

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

THIRD SECTION

DECISION

Application no. 44746/08
Vasile BALAN
against Moldova

The European Court of Human Rights (Third Section), sitting on 24 January 2012 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Mihai Poalelungi, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above applications lodged on 1 September 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Vasile Balan, is a Moldovan national who was born in 1956 and lives in Pănăşeşti. He was represented before the Court by Mr Lilian Osoian, a lawyer practising in Chişinău. The Government were represented by their Agent, Mr Vladimir Grosu.

I. THE CIRCUMSTANCES OF THE CASE

1. Domestic judgment in favour of the applicant and its enforcement

2. The facts of the case may be summarised as follows.

3. On 28 September 2003 the applicant was accidentally injured by an individual, D., sustaining an injury to his left thigh bone. On an unspecified date the applicant instituted civil tort proceedings against D., seeking a court order obliging D. to pay him compensation for pecuniary damage.

4. On 26 November 2004 the Strășeni District Court ordered D. to pay the applicant 7,184 Moldovan lei (MDL) (the equivalent of 435 euros (EUR) in compensation for pecuniary damage and MDL 215 (EUR 13) for legal fees. This decision was final and an enforcement warrant was issued. It has not been enforced to date.

2. The Olaru and others *pilot judgment and its consequences for similar cases*

5. On 28 July 2009 the Court delivered the *Olaru and others* pilot judgment (see *Olaru and Others v. Moldova*, nos. 476/07, 22539/05, 17911/08 and 13136/07, 28 July 2009) in which it found, *inter alia*, that the problem of non-enforcement of domestic judgments awarding social housing to different categories of individuals disclosed the existence of a "systemic problem". The Court ordered, *inter alia*, that the respondent State set up an effective domestic remedy which secures adequate and sufficient redress for non-enforcement or delayed enforcement of final domestic judgments (see *Olaru and others*, cited above, § 58 and point 4 of the operative part).

3. The creation of a new domestic remedy and subsequent evelopments

6. On 20 September 2011 the Moldovan Government informed the Court that on 1 July 2011 a new law (Law no. 87) entered into force, instituting a remedy against the problem of non-enforcement of final domestic judgments and against the problem of unreasonable length of proceedings.

7. On 29 September 2011 the Registry of the Court informed the applicant and all other applicants in the same position of the new remedy, asking whether they intended to make use of it within the six-month time-limit set by Law No. 87 (see paragraph 9 below). The applicants' attention was drawn to the fact that according to Article 35 § 1 of the Convention, the Court may only deal with a matter after all domestic remedies have been exhausted and that failure to observe the above rule could constitute a reason for declaring the application inadmissible.

8. By a letter of 10 November 2011 the applicant informed the Court in response that he was not intending to use the new remedy because it was not

effective. In particular, the applicant argued that even the denomination of Law no. 87 suggested that it offered a remedy only when a final judgment had not been enforced in a timely manner but not when the judgment had not been enforced at all. In the applicant's view, the law did not provide for a mechanism to trigger a rapid enforcement of an unenforced final judgment. Moreover, the applicant submitted that it would be an excessive burden for him to be requested to go back to the domestic courts and attempt to exhaust the new remedy.

II. RELEVANT DOMESTIC LAW

9. According to Law no. 87 anyone who considers him or herself to be a victim of a breach of the right to have a case examined or a final judgment enforced within a reasonable time is entitled to apply to a court for the acknowledgement of such a breach and compensation. According to section 1 of the law, it should be interpreted and applied in accordance with the national law, the Convention and the Court's case-law. According to section 4 of the law the courts are obliged to deal with applications lodged under the law within three months. Section 5 of the law states that if a breach of the right to have a case examined or a final judgment enforced within a reasonable time is found by a court, compensation for pecuniary damage, non-pecuniary damage and costs and expenses have to be awarded to the applicant. Section 6 of the law simplifies the procedure of enforcement of judgments adopted under the law so as no further applications or formalities should be required from the part of the applicants. Under section 7 of the law all individuals who have complained to the European Court of Human Rights that their right to a trial within a reasonable time or to enforcement of a judgment within a reasonable time has been violated may claim compensation in domestic courts within six months of the entry into force of the new law, provided that the European Court has not ruled on the admissibility and merits of the complaint.

10. At the same time the Code of Civil Procedure was modified in such a manner as to reduce the number of instances of appeal from two to one and to waive court fees for such proceedings.

COMPLAINTS

11. Referring to Article 6 of the Convention and Article 1 of Protocol No. 1, the applicant complained that the State had failed to ensure the enforcement of the binding and enforceable judgment in his favour.

