

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

FOURTH SECTION

CASE OF GHINCEA v. ROMANIA

(Application no. 36676/06)

JUDGMENT

STRASBOURG

9 January 2018

FINAL

09/04/2018

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



In the case of Ghincea v. Romania,

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Faris Vehabović,
Iulia Motoc,
Carlo Ranzoni,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 5 December 2017,

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

PROCEDURE

1. The case originated in an application (no. 36676/06) 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 Marius Cristian Ghincea ("the applicant"), on 4 September 2006.

2. The applicant was represented by Mr R.G. Dincă, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Mrs I. Cambrea, from the Ministry of Foreign Affairs.

3. The applicant alleged that the criminal proceedings against him had not been fair, in particular as regards the court of last resort, which had convicted him – the first court ever to do so – without having heard him or any of the witnesses heard by the district court.

4. On 16 December 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975 and lives in Voluntari.

6. In 2002 he was the legal secretary of Voluntari City Hall in charge of registering applications for restitution of land based on Law no. 18/1991. On an unspecified date in 2003 the prosecutor attached to the Buftea

District Court initiated a criminal investigation in respect of the applicant and two other individuals, M.C.I. and N.G.

7. The injured party, M.M. – who filed the criminal complaint –maintained that in December 2002, N.G. – who was employed at Voluntari City Hall – had, at the request of the applicant, antedated the registration of six applications for title submitted by M.C.I.

8. On 19 February and 23 July 2004 respectively the prosecutor questioned N.G. On both occasions she stated that she had antedated the registration of the applications submitted by M.C.I. at the applicant's express request.

9. The applicant gave statements on 27 February and 11 August 2004. He admitted that he knew M.C.I. ("as an acquaintance but not as a friend") but denied that he had asked N.G. to falsify the date of registration of the applications.

10. An expert report ordered by the prosecutor confirmed the fact that N.G. had antedated the registration of the six applications.

11. The prosecutor charged N.G. with committing intellectual forgery and charged the applicant with acting as N.G.'s accomplice. He decided not to institute a criminal investigation against M.C.I.

12. The injured party stated before the first-instance court that the only fact that she knew was that M.C.I. had asked some civil servants at Voluntari City Hall to antedate the registration of the applications.

13. At a hearing on 11 March 2005 the Buftea District Court questioned the applicant and N.G. in respect of the charges brought against them. N.G. changed the statements she had made initially before the prosecutor and stated that the applicant had only called her and asked her to help M.C.I. to register the applications for title. She also stated that she had antedated the registration at M.C.I.'s request. The applicant did not change his statements and continued to deny any involvement in committing the intellectual forgery. He stated that he had only called N.G. and asked her to help M.C.I. with the registration of the applications as the latter had arrived after closing time.

Two other witnesses made statements at the same hearing. However, their statements did not provide any further clarification concerning the applicant's role in committing any offence.

14. The district court changed the legal classification of the offence with which the applicant had been charged to inciting intellectual forgery.

15. By a judgment of 9 May 2005 the Buftea District Court convicted N.G. of intellectual forgery, imposed a suspended sentence of six months' imprisonment and placed her on probation. The court noted that N.G. had given contradictory statements to the prosecutor and to the court with respect to the applicant's role in the commission of the offence. It held that the statement given to the prosecutor, but not maintained before the court – according to which the applicant had asked her to antedate the registration

of the applications – was not corroborated by the other pieces of evidence adduced before it. The applicant was therefore acquitted on the grounds of not having committed the offence with which he had been charged.

16. An appeal against this decision was lodged by the prosecutor's office but was dismissed as unfounded by the Bucharest County Court on 16 December 2005. The applicant, co-defendant N.G. and the witnesses were not heard directly by the County Court. It upheld the decision of the firstinstance court, emphasising that there was no evidence that the applicant had asked N.G. to antedate the registration of the applications.

17. The prosecutor lodged an appeal on points of law, pointing to fundamental factual errors in the decisions of the two lower courts regarding the applicant's acquittal and claiming that the court had made a superficial assessment of the evidence in the file.

