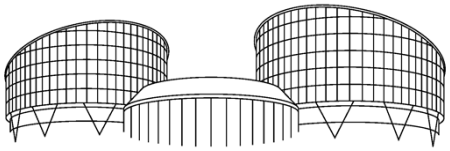

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF HORHAT v. ROMANIA

(Application no. 53173/10)

JUDGMENT

STRASBOURG

3 March 2020

This judgment is final but it may be subject to editorial revision.

In the case of Horhat v. Romania,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Faris Vehabović, *President,*
Iulia Antoanella Motoc,
Carlo Ranzoni, *judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having deliberated in private on 11 February 2020,

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

PROCEDURE

1. The case originated in an application (no. 53173/10) 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 Ioan Horhat ("the applicant"), on 4 August 2010.

2. The applicant was represented by Ms I.C. Bogoș, a lawyer practising in Alba-Iulia. The Romanian Government ("the Government") were represented by their Agents, Ms C. Brumar and Simona-Maya Teodoroiu, of the Romanian Ministry of Foreign Affairs.

3. On 1 September 2015 notice of the applicant's complaint under Article 4 of Protocol No. 7 was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. The Government objected to the examination of the application by a Committee. Having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Jidvei.

6. On 1 November 2006 the National Anticorruption Department (*Departamentul Național Anticorupție* – "the DNA") instituted criminal proceedings against the applicant for embezzling European Union funds.

7. On 5 December 2006 a prosecutor attached to the DNA discontinued the criminal proceedings against the applicant on the ground that the acts committed by him were not serious enough to constitute an offence and ordered the applicant to pay an administrative fine of 1,000 Romanian Lei (RON – approximately 291 euros (EUR)). The prosecutor also held that the penalty was to be enforced in accordance with the relevant criminal procedure rules.

8. The applicant never contested this decision before a court and on 5 January 2007 he paid the administrative fine. He never asked for the fine to be reimbursed because he alleged that it had never been cancelled.

9. On 9 August 2007 a superior prosecutor attached to the DNA reviewed the decision of 5 December 2006 of her own motion. Relying on Article 270 § 1 (c) and Article 273 of the Code of Criminal Procedure ("the CCP"), the superior prosecutor quashed the aforementioned decision and reopened the criminal proceedings previously instituted against the applicant for embezzling European Union funds. She contended that according to the available evidence in the case-file, and as also acknowledged by the lower prosecutor, the applicant had intentionally misappropriated European Union funds which had not been recovered during the criminal proceedings. As a result, the superior prosecutor considered the decision of 5 December 2006 to be unlawful.

10. On 21 September 2007 the DNA indicted the applicant for embezzling European Union funds and sent his case for trial to the Blaj District Court ("the District Court").

11. In an interlocutory judgment of 23 June 2009 the District Court noted that, according to the applicant's lawyer's arguments, the DNA's initial decision in the case had been to fine the applicant, who had paid that fine and reimbursed the embezzled funds.

12. On 27 October 2009 the District Court examined the case on the merits and acquitted the applicant on the ground that the acts committed by him did not constitute an offence. The DNA appealed against the judgment.

13. On 18 January 2010 the Alba County Court allowed the DNA's appeal, quashed the first-instance court's judgment, convicted the applicant of embezzling European Union funds and sentenced him to a suspended sentence of six months' imprisonment. It held that the acts committed by the applicant formed the elements of an offence. The applicant lodged an appeal on points of law against the judgment.

14. By a final judgment of 11 March 2010 the Alba-Iulia Court of Appeal, by a majority, dismissed the applicant's appeal on points of law as ill-founded. In a separate opinion, the dissenting judge was of the view that the acts committed by the applicant had not been serious enough to constitute an offence and that it would have been sufficient to impose an administrative penalty on the applicant.

