



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

THIRD SECTION

CASE OF MIREA v. ROMANIA

(Application no. 19314/07)

JUDGMENT

STRASBOURG

6 October 2015

FINAL

06/01/2016

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

In the case of Mirea v. Romania,

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

Luis López Guerra, *President*,

Kristina Pardalos,

Johannes Silvis,

Valeriu Grițco,

Iulia Antoanella Motoc,

Branko Lubarda,

Mārtiņš Mits, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 15 September 2015,

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

PROCEDURE

1. The case originated in an application (no. 19314/07) 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 Călin Eusebiu Mirea (“the applicant”), on 19 April 2007.

2. The applicant was represented by Mr R.C. Butnaru, a lawyer practising in Brasov. The Romanian Government (“the Government”) were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. The applicant alleged that the accusations against him had not been heard fairly or expeditiously by the courts, and that he could not adduce relevant evidence which was withheld by the Intelligence Service.

4. On 8 October 2012 the above complaint was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. Background of the case

6. At the time of the events in question the applicant was occasionally working for M.V. and also providing information on the latter's business activities to S.S., an operative officer of the Romanian Intelligence Service ("the SRI").

7. In the evening of 25 September 2002 E. paid a visit to M.V. at the latter's business headquarters in Braşov and asked him to return 50,000 United States dollars (USD) which E. had allegedly lent him to help him start his activity. M.V. had previously refused to pay the money back. That evening, an argument broke out among them. M.V. and four other individuals kidnapped E. and beat him severely to induce him to give up the debt demand. Later that night M.V. called the applicant and asked him to come by car to the headquarters to transport someone to Bacău.

8. The applicant arrived later in the evening, and found E. severely beaten and begging M.V. to spare him. The attackers tied the victim up and put him in the boot of his own car. They drove away, murdered E. and staged a road accident as cover-up. The applicant arrived at the scene by car and drove the attackers back to their homes.

9. On 5 October 2002 the applicant contacted S.S., who was away on holiday, to tell him what had happened. They met a few days later, upon S.S.'s return, and on 23 October 2002 S.S. transmitted the information to the police via his superiors.

10. There was no criminal investigation of the events until a year later, when one of the participants confessed to the police.

B. First set of criminal proceedings against the applicant

11. On 27 October 2003 the applicant was informed that accusations had been brought against him, and made a statement to the prosecutor's office. A lawyer of his choice was present at that meeting.

12. On 18 January 2004 the applicant and the others involved in the events of 25 September 2002 were committed for trial on charges of illegal deprivation of liberty and extremely aggravated murder.

13. Throughout the proceedings the applicant argued that he had infiltrated M.V.'s group as an informant on the behalf of the SRI. He also stated that M.V. had forced him to participate in the events by threatening him and his family.

14. On 10 November 2004 he was convicted by the Braşov County Court of aiding and abetting illegal deprivation of liberty and extremely aggravated murder. He was sentenced to seven years' imprisonment and removal of certain rights.

15. The court based the conviction on a whole body of evidence, consisting of witness testimony, the statements made by the accused persons

during the proceedings, expert examinations and police reports. Based on the evidence in the file, the County Court established that the fact for the applicant to come to the M.V.'s business headquarters at M.V.'s request and to drive alongside the car where the victim was transported and to drive the culprits back with his car constituted the crimes he was accused of; the court considered that he had helped the other culprits to commit their crimes.

16. As for the applicant's connection with the SRI, the County Court acknowledged that he was transmitting information on M.V.'s group to officer S.S. It also took note that the SRI denied that the information about the murder provided by the applicant had been the result of collaboration with the Service. The County Court heard testimony from F.B., who confirmed that both he and the applicant had infiltrated M.V.'s group on behalf of the SRI. F.B. had been informed by S.S. that after September 2002 it had become too dangerous for the applicant to stay in direct contact with M.V., because of certain information in the applicant's possession.

