



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

THIRD SECTION

CASE OF CIPLEU v. ROMANIA

(Application no. 36470/08)

JUDGMENT

STRASBOURG

14 January 2014

FINAL

14/04/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Cipleu v. Romania,

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

Josep Casadevall, *President*,

Alvina Gyulumyan,

Corneliu Bîrsan,

Ján Šikuta,

Luis López Guerra,

Nona Tsotsoria,

Valeriu Grițco, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 10 December 2013,

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

PROCEDURE

1. The case originated in an application (no. 36470/08) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Dănuț Cipleu (“the applicant”), on 18 July 2008.

2. The applicant was represented by Mr I. Pașca, a lawyer practising in Timișoara. The Romanian Government (“the Government”) were represented by their Agent, Ms I. Cambrea, of the Ministry of Foreign Affairs.

3. The applicant alleged that the criminal proceedings against him had not been fair, in particular in so far as he had been convicted without being heard in person by the court of last resort.

4. On 15 September 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Timișoara.

6. On the evening of 17 November 2005 the applicant’s family car was involved in an accident: it hit a person who was crossing the street at a pedestrian crossing and the driver then fled from the scene of the accident.

7. Soon after the events, a police patrol alerted to the accident by an eyewitness went to the applicant’s home, informed the applicant about the

accident and asked him who the driver was. The applicant stated that he had been driving the car that evening. As the applicant smelled of alcohol, he was taken to hospital for a blood test and then to the police station, where he made a written confession in the presence of a lawyer.

8. On the same evening, the police officers drafted a report on the above events.

9. On 8 December 2005 the applicant changed his statement and told the prosecutor that his wife had been the driver on the night of the accident, but that he had lied to protect her. His wife confirmed his statement.

10. The applicant was committed for trial on charges of failure to stop after an accident and drink driving.

11. Before the Timiș County Court the applicant pleaded innocent. He also requested that the first statement he had made in the police headquarters be removed from file, as he had made it before the police had informed him of the nature of the accusation and before he had had time to prepare his defence. He also reiterated that his wife had been driving the car that night.

12. The court heard statements from several witnesses for the prosecution and for the defence. The evidence before it included a medical report confirming that the applicant had had 2.55 per mil alcohol in his blood on the night of the accident.

13. On 15 June 2007 the County Court found the applicant guilty as charged and imposed a three-year suspended sentence. The court noted that the applicant had changed his position during the investigation but considered that his initial confession was more consistent with the evidence in the file.

14. The applicant appealed. He gave evidence before the Timișoara Court of Appeal and reiterated that the statement of 17 November 2005 and the police report of the same day should not have been allowed as evidence as his statements had been taken in violation of his defence rights.

15. On 1 November 2007 the Timișoara Court of Appeal acquitted the applicant on the ground that the confession of 17 November 2005 did not constitute “evidence” under the Code of Criminal Procedure (“the CCP”) and that the first-instance court had not taken into account the evidence adduced before it, but based its decision solely on the evidence presented before the prosecutor, at the pre-trial phase of the proceedings.

16. The prosecutor appealed in cassation, invoking essential factual errors in the Court of Appeal’s decision (Article 385⁹ § 18 of the CCP, see paragraph 19 below). He argued that the applicant’s first statements were corroborated by the evidence given by the witnesses for the prosecution, whereas the applicant’s wife and other witnesses for the defence were clearly biased and in any event their statements did not preclude the possibility that the applicant was the author of the crime.

17. The High Court of Cassation and Justice held two hearings. It heard submissions from the prosecutor and counsel for the defence and allowed the applicant to address it at the end of the hearing (*ultimul cuvânt al inculpatului*). In his address, the applicant endorsed his counsel's position.

18. The court quashed the previous decisions and proceeded to re-examine the evidence in the file. It found that the applicant's first statements, as well as the police report of 17 November 2005, had been lawfully admitted as evidence. It examined them in the light of the witness statements in the file and concluded that there was solid evidence that the applicant had been the driver of the car on the night of the accident and that the alcohol level in his blood had been above the legal limit at that time. For all these reasons, the High Court upheld the applicant's conviction.

It rendered its decision on 20 February 2008.

II. RELEVANT DOMESTIC LAW

19. The relevant provisions of the Code of Criminal Procedure, as amended by Law no. 356/2006 and in force since 6 September 2006, read as follows:

Article 3859

Circumstances when an appeal in cassation may be lodged

“(1) Decisions may be subject to an appeal in cassation in the following circumstances: ...

