



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

THIRD SECTION

CASE OF BRAGADIREANU v. ROMANIA

(Application no. 22088/04)

JUDGMENT

STRASBOURG

6 December 2007

FINAL

06/03/2008

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 Bragadireanu v. Romania,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE,
Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 15 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 22088/04) 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 Alexandru Bragadireanu (“the applicant”), on 25 May 2004.

2. The applicant, who had been granted legal aid, was represented by Mr A. Grigoriu, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Mrs B. Ramaşcanu, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his continued detention, in the light of his severe health problems, and the standard of medical care received in prison amounted to a violation of Article 3 of the Convention. He also complained under Article 6 of the Convention that the criminal proceedings against him had been unfair and had lasted too long.

4. On 4 July 2006 the Court decided to communicate the above complaints to the Government and to grant formal priority to the application, under Rule 41 of the Rules of the Court. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Bucharest.

A. Criminal proceedings against the applicant

6. On 9 June 1993, the applicant was placed in police custody for five days under the accusation of having murdered his partner. On 14 June 1993, the prosecutor attached to the Giurgiu County Court ordered the applicant's remand in custody.

1. Examination of the merits by the domestic courts

7. On 22 October 1993, the prosecutor attached to the Giurgiu County Court committed the applicant for trial for aggravated murder, under Article 176 (a) of the Criminal Code.

8. On 4 April, 10 October, 28 November 1994, 9 January, 13 February and 15 May 1995, in the presence of the applicant and D.U., his chosen defence counsel, the County Court heard evidence from witnesses. On 10 October 1994 the applicant also gave evidence. On 15 May 1995 the County Court heard evidence from the prosecutor, the civil party and D.U. It then allowed the applicant to address the court last.

9. In a judgment of 29 May 1995 the County Court found the applicant guilty of aggravated murder and sentenced him to twenty years' imprisonment. It based its judgment on the witness testimonies, the applicant's declarations and behaviour and the medical reports concerning the death of the victim. On 16 February 1996 the sentence was confirmed, upon the applicant's appeal, by the Bucharest Court of Appeal which heard evidence from the applicant and I.C., his defence counsel.

10. The applicant appealed in cassation before the Supreme Court of Justice alleging that he had not committed the murder and that, therefore, the evidence had been wrongly interpreted by the courts.

2. Development of the applicant's medical condition during the proceedings

11. The applicant was sent to the Prison Hospital from 4 August to 5 October 1995, from 4 April to 25 April 1996 and again from 8 to 22 August 1996. He underwent several surgical interventions there. In 1996 he was diagnosed with a perianal tumour but refused further surgery.

Due to a severe problem with his eyes, the doctors who examined the applicant recommended his release.

12. During the proceedings before the Supreme Court, the applicant's health was in constant decline. Therefore, he was absent from most of the hearings held in the case, but allegedly requested repeatedly that the proceedings be suspended because of his illness.

13. It appears from the non-definitive decisions that the applicant was represented either by a court-appointed counsel or by a lawyer of his choice for most of the hearings.

14. On 17 February 1997, after having examined the applicant and having noted, in particular, that he had lost 20 kg in six months, the prison doctors recommended that the applicant undergo an expert examination by the Forensic Institute. On 10 March 1997, the same doctors recommended the applicant's release.

15. He was hospitalised again between 8 January and 30 May 1997. In March 2007, he was transferred under escort to the Bagdasar public Hospital in Bucharest where he underwent a colostomy. He claims that he was handcuffed to the bed.

16. On 23 April 1997, the doctors recommended his release from custody due to his severe medical condition.

17. On 15 May 1997, the Forensic Institute concluded that the applicant had to follow a three-month course of treatment, which would prevent him from participating in the proceedings.

3. Suspension of the proceedings

18. On 27 May 1997 the Supreme Court suspended the trial due to the applicant's health condition, as revealed by the Forensic Institute's report adduced in the case. It also ordered the applicant's release, which took place on 30 May 1997.

19. The Supreme Court requested periodically the experts' opinion on the applicant's condition in order to assess if the reasons for the suspension of the proceedings were still valid.

20. After his release, the applicant continued to be treated for his illness. On 15 January 1998 the Forensic Institute certified that another six-month course of treatment was necessary and that during that time the applicant could not participate in the proceedings.

21. On 10 March 1999 the court held a hearing and noted that the medical report had not yet been submitted. It set its next hearing for 2 June 1999.

22. On 12 March 1999 the Forensic Institute informed the Supreme Court that the applicant was fit to participate in the trial.

23. On 2 June the court took note of the medical report but noted some informalities and sent it back to the Forensic Institute. It set its next hearing for 13 October.

