FOURTH SECTION

CASE OF TOCONO AND PROFESORII PROMETEIŞTI v. MOLDOVA

(Application no. 32263/03)

JUDGMENT

STRASBOURG

26 June 2007

FINAL

26/09/2007

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 Tocono and Profesorii Prometeişti v. Moldova,

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

Sir Nicolas Bratza, *President*,
Mr J. Casadevall,
Mr G. Bonello,
Mr K. Traja,
Mr S. Pavlovschi,
Mr J. Šikuta,
Mrs P. Hirvelä, *judges*,
and Mr T.L. Early, *Section Registrar*,

Having deliberated in private on 5 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 32263/03) 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 S.R.L. Tocono and the Profesorii Prometeişti Foundation ("the applicants"), two legal entities based in Chişinău, on 26 May 2003.

2. The applicants were represented by Mr V. Nagacevschi, a lawyer practising in Chişinău and a member of the non-governmental organisation Lawyers for Human Rights. The Moldovan Government ("the Government") were represented by their Agent, Mr V. Pârlog.

3. The applicants alleged, in particular, a breach of Article 6 § 1 of the Convention on account of the alleged lack of impartiality of one of the judges who examined the appeal in their case. They also alleged a violation of their rights guaranteed by Article 1 of Protocol No. 1 to the Convention.

4. On 9 February 2006 the Court decided to give notice of 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 1991, immediately after the collapse of the Soviet Union, Tocono, the Chişinău Municipal Council and the Ministry of Education took the initiative to create the first private high school in Moldova ("the school"). In view of the lack of legislation regulating private education, the Government issued Decision no. 473 of 29 August 1991, in which they confirmed that Tocono was the school's sole founder and that the school was to be financed from the local budget, donations, fees and money invested by Tocono.

6. In the autumn of the same year the school, called the Experimental High School, was opened.

7. On 9 December 1991 the Government issued Decision no. 685 amending the previous decision and naming as co-founders of the school five other legal entities which had invested in it.

8. Between 1991 and 2001 the school existed without State registration, owing to the lack of any legislation governing that area.

9. In 2001, after the enactment of legislation concerning private education, the school was required to obtain State registration.

10. On 10 December 2001, following a request by the school's head teacher, the Government issued Decision no. 1375, repealing Decision no. 685. On 20 December 2001 it was published in the Official Gazette and entered into force.

11. On 28 December 2001, Tocono and a group of teachers from the school, who had joined forces to create a foundation called "Professorii Prometeişti", registered new articles of association for the school in accordance with the new legislation. The new articles stated that there were only two founders - Tocono and Profesorii Prometeişti- and that the school would thenceforth be called S.R.L. Prometeu. The same day the newly created entity was issued with a State registration certificate.

12. On 10 June 2002, following a request by the school's former co-founders, the Government issued Decision no. 718 repealing Decision no. 1375.

13. On 25 June 2002 four of the former co-founders mentioned in Decision no. 685 brought an action against the Chamber of State Registration and against S.R.L. Prometeu, seeking to have the registration of the new entity S.R.L. Prometeu declared null and void on the ground that they should also have been included as co-founders of the school in accordance with decision No. 685.

14. On 11 December 2002 the Court of Appeal dismissed the action. It found, *inter alia*, that at the date of registration of the new school (28 December 2001), Decision no. 685 had no longer been in force.

15. The plaintiffs lodged an appeal with the Supreme Court of Justice.

16. On 30 April 2003 a panel of the Supreme Court of Justice, composed of judges V.M., I.P. and V.B., upheld the appeal, quashed the judgment of the Court of Appeal and ruled in favour of the former co-founders. It observed, *inter alia*, that the request for registration of S.R.L. Prometeu had been lodged with the Registration Chamber on 13 December 2002, when Decision no. 685 of 9 December 1991 had still been in force. It also decided to exclude the Profesorii Prometeişti Foundation from the list of founders of the school.

17. The applicants did not learn of the composition of the panel until the day of the hearing. They alleged not to have known at the time of the hearing that, three years earlier, Judge V.B.'s son had been expelled from the school for misbehaviour, truancy and bad grades, an expulsion carried out by the head teacher of the school and by teachers who formed part of the Profesorii Prometeişti Foundation. As a result of the incident the judge had allegedly threatened the school authorities with retaliation.

