

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

FOURTH SECTION

DECISION

Application no. 50303/16
Cristian ENE
against Romania

The European Court of Human Rights (Fourth Section), sitting on 10 January 2023 as a Committee composed of:

Faris Vehabović, *President*,
Iulia Antoanella Motoc,
Branko Lubarda*, judges*,

and Crina Kaufman, *Acting Deputy Section Registrar*,

Having regard to:

the application (no. 50303/16) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 18 August 2016 by a Romanian national, Mr Cristian Ene, who was born in 1977, lives in Bucharest ("the applicant") and was granted leave to present his own case in the written proceedings before the Court (Rules 36 § 2 *in fine* of the Rules of Court);

the decision to give notice of the complaint under Article 10 of the Convention (right to freedom of expression) to the Romanian Government ("the Government"), represented by their Agent, Ms O.F. Ezer, of the Ministry of Foreign Affairs, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The applicant is a lawyer. Together with a co-counsel he represented H.G. during a criminal trial.

2. During a public hearing of 17 November 2015 held before the Bucharest Court of Appeal ("the Court of Appeal") the applicant's co-counsel challenged A.T., the single judge and bench president sitting in the case. She argued that A.T.'s impartiality was in doubt, on the one hand, because she had dismissed allegedly unlawfully the defence's requests for evidence and, on the other hand, because a complaint by H.G. to the president of the Court of Appeal about A.T.'s conduct during the case had been referred by the said president to the Court of Appeal's appraisal commission for judges ("the commission").

3. A.T. asked H.G.'s representatives to explain how the above-mentioned complaint to the president of the Court of Appeal could affect her impartiality.

4. The applicant stated the following:

> "The president of the Court of Appeal has responded that our [complaint] has been sent to [the commission for the latter] to review your activity as judge. As a result, you have every chance to not be awarded a 'very good' in your future [appraisal]. [I]n such a situation we, [H.G.'s representatives and H.G. himself], will [be responsible for] hurt[ing] [your] career advancement to the High Court of Cassation and Justice ('the Court of Cassation'). [F]or this reason we consider it unlikely that [you will] continue to remain a rock of impartiality of the justice act since from the reasons [given] by you in other cases in which you say and ask and correct your colleagues that a judge must prove [that his or her] impartiality is 100% certain, [it transpires that] the act of bias is already the conflict between your personal interest and [that of the defendant]. Do you believe that there is any person in this room who believes that [–] after [you] have [faced] so many complaints [and especially to the commission] which reviews your activity and can punish you professionally, with a chance for your career advancement to the [Court of Cassation] to be stopped for three or five years [and for] your merits until now to be overshadowed by the administrative investigation ... [–] in such a situation the subjective personal interest [does not] linger as [a] generic and fundamental argument of the notion of bias [?]".

5. On the same date the Court of Appeal, sitting as a formation of single judge, namely A.T., referred the part of above-mentioned challenge (see paragraph 2) which concerned the alleged unlawful dismissal of the defence's requests for evidence to a different judicial formation for examination. At the same time, it dismissed the remaining part of the challenge. It held in this latter connection that the challenge in question, much like the other previous challenges for bias which were lodged by H.G.'s representatives against A.T., was inadmissible. It held in this connection that it had established already that a mere complaint against A.T. could not affect her impartiality because she was a professional judge and could not be influenced by complaints of the kind lodged against herself before the commission.

6. In addition, the Court of Appeal held that the manner chosen by the applicant to support this part of the challenge was insulting for any bench president and showed the ill-intent behind the challenge. It further held that the applicant's arguments disclosed that this challenge was an attempt to push and shove (*şicana*) the court. Also, the arguments were presented during a

court public hearing and made an impression on all those present at that hearing. The court therefore fined the applicant RON 5,000 (EUR 1,126).

7. The fine was the statutory maximum amount provided for by Article 283 § 4 of the Code of Criminal Procedure.

8. According to the partial transcripts of the hearing of 17 November 2015, the applicant's co-counsel whispered to the applicant that the court was going to fine him as soon as the co-counsel heard A.T. referring to the manner chosen by the applicant to support the part of the challenge in question and before A.T. announced her decision.

9. The applicant contested the fine. He argued that it was unlawful and ill-founded because the court had failed to a) cite the legal norm on which it had relied in order to fine him, and b) to explain which part of his verbal and non-verbal conduct was insulting. Moreover, his alleged attempt to push and shove the court could not result in an insult to a judge given that the attempt to insult someone was not recognised as an unlawful act under national law. Furthermore, he argued that his statements, grounded on the relevant national law concerning the career of judges, were mere speculations about the effects that the commission's review could have on A.T.'s career, which justified nevertheless the challenge made on behalf of his client.

10. The applicant argued further that the fine violated the national and international rules and the European Court of Human Right's ("the Court") case-law on the freedom of expression afforded to lawyers, given that the applicant had acted in good faith and had not used threats, coarse or offensive expressions or gestures, or an inappropriate tone of voice. Also, the applicant had presented his arguments during a hearing attended only by the parties in the case and had not brought them to the attention of the public or of the authorities. In addition, his co-counsel had challenged A.T. spontaneously because of the tense atmosphere at the hearing and the fine was the first of its kind imposed on the applicant in his career.

11. By an interlocutory judgment of 15 December 2015 not amenable to appeal (made available on 7 March 2016) the Court of Appeal, sitting as a single judge, namely A.B.R., dismissed the applicant's challenge against the fine. It held that the court's omission to cite the legal norm on which it had relied in order to fine the applicant was irrelevant as long as the facts underlying the fine had been described.