4. Referral of the case back to the first-instance court

24. On 13 October 1999, in the presence of the applicant's chosen counsel, the Supreme Court noted that neither the prosecutor nor the lower courts had ordered the applicant's psychiatric evaluation, required by law for any person prosecuted for aggravated murder.

25. Therefore, in a final decision of 25 October 1999 the Supreme Court of Justice quashed the previous decisions adopted in the case and sent the case back to the County Court, ordering the applicant's psychiatric evaluation.

5. Re-examination of the case

26. On 10 March 2000 the file was sent to the Giurgiu County Court, which held the first hearing on 10 April 2000, and then several more, the applicant being absent due to his health problems. He was, however, represented in the proceedings mainly by D.U., a lawyer of his choice.

27. Evidence in the file showed that on 31 May 2000 he had been released from hospital.

28. On 20 November 2000 the County Court referred the case back to the prosecutor to order the psychiatric evaluation.

29. The prosecutor's appeal against this judgment was allowed by the Bucharest Court of Appeal in a final decision of 1 March 2001 which instructed the County Court to order the applicant's evaluation itself, as decided by the Supreme Court on 25 October 1999.

30. On 23 April 2001 the case was restored to the County Court's list of cases.

31. Some twenty hearings took place before the County Court, the case being repeatedly postponed due to the absence of the expert reports or for erroneous summoning of the parties. It appears that the applicant did not attend any of these hearings but was represented at most of them by D.U., his defence counsel.

32. On 15 June 2001 the applicant was hospitalised for another operation.

33. On 14 September 2001 the Forensic Institute estimated that the applicant required a four-month course of medical treatment that could not be administered in prison. However, on 29 October 2001, upon the County Court's request, it concluded that the applicant was fit to participate in the trial.

34. On 5 November 2001 the applicant appeared before the medical commission for his psychiatric examination.

35. On 27 March 2002 the psychiatric expert report was adduced in the case. It confirmed that the applicant had been mentally competent for legal purposes at the time of the victim's murder. The County Court heard evidence from the applicant's lawyer and the prosecutor on 20 May 2002

and pronounced its judgment on 10 June 2002. Due to the applicant's repeated absence on account of his medical condition, the County Court could not hear evidence from him in person.

36. The court re-examined the evidence already in the file and based its decision on the corroboration of witness testimonies gathered by the investigators and the courts, the expert reports concerning the victim's death and the applicant's behaviour towards his partner, towards his former wives (witnesses in the case) and during the criminal investigations and court proceedings – including the assessment of the answers he gave during a polygraph test that he had agreed to take on 12 June 1993 and in the course of which he had not been assisted by a lawyer – and the psychiatric evaluation of the applicant. The County Court found him guilty of aggravated murder and sentenced him to twenty years' imprisonment.

37. The applicant, through his lawyer, lodged an appeal against this judgment challenging the interpretation of facts and law by the County Court. He claimed his innocence and alternatively asked the court to reduce his sentence. His appeal was rejected as out of time in a decision of 13 November 2002 of the Bucharest Court of Appeal.

38. However, on 28 February 2003 the Supreme Court of Justice, upon the applicant's request, quashed the decision and referred the case back to the Bucharest Court of Appeal for a re-examination of the appeal. It considered that the applicant had respected the time limits for lodging his appeal.

39. The applicant did not attend any of the four hearings held before the Court of Appeal. I.C., his chosen representative, attended one of these hearings. The court noted that both the applicant and his lawyer alleged that their health had prevented them from attending the hearings. However, the Court of Appeal found that the applicant was not hospitalised at that time and that his lawyer had failed to designate a substitute, although the court had requested him to do so, in compliance with the law.

40. On 29 May 2003 the Court of Appeal designated of its own motion a representative for the applicant. The same day it examined and rejected the appeal, the applicant not being present at the hearing. It found that the evidence confirmed the applicant's guilt and that in the circumstances of the case the penalty imposed by the District Court was justified. The court-appointed counsel pleaded for the applicant's innocence and alternatively asked the court to lower the sentence imposed.

41. The applicant appealed in cassation against this decision with the Supreme Court of Justice, challenging, as before, the interpretation of facts and law by the courts. The applicant did not attend any of the three hearings on the merits held in the case. At the first hearing, his personal assistant appeared (see paragraph 42 below), informed the Court of the applicant's poor health and asked for a postponement to allow the applicant to appoint a representative. The court postponed the case and appointed a lawyer for the

applicant. Before the next hearing, I.C., the applicant's defence council who had represented him in the appeal above, made a written request for another postponement on the ground that he did not have time to study the whole file. In the presence of the court-appointed counsel and of the prosecutor, the court allowed the request. However, I.C. failed to appear at the last hearing of 12 February 2004. The court-appointed counsel participated on behalf of the applicant. In a final decision rendered on the same day, after reassessing the evidence adduced in the case, the Supreme Court upheld the sentence.

