CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF JOSAN v. MOLDOVA

(Application no. 37431/02)

JUDGMENT

STRASBOURG

21 March 2006

FINAL

21/06/2006

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 Josan v. Moldova,

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

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mrs L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 28 February 2006,

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

PROCEDURE

1. The case originated in an application (no. 37431/02) 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 a Moldovan national, Mrs Vera Josan, ("the applicant"), on 4 October 2002.

2. The applicant was represented by Mr Vitalie Iordachi, acting on behalf of the "Lawyers for Human Rights", a non-governmental organisation based in Chişinău. The Moldovan Government ("the Government") were represented by their Agent, Mr Vitalie Pârlog.

3. The applicant complained that her rights guaranteed by Article 6 § 1 of the Convention and her right to the peaceful enjoyment of her possessions were breached as a result of the non-enforcement of the final judgment of the Court of Appeal of 11 April 2002 and its subsequent quashing following a request for annulment lodged by the Prosecutor General's Office.

4. The application was allocated to the Fourth Section. On 7 January 2003 a Chamber of that Section decided to communicate the application 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. It also decided to give priority to the case under Rule 41 of the Rules of Court in view of the applicant's advanced age and poor state of health.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1931 and lives in Hagimus.

7. Following the construction of a public road, her house was damaged and she brought an action against the Local Council.

8. On 1 June 2001 she obtained a judgment in her favour, according to which the Local Council was obliged to pay her 155,868 Moldovan lei (MDL). On 29 January 2002 the Chişinău Regional Court dismissed the Local Council's appeal. On 11 April 2002 the Court of Appeal dismissed the Local Council's appeal on points of law and the judgment became final.

9. It appears from the documents submitted by the applicant that on 21 May 2002 an enforcement warrant was sent by the Căuşeni District Court to the Căuşeni Department of Enforcement of Judgments.

10. The applicant complained to the Căuşeni District Court and to the Ministry of Justice on numerous occasions about the non-enforcement of the judgment favourable to her.

11. In a letter of 28 August 2002 the Ministry of Justice informed the applicant that during the enforcement proceedings the court decided to change the manner of enforcement of the judgment and on 29 July 2002 it issued a decision in that respect. That decision was challenged by one of the parties to the proceedings.

12. In the meantime, on 11 July 2002 the Prosecutor General's Office filed a request for annulment of all the judgments, and asked the Supreme Court of Justice to re-open the proceedings.

13. On 2 October 2002 the Supreme Court of Justice upheld the request for annulment, quashed all the judgments and ordered the re-opening of the proceedings. The re-opened proceedings are still pending before the domestic courts.

II. RELEVANT DOMESTIC LAW

14. The relevant domestic law has been summarised in *Prodan v. Moldova*, no. 49806/99, § 31, ECHR 2004-III and in *Roşca v. Moldova*, no. 6267/02, § 16, 22 March 2005.

THE LAW

15. The applicant complained that the non-enforcement of the final judgment in her favour and its subsequent quashing by way of a *Brumărescu*-type request, violated her rights provided for by Article 6 § 1 of the Convention, which in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

16. She also stated that because of the non-enforcement of the judgment in her favour and its subsequent quashing she was unable to enjoy her possessions, and thus that her right to protection of property under Article 1 of Protocol No. 1 to the Convention had been violated. 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."

III. ADMISSIBILITY OF THE COMPLAINTS

A. The non-enforcement of the judgment favourable to the applicant

17. The Government argued in respect of this complaint that the applicant had not exhausted domestic remedies. Since this complaint is in any event inadmissible as being manifestly ill-founded (see below), the Court does not consider it necessary to reach any conclusion in respect of the Government's objection.

18. The Court recalls that a delay in the execution of a judgment may be justified in particular circumstances (see *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III). The Court has to examine whether the length of the enforcement proceedings, to which the applicant had been a party, exceeded the "reasonable time" requirement in Article 6 § 1 (see, *mutatis mutandis*, the *Di Pede v. Italy* and *Zappia v. Italy* judgments of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 20-24 and 16-20, respectively). The Court recalls in this connection that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and that of the authorities dealing with the case (see, as a recent authority, *Kormacheva v. Russia*, no. 53084/99, § 51, 29 January 2004).

19. The period to be taken into consideration would normally begin, in accordance with the Moldovan law, at the date on which the applicant officially requested the enforcement of the judgment favourable to her. Since the applicant did not submit such information, the Court will consider that date to be 21 May 2002, when the enforcement warrant was sent to the Căuşeni Department of Enforcement of Judgments. The end of the period

should be considered 2 October 2002, when the judgment favourable to the applicant was quashed by the Supreme Court of Justice. The enforcement proceedings thus lasted for four months and ten days.

