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Communication from a NGO (19/05/2017) in the case of ASITO No. 2 v. Republic of Moldova (Application No. 39818/06)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1294e réunion (septembre 2017) (DH)

Communication d'une ONG (19/05/2017) dans l'affaire ASITO n° 2 c. République de Moldova (Requête n° 39818/06) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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To: Department for the Execution of Judgments of the ECHR
DGI - Directorate General of Human Rights and Rule of Law
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From: Lawyers for Human Rights P.A.
MD 2009, Vlaicu Pircalab street, 2, of. 13
Chisinau, Republic of Moldova

INDIVIDUAL COMMUNICATION FROM LAWYERS FOR HUMAN RIGHTS ON THE EXECUTION OF THE JUDGMENT OF THE ECtHR IN CASE ASITO no. 2 v. Moldova

Application nr. 39818/06, judgment of 13/03/2012

I. Introduction

Public Association "Lawyers for Human Rights" is a Human Rights non-governmental organisation based in Chisinau, Republic of Moldova.

The main statutory purpose of Lawyers for Human Rights P.A. is to secure the effective implementation of the ECHR in Moldova. To achieve this purpose, the LHR represents persons at the ECtHR, organized training courses for lawyers on the ECHR standards and the procedures before the ECtHR, insures the translation into Romanian and publication of the ECtHR jurisprudence concerning Moldova, as well as informs the legal community and media through press-releases about the essence of this jurisprudence.

Following the Rule 9.2 of the Committee of Ministers for the supervision of the execution of judgments and of the terms of the friendly settlements, the Lawyers for Human Rights P.A. hereby presents its individual communication. The communication aims to address the Committee of Ministers on the status of execution of the judgment in the case Asito no.2, application no. 39818/06, judgment from 13/03/2012.

II. Case summary

The present case concerns the violation of the applicant company's right to a fair hearing and principle of legal certainty on account of a supplementary judgment of March 2006 of the Supreme Court, ordering the applicant company to pay additional legal costs allegedly incurred by another company which was not a party to the main proceedings (Article 6 § 1). The Court held that the supplementary judgment was in fact a determination of the case in respect of new claims which had not been made before and thus went beyond the ordinary correction of judicial errors and miscarriages of justice. The Court further found an unjustified interference with the applicant company's right to enjoyment of possessions on account of the said supplementary judgment (violation of Article 1 of Protocol No. 1).

III. Description of the measures taken by the authorities

According to the Action Report for execution of the judgment, presented to the Committee of Ministers, the Government considers that the adverse effects were consumed by the sole fact of awarding the monetary compensation and the just satisfaction in the present case covers all negative consequences of the violation(s). Therefore, neither re-opening nor other individual measures are required.

Also, given the particularities of the present case, the Government considers that it rises only the problem of accurate application of the domestic law and it does not imply any dispute as to the quality of that law. Indeed, the Court found in the judgment that under the relevant civil procedural law a Moldovan court may deliver a supplementary judgment, which may be used to correct miscarriages of justice. The relevant provision of the law does not in itself contradict the principle of legal certainty, and in one head of the applicant's complaints the Court did not find a violation. However, as regards

the awarding of additional costs for a private company which was not a part in the initial proceedings, the Court determined that such a procedure had been applied in a manner incompatible with the Convention. Therefore, no legislative improvements or amendments are required and the present case concerns only the changing of judicial practices.

On 15 April 2013 the Supreme Court adopted its explanatory decision no. 2 that concerns the practices and the application of the extraordinary revision in civil cases. The Supreme Court explained that the procedural civil legislation has been amended by decreasing the legal grounds for extraordinary revision of final judgments and it could be applied only in view of correction of judicial miscarriages. The revision procedure can be also used only for consolidation of the domestic case law when two or more judgments reveal inconsistency of judicial practices. Another ground for revision can be used only after the European Court of Human Rights judgment or during the pending application before it, if such a revision would allow total or partial redress for the alleged breach of an applicant's rights. According to the explanatory decision, the law and judicial practices prohibit any other grounds for revision, especially those concerned to rehearing of a case or to an appeal in disguise.

The Government has informed the Ministers Committees on the measures taken for professional development and training of judges and prosecutors, through the National Institute of Justice.

On 30 July 2015 the Parliament has passed a new law regarding the Agent for the Government, Law nr. 151. According to its 27 article, the state has recourse right against the persons whose actions or inactions determined the break of the Convention for human rights defence and fundamental freedoms, fact that should be confirmed by a decision or has imposed to amicable settlement of a case examined by the ECHR or by issuing a unilateral statement. The established amounts by the ECHR's decision, by out of court amicable settlement of the cause examined by the ECHR of by judge decision or by unilateral statement, is to be returned proportionally according to the established culpability.

On 25 July 2016, the Constitutional Court has pronounced the judgement on the exception of the non-constitutionality of the 27th article of the Law nr. 151 from 31 July 2015 regarding non-government agent. The origin of this cause lies in the exception of the non-constitutionality of the 27th article of the Law regarding the Agent for the Government, which was filed by a group of judges that were confronted with recourse actions. According to the contested norm, the Ministry of Justice is obliged to come with recourse actions, if the conditions stipulated in the law are met, in a term of 3 years from the day the amount established by the ECHR's decision or the amicable settlement agreement was paid.

The Constitutional Court has stated that the automatically holding of disciplinary liability of judges only according to a ECHR decision that convicts the state, without a demonstration of the fact that he law was violated **intentionally** of by **gross negligence** of a judge, represents an inadmissible interference with the judiciary.

We do believe that the optimization of the legal framework by the Parliament and the measures taken by the Government are relatively sufficient. More, the Court has qualified this as not a legal omission, but a human error regarding the enforcing and interpretation of the legislation.

We are reserved towards the concept of **gross negligence** imposed by the decision of the Constitutional Court, which without any clear explanation might lead to a misinterpretation of it by national judges when examining the causes of recourse brought against their peers, given the fact there is a strong solidarity guild within the system. Thus, if there is a gross negligence which offers the right of recourse, it should also be a less serious negligence that does not meet the necessary conditions for the recourse action. We believe that any form of negligence, either ordinary or gross, is inadmissible in the work of judges, prosecutors, police officers, etc. and provides grounds for bringing the action to recourse.

At the same time, the Ministry of Justice is obliged to bring to recourse when there is a decision of conviction from the ECHR or in the case of amicable settlement of the cause. Still there is lack of clarity on the fact on what happens if the persons responsible from the Ministry of Justice fails to

comply with this obligation. Will it be any recourse action against the person guilty for non-recovery of public money?

At the same time, we propose to amend article 250 of the Civil Procedure Code, in a more clear way in order not leave room for the interpretations which would violate the principle of legal certainty. Namely, to specify at c) section paragraph (1), there is need to specify clearly what expenses are envisaged: expenses presented at the trial and demonstrated; in order to avoid suspicious expenses.

IV. Proposed recommendations to fully and effectively implement the judgment

Moldovan Government should consider the following recommendations:

1. Strictly provide a definition of the concept of **gross negligence** and how to distinguish it from other types of negligence
2. To establish an efficient and transparent mechanism to bring recourse action and public money recovery paid as a results of the convictions of the state by the ECHR
3. Amendment of Article 250 of the Civil procedure code as mentioned supra.

V. Questions to the Government

Taking into account all the information provided above, we would like to seek reply from the Government to the following.

- Invite the Government of the Republic of Moldova to answer whether are there plans to amend the current administrative practices, legislation, to deal with the above-mentioned shortcomings in the Moldovan legal framework.

Vitalie ZAMA

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