FOURTH SECTION

CASE OF GUROV v. MOLDOVA

*(Application no. **36455/02**)*

JUDGMENT

STRASBOURG

11 July 2006

FINAL

11/10/2006

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 Gurov v. Moldova,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and T.L. EARLY, *Section Registrar*,

Having deliberated in private on 20 June 2006,

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

PROCEDURE

1. The case originated in an application (no. **36455/02**) 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 Maria Gurov.

2. The applicant was represented by Mr Vitalie Nagacevschi, 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 alleged, in particular, a breach of the right to a fair trial by a "tribunal established by law" on the ground that the term of office of one of the judges who sat on her case had expired.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 22 June 2005 the Court communicated 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. In 1994 the applicant concluded a contract with ASITO (an insurance company incorporated in Moldova), according to which she paid an insurance premium in exchange for an annuity.

6. Since ASITO failed to pay the annuity at the term, the applicant brought a civil action against it, seeking the payment of the pension to date and requiring the company to abide by the contract.

7. On 5 October 2001, the Râşcani District Court found in favour of the applicant and ordered ASITO to pay the pension due and to resume the execution of the contract.

8. ASITO appealed against this judgment, asking *inter alia* for the cancellation of the contract concluded with the applicant in 1994 on the ground that the economic situation of the country had become worse and that the interest rate of the National Bank of Moldova had changed.

9. On 27 February 2002, the Chişinău Regional Court dismissed the appeal arguing that the contract of 1994 was legal and valid and therefore had to be upheld by the parties. ASITO lodged an appeal in cassation against this judgment.

10. In the meantime, on an unspecified date, the Prosecutor General lodged an "appeal in the interests of the law" with the Supreme Court of Justice. According to the Prosecutor General, the appeal had the purpose of clarifying the controversy surrounding all such contracts and of setting a uniform practice for all the courts.

11. On 11 March 2002, the Plenary Supreme Court issued a judgment deciding the dispute between ASITO and the pension beneficiaries in favour of the former. It also ruled that its judgment had no retrospective effect on any already existing judgments and that it could not be used against the parties to those proceedings.

12. On 16 April 2002, a panel of the Court of Appeal composed of judges V.D. (president), T.D. and V.B., quashed the judgments of 5 October 2001 and 27 February 2002, and found in favour of ASITO.

13. After the delivery of the judgment, the applicant found out that the mandate of Judge V.D., who had presided at the hearing, had expired in 2000 and that he had been dismissed from the position of judge in July 2002.

II. RELEVANT DOMESTIC LAW

14. Article 151 of the Constitution of the Soviet Socialist Republic of Moldova of 1989 provided as follows:

> The judges ...shall be elected by the Supreme Soviet for a term of office of ten years.

15. The Decision of the Supreme Soviet of the Soviet Socialist Republic of Moldova, No. 98-XII of 15

June 1990 provided:

... V.D. is appointed as a judge at the Supreme Court of Justice...

16. The Presidential Decree No. 91-94 of 27 July 2002, in so far as relevant, provided:

...

V.D. is dismissed from the position of judge.

...

17. The relevant parts of the Code of Civil Procedure in force at the material time read as follows:

Section 19. The grounds for challenging a judge

A judge shall not be admitted to sit in a case and shall be challenged in the following cases:

1) if he or she participated in an earlier stage of the proceedings as a witness, expert, interpreter, representative, prosecutor, registrar;

2) if he or she is personally interested, directly or indirectly, in the outcome of the proceedings or if there are other reasons for which his impartiality could be doubted;

3) if he, his spouse, his ascendants or descendants have any interest in the outcome of the proceedings...;

4) if his spouse... is a relative of one of the parties to the proceedings...;

5) if he is a tutor... of one of the parties to the proceedings.

...

Section 162. Adjourning the hearing

It is possible to request the adjournment of a hearing when one of the parties, a witness, an expert or an interpreter is absent, or when it is necessary to present new evidence or when there are other circumstances which render impossible the holding of the hearing.

...

