



Romania violated the rights of anti-corruption directorate chief prosecutor when dismissing her before the end of her mandate

In today's Chamber judgment¹ in the case of *Kövesi v. Romania* (application no. 3594/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, and a violation of Article 10 (right to freedom of expression) of the European Convention.

The case concerned the applicant's removal as the chief prosecutor of the National Anticorruption Directorate before the end of her second term following her criticism of legislative reforms in the area of corruption. She alleged that she had also been unable to challenge that decision in court.

The Court found in particular that there had been no way for the applicant to bring a claim in court against her dismissal as such proceedings would only have been able to examine the formal aspects of the presidential decree for her removal and not her substantive argument that she had been incorrectly removed for criticising the legislative changes in corruption law.

Her right to freedom of expression had been violated because she had been dismissed for those criticisms, which she had made in the exercise of her duties on a matter of great public interest. One of her duties as anticorruption chief prosecutor had been to express her opinion on legislative reforms which could have an impact on the judiciary and its independence, and on the fight against corruption.

It appeared that her premature removal had defeated the very purpose of maintaining judicial independence and must have had a chilling effect on her and other prosecutors and judges in taking part in public debate on legislative reforms affecting the judiciary and judicial independence.

Principal facts

The applicant, Laura-Codruța Kövesi, is a Romanian national who was born in 1973 and lives in Bucharest (Romania).

Ms Kövesi was first appointed as chief prosecutor of the National Anticorruption Directorate (Direcția Națională Anticorupție, "the DNA"), in May 2013 for a three-year term. After positive assessments from the then Minister of Justice and the prosecutors section of the Higher Council of the Judiciary (Consiliul Superior al Magistraturii, "the CSM"), the President of Romania in April 2016 re-appointed her for a second term, to run from May 2016 to May 2019.

Parliamentary elections in December 2016 led to the formation of a new government, which proposed several legislative reforms in the justice system, including among other things the decriminalization of the abuse of office committed when approving or passing legislation. The legislative measures, adopted in 2017, prompted demonstrations and international expressions of concern as well as an investigation by the DNA into the manner in which certain pieces of legislation had been adopted.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In February 2018 the Minister of Justice proposed that the applicant be removed from office, referring, among other things, to three Constitutional Court decisions adopted in connection with the activity of the DNA and to public statements she had made. The section for prosecutors of the CSM refused by a majority to endorse her dismissal, largely rejecting the Minister's criticisms of the applicant and finding no evidence that her management had been inadequate. In April 2018 the President of Romania refused in turn to sign the dismissal decree, which prompted a complaint to the Constitutional Court by the Prime Minister.

In May 2018 the Constitutional Court ordered the President to sign the decree, finding, among other things, that neither the President nor the Constitutional Court were authorised to assess the reasons put forward by the Minister of Justice in his proposal. The Court also clarified that the administrative courts could only examine the external lawfulness of the administrative decision issued in the case, more specifically the lawfulness of the procedure but not its utility.

The applicant was removed from office in July 2018.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial/fair hearing) of the Convention, Ms Kövesi complained that she had been denied access to a court to defend her rights in relation to her disciplinary dismissal from the position of chief prosecutor of the DNA.

Under Article 10 (freedom of expression), she alleged that her mandate had been terminated after she had publicly expressed her views, in her professional capacity, on legislative reforms affecting the judiciary.

She also raised a complaint under Article 13 (right to an effective remedy) taken in conjunction with Article 6 § 1 and Article 10 of the Convention.

The application was lodged with the European Court of Human Rights on 28 December 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Jon Fridrik **Kjølbro** (Denmark), *President*,
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Branko **Lubarda** (Serbia),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),
Péter **Paczolay** (Hungary),

and also Andrea **Tamietti**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court reiterated that in principle, disputes between civil servants and the State fell within the scope of Article 6 unless two conditions had been met, as set out in [Vilho Eskelinen and Others](#). The conditions were that legislation had expressly excluded access to a court to resolve the dispute and the exclusion had to be justified on objective grounds in the State's interest.

There was no such express exclusion in Ms Kövesi's case, confirmed by the Government's argument that she had not exhausted domestic remedies by not taking her case to an administrative court.

Furthermore, any exclusion in this case would not have been objectively justified: an absence of judicial control of the process of removal of the chief prosecutor of the DNA could not be in the

interests of the State while only oversight by an independent judicial body could protect senior members of the judiciary from arbitrariness from executive power.

The Court thus concluded that Article 6 applied to Ms Kövesi's case under its civil aspect.

On the substantive question, the Court noted that the Government did not dispute the fact that there had been no judicial review of the applicant's case. Rather, it had submitted that she had not exhausted the various available domestic remedies, in particular by not applying to the administrative courts against the Minister of Justice's report, which had laid out the grounds for her dismissal, against the CSM's decision, or the president's removal decree.