II. RELEVANT DOMESTIC AND EUROPEAN UNION LAW AND PRACTICE AND INTERNATIONAL LAW MATERIAL

15. The relevant parts of the Criminal Code and of the CCP, as in force at the material time, concerning the imposition and enforcement of administrative fines, the discontinuation and reopening of criminal proceedings and the final nature of a public prosecutor office's decision; the

relevant domestic practice concerning the interpretation and application of the *res judicata* principle; the relevant parts of the Explanatory Report on Protocol No. 7 to the Convention; and the relevant international-law materials, European Union law and the case-law of the Court of Justice of the European Union are set out in *Mihalache v. Romania* ([GC], no. 54012/10, §§ 33-43, 8 July 2019).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

16. The applicant complained that he had been prosecuted and punished twice for the same offence. He relied on Article 4 of Protocol No. 7 to the Convention, which, in so far as relevant, reads:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> ..."

A. Admissibility

1. Non-exhaustion of domestic remedies

17. The Government argued that the applicant had not exhausted the available domestic remedies. The DNA's decisions of 5 December 2006 and 9 August 2007 (see, respectively, paragraphs 7 and 9 above) were not attached to the file available to the domestic courts and the applicant had not argued before the last-instance court, even in substance, that the authorities had breached the *ne bis in idem* principle in his case.

18. The applicant argued that he had raised the matter of the fine imposed on him before the first-instance court.

19. The Court reiterates the general principles set out in its case-law concerning the exhaustion of domestic remedies (see *Gherghina v. Romania* [GC] (dec.), no. 42219/07, §§ 83-89, 9 July 2015).

20. In the present case, the Court notes that the applicant did not argue before the appellate courts that he had been fined by the DNA for the same offence or that the domestic authorities had breached the *ne bis in idem* principle in his case. In addition, the DNA's decisions of 5 December 2006 and 9 August 2007 were not attached to the domestic case-file. On

4 December 2015 the District Court had informed the Government that the aforementioned decisions could not be found in the domestic case-file.

21. However, the Court notes that – according to the Government's own submissions (see paragraph 28 below) and to the relevant domestic practice (see paragraph 15 above) – the courts reasoned that a prosecutor's decision to discontinue the criminal proceedings instituted in a case, regardless of whether or not a penalty had been imposed, acquired the force of *res judicata* and therefore became relevant for an argument concerning an alleged breach of the principle of *ne bis in idem* only after it had been upheld by a final court judgment. By this reasoning, the DNA's decision of 5 December 2006 had never been reviewed and upheld by a court and therefore it could not be considered to be a final judgment which had acquired the force of *res judicata*.

22. In such circumstances the Court considers that the applicant was relieved of the necessity of raising before the appellate courts, either expressly or in substance, an argument about the alleged breach of the *ne bis in idem* principle in his case, given that such an argument would stand no realistic prospects of success because the decision of 5 December 2006 was not considered a final judgment. The Court also finds relevant in this connection the fact that the Government have not supported their objection by submitting any relevant case-law indicating that the domestic courts would allow complaints concerning an alleged breach of the principle of *ne bis in idem* in circumstances similar to those of the applicant.

23. In the light of the foregoing, the Court considers that the Government's preliminary objection of non-exhaustion of domestic remedies must be dismissed.

2. Manifestly ill-founded

24. Relying on the arguments submitted in connection with the merits of the case (see paragraphs 28-29 below), the Government argued that the applicant's complaint was manifestly ill-founded.

25. The applicant did not submit observations on this point.

26. The Court notes that the applicant's complaint raises issues of fact and Convention law, such that it cannot be rejected on the ground of being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention (see *Mihalache v. Romania* [GC], no. 54012/10, § 46, 8 July 2019). It further notes that it is not inadmissible on any other grounds, and must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

27. The applicant argued that the decision of 5 December 2006 (see paragraph 7 above) had acquired the force of *res judicata* because it had not been challenged. Moreover, the superior prosecutor's decision to reopen the criminal proceedings (see paragraph 9 above) had not been based on new facts or circumstances coming to light and had relied on the evidence already gathered and examined by the lower prosecutor.

28. The Government conceded that the applicant had been fined and convicted for the same offence. However, the decision of 5 December 2006 was not a final judgment which had acquired the force of *res judicata*. In accordance with the relevant domestic practice this decision would have acquired such force only after it had been approved by a court. Therefore, the decision to reopen the proceedings had not constituted the institution of a second set of criminal proceedings.