18. On 12 June 2003 a new Code of Civil Procedure entered into force. Section 449, so far as relevant, reads as follows:

“Grounds for revision

Revision may be requested:

...

k) When the European Court of Human Rights has found a violation of fundamental rights and liberties, as well as when it has found that the interested person could obtain, in accordance with domestic law, at least partial reparation by way of annulment of a judgment pronounced by a domestic court....”

THE LAW

19. The applicant complained under Article 6 of the Convention of a breach of the right to a fair hearing by a tribunal established by law.

The relevant part of Article 6 § 1 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. ...”

I. ADMISSIBILITY OF THE COMPLAINTS

A. The complaint about the alleged secret deal between ASITO and the Government and the alleged abuse of the right of petition

20. In her initial application, the applicant complained under Article 6 of the Convention that the proceedings had been unfair because of an alleged secret arrangement between ASITO and the Government. The complaint was similar to that examined in *Macovei and others v. Moldova*, no. 19253/03 and 17667/03, 31960/03, 19263/03, 17695/03, 31761/03, §§ 22-23, 25 April 2006. She also submitted a complaint under Article 1 of Protocol No. 1 to the Convention. Later in her comments to the Government's observations, the applicant withdrew these complaints.

21. The Government denied the applicant's allegations, calling them "abusive insinuations". They argued that the applicant's allegations were offensive and defamatory in nature and submitted that the Court should declare the application inadmissible for abuse of the right of petition.

22. The Court takes note of the applicant's withdrawal of the complaint about the alleged secret arrangement and of the complaint under Article 1 of Protocol No. 1 and accordingly will not examine them.

23. In so far as the Government's objection concerning the abuse of the right to petition is concerned, the Court notes that it has already dismissed an identical objection in the above-mentioned *Macovei* case and it does not see any reason to depart from that decision in the circumstances of this case. Accordingly, this objection should be dismissed.

B. Failure to exhaust domestic remedies

24. The Government argued that any judge who is aware of any ground of incompatibility or of any other circumstance which hinder him or her from examining a case objectively and impartially is obliged to withdraw from the case. If not, he or she could be held responsible.

In the present case the applicant could have challenged the judge in accordance with the provisions of section 19 of the Code of Civil Procedure in force at the material time. Had the applicant not known at the time of the hearing that Judge V.D.'s mandate had expired, she could have asked for an adjournment of the hearing, in accordance with section 162 of the Code. The Government accepted that there was no domestic case-law to confirm the effectiveness of the remedy suggested by them.

25. The applicant argued that she had not known at the time of the hearing that Judge V.D.'s term of office had expired. She submitted that according to section 19 of the Code of Civil Procedure, a judge could not be challenged on the ground that his or her mandate had expired. Even assuming that a judge could have been challenged on such grounds, in practice that would have been impossible because a party to a case would not know the names of the judges who would sit on his or her case before the hearing, and accordingly would have no possibility of checking the validity of their mandate. For a party to the proceedings to request an adjournment in order to check the mandate of a particular judge would also have been impossible because, according to section 162 of the Code of Civil Procedure, a party is not entitled to request an adjournment on such grounds. Moreover, even if an adjournment had been granted, at the next hearing the formation of judges might change. The practice of keeping secret the names of judges until the hearing was justified by the need to ensure their impartiality and independence.

In conclusion, the applicant argued that the lack of remedies was confirmed by the absence of any relevant case-law.

26. The Court recalls that under Article 35 § 1 of the Convention 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, among other authorities, the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 66).

27. The Court notes that section 19 of the Code of Civil Procedure, which contains an exhaustive list

of the grounds for challenging a judge, makes no reference to a situation similar to that in the present case. That is consistent with the lack of case-law indicating to the contrary. However, even assuming that there existed a possibility of challenging a judge on the ground of the expiry of his term of office, it would have been unreasonable to expect an applicant to know the term of office of every judge in a particular court, especially in view of the general practice permitting judges to sit after the expiry of their mandates, which the Government conceded in their submissions. In such circumstances, the Court concludes that the application cannot be declared inadmissible for non-exhaustion of domestic remedies and accordingly the Government's objection must be dismissed.