12. The Court of Appeal held also that according to the rules of their profession, lawyers had an obligation to respect the authority of the judiciary and the solemnity of a court hearings, to practice their profession lawfully and ethically and to plead a case with dignity. They could not use expressions which could harm the court or the participants to a trial. Therefore, a lawyer's conduct in the courtroom had to comply with certain standards and to foster mutual respect, otherwise he or she could be punished.

13. The Court of Appeal held further that the Court's case-law invoked by the applicant in his defence could not be interpreted in the manner

suggested by him. The applicant's case concerned different circumstances. Moreover, under the Court's case-law, the court was bound to strike a fair balance between a lawyer's freedom of expression and the protection owed to the authority of the judiciary.

14. The Court of Appeal held that the applicant had disrespected the court given his attitude toward A.T. and the manner in which he had addressed her. Therefore, the judge had imposed an appropriate sanction on him as a warning that his behaviour was incompatible with his duty of respect for the judiciary.

THE COURT'S ASSESSMENT

15. The applicant complained that the fine of 17 November 2015 violated his right to freedom of expression guaranteed by Article 10 of the Convention.

16. The Government have not contested that the fine imposed on the applicant constituted an interference with his right to freedom of expression. Moreover, the Court of Appeal dismissed the applicant's plea that the fine was unlawful and found that it served the protection of the authority of the judiciary (see paragraphs 9 and 11-14 above). Given the available evidence, the Court finds no reason to hold otherwise.

17. The issue is, therefore, whether the fine imposed on the applicant was "necessary in a democratic society".

18. The Court reiterates the general principles for assessing the necessity of an interference with an attorney's freedom of expression in the interest of "maintaining the authority of the judiciary" (see *Karpetas v. Greece*, no. 6086/10, §§ 67-70, 30 October 2012, and *Morice v. France* [GC], no. 29369/10, §§ 124-39, ECHR 2015).

19. The remarks in dispute in the instant case were made by the applicant in the context of seemingly tense judicial proceedings while he was acting in his capacity as an attorney. In other words, they were made in a forum where it was natural for the applicant's client's rights to be defended vigorously. Also, the remarks were connected to the proceedings in H.G.'s case and were confined to the courtroom, as opposed to being voiced, for instance, in the media or before the general public.

20. The Court of Appeal found on 17 November 2015 that the impugned remarks were an attempt to push and shove the court, were insulting to any judge or court and made an impression on those present at the hearing (see paragraph 6 above). The same court in effect endorsed these findings on 15 December 2015 when it dismissed the applicant's challenge against the fine (see paragraphs 12-14 above).

21. The Court sees no reason to depart from the Court of Appeal's findings above. First of all, it notes that the applicant made the remarks in question to support the defence's challenge, even though he must or should have known that the proceedings against A.T. (see paragraph 2 above) were

still pending before the commission and that the part of the challenge he was supporting had no prospects of success, given the defence's past history with similar challenges brought against A.T. and the reasons provided by the latter for declaring them inadmissible (see paragraph 5 above).

22. Moreover, nothing in the casefile suggests that the applicant could not have voiced the substance of his criticism without using the style speech he used (see *Žugić v. Croatia*, no. 3699/08, § 47, 31 May 2011, with further references). The language such as "rock of impartiality of the justice act", "the reasons [given] by you in other cases in which you say and ask and correct your colleagues that a judge must prove [that his or her] impartiality is 100% certain, [it transpires that]...", and "[d]o you believe that there is any person in this room who believes that...", appears to be arrogant and discourteous, suggesting furthermore that A.T. was condescending toward her colleagues and ignored her own views on matters of impartiality.

23. Furthermore, the co-counsel's reaction (see paragraph 8 above), suggests that at least some participants to the hearing were left with the impression that the applicant's statements and message were such to warrant a fine.

24. As to the nature and severity of the sanction, the Court notes that, while it was the first of its kind imposed on the applicant and the statutory maximum (see paragraphs 6 and 10 above), it could not be qualified as a criminal charge within the meaning of Article 6, could neither appear on the applicant's criminal record, nor be replaced by imprisonment in the event of default of payment (see *Andreiescu v. Romania* (dec.), no. 10656/05, §§ 38, 38-43, 9 April 2013, and *Ţuluş v. Romania* (dec.) [Committee], no. 23562/13, § 30, 17 December 2019).

25. Although the amount of the fine, of more than 1,000 EUR (paragraph 6 above), could be viewed as dissuasive, the Court is not prepared to speculate on the impact of that measure on the applicant's situation, since no information was provided on its enforcement (see *Ţuluş*, cited above, § 30). Moreover, the Court notes that the Court of Appeal found the measure appropriate in the circumstances of the applicant's case (see paragraphs 13-14 above).

26. In the light of the above considerations, the Court finds that the fine imposed on the applicant was proportionate to the legitimate aim pursued (contrast and compare *Skałka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003) and that the reasons given by the national courts to justify such a measure were relevant and sufficient. The interference with the applicant's exercise of his right to freedom of expression could therefore reasonably be regarded as "necessary in a democratic society" to maintain the authority of the judiciary, within the meaning of Article 10 § 2 of the Convention.

27. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 2 February 2023.

Crina Kaufman Acting Deputy Registrar	Faris Vehabović President