***Greek-Catholic Parish Lupeni and others v. Romania*: The ECHR Makes Impossible for the Greek-Catholic Parishes to Recover their Properties and to Worship in their Former Churches**

Andreea Popescu, ECLJ, 2 June 2015

On 19 May 2015, the ECHR adopted a judgment in *Greek-Catholic Parish Lupeni and others v. Romania* case (no. 76943/11) founding only a violation of the right to trial within a reasonable time (Article 6 of the Convention) for 10 years and three weeks of length of proceedings for three degree of jurisdiction attributable to the national authorities (§§ 98-99). The complaints related to the access to court and fair trial (Article 6 of the Convention), to the property rights (Article 1 of Protocol no. 1 to the Convention) and to the freedom of religion (Article 9 of the Convention) of the applicants were unfortunately rejected as ill-founded.

The case concerns an action of recovery of the exclusive property and possession of a church that before its abusive transfer to the Orthodox Church in 1948 belonged to the Greek-Catholic Parish of Lupeni. Although this action was based on the general law (Article 480 of the Civil Code, as interpreted by the doctrine and the case-law), according to which the titles of property of the parties should be compared, the most characterized of them prevailing, by judgments of 11 June 2010 and 15 June 2011 respectively, the Court of appeal and the High Court rejected the action applying the criterion established in the special law (law-decree n° 126/1990), according to which the "*will of the faithful of the local community owning the disputed properties*" should be taken into account, without comparing the two titles. In the applicants' opinion, the application of this criterion by the internal courts infringed their right to court and to a fair trial, their right to property and their right to freedom of religion, being discriminated in the exercise of those rights, and they addressed their complaints to the ECHR.

Regarding the **right to access to court**, the applicants considered that by applying the criterion of the "*will of the faithful of the local community owning the disputed properties*" the tribunals deprived them of their right to access to court. Nevertheless, the Court concluded to a non-violation of this right, as it noted that the internal courts judged the case of the applicants on the merits by applying the criterion of the "*will of the faithful*" and taking into account concrete elements of fact (the historical and social context, the financial contribution of the parties for the construction of the church, the manner in which the church was used in the past) and did not refer only to the statistics. The Court also observed that all the points raised by the applicants were assessed by the internal courts which delivered reasoned decisions (§ 71).

As to the **principle of the legal certainty**, the applicants complained that the application of the criterion of the "*will of the faithful*" to their action for the restitution of their property was unforeseeable, as the case-law of the High Court (as well as the one of other tribunals) was divergent after 2005 and only between 2012 and 2013 the case-law became more foreseeable regarding the application of this criterion. Moreover, they alleged that 24 years after the adoption of the law-decree n° 126/1990, it was still not clear whether in cases regarding claims for recovery of property of churches the tribunals should apply the dispositions of this law combined with the ones of the general law. In this situation, the applicants considered themselves disadvantaged. Assessing this complaint, the ECHR found no violation of the Convention. To arrive to this conclusion the Court noted that it is true that the tribunals in Romania had to assess cases although they did not have a clear and foreseeable legal

framework and that that situation led to different conclusions for the same legal issue: some tribunals judged the cases applying the general law (Article 480 of the Civil Code - action of recovery of property), other tribunals applied the rules of the special law (the criterion of the "*will of the faithful*") (§ 86). Nevertheless, the Court held that, even though the contested judgments of the internal tribunals were adopted before the unification of the case-law, the divergent case-law cannot be considered in breach of the principles of foreseeability and legal certainty, as long as the internal legal system was able to put an end to this situation. Moreover, the solution adopted in the case of the applicants (by the judgments of the Court of appeal of 11 June 2010 and of the High Court of 15 June 2011) was similar to the one adopted one year after by the Constitutional Court (by the decision of 27 September 2012) and to the one of the majority of the High Court (by decisions adopted since January 2011 to February 2013) (§ 89). Furthermore, the ECHR held that although from the pieces of evidence produced by the parties it was difficult to establish for how long the divergent case-law persisted, given the complexity and the social impact of the issue, it cannot constitute a breach of the Convention. Also, the Court considered that at issue was not a divergent interpretation of a legal provision, but a divergence in the way of applying the general law and the special law (§ 90).