THE LAW

12. The Court will determine first whether the applicant complied with the rule of exhaustion of domestic remedies set out in Article 35 of the Convention, which provides, in so far as relevant:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

I. GENERAL PRINCIPLES

13. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had the opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (see, among many other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

14. Nevertheless, the only remedies which Article 35 of the Convention requires to be used are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 36, Series A no. 40, A, and *Akdivar and Others*, cited above, § 67). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Van Oosterwijck* , cited above, § 37; *Akdivar and Others*, cited above, § 71, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX).

15. An assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001, and *Brusco*, cited above).

16. Relying on the well-established principles set out above, the Grand Chamber vigorously reiterated in a recent decision the subsidiary role of the Convention system and the ensuing limits attached to the Court's function (see *Demopoulos and Others v. Turkey* (dec.), nos. 46113/99 *et al*., § 69, ECHR 2010-...):

> "69. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. (...) The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions."

II. APPLICATION TO THE PRESENT CASE

17. The Court notes that the applicant refused to use the new remedy. While disputing its effectiveness, he showed no doubt that it was available to him. Indeed, the Court does not see any reason to doubt that the applicant was entitled to bring his claims to domestic courts in accordance with Law no. 87 as his complaints to the Court concern delays in enforcement of a binding and enforceable judgment and because his action in domestic courts did not appear to be barred in any way by the time-limits set in section 7 of the law.

18. As regards the effectiveness of the new remedy available to the applicant, it is obvious from the text of Law no. 87 that when deciding on claims lodged under it, domestic courts are required to apply the Convention criteria in the same manner as the Court does. In particular, as in the case of the Court's judgments, the domestic courts are entitled to find a breach of the right to speedy enforcement of a final judgment and, where appropriate, to award compensation in monetary form for pecuniary damage, non-pecuniary damage and costs and expenses.

19. In view of these elements, the Court accepts that Law no. 87 was designed, in principle, to address the issue of delayed enforcement of judgments in an effective and meaningful manner, taking account of the Convention requirements. It is true that domestic courts have not been able yet to establish any stable practice under this Act within several months since its entry into force (see *Nogolica v. Croatia* (dec.), no. 77784/01,

ECHR 2002-VIII). However, the Court does not see at this stage any reason to believe that the new remedy could not afford the applicant the opportunity to obtain adequate and sufficient redress for his grievances or that it could not offer reasonable prospects of success.

20. The Court further notes the applicant's argument that the new remedy is only designed to compensate for enforcement delays but does not ensure the actual enforcement when the final judgment has not been enforced. It recalls that a similar argument was considered in *Nagovitsyn and Nalgiyev v. Russia* ((dec.), nos. 27451/09 and 60650/09, 23 September 2010) and dismissed for the following reasons:

> "33. The Court reiterates that prevention of a violation is, in absolute terms, the best solution in many spheres. A remedy designed to prevent enforcement delays and to hasten the ultimate recovery of the judgment debt would therefore be most desirable. Such a remedy would offer an undeniable advantage over a remedy affording only compensation, since it would prevent a finding of successive violations in the same case and would not merely repair the breach *a posteriori*, as does a compensatory remedy of the type provided for under the Compensation Act. (see, *mutatis mutandis*, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 183-184, ECHR 2006-V). It is also true, at the same time, that a remedy designed to expedite the enforcement of a judgment would not provide adequate redress in numerous cases in which the enforcement of judgments has already been delayed (ibid.). Finally, the Contracting States are afforded some discretion as to which remedy should be introduced in a given situation (see *Kudła v. Poland* [GC], no. 30210/96, §§ 154-155, ECHR 2000-XI, and *Scordino (no. 1)*, cited above, §§ 188).
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> 34. The Court therefore concludes, as it has repeatedly done in previous cases, that the States can choose to introduce only a compensatory remedy in respect of the non-enforcement of judgments without that remedy being regarded as ineffective (see, *mutatis mutandis*, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 17, ECHR 2002-VIII; *Scordino (no. 1)*, cited above, § 187, and *Burdov (no. 2)*, cited above, § 99). In the Court's view, the pecuniary compensation that may be awarded to applicants under the Compensation Act would at least be capable of providing adequate and sufficient redress for those violations of the Convention which have allegedly occurred in their cases to date.
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> 35. The Court is mindful that an issue may subsequently arise whether the new compensatory remedy would still be effective in a situation in which the defendant State authority persistently failed to honour the judgment debt notwithstanding a compensation award or even repeated awards made by domestic courts under the Compensation Act. That was indeed a hypothesis suggested by the applicants (see paragraph 14 above), but the Court does not find it appropriate to anticipate such an event, nor to decide this issue *in abstracto* at the present stage."

