

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

THIRD SECTION

DECISION

Application no. 59064/11
Adrian DRAGOMIR
against Romania

The European Court of Human Rights (Third Section), sitting on 3 June 2014 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Dragoljub Popović,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 12 September 2011,

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, Mr Adrian Dragomir, is a Romanian national who was born in 1989 and lives in Bucharest. He was represented before the Court by Ms E. R. Iancu, a lawyer practising in Bucharest.

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.

4. On 25 November 2010 criminal proceedings were instituted against the applicant and eight other co-accused in respect of fraud, forgery, use of forged documents, and money-laundering offences.

5. On 26 November 2010 the prosecutor's office attached to the Bucharest County Court decided to place the applicant in pre-trial detention. An arrest warrant was issued against the applicant and the prosecutor's order was confirmed by the court.

6. The applicant's pre-trial detention was extended on successive occasions by court order.

7. On 8 April 2011 the applicant lodged an application with the court requesting revocation of the order for his detention. In an interlocutory judgment of 12 April 2011, the Bucharest County Court dismissed the applicant's request. However, it replaced the applicant's detention with an undertaking not to leave the city, given that the impact of his deeds on public order had diminished with the passage of time. It ordered the applicant's release from detention.

8. The prosecutor did not appeal against the interlocutory judgment. Despite the fact that the judgment became final on 13 April 2011, the applicant was not released from Bucharest Prison until two days later, namely on 15 April 2011.

B. Relevant domestic law and practice

9. The relevant provisions of domestic law and practice regarding the award of compensation in the event of unlawful detention – namely Articles 504 and 505 of the Code of Criminal Procedure (CCP) and decision no. 45/1998 of the Constitutional Court – are to be found in *Ogică v. Romania*, no. 24708/03, § 56, 27 May 2010, and *Degeratu v. Romania*, no. 35104/02, § 59, 6 July 2010.

10. The Government submitted examples of case-law with the aim of showing that at present, in similar cases concerning unlawful detention, the system of legal remedies in Romania – including the direct applicability of the Convention and the Romanian Constitution – made it possible to make good any damage suffered.

11. In a judgment of 2 March 2007 concerning an unlawful detention for two days, the Mehedinți County Court allowed the action for compensation and awarded the claimant 1,000 Romanian lei (RON) (approximately 350 euros (EUR)). The Craiova Court of Appeal upheld that judgment and increased the compensation to RON 2,000 (approximately EUR 700). The appellate court held that, although Article 504 of the CCP was not applicable to the claimant's situation, Article 23 and Article 52 § 3 of the Romanian Constitution and Article 5 of the Convention were applicable.

12. In another case, in a final decision of 13 June 2012 the Bucharest Court of Appeal allowed a tort action and awarded the claimant EUR 500 as

compensation for an unlawful detention lasting twenty-two days. It held that – although Article 504 of the CCP was not applicable to the claimant's situation – the claimant was entitled to compensation for unlawful detention.

13. In a judgment of 18 February 2010 the Vâlcea County Court awarded the claimant RON 30,000 (approximately EUR 7,400) by way of compensation for thirty-six days of unlawful detention. On 4 May 2012 the High Court of Cassation and Justice upheld that judgment. It noted that the claimant was entitled to compensation on the basis of Article 5 § 5 of the Convention, even though the extension of his detention by an additional thirty-six days after his prison sentence had been served had not been found unlawful by a decision of a prosecutor or a court, as required by Article 504 § 3 of the CCP.

14. By a decision of 17 March 2011 the Oradea Court of Appeal allowed an action for compensation for unlawful detention and awarded the claimant RON 500. It found that, although Article 504 of the CCP was not applicable to the claimant's situation, he was entitled to compensation on the basis of Article 5 of the Convention. That decision became final on 6 March 2012, when the High Court of Cassation and Justice dismissed an appeal on points of law against it.

COMPLAINT

15. The applicant complained under Article 5 § 1 of the Convention that he had been unlawfully detained for the period between 13 and 15 April 2011 even though his release had been ordered by a court on 13 April 2011.

THE LAW

16. The applicant complained that he had been detained without any legal basis between 13 and 15 April 2003. He relied on Article 5 § 1 which reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

1. The parties' submissions

17. The Government submitted that the applicant had failed to exhaust domestic remedies as he had not availed himself of any of the avenues of redress at his disposal for the purpose of claiming compensation. They argued that domestic case-law provided adequate, effective and sufficient remedies which could have been used, such as a civil action for compensation.

