



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

THIRD SECTION

CASE OF NIȚULESCU v. ROMANIA

(Application no. 16184/06)

JUDGMENT

STRASBOURG

22 September 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nițulescu v. Romania,

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

Luis López Guerra, *President*,

Josep Casadevall,

Kristina Pardalos,

Johannes Silvis,

Valeriu Grițco,

Iulia Antoanella Motoc,

Branko Lubarda, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 1 September 2015,

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

PROCEDURE

1. The case originated in an application (no. 16184/06) 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, Ms Gabriela Nițulescu (“the applicant”), on 14 April 2006.

2. The applicant was represented by Mr D. Matei, a lawyer practising in Târgoviște. The Romanian Government (“the Government”) were represented by their Agent, Mrs I. Cambrea, from the Ministry of Foreign Affairs.

3. The applicant alleged, under Article 6 § 1 of the Convention, that the proceedings against her had been unfair. She complained, in particular, that her conviction had been based mainly on transcripts of audio tapes, which she claimed should not have been used as evidence in the file.

4. On 14 January 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lives in Moreni.

A. General background

6. On 17 July 2000, R.C.A. was hired as an inspector by the Moreni City Council on the recommendation of the applicant and another person, G.A. She had a contract for a limited period of time, namely three months, which was extended for another three months. In order to obtain a permanent contract she took part in a competition organised by the City Council in February 2001. She succeeded, being the only candidate. After a few months, the atmosphere at the workplace became tense. R.C.A. was on probation in her new post and was therefore monitored and kept under close scrutiny.

7. According to R.C.A.'s statements, she was persecuted by her superiors and even sexually harassed by the mayor. Therefore, she asked for the protection of the applicant, to whom she allegedly gave 1,000 German marks (DEM).

8. According to the applicant's statement, the money was given to her as a loan with no prearranged date of reimbursement in the summer of 2001. The applicant also stated that another colleague, C.M., had borrowed money from R.C.A., and that the practice of borrowing money from each other was common in their workplace. The applicant's statements were confirmed by her colleague, who was heard as a witness before the court.

B. The criminal investigation against the applicant

9. On 24 January 2002 R.C.A. denounced the applicant to the police for influence peddling. She claimed that the applicant had asked her for DEM 1,000 in order to persuade the mayor to give her a permanent position within the City Council.

10. On 29 January 2002 R.C.A. obtained the authorisation of the prosecutor's office attached to the Ploiești Court of Appeal to record conversations between herself and the applicant. Subsequently, all the conversations that took place between the applicant and herself between 29 January and 2 February 2002 were recorded. The recording was carried out using two recording devices, one belonging to R.C.A. and the other to a police officer.

11. Following a request by R.C.A. for the return of the money, the applicant and R.C.A. met in a cake shop close to the applicant's home on 2 February 2002. The applicant stated that she was accompanied by a colleague, D.C. According to R.C.A.'s version, the applicant was alone, while she herself was accompanied by her husband and brother, who waited outside the cake shop. The applicant handed over to R.C.A. 400 United States dollars (USD) (the equivalent of DEM 1,000).

12. On 4 April 2002 a criminal investigation was initiated against the applicant on the charge of influence peddling.

13. On 12 June 2002 R.C.A. was invited to the prosecutor's office attached to the Dâmbovița County Court to give clarification on the recordings. After some discussion of the transcripts of the conversations she said she had a headache and left, promising to come back the same day. However, she never came back to continue the discussion with the prosecutor. This was mentioned in the record of the meeting drafted by the prosecutor.

14. On 24 September 2002 the Ploiești Division of the National Anti-Corruption Directorate decided to discontinue the investigation against the applicant on the ground that the *actus reus* of the offence was missing.

15. On 9 December 2002 the chief prosecutor decided to reopen the criminal investigation against the applicant. He noted that the investigation had been incomplete and that there were several aspects to be clarified in connection with the charges against the applicant. He also ordered a preliminary investigation against the mayor of Moreni.

16. On 27 March 2003 R.C.A. enquired the chief prosecutor about the progress of the investigation. She expressed concern about the integrity of the transcripts of the recordings, as she had noted that the parts of the conversations had been erased.

17. The file was presented to the applicant on 5 June 2003. The minute certifying the taped conversations was drafted afterwards, on 13 June 2003.

18. By a bill of indictment of 20 June 2003, the prosecutor's office committed the applicant for trial on a charge of influence peddling in violation of Article 257 § 1 of the Romanian Criminal Code and Articles 1 (a) and 6 of Law no. 78/2000. By the same decision the prosecutor decided not to open a criminal investigation against the mayor, without giving any reasons.