B. The applicant's detention

42. On 28 August 2003 the applicant was examined by a commission of doctors from the Commission for the protection of handicapped persons. They established that his condition amounted to a severe functional deficiency which entitled him to a personal assistant.

1. Expert examination of the applicant with a view to postponing or suspending the execution of his sentence

43. On 19 February 2004 the applicant lodged a request for the postponement of the execution of the sentence for medical reasons. Later on he reformulated it, asking for the suspension of the sentence.

44. On 1 March 2004 the applicant was referred to the Forensic Institute for an opinion on whether he was fit to serve the sentence.

45. The Forensic Institute doctors re-examined the applicant and concluded that the stage of his illness permitted the continuation of his imprisonment and that his medical treatment could be continued in prison hospitals:

“The pathology ... is severe, with unpredictable evolution, possibly towards a fatal prognosis which can happen regardless of whether [the applicant] is in prison or released.”

The doctors submitted their report on 30 September 2004.

46. Based on this evidence, the applicant's request for suspension was rejected on 18 October 2004 by the Giurgiu County Court. The decision was upheld by the Bucharest Court of Appeal on 22 November 2004. The applicant did not appeal on points of law and thus this latter decision became final.

47. On 24 October 2006 the Forensic Institute started a new expert examination of the applicant in order to assess the possibility of interrupting the execution of his sentence. However, on 30 August 2006 the applicant refused to continue with this examination, as he considered that it would not benefit him.

2. Medical care and conditions in prison

48. On 10 March 2004 the applicant was imprisoned in order to serve the remainder of the sentence. He claimed that he had been placed in a cell with thirty beds arranged at three levels and with badly damaged mattresses, with two detainees in each bed, two toilets and no shower or warm water in the room. Due to his medical condition (as he had an artificial anus, he was unable to control his bowel movements) he asked to be transferred to a single-bed cell, but his request was rejected on the ground that no such cells existed in that penitentiary, except those for solitary confinement.

49. According to the applicant, he repeatedly requested to be examined by a doctor, but to no avail. He claimed that his medicine had not been provided by the authorities for lack of funds, and his family had had to send it to him.

50. The Government sent the applicant's medical file along with a letter from the Administration of Penitentiaries dated 26 September 2006 which detailed the medical care that the applicant received in prison.

51. It appears that from 10 to 22 March 2004 he was hospitalised in the Jilava Penitentiary Hospital where he was examined by the penitentiary doctors. He underwent laboratory tests and an oncological evaluation in public hospitals.

52. Subsequently he was examined periodically by the penitentiary doctors and often sent for specialist check-ups.

53. From 8 May to 22 July 2004 the applicant was hospitalised again in the Jilava Penitentiary Hospital. Laboratory analyses were performed and he was also sent to the public hospital for more detailed examinations.

54. He was hospitalised again in Jilava from 8 to 28 August 2004. On 18 August 2004 the doctors performed an abdominal ultrasound scan and recommended check-ups every three months.

55. On 6 August 2004 the applicant received from his family thirty tubes of Pentoxifilin.

56. His medical surveillance continued throughout 2004, 2005 and 2006. He underwent ophthalmologic check-ups, was seen by specialist doctors at least every other month, and received through the penitentiary pharmacies the prescribed medicines every month.

57. On 28 June 2005 the applicant informed the authorities that he refused to be examined in the Jilava Penitentiary Hospital, bearing in mind his criminal complaint of ill treatment against the penitentiary doctors (see paragraphs 61-62 below).

58. He was hospitalised again in Jilava from 23 to 31 August 2006.

59. It appears that the applicant received medicine from the penitentiary pharmacies as prescribed by the doctors that had examined him.

60. Between the periods of hospitalisation, the applicant was detained in the penitentiaries in Rahova and Giurgiu.

3. Complaints concerning the conditions in prison and medical care

61. On 4 June 2004 the applicant lodged a criminal complaint against the penitentiary doctors that had operated on him while in detention. He accused them of intentional harm and malpractice during the surgical intervention. On 1 April 2005 the Bucharest Military Prosecutor's Office dismissed the complaint as out of time. The applicant appealed against this decision. In his letter to the Prosecutor's Office, he invoked the fact that he was "transported to and kept in the Bagdasar-Arseni Hospital under escort". The criminal complaint was re-examined and dismissed again, on 28 July 2005, by the Bucharest Military Prosecutor. In a decision of 18 April 2006 the Bucharest Military County Court upheld the Prosecutor's decision, on the grounds that the accusation against the penitentiary doctors was unfounded and that, in any case, due to the time lapse between the operations and the lodging of the criminal complaint, responsibility for any of the alleged crimes was time-barred.