18. They asserted that those remedies were available both in theory and in practice, and would have been accessible to the applicant. They relied on Articles 998-999 of the former Civil Code. They also contended that there was settled case-law of the High Court of Cassation and Justice confirming the domestic courts' tendency to apply Article 5 of the Convention directly, as well as the Court's standards, in cases where a person had been unlawfully detained by the authorities but the case did not fall exactly within the scope of Article 504 of the CCP. Such cases were no longer rejected as inadmissible but were considered on the merits.

19. However, they emphasised that cases similar to the applicant's were brought before the domestic courts infrequently, as they occurred only rarely. According to information submitted by various domestic courts, prisons were given notice promptly whenever a decision ordering a person's release became final and enforceable.

20. The applicant contested the effectiveness of the remedies referred to by the Government in his particular case.

2. The Court's assessment

21. 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 concerning a violation of a Convention right and, where appropriate, to afford redress before those allegations are submitted to the Court (see *Azinas v. Cyprus [GC]*, no. 56679/00, § 38, ECHR 2004-III, and *Kudła v. Poland [GC]*, no. 30210/96, § 152, ECHR 2000-XI).

22. Under Article 35 of the Convention, applicants must use the remedies that are normally 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; it falls to the respondent State to establish that these various conditions are satisfied (see, *inter alia*, *Vernillo v. France*, 20 February 1991, § 27, Series A

no. 198, and *Dalia v. France*, no. 26102/95, § 38, Reports of Judgments and Decisions 1998-I).

23. It further reiterates that mere doubt on the part of an applicant as to the prospect of success and the effectiveness of the available domestic remedies, unsupported by any convincing evidence, is not a plausible reason for failure to make use of these remedies (see *Kunqurova v. Azerbaijan* (dec.), no. 5117/03, 23 June 2005, and *Guliyev and Ramazanov v. Azerbaijan* (dec.), no. 34553/02, 14 February 2006).

24. On the facts of the present case, the Court observes that the applicant did not lodge any civil complaint with the domestic courts seeking damages for unlawful detention.

25. The Court further notes that, under Article 504 of the CCP, a convicted person or a person against whom a preventive measure of detention has been applied is entitled to compensation for the damage caused by keeping him in detention only if his detention is found to be unlawful by a decision of a prosecutor or of a competent court. Article 504 does not provide for any other situations giving rise to redress. For this reason the constitutionality of this Article has been challenged several times before the Constitutional Court (see *Visan v. Romania*, no. 15741/03, § 18, 24 April 2008).

26. In the case of the applicant, the deprivation of liberty that he suffered in the period between between 13 and 15 April 2011 was not held to be unlawful by any court. Consequently, he was unable to claim compensation for unlawful detention on the basis of Article 504 of the CCP.

27. The Court further notes that the Government claimed that the applicant could have obtained compensation despite the fact that his situation did not fall within the scope of Article 504 of the CCP. They submitted examples of case-law from the domestic courts showing that actions seeking compensation for unlawful detention lodged by claimants in situations similar to that of the applicant had been allowed (see paragraphs 11-14 above).

28. The Court notes that the Constitutional Court concluded in its decision no. 45/1998 that Articles 504 and 505 of the CCP should be interpreted in such a way as to cover all cases of unlawful detention, even those which did not appear to be covered by the Article in question (see paragraph 9 above). In this connection, the Court also notes that the Craiova Court of Appeal based its decision (see paragraph 12 above) on Article 52 § 3 of the Constitution interpreted in the light of decision no. 45/1998. Moreover, the domestic decisions submitted by the Government in the present case, as well as in other similar cases concerning unlawful detention, show a clear tendency on the part of the domestic courts both to apply Article 52 of the Romanian Constitution and also to apply Article 5 of the Convention directly in order to cover loopholes in the CCP as in force at the material time (see, *mutatis mutandis*, *Stoianova and*

Nedelcu v. Romania (dec.), nos. 77517/01 and 77722/01, 3 February 2004, and *Temeşan v. Romania*, no. 36293/02, §§ 26-30, 10 June 2008).

29. Reiterating that it is not its role to examine national law in the abstract (see *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28), the Court considers that, given the background information at his disposal, the applicant could not claim to be certain about the lack of any prospect of success of a complaint raised under these circumstances.

30. In any event, as the applicant failed to lodge a complaint with the authorities about his situation, the Court cannot speculate as to what would have been the outcome of such an action.

31. For all these reasons, the Court considers that the applicant should have complained to the authorities about the lack of compensation for his two days of unlawful detention.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares inadmissible the application.

Santiago Quesada
Registrar

Josep Casadevall
President