

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

THIRD SECTION

CASE OF MIHALACHE v. ROMANIA

(Application no. 15859/07)

JUDGMENT

STRASBOURG

25 September 2012

This judgment is final. It may be subject to editorial revision.



In the case of Mihalache v. Romania,

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

Alvina Gyulumyan, *President,*
Ineta Ziemele,
Kristina Pardalos, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 4 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 15859/07) 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, Ms Geanina Mariana Mihalache ("the applicant"), on 16 March 2007.

2. The applicant was represented by Ms Maria Lefter, a lawyer practising in Brasov. The Romanian Government ("the Government") were represented by their Agent, Mrs Irina Cambrea, from the Ministry of Foreign Affairs.

3. On 20 June 2007 the application was communicated to the Government.

4. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Brasov.

6. At an unspecified date the former owners of the flat that the applicant had bought lodged restitution proceedings concerning nationalised immovable property.

By the final decision of 13 February 2003 the Brasov Court of Appeal rejected the restitution proceedings lodged by the former owners on the ground of lack of active standing and established thus that the applicant was the lawful owner of the flat.

7. At an unknown date the Prosecutor General of Romania lodged a request for supervisory review against the final decision of 13 February 2003 of the Brasov Court of Appeal.

By the final decision of 16 November 2005 the High Court of Cassation and Justice admitted the application for supervisory review lodged by the Prosecutor General, quashed the final decision of 13 February 2003 of the Brasov Court of Appeal and sent the case for re-trial.

Upon re-trial, by a final decision of 21 September 2006 the Brasov Court of Appeal admitted the restitution proceedings of the former owners accepting that they had active standing and establishing that they were the owners of the flat.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 OF THE CONVENTION AND 1 OF PROTOCOL No. 1 TO THE CONVENTION

8. The applicant complained that the quashing of the final decision in her favour by means of an application for supervisory review lodged by the Prosecutor General of Romania had breached Article 6 of the Convention and 1 of Protocol No. 1 to the Convention which read as follows:

Article 6

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

Article 1 of Protocol No. 1

"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. Admissibility

9. The Government argued that the present application has been lodged out of time. They suggested that the final decision to be taken into consideration is the decision of 16 November 2005 of the High Court of Cassation and Justice.

10. The applicant disagreed with the Government and argued that the final decision to be taken into consideration is the decision of 21 September 2006 of the Brasov Court of Appeal which was adopted after the admission of the Prosecutor General's application for supervisory review.

11. The Court recalls that an application for re-opening of proceedings does not constitute an effective remedy for the purposes of the Convention, unless it is successful and results in a re-opening (see, *Çıraklar v. Turkey*, 28 October 1998, §§ 29-32, *Reports of Judgments and Decisions*; *Atkın v. Turkey*, no. 39977/98, § 33, 21 February 2006).

12. Turning to the case at hand the Court notes that by the final decision of 16 November 2005 the High Court of Cassation and Justice admitted the application for supervisory review, quashed the final decision in the applicant's favour and sent the case for re-trial.

Upon re-trial, by the final decision of 21 September 2006 the Brasov Court of Appeal adopted a new solution in the applicant's case.

In these circumstances, the Court notes that the final decision to be taken into consideration for the purposes of the six months rule is the decision of 21 September 2006 of the Brasov Court of Appeal and that, consequently, the present application has been lodged in a timely manner.

13. The Court considers thus that the Government's objection must be rejected.

14. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

15. The applicant argued that the quashing of her final decision by means of an application for supervisory review lodged by the Prosecutor General – who was not a party to the proceedings – breached the principle of legal certainty and the right to property.

16. Referring to the *Brumărescu* case, the Government argued that according to the Court's case-law quashing of final judgements by means of an extraordinary appeal is to be deemed as a breach of the legal certainty principle (*Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII). However, the Government highlighted that, following the

Brumărescu case, the Romanian Civil Procedure Code has been modified. As a result, the current Romanian legislative framework does not allow for an application for supervisory review to be lodged with the Supreme Court, which is now called the High Court of Cassation and Justice.

