.

41. The Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Moldovan Government and the applicants.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle of legal certainty;
3. *Holds* that there is no need to examine separately the applicants' other complaints under Article 6 § 1 of the Convention;
4. *Holds* that there has been a violation of Article 1 of Protocol No. 1 of the Convention;

5. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision and accordingly
- (a) reserves the said question;
 - (b) invites the Moldovan Government and the applicants to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
 - (c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 24 November 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President