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

FOURTH SECTION

DECISION

Application no. 45558/08
Luminița CHIRIAC
against Romania

The European Court of Human Rights (Fourth Section), sitting on 29 March 2016 as a Chamber composed of:

András Sajó, *President,*
Vincent A. De Gaetano,
Boštjan M. Zupančič,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having regard to the above application lodged on 6 September 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Luminiţa Chiriac, is a Romanian national, who was born in 1969 and lives in Iaşi. The applicant was allowed to represent herself in the proceedings before the Court.

2. The Romanian Government ("the Government") were represented by their Agent, Mrs C. Brumar, from the Ministry of Foreign Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background information

4. On 12 April 2004, two individuals, one of whom was the applicant's brother, were taken to an Iaşi Police station charged with disturbance of public order due to drunken behaviour. Following a call from her brother, the applicant went to the same police station in her capacity as a lawyer in order to represent the two aforementioned individuals.

2. Newspaper article concerning the applicant

5. On 23 April 2003 a local newspaper published an article entitled "Big row in the middle of the night between a lawyer and police officers from Station II" (*Mare tărăboi în miez de noapte între un avocat şi poliţiştii de la Secţia II*). The article related the events of 12 April 2004. It included the following quote from the deputy to the head of the police station: "... both the lawyer and her client were under the influence of alcohol and caused a furore in the police station".

3. Defamation complaint lodged by the applicant

(a) First set of criminal proceedings

6. On 16 May 2003 the applicant lodged a criminal complaint of defamation against the journalist who had written the article and the police officer who had been quoted in it. She argued that as a result of the publication of the article, including the allegation that she had been under the influence of alcohol, her reputation had been damaged. Several clients had rescinded their representation agreements with her and her family had been negatively affected subsequent to the publication of the article. On 2 December 2003 the applicant joined the proceedings as a civil party claiming 25,000 euros in compensation.

7. On 20 April 2004 the Iaşi Court of Appeal sent the file to the prosecutor's office attached to it, instructing the prosecuting authorities to examine the applicant's complaint under Article 37 § 2 of the Legal Profession Act (Law No. 51/1995).

8. On 29 November 2004 the prosecutor attached to the Iaşi Court of Appeal dismissed the applicant's complaint in respect of the police officer for lack of sufficient evidence that he had made defamatory statements and in respect of the journalist on the grounds that he had not acted with the intention to defame. The prosecutor based his decision on Article 10 (a) of the Criminal Code.

The prosecutor noted that on the evening of 22 April 2004 the journalist had had a private conversation with police officer B.P. but that, according to a few witnesses who had been present, B.P. had refused to give any details about the incident of 12 April 2004 and had invited the journalist to seek the information from the officer tasked with providing information to the press.

The prosecutor noted that the versions of the two defendants concerning the journalist's source for his article of 23 April 2004 differed. While the journalist contended that police officer B.P. had given him information concerning the applicant's alcoholic intoxication on the evening of 12 April 2004, officer B.P. denied it.

9. On 26 January 2005 the chief prosecutor upheld his decision.

10. The applicant lodged a complaint with the Iaşi Court of Appeal against the prosecutor's decision not to open a criminal investigation. She contended that the circumstances of the incident of 12 April 2003 had not been accurately reflected by the prosecutor in his decision. She maintained that on the evening of the incident she had complained to the prosecutor in charge about the abusive behaviour of the police officers towards her and the two individuals who had been handcuffed and taken to the police station (one of whom was her brother) and that a criminal investigation had been opened in this connection.

11. On 12 May 2005 the Iaşi Court of Appeal dismissed the applicant's complaint. The applicant lodged an appeal on points of law.

12. By a judgment of 12 January 2006 the High Court of Cassation and Justice allowed the applicant's appeal on points of law and remitted the case for further investigation to the prosecutor's office attached to the Court of Appeal. The court reasoned that the applicant's complaint had been dealt with superficially and that the investigation should have addressed the crime of defamation of a lawyer, as provided for under Article 37 § 2 of the Legal Profession Act.

(b) Second set of criminal proceedings

13. On 4 May 2006 the prosecutor's office attached to the Iaşi Court of Appeal dismissed the applicant's criminal complaint, basing its decision on Article 10 (a) of the Criminal Code. It concluded that police officer B.P. had not made any defamatory statements about the applicant and that the journalist had written the article on the basis of a report drawn up by the police on the evening of 12 April 2003 without the intent to defame the applicant.