62. On 3 August 2005 the applicant lodged a complaint with the Bucharest District Court under the Government's Ordinance no. 56/2003. He considered that his right to information, to the protection of his health and to a healthy environment had been infringed in prison. Furthermore he claimed that the prison conditions had amounted to torture. Accordingly, he argued that despite his severe medical condition the prison authorities had refused to put him in a cell by himself. He also claimed lack of access to his medical and criminal files.

63. In a decision of 17 October 2005 the District Court dismissed his action. It considered that the quality of medical care did not fall under the ordinance invoked; the applicant should have lodged an action in civil responsibility against the doctors. In any case, the evidence showed that the applicant had been given adequate medical care, seen by various doctors and examined and afforded the aftercare that had been prescribed.

64. The court dismissed as unfounded the applicant's allegation of lack of access to his medical file. It noted that the said file had been adduced in the case, both the applicant and his representative having thus had access to it.

65. Lastly, the District Court recalled that the Ordinance did not impose an obligation on the prison authorities to ensure access for the applicant to his criminal file. It recalled that the applicant had the right to designate a representative to study it.

66. The applicant's appeal was also dismissed by the Bucharest County Court, in a final decision of 5 December 2005. The County Court noted that the Penitentiary had refused to move the applicant to an individual cell on the ground that he would be soon transferred to a new section, to a room that would be better suited to his medical requirements. It appears that the court estimated that the applicant's allegations concerning the negative influence on his health of the conditions of his detention were unfounded.

The court also recalled that it was for the prison authorities to provide his personal assistant.

67. In a letter of 16 December 2005 the Commission for the Protection of handicapped persons informed the applicant that as long as he was imprisoned he was not entitled to any special allowance for his own needs or for hiring a personal assistant, since it was for the penitentiary to provide care for him.

68. To date, the applicant is still in prison. It seems that he has not been transferred to an individual cell.

II. RELEVANT DOMESTIC LAW

69. The relevant provision of the Code of Criminal Procedure on the psychiatric evaluation of a person charged with a criminal offence reads as follows:

Article 117 Mandatory expert examination

“(1) The psychiatric evaluation is mandatory in cases of aggravated murder...”

70. The Code of Criminal Procedure provides that informalities in the trial such as the courts not hearing evidence from the accused in person, constitute an infringement of the rights to defence which shall lead to declaring the decision taken null and void. The relevant provisions of domestic law and practice are described in detail in the case of *Ilişescu and Chiforec v. Romania* (no. 77364/01, §§ 18-19, 1 December 2005).

71. The relevant part of law no. 51/1995 on the organization and exercise of lawyers' practice reads:

Article 38

“The lawyer shall study the case thoroughly..., shall attend every court hearing...”

72. The relevant part of the statutes of the lawyers' practice reads:

Article 221

“(2) When the lawyer is prevented from fulfilling his professional duties, he shall provide a substitute...”

III. RELEVANT PROVISIONS OF THE COUNCIL OF EUROPE CONCERNING CONDITIONS OF DETENTION

73. Extract from the 11th General Report of the European Committee for the Prevention of Torture (CPT) (CPT/Inf (2001) 16)

“29. In a number of countries visited by the CPT, particularly in central and eastern Europe, inmate accommodation often consists of large capacity dormitories which contain all or most of the facilities used by prisoners on a daily basis, such as sleeping and living areas as well as sanitary facilities. The CPT has objections to the very principle of such accommodation arrangements in closed prisons and those objections are reinforced when, as is frequently the case, the dormitories in question are found to hold prisoners under extremely cramped and insalubrious conditions. No doubt, various factors - including those of a cultural nature - can make it preferable in certain countries to provide multi-occupancy accommodation for prisoners rather than individual cells. However, there is little to be said in favour of - and a lot to be said against - arrangements under which tens of prisoners live and sleep together in the same dormitory.”

74. The CPT standards (“Substantive” sections of the CPT's Annual General Reports)

“50. The CPT would add that it is particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners...

[Prisoners unsuited for continued detention]

70. Typical examples of this kind of prisoner are those who are the subject of a short-term fatal prognosis, who are suffering from a serious disease which cannot be properly treated in prison conditions, who are severely handicapped or of advanced age. The continued detention of such persons in a prison environment can create an intolerable situation. In cases of this type, it lies with the prison doctor to draw up a report for the responsible authority, with a view to suitable alternative arrangements being made.”