17. The County Court considered the Prevention and Combat of Organised Crime Act (see paragraph 37 below) and decided that the applicant could not benefit from any status as an SRI informant, for the following reasons:

"Under Article 21 of the Prevention and Combat of Organised Crime Act, in exceptional situations, when there are indications that a crime has been committed or is being planned by members of an organised criminal group, and neither the crime nor its perpetrators can be identified by other methods, informants may be used in order to gather data concerning the commission of crimes and the identification of the perpetrators. No such indication ... existed in the present case and [the applicant] was not an informant used for gathering data concerning the crimes of illegal deprivation of liberty and extremely aggravated murder."

18. The court also examined and discarded as unfounded the applicant's allegations of coercion and considered that the applicant could have refused to help or informed the authorities about what was happening. It maintained as follows:

"[The applicant] had the option to leave when, after arriving at the [scene], he realised what was going on, but at no point during the events had he expressed the intention to leave the group. Even assuming that he had only remained in order to collect data for the SRI, he had had an obligation to inform immediately the police or the SRI about what was happening. From the statements given by the participants, including the applicant himself, it appears that on several occasion [during that night, the applicant] remained alone and could have used his mobile phone to call the police but he did not do it, claiming that the mobile phone keyboard was blocked. However, the court cannot accept this explanation, as it is notorious that calling the police phone number is free of charge."

19. The judgment was upheld by the Braşov Court of Appeal on 26 January 2006.

20. S.S. gave testimony in the appeal proceedings, and confirmed that he had been informed about the murder by the applicant. He reiterated in detail

the events described by the applicant. As for the nature of the collaboration between him and the applicant, S.S. explained as follows:

“My collaboration with [the applicant] was based on friendship and I confirm that he is an exceptional man. Our friendship goes back some twenty years. I knew that [the applicant] had relations with a certain group, but the members of the group and its activity was of no interest for the SRI, as it did not concern threats to the national security.

...

I expressly declare that I cannot give any information about specifically infiltrating [the applicant] in [M.V.]’s group, because at that point, the group was not of interest for the national security.”

21. S.S. refused to give details about where he had met with the applicant, asserting that the information requested by the court was classified.

22. The Court of Appeal concluded that the applicant had taken on his own initiative the role of an SRI informant:

“[The applicant] claimed that he had been infiltrated in M.V.’s criminal group by the SRI, in order to gather data about its activities.

However, the SRI informed the court, by address no. 49,538 of 15 April 2004 ... that the information presented by [the applicant] to S.S. was not the outcome of any collaboration between that Service and [the applicant].

Moreover, the witness S.S. (an SRI officer), declared that M.V.’s criminal group *did not constitute threats to national security* ..., that being the reason why [the applicant] was not requested to gather intelligence about M.V. group.

It follows that [the applicant] took on his own initiative the role of “informant”, without being officially requested to do so, and without being granted permission to participate in crimes for the purpose of gathering intelligence.”

23. The decision by the Braşov Court of Appeal was upheld by the High Court of Cassation and Justice on 24 October 2006. The High Court increased the sentence to ten years in prison. This decision was final.

C. Procedure as regards revision of final decision

24. The applicant asked for a revision of the final decision. He reiterated that it was impossible to prove before the ordinary courts that he was an SRI informant, as on the one hand the information was classified at the time, and, on the other S.S. risked losing his job if he divulged such information. He requested that the information be declassified. Furthermore, he pointed out that, as the police had failed to act upon the information he had transmitted through the SRI, he could not even benefit from a more lenient sentence, as had been the case with the other participant who had confessed to the crimes.

25. On 25 July 2007 the request was granted in principle by Braşov County Court. It considered that the information could constitute relevant evidence which had not been available to the ordinary courts.

26. The County Court heard a fresh statement from S.S., who reiterated his previous statements. He further explained that he could not reveal whether the applicant had infiltrated M.V.'s group as an informant, nor could he discuss the nature or content of the information which the applicant had given him, as the law considered it classified information. Nor could he clarify whether, as a general rule, an informant who committed an offence would benefit from protection.