17. 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 (see *Brumărescu*, cited above, § 61).

18. Legal certainty presupposes respect for the principle of *res judicata* (ibid., § 62), that is the principle of the finality of judgments. This principle underlines 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 (*Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX).

19. The Court considers that, on the basis of the documents in its possession, the present case does not differ from the above mentioned case-law as to the complaint concerning Article 6 of the Convention.

20. As to the complaint raised under Article 1 of Protocol No. 1, the Court notes that the applicant had her property right acknowledged by a final judgement issued by the Romanian domestic courts. The Court considers thus that the applicant had a "possession" for the purposes of Article 1 of Protocol No. 1 (*Savu v. Romania*, no. 19982/04, § 22, 4 November 2008).

The Court has on numerous occasions dealt with similar issues and has found a violation of Article 1 of Protocol No. 1 in cases where the applicants' property right had been reconsidered following applications for supervisory review (see *Brumărescu*, cited above, §§ 61, 77 and 80; *SC Maşinexportimport Industrial Group SA v. Romania*, no. 22687/03, §§ 32 and 46-47, 1 December 2005; *Piaţa Bazar Dorobanţi SRL v. Romania*, no. 37513/03, §§ 23 and 33, 4 October 2007).

21. Having considered the present application, the Court holds the view that the Government failed to submit any argument justifying a departure from the approach described above. Despite the margin of appreciation enjoyed by the State in this field, the Court considers that supervisory review proceedings cannot justify the applicant's deprivation of possessions acquired by means of a final and enforceable decision (see *Blidaru*

v. Romania, no. 8695/02, § 55, 8 November 2007; *SC Maşinexportimport Industrial Group SA*, cited above, § 46).

22. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Articles 6 of the Convention and 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. The applicant claimed the restitution of the flat that she has bought or, alternatively, 51,000 euros (EUR) representing the market value of the flat in issue. The applicant has joined an expert report in this sense.

25. The applicant has also claimed EUR 5,000 in respect of non-pecuniary damage.

26. The Government argued that the applicant was only entitled to the restitution of the updated price which she has paid for the flat, not to the market value. The Government joined an expert report that concluded that the market value of the flat was EUR 43,529.

27. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 72). In the present case, the reparation should aim at putting the applicant in the position in which she would have found herself had the violation not occurred, namely prior to the quashing of the judgment of 13 February 2003 of the Brasov Court of Appeal (see *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, §§ 20-23, ECHR 2001-I).

Therefore, failing restitution of the applicant's immovable property by the respondent State within six months from the delivery of this judgment, the Court holds that the respondent State is to pay the applicant, for pecuniary damage, the current value of the flat, which the Court estimates, based on the expert reports submitted by the parties, at EUR 50,000.

28. The Court also considers that the applicant must have suffered a certain amount of stress and frustration as a result of the quashing of the judgment of 13 February 2003 of the Brasov Court of Appeal. Making its

assessment on an equitable basis, the Court awards the applicant EUR 2,000 for non-pecuniary damage.

B. Costs and expenses

29. The applicant also claimed EUR 4,000 for the costs and expenses incurred before the Court and submitted vouchers for some of the amounts.

30. The Government argued that the applicant's request for costs and expenses is only partly justified.

31. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 300 covering costs under all heads.

C. Default interest

32. The Court considers it appropriate that the default interest rate 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 application admissible;

2. *Holds* that there has been a violation of Article 6 of the Convention and of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*

(a) that the respondent State is to return to the applicant, within six months, the flat in issue;

(b) that the respondent State, failing such restitution, is to pay the applicant within the same period of time, in respect of pecuniary damage, EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable, to be converted into the respondent State's national currency at the rate applicable on the date of settlement;

(c) that the respondent State is to pay the applicant, within three months, the following sums, plus any tax that may be chargeable, to be converted into the respondent State's national currency at the rate applicable on the date of settlement:

(i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(ii) EUR 300 (three hundred euros) in respect of costs and expenses;

(d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Alvina Gyulumyan
Deputy Registrar	President