75. The CPT visited Romania in 1995, 1999, 2001, 2002, 2003, 2004 and 2006. All but its most recent visit report have since been made public.

Overcrowding of prisons and lack of reasonable hygiene facilities were constantly stressed by the CPT.

76. Recommendation no. R (98) 7 concerning the ethical and organisational aspects of health care in prison reads:

“C. Persons unsuited to continued detention: serious physical handicap, advanced age, short term fatal prognosis

50. Prisoners with serious physical handicaps and those of advanced age should be accommodated in such a way as to allow as normal a life as possible and should not be segregated from the general prison population. Structural alterations should be effected to assist the wheelchair-bound and handicapped on lines similar to those in the outside environment.

51. The decision as to when patients subject to short term fatal prognosis should be transferred to outside hospital units should be taken on medical grounds. While awaiting such transfer, these patients should receive optimum nursing care during the terminal phase of their illness within the prison health care centre. In such cases provision should be made for periodic respite care in an outside hospice. The possibility of a pardon for medical reasons or early release should be examined.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

77. The applicant considered that the conditions of his detention and the lack of adequate medical treatment for his illness amounted to a violation of 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

78. The Government commented in detail on the applicant's pre-trial detention and the conditions of his release on 30 May 1997, including the alleged use of handcuffs to attach the applicant to his bed in the Bagdasar-Arseni Hospital. Insofar as the complaint is understood to refer to these aspects, the Court recalls that the present application was only lodged on 25 May 2004, that is, more than six months after the end of the pre-trial detention.

79. As for the alleged use of handcuffs, the applicant did not raise at least in substance such a complaint with the local authorities. The mere fact that he mentioned in his criminal complaint against the doctors that treated him in 1995-1996 that he had been “transported under escort” to the public hospital does not enable the Court to consider that the applicant allowed the Romanian authorities to deal with the matter. If it were argued that he had no effective channel of complaint at his disposal, the six-month rule, with which the applicant did not comply, would come into operation once more (see, *mutatis mutandis*, *Rosengren v. Romania* (partial dec.), no. 70786/01, 27 April 2004).

80. It follows that this part of the complaint must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

81. However, in so far as the complaint refers to the conditions of his imprisonment from March 2004 onward, the Court notes that these allegations are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that this part of the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

82. The Government contended that the applicant had not proved “beyond reasonable doubt” his alleged ill-treatment. They recalled that the applicant was examined periodically by specialists and received the adequate treatment as prescribed by his doctors. The fact that he had to occasionally receive medicines from his family did not amount to ill-treatment. They relied on cases such as *Cara-Damiani v. Italy* ((dec.), no. 35995/97, 28 March 2000) and *I.T. v. Romania* ((dec.), no. 40155/02, 24 November 2005).

83. The applicant replied that his medical condition, namely his inability to control his bowel movements, generated a very hostile environment in his cell, subjecting him to continuous mockery from his inmates, and culminating in his exclusion from any social activity. He recalled that although he was entitled to special conditions and even to a personal assistant (see paragraph 42 above), he was still sharing the cell and could not ensure a minimum standard of hygiene, because of the lack of warm running water or showers. In addition, the applicant contended that nobody had offered to help him get from his cell to the sanitary facilities in the penitentiary.

84. The Court recalls that although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX).

85. Coming back to the facts of this case, the Court considers that this complaint has two branches: medical care in prison and the conditions of detention. The Court will assess them individually.

1. Medical care in prison

86. The evidence available to the Court shows that the applicant was examined by the penitentiary doctors on regular basis and sent to the public hospitals for further examinations when considered necessary. The applicant's claims to the contrary seem unsubstantiated in the light of his

medical record adduced in the case by the Government and uncontested by the applicant.

87. It is true that the applicant's family provided medicines for him. However, the Court notes that this was only reported to have happened once, on 6 August 2004, and the medical record of the applicant contains doctors' prescriptions during his detention, which proves that the penitentiary authorities have generally responded adequately to his medical treatment requirements.

88. The Court will not speculate on the effects on the applicant's health should these medicines have not been provided by his family. However, it is to be noted that the applicant's general health did not seem to have deteriorated in prison due to lack of medical treatment.

89. Lastly, the Court recalls that on the question of whether a severely ill person should remain deprived of liberty, it is precluded from substituting the domestic courts' assessment of the situation with its own, especially when the domestic authorities have generally discharged their obligation to protect the applicant's physical integrity, notably by providing appropriate medical care (*ibid.*).

