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

FOURTH SECTION

DECISION

Application no. 45594/11
Adalbert-Cornel SZEKELY
against Romania

The European Court of Human Rights (Fourth Section), sitting on 5 September 2017 as a Committee composed of:

Paulo Pinto de Albuquerque, *President,*
Egidijus Kūris,
Iulia Motoc, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 15 July 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 Adalbert-Cornel Szekely, is a Romanian national who was born in 1968 and is currently serving a prison sentence in Satu Mare Prison. He was represented before the Court by Mr S. Bogdan, a lawyer practising in Cluj-Napoca.

2. The Romanian Government ("the Government") were represented by their Agent, Ms 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. At the material time the applicant was a lawyer. On 10 March 2011 A and B reported the applicant to the Anti-Corruption Department of the Prosecutor's Office (hereinafter "the DNA"). They claimed that the

applicant had asked them for EUR 10,000 in return for persuading certain judges to adopt favourable judgments in their husbands' respective cases. Subsequently, the prosecutor's office authorised the monitoring and recording of telephone conversations between the individuals involved in the influence peddling.

5. On 2 May 2011 the police initiated a criminal investigation against the applicant for influence peddling. On the same day the police caught the applicant red-handed after he had received EUR 10,000 from A and B. The applicant was arrested and taken to the DNA's headquarters.

6. On 3 May 2011 the Cluj Court of Appeal ordered his pre-trial detention for twenty-nine days. The court considered that the specific danger that the applicant posed to the public order was serious enough to justify his detention.

7. On 23 May 2011 a bill of indictment was issued and the case was registered with the Cluj Court of Appeal.

8. The applicant's detention was extended every thirty days by interlocutory judgments of the Cluj Court of Appeal. The court reasoned that the extensions were justified on account of the nature and severity of the offence for which the applicant was under investigation, and the fact that he might obstruct the course of justice by intimidating possible witnesses and the persons who had lodged complaints against him. It observed that such an offence might attract a prison sentence of longer than four years and also held that releasing the applicant would give rise to a real danger to public order, given the circumstances in which the acts had been committed, their consequences and their social impact.

9. The applicant, assisted by several lawyers of his own choice, attended the hearings. At the hearings held on 31 August, 9 and 21 September 2011 he was assisted by two lawyers, X and Y, working for the same law office.

10. By an interlocutory judgment of 5 October 2011 the Cluj Court of Appeal again extended the applicant's detention. Both the applicant and his lawyers were present at the hearing and presented their arguments against the extension of detention.

11. The applicant challenged this judgment, asking to be released from prison. The case file was sent from the Cluj Court of Appeal to the High Court of Cassation and Justice (hereinafter, "the High Court of Cassation"). Upon receipt of the case file on 10 October 2011, the High Court of Cassation sent a summons to Gherla Prison informing the applicant that a hearing was scheduled for 12 October 2011 and appointed a lawyer to ensure that the applicant had legal assistance in case a lawyer of his own choice was not able to be present.

12. The applicant received the summons on 11 October 2011. However, he did not attend the hearing before the High Court of Cassation as the prison staff informed him that it was not possible for them to bring him

from Gherla Prison (close to Cluj city) to Bucharest because no such service for detainees was available on that date.

13. The applicant informed one of his lawyers of his choice, X, of the hearing at the High Court of Cassation. X submitted a written request to the High Court of Cassation, seeking adjournment of the hearing on the grounds that the Cluj Court of Appeal had scheduled a hearing on the merits of the applicant's case on the same day and at the same time.

14. On 12 October 2011 the High Court of Cassation dismissed the request for adjournment, stressing the urgency of the procedure seeking extension of the pre-trial detention. After hearing the prosecutor and the lawyer appointed by the court, it dismissed the applicant's appeal and maintained the pre-trial detention.

15. According to the transcript of the hearing at the Cluj Court of Appeal held on the same day, the applicant attended the hearing in the presence of his lawyer Y. The other lawyer, X, was not present at the hearing.

16. The applicant's pre-trial detention lasted until 23 March 2012, when the High Court of Cassation and Justice ordered it to be replaced with an order not to leave the country.

17. On 5 April 2013 the Bucharest Court of Appeal convicted the applicant as charged and sentenced him to four years and six months' imprisonment.