18. when an essential factual error has occurred, as a result of which an acquittal or conviction has been wrongfully pronounced; ...”

Article 38514

Examination of decision

“(1) The appealed decision is examined in the light of the evidence in the file and of any new documents adduced before the cassation court.

(1¹) When trying the appeal in cassation, the court must hear evidence from the applicant ... if he was not heard by the first-instance court or the appeal court, or when those courts did not find him guilty.”

Article 38515

Outcome [of the appeal in cassation]

“In giving judgment on an appeal in cassation, the court may either ...:

2. uphold the appeal, quash the lower court's decision and:

a) uphold the first-instance judgment if the appeal was wrongly allowed; ...

(d) hold a retrial of the case in the circumstances described in Article 385⁹ (1) 11-20 ...”

Article 38516
Other matters

“Where a court which has given judgment on an appeal holds a retrial of the case in accordance with Article 385¹⁵ (2) (d), it shall also rule on matters relating to the taking of evidence and fix a date for trial. At the trial, the court must hear evidence from the applicant ... if he was not heard by the first-instance court or the appeal court, or if those courts did not find him guilty.”

THE LAW

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

20. The applicant complained that the criminal proceedings against him had not been fair, in particular in so far as the High Court of Cassation and Justice had convicted him without hearing evidence from him. He relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

21. The Government argued that the applicant had failed to exhaust domestic remedies in so far as he had not requested leave to give new evidence before the High Court of Cassation and Justice. They considered that he could have made such a request in his last address to the court and that the court could have remitted the case to the court of first instance for a fresh trial.

22. The applicant disagreed with the Government’s submissions, arguing that the CCP did not allow for new evidence, other than documents, to be adduced before the court of last resort.

23. The Court considers that the issue of exhaustion of domestic remedies is closely linked to the merits of the complaint concerning the fairness of the proceedings. It therefore finds it necessary to join it to the merits of this complaint.

24. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

25. The applicant argued that being allowed to address the court before the end of the hearing could not be equated with his right to be heard by the court during the trial. He further argued that it was for the High Court to hear evidence again and not for him to request that. Lastly, he contended that the High Court's examination of the case had not been limited to procedural issues but had concerned the factual basis of his conviction.

26. The Government reiterated that the applicant could have asked to give evidence before the High Court. They averred that, in accordance with the rules of procedure, there was no obligation for the court of last resort to hear evidence from an applicant who had already been heard by a county court and by a court of appeal.

27. Furthermore, the Government argued that the High Court had addressed exclusively questions of law, namely the procedural norms for the admission of evidence to the file. It had not reached a different interpretation of the evidence in the file from that given by the county court.

28. Both the applicant and his lawyer had been present at the High Court hearing and had addressed the court freely. However, they had not requested that fresh evidence be adduced.

29. Lastly, the Government stated that the applicant's conviction had been based on the entire body of evidence available to the court.

2. The Court's assessment

(a) General principles

30. The Court reiterates that the manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.

31. However, where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by an accused who claims that he has not committed the act alleged to constitute a criminal offence (see, among many others, *Ekbani v. Sweden*, 26 May 1988, § 32, Series A no. 134; *Constantinescu v. Romania*, no. 28871/95, § 55, ECHR 2000-VIII; *Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 22, 29 September 2009; *Sinichkin v. Russia*, no. 20508/03, § 32, 8 April 2010; *Lacadena Calero v. Spain*, no. 23002/07, §§ 36 and 38, 22 November 2011; and *Hanu v. Romania*, no. 10890/04, § 32, 4 June 2013).

32. Moreover, the Court is of the view that, in the determination of criminal charges, the hearing of the defendant in person should nevertheless be the general rule. Any derogation from this principle should be exceptional and subjected to restrictive interpretation (see, notably *Popa and Tănăsescu v. Romania*, no. 19946/04, § 46, 10 April 2012).

(b) Application of these principles to the present case

33. Turning to the present case, the Court finds that it is not disputed that the applicant was first convicted by the County Court, was afterwards acquitted by the Court of Appeal and was then convicted again by the High Court. While the County Court and the Court of Appeal heard evidence from the applicant in person, the High Court did not hear him, or any evidence, directly.