With reference to the **prohibition of discrimination in the exercise of the right to access to court**, the applicants asserted that the application by the internal courts of the criterion of the "*will of the faithful*" to establish the legal situation of the church was discriminatory and rendered illusory their right to access to court. They affirmed that "*the faithful of the local community owning the disputed properties"* will always be Orthodox, which is the majority religion of the country. The Court, stating that there is a difference of treatment, although the two Churches found themselves in a similar situation regarding their claim of property over the church (§ 115), assessed whether this difference of treatment had an objective and reasonable justification. Firstly, it agreed with the Romanian Government that the disputed criterion aimed to protect the faithful allowing them to express their will regarding their religion and the use the church (§ 117). Secondly, the Court noted that the national tribunals weighted the interests at stake taking into account concrete factual elements (regarding the construction and the use of the church during the time, the prohibition of the Greek-Catholic Church, the obligation of the faithful to "pass" to Orthodox Church and their choice after the rehabilitation of the Greek-Catholic Church) and adopted reasoned judgments in conformity with the decision of the Constitutional Court (§ 118). Thirdly, the ECHR, taking into account the decision of the Constitutional Court which validated the disputed criterion for reasons of respect for the freedom of the religious communities and of others, considered that the state respected the autonomy of the religious communities by affirming the right for the communities to decide themselves on the right to property over their churches (§ 119). For those reasons, the applicants complaint was rejected (§ 121).

Regarding the **prohibition of discrimination in the exercise of the right to freedom of religion**, the applicants alleged that the manner in which the internal court decided their case and their refusal to restitute their church constituted a breach of their right to manifest their religion in their church. They also complained that they have no church for the exercise of their religion and that they had to pay a rent to another church for this end. The ECHR found that there was no interference with the right of the applicants in this respect. To arrive to this conclusion, it noted that the law-decree n° 126/1990 that recognized the Greek-Catholic Church did not provided for the automatic restitution of its properties (§ 135). Further, the Court observed that the refusal of the tribunals to restitute their church did not prevent the applicants to practice their religion or to build a new church (§ 136). Moreover, the reasoning

of the High Court in this respect was justified, taking into account the social and historical context of the case (§ 137) and not founded on elements of religious affiliation (§ 139). Lastly, Article 4 of law-decree n° 126/1990 provides on the state aid for the construction of new churches, the applicants still having the possibility to benefit from such aid, as other Greek-Catholic communities had (§ 138).

As to the **prohibition of discrimination in the exercise of the right to property**, the applicants complained that the manner in which the internal tribunals judged their case, applying the criterion of the "*will of the faithful*" and not the general law, infringed their right to property. Moreover, they denounced this criterion as discriminatory. The Court rejected this complaint, as the applicants did not have a "*possession*" or a "*substantive interest*" for the purpose of this provision. The Court noted, on one hand, that the internal tribunals considered that the applicants did not fulfill the requirements established by the law to see their right to property recognized (§ 153). On the other, the Court held that at no moment the national authorities adopted a normative or an administrative act mentioning the restitution of the church of the applicants (*a contrario Catholic Achidiocese of Alba-Iulia v. Romania*, n° 33003/03, judgment of 25 September 2012, §§ 82-88). Moreover, the Court decided that divergent case-law related to the applicable law on the issue of the restitution of the churches does not give rise to a "*substantive interest*" (§ 154). Regarding the allegation of discrimination, the Court reiterated that neither the criterion, nor its application in this case leaded to a discrimination of the applicants (§ 158).

Adopting this judgment, the ECHR validated the manner in which the internal tribunals had judged this case, applying the criterion of the "*will of the faithful of the local community owning the disputed properties*" to establish the right to property over the church. And this, although there was a divergent case-law at national level on whether such cases should be judged applying the above-mentioned criterion or/and together with the general law, according to which the two property titles should be compared. This situation affected the applicants. Moreover, the transmission of the right to property operates only in the framework of the Civil Code and not according to the "*will of the faithful*". Thus, the establishment of the right to property of the Greek-Catholic parishes over their churches depends on the "*will of the faithful*" and not on the existence of a title of property. It is a legitimation of an abusive transfer of property. Moreover, as the majority of the faithful will always be Orthodox, especially after 42 years of the prohibition of the Greek-Catholic Church in Romania, the Greek-Catholics will never be able to recover their properties, although the churches and parishes were built on their expenses.

Currently, there are two more communicated pending cases on the issue of the application by the internal tribunals of the criterion of the "*will of the faithful*" to establish the right to property over a church: *Greek-Catholic Parish Glod, Greek-Catholic Archdiocese Orastie and Greek-Catholic Parissh Orastie v. Romania* (nos. 53528/07 and 32729/12).