



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

THIRD SECTION

CASE OF ANDREȘAN v. ROMANIA

(Application no. 25783/03)

JUDGMENT

STRASBOURG

30 October 2012

FINAL

30/01/2013

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

In the case of Andreșan v. Romania,

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

Josep Casadevall, *President*,

Egbert Myjer,

Alvina Gyulumyan,

Ján Šikuta,

Luis López Guerra,

Nona Tsotsoria,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 9 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 25783/03) 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 Ilie Andresan (“the applicant”), on 21 July 2003.

2. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan Horațiu Radu, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had been subjected to ill-treatment when arrested by two police officers, and that the ensuing investigations had not been effective.

4. On 31 May 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. As Mr Corneliu Bîrsan, the Judge elected in respect of Romania, had withdrawn from the case (Rule 28 of the Rules of Court), the President of the Chamber appointed Mrs Kristina Pardalos to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1982 and lives in Luduș, Mureș County.

A. Events on 30 April 2001

7. According to the applicant, on 30 April 2001 his employer, I.N., reported informally to two police officers, N.D. and C.B., that some money had been stolen from his house and that he suspected the applicant of the theft. The two officers rushed to arrest the applicant in the street, handcuffed him in front of other people and then took him to the police station by car. There, the applicant was kept handcuffed and the police agents hit him continuously, forcing him to confess that he had stolen the money.

The applicant signed a confession.

8. Afterwards he was taken, still handcuffed, to his parents' house, where the police agents performed a search. They found 1,000,000 Romanian lei (RON), which they seized and handed over directly to I.N.

9. According to the applicant, during the search of the house the two police agents continued to hit him in front of his parents and tried to get him to reveal where the rest of the money was hidden. As he refused to do so, he was taken back to the police station, where he was hit again until I.N. took pity on him and asked the two agents to release him. He then took the applicant back to his house, where he declared in front of those present: "I took Ilie out of the police station and brought him home. He had been so severely beaten by the police that I felt pity for him."

10. On 2 May 2001 following an official complaint about the theft lodged by I.N., the applicant was again taken to the police station, where, it was alleged, the abuse continued.

B. Criminal proceedings against the police agents

11. On 8 October 2001 the applicant gave a statement before Luduş Police concerning the accusations of theft against him. He retracted his previous confessions and accused the two police officers, N.D. and C.B., of beating and threatening him on 30 April and 2 May to make him confess. He lodged a complaint against them for abuse of position and wrongful arrest without a legal basis.

12. On 13 December 2001 the prosecutor attached to the Luduş District Court sent the applicant's complaint to the Military Prosecutor's Office at the Târgu-Mureş Military County Court. The complaint was subsequently lodged with the Military Prosecutor's Office attached to the Bucharest Military County Court, to be examined under Article 266 § 2 of the Criminal Code. The said provision prohibits the use of promises, threats or violence to obtain statements from a person under criminal investigation.

13. Before the military prosecutor, two witnesses declared that they did not know anything about the case and had not witnessed the events. One witness declared that he had seen the applicant being hit by the police

officers and arrested. Another witness, a neighbour who saw the applicant being taken to the police station, declared that one of the police officers had hit the applicant and pushed him into the car like a “bag of potatoes”. The accused police officers and I.N. denied having hit or threatened the applicant.

14. On 12 June 2002 the military prosecutor dismissed the criminal complaint against the two police officers.

The prosecutor noted that the applicant did not put forward any medical evidence and considered it “hard to believe that the victim wouldn’t have gone to the forensic doctor, if he had injuries”. He also noted that the applicant had failed to make a complaint against the police officers. The prosecutor lastly noted that the witnesses’ statements were contradictory.

He concluded that it could not be established with certainty whether the police officers had done what they were accused of.

15. The applicant lodged a complaint against that decision with the superior prosecutor. He claimed that only four witnesses had been heard during the investigation, whereas two of the most important witnesses he had put forward – his parents, in front of whom he had been beaten – had not been questioned. He also complained that he or his lawyer had not been allowed to participate in the interviews and had thus had no opportunity to question the witnesses in order to clarify the contradictory statements. He also argued that the local authorities had exercised pressure on the witnesses so they would not reveal the truth about what had happened.

16. On 7 July 2003 the applicant was informed by a summary letter that his complaint had been dismissed. The applicant subsequently lodged a judicial complaint against the prosecutor’s decision with the Cluj Military Court.