29. The superior prosecutor had had the power to review and quash the lower prosecutor's decision by relying on grounds concerning the seriousness of the offence and had not been confined to the exceptions provided for in Article 4 § 2 of Protocol No. 7 to the Convention. That power of review had not been subject to a time-limit. Consequently, by not challenging the decision of 5 December 2006 before a court and by paying the fine, the applicant had accepted the possibility that the proceedings could be reopened by a superior prosecutor. In addition, under the relevant tax rules, the applicant could ask the tax authorities to reimburse the previously paid fine.

2. *The Court's assessment*

30. The Court reiterates the principles set out in its case-law concerning the duplication of criminal proceedings (see *Mihalache*, cited above, §§ 47-49).

31. In the instant case, the Court notes that the Government have not contested that the proceedings leading to the decision of 5 December 2006 and those leading to the final judgment of 11 March 2010 (see paragraph 14 above) were criminal in nature for the purpose of Article 4 of Protocol No. 7. Moreover they have not contested that those two decisions concerned the same facts and the same accusation against the applicant.

32. Having regard to the particular circumstances of the applicant's case, the Court does not find any grounds to hold that the two sets of proceedings were not criminal in nature or that they did not concern the same facts or accusation against the applicant.

33. Therefore, it remains to be determined whether there was a duplication of proceedings in the applicant's case.

34. The Court notes that it has already established that a prosecutor's decision discontinuing criminal proceedings against an applicant on the ground that the acts were not serious enough to constitute an offence, while at the same time imposing an enforceable administrative penalty on him for the acts he had committed, after the prosecutor had assessed all the circumstances of the case, entailed a "conviction" within the substantive meaning of the term (see *Mihalache*, cited above, §§ 13 and 100-01).

35. The Court observes in this connection that on 5 December 2006, after carrying out his own assessment of all the circumstances of the case on the basis of the evidence produced in the file, a prosecutor attached to the DNA discontinued the applicant's prosecution, simultaneously imposing a penalty on the applicant that had a punitive and deterrent purpose (see paragraph 7 above).

36. Such a decision became final, within the autonomous Convention meaning of the term, on the expiry of the twenty-day time-limit laid down in Article 249[1] of the CCP for an applicant to avail himself of the remedy provided for within that Article (see *Mihalache*, cited above, § 126).

37. In the present case, the applicant did not see it fit to avail himself of the remedy provided for in Article 249[1] of the CCP to challenge this decision. Even though the date on which he was notified of the prosecutor's decision is unclear, there is no doubt that he took cognisance of it, allowed the twenty-day time-limit laid down in Article 249[1] of the CCP to expire, and on 5 January 2007 paid the fine imposed on him (see paragraph 8 above). Since the applicant had no other ordinary remedy available to him for challenging it, the decision of 5 December 2006 had become final by the time when, on 9 August 2007, the superior prosecutor attached to the DNA exercised her discretion to reopen the criminal proceedings against the applicant (see paragraph 9 above).

38. According to the Court's case-law, a decision by a superior prosecutor to reopen proceedings concluded by a final conviction which is the result of a mere reassessment of the facts in the light of the applicable law, in the absence of emergent new or newly discovered facts or evidence or the discovery of a fundamental procedural defect concerning those proceedings, was not covered by the exceptional circumstances referred to in Article 4 § 2 of Protocol No. 7 justifying a possible reopening of the proceedings (see *Mihalache*, cited above, §§ 135-37).

39. It is clear from the decision of 9 August 2007 rendered in the present case that the reopened proceedings arose from the same facts as those forming the basis of the decision of 5 December 2006. The superior prosecutor made her decision on the basis of the same case file as the lower prosecutor, no new evidence having been adduced and examined. The reopening of the case was therefore not justified by the emergence of new or newly discovered facts.

40. Moreover, it appears from the decision of 9 August 2007 that the reopening of the proceedings was justified by the superior prosecutor's different assessment of the circumstances of the case, which in her view should have given rise to criminal rather than "administrative" liability on the applicant's part. However, the decision does not include any mention of any need to remedy a breach of a procedural rule or a serious omission in the proceedings or in the investigation conducted by the lower prosecutor. The reopening of the criminal proceedings was thus not justified by a fundamental defect in the previous proceedings.

