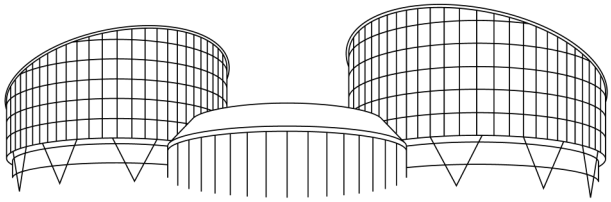

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

CASE OF STOYANOVA-TSAKOVA v. BULGARIA

(Application no. 17967/03)

JUDGMENT

STRASBOURG

25 June 2009

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 Stoyanova-Tsakova v. Bulgaria,

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

Peer Lorenzen, *President,*
Rait Maruste,
Karel Jungwiert,
Renate Jaeger,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 17967/03) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Ms Margarita Viktorova Stoyanova-Tsakova ("the applicant"), on 19 May 2003.

2. The applicant was represented by Ms N. Kostova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova, of the Ministry of Justice.

3. The applicant alleged, in particular, that the proceedings in which she had disputed the use of a flat with her former husband had been unfair on account of the Supreme Court of Cassation's failure to acquaint itself with a memorial filed by her counsel.

4. On 27 September 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Sofia.

6. Following a petition from her former husband, on 29 October 1998 the Sofia District Court dissolved their marriage. It gave the applicant

custody of the couple's only child, and also gave her the use of the former matrimonial home. It found that this home was a flat acquired jointly by the former spouses during their marriage, situated in the "Strelbishte" neighbourhood of Sofia, and intended by them to fulfil the family's housing needs (the applicant had moved into that flat in 1997 although it had not been fully finished). The fact that the applicant's former husband had never lived there was of no relevance, as this had been the result of his disregarding his duty to co-habit with his spouse. As the applicant had been given custody of their only child, the court held that she was entitled to use the flat.

7. The applicant's former husband appealed against the court order relating to the former matrimonial home. He averred that this home was in fact another flat – situated in the "Borovo" neighbourhood of Sofia and co-owned by him and his mother and sister – where the spouses had lived before their *de facto* separation in 1995.

8. On 16 June 2000 the Sofia City Court upheld the order. It agreed with the Sofia District Court that the former matrimonial home was the flat in "Strelbishte", as it had been acquired, by means of a preliminary contract with the builder, during the marriage, for the family's housing needs, as at that time the spouses had not owned another home, and as the applicant and her child had been living there at the time when the marriage was dissolved. The flat in "Borovo" was not the former matrimonial home, because it was co-owned by the applicant's former husband and third parties and both spouses had left it in 1995.

9. The applicant's former husband appealed on points of law.

10. In a judgment of 29 March 2001 the Supreme Court of Cassation quashed the lower court's judgment and remitted the case. It held that the former matrimonial home was the flat in "Borovo", not the one newly built in "Strelbishte". According to its settled case-law, the former matrimonial home was the one which had been used before the dissolution of the marriage and, in case of a *de facto* separation preceding the dissolution, the one used before the separation.

11. On remittal, the Sofia City Court, in a judgment of 20 March 2002, again upheld the order of the Sofia District Court. It relied on interpretative decision no. 12/1971 of the Plenary Meeting of the Supreme Court (see paragraph 18 below), according to whose point 2 (b), in the event of a *de facto* separation, the former matrimonial home is the one acquired during the separation with funds accumulated during the marriage. On this basis, it found that the former matrimonial home was the flat in "Strelbishte". Given the unambiguous rule set out in the interpretative decision, the fact that the spouses had not lived in that flat together was immaterial.

12. The applicant's former husband appealed on points of law.

13. The Supreme Court of Cassation held a hearing on 9 October 2002. The applicant was represented by counsel, who asked the court to dismiss

the appeal and said that he had developed his arguments in a memorial which he filed during the hearing.