II. RELEVANT DOMESTIC LAW

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

> Article 19 Grounds for challenging a judge
>
> A judge shall not be admitted to sit in a case or may 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 or registrar;
>
> (2) if he or she is personally interested, directly or indirectly, in the outcome of the proceedings or if there are other reasons to doubt his or her impartiality;
>
> (3) if he or she, his or her spouse or his or her 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 or she is a guardian... of one of the parties to the proceedings.
>
> ...
>
> Article 23 The request to challenge a judge
>
> If the circumstances indicated in Article 19 ... are present, the judge shall be obliged to withdraw from the case.
>
> For the same reasons the parties to the proceedings may challenge [a judge].

A challenge must be declared, and reasons given, before the examination of the merits of the case. A challenge may be declared later only if the party to the proceedings learned about the reasons for the challenge after the beginning of the proceedings. If the circumstances [indicated above] become known to the court after the examination of the case has begun, the court shall be obliged to inform the parties in order to decide on the matter of [incompatibility].”

THE LAW

19. The applicants complained under Article 6 of the Convention of a breach of their right to a fair hearing by an impartial tribunal, arguing that Judge V.B. could not be impartial because his son had been expelled from the school. They also complained that the entire panel of judges of the Supreme Court of Justice had lacked independence since the arrival of the Communist Party to power and that the Supreme Court of Justice had failed to give sufficient reasons in its judgment. The relevant part of Article 6 § 1 reads as follows:

> “In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

20. The applicants also complained that the obligation imposed on them by the Supreme Court of Justice to enter into association with other persons breached their right under Article 11 of the Convention. Article 11 reads as follows:

> “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

21. The applicants also claimed that the unfairness of the proceedings had resulted in a breach of their rights under Article 1 of Protocol No. 1 to the Convention, which 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

A. The complaint under Article 11 of the Convention

22. The applicants argued that the ruling of the Supreme Court amounted to an obligation on them to enter into association with the other founders of the school, which in their view was contrary to Article 11 of the Convention.

23. The Court notes that the final judgment of the Supreme Court of Justice amounted to recognition of the latter's status as founders (shareholders) of the school. There is nothing in the judgment to indicate that the applicants were obliged in any way to keep their status as associates. This complaint should therefore be dismissed as being manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

B. The complaint under Article 6 of the Convention concerning the lack of independence of the Supreme Court of Justice

24. In their initial application, the applicants also complained under Article 6 § 1 of the Convention that the Supreme Court of Justice had lacked independence. However, in their observations on the admissibility and merits, they asked the Court not to proceed with the examination of this complaint. The Court finds no reason to examine it.

C. Conclusion on admissibility

25. The Court considers that the applicants' complaints under Article 6 of the Convention concerning the lack of impartiality of Judge V.B. and the insufficient reasons given in the judgment of the Supreme Court of Justice, and also their complaint under Article 1 of Protocol No. 1 to the Convention, raise questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits. It further notes that the Government did not raise any admissibility objection and that no 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.

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

A. The arguments of the parties

26. The Government argued that the applicants could have challenged Judge V.B. in accordance with the provisions of Articles 19 and 23 of the Code of Civil Procedure as in force at the material time. They agreed that the applicant could not have known the composition of the panel of judges before the commencement of the hearing; however, they argued that it had been open to them to challenge the judge even after the hearing had begun. They also expressed doubts concerning the applicants' submission that the head teacher of the school, who had been present at the hearing before the Supreme Court of Justice, had not recognised Judge V.B. They argued that it had not been very long since the incident between the judge and the school and that, moreover, Judge V.B. had kept his moustache. According to them, the fact that he had shaved off his beard had not created such a radical change in his appearance as to render him unrecognisable. Moreover, the President of the panel had read out at the beginning of the proceedings both the first name and surname of Judge V.B., which should have enabled the head teacher of the school to realise who it was. The Government pointed out that there were no other judges in Moldova with a first name and surname similar to that of Judge V.B. and submitted that, in view of the tense relations between the head teacher of the school and Judge V.B., it was difficult to believe that the former would have forgotten the latter.

27. The applicants admitted that the Code of Civil Procedure afforded them the right to challenge Judge V.B.; however, this right could not have been effectively exercised by them because the composition of the panel of judges was not known to them until the very moment of the hearing. They acknowledged that the head teacher of the school, who participated in the hearing before the Supreme Court, remembered the incident with Judge V.B.'s son, especially since the latter had threatened retaliation. However, on the spur of the moment he had not recognised the judge. According to the applicants, at the time his son was expelled, Judge V.B. used to work at the Economic Court and not at the Supreme Court. Moreover, he had changed his appearance in the meantime by shaving off his beard, added to which his name was very common in Moldova. It was not until several days after the proceedings in the Supreme Court that the applicants realised that Judge V.B. was the same person as the judge whose child had been expelled three years earlier. The applicants argued that in any event the judge was obliged under Article 23 of the Code of Civil Procedure to withdraw from the case on his own initiative.