20. The Court notes that during this period the enforcement proceedings were suspended due to a request by one of the parties to change the manner of enforcement and the court proceedings linked to that request (see paragraph 11 above). Regard being had to the above considerations and to the relatively short overall duration of the enforcement proceedings, the Court finds that this complaint is manifestly ill-founded and that it must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. The quashing of the final judgment favourable to the applicant

21. In her supplementary observations on the merits of June 2005 the applicant submitted that when the Supreme Court of Justice upheld the Prosecutor General's request for annulment, it "either was not aware of the provisions of the Convention or it intentionally ignored them".

22. The Government contended that this statement was abusive under Article 35 § 3 of the Convention and asked the Court to declare the application inadmissible.

23. The Court considers that an application would not normally be rejected as abusive under Article 35 § 3 of the Convention on the basis that it was "offensive" or "defamatory" unless it was knowingly based on untrue facts (see the *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X or *Rehak v. the Czech Republic*, (dec.), no 67208/01, 18 May 2004). However, on the basis of the material in its possession, the Court is unable to conclude that the applicant has based her allegations on information which she knew to be untrue. Accordingly, this submission fails.

C. Conclusion on admissibility

24. The Court considers that the applicant's complaints under Articles 6 § 1 and under Article 1 of Protocol No. 1 to the Convention, concerning the quashing of the final judgment favourable to her, raise questions of 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 these complaints admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

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

25. The applicant complained that the judgment of the Supreme Court of Justice of 2 October 2002, which set aside a final judgment in her favour, had violated Article 6 § 1 of the Convention.

26. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be 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. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (*Roşca v. Moldova*, no. 6267/02, § 24, 22 March 2005).

27. Legal certainty presupposes respect for the principle of *res judicata* (*ibid.*, § 62), that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (*ibid*., § 25).

28. In the present case the Court notes that the request for annulment was a procedure by which the Prosecutor General's Office could challenge any final decision upon the request of one of the parties to the proceedings. The procedure was provided for in Article 332 of the former Code of Civil Procedure which was in force until 12 June 2003.

29. The Court further notes that, by allowing the request lodged by the Prosecutor General under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in a final and enforceable judicial decision and thus *res judicata*.

30. In applying the provisions of Article 332, the Supreme Court infringed the principle of legal certainty. There has thus been a violation of Article 6 § 1 of the Convention.

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

31. The applicant complained that the Supreme Court of Justice's judgment of 2 October 2002 had had the effect of infringing his right to

peaceful enjoyment of her possessions as secured by Article 1 of Protocol No. 1.

32. The Court reiterates that a judgment debt may be regarded as a "possession" for the purposes of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III, and the cases cited therein). Furthermore, quashing such a judgment after it has become final and unappealable will constitute an interference with the judgment beneficiary's right to the peaceful enjoyment of that possession (see *Roşca*, cited above, § 31). Even assuming that such an interference may be regarded as serving a public interest, the Court finds that it was not justified since a fair balance was not preserved and the applicant was required to bear an individual and excessive burden (cf. *Roşca*, cited above, § 31).

33. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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. Pecuniary damage

35. The applicant claimed MDL 264,539 (the equivalent of 17,578 euros (EUR) at the time) for pecuniary damage suffered as a result of the quashing of the final judgment favourable to her, of which MDL 155,868 was the amount to which she was entitled by virtue of the final judgment of the Court of Appeal of 11 April 2002 and the rest corresponded to the lost interest calculated by her on the basis of the average interest rate calculated by the National Bank of Moldova during the period in question and a five percent penalty calculated in accordance with the provisions of the Civil Code.

36. The Government disagreed with the method of calculation used by the applicant and asked the Court to dismiss her claims for pecuniary damage.

37. The Court considers that the applicant must have suffered pecuniary damage as a result of the quashing of the final judgment favourable to the applicant and as a result of the impossibility to use and enjoy the money awarded to her for a period of approximately thirty-nine months (see *Prodan v. Moldova*, cited above, § 71). Taking into account the line of

approach in the *Prodan* case, and the circumstances of the case under consideration, the Court awards the applicant the total sum of EUR 16,000 for pecuniary damage. This amount includes the sum awarded to the applicant by virtue of the judgment of 11 April 2002 and the lost interest.

B. Non-pecuniary damage

38. The applicant claimed EUR 400,000 for the non-pecuniary damage suffered as a result of the quashing of the final judgment favourable to her.

39. She argued that the quashing of the final judgment caused her suffering, stress and anxiety which had negatively affected her health.

40. The Government disagreed with the amount claimed by the applicant, arguing that it was excessive in light of the case-law of the Court.

41. The Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of the quashing of the final judgment of 11 April 2002 and of the impossibility to use her money for a period of approximately thirty-nine months. It awards her EUR 2,000 for non-pecuniary damage.