14. In the memorial, which ran to four pages, the applicant's counsel argued that the Sofia City Court had not erred by taking into account interpretative decision no. 12/1971 instead of the guidelines of the Supreme Court of Cassation given in the judgment of 29 March 2001, since where there was conflict between the instructions given in a specific case and the solution envisaged by a binding interpretative decision the latter prevailed. He further presented a number of arguments why the flat in "Strelbishte" was the former matrimonial home and why its use should be given to the applicant. He asserted that this flat had been acquired by the spouses with a view to fulfilling the family's housing needs, that the applicant had contributed financially to its acquisition and that the only reason why she did not have title to it was her former husband's protracting the conclusion of the final contract for its acquisition from the builder. The applicant had brought a separate suit, seeking a court order declaring the preliminary contract with the builder final. However, that suit was still pending. The spouses had lived in the flat since 1997, but even assuming that the applicant's former husband had not done so throughout the entire period, this had been due to his dereliction of the duty to co-habit with his wife. The applicant and her child could not live in the flat in "Borovo", because this was not the former matrimonial home, and this would mean co-habiting with their former in-laws, with whom they did not have good relations.

15. On 21 November 2002 the Supreme Court of Cassation quashed the Sofia City Court's judgment. In the beginning of its two-and-a-half page opinion it observed that the applicant had not made submissions in the proceedings before it. It found no indication that the spouses had obtained title and thus acquired the flat in "Strelbishte" during the marriage; there was merely a preliminary contract in respect of it. The date of delivery of the flat was irrelevant. Therefore, point 2 (b) of interpretative decision no. 12/1971 (see paragraph 18 below) was not applicable. However, even if the spouses had acquired the flat during the marriage, it would not have become the matrimonial home, because it had not been acquired in order to fulfil the family's housing needs. Where a home had not been acquired for such purpose, point 2 (b) was inapposite on account of the repeal in 1991 of a communist-era statute restricting the number of properties which an individual was allowed to own. Thereafter, the contribution of funds by both spouses could be of importance solely for the existence or otherwise of a joint title to a home acquired during the marriage, not for its designation as the matrimonial home. The former matrimonial home was the flat in "Borovo", as the spouses had lived there before their *de facto* separation in 1995. Since the couple's child was already an adult and since the applicant shared some of the responsibility for the breakdown of the marriage, the use of the former matrimonial home was to be given to her former husband.

16. On 29 November 2002 the applicant's counsel asked the Supreme Court of Cassation to rectify the statement in its judgment that he had not made any submissions in the cassation proceedings. He considered that statement to be an obvious mistake, because, as noted in the minutes of the hearing, he had filed a memorial, which featured after page 10 in the case file. On 6 December 2002 the court refused, saying that only errors in the operative provisions of a judgment could be rectified.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. Article 107 § 1 of the 1985 Family Code provides that when a court allows a divorce petition, it must give the use of the former matrimonial home to one of the spouses if it cannot be used separately by both of them. In reaching its decision, the court must have regard to the interests of the children, the fault for the breakdown of the marriage, the health of the spouses and all other relevant circumstances.

18. Interpretative decision no. 12/1971 of the Plenary Meeting of the Supreme Court (постановление № 12 от 28 ноември 1971 г., Пленум на ВС) was adopted on 28 November 1971 under the 1968 Family Code (which was superseded by the 1985 Family Code). It deals with all issues relating to the use of the former matrimonial home. Point 2 (b) of its operative provisions defines the former matrimonial home as the one acquired while the spouses were separated *de facto*, but with funds accumulated during the marriage.

THE LAW

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

19. The applicant complained under Article 6 § 1 of the Convention that the Supreme Court of Cassation had erroneously found that she had not expressed an opinion in the proceedings before it and had not examined her submissions and objections to her former husband's appeal on points of law.

20. Article 6 § 1 provides, in so far as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing..."

A. The parties' submissions

21. The Government analysed in detail the reasoning given by the Supreme Court of Cassation, and concluded that the judges who had examined the case had fully assessed the evidence adduced by the parties and the well-foundedness of their arguments. It was thus clear that the panel deciding the case had been acquainted in detail with the parties' memorials and arguments, and that the note in its judgment that the applicant had not expressed an opinion was an inadvertent clerical mistake.