According to the applicants Judge V.B. could not be considered impartial after the expulsion of his son from the school, especially since he had threatened the school authorities with retaliation. They observed that the Government did not dispute Judge V.B.'s lack of impartiality in the particular circumstances of the case and had focused solely on their alleged possibility to challenge him.

B. The Court's assessment

28. To the extent that the Government argue that the applicants failed to challenge Judge V.B., the Court finds that it has not been presented with any satisfactory evidence to counter the applicants' submission that the head teacher of the school did not recognise Judge V.B. during the hearing.

29. In *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-..., the Court summarised the principles arising from its case-law concerning the impartiality of a tribunal as follows:

> " The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see the *Padovani v. Italy* judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, § 30 and *Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45 and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy,* judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58, and *Wettstein v. Switzerland*, no. 33958/96, § 44, CEDH 2000-XII).

30. The Court is prepared to assume that Judge V.B. was not subjectively biased. It will, however, examine the case from the standpoint of the objective test.

31. It is not disputed between the parties that three years before the hearing of the Supreme Court of Justice, Judge V.B.'s son was expelled from the school by the head teacher and teachers belonging to the applicant entities, and that Judge V.B. threatened the school authorities with retaliation. The Court considers that it can reasonably be inferred that Judge

V.B. was aware of his past relations with the school. It was incumbent on him under Article 23 of the Code of Civil Procedure to inform the parties of a possible incompatibility. The Court recalls that Article 6 § 1 of the Convention imposes an obligation on every domestic court to check whether, as constituted, it is an "impartial tribunal" within the meaning of that provision (see *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, § 48).

32. The Court is therefore of the view that in the circumstances of the case the impartiality of the said judge was capable of appearing to be open to doubt and that the applicants' fears in this respect can be considered objectively justified.

33. Accordingly, there has been a breach of Article 6 § 1 of the Convention on this point. It is therefore not necessary to enter into other aspects of this provision relied on by the applicant.

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

34. The applicants argued that the outcome of the proceedings constituted a breach of their rights under Article 1 of Protocol No. 1 to the Convention.

35. Having regard to its finding of a breach of Article 6 § 1 of the Convention (see paragraphs 32 and 33 above), the Court finds that it is not necessary to examine separately whether, in the present case, there has been a violation of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Zanghì v. Italy*, judgment of 19 February 1991, Series A no. 194-C, p. 47, § 23, and *Lungoci v. Romania*, no. 62710/00, § 48, 26 January 2006).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicants claimed 15,000 euros (EUR) for non-pecuniary damage and argued that, as a result of the unfair proceedings, the Profesorii Prometeişti Foundation had been excluded from the list of founders of the school, while Tocono had been obliged to enter into association with three other entities.

38. The Government contested the claim and argued that it was ill-founded and excessive.

39. Having regard to the violation found above, the Court considers that an award of compensation for non-pecuniary damage is justified in this case. Making its assessment on an equitable basis, the Court awards the applicants EUR 3,000.

B. Costs and expenses

40. The applicants' lawyer claimed EUR 3,675 for the costs and expenses incurred before the Court. He submitted a detailed time-sheet which also indicated that his hourly rate was EUR 75 and a receipt proving that the entire amount had been paid to him by the applicants. He also presented a receipt proving that EUR 80 had been spent on the translation of the applicants' observations from Romanian into French.

41. The Government disagreed with the amount claimed for representation and disputed, *inter alia*, the number of hours spent by the applicant's lawyer and the hourly rate charged by him.

42. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, 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).

43. In the present case, regard being had to the itemised list submitted and the complexity of the case, and also to the fact that one complaint was declared inadmissible (see paragraph 23 above), the Court awards the applicant's lawyer EUR 2,080 for costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 11 of the Convention inadmissible and the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on the ground that Judge V.B. lacked impartiality;

3. *Holds* that there is no need to examine separately the complaint under Article 6 § 1 of the Convention that the Supreme Court of Justice failed to give sufficient reasons in its judgment;

4. *Holds* that there is no need to examine separately the complaint under Article 1 of Protocol No. 1 to the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;

(ii) EUR 2,080 (two thousand and eighty euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(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* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY Registrar

Nicolas BRATZA President