21. In view of the similarity between *Nagovitsyn and Nalgiyev* and the present case, the Court does not consider it necessary to depart from its findings in that case. As in the above case, the Court does not find it appropriate to anticipate what would happen if the principal judgment is not enforced, nor to decide this issue *in abstracto* at the present stage. Accordingly, the applicant's objection is dismissed on similar grounds.

22. The Court has paid attention next to the fact that the new remedy only became available after the introduction of the present application and that only exceptional circumstances may compel the applicant to exhaust such a remedy. It observes that there have been several cases concerning the length of proceedings in various countries, in which such exceptional circumstances were found to exist (see *Brusco*, cited above; *Nogolica*, cited above; *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00 *et al.*, ECHR 2002-IX; *Michalak v. Poland* (dec.), no. 24549/03, §§ 41-43, 1 March 2005; *Korenjak v. Slovenia*, no. 463/03, §§ 63-71, 15 May 2007 and *Nagovitsyn and Nalgiyev*, cited above § 37). The Court stresses that the nature of the remedy and the context in which it was introduced weighs heavily in its assessment of such exceptions (see *Scordino (no. 1)*, cited above, § 144).

23. As in the cases mentioned above, the Court considers it appropriate and justified in the circumstances of the present cases to require that the applicant uses the new domestic remedy introduced by Law no. 87. This conclusion is supported by the following reasons.

24. Regarding the underlying context, the Court finds it significant that the Moldovan Government has passed the legal reform introducing the new domestic remedy in response to the *Olaru* pilot judgment under the supervision of the Committee of Ministers. One of the aims of the pilot judgment procedure was precisely to allow the speediest possible redress to be granted at the domestic level to the large numbers of people suffering from the structural problem of non-enforcement and implicitly of length of proceedings (see *Olaru*, cited above §59). In the Court's view, it would be in line with the spirit and the logic of the pilot judgment that the applicants complaining about non-enforcement of final judgments and length of proceedings now claim redress for their grievances in the first place through the new domestic remedy.

25. Furthermore, the Court attaches particular importance to the transitional provision of Law no. 87 (section 7) which reflects the Moldovan authorities' intention to grant redress at the domestic level to those people who had already applied to the Court before the entry into force of the Act (compare *Brusco*, cited above). In these circumstances, the continuation of the proceedings before the Court in the applicant's case and hundreds of similar ones would be at odds with the principle of subsidiarity, which is paramount in the Convention system. The consideration of such cases mainly involves the establishment of basic facts and calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Demopoulos and others*, cited above, § 69). The Court reiterates that its task, as defined by Article 19, would not be best achieved by taking such cases to judgment in the place of domestic courts, let alone considering them in parallel with the domestic proceedings (see, *mutatis mutandis*, *E.G. v. Poland* (dec.),

no. 50425/99, § 27, 23 September 2008, and *Burdov (no. 2)*, cited above, § 127).

26. While the Court may exceptionally decide, for the sake of fairness and effectiveness, to conclude its proceedings by a judgment in certain cases of this kind, which remain on its list for a long time or have already reached an advanced stage of proceedings (see, *mutatis mutandis*, *Olaru*, cited above, § 61), it will require, as a matter of principle, that all new cases introduced after the pilot judgment and falling under Law no. 87 be submitted in the first place to the national courts.

27. However, the Court's position may be subject to review in the future depending, in particular, on the domestic courts' capacity to establish consistent case-law under Law no. 87 in line with the Convention requirements (see *Korenjak*, cited above, § 73). Furthermore, the burden of proof as to the effectiveness of the new remedy in practice will lie with the respondent Government (ibid.).

28. Finally the Court notes that the procedure under Law no. 87 before the first instance court was limited in time to three months and that the number of appeals was reduced to one. Unlike in other cases, the proceedings under the new law will only take place before the district courts and the Courts of Appeal. This shall contribute significantly to the speediness of the proceedings. Moreover, it is noted that no court fees are envisaged for such proceedings. In such circumstances the Court is satisfied that going back to the domestic courts does not constitute an excessive burden for the applicant and for other applicants in a similar position.

29. Having regard to all the above considerations, the Court concludes that the applicant was required by Article 35 § 1 to avail himself of the new domestic remedy by pursuing the domestic proceedings under Law no. 87. It notes, however, that such proceedings have not been instituted at the national level by him.

30. It follows that his application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President