C. The proceedings before the court of first instance

19. Several hearings were held before the Dâmbovița County Court.

20. According to a witness statement given by the mayor of Moreni before the county court on 4 November 2003, R.C.A. was well known as a person who recorded her private conversations at work, about which many colleagues had complained. A similar aspect was revealed by another witness, G.A. She stated that R.C.A. had changed her behaviour at work after she had obtained a permanent contract. As G.A. was the person who had recommended R.C.A. for the job, other employees informed her that R.C.A. was leaving her office during working hours. G.A. had tried to advise R.C.A. to change her behaviour; she noted that the latter was recording their conversation.

21. On 16 December 2003 the court granted a request by the applicant for a technical report on the contents of the tape recordings. On 4 January 2004 the applicant's lawyer asked to see the authorisation for the

recording of the conversations and the minute drafted of the occasion when R.C.A. handed over the recordings. She also lodged a written request for an expert assessment of the authenticity and integrity of the recordings.

22. On 4 February 2004 the National Institute for Forensic Expert Opinions, which was in charge of the preparation of the report, asked the court to send it all the technical equipment used for the recording of the audio tapes.

23. On 30 March 2003 R.C.A. submitted written notes by which she informed the court that on 12 June 2002 she had refused to confirm that the transcripts of the recorded conversations presented by the prosecutor corresponded to the recordings performed by her (see paragraph 17 above).

24. On 11 May 2004, the court imposed a fine on R.C.A. as she had refused to provide the court with the original tapes and equipment used for recording the applicant.

25. As R.C.A. refused to attend the court hearings or to submit the original tapes, two orders for her to be brought before the court were issued by the county court.

26. By a judgment rendered on 2 July 2004, the Dâmbovița County Court acquitted the applicant on the ground that the elements required for the offence were not present.

27. The county court held that R.C.A.'s version of events was supported only by the testimony of her husband and brother and by the taped conversations, whose authenticity and integrity could not be established by an expert, mainly because R.C.A. had refused to provide the expert with the technical equipment used for the recording. Moreover, R.C.A.'s statements contained many contradictions. In this respect the county court stated:

“... although R.C.A. stated that the money was given to the applicant before the competition which was to take place on 6 February 2001, during the proceedings before the court she stated that it was given later, after the competition, then she changed her previous statement only when she was asked by the prosecutor attending the hearing about the logic of such an action ...

In conclusion, the statements mentioned above are not corroborated by the facts or circumstances resulting from all the evidence adduced in the case, and cannot be confirmed by the audio recording of the conversations, since these were not executed in accordance with the provisions of Article 91¹ or with the Code of Criminal Procedure (in force until 1st January 2004, in accordance with Law 281/2003) ...

Contrary to the above-mentioned legal provisions, in the case file there are three minutes, all dated 13 June 2003, which mention only that the conversations between R.C.A. and the defendant were authorised under no.502 on 29 January 2002 (although the transcripts from pages 75-78 of the file indicate a previous date, namely 22 January 2002), and after the tapes had been heard it was confirmed that their contents were mentioned in the transcripts.

Moreover, according to the letter of 8 April 2004 from the Dâmbovița Police Department and the statements of R.C.A. and the witness B.M., the recording of the conversations was made by devices belonging to R.C.A., who submitted to the

criminal investigation body recordings made before she had made her accusations, and thus before she had obtained authorisation from the prosecutor.

Despite the fact that a forensic report intended to establish the contents of the audio tapes was ordered at the request of the defendant ... it could not be adduced before the court in the absence of the technical equipment (microphone and tape recorder) used for the recording of the tapes. The Dâmbovița Police Department stated in the above-mentioned letter that the police officer's recording device had been lost, and the other one was in the possession of R.C.A., who had refused to hand it over."

D. The appeal proceedings

28. The prosecutor's office appealed against the judgment rendered by the Dâmbovița County Court. It argued that the applicant's guilt was proved by the statements of the accuser, R.C.A., and confirmed by the audio recordings of the conversations between R.C.A. and the applicant.

29. On 14 October 2004 the Ploiești Court of Appeal ordered an expert technical report on the authenticity or otherwise of the tape recordings. At the hearing held on 7 March 2005 the court revoked that order on the ground that "R.C.A. no longer has the originals of the audio tapes".

30. On 15 March 2005, the Ploiești Court of Appeal dismissed the appeal on the ground that the applicant could not be convicted on the basis of recordings obtained in breach of the applicable legal provisions. It noted that the prosecutor had not observed the legal provisions concerning the attestation of the authenticity of the recordings, and considered that the correct procedures for telephone tapping had not been observed. With respect to R.C.A.'s statements the Court of Appeal arrived at the same conclusion as the first-instance court. It held that most of her statements were contradictory and were corroborated only by her husband and brother. However, the applicant's statement that she had received the money from R.C.A. as a loan was confirmed by the statements of four other colleagues. Two of them stated that they had heard R.C.A. threatening the applicant that she would claim that the money given as a loan was in fact a bribe.