17. Following the demilitarisation of the police by Law no. 218/2002 on the Organisation and Functioning of the Police (“the Police Functions Act 2002”) and Law no. 360/2002 on the Status of Police Officers (“the Police Officers Act 2002”), the case was sent to the Târgu-Mureş Court of Appeal which, on 10 September 2004, ruled that the complaint was ill-founded.

18. The Court of Appeal based its decision exclusively on the statements given during the criminal investigation, as it refused the applicant’s request for witnesses to be re-examined. It noted the contradiction in evidence, but considered that in the absence of any new written evidence and given the lack of medical evidence, it could not conclude with certainty that the accused had committed the acts in question; it therefore upheld the prosecutor’s decision.

19. The applicant lodged an appeal on points of law, arguing that the lower court should not have relied exclusively on the evidence adduced by the prosecutors, but should have heard witnesses directly and ordered supplementary investigative measures to clarify the contradictory statements.

20. On 24 November 2004 the High Court of Cassation and Justice dismissed the appeal and thus upheld the contested decision. It considered that as long as the criminal proceedings against the applicant were still pending (see paragraph 21 below), it was not possible to undertake parallel criminal investigations against the individuals who had conducted the investigation against the applicant. It further considered the contested decision to be lawful and well founded.

C. Criminal proceedings against the applicant

21. On 5 November 2002 the applicant was indicted for theft of money from I.N.'s house.

22. On 1 March 2005 Luduş District Court acquitted the applicant. In the course of these proceedings, the applicant maintained that the confession signed by him on 30 April 2001 had been made because of violence and pressure inflicted on him by the investigating officers and I.N. The district court found that the house search and the seizure of the money had been unlawful and all the evidence adduced under those circumstances had to be struck from the records. Based on statements from different witnesses, it further held that on 30 April 2001 the applicant had been subjected to acts of violence and that the confession signed by him had been made under duress from the police officers and I.N.

The judgment was upheld by a decision of the Mureş County Court of 3 October 2005 and by a final decision of the Târgu-Mureş Court of Appeal of 18 January 2006.

23. It also appears from the case file that the money seized from the applicant's parents' house was returned to them by virtue of a decision of the prosecutor of 11 June 2002.

II. RELEVANT DOMESTIC LAW

24. The relevant provisions of the Code of Criminal Procedure and of the provisions governing the police and military prosecutor are set out in *Dumitru Popescu v. Romania* ((no. 1), no. 49234/99, §§ 43-46, 26 April 2007), and *Barbu Anghelescu v. Romania* (no. 46430/99, § 40, 5 October 2004).

25. In paragraphs 43-45 of the judgment in *Dumitru Popescu* (no. 1), cited above, there is a description of the development of the law concerning complaints about decisions by the prosecutor (Article 278 of the Code of Criminal Procedure and Article 278¹ introduced by Law no. 281/24 June 2003, applicable from 1 January 2004).

26. In addition, on the date of the events in the current case, Article 278¹ § 8 (a) of the Code of Criminal Procedure provided that the court may decide to dismiss, by means of a judgment, the complaint lodged

by the interested party against the prosecutor's decision. Under Article 278¹ § 11, after the court upheld the prosecutor's decision, an investigation of the same events could only start or continue if new facts or circumstances are discovered which were previously unknown to the investigators.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

27. The applicant complained that he had been ill-treated by police and that the ensuing investigations had not been effective. He relied in substance on Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

1. Plea of non-exhaustion

28. The Government raised a plea of non-exhaustion of domestic remedies, arguing that after the decision of 1 March 2005 by means of which the courts acknowledged the ill-treatment inflicted on the applicant, it would have been possible for him to ask for the reopening of the criminal investigation in respect of the police officers under Article 278¹ § 11 of the Code of Criminal Procedure. In their view, the recognition by the domestic courts of the violence inflicted upon the applicant constituted a “new circumstance” for the purpose of that provision.

Furthermore, the applicant could have lodged a civil action against the police officers under Article 998 of the Civil Code.

29. The applicant did not comment on these points.

30. The Court considers that the arguments put forward by the Government are closely linked to the substance of the complaint. It therefore joins their examination to the merits.

2. Well-foundedness of the complaint

31. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds.