27. On 12 September 2007 the SRI informed the County Court that it declassified partially the report drafted by S.S. based on the information given by the applicant concerning the crimes (the report, which contained a description of the facts as presented by the applicant, was adduced to the criminal file). It further explained that the document drafted by the applicant himself for S.S. had been destroyed after verification of the information contained and communication of that information to the police. It lastly reiterated that the information concerning collaboration with the SRI was classified under Law no.182/2002, "the Protection of Classified Information Act", and, if revealed, could "severely affect national security".

28. The County Court made an extensive examination of the evidence in the file and the applicable laws. It acknowledged that the applicant had failed to provide it with conclusive evidence of his status as an SRI informant, but also considered that that situation was not imputable either to him or to the courts. It noted that declassification of documents was left to the discretion of the SRI, which, claiming "national security", refused to reveal relevant information in the case at hand. Moreover, declassification followed a lengthy and cumbersome procedure, which undermined the rights of the defence as guaranteed by Article 6 of the Convention.

29. For these reasons, the court considered that given the difficulty of obtaining unequivocal evidence as to the applicant's status, the incomplete information provided by the SRI and by S.S. should be given increased significance in favour of the applicant.

30. It thus concluded that the applicant had participated in the events solely as an SRI informant, and that the representation of his own role and his feelings of fear, horror, despair and repugnance at the scene of the abuse against E. removed his criminal responsibility.

31. Consequently, on 20 November 2008, the County Court quashed the previous decisions in part and acquitted the applicant on both counts.

32. On 22 October 2009, acting upon an appeal lodged by the prosecutor's office, the Braşov Court of Appeal quashed that judgment and dismissed the request for revision. It considered that that remedy could not be used solely to adduce new evidence, and that the ordinary courts had

already examined the theory according to which the applicant had been a SRI informant who had infiltrated M.V.'s group:

“Article 394 (a) of the Code of Criminal Procedure concerning revision does not refer to newly discovered evidence, because if it were so, revision would become another [ordinary] level of jurisdiction ...

The new facts of circumstances [required by Article 394 above as reason for allowing the revision] will be confirmed by new evidence, but it is not the evidence that constitutes the reason for revision ...”

33. The court also considered that the fact that the status of an SRI informant was not regulated by law made it impossible for the courts to establish the extent of such activities, thus leaving room for abuse of that status. However, reliance of such status could not exonerate from criminal responsibility:

“As there is no legal frame for regulating the status of an informant for an intelligence service, we cannot establish the scope of such a mandate, and thus the opportunity for abusing this status exists.

The fact that [the applicant]'s activity as an informant would have benefitted the SRI does not exonerate [the applicant] from criminal responsibility for criminal acts.”

34. On 28 October 2010 the High Court of Cassation and Justice dismissed the appeal on points of law lodged by the applicant and upheld the decisions rendered by the Court of Appeal, on similar grounds to those given by the lower court.

II. RELEVANT DOMESTIC LAW

35. The SRI Act (Law no. 14/1992 on the organisation and functioning of the SRI) and the National Security Act (Law no. 51/1991) allow SRI active agents to receive information and written reports from their informants. The agents do not have the power to start criminal investigations (Article 13 of the SRI Act).

36. The procedures for the use of undercover agents under the National Security Act are described in *Dumitru Popescu v. Romania* (no. 2), no. 71525/01, §§ 41-42, 26 April 2007).

37. According to the Prevention and Combat of Organised Crime Act (Law No. 39/2003) a person who participates in the commission of an organised crime is absolved of criminal responsibility if he or she informs the authorities about the crime; he receives a reduced sentence if he cooperates with the investigators and courts (Article 9). Likewise, police informants may be remunerated for their work or may benefit from witness protection programmes (Articles 22-23). The same Act stipulates that police informants should only be used in exceptional circumstances, if there are strong indications that a crime has been committed or is being planned by

members of an organised group and neither the crime nor its perpetrators can be identified by other methods (Article 21).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE FAIRNESS OF THE PROCEEDINGS

38. The applicant complained that the criminal proceedings against him had not been fair, and in particular that it was impossible for him to present his case and make his defence as the SRI refused to release evidence to the court. Article 6 §§ 1 and 3 reads as follows:

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

3. Everyone charged with a criminal offence has the following minimum rights ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...”

