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

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Court decides not to accept request for advisory opinion from High Court of Cassation and Justice of Romania

The European Court of Human Rights has decided not to accept the request for an advisory opinion (no. P16-2024-002) received from the High Court of Cassation and Justice of Romania ("the High Court") on 13 November 2024.

The request was made in the context of an appeal pending before the High Court concerning a judge's dismissal from office for failure to attend an expert medical evaluation, which was intended to determine whether she was suffering from a mental illness that would prevent her from performing her duties properly.

The High Court requested that the European Court give an advisory opinion on two questions concerning (i) the applicability of Article 8 (right to respect for private and family life) and (ii) the level of precision required of the domestic law which had served as the legal basis for the dismissal.

Having deliberated on 16 December 2024, the Court decided not to accept the request, considering that it did not concern a question of principle, within the meaning of Article 1 § 1 of Protocol No. 16, which warranted examination by the Grand Chamber. Presenting an overview of its relevant case-law, the Court showed that the requesting court already had guidance on Convention issues when determining the case before it. It thus saw no reason to elaborate further on the existing principles.

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Protocol No. 16 allows the highest courts and tribunals, as specified by the member States that have ratified it, to request advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or its Protocols.

Romania ratified Protocol No. 16 on 15 September 2022. This was the second request for an advisory opinion to have been submitted by one of the country's highest courts and tribunals.

A legal summary of this case will be available in the Court's database HUDOC (link).

Legal background

Under Romanian law, Law no. 303/2004 lays down the circumstances in which a member of the judiciary may be suspended or dismissed from office. In particular, judges and prosecutors are to be suspended from office if they suffer from a mental illness which prevents them from performing their duties, until such time as they recover. To determine whether a judge or prosecutor suffers from a mental illness, he or she is required, on the initiative of the president of the court to which he or she is attached, to undergo a specialised expert evaluation by a medical board, by order of the National Judicial and Legal Service Commission (*Consiliul Superior al Magistraturii* – "the CSM").

If the judge or prosecutor refuses to attend the evaluation, the CSM's Disciplinary Board first orders his or her suspension from office for a period of one year. If the evaluation is then not carried out during that suspension, the judge or prosecutor is dismissed from office by decree of the President of Romania, on the recommendation of the CSM.

Factual background

On 10 April 2019 the CSM's Disciplinary Board for Judges ordered a judge to undergo an expert medical evaluation to assess her mental health, in accordance with Article 64 § 1 of Law no. 303/2004.

On 7 May 2020 the CSM's Disciplinary Board for Judges took note of that judge's unjustifiable failure to attend the medical board's evaluation, and ordered her suspension from office for one year.

On 13 May 2021, noting that the one-year period had elapsed but that no evaluation had been carried out, the CSM's Disciplinary Board for Judges recommended to the President of Romania that the judge be dismissed from office.

The judge appealed to the Timişoara Court of Appeal to have the CSM's decision of 13 May 2021 set aside, arguing that it had had no precise and foreseeable legal basis. The law did not stipulate whether it was for her to take steps to have the evaluation completed during her suspension, or whether it was for the authorities to take such steps first.

On 8 November 2022 the Court of Appeal dismissed her appeal as unfounded.

The High Court, examining an appeal against the Court of Appeal's judgment of 8 November 2022, elected of its own motion to defer its decision and to request an advisory opinion from the Court, asking two questions.

The questions asked

"1. Does Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms apply in respect of an alleged violation of a person's right to respect for private life where that person was dismissed from judicial office for failure to attend an expert evaluation intended to determine the extent to which he or she was suffering from a mental illness which was such as to prevent the proper performance of his or her duties?

2. If the answer to the first question is in the affirmative, are the quality-of-law requirements – namely, accessibility, precision and foreseeability – met if the applicable legal rule does not expressly provide that, during the period of suspension from judicial office, it is for the competent authority to take the first steps by sending the judge concerned fresh notice to attend the specialised expert evaluation, even though such notice was sent at the outset and the refusal by the person concerned to comply resulted in the above-mentioned suspension from judicial office; furthermore, can it be deduced from the spirit of the law that the suspended judge has an obligation to show a minimum of diligence by indicating his or her willingness to participate in the expert evaluation, and to that end specifying a date or dates or a timeframe for such participation, as a first step in completing the expert evaluation procedure, if such a consideration may be useful in formulating a response?"