90. In the instant case, the courts refused to suspend the execution of the sentence based on the 2004 medical report's conclusion that the applicant was fit for detention. In 2006 the applicant put an end to the second medical examination that was meant to assess the possibility of his release from detention.

However, there is no indication in this file of the ineffectiveness of the application with the courts for release from prison on health grounds.

91. Therefore, taking into consideration the medical care in prison alone, the applicant did not prove "beyond reasonable doubt" that his suffering attained the minimum level of severity in order to fall within the scope of Article 3 (see *Kudła*, § 91 and *I.T.* (dec.), both cited above, and also paragraph 95 of this judgment, below).

2. Adequate facilities in prison

92. The Court considers that a separate issue arises insofar as the conditions ensured to the applicant in prison are concerned, regard having been had to his health requirements. The applicant's allegations of the lack of any organised help from the prison authorities are in no way contested by the Government. Moreover, it seems that the applicant did not benefit in prison from a personal assistant, required by his poor health, being forced to rely on his inmates for the most basic sanitary needs.

93. It is true that the Court requires in such cases that the interference be proved "beyond reasonable doubt", it being noted that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland*

v. *the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 64-65, § 161).

94. In the present case the Court cannot but notice that the Government, which provided very detailed information from the penitentiary authorities concerning the medical surveillance of the applicant, could not produce a single piece of information on the facilities offered to the applicant in detention, including on the question of a the personal assistant. This allows the Court to conclude that no such facilities were provided to the applicant.

The Court recalls thus that the applicant's medical condition is severe, his basic sanitary needs are difficult to attend to and he has severe functional deficiencies. Although the authorities are aware of these facts, he is still detained in a regular penitentiary, is sharing the cell with other persons, has no showers or warm water at his disposal and is not regularly assisted for his needs. His poor condition has led to social segregation from the rest of the prison population.

95. Moreover, the applicant's description of the prison facilities both in his initial letters to the Court and in his further observations, in particular overcrowding, obligation to share beds with other persons, damaged mattresses and inappropriate sanitary facilities are not contested by the Government and are confirmed by the CPT's reports on Romania. These conditions do not satisfy the European standards established by the CPT (see paragraphs 73-75 above).

Accordingly, as stressed by the CPT, the cumulative effect of overcrowding in large capacity (and sometimes also insalubrious) dormitories, poor regime of activities and inadequate access to washing facilities can prove detrimental to the prisoners (see also, *mutatis mutandis*, *Kalashnikov v. Russia*, no. 47095/99, § 97, ECHR 2002-VI, and *Kehayov v. Bulgaria*, no. 41035/98, § 66, 18 January 2005).

96. In this context the Court also recalls that it does not exclude that in particularly severe situations humanitarian measures could be taken (see, *mutatis mutandis*, *Farbtuhs v. Latvia*, no. 4672/02, § 52, 2 December 2004)

97. The foregoing considerations are sufficient to enable the Court to conclude that the conditions in prison, in particular the overcrowding and lack of access to hygiene and other facilities appropriate to his health situation, caused the applicant suffering attaining the threshold of inhuman and degrading treatment proscribed by Article 3.

98. There has accordingly been a violation of Article 3 of the Convention insofar as the conditions of the applicant's detention are concerned.

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

A. Right to a fair trial

99. The applicant complained under Article 6 § 1 of the Convention that he had not had a fair trial before the domestic courts. In particular, he claimed that the witnesses had been influenced by the prosecution, that the courts had judged the case in his absence and that he had not always been represented by a lawyer during the proceedings and in particular during the polygraph test (see paragraph 36 above).

100. The relevant part of Article 6 reads as follows:

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

101. The Government contended that the decisions taken by the courts in the applicant's absence had not been decisive for the applicant's fate. Unlike in the case of *Ilişescu and Chiforec*, cited above, where the Court found a violation of Article 6 on the ground that the applicant had not given evidence before the domestic courts that convicted him, in the present case the applicant had given evidence twice before the first-instance court.

102. The Court notes from the outset that there is no evidence in the file that would allow it to draw a conclusion as to the alleged lack of representation during the applicant's polygraph test. Moreover, nothing in the file indicates that he raised this complaint with the domestic courts. However, even assuming that the applicant was not represented and that he did exhaust the domestic remedies for this complaint, the Court notes that his conviction was not based solely on this evidence. Therefore, although regrettable, such a circumstance is not in itself sufficient for the finding of a violation of Article 6. Moreover, it is not the Court's role to speculate as to what the outcome of the criminal proceedings would have been if the answers in the polygraph test had not been taken into account by the domestic courts.