18. No new pieces of evidence were adduced before the Bucharest Court of Appeal.

19. On 24 February 2006 the Bucharest Court of Appeal heard submissions from the prosecutor and counsel for the defence and allowed the applicant to address it at the end of the hearing (*ultimul cuvânt al inculpatului*).

20. By a final decision of 3 March 2006, the Bucharest Court of Appeal allowed the appeal on points of law lodged by the prosecutor's office, quashing the two previous decisions. It convicted the applicant of inciting intellectual forgery and imposed a suspended sentence of six months' imprisonment, placing him on probation.

21. The appellate court based its reasoning on the evidence existent in the file. It held that both the lower courts had made a wrong assessment of evidence. However, it did not question the applicant, the co-defendant N.G., or the witnesses, instead merely citing some of the statements they had made before the prosecutor and the first-instance court. It referred in particular to the statements submitted by N.G. to the prosecutor on 19 February and 23 July 2004 and before the district court on 11 March 2005, and to the statements given by the applicant on 27 February and 11 August 2004. Having reassessed the facts without rehearing any evidence, it arrived at the conclusion that the applicant had incited N.G. to commit intellectual forgery.

22. The final written decision containing the court's reasoning became available on 20 March 2006. The applicant alleged that he had been served with a copy of the decision later but he was not able to state any date.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. The relevant provisions of the Romanian Code of Criminal Procedure ("the CCP") regarding appeals on points of law and the

assessment of evidence by the courts can be found in the case of *Dănilă v. Romania* (no. 53897/00, § 26, 8 March 2007).

24. Law no. 356/2006, published in the Official Gazette no. 677 of 7 August 2006, amended the CCP. It entered in force on 6 September 2006. According to Article 385^{14} § 1^{1} of the CCP, as amended by Law no. 356/2006, when trying an appeal on points of law, the court must hear evidence from the applicant if he was acquitted by the first-instance court and the appeal court. According to Article 385^{16} of the amended CCP, where a court quashes a judgment given by a lower court, it must decide on the evidence to be adduced and set a date on which it will take statements from the accused if the latter has not been heard or if he or she was acquitted by the lower courts.

25. Article 465 of the new CCP provides for possible revision of a domestic trial where the Court has found a violation of an applicant's fundamental rights and freedoms set forth by the Convention and the Protocols thereto if the serious consequences of the violation continue to exist and can only be redressed by reopening.

26. In similar cases the domestic courts quashed the applicants' conviction and remitted their cases for retrial following judgments delivered by the Court (see, for example *Dănilă*, cited above; *Mircea v. Romania*, no. 41250/02, 29 March 2007, and *Mihai Moldoveanu v. Romania*, no. 4238/03, 19 June 2012).

THE LAW

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

27. The applicant complained that, after having been acquitted twice, the Bucharest Court of Appeal had convicted him of inciting N.G. to commit intellectual forgery and had imposed a prison sentence on the basis of the evidence in the file – which consisted mainly of statements given by him and his co-defendant – without having heard him or any of the witnesses heard by the district court. He relied on Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

1. The parties' submissions

28. The Government submitted that the applicant had not complied with the six month time-limit. In this respect they argued that the six-month term had started to run on 24 February 2006, when the Bucharest Court of Appeal held its last hearing. The fact that the decision had been delivered on 3 March 2006 had had no relevance for the applicant since the delay had been granted by the court purely in order to allow the applicant's lawyer to submit written observations. Accordingly, the applicant had been aware of the infringement of his right to be heard by the court of last resort since 24 February 2006, but had not lodged the application with the Court until 7 September 2006.

29. The applicant submitted that the date of 24 February 2006 had only been the date scheduled for the last hearing by the Bucharest Court of Appeal, whereas a record of the decision had been issued on 3 March 2006 and a written decision containing the court's reasoning for his conviction had not been available until 20 March 2006.

2. The Court's assessment

30. The Court notes that the domestic court of last instance delivered a reasoned final decision on 20 March 2006, of which the applicant took cognisance later on an unspecified date (see paragraph 22 above).