22. The applicant argued that the text of the judgment clearly showed that the Supreme Court of Cassation had not taken into account the memorial filed by her counsel. In her view, the Government's speculations about this fact – which in any event could not be established directly – were fully disproved by the judgment. The only way for outsiders to scrutinise the courts' decision-making process was to examine the written reasons given by them. These were official documents which objectivised the courts' *ratio decidendi*. There was nothing in the case file to show that the Supreme Court of Cassation had – contrary to its own statement – acquainted itself with the memorial submitted to it.

B. The Court's assessment

23. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

24. Concerning the merits of the complaint, the Court observes that the right to a fair trial as guaranteed by Article 6 § 1 includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can only be seen to be effective if the observations are actually "heard", that is duly considered by the court. In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see *Quadrelli v. Italy*, no. 28168/95, § 34, 11 January 2000; and *Dulaurans v. France*, no. 34553/97, § 33, 21 March 2000, with further references). In this context, the Court has stressed the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the litigants with regard to the fairness of the proceedings must be capable of being found objectively justified (see *Kraska v. Switzerland*, 19 April 1993, § 32, Series A no. 254-B).

25. In the instant case, the Court firstly notes that the Government did not dispute that, following her former husband's appeal on points of law, the applicant's counsel actually filed a memorial with the Supreme Court of Cassation (see, as an example to the contrary, *Quadrelli*, cited above, § 33).

26. It must therefore be established – in so far as possible on the basis of the material in the case – whether the Supreme Court of Cassation actually took into account this memorial when deciding the case. On this point, it should be observed that in the beginning of its judgment this court mentioned that the applicant had not made any submissions, thus implying that it had not had regard to the memorial. However, its reasoning makes it clear that it dealt with all substantial issues in the case and addressed the main arguments raised in the memorial filed by the applicant's counsel, namely, the applicability of interpretative decision no. 12/1971, the question whether or not the spouses had acquired the flat in "Strelbishte" during the marriage, and the question whether or not the applicant's financial contribution was relevant in this context (see paragraphs 14 and 15 above). It is not the Court's task to verify whether these rulings were correct in terms of Bulgarian law, because, not being a court of appeal from the national courts, it cannot deal with errors of fact or law allegedly made by them (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; and *Cornelis v. the Netherlands* (dec.), no. 994/03, ECHR 2004-V (extracts)). It is sufficient to note that the reasoning of the Supreme Court of Cassation shows that it was aware of the arguments raised in the memorial. It is moreover clear that the memorial actually featured in the court's case file (see, as an example to the contrary, *Quadrelli*, cited above, § 34) and that the applicant's counsel was aware of this fact (see paragraph 16 above).

27. The Court additionally notes that, after acquainting himself with the Supreme Court of Cassation's judgment, the applicant's counsel did not voice any doubts as to whether his arguments had in fact been examined by the court; he merely requested a rectification of the paragraph of the judgment where it was mentioned, erroneously, that he had not made any submissions (see paragraph 16 above).

28. In view of the foregoing, the Court finds no evidence to suggest that the Supreme Court of Cassation failed to examine the memorial filed by the applicant's counsel with due care before deciding the case. The applicant's misgivings on this point, not shared by her counsel and based entirely on what appears to be a mere clerical mistake in the court's judgment, cannot be considered to be objectively justified.

29. There has therefore been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

30. The applicant complained under Article 13 of the Convention that no remedy existed against the violation of her fair trial rights committed by the Supreme Court of Cassation.

31. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

32. The Court does not find it necessary to examine whether the applicant's complaint is arguable. It observes that where a violation of the Convention is alleged to have been committed by the highest court or authority, the application of Article 13 is subject to an implied limitation since it cannot be construed as requiring that special bodies be set up for the purpose of examining complaints against decisions by the highest courts (see *Crociani and Others v. Italy*, nos. 8603/79, 8722/79, 8723/79 and 8729/79, Commission decision of 18 December 1980, Decisions and Reports 22, p. 147, at pp. 223-24; *Myrman v. Sweden*, no. 13538/88, Commission decision of 7 May 1990, unreported; *R.A. and L.A. v. Sweden*, no. 21524/93, Commission decision of 9 July 1993, unreported; and *Amihalachioaie v. Moldova* (dec.), no. 60115/00, 23 April 2002).

33. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the alleged unfairness of the proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 25 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Peer Lorenzen President