B. Relevant domestic law

18. The relevant provisions of the Code of Criminal Procedure ("the CCP") concerning the presence of defendants at detention order review hearings were set out in *Lapusan v. Romania* (no. 29723/03, § 21, 3 June 2008). In particular, Article 385 of the CPP stated that the rule according to which the examination of the lawfulness of a deprivation of liberty could not take place in the absence of the detainee was not applicable in case of an appeal against a decision on precautionary measures. The presence of a prosecutor at such a hearing was always mandatory.

19. At the material time, other parts of the relevant provisions of the CCP read as follows:

Article 171

> "(5) During the entire course of criminal proceedings, in cases where legal assistance is mandatory, if a retained lawyer is unjustifiably absent or does not provide a replacement or refuses unjustifiably to provide a defence, the judicial body shall take steps to obtain the appointment by the court of a lawyer to replace him or her, allowing such replacement a reasonable period of time for the preparation of an effective defence. During the course of a trial, in cases where legal assistance is mandatory, if a retained lawyer is unjustifiably absent from the hearing and does not provide a replacement, the court shall take steps to appoint a duty lawyer to replace

him or her, allowing such replacement a minimum period of 3 days to prepare the defence.

(6) The mandate of a lawyer appointed by court ceases when the chosen lawyer appears."

Article 141

"(2) The file shall be transmitted to the appellate court within 24 hours and the appeal on points of law shall be examined within 3 days ...".

COMPLAINT

20. The applicant complained under Article 5 § 4 of the Convention that he had been denied adversarial proceedings in the review of his continued detention.

21. The applicant further complained under Article 5 §§ 1 and 3 of the Convention about his allegedly unlawful arrest, the excessive length of his pre-trial detention and the alleged lack of sufficient reasons for maintaining his pre-trial detention.

THE LAW

A. Complaint under Article 5 § 4 of the Convention

22. The applicant complained that on 12 October 2011 the High Court of Cassation had dismissed his appeal against the detention order in his and his chosen lawyer's absence. He relied on Article 5 § 4 of the Convention, which reads as follows:

"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."

1. The parties' submissions

(a) The applicant

23. The applicant submitted that his absence from the hearing before the High Court of Cassation could not be justified by the urgent nature of the procedure for reviewing the extension of his pre-trial detention.

24. The applicant further contested the Government's argument that lawyer X had acted in bad faith in asking the High Court of Cassation to postpone the hearing scheduled for 12 October 2011, so that he could attend

the hearing before the Cluj Court of Appeal, but had then not been present at either hearing (see paragraph 28 above). In this connection he contended that lawyer X had expected that the hearing at the High Court of Cassation would be adjourned. Moreover, it was the applicant who had insisted that lawyer X be present at the hearing before the Court of Appeal as there had been a high probability that the judges would ask the parties to make their final oral submissions on the merits of the case. X could not have foreseen the fact that the merits of his case would not be discussed until 29 March 2013. It was the lawyer Y who had been in charge of the procedural aspects of his case, while lawyer X had dealt with the merits. But on 12 October 2011 only lawyer Y had been present at the hearing to ascertain whether the merits of the case would be discussed. As it had appeared that the Cluj Court of Appeal would not examine the case on the merits, he had not considered it necessary to summon lawyer X to support the applicant at the hearing.

25. As regards his representation by a lawyer appointed by the High Court of Cassation, the applicant contended that he should not have been represented by any other lawyer because he had appointed lawyer X to represent him at the hearing on 12 October 2011. On 11 October 2011 lawyer X had sent the adjournment request, accompanied by a power of attorney, to the High Court of Cassation. The fact that the power of attorney had not been signed by the applicant did not mean that it was invalid, since it had been issued on the basis of a legal assistance contract – duly signed by the applicant – with the law office in which lawyer X was a partner.

26. The applicant further contended that he had been deprived of effective legal assistance before the High Court of Cassation as the legal assistance provided by the duty lawyer had been purely formal and ineffective.

