THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

On 5 May 2008 the applicants filed a petition with their employer, an Employment Agency, a State agency, asking to have their entitlement to certain wage-related rights acknowledged. More specifically, relying on section 31(1) (c) and (d) of Law no. 188/1999 on the status of civil servants, they asked for two allowances to be added to their basic salary, namely a grade supplement and a supplement related to their salary step. The applicants quantified each of these supplements at 25% of the basic salary.

The aforesaid allowances were to be paid retroactively, starting from April 2004, but also in the future, until the applicants' contracts ended.

At the same time, the applicants requested that these entitlements be noted in their employment record books.

On 19 May 2008 their employer dismissed the petition as ill-founded.

On 30 May 2008 the applicants contested that decision before the **County Court**. They contended that even though, in accordance with Government Emergency Ordinance no. 92/2004, the application of the provisions granting them the rights in question had been suspended until 31 December 2006, this did not mean that they were not due for payment starting from 1 January 2007, when the suspension had ended, as the suspension of a right was not equivalent to the extinction of that right.

In any event, they considered that the suspension was in breach of Articles 41 and 53 of the Constitution, and that the allowances claimed were therefore to be paid retroactively, from 2004 onwards.

On 10 September 2008 the County Court dismissed the applicants' claim. The court acknowledged that, according to the provisions of the Labour Code applicable to the case, the employer was obliged to pay its employees all the allowances derived from the law and from the employment contract. Therefore, the applicants, civil servants, were entitled to receive, in addition to their other salary entitlements, the two supplements in question – the grade allowance and the allowance corresponding to the salary step – as provided for by section 31(1) (c) and (d).

The two supplements were first provided for by section 29 of Law no. 161/2003 of 16 April 2003, but without any indication as to the exact amount. In fact, none of the subsequent legal texts on civil servants' salary rights made any reference to a method or criterion for determining the amount of any of the supplements.

Hence, even though Law no. 188/1999 expressly stated that a civil servant's salary was also composed of the grade supplement and the

salary-step supplement, the determination of these rights was left to the executive, which was entitled to set out rules for the application of the law. Consequently, the court held as follows:

> "In the absence of a legal act issued or adopted by the executive in which the amount of the two allowances claimed is defined, the court does not have jurisdiction to determine by itself the amounts, as this would undermine the separation of powers principle by encroaching on the powers of the administrative authorities.
>
> The court therefore holds that in the above-mentioned circumstances, the respondent cannot be ordered to pay the allowances claimed before their amount has been determined."

The applicants appealed against that judgment to the **Court of Appeal T,** reiterating the arguments they had submitted before the first-instance court. In addition, they stated that under Article 38 of the Labour Code the acquired rights of employees could not be made subject to any limitations. Furthermore, they contended that it was a basic legal principle that laws were made in order to produce effects, it being inconceivable that a legal text would have only a superficial value and not be applicable. They asserted that their right to the allowances they had requested was protected by Article 1 of Protocol No. 1 to the Convention, in so far as it was a right provided for by law.

The applicants alleged that the interpretation of the applicable legal provisions given by the court in refusing to allow their claims rendered those texts completely ineffective and thus devoid of any substance.

Moreover, such an interpretation was discriminatory and in breach of Article 14 of the Convention, in so far as there was consistent national case-law granting other claimants (also civil servants) the right to the supplements in question. The discrimination was even more disturbing given that another person, S.S.M., employed by the same institution as them, had obtained the allowances following a decision of 21 March 2008 given by the same first-instance court, the County Court. That decision had been upheld by the **Court of Appeal T** on 2 October 2008, when it became final.

On 21 January 2009 the **Court of Appeal T** dismissed the applicants' appeal.

The court noted that there was no legal justification for claiming the allowances in an amount of 25% of the basic salary, and consequently for allowing such a claim, as the figure in question was not laid down anywhere in the law.

In that connection, in order to be able to determine the exact amount of the allowances in question, additional legislation was needed, either in the form of legal provisions adopted by the legislature designed to regulate the application of section 31, or in the form of instructions issued by the Government in a separate legal text designed to explain how the law should be applied.

The **Court of Appeal T** also referred to the Constitutional Court's case-law to the effect that:

> "The courts do not have jurisdiction to repeal or to refuse to apply specific normative acts which they consider to be discriminatory, and thus to replace them with norms created by judicial intervention or with provisions contained in other normative acts."

Therefore, the court considered that it could not allow the applicants' claims, in so far as those claims had not been determined by the competent authorities.

