Information Note on the Court's case-law No. 159

January 2013

Bucur and Toma v. Romania - 40238/02

Judgment 8.1.2013 [Section III]

Article 10

Article 10-1

Freedom to impart information

Criminal conviction for making public irregular telephone tapping procedures: *violation*

Facts – The first applicant worked in the telephone communications surveillance and recording department of a military unit of the Romanian Intelligence Service (RIS). In the course of his work he came across a number of irregularities. In addition, the telephones of a large number of journalists, politicians and businessmen were tapped, especially after some high-profile news stories received wide media coverage. The applicant affirmed that he reported the irregularities to his colleagues and the head of department, who allegedly reprimanded him. When the people he spoke to showed no further interest in the matter, the applicant contacted an MP who was a member of the RIS parliamentary supervisory commission. The MP told him that the best way to let people know about the irregularities he had discovered was to hold a press conference. In his opinion telling the parliamentary commission about the irregularities would serve no purpose in view of the ties between the chairman of the commission and the director of the RIS. On 13 May 1996 the applicant held a press conference which made headline news nationally and internationally. He justified his conduct by the desire to see the laws of his country – and in particular the Constitution – respected. In July 1996 criminal proceedings were brought against him. Amongst other things, he was accused of gathering and imparting secret information in the course of his duty. In 1998 he was given a two-year suspended prison sentence.

One of the tapes the applicant had made public contained a recording of a telephone conversation between the third applicant, the minor daughter of the second applicant, and her mother on the telephone at the home of the second and third applicants.

Law – Article 10: The applicant's criminal conviction had interfered with his right to freedom of expression, with the legitimate aim of preventing and punishing offences that threatened national security. Concerns about the foreseeability of the legal basis for the conviction did not need to be examined in so far as the measure was, in any event, not necessary in a democratic society.

(a) *Whether or not the applicant had other means of imparting the information* – No official procedure existed. All the applicant could do was inform his superiors of his concerns. But the irregularities he had discovered concerned them directly. It was therefore unlikely that any internal complaints the applicant made would have led to an investigation and put a stop to the unlawful practices concerned. As regards a complaint to the parliamentary commission responsible for supervising the RIS, the applicant had contacted an MP who was a member of the

commission, who had advised him that such a complaint would serve no useful purpose. The Court was not convinced, therefore, that a formal complaint to this commission would have been an effective means of tackling the irregularities. It was worth noting that Romania had passed special laws to protect whistleblowers in the public service. However, these new laws, which were all the more praiseworthy as very few other States had introduced them, had been passed well after the activities denounced by the applicant, and therefore did not apply to him. Consequently, divulging the information directly to the public had been justifiable.

(b) *The public interest value of the information divulged* – The interception of telephone communications took on a particular importance in a society which had been accustomed under the communist regime to a policy of close surveillance by the secret services. Furthermore, civil society was directly affected by the information concerned, as anyone's telephone calls might be intercepted. The information the applicant had disclosed related to abuses committed by high-ranking officials and affected the democratic foundations of the State. It concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The domestic courts did not take this argument of the applicant into account, however.

(c) *The accuracy of the information made public* – The applicant had spotted a number of irregularities. All the evidence seemed to support his conviction that there were no signs of any threat to national security that could justify the interception of the telephone calls, and indeed that no authorisation for the phone tapping had been given by the public prosecutor. In addition, the courts had refused to examine the merits of the authorisations produced by the RIS for the interception of the phone calls. The domestic courts had thus not attempted to examine every aspect of the case, but had simply acknowledged the existence of the requisite authorisations. Yet the applicant's defence comprised two arguments: firstly that the requisite authorisations had not been obtained, and secondly that there was no evidence of any threat to national security that could possibly have justified the alleged interception of the telephone conversations of numerous politicians, journalists and members of the public. What is more, the Government had failed to explain why the information divulged by the applicant was classified "top secret"; instead, they had refused to produce the full criminal case file, which included the requests from the RIS and the authorisations of the public prosecutor. In such conditions the Court could only trust the copies of these documents submitted by the applicants concerning the interception of the telephone conversations of the second applicant, Mr Toma. However, these documents showed that the RIS had given no reasons for requesting the authorisation and the public prosecutor had given no reasons for granting it. The first applicant had accordingly had reasonable grounds to believe that the information he divulged was true.

(d) *The damage done to the RIS* – The general interest in the disclosure of information revealing illegal activities within the RIS was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution.

(e) *The good faith of the first applicant* – There was no reason to believe that the applicant was driven by any motive other than the desire to make a public institution abide by the laws of Romania and in particular the Constitution. This was supported by the fact that he had not chosen to go to the press directly, in order to reach the broadest possible audience, but had first turned to a member of the parliamentary commission responsible for supervising the RIS.

Consequently, the interference with the first applicant's freedom of expression, and in particular with his right to impart information, had not been necessary in a democratic society.

Conclusion: violation in respect of the first applicant (unanimously).

The Court also found a violation of Article 6 in respect of the first applicant and a violation of Article 8 and of Article 13 combined with Article 8 in respect of the second and third applicants.

Article 41: The applicants were each awarded a sum ranging from EUR 7,800 to EUR 20,000 in respect of non-pecuniary damage; the first applicant's claim in respect of pecuniary damage was rejected.

(See also *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, Information Note no. 105)