14. On 5 June 2006 the chief prosecutor upheld that decision.

15. On 10 October 2006 the Iaşi Court of Appeal allowed an appeal lodged by the applicant against the prosecutor's decisions. It quashed the prosecutor's decision on the grounds that the applicant's complaint should have been examined in the light of Article 37 § 2 of the Legal Profession Act and sent the case-file back to the prosecutor's office for a fresh examination.

(c) Third set of criminal proceedings

16. By a decision of 27 September 2007 the prosecutor's office attached to the Iaşi Court of Appeal dismissed the applicant's criminal complaint.

17. The applicant challenged the prosecutor's decision before the courts.

18. An appeal on points of law lodged by the applicant was finally dismissed by the High Court of Cassation and Justice on 6 March 2008. The court upheld the reasoning of the lower courts that the offence did not fall under the provisions of the Legal Profession Act, as the acts complained of had not occurred during the exercise of the applicant's duties. Furthermore, the High Court of Cassation and Justice held that although the acts complained of may have fallen under the provisions of the Criminal Code regarding defamation, those charged with such acts could no longer be prosecuted because from 2006 to 2007 defamation had been decriminalised. The defendants were therefore able to benefit from the application of the more favourable law. No reference was made to the civil action lodged by the applicant.

B. Relevant domestic law

19. Article 206 of the Code of Criminal Procedure (CCP), as in force at the time of the events, read as follows:

> "Anyone who makes a statement or allegation in public concerning a particular person which, if true, would render that person liable to a criminal, administrative or disciplinary penalty or expose them to public opprobrium shall be liable to a fine ...."

20. Law No. 278/2006 amended certain provisions of the CCP and repealed the Articles on insult and defamation.

21. However, by its decision no. 62 of 18 January 2007 the Constitutional Court declared the repeal unconstitutional.

22. The relevant provisions of the CCP in force at the time of the relevant facts read as follows:

Article 10

> "(1) Criminal proceedings cannot be instituted and, if instituted, cannot be continued if ...
>
> ...
>
> (b) the act is not proscribed by the criminal law;"

Article 14

> "The aim of a civil action is to establish the civil liability of the accused and the liability for the payment of damages of any other person who may be held legally responsible.
>
> A civil action can be brought together with a criminal action in a criminal trial, by way of joining the proceedings."

Article 15

> "A person who has suffered civil damage may join the criminal proceedings ...

He or she may do so either during the criminal investigation ... or before the court ...”

Article 22

“The findings contained in a final judgment of the criminal court concerning the issue whether the act in question was committed and the identification of the perpetrator and establishment of his guilt are binding on the civil court when it examines the civil consequences of the criminal act.”

Article 346

“(1) In the event of a conviction or an acquittal, or the termination of the criminal trial, the court shall deliver a judgment in which it also decides on the civil action.

(2) Where acquittal has been pronounced for a reason provided for in Article 10 (b^1) or because the court has identified an element that removes the criminal nature of the act, or because one of the constitutive elements of an unlawful act is missing, the court may award pecuniary and non-pecuniary damages in accordance with the civil law.

(3) Civil damages cannot be awarded if the acquittal was decided because the offence does not exist or has not been committed by the defendant.

(4) The criminal court shall not settle the civil action if it decides to acquit for reasons provided for in Article 10 (b) or if it decides to terminate the criminal proceedings for one of the reasons provided for in Article 10 (f) and (j) or in the event of withdrawal”.

23. The provisions of Articles 19 and 20 of the CCP are mentioned in *Forum Maritime S.A. v. Romania* (nos. 63610/00 and 38692/05, §§ 64 and 65, 4 October 2007).

24. Articles 999 and 1000 of the Civil Code, as in force at the relevant time, provided that any person who had suffered damage could seek redress by bringing a civil action against the person who had negligently caused it.

25. Article 37 § 2 of the Legal Profession Act, as in force at the time of the events, read as follows:

“(2) Insulting, defaming or threatening a lawyer during the exercise of his or her profession and in connection with the profession shall be punished by a term of imprisonment from three months to two years or by a fine.”

COMPLAINTS

26. The applicant complained under Article 10 § 2 of the Convention that her reputation had been tarnished and that the courts had failed to remedy the situation.

27. The applicant complained, under Article 6 § 1 of the Convention, of the excessive length of the criminal proceedings.

THE LAW

A. Complaint under Article 8 of the Convention

28. The applicant complained under Article 10 § 2 of the Convention that an article that had appeared in a local newspaper on 23 April 2003 had tarnished her reputation. She further complained that, by dismissing her joined criminal and civil complaints against the journalist and the police officer who had allegedly made the defamatory statement reported in the newspaper, the courts had failed to remedy the situation.