C. Conclusion on admissibility

28. The Court considers that the applicant's complaint under Article 6 of the Convention raises questions of law which are sufficiently serious that its determination should depend on an examination of the merits. No other ground for declaring it inadmissible has been established. The Court therefore declares this complaint 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 this complaint.

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

29. The Government submitted *inter alia* that Judge V.D. was appointed as a judge on 13 June 1990 for a period of ten years. After the expiry of the ten-year period he was not dismissed by a Presidential Decree and the exercise of his functions was tacitly prolonged for an undetermined period until he was nominated for tenure.

30. In order to be nominated for tenure, Judge V.D. had to pass a procedure of attestation, namely to pass a test before the Superior Council of Magistrates and, if successful, to be approved by the President of the country. Since he was not approved by the President, the Superior Council of Magistrates made a new proposal to the President to dismiss Judge V.D., which was approved. During the entire period of attestation, the judge continued to exercise his functions.

31. The Government concluded that Judge V.D. was legally exercising the function of judge after the expiry of the ten-year period up until his dismissal by the President on 27 July 2002.

32. The applicant argued that the practice invoked by the Government, of permitting judges to exercise their functions after the expiry of their mandates and until their nomination for tenure or dismissal, was not prescribed by law. It was contended that since Moldova is not a common law country, such a practice cannot be regarded as law, especially in such a sensitive area as the term of office of a judge. Relying on *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR 2000-VII and *Zand v. Austria*, application no. 7360/76, report of the Commission of 12 October 1978, DR 15, p. 70, the applicant argued that the organisation of the judiciary should be regulated by a law emanating from Parliament and that the organisation of the judiciary in a democratic society should not depend on the discretion of the executive.

33. The applicant complained that the mandate of one of the three judges who heard her appeal on points of law had expired. The Court recalls that Article 6 § 1 does not guarantee a right to appeal from a decision of first instance. Where, however, domestic law provides for a right of appeal, the appeal proceedings will be treated as an extension of the trial process and accordingly will be subject to Article 6 (*Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, § 25).

34. According to the Court's case-law, the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament" (see *Zand v. Austria*, cited above).

35. The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case (see *Posokhov v. Russia*, no. 63486/00, § 39,

ECHR 2003-IV).

36. A tribunal established by law must satisfy a series of conditions such as the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards (see *Coëme and Others v. Belgium*, cited above, § 99).

37. It is not disputed in the present case that the term of office of Judge V.D. expired some time before he sat in the applicant's case. Moreover, the Government admitted that at the time there was a practice of allowing judges to exercise their functions for an undetermined period of time after the expiry of their terms of office, until the question of their tenure had been decided by the President, and that the matter was not regulated by any law emanating from Parliament. In such circumstances, the Court considers that there were no legal grounds for the participation of Judge V.D. at the hearing of the applicant's appeal on points of law. Moreover, this practice was in contradiction with the principle that the judicial organisation in a democratic society should not depend on the discretion of the executive.

38. These circumstances, cumulatively, do not permit the Court to conclude that the Court of Appeal which heard the applicant's case on 16 April 2002 could be regarded as a "tribunal established by law".

39. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed the sum of 5,000 euros (EUR) for the violation of her right to have her civil claim examined by a tribunal established by law. She claimed to have suffered emotional distress and frustration. She did not make any claim in respect of pecuniary damage.

42. The Government argued that the amount claimed by the applicant was excessive and submitted that a finding of a violation would be sufficient just satisfaction in the present case. In any event, they argued that in the case of *Posokhov v. Russia*, no. 63486/00, ECHR 2003-IV, which was similar to the present case, the Court awarded EUR 500 to the applicant.

43. The Court recalls that where it has found that an applicant's case has been decided by a tribunal which was not independent and impartial within the meaning of Article 6 § 1 of the Convention, it has considered that, in principle, the most appropriate form of relief would be to ensure that the applicant was granted in due course a rehearing of the case by an independent and impartial tribunal (see, *San Leonard Band Club v. Malta*, no. 77562/01, § 70, ECHR 2004-...). In the present case, the Court notes that the possibility exists under Moldovan law (see paragraph 18 above) for the applicant, if she so requests, to obtain a re-hearing of her civil case in the light of the Court's finding that the proceedings did not comply with Article 6 guarantees.