However, the Court noted that the Constitutional Court had found that the Minister's report was regarded as a preliminary act which had produced no effects by itself. Furthermore, documents submitted by the Government had shown that non-governmental organisations had tried to challenge the Minister's report in court without success. As for the CSM decision, she had had no interest in attacking it as it had been in her favour.

In addition, the Constitutional Court had found that any administrative court claim against the presidential decree could lead only to an assessment of whether the external formalities of adopting the decree had been observed, whereas the applicant's complaint had required an examination of the merits and the internal legality of the decree.

The Court was thus not convinced that the applicant had had an available domestic remedy for effectively attacking in court what she had really intended to challenge, namely the reasons for her removal from the position of chief prosecutor of the DNA.

The Court highlighted that any serious and genuine dispute over the lawfulness of an interference with an individual's civil rights entitled that person "to have this question of domestic law determined by a tribunal". Council of Europe and European Union instruments had also attached increasing importance to procedural fairness in the removal or dismissal of prosecutors, including the intervention of an authority independent of the executive and the legislature.

The Court dismissed the Government's objection of non-exhaustion of domestic remedies and concluded that the respondent State had impaired the very essence of the applicant's right of access to a court owing to the specific boundaries for a review of her case set by the Constitutional Court. There had accordingly been a violation of Ms Kövesi's right of access to a court.

Article 10

The Court found that there was *prima facie* evidence of a causal link between the applicant exercising her right to freedom of expression and the termination of her mandate. Other justifications for her removal provided by the Government were not convincing. The termination of her mandate had thus been an interference with her right to freedom of expression.

It then focussed its analysis on whether the Government action in removing her had pursued a legitimate aim or "pressing social need", justifications for an interference under Article 10 § 2.

Legitimate aim

The Court noted that the Minister of Justice had cited the need to protect the rule of law as a reason for removing the applicant from her post, a process which he had begun after she had criticised his legislative proposals and opened criminal investigations in connection with statutory instruments with which he had been involved. He had also alleged that her behaviour had created a crisis, which had made Romania a subject of concern at national, European and international level.

The Court observed that that concern, on the contrary, was about the removal of the applicant.

Furthermore, it considered that no evidence had been presented to show that the measure had served the aim of protecting the rule of law or any other legitimate aim. It had been a consequence

of the applicant's previous exercise of the right to freedom of expression. Nor had the Government submitted any legitimate aim for the interference in question.

The Court thus could not accept that the interference had pursued a legitimate aim.

While such a conclusion usually ended its examination of complaints under Article 10, it nevertheless decided to assess whether the interference had been necessary in a democratic society.

Necessary in a democratic society

The Court noted that the applicant had made the comments in question in her professional capacity as chief prosecutor of the DNA. She had also used her legal power to start investigations into suspicions of crimes of corruption committed by Government members in connection with highly disputed pieces of legislation and to inform the public about those investigations. She had in addition expressed her opinion directly in the media or during professional gatherings.

The Court attached particular importance to the office held by the applicant as chief of the national anticorruption prosecutor's office, whose functions and duties included expressing her opinion on legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department.

The Committee of Ministers of the Council of Europe had recognised that prosecutors should have the right to take part in public discussions on matters concerning the law, the administration of justice and the promotion and protection of human rights, and that they should be in a position to prosecute public officials for offences, particularly corruption, without obstruction.

Furthermore, the applicant's position and statements, which had clearly fallen within the context of a debate on matters of great public interest, called for a high degree of protection for her freedom of expression and a strict scrutiny of any interference by the respondent State. The State, in turn, had only limited discretion ("a narrow margin of appreciation") in regard to such interferences.

The Court found that the applicant's removal and the reasons justifying it could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which – according to Council of Europe and other international instruments – was a key element for the maintenance of judicial independence. It thus appeared that her premature removal had defeated the very purpose of maintaining the independence of the judiciary.

The severity of the measure must also have had a "chilling effect" by discouraging not only her but also other prosecutors and judges from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

Referring to its findings under Article 6, the Court also held that the restrictions on her freedom of expression had not been accompanied by effective and adequate safeguards against abuse.

The applicant's removal from her position of chief prosecutor of the DNA had therefore not pursued any of the legitimate aims listed in Article 10 § 2 and had not been "necessary in a democratic society". There had therefore been a violation of Article 10.

[Other Articles](#)

Given its conclusions under Article 6, the Court found that no separate issue arose under Article 13.

[Just satisfaction \(Article 41\)](#)

The applicant did not submit a claim for just satisfaction and the Court considered that there was no call to award her any sum on that account.

The judgment is available only in English.

Press Release

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.