41. Having regard to the foregoing, the Court takes the view that the reasons given by the superior prosecutor to justify the reopening of the proceedings on the basis of the decision of 9 August 2007 are at variance with the strict conditions imposed by Article 4 § 2 of Protocol No. 7. Therefore, the reopening of the proceedings in the instant case was not justified by the exception set out in that provision.

42. It follows that the applicant was convicted on the basis of the decision of 5 December 2006, which had become final by the time a further prosecution was triggered by the decision of 9 August 2007. Given that none of the situations permitting the combination (see *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 112-34, 15 November 2016) or reopening of proceedings arose in the present case, the Court concludes that the applicant was tried twice for the same offence, in breach of the *ne bis in idem* principle.

43. The Court's conclusion is not prejudiced by the fact that the applicant did not ask the tax authorities for a reimbursement of the paid fine (see paragraph 8 above).

44. There has accordingly been a violation of Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed RON 18,200 (EUR 4,700) in respect of pecuniary damage for lost benefits between October 2010 and 2016 following his removal from the position of local councillor after his conviction by the final judgment of 11 March 2010 (see paragraph 14 above). His claim included RON 3,800 (EUR 850) for benefits lost between

October 2010 and May 2012 and the rest was for benefits lost between May 2012 and 2016. He submitted his income statements for June 2009 and April 2012, which attested that in June 2009 he was working as a local councillor and that in 2008 he had a salary income of RON 2,000 (EUR 550). His salary income increased significantly in 2011.

47. The applicant also claimed EUR 20,000 in respect of non-pecuniary damage for physical and mental suffering experienced because of his conviction. He submitted medical documents attesting that in 2011 he had been hospitalised for a number of illnesses.

48. The Government acknowledged that a clear link existed only between the applicant's conviction of 11 March 2010 and his removal from office between October 2010 and May 2012. In any event, the applicant failed to prove his actual income as a local councillor prior to his conviction. Also, according to the Court's case-law the applicant was not entitled to compensation for loss of earnings as long as he had been employed after his removal from office and his income had increased.

49. The medical documents did not prove a connection between the applicant's conviction and the alleged non-pecuniary damage. The mere finding of a violation was sufficient just satisfaction for him in this regard, considering that in the case of a violation being found by the Court the applicant would be able to seek a revision of the judgment delivered in his case under Article 465 of the CCP and compensation if subsequently acquitted.

50. The Court notes the Government's acknowledgement of a clear link between the applicant's conviction of 11 March 2010 and his removal from office between October 2010 and May 2012. However, given the available evidence, the exact amount of the actual benefits the applicant would have been entitled to for working as a local councillor between October 2010 and 2016 remains unclear. Moreover, it does not seem that he was unemployed or without income over the relevant period of time or that his benefits would have exceeded the income he actually earned following his removal from office. The Court, therefore, rejects the applicant's claim for pecuniary damage (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 67, ECHR 2000-IV).

51. As regards the applicant's claim for non-pecuniary damage, the Court considers that, even assuming that the applicant would be able to seek a revision of the domestic judgment delivered in his case under Article 465 of the CCP, a mere finding of a violation by the Court is insufficient to compensate the applicant for the sense of injustice and frustration which he must have felt on account of the reopening of the proceedings (see *Mihalache*, cited above, § 148). Making its assessment on an equitable basis, the Court therefore awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant also claimed RON 7,000 (EUR 1,570) for the costs and expenses incurred before the domestic courts. He submitted three receipts attesting to the payment of the aforementioned amount to his lawyer during the period from March 2008 to March 2010.

53. The Government argued that the applicant's claim was excessive and not fully substantiated.

54. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession, the violation found and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 1,570 covering the costs and expenses incurred before the domestic courts.

C. Default interest

55. 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 4 of Protocol No. 7 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,570 (one thousand five hundred and seventy euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 March 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Faris Vehabović
President