(b) The Government

27. The Government submitted that the absence of the applicant and a lawyer of his choice at the hearing of 12 October 2011 before the High Court of Cassation had had no significant consequences as regards the applicant's ability to contest the lawfulness of his detention in accordance with the requirements of Article 5 § 4 for the following reasons: (a) the applicant's personal presence at the appeal hearing of 12 October 2011 had not been mandatory under domestic criminal procedure (see paragraph 18 above); (b) the review of the detention order had been of an urgent nature (a decision should have been delivered within three days – see paragraph 19 above); (c) the applicant had been brought to appear in person − on 5 October 2011 and on each occasion that his detention had been extended − before the court which had extended the term of his detention; (d) the detention order of 5 October 2011 had been issued on the same grounds as the previous detention orders, and there was no evidence that in his appeal

against the above order the applicant had presented any factual arguments that required his personal presence at the hearing of 12 October 2011; (e) the applicant's legal assistance had been ensured by a lawyer appointed by court, who had time to prepare the applicant's defence as he had been appointed a few days prior to the hearing (see paragraph 11 above); and (f) the defence presented by the lawyer appointed by the court had been effective.

28. The Government also expressed their doubts about the good faith of lawyer X. On 12 October 2011 he had not been present at any hearings even though he had sent a letter to the High Court of Cassation asking it to adjourn its hearing as he had to attend the hearing before the Cluj Court of Appeal. The applicant had been assisted before the court of appeal by lawyer Y (see paragraph 15 above).

29. In the Government's opinion, the absence of lawyer X before the High Court of Cassation had been unjustifiable. He should have ensured his substitution by another lawyer from the same law office. Moreover, neither of the applicant's lawyers had submitted the grounds for appeal or written observations concerning the extension of detention.

2. The Court's assessment

(a) General principles

30. The Court reiterates that under Article 5 § 4 of the Convention arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness" – in the Convention sense – of their deprivation of liberty. Although such a review does not always have to afford the same guarantees as those provided for in Article 6 § 1 of the Convention, a person deprived of liberty under Article 5 § 1 (c) must be heard either in person or, where necessary, through some form of representation (see *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B, and *Tarău v. Romania*, no. 3584/02, § 58, 24 February 2009). Proceedings relating to the review or extension of pre-trial detention must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *Włoch v. Poland*, no. 27785/95, § 126, ECHR 2000-XI).

31. The first fundamental guarantee which flows naturally from Article 5 § 4 of the Convention is the right to an effective hearing before a judge in the review of the lawfulness of a detention. On the other hand, this provision also guarantees the expeditious determination by the authorities of the necessity of a person's continued detention. Taking into account the specific nature of the procedure under Article 5 § 4, and in particular the promptness requirement, the Court has held that a hearing is not necessary each time an appeal is lodged, save in special circumstances. Hence, the

Court considered that if the detained person had an opportunity to appear at first instance before the judge ruling on his or her detention, the fact that he or she does not appear at the appeal stage – either in person or, where necessary, by being represented – does not in itself infringe Article 5 § 4 of the Convention unless it is in breach of the principle of equality of arms (see *Altınok v. Turkey*, no. 31610/08, § 54, 29 November 2011).

32. The Court has recognised that the procedural guarantees of Article 5 § 4 of the Convention are also respected in circumstances where a detained person was present before the first-instance court which ruled on his request to be released but did not then appear again before the second-instance court in the appeal proceedings (see *Rahbar-Pagard v. Bulgaria*, nos. 45466/99 and 29903/02, § 67, 6 April 2006; *Depa v. Poland*, no. 62324/00, §§ 48-49, 12 December 2006; and *Saghinadze and Others v. Georgia*, no. 18768/05, § 150, 27 May 2010). The Court emphasises that the principles of adversarial procedure and equality of arms were not violated in these three cases, either because neither of the parties had participated in the proceedings on appeal or because the presence of the detained person's lawyer was sufficient to satisfy these requirements.

33. By contrast, in cases where neither the detained person nor his lawyer appeared at the appeal but the public prosecutor was present at the hearings – which is a situation that differs from that mentioned above – the Court concluded that the principle of equality of arms was violated (see *Samoilă Cionca v. Romania*, no. 33065/03, § 74, 4 March 2008, and *Lapusan v. Romania*, no. 97723/03, § 53, 3 June 2008).

(b) Application of the above principles to the present case

34. Turning to the facts in the instant case, the Court notes that the applicant was absent from the hearing on 12 October 2011 before the High Court of Cassation which reviewed his appeal against the interlocutory judgment of 5 October 2011 extending his pre-trial detention (see paragraph 12 above).

35. One of the reasons for his absence was the fact that a hearing before the Cluj Court of Appeal had been scheduled on that the same day. Moreover, the prison authorities informed the applicant that they had no transport available to take detainees to Bucharest on that date (see paragraph 12 above).