C. Costs and expenses

42. The applicant also claimed EUR 2,000 for costs and expenses.

43. The Government did not agree with the amount claimed, stating that the applicant had failed to prove the alleged representation expenses.

44. The Court recalls that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-III).

45. In the present case, regard being had to the itemised list submitted by the applicant, the above criteria and the complexity of the case, the Court awards the applicant EUR 1,250 for incurred costs and expenses.

D. Default interest

46. 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

1. *Declares* unanimously inadmissible the complaint about the non-enforcement of the final judgment.

2. *Declares* unanimously the remainder of the application admissible.
3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand euros) in respect of pecuniary damage; EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 1,250 (one thousand two hundred and fifty euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring and partly dissenting opinion of Mr Pavlovschi is annexed to this judgment.

N.B.
F.E-P.

PARTLY DISSENTING OPINION OF JUDGE PAVLOVSCHI

I share the view of the other members of the Chamber that there has been a violation of Article 6 of the Convention in the present case as well as a violation of Article 1 of Protocol No. 1.

At the same time I regret very much the fact that I cannot say the same as far as the conclusions drawn by the majority regarding the application of Article 41 are concerned. I am not able to share the position taken by the majority for the following reasons.

In paragraph 13 of the judgment there is a reference to the fact that the proceedings are still pending before the domestic courts.[1]

In this kind of situation I think that before ruling on the Article 41 issue the Court would have been justified in waiting till the domestic proceedings had come to an end.

Exactly the same approach was taken by the Grand Chamber in the case of *Brumarescu v. Romania* – a leading case that concerned the quashing of a final judicial decision.

As in the present case, in *Brumarescu* the Court was dealing with a situation in which domestic proceedings were pending before the national authorities.[2]

In their observations in that case, the Romanian Government submitted, along with other arguments, that any award for pecuniary damage would be unjust as the applicant's claim in the domestic courts to his house could still succeed. [3]

In the particular circumstances of that case, the Court considered that the question of the application of Article 41 was not ready for decision and decided to reserve it in its entirety.[4]

It was only fifteen months later, that is to say after the domestic proceedings had come to an end, that the Grand Chamber returned to the question of Article 41 and delivered a judgment on just satisfaction.

In that judgment the Grand Chamber stated:

> "It appears from the documents submitted by the parties that the applicant's appeal against the judgment of 21 April 1999 (see the principal judgment, § 30) was dismissed by the Bucharest County Court on 28 February 2000. On an application made under Law no. 112/1995, that court held that it had jurisdiction only to award compensation, according to the criteria laid down in Law no. 112/1995. The applicant appealed against that decision to the Bucharest Court of Appeal as the court of last instance. His appeal was dismissed on 26 October 2000."[5]

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[1] See: the present judgment, paragraph 13.
[2] See: the judgment in the case of *Brumarescu v. Romania* (Merits), paragraph 30.
[3] See: ibid, paragraph 83.
[4] See: ibid, paragraph 84.
[5] See: the judgment in the case of *Brumarescu v. Romania* (Just satisfaction), paragraph 8.

So, in my view, and in so far as it clearly follows from *Brumarescu*, there was a direct link between the fact that domestic proceedings were pending and the decision to adjourn the determination of the Article 41 question. It is also quite obvious from the judgment, that, along with other reasons, the pending domestic proceedings served as a legal ground for the Grand Chamber's decision to reserve the Article 41 issue in its entirety.

The same solution would have been logical in the present case, at least as regards the question of pecuniary damage. The consideration of the Article 41 issue should have been adjourned till the domestic judicial proceedings had ended. Unfortunately, this has not been the case.

Despite the fact that a similar issue, that is the determination of the damage caused to the applicant, is still pending before the national courts, the majority decided to grant the applicant practically everything she claimed, including hypothetical bank interest and the principal value of her law-suit (she sought EUR 17,578 for pecuniary damage and was awarded EUR 16,000 under this head).[1] In practical terms, the majority has stood in the shoes of the first-instance Moldovan court. This decision makes the national judicial proceedings devoid of purpose and in my view constitutes both a serious deviation from the principle of "subsidiarity" and interference with the proper administration of justice in Moldova.

I have spent a lot of time studying judgments delivered against other countries trying to find at least one example of the Court ruling on a matter pending before national judicial authorities, but have failed to do so (information as of 13 January 2006). To the best of my knowledge, only in the case of *Popov* and in the present case has the Court ignored the principle of "subsidiarity" and ruled on a case similar to a case pending before national judicial authorities in lieu of a national court.

Time and again I ask myself how far this Court is going to move in the direction of assuming the role of the national authorities.

I would readily have accepted an award for non-pecuniary damage following our finding of a violation, but an award for pecuniary damage, in the particular circumstances of the present case, is something which is very difficult for me to accept.

This is where I respectfully disagree with the majority.

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[1] See: the present judgment, paragraphs 35 and 37.