A. Admissibility

39. 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' arguments

40. The applicant accepted that matters of national security could encroach on the rights of the defence, but considered that such interference had to be compensated for by other procedural means, which had not been the case in the criminal proceedings under review. He further alleged that he had not relied on his capacity as SRI informant as a mere defence argument, but rather to provide an explanation of why he had been present at the crime scene: namely that he had been there solely to collect information for the SRI.

41. The Government pointed out that the particularity of the case resided in the applicant's capacity of occasional informant of an intelligence officer. However, they argued that in this context the fact that the SRI had not put forward all the requested information was not relevant to the applicant's situation.

42. In particular, they averred that the domestic courts had examined the applicant's defence arguments in detail and had concluded in particular that being an SRI informant did not remove criminal responsibility.

43. The Government also pointed out that the domestic courts had heard evidence from S.S., the SRI officer, and from other witnesses for the defence, and had carefully weighed the evidence in the file; they had given reasons why they had dismissed the applicant's arguments and why they had considered the additional evidence sought by the applicant irrelevant.

2. *The Court's assessment*

(a) **General principles**

44. The Court reiterates that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1. It will therefore examine them together.

45. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations submitted and the evidence adduced by the other party (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II).

46. However, entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security, the need to protect witnesses at risk of reprisals, or the need to keep police methods of investigation of crime secret, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest (see *Rowe and Davis*, cited above, §§ 61-62 and *Botmeh and Alami v. the United Kingdom*, no. 15187/03, § 37, 7 June 2007).

47. Only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 43-45, ECHR 2000-II).

(b) Application of those principles to the case at hand

48. The Court notes that the applicant was accused of and eventually convicted of aiding and abetting illegal deprivation of liberty and extremely aggravated murder. His main defence arguments before the domestic courts were that he had only been present at the murder scene because he was an SRI informant, and that he had felt coerced by M.V. to participate. His status as SRI informant and the benefits of such a position in the criminal proceedings were in dispute before the domestic courts, and the SRI did little to clarify all aspects of the matter (see paragraphs 16, 20, 21 and 27 above). However, the SRI's decision not to disclose information does not in itself contradict the requirements of Article 6.

49. The Court notes that from the information gathered by the courts through adversarial procedure (including S.S.'s testimonies and documents presented by the SRI), it was established that the applicant was spontaneously offering information to the Service concerning M.V., and that he was not infiltrated into M.V.'s group at least for the purpose of the crime committed on 25 September 2002.

In particular, S.S. and the Service were consistent in denying that they had infiltrated the applicant into M.V.'s group (see paragraphs 16 and 27 above). Moreover, the authorities had no prior information that the crime was being planned, and thus there was no need for such an operation. There was no suggestion during the domestic court proceedings that an undercover operation had been mounted under the National Security Act (see paragraphs 17 and 37 *in fine*, above). The domestic court concluded, based on the evidence in the file (in particular that adduced by the SRI) that the evidence gathered concerning the crime was not the result of the applicant's alleged collaboration with the Service (see paragraph 16 above). It is also to be noted that the applicant did not claim that he had been encouraged or had felt encouraged by the SRI to stay in M.V.'s group, and in particular during the crimes perpetrated on 25 September 2002.

50. Moreover, save for the County Court which granted the revision request (see paragraph 28 above), the domestic courts, including the court of last resort, were consistent in finding that the information being withheld by the SRI had no bearing on the outcome of the proceedings (see paragraphs 17, 22 and 33 above, as well as *Botmeh and Alami*, cited above, §§ 43 *in fine*, and 44). The Court has no reason to depart from these findings.

51. However, as information was being withheld from the courts and the applicant, the Court will look into how the courts sought to ensure the fairness of the proceedings in the absence of that information. It notes that the domestic courts examined in detail the defence arguments and gave reasoned decisions. The SRI operative officer was heard by the courts and could be questioned by the parties, including the applicant, in an adversarial manner and he confirmed the applicant's position as regards the nature of

his relationship with the Service (see paragraphs 20 and 26 above). Other evidence was also heard by the courts.