Regarding the divergent case-law referred to by the applicants in their arguments, the court held that in the country's legal system, legal precedents were not a source of law and therefore could not be taken into consideration.

On the applicability of Article 1 of Protocol No. 1 to the Convention, the court mentioned that the applicants had not proved the existence of a "possession", or at least of a "legitimate expectation", since the case-law on the matter was not well-established.

Furthermore, the court held that the Labour Code was not applicable to civil servants, as they were appointed to their posts on the basis of Law no. 188/1999. The appointments were thus made by means of individual administrative acts which did not make any reference to the allowances in question and, in any event, had not been contested by any of the applicants at the time of their appointment.

In conclusion, the applicants' claims were dismissed as unfounded.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The Public Servants' Statute

1. The Public Servants' Statute entered into force on 7 January 2000, once Law no. 188/1999 had been enacted. On 1 January 2004 section 29 of the Statute was amended to provide that, starting from that date, certain allowances were to be included in the salaries of public servants.

Section 29

> "1. For discharging their activities public servants shall have the right to a salary composed of the following:
>
> (a) the basic salary
>
> (b) seniority allowance
>
> (c) grade allowance
>
> (d) step allowance
>
> 2. Public servants shall be granted bonuses and other salary entitlements, in accordance with the law.

3. The remuneration of public servants shall take place in accordance with [the criteria] set forth in the law on the implementation of a uniform remuneration scheme for public servants."

On 19 July 2006, point (d) was amended to read "allowance corresponding to the salary step". With effect from 1 June 2007, section 29 became section 31, while no amendments were made to the content.

The application of these provisions was suspended from 2004 until 2006, first by Law no. 164/2004 of 15 May 2004, then by Government Emergency Ordinance no. 92/2004, enacted as Law no. 76/2005, and then by Government Ordinance no. 2/2006, enacted as Law no. 417/2006.

With effect from 1 January 2010 the two allowances, namely the grade supplement and the allowance corresponding to the salary step, were abolished by Law no. 330/2009.

2. Case-law on similar claims

2. The applicants submitted two other judgments given by the **Court of Appeal of T,** in which the claimants' requests had been granted. In one of the judgments, given on 23 January 2008 by the same panel as the one which sat in the applicants' case, it was stated, *inter alia*, as follows:

"It is irrelevant that the legal text did not lay down the exact amount of the salary entitlements in question, as this cannot constitute a well-founded reason for dismissing the claims; such an interpretation would render ineffective the legal provisions concerned, which are part of the positive law, and this would be inconceivable."

In another judgment submitted by the applicants, the **Court of Appeal S** held on 5 June 2008 in a similar case that the claimants, employees of the the Employment Agency, were entitled to the allowances in question, as the corresponding rights were provided for by the law, it being irrelevant whether their amount was determined or not.

3. The Government contended that, of the fifteen courts of appeal across the country, a number had dismissed similar claims relating to salary entitlements even before 21 September 2009, when the **Supreme Court** had ruled on an appeal in the interests of the law (see paragraph 15 below). These included the **Court of Appeals A, G and B.** The reasons given for dismissing the claims had been identical, resembling those subsequently given in the ruling on the appeal in the interests of the law.

3. The appeal in the interests of the law of 21 September 2009

4. On 13 May 2009, noting that since 2008 a divergence of case-law had emerged across the country concerning the granting of certain allowances to public servants, the Attorney General applied to the **Supreme Court** in accordance with the provisions of Article 329 of the Civil Procedure Code, in order to ensure the uniform interpretation and application of the law.

The **Supreme Court** delivered its judgment on 21 September 2009, confirming the existence of a divergence in the case-law concerning the interpretation of section 31(1) (c) and (d) of Law no. 188/1999, while also setting out guidelines for a uniform interpretation of the text, as follows:

> "For the uniform interpretation and application of Article 31(1) (c) and (d) of Law no. 188/1999, the Court holds that, in the absence of a legal determination of their amount, the grade allowance and the allowance relating to the salary step cannot be granted by the judiciary."

The **Supreme Court** further held that the entitlements claimed by the public servants did not constitute a "possession", as, in the absence of criteria for their calculation, they were only "virtual rights".

According to Article 329 of the Civil Code of Procedure, the **Supreme Court**'s interpretation of the provisions in question is binding on all the domestic courts. A decision delivered on an appeal in the interests of the law cannot alter the outcome of cases already decided.

Following the adoption of the above-mentioned judgment, the divergent case-law on the issue ceased and the domestic courts followed the **Supreme Court**'s guidelines.