



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

THIRD SECTION

CASE OF ION TUDOR v. ROMANIA

(Application no. 14364/06)

JUDGMENT

STRASBOURG

17 December 2013

FINAL

17/03/2014

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

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In the case of Ion Tudor v. Romania,

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

Josep Casadevall, *President*,

Alvina Gyulumyan,

Corneliu Bîrsan,

Luis López Guerra,

Nona Tsotsoria,

Johannes Silvis,

Valeriu Grițco, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 26 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 14364/06) 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 Ion Gheorghe Tudor (“the applicant”), on 31 March 2006.

2. The Romanian Government (“the Government”) were represented by their co-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 1973 and lives in Târgu Jiu.

6. On 15 November 2002 the applicant and M.P. were committed for trial on charges of robbery and aggravated murder. Throughout the proceedings the applicant pleaded innocent.

In his statements to the police and the prosecutor, the applicant’s co-accused declared that he had committed the acts together with the

applicant. He changed his position before the court, stating that he had acted alone and that the applicant had not participated in the alleged crimes.

7. On 16 December 2003 the Gorj County Court convicted the applicant of murder and sentenced him to twenty-three years' imprisonment. It based its decision on the evidence in the file, including the statements made by both the accused during the investigations and in court, as well as on witness testimony and forensic evidence. The court concluded that both defendants had committed the crimes.

8. On 28 June 2004 the Craiova Court of Appeal quashed that decision and remitted the case to the County Court for re-examination.

9. On 13 July 2004 the Gorj County Court heard evidence from the applicant and the co-defendant. On 20 December 2004 it found the applicant guilty and sentenced him to twenty-three years in prison.

10. The defendants appealed. The Craiova Court of Appeal re-examined the merits of the case. It examined the evidence already gathered, heard evidence from the defendants, requested new evidence and was addressed by defence counsel and the prosecutor.

11. On 22 September 2005 it acquitted the applicant as it considered that the evidence in the file did not convincingly link the applicant to the robbery.

12. The prosecutor appealed in cassation on the ground that the Court of Appeal had wrongly assessed the evidence and had relied exclusively on the evidence administered directly before it, ignoring the evidence adduced during the prosecution and before the lower courts. The High Court of Cassation and Justice was addressed by defence counsel and the prosecutor. It allowed the defendants to address it before the end of the hearing (*ultimul cuvânt al inculpatului*).

13. In a final decision of 8 February 2006 the High Court quashed the Court of Appeal's decision, re-examined the evidence in the file and upheld the County Court's decision of 20 December 2004. The High Court found that the Court of Appeal had not weighed the evidence properly and had ignored relevant information from the file, notably the statements made by the co-defendant immediately after the commission of the crimes, whereby he had incriminated the applicant. It reassessed the evidence and found that the first statements given by the applicant's co-defendant were corroborated by the remaining evidence.

II. RELEVANT DOMESTIC LAW

14. The relevant provisions of the Code of Criminal Procedure in force at the time of the facts giving rise to the present application are set out in *Constantinescu v. Romania* (no. 28871/95, § 37, ECHR 2000-VIII).

THE LAW

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

15. The applicant complained that the criminal proceedings against him had not been fair. In particular he complained about the difference in the interpretation of evidence among the courts and pointed out that the Court of Appeal had heard evidence and acquitted him, whereas the High Court had convicted him again based on the evidence in the file. He relied on Articles 5 § 1 and 6 § 1 of the Convention.

The Court considers that the complaint falls to be examined exclusively under Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

16. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' positions*

17. The applicant reiterated that the proceedings against him had been unfair.

18. The Government contended that the criminal proceedings had been fair. The applicant had participated in the trial, given evidence in his defence, and examined the evidence for the prosecution in open court. He had given evidence before both the County Court and the Court of Appeal. The applicant had not requested a fresh examination of the evidence by the High Court.

19. The Government further argued that the case at hand did not involve any special circumstance which would have necessitated a fresh examination of the evidence, as the witnesses had maintained their position throughout the proceedings. The only person who had changed his position was the co-defendant, but the High Court had explained why it had given preference to his initial statements to the detriment of those he gave later in the proceedings.

2. *The Court's assessment*

(a) **General principles**

20. 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.

21. 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, *Ekbatani v. Sweden*, 26 May 1988, § 32, Series A no. 134; *Constantinescu*, cited above, § 55; *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).

22. Moreover, the Court is of the view that, in the determination of criminal charges, the hearing of the defendant in person should 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**

23. 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 other evidence directly.

24. 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). Lastly, in practice, the Court sees no reason why the applicant, who won the case before the Court of Appeal and was given no indication whatsoever from the High Court that the decision might be reversed, should have had any interest in asking the High Court to hear the evidence again.

25. 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 v. Romania*, no. 10890/04, § 34, 4 June 2013).

26. 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 Code of Criminal Procedure in force at the material time (see paragraph 14 above).

27. 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 12 above). The High Court examined the appeal within that framework. It had to decide what weight to give to the co-defendant's first statements and his subsequent change of position. The court was thus called upon to make a full assessment of the applicant's guilt or innocence regarding 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 7 and 9 as well as 11 above). The court re-tried the case, re-examined the evidence and gave it a fresh interpretation (see paragraph 13 above).

28. 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).

29. 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.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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, costs and expenses

31. The applicant claimed 700,000 euros (EUR) in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

32. The Government argued that the claim was unsubstantiated and excessive. They also asked the Court to rule that the acknowledgment of a violation of the applicant’s right to a fair trial represented in itself just satisfaction.

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

34. 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 absence of any documents certifying the costs alleged, the Court rejects the claim made by the applicant.

35. Lastly, the Court reiterates that when a person, as in the instant case, has been 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 Code of Criminal Proceedings provides for the possibility of a retrial or the reopening of the domestic proceedings where the Court has found a violation of an applicant’s fundamental rights and freedoms (see *Hanu*, cited above, § 50).

B. Default interest

36. 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 6 § 1 of the Convention;
3. *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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President