It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

32. The applicant argued that he had been beaten by two police agents on 30 April and 2 May 2001 and held in handcuffs in public, in front of his parents. He also complained that the domestic authorities had failed to conduct an effective investigation of the matter.

33. The Government averred that the applicant had failed to adduce medical evidence of the alleged abuse, and that the witness statements before the prosecutor had been contradictory. In these circumstances the authorities could only conclude that the police officers' responsibility had not been established beyond reasonable doubt and to apply the presumption of innocence in their favour. In their view the investigation of the incidents had been adequate and effective.

They also pointed out that the domestic courts had acknowledged that the two police officers had ill-treated the applicant to obtain a confession, and reiterated that after that ruling he should have asked for the reopening of the investigations or for civil damages.

2. *The Court's assessment*

(a) Relevant general principles

34. The Court reiterates its case-law on Article 3, in particular concerning the Court's assessment of the minimum level of severity that ill-treatment has to attain in order for it to fall within the scope of this Article (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports of Judgments and Decisions* 19986VIII; *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25; *Kudła v. Poland* [GC], no. 30210/96, § 91-92, ECHR 2000-XI; *Peers v. Greece*, no. 28524/95, § 67-74, ECHR 2001-III; and *Raninen v. Finland*, 16 December 1997, § 55, *Reports* 1997-VIII).

35. Furthermore, where an individual raises an arguable claim that he has been seriously ill-treated by police or other agents of the State unlawfully and in breach of Article 3, that provision requires that there should be an effective official investigation capable of leading to the identification and, if need be, the punishment of those responsible (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Assenov and Others*, cited above, § 102; and, *mutatis mutandis*, *Velikova v. Bulgaria*, no. 41488/98, § 70, ECHR 2000-VI).

36. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances

of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336, and *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001-VII (extracts)) even if certain domestic proceedings and investigations have already taken place (see *Cobzaru v. Romania*, no. 48254/99, § 65, 26 July 2007, as well as *Ireland*, cited above, § 161; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Boicenco*, cited above, § 104, on the standard of proof applied in such cases).

(b) Application of those principles to the case

37. At the outset the Court reiterates that the applicant alleged having been subjected to ill-treatment by police and that his allegations were examined by the military prosecutor and by courts.

38. It is therefore the Court's task to ascertain whether the investigations of the alleged police abuse were effective and whether the applicant had been subjected to police brutality.

39. The military prosecutor was in charge of the operations. The Court has already established that the applicable law in place at that time made the hierarchical and institutional independence of the military prosecutor appear doubtful (see *Barbu Anghelescu v. Romania*, no. 46430/99, § 67, 5 October 2004, and *Georgescu v. Romania*, no. 25230/03, § 75, 13 May 2008). On the facts of the case, such doubts may easily be entertained by the ease with which the investigators discarded the witness statements attesting to the ill-treatment (for further details, see paragraphs 13 and 14 above and paragraph 45 below).

40. Even though, in the instant case, the judicial complaint against the military prosecutor's decision was examined by civilian courts and not by military courts, following the demilitarisation of the police, those courts relied almost exclusively on the evidence submitted during the criminal investigation by the military prosecutor. They never heard witnesses, not even after the applicant requested them to do so. Furthermore, the reasoning in the final decision suggests that the allegations of ill-treatment could not be reviewed by that court at all, as the criminal proceedings against the applicant were still pending. The Court fails to see how the merits of the criminal proceedings against the applicant could be relevant to the separate investigations of the alleged police abuse.

41. The Court will further examine whether the ruling of 1 March 2005 whereby in the criminal proceedings lodged against the applicant the domestic courts acknowledged that he had been ill-treated (see paragraph 22 above) may compensate for the lack of effectiveness of the investigation commenced by the military prosecutor.

42. The Court reiterates that in order to be effective, the investigations into allegations of ill-treatment should be capable of leading to the identification and, if need be, to the punishment of those responsible (see paragraph 35 above). Under these principles, the ruling of 1 March 2005 does not constitute in itself the outcome of an effective investigation: it could not have led to the punishment of the police officers, as they were not party to the proceedings; the finding of police abuse thus remains incidental and not attributable to the police officers.