36. Although the applicant was absent from the hearing of 12 October 2011, the Court notes that he had the opportunity to present his arguments against the extension of his pre-trial detention on several similar occasions, given that the Cluj Court of Appeal examined the lawfulness of his continued detention at hearings held at regular thirty-day intervals (see paragraphs 8 and 9 above). He also presented his arguments against his continued detention to the Cluj Court of Appeal orally at the hearing on 5 October 2011 (see paragraph 10 above). Following the court's refusal to

release him from prison pending trial proceedings, he lodged an appeal on points of law against the interlocutory decision of 5 October 2011 (see paragraph 11 above).

37. Moreover, the Court notes that the domestic rules of procedure in force at the relevant time did not require the mandatory presence of the defendant at hearings in which his or her appeal against an interlocutory judgment extending pre-trial detention was reviewed (see paragraph 18 above).

38. The Court will further examine whether the presence of a lawyer during the hearing of 12 October 2011 compensated for the applicant's absence in a sufficient and effective manner.

39. In this connection the Court notes that at the hearing of 12 October 2011, the applicant was represented by a lawyer appointed by the High Court of Cassation (see paragraphs 11 and 14 above). The lawyer chosen by the applicant, X, had asked the High Court for an adjournment since he needed to assist the applicant at the hearing held before the Cluj Court of Appeal on the same day (see paragraph 13 above). However, according to the transcript of the hearing at the Cluj Court of Appeal, not contested by the applicant, lawyer X was not present at that hearing either (see paragraph 15 above).

40. In examining whether, in the present case, there were relevant and sufficient grounds for the High Court of Cassation to consider that it was necessary in the interests of justice to allocate to the applicant a defence lawyer other than the one appointed by him, the Court observes that the main reason for the High Court of Cassation's appointing another lawyer was that – given the specific nature of proceedings concerning the extension of pre-trial detention, which requires speedy decisions – it tried to avoid the need for an adjournment (see paragraph 14 above). According to Article 141 of the CPP, the appeal against the detention order of 5 October 2011 should have been examined within three days (see paragraph 19 above). As the file arrived at the High Court of Cassation on 10 October 2011, it scheduled a hearing on 12 October 2011 (see paragraph 11 above). In order to avoid an adjournment for lack of defence, the High Court of Cassation appointed a lawyer to represent or assist the applicant.

41. Referring to the principles it has developed in respect of Article 6 § 3 (c) of the Convention, concerning the right of an accused to be defended by counsel "of his own choosing" and which could be applied, *mutatis mutandis*, to the right to receive legal assistance in proceedings covered by Article 5 § 4 (see *Heiko Prehn v. Germany* (dec.), no. 40451/06, 24 August 2010), the Court reiterates that, notwithstanding the importance of the relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where – as in the present case – it is for the courts to decide whether the interests of justice require that the accused be defended by

lawyers appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B, and *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII (extracts)). The Court is of the opinion that in the present case it was not arbitrary to consider that the interests of justice – and notably the interest of a speedy decision on the lawfulness of the applicant's continued detention – could override the applicant's wish to be represented by lawyer X at the hearing before the High Court of Cassation.

42. As regards the applicant's complaint concerning the effectiveness of his defence on 12 October 2011, the Court notes that the High Court of Cassation took care to appoint a lawyer to assist or represent the applicant a few days before the hearing (see paragraph 11 above) in an effort to ensure that the applicant's position was conveyed through effective representation (see, by contrast, *Tarău* cited above, § 61, and *Catană v. Romania*, no. 10473/05, § 48, 29 January 2013).

43. Moreover, there is no indication that the legal assistance provided to him by the lawyer appointed by the High Court of Cassation was manifestly ineffective or otherwise in breach of Article 5 § 4 of the Convention.

44. In the light of the above considerations the Court considers that, viewed as a whole, the proceedings initiated by the applicant in the present case afforded him a speedy and effective review of the lawfulness of his detention, as required by Article 5 § 4.

45. 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.

B. Other complaints

46. The applicant complained under Article 5 §§ 1 and 3 of the Convention about his allegedly unlawful arrest, the excessive length of his pre-trial detention and the alleged lack of sufficient reasons for maintaining his pre-trial detention.

47. 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 they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints are 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 28 September 2017.

Andrea Tamietti
Deputy Registrar

Paulo Pinto de Albuquerque
President