E. The appeal on points of law before the High Court of Cassation and Justice

31. The appeal on points of law submitted by the prosecutor was allowed by the High Court of Cassation and Justice on 14 October 2005. That court quashed the decisions of the first two domestic courts and convicted the applicant of influence peddling, sentencing her to two years' imprisonment, suspended, with probation. Without hearing evidence directly from the applicant, R.C.A. or any witnesses, the court arrived at the conclusion that R.C.A.'s statements were not contradictory and that in fact the applicant's statements were corroborated only by the testimony of one

witness, C.M., a colleague of the applicant and one of the individuals who had also persecuted R.C.A.

32. It mainly based its decision on the statements of R.C.A., the testimony of R.C.A.'s husband and brother and the audio tapes containing the conversations between R.C.A. and the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

33. The legal provisions in force at the time of the events concerning the use of audio tapes as evidence in a criminal trial, as well as the subsequent modifications, were contained in Article V¹ of the Criminal Code of Procedure ("the CCP"), "Audio and video recordings". They were introduced into the CCP by Law 141/1996, after which the text was amended as a result of the entry into force of Law 281/2003, Law 356/2006, and Government Emergency Ordinance 60/2006.

34. The legal provisions of the CCP concerning telephone surveillance, as applicable at the time the recordings were made, are described in *Dumitru Popescu v. Romania* (no. 2) (no. 71525/01, § 44, 26 April 2007).

35. The relevant provisions concerning the appeal on points of law of the CCP, as in force at the material time, are described in *Găitănanu v. Romania* (no. 26082/05, § 17, 26 June 2012).

THE LAW

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

36. The applicant complained that her conviction by the High Court of Cassation and Justice had been mainly based on recordings of her conversations with her accuser R.C.A., recordings that were not in compliance with the applicable legal provisions.

She 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

37. The Court notes that this complaint 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' submissions

38. The applicant submitted that after being acquitted by courts at the first two levels of jurisdiction the High Court of Cassation and Justice had convicted her on the basis of recordings of her telephone conversations corroborated by statements by her accuser and R.C.A.'s brother and husband, despite the fact that the prosecutor had not been able to provide the courts with the authorisation of the telephone interception, the original tapes, or the recording devices. The High Court of Cassation and Justice gave a new interpretation to the evidence in the file without making any reference to witness statements which in the opinion of the first two courts proved the applicant's innocence.

39. The Government submitted that the applicant had had full access to all evidence in the file, including the recordings of her telephone conversations with her accuser R.C.A. They admitted that the applicant had challenged the authenticity of the recordings and had asked for an expert opinion on the matter. However, the expert opinion could not be produced because the original tapes and the recording devices could not be obtained from the prosecutor's office.

40. According to the Government, the recordings of the telephone conversations had been carried out in accordance with the law. They had been authorised by a prosecutor and had been carried out by a private individual, R.C.A.

41. The Government further contended that even assuming that the recorded telephone conversations had not been reproduced in full in the transcripts, as the applicant had alleged, the High Court of Cassation and Justice had corroborated this piece of evidence with other relevant evidence in the file, such as the statements of R.C.A. and of R.C.A.'s brother and husband.

42. They concluded that as a whole the criminal proceedings against the applicant had been fair and in compliance with Article 6 § 1 of the Convention.

2. The Court's assessment

43. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under

national law (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII, and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

44. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence - for example, unlawfully obtained evidence - may be admissible. The Court has already found in the particular circumstances of a given case that the fact that the domestic courts used as sole evidence transcripts of unlawfully obtained telephone conversations did not conflict with the requirements of fairness enshrined in Article 6 of the Convention (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V, and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX).

45. The question which must be answered in the present case is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 144, ECHR 2011).

46. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009).

47. At the outset the Court notes that the applicant was acquitted by the first two courts on the ground that the evidence against her was not conclusive (see paragraphs 27 and 31 above). However, on the basis of the same evidence, she was subsequently convicted by the High Court of Cassation and Justice (see paragraph 32 above).

48. In the cases of *Popa and Tănăsescu* (no. 19946/04, § 48, 10 April 2012), and *Găitănaru* (cited, above, § 30), 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.

49. In the present case, the High Court was called upon to make a full assessment of the applicant's guilt or innocence regarding the charges

against her. When convicting the applicant, it relied on the statements of her accuser R.C.A., and of R.C.A.'s husband and brother, and on the transcripts of the recorded conversations, despite the fact that the applicant consistently challenged the lawfulness of the recordings and claimed that R.C.A.'s husband and brother were never present at their conversations. Moreover, the High Court quashed the decisions of the two lower courts without hearing evidence either from the applicant or the witnesses.