43. Furthermore, the Government stated that it was possible for the applicant to seek a reopening of the investigation once the domestic courts had established that the applicant had actually been ill-treated by police. However, the Court notes that the text of the Article relied on by the Government refers to “new facts or circumstances”, and a finding of a different court, subsequent to those investigations, does not clearly fall into either of those categories. The Court cannot speculate on what interpretation the domestic courts might have given to the facts of this case. It nevertheless considers that given the leeway of interpretation that these notions have, the Government should have explained their point in more depth and submitted examples of domestic practice to support their position.

Reiterating that the applicant can only be required to avail himself of remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Assenov and Others*, cited above, § 85), the Court considers that the above arguments pointing to a lack of practical effectiveness of this remedy in the applicant’s situation go beyond the existence of mere doubt as to the chances of success of that remedy; the applicant is thus exempted from the obligation to make use of it (see, *mutatis mutandis*, *Kondratyev v. Ukraine*, no. 5203/09, § 100, 15 December 2011).

44. In the light of the above, the Court can only conclude that the investigations of the applicant’s allegations of police brutality were not effective for the purpose of Article 3 of the Convention.

45. Concerning the substantive limb of Article 3 of the Convention, the Court reiterates that the domestic courts established, be it only in passing, that the applicant had been ill-treated by police (see paragraph 22 above). The Government also acknowledged in their pleadings before the Court that the applicant was ill-treated (see paragraph 33 above). The evidence adduced before it also supports this version of events. In particular, the Court notes that some witnesses attested that police abuse occurred, but that the investigators failed to place those statements in the context, or to clarify the discrepancies in the evidence gathered (see paragraphs 13 and 14 above). The Court sees no reason why the evidence against the police abuse should be preferred to the detriment of that supporting the applicant’s position; the military prosecutor and courts failed to provide such reasons. Moreover, nothing in the file indicates that the applicant’s conduct would

have been such as to necessitate physical force or the use of handcuffs in public.

46. The Government argues that the applicant should have provided a medical certificate in support of his allegations. While that would certainly have made his case stronger, the Court can but note that the absence of a medical certificate did not preclude the courts dealing with the criminal accusations against the applicant from finding unequivocally that the police had ill-treated him.

47. The Court is also not convinced of the chances of success of the civil action indicated by the Government I their observations on the merits of this complaint. In fact there are currently two conflicting interpretations of the evidence as to whether police abuse took place. For the same reasons as those given above with respect to the request for reopening of the investigations, this remedy appears too equivocal to be considered effective by the Court's standards (see paragraph 43 above).

48. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was a victim of treatment contrary to Article 3 of the Convention.

49. In the light of the conclusions reached at paragraphs 44 and 48 above, the Court dismisses the Government's plea of non-exhaustion of effective domestic remedies and considers that there has been a violation of Article 3 of the Convention on both counts.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

50. The applicant further complained that the criminal proceedings against him had lasted too long and had been abusive. He alleged that on 30 March 2001 he had been unlawfully arrested and the police had undertaken an illegal search of his parents' house and had seized the money found.

51. 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 part of the application 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

52. 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

53. The applicant claimed RON 30,000 in respect of “pecuniary damage” incurred as a result of ill-treatment and abusive criminal proceedings against him, and RON 50,000 for damage suffered as a consequence of the unlawful arrest and search, which he describes as “non-pecuniary damage”.

54. The Government argues that the applicant failed to substantiate the claim for pecuniary damage and that there is no causal link between the violations found and the non-pecuniary damage alleged by the applicant.

55. The Court is not bound by the wording used by the applicant for his various claims. It discerns, from the manner in which he explained the loss incurred, that both claims refer to non-pecuniary damage. On the basis of its case-law in the matter, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage incurred as a result of the violation of his Article 3 rights.

B. Costs and expenses

56. The applicant also claimed RON 8,200 for costs and expenses incurred before the domestic courts and for those incurred before the Court, and RON 800 to compensate for inflation between 2001 and 2010. He sent various invoices attesting to payment of court fees, lawyer’s fee, translations and postage for letters addressed to the Court.

57. The Government averred that the invoices submitted by the applicant were not sufficient to prove the whole extent of the costs allegedly incurred by the applicant.

58. 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 and the above criteria, the Court considers it reasonable to award the sum of EUR 300 covering costs under all heads.

C. Default interest

59. 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 exhaustion of domestic remedies concerning the applicant's complaint of ill-treatment by the police and dismisses it;
2. *Declares* the complaint concerning Article 3 admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of the procedural and the substantive branches of Article 3 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 300 (three hundred 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President