103. As for the applicant's conviction without having given evidence before the domestic courts, when national law permits a trial to be held notwithstanding the absence of a person “charged with a criminal offence”, that person should be able to obtain, from a court which has heard evidence from him, a fresh determination of the merits of the charge (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 15, § 29, and *Ilişescu and Chiforec*, cited above, § 34).

104. The Court has already established that Romanian law allows for the quashing of a decision taken without the person accused being present and questioned by the courts (see paragraph 70 above).

105. In the present case, the Court notes, as do the Government, that the applicant gave evidence, in the presence of his chosen counsel, before the first-instance and the appeal courts that examined for the first time the merits of the case (see paragraphs 8-9 above). However, in the re-trial, the same levels of jurisdiction re-examined the merits of the case without hearing evidence from the applicant. It is true that unlike in the cases of *Constantinescu v. Romania* (no. 28871/95, § 19, ECHR 2000-VIII) and *Ilişescu and Chiforec* (cited above, § 15) where the courts refused to hear evidence from the applicants and/or their lawyers although they were present at the hearings, in the instant case neither the applicant nor his chosen counsels (with few exceptions) appeared in court.

106. However, the applicant did not raise at least in substance a violation of his right to give evidence in person in his appeals, which were formulated through his chosen representative. Neither did he provide any arguments that would allow the Court to conclude that such a remedy could not be effective in his particular case (see *Ilişescu and Chiforec*, cited above, § 14).

107. Therefore, bearing in mind that under Article 35, normal recourse should be had by an applicant to effective remedies, that is, remedies that are available and sufficient to afford redress in respect of the breaches alleged (see, *mutatis mutandis*, *Sakkopoulos v. Greece*, no. 61828/00, § 44, 15 January 2004), it follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

108. As for the representation, the Court notes from the outset that the applicant did not complain about the lack of effective representation in his appeal lodged with the Supreme Court by his representative on his behalf.

109. Notwithstanding this and even assuming that the applicant did exhaust the domestic remedies in this matter, the Court considers that this complaint is inadmissible for the following reasons.

110. Accordingly, it notes, as do the Government, that each time the courts heard evidence from the applicant or witnesses, his lawyer was present.

However, in the re-examination of the case, while the applicant's lawyer was present during the first-instance proceedings, he did not attend the appeal proceedings. Moreover, he failed to provide an acceptable explanation both for his absence and for his failure to designate a substitute (see paragraphs 26, 39, 71-72 above), although he had a legal obligation to do so. The Supreme Court allowed two postponements to ensure the applicant's representation by a lawyer of his choice, but to no avail.

In this context, it is reasonable that lawyers were appointed by the courts of their own motion (see *a contrario*, *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, § 38).

111. For all these reasons, it considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Length of the criminal proceedings

112. The applicant complained that the length of the criminal proceedings against him had been incompatible with the “reasonable time” requirement laid down in Article 6 § 1 of the Convention, which provides:

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

113. The period to be taken into consideration began only on 20 June 1994, when Romania ratified the Convention. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time. Accordingly, at the date of the ratification, the case was pending with the first-instance court, the criminal proceedings having been pending for one year.

The period in question ended on 12 February 2004, when the Supreme Court of Justice delivered the final decision in the case.

The time during which the proceedings were suspended due to the applicant's illness, from 27 May 1997 to 2 June 1999, will not be taken into account.

The proceedings thus lasted eight years and eight months, of which seven years and eight months were after the ratification of the Convention. During this time, the case was heard by eight courts at three levels of jurisdiction.

1. Admissibility

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

2. Merits

115. The Government contended that the case had been very complex because of the very serious crime committed, and that the authorities had had difficulties in gathering the evidence. The complex nature of the case was confirmed, in their view, by the significant period of time that was necessary for the completion of the mandatory psychiatric examination of the applicant. In their opinion, the time during which the proceedings were suspended should not be taken into account by the Court (see *Lavents v. Latvia*, no. 58442/00, § 100, 28 November 2002). Lastly, they contended that the applicant and his representative had been responsible for

the protraction of the case insofar as they had been absent from hearings and the latter had not appointed replacements, as required by law.

116. The Court reiterates that the reasonableness of the length of 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 and 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)

117. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Pélissier and Sassi*, cited above).

118. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

119. In particular the Court notes that it took the courts almost six years before they ordered the mandatory psychiatric evaluation of the applicant. It does not accept the Government's argument that this long period was caused by the complexity of the case, insofar as the applicant was charged with aggravated murder from the beginning of the proceedings and the obligation to examine psychiatrically in such cases is set down directly by law.