50. The relevant Romanian provisions concerning telephone surveillance were examined by the Court in the context of Article 8 of the Convention in the case of *Dumitru Popescu v. Romania* (no. 2), (no. 71525/01, §§ 72-81, 26 April 2007). The Romanian law applicable at the time of recording permitted authorised interceptions of private conversations if there were serious indications that a crime had been perpetrated. In that case, the Court found that the recording of conversations lacked proper controls, either by means of prior authorisation or subsequent verification by an independent and impartial tribunal, as well as through guarantees safeguarding the intactness and completeness of records. As in the present case, the authorisation of the recording was granted by a prosecutor, without a subsequent review by an independent tribunal.

51. With respect to Romanian prosecutors, the Court has already found in *Vasilescu v. Romania* (22 May 1998, §§ 40-41, Reports 1998-III) and *Pantea v. Romania* (no. 33343/96, §§ 238-239, ECHR 2003-VI (extracts)), that they do not satisfy the requirement of independence from the executive.

52. The Court further notes that the applicant complained before the domestic courts that the recordings of the private conversations between her and her accuser R.C.A. had been obtained illegally. Moreover, she claimed that the recordings used as the main evidence against her lacked authenticity, stressing that the audio tapes did not contain the entire conversations; important parts of the conversations were missing.

53. Both courts at the lower levels considered a technical expert report on the recordings to be necessary (see paragraphs 21 and 29) and ordered that such a report be produced. Despite the importance of the recordings in the assessment of the evidence, the authenticity of the audio tapes could never be established by the domestic courts, because the original tapes in R.C.A.'s possession were never submitted to the court, nor was the technical equipment used for recording them. That being so, a technical examination of the recordings could not be carried out.

54. Although the authenticity and integrity of the recordings could not be established by an expert, the High Court of Cassation and Justice based its reasoning on the transcripts of the recordings, corroborated by R.C.A.'s statements and those of her husband and brother (see paragraph 32). Moreover, the integrity of the transcripts had been challenged even by R.C.A. herself (see paragraphs 16 and 23 above).

55. As regards R.C.A.'s statements, the Court notes that in spite of the fact that the domestic courts at the first two levels had considered her statements to be contradictory (see paragraphs 27 and 30 above) the High Court of Cassation and Justice based its decision on her statements **without directly hearing her**. The Court also notes R.C.A.'s lack of cooperation with the investigating authorities. **As she refused to present the original tapes and the device used by her to record the conversations, she was fined by the court of first instance (see paragraph 24 above). She also refused to attend the hearings of the same court; two orders to be brought before the court had been issued in this respect (paragraph 25 above) and when she was invited by the prosecutor to confirm the accuracy of the transcripts she left without providing the requested clarifications (see paragraph 13 above).**

56. As regards the statements of R.C.A.'s husband and brother, the Court notes that, as R.C.A. had admitted, they had never been present at any of the conversations between the applicant and R.C.A. On 2 February 2002, when they claimed that they had accompanied R.C.A. to the coffee shop, they had in fact waited outside. Furthermore, the High Court of Cassation and Justice **had heard neither the witnesses nor the applicant, basing its decision on written statements**.

57. In view of the above findings, the Court concludes that the proceedings in the applicant's case, taken as a whole, did not satisfy the requirements of a fair trial.

It follows that there has been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

58. Lastly, the applicant complained under Article 6 § 1 of the Convention that the judges were not impartial and that the reasoning given by the High Court of Cassation and Justice was of a summary nature.

59. 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 these complaints are 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

60. 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

61. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage, representing the salary to which she would have been entitled (she lost her job as a civil servant and could not get a similar job because of her conviction). In respect of non-pecuniary damage, the applicant asked for EUR 10,000.

62. The Government stated that the amounts claimed by the applicants for pecuniary damage were speculative, excessive and not proven.

In respect of the compensation for non-pecuniary damage claimed by the applicant, the Government stated that it was excessive and asked the Court, if it found a violation, to consider that violation of itself to be sufficient just satisfaction.

63. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it considers that the applicant did suffer non-pecuniary damage.

64. Therefore, ruling on an equitable basis, in accordance with Article 41, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

65. 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 established violation. In this respect, it notes that Article 465 of the Romanian Code of Criminal Procedure provides for the possibility of revision of a domestic trial where the Court has found a violation of an applicant’s fundamental rights and freedoms.

B. Costs and expenses

66. The applicant also claimed the reimbursement of the costs and expenses incurred before the domestic courts and the Court, without indicating any amount.

67. The Government pointed out that the applicant had failed to submit any supporting documents.

68. 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 above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

69. 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 complaint concerning the unfairness of the criminal proceedings on account of the allegedly unlawful recording of the applicant's conversations used as the main evidence against her admissible and the remainder of the application inadmissible;
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) 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 22 September 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Luis López Guerra
President