The Registry of the Court received the request for an advisory opinion on 13 November 2024.

Decision of the Grand Chamber panel

The Court was first called upon to examine whether the request fulfilled the admissibility conditions laid down in Article 1 of Protocol No. 16 to the Convention. It noted that there was no doubt that the first, third and fourth admissibility conditions had been met (Article 1 of Protocol No. 16). All that remained, therefore, was to settle the essential question whether the request fulfilled the second admissibility condition. In that regard, the Court had to determine whether the request concerned "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Article 1 § 1 of Protocol No. 16).

"Questions of principle" were those which, on account of their nature, degree of novelty and/or complexity or otherwise, concerned an issue on which the requesting court would need the Court's guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it.

The first question asked by the High Court thus concerned whether Article 8 of the Convention was applicable to disputes arising from the dismissal from office of a judge or prosecutor.

The Court reiterated that the concept of "private life" was a broad term not susceptible to exhaustive definition, and could therefore embrace multiple aspects of a person's physical and social identity. As a broad term, "private life" did not exclude in principle activities of a professional nature. Employment-related disputes were not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention. In the cases falling into that category, the Court applied the concept of "private life" on the basis of two different approaches: (α) identifying the "private life" issue as the reason for the dispute (reason-based approach) and (β) deriving the "private life" issue from the consequences of the contested measure (consequence-based approach).

Article 8 only applied where those consequences were very serious and affected the person's private life to a very significant degree.

The Court specified that in the event of doubt as to whether Article 8 of the Convention applied to a given situation, that question could be left open where the conditions laid down in Article 8 § 2 of the Convention – including the requirement that an interference be "in accordance with the law" – were deemed to have been fulfilled.

That led the Court to examine whether the High Court's second question, on the level of precision of the domestic law which had served as the legal basis for the dismissal, concerned a "question of principle".

The Court reiterated its case-law to the effect that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only required that the measure complained of should have a legal basis in domestic law, but also referred to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.

Experience had shown, however, that it was impossible to attain absolute precision in the framing of laws. While certainty was highly desirable, it could bring in its train excessive rigidity and the law had to be able to keep pace with changing circumstances. Accordingly, many laws were inevitably couched in terms which, to a greater or lesser extent, were vague and whose interpretation and application were questions of practice.

The role of adjudication vested in the national courts served precisely to dissipate such interpretational doubts as might remain. The Court also reiterated that for domestic law to meet the qualitative requirements, it had to afford a measure of legal protection against arbitrary interferences by public authorities with Convention rights. It was primarily for the national authorities, notably the courts, to interpret and apply domestic law. In the present case, that implied that the High Court had to determine whether or not the domestic law met the foreseeability requirement provided for in Article 8 § 2 of the Convention, basing its decision on the case-law as it stood and referring to relevant domestic legislation and to the facts of the case pending before it.

The aim of the procedure under Protocol No. 16 was not to transfer the dispute to the Court, but rather to give the requesting court guidance on Convention issues when determining the case before it. The Court's case-law as it stood already provided the requesting court with such guidance. The Court thus saw no reason to elaborate further on the existing principles.

The Court concluded that the request for an advisory opinion did not concern a question of principle, within the meaning of Article 1 § 1 of Protocol No. 16, which warranted examination by the Grand Chamber.

Accordingly, it decided not to accept the request.

Protocol No. 16

Protocol No. 16 allows the highest courts and tribunals, as specified by the member States that have ratified it, to request advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or its Protocols.

Protocol No. 16 allows for enhanced interaction between the Court and national authorities and thereby reinforces the implementation of Convention rights and freedoms by requesting courts in their adjudication of pending cases.

An advisory opinion may only be sought in the context of a case pending before the requesting court. The acceptance or refusal of a request is left to the Court's discretion. A panel of five judges decides whether to accept the request, giving reasons for any refusal.

Advisory opinions, which are given by the Grand Chamber, are not binding. The panel and the Grand Chamber include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. Judges are entitled to deliver a separate opinion.

Useful links

- What is a request for an advisory opinion?
- Chart of signatures and ratifications
- Advisory opinions page

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