29. The Court reiterates that since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant or a government. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it. A complaint is characterised by the matters alleged in it and not merely by the legal grounds or arguments relied on (see, *mutatis mutandis*, *Powell and Rayner v. the United Kingdom*, 21 February 1990, §29, Series A no. 172; and *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). Consequently, the Court considers that the applicant's complaint should be examined under Article 8 of the Convention, which read as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

30. The Government raised an objection of non-exhaustion of domestic remedies. They submitted that, despite the prosecutor's decision not to pursue the police officer and the journalist, the applicant could have brought a separate civil action against them based on Articles 998 and 999 of the Civil Code (as in force at the relevant time), in conjunction with Article 54 of Decree-Law no. 31/1954 in connection with the infringement of her right to reputation. Moreover, Article 22 of the Code of Criminal Procedure did not prevent the applicant from bringing such a civil action.

31. The applicant did not agree with the Government and contended that she had added a civil claim to the criminal complaint and pursued all the available domestic remedies until a final decision was delivered by the High Court of Cassation and Justice on 6 March 2008.

2. The Court's assessment

32. The Court reiterates that the object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address allegations that a Convention right has been violated and, where appropriate, to afford redress before those allegations are submitted to the Court (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, 28 April 2004, and *Kudla v. Poland* [GC] no. 30210/96, § 152, ECHR 2000-XI).

33. Under Article 35 of the Convention, an applicant should have normal recourse to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, *Vučković and Others v. Serbia* [GC], no. 17153/11, § 71, 25 March 2014*; Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 222, ECHR 2014 (extracts)*;* and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 85, 9 July 2015).

34. The Court notes that the applicant lodged a criminal complaint against third parties for defamation on 16 May 2003 and joined the proceedings as a civil party on 2 December 2003. The applicant's criminal complaint was finally dismissed by the High Court of Cassation and Justice on 6 March 2008. The domestic courts failed to examine the merits of the applicant's complaint concerning defamation because the criminal penalty in respect of defamation had been abolished from 2006 to 2007; although defamation subsequently became an offence again (see paragraphs 20 and 21 above), while the proceedings were ongoing the domestic courts applied the criminal law that was most favorable to the defendants. Accordingly, the domestic courts discontinued the criminal proceedings instituted by the applicant on the grounds that the acts committed by the journalist and the police officer were not proscribed by criminal law, basing their decision on Article 10 (b) of the CCP.

35. The domestic courts did not examine the civil claim joined to the criminal complaint. In this connection, the Court notes that although the domestic courts did not provide any reasoning for their decision, pursuant to Article 346 § 4 of the CCP a criminal court did not have to settle a civil action if it decided to discontinue the criminal proceedings for reasons provided for in Article 10 (b) of the CCP.

36. The Government argued in their observations in respect of non-exhaustion of domestic remedies that although the domestic courts had dismissed the criminal complaint, the applicant had had the opportunity to lodge a separate civil action with the civil courts.

37. In other cases in which the domestic courts had not analysed a civil complaint on grounds of inadmissibility of the criminal complaint to which it was joined (see *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98

and 64320/01, §§ 119-22, ECHR 2005-VII (extracts), and *Forum Maritime S.A.,* cited above, § 91), the Court stressed the importance of the existence of other effective remedies for the civil claims.

38. The Court observes that under Article 20 of the CCP in force at the material time (see paragraph 23 above), an injured party who joined a civil action to criminal proceedings was entitled to lodge a separate new action with the civil courts if the criminal courts had not issued a decision in respect of the civil claim.

39. The Court considers that the applicant had the possibility of bringing a separate civil action for compensation on the basis of Articles 998-999 of the Romanian Civil Code applicable at the material time or a claim on the basis of Article 54 of Decree No. 31/1954 (see *Stoian v. Romania*, no. 33038/04, § 94, 8 July 2014), but did not avail herself of such a remedy after her criminal complaint had been dismissed.

40. In the light of these circumstances and having regard to the subsidiary character of the Convention machinery, the Court considers that the applicant should have brought a separate new action before the civil courts.

41. It follows that the complaint raised by the applicant concerning the infringement of her right to reputation must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Other complaints

42. The applicant raised a complaint under Article 6 § 1 of the Convention, alleging that the proceedings had been unreasonably lengthy. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 21 April 2016.

Marialena Tsirli
Registrar

András Sajó
President