Even taking as the point of departure for the calculation of the six-month term the date on which the court of last instance delivered its reasoned decision – namely 20 March 2006 – the Court notes that the applicant, who lodged his application with the Court on 4 September 2006, complied with the six-month rule. Accordingly, the Court dismisses the Government's objection.

31. Noting further that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and that it is not inadmissible on any other grounds, the Court concludes that it must be declared admissible.

B. Merits

1. The parties' submissions

32. The Government submitted that the applicant had been heard by the prosecutor and the first-instance court. Moreover, he had adduced before them all the evidence he had considered necessary and had been assisted by a lawyer of his choosing. They admitted that the applicant had consistently denied that he had committed any offence but pointed out that he had missed many hearings.

33. They contended that neither the applicant nor his lawyer had asked the court of last instance to admit new evidence or to hear the applicant.

34. They also argued that the present case was similar to the case of *Rusu v. Romania* ((dec.) no. 6246/04, 31 August 2010), in which the Court dismissed the applicant's complaint under Article 6 § 1 of the Convention as manifestly ill-founded.

35. The applicant contested the Government's allegation that he had missed many of the hearings. In this respect he maintained that the court of last instance had held only one hearing, on 24 February 2006, on which occasion the parties had made their final submissions.

36. The applicant also contended that he had had no interest in adducing new evidence before the court of last resort since the lower level courts had acquitted him on the basis of the available evidence. He also pointed out the amendments introduced by Law no. 356/2006 to the Romanian CCP, which entered in force on 6 September 2006, after the Bucharest Court of Appeal handed down its final decision in his case (see paragraph 24 above).

37. He concluded by pointing out that the only incriminating evidence against him had been the statements given by N.G., his co-defendant before the prosecutor, which had not been maintained before the domestic courts.

2. The Court's assessment

38. The Court reiterates that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by the accused who claims that he has not committed the act alleged to constitute a criminal offence (see *Constantinescu v. Romania*, no. 28871/95, § 55, ECHR 2000-VIII, and *Cipleu v. Romania*, no. 36470/08, § 31, 14 January 2014).

39. Furthermore, the Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that provision, which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national legislation and the domestic courts. The Court's only concern is to examine whether the proceedings have been conducted fairly (see *Kashlev v. Estonia*, no. 22574/08, §§ 39-40, 26 April 2016).

40. Moreover, the Court is of the view that those who have responsibility for deciding the guilt or innocence of an accused ought, in principle, to be able to question the accused and the witnesses in person and

assess their trustworthiness. The assessment of trustworthiness is a complex task which usually cannot be achieved by a mere reading of his or her recorded words (see *Dan v. Moldova*, no. 8999/07, § 33, 5 July 2011).

41. Similarly, it is not enough for the accused merely to be present at the hearing and only to be given the opportunity to address the court last. In a series of Romanian cases the Court has stressed that an appeal court has the duty to hear evidence directly from the defendant, in particular if it is the first court to have convicted him of a criminal charge (see, for example *Constantinescu*, cited above, § 58; *Dănilă v. Romania*, no. 53897/00, § 42, 8 March 2007, and *Coniac v. Romania*, no. 4941/07, § 63, 6 October 2015). The Court does not consider it to be of relevance that an applicant has not specifically asked for an oral hearing or to be heard at the hearing before an appellate court following his acquittal. It is understandable that in such a situation the applicant has no interest in requesting that the evidence be heard again (see *Cipleu*, cited above, § 39).

42. Turning to the instant case, the Court notes that the Bucharest Court of Appeal, which examined the appeal on points of law lodged by the prosecutor, determined the criminal charge against the applicant convicting him for the first time of inciting intellectual forgery without hearing any new evidence, solely on the basis of the statements given by the applicant, his co-defendant N.G. and witnesses before the prosecutor and during the proceedings before the first-instance court.

43. The Court considers that in order to determine whether there has been a violation of Article 6 § 1 of the Convention, an examination must be made of the role of the Bucharest Court of Appeal and the nature of the issues which it was called upon to try.