44. Accordingly, the Court decides not to make any monetary award.

B. Costs and expenses

45. The applicant also claimed EUR 1,800 for costs and expenses.

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

47. 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).

48. In the present case, regard being had to the itemised list submitted by the applicant's lawyer, the Court awards the applicant EUR 1,200.

C. Default interest

49. 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant

4. *Holds*
   (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 1,200 (one thousand two hundred 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;

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

Done in English, and notified in writing on 11 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY Nicolas BRATZA
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Garlicki, joined by Mr Pellonpää is annexed to this judgment.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE GARLICKI JOINED BY JUDGE PELLONPÄÄ

1. I am ready to accept that there has been a violation of Article 6 § 1 of the Convention because a "tribunal" meeting the requirements provided for in that Article has not heard the applicant's case.

I am not sure, however, whether the real deficiency in this case resulted from the fact that one of the judges continued his duties after his term of office had expired. On the one hand, I am not impressed by the manner in which the relevant domestic law is presented. The Court quotes Article 151 of the 1989 Constitution of the Soviet Socialist Republic of Moldova, but it gives no information as to the subsequent 1994 Constitution. Article III.6 of Chapter VIII of that Constitution provided for an extension of the term

of office of all judges who had already completed 15 years of service. It would be interesting to know whether there has been any other regulation concerning judges of lesser seniority. On the other hand, the Government indicated that there had been a general practice of tacit prolongation of the functions of all judges whose term of office had expired but whose reappointment was still awaiting a formal decision.

In my opinion it would be safer to assume that the judge in question had the right to exercise his functions. Yet, the violation of the Convention arose from that judge's lack of impartiality and independence.

2. A judge whose reappointment (and, alternatively, dismissal) is under consideration by the executive branch can hardly be regarded as satisfying the requirements of impartiality and independence. It does not necessarily mean that each and every judicial system in which judges are appointed to a limited term of office subject to subsequent reappointments must, *per se*, be disqualified under the Convention.

As has already been found in Strasbourg case-law, a fixed term of office of a relatively short duration is allowed in respect of special administrative tribunals or disciplinary tribunals (see *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, § 57, and *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, § 80). However, such tribunals differ from regular courts of law and may have different standards of independence. Also, in respect of regular courts, an initial appointment for a fixed probationary period is not as such incompatible with the Convention.

There may also be countries where the tradition of periodic reappointments of "regular" judges has become so well established that it would not affect their impartiality and independence to a degree incompatible with the Convention. However, such situations are but rare exceptions. The general approach to the judicial function in Europe is that judges should be appointed for life and if – as in the case of several
constitutional courts – their term of office is to be limited in time, no reappointment should be permitted. The same considerations prompted the drafters of Protocol No. 14 to adopt a single term of office for the judges of the European Court of Human Rights and it should be recalled that this decision was also a fruit of practical experience, by no means limited to the new Member States.

3. The lack of external appearances of impartiality and independence in the case of Judge V. D. stemmed from the very fact that he was exercising his judicial function in the awareness that his future depended on Presidential approval of his reappointment. This – generally unacceptable – situation was aggravated by three additional factors.

First of all, the whole reappointment process lacked transparency and normality. There was no comprehensive parliamentary regulation of criteria, procedures and deadlines for reappointment. The final decision was left entirely to the discretion of the President of the Republic.

Secondly, the case in which Judge V. D. was participating required him to decide on the legal claims and liabilities of the ASITO Company. This Company, on account of its history and importance, did not entirely remain outside the Government's sphere of interest.

Last, but certainly not least, the general context of the so-called post-communist countries should be kept in mind. Under the Communist regime, judges had, in almost all those countries, been "elected" for a limited period of time and decisions as to possible "re-election" remained vested with the executive branch. This system led to an almost total destruction of judicial independence. Any attempt to revive it, in one form or another, on a permanent or transitional basis, would be perceived as an attempt to restore old practices and would destroy public confidence in the independence of the judiciary.

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