52. Furthermore, the courts explained why the applicant could not claim that the benefits offered by law to informants could apply to him as well (see paragraph 18 above). In the light of the particular circumstances of the case, the Court is satisfied with the explanation offered by the domestic court as to the interpretation of the relevant law provisions.

53. Lastly, the Court notes that the report sent by the applicant to the SRI operative could not guarantee him more lenient treatment, as according to the applicable law as interpreted by the domestic courts the SRI was not an investigating authority (see paragraphs 18, 35 and 37 above). There is no indication in the file that the applicant was in any way prevented from sending the same report to the police or the prosecutor's office even anonymously, should the applicant have feared retaliation from M.V.

54. The Court concludes that the domestic courts, noting that information had been withheld by the SRI, examined its potential relevance for the case, allowed the applicant to present his arguments and to challenge in an adversarial manner the evidence presented by the SRI (both documents and witness testimony from the agent) and examined the relevant law, including on undercover agents and collaborators, explaining in an exhaustive manner why those provisions were not applicable to the applicant's situation.

55. For all these reasons, the Court considers that the domestic courts balanced correctly the public interest in non-disclosure against the interests of the applicant's defence and offered sufficient guarantees to counterbalance any limitation of his defence rights (see paragraphs 17, 22 and 33 above).

56. There has accordingly been no violation of Article 6 §§ 1 and 3 of the Convention on account of the fairness of the proceedings.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

57. The applicant complained that in starting the criminal investigations over one year after the initial report on the facts, the authorities had unreasonably protracted the criminal proceedings against him. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

58. 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' arguments

59. The applicant maintained that the proceedings should be calculated for him from 23 October 2002, when he had informed the authorities about the crime.

60. The Government averred that the proceedings lasted from 27 October 2003, when the applicant gave his first statement to the investigators, to 24 October 2006, when the final decision was delivered, and again from 25 July 2007 to 22 October 2009, whilst the domestic courts were re-examining the case at the applicant's request. The total length of five years, five months and two weeks was not unreasonable, in particular given the complexity of the case. There were no periods of inactivity caused by the authorities, and the applicant himself contributed to the general length by using all remedies at his disposal, including an extraordinary appeal, which considerably protracted the proceedings.

2. The Court's assessment

61. The Court reiterates that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

62. The parties are in disagreement as to the start of the period to be taken into consideration. The Court considers that, given the SRI's lack of jurisdiction to conduct criminal investigations, the applicant could not reasonably expect the date the report was sent to the SRI, 23 October 2002, to mark for him the beginning of the criminal investigations (see paragraphs 9 and 53 above). The Court is satisfied that the applicant was first informed of the accusations against him on 27 October 2003 (see paragraph 11 above), and this date will be considered the starting point of the criminal proceedings against the applicant.

63. The first set of proceedings ended on 24 October 2006, when the High Court of Cassation and Justice rendered the final decision (see paragraph 23 above). The second set of proceedings started on 25 July 2007, when the revision request lodged by the applicant was accepted in principle by Braşov County Court (see paragraph 25 above), and ended on 28 October 2010 before the High Court of Cassation and Justice (see paragraph 34 above; for the exclusion from the overall duration of the

periods between the adoption of a final and binding judgment and its annulment in the course of extraordinary appeal proceedings see, *mutatis mutandis*, *Cerăceanu v. Romania* (no. 1), no. 31250/02, § 47, 4 March 2008).

64. The proceedings thus lasted in total six years, at three levels of jurisdiction. Given the complexity of the case, this duration is not unreasonable.

There has accordingly been no violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

65. Lastly, the applicant complained that his conviction and sentence had been unjust and humiliating and constituted a severe miscarriage of justice, in violation of Articles 3 of the Convention and 3 of Protocol No. 7 to the Convention.

66. 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.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 6 §§ 1 and 3 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 of the Convention on account of the fairness of the proceedings;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings.

Done in English, and notified in writing on 6 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Luis López Guerra
President