44. The proceedings in the Bucharest Court of Appeal were full proceedings governed by the same rules as a trial on the merits, with the court being required to examine both the facts of the case and questions of law (see *Moinescu v. Romania*, no. 16903/12, § 36, 15 September 2015). The appeal court could decide either to uphold the applicant's acquittal or to convict him after making a thorough assessment of the question of his guilt or innocence, taking fresh evidence if applicable.

45. Thus, without rehearing any of this evidence, the Bucharest Court of Appeal chose to rely on the statements made by N.G. during the criminal investigation, according to which the applicant – in his capacity as the legal secretary of Voluntari City Hall – had asked her by telephone to antedate the registration of the six applications for restitution of land submitted by M.C.I. (see paragraph 8 above) and to ignore the other statements given by the applicant and N.G. before the first-instance court (see paragraph 13 above). The Court considers that the contradiction between the statements given by the co-defendant at different stages of the proceedings could have been better clarified had, at least, N.G. and the applicant been reheard by the court of last resort.

46. The Court is aware that there are cases where it is impossible to hear someone in person at the trial because, for example, he or she has died, or in order to protect the right of a witness not to incriminate himself or herself (see *Craxi v. Italy (no. 1)*, no. 34896/97, § 86, 5 December 2002, and *Dan*, cited above, § 33). However, that was not the case here.

47. Therefore, taking account of what was at stake for the applicant, the Court is not convinced that the issues that had to be determined by the Court of Appeal when convicting and sentencing the applicant – and, in doing so, overturning his acquittal by the first-instance court – could be properly examined, as a matter of fair trial, without a direct assessment of the evidence.

48. As regards the Government's argument that the applicant did not ask the court of last instance to admit new evidence or to hear him, the Court notes that it has already established that the appellate court was under a duty to take positive measures to this effect (see *Găitănaru v. Romania,* no. 26082/05*,* § 34*,* 26 June 2012, and *Manolachi v. Romania*, no. 36605/04, § 50, 5 March 2013).

49. Moreover, the Court considers that the applicant's case should be distinguished from the case of *Rusu*, to which the Government made reference in their written submissions. In the present case the applicant had attended the hearings at the court of last resort, whereas in the *Rusu* case the applicant had been absent from all the hearings before the court of last resort, despite the fact that he had been duly notified about them.

50. The Court acknowledges the changes in the domestic legislation which brought criminal procedures closer to the Convention requirements on this point (see paragraph 24 above). Nevertheless, those changes occurred on 6 September 2006 and thus remain without relevance for the instant case (see paragraph 24 above).

51. Given the foregoing considerations, the Court concludes that in the instant case, the Bucharest Court of Appeal failed to comply with the requirements of a fair trial.

52. Since that requirement was not satisfied, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage. He also submitted that he wished to be compensated for the pecuniary damage caused by his conviction but did not indicate any amount in this respect.

55. The Government pointed out that the applicant was not entitled to compensation in the form of the claimed pecuniary damage as he had neither indicated the exact amount nor submitted any documentation to support such a claim. In respect of the compensation for nonpecuniary damage claimed by the applicant, the Government stated that it was excessive and asked the Court, if it found a violation, to consider such finding of a violation of itself to be sufficient just satisfaction.

56. The Court notes that in the present case an award of just satisfaction can only be made on a basis of the applicant's not having had the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it considers that the applicant did suffer non-pecuniary damage.

57. Therefore, ruling on an equitable basis, in accordance with Article 41, it awards the applicant EUR 2,000 in respect of non-pecuniary damage.

58. Moreover, the Court reiterates that when a person, as in the instant case, has been convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested party represents an appropriate way to redress such a violation (see *Mischie v. Romania*, no. 50224/07, § 50, 16 September 2014).

B. Costs and expenses

59. The applicant did not claim any amount for the costs and expenses incurred before the domestic courts and the Court.

C. Default interest

60. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (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 2,000 EUR (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) 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.

Done in English, and notified in writing on 9 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	Ganna Yudkivska President