34. The Court reiterates that although an accused's right to address the court last is certainly of importance, it cannot be equated with his right to be heard by the court during the trial (see *Constantinescu*, cited above, § 58). Moreover, as a matter of fair trial, a court cannot quash a previous judgment and reassess evidence without properly informing the interested parties and allowing them the opportunity to present their case (see *Popa and Tănăsescu*, cited above, § 51).

35. Accordingly, in order to determine whether there was a violation of Article 6 in the instant case, an examination must be made of the role of the High Court of Cassation and Justice and the nature of the issues which it was called upon to try (see *Popa and Tănăsescu*, cited above, § 47, and *Hanu*, cited above, § 34).

36. In the cases of *Popa and Tănăsescu* (cited above, § 48) and *Găitănanu v. Romania* (no. 26082/05, § 30, 26 June 2012), the Court had the opportunity to examine the scope of the High Court's powers when examining appeals in cassation similar to the one lodged in the present case, namely after a first appeal had already been decided by a lower court. It found that proceedings before the High Court were full proceedings governed by the same rules as a trial on the merits, with the court being required to examine both the facts of the case and questions of law. The High Court could decide either to uphold the applicant's acquittal or convict him, after making a thorough assessment of the question of guilt or innocence. If the necessity to hear evidence directly arose from the circumstances of the case, the High Court could refer the case to a lower court in accordance with the provisions of the CCP in force at the material time (see paragraph 19 above).

37. In the present case, the prosecutor argued his appeal in cassation on the ground that essential factual errors had occurred in the lower courts' decisions (see paragraph 16 above). The High Court examined the appeal within that framework. The Government argued that the High Court had only dealt with questions of law (see paragraph 27 above). However,

whether the High Court considered the elements raised before it as matters of fact or law is irrelevant for the Court. It is not its task to take the place of the domestic courts. It is primarily for those courts to resolve problems of interpretation of domestic legislation (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII; *Igual Coll v. Spain*, no. 37496/04, § 36, 10 March 2009; and *Lacadena*, cited above, § 47).

38. What matters for the purposes of Article 6 is that the High Court had to decide what weight to give to the applicant's first statements and to his wife's subsequent confessions. The court was called upon to make a full assessment of the applicant's guilt or innocence in respect of the charges against him since the same evidence directly heard by the lower courts had been used both to convict and to acquit him (see paragraphs 11 and 15 above). The court re-tried the case, re-examined the evidence and gave it a fresh interpretation (see paragraph 18 above). However, the issues raised can reasonably be considered to have presented a certain factual and legal complexity and they could not be properly assessed without evidence from the applicant and witnesses being heard directly by the court (see *Sinichkin*, § 38 and *Hanu*, § 40, cited above, and, *mutatis mutandis*, *Spînu v. Romania*, no. 32030/02, § 58, 29 April 2008; *Moreira Ferreira v. Portugal*, no. 19808/08, § 34, 5 July 2011; and *Mihai Moldoveanu v. Romania*, no. 4238/03, § 63, 19 June 2012).

39. Lastly, as concerns the issue of non-exhaustion of domestic remedies, the Court reiterates that an applicant's last address to the court before the end of the hearings does not suffice for the purposes of compliance with Article 6 of the Convention (see paragraph 34 above). In particular, the Court sees no reason why the applicant, who won his case before the Court of Appeal, should have had any interest in asking the High Court to hear the evidence again.

40. The foregoing considerations are sufficient to enable the Court to conclude that in the instant case the High Court failed to comply with the requirements of a fair trial.

41. For all these reasons, the Court rejects the Government's objection concerning the non-exhaustion of domestic remedies and concludes that there has been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant complained that the courts had relied on the police report and on his first statements from the night of the accident, and argued that those items had been obtained unlawfully. He relied on Article 6 § 1 of the Convention.

43. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds

that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

46. The Government argued that the claim was excessive.

47. The Court awards the applicant EUR 3,000 in respect of non-pecuniary damage.

48. Moreover, the Court reiterates that when a person, as in the instant case, was convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the violation found. In this connection, it notes that Article 4081 of the CCP provides for the possibility of a retrial or the reopening of domestic proceedings where the Court has found a violation of an applicant’s fundamental rights and freedoms (see Hanu, cited above, § 50).

B. Costs and expenses

49. The applicant did not make a claim under this head.

C. Default interest

50. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's objection as to the exhaustion of domestic remedies in respect of the applicant's complaint about the fairness of the proceedings and *rejects* it;
2. *Declares* the complaint concerning the fairness of the proceedings (not being heard in person by the court who convicted him) admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President