120. The Court also recalls that since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system (see *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003). Because of these remittals the case was correctly decided by the first-instance court only on 10 June 2002, that is, eight years after the ratification of the Convention, during six of which there was continuous examination by the courts.

121. Lastly, the Court attaches great importance to the stakes of this case for the applicant, who was charged with aggravated murder.

122. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

123. The applicant also complained under Article 8 of the Convention about his pre-trial detention and claimed that he had been prevented from contacting his family at that time. However, the Court notes that the applicant was released on 30 May 1997, while the present application was only lodged on 25 May 2004. Assuming that the applicant did not have an effective remedy at his disposal to complain about the violations that had allegedly occurred during his pre-trial detention, the starting date of the

six-month period provided by Article 35 § 1 of the Convention is that when the violation ended, namely 30 May 1997.

124. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

125. Lastly, the applicant considered that the way the authorities had handled the criminal proceedings and his detention constituted a violation of Articles 1, 7, 13 and 14 of the Convention. However, the Court considers that nothing in the case file indicates a violation of the aforementioned Articles and the applicant failed to produce any evidence to substantiate his complaint.

126. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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

128. The applicant claimed 30,000 euros (EUR) in respect of pecuniary damage, namely EUR 10,000 for the violation of Article 3 and EUR 20,000 for the violation of Article 6. He also claimed EUR 40,000 in respect of non-pecuniary damage, respectively EUR 25,000 for the Article 3 violation and EUR 15,000 for the Article 6 violation.

129. Later on he revised his position and only claimed EUR 30,000 in respect of non-pecuniary damage, that is EUR 10,000 for the violation of Article 3 and EUR 20,000 for the violation of Article 6.

130. The Government asked the Court to acknowledge that the applicant had withdrawn his claims for compensation for pecuniary damage and considered that, in the light of the Court's case-law, the compensation claimed for non-pecuniary damage was exaggerated.

131. The Court notes that the applicant limited his claims to compensation for non-pecuniary damage (see paragraph 129 above). It further accepts that the applicant suffered distress and frustration because the State authorities continued his detention while failing to provide him with adequate decent facilities in prison and because of the length of the criminal proceedings against him. Making its assessment on an equitable

basis, the Court awards the applicant EUR 6,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

132. The applicant also claimed the reimbursement of the costs and expenses incurred before the Court, without specifying the amount and without sending any supporting document.

133. The Government contended that the applicant had not justified the expenses.

134. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The applicant's representative received EUR 850 in respect of legal aid from the Council of Europe. No other costs being proved, there is no call to award any sum on that account.

C. Default interest

135. The Court considers it appropriate that the default interest 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

1. *Declares* unanimously admissible the complaints concerning conditions of detention after May 2004 and the length of the criminal proceedings, and the remainder of the application inadmissible;
2. *Holds* unanimously that there has been no violation of Article 3 of the Convention insofar as the medical care in prison is concerned;
3. *Holds* unanimously that there has been a violation of Article 3 of the Convention insofar as the conditions of detention are concerned;
4. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention (length of criminal proceedings);
5. *Holds* by six votes to one
 - (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 6,500 (six

thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that this amount is to be converted into new Romanian lei at the rate applicable at the date of settlement;

(c) 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;

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

Done in English, and notified in writing on 6 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr E. Myjer is annexed to this judgment.

B.M.Z.
S.Q.

PARTLY DISSENTING OPINION OF JUDGE MYJER

I voted against finding a violation of Article 6 (reasonable time).

True, a long time elapsed between the *dies a quo* (20 June 1994, the date when Romania ratified the Convention) and the *dies ad quem* (12 February 2004, when the Supreme Court delivered the final decision in this case). At first sight such a long period seems to be sufficient to conclude that the national judicial authorities did not act with the necessary diligence. However, as the Court rightly took into account in paragraph 113, the time during which the proceedings were suspended due to the applicant's illness (more than two years) should be deducted from that period. In my opinion, there were many other substantial delays attributable to the illness or poor health of the applicant and/or his absence from hearings, or to the fact that his lawyer did not attend the hearings. These delays should not be held against the Government. Besides, the case was a complex one and many hearings were needed in order to hear the testimonies of witnesses. The fact that the applicant made use of all the legal possibilities available to him to appeal against the various decisions and judgments also contributed to the overall length.

In general terms, the fact that a case was heard by eight courts at three levels of jurisdiction justifies the remark made by the majority in paragraph 120 that this discloses a serious deficiency in the judicial system. However, in the particular circumstances of this case, I consider this to be too harsh and unjust.

Because in my opinion there has been a violation of Article 3 only insofar as the conditions of detention are concerned, I also voted against the amount of compensation awarded in respect of non-pecuniary damage.