



Applicants' conviction for abuse of office as judges was not precluded by guarantee of judicial independence

In today's **Chamber** judgment¹ in the case of [Bădescu and Others v. Romania](#) (applications nos. 22198/18, 48856/18 and 57849/19) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 7 (no punishment without law) of the European Convention on Human Rights

The case concerned a lack of foreseeability in the criminal law alleged by the applicants, who were judges who had been convicted of abuse of office.

Like the national courts, the Court noted that the applicants had not been prosecuted for the delivery of a judicial decision as such, but for having adopted a particular line of conduct prior to the drafting of that decision and having then knowingly devised legal reasoning that was in breach of the law for the purpose of delivering a predetermined ruling with a prejudicial result. The national authorities had thus found that the applicants had misrepresented the facts such that the *ne bis in idem* principle could be applied to a case that had been brought before them.

The Court attached weight to the analysis by the High Court of Cassation and Justice according to which the purpose of a criminal investigation into abuse of office was not to examine the lawfulness and merits of a decision delivered at the end of the adjudication process – a role that fell exclusively to the competent supervisory bodies provided for by law – but to identify, beyond the decision itself, conduct that was in breach of official duties and corresponded to the material element of the offence, as such conduct could, in certain cases, have an influence on the ruling to be given. Thus, the national courts had distinguished the act that had engaged the applicants' criminal liability from the delivery of a decision in good faith.

Principal facts

The applicants, Liliana Bădescu ("the first applicant"), Dumitrița Piciarcă ("the second applicant") and Veronica Cîrstoiu ("the third applicant") are three Romanian nationals who were born in 1957, 1955 and 1957 respectively and live in Bucharest. They were judges of the Criminal Division of the Bucharest Court of Appeal.

In a final judgment delivered on 4 April 2011 the Bucharest Court of Appeal sentenced one S.D. to seven years' imprisonment for various financial offences. Making use of an extraordinary remedy, S.D. lodged two applications for review with the Bucharest Court of Appeal. The applications for review were heard by a bench of three judges. As these two challenges were unsuccessful, S.D. lodged a third challenge. The case was assigned randomly to a bench composed of the three applicants.

In a final judgment of 22 February 2012 the Bucharest Court of Appeal, sitting as a bench composed of the three applicants, allowed the third application for review and overturned S.D.'s conviction. It noted that S.D. had previously been prosecuted for offences relating in part to those for which he had been convicted in the final judgment of 4 April 2011. It noted that the criminal investigation in that

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.

case had resulted in a discontinuance order, which had been upheld by the Craiova Court of Appeal, and concluded that, in the case at hand, there had been a breach of the *ne bis in idem* principle, since S.D. had been prosecuted twice.

In 2013 a criminal investigation was opened against the third applicant and other individuals in connection with a number of corruption-related offences. In a judgment of 26 March 2016, which was upheld in a final judgment of the High Court of Cassation and Justice ("the High Court"), the Constanța Court of Appeal sentenced the third applicant to seven years' imprisonment, in particular for accepting bribes. She was accused of having accepted a sum of money in February 2012 as a bribe for delivering a decision, together with the other two applicants, finding in favour of S.D. in the context of his applications for review.

In the meantime, on 27 April 2012, a disciplinary investigation had been opened against the applicants following several articles in the press concerning the overturning of S.D.'s conviction. The Judicial Inspection Board had called for a disciplinary sanction to be imposed on the applicants.

In a decision of 4 December 2012, the National Judicial and Legal Service Commission (*Consiliul Superior al Magistraturii*), by a majority, rejected the Judicial Inspection Board's proposal, finding that the acts identified by the board did not constitute misconduct.

On 28 February 2012 the National Anti-Corruption Prosecution Service ("the Anti-Corruption Service") opened a criminal investigation against the three applicants of its own motion and instituted criminal proceedings against them on 3 April 2012 for aggravated abuse of office and for favourable treatment of an alleged offender.

In a decision of 7 August 2012 the Anti-Corruption Service discontinued the criminal proceedings against the three applicants. It considered that, although the constituent elements of the offences were indeed established in the case at hand, under section 2 of Law no. 303/2004, which provided that judges were independent and irremovable and that all institutions were bound to respect their independence, judges could not be held criminally liable for acts constitutive of abuse of office and negligence in the performance of duties in respect of the decisions they delivered in that capacity. The Anti-Corruption Service considered that there was some doubt as to the legal framework governing the criminal liability of judges for offences linked to their office with regard to the measures ordered in judicial decisions.

The applicants lodged a complaint against that decision with the Bucharest Court of Appeal. They complained that they had been prosecuted for the ruling they had given in the judgment of 22 February 2012.

In a final judgment delivered on 1 October 2012 the Bucharest Court of Appeal dismissed the applicants' complaint.

In a decision of 29 January 2014 the Chief Prosecutor of the Anti-Corruption Service overruled, of his own motion, the Service's decision of 7 August 2012 and ordered the reopening of the criminal proceedings against the three applicants.

In an application of 15 April 2014 the Anti-Corruption Service sent the three applicants for trial before the Bucharest Court of Appeal on charges of abuse of office, favourable treatment of an alleged offender and forgery. The Anti-Corruption Service accused the applicants of failing to fulfil their statutory obligations and of having delivered an ill-founded decision owing to an external factor that had influenced their decision, namely, the bribe which the third applicant had received from S.D.

In a judgment of 19 May 2016, the Bucharest Court of Appeal acquitted the first and second applicants of all charges and severed the case against the third applicant from the rest of the proceedings on the ground that the criminal proceedings against her for accepting a bribe in connection with the delivery of the judgment of 22 February 2012 were pending before the High Court.

Both the Anti-Corruption Service and the second and third applicants lodged appeals with the High Court. The Anti-Corruption Service challenged the acquittal of the two applicants, considering that their guilt had been proved.

In a final judgment of 14 June 2017, the High Court sentenced the first and second applicants to four years' imprisonment for abuse of office.

On 19 January 2018 the first and second applicants lodged an appeal on points of law with the High Court against the final judgment of 14 June 2017.

In a final judgment of 7 November 2019, the High Court dismissed the appeal on points of law as ill-founded. It pointed out that the independence of judges was not absolute and went hand in hand with the principle of responsibility of members of the judiciary, the principle that all judicial acts must be consistent with the law and the principle of equal rights for all citizens. It further held that judges who, in the discharge of their official duties, committed an act in breach of the law, whether intentionally or in bad faith, and thereby caused damage to or infringed the legitimate rights of a natural or legal person, could be held criminally liable for the offence of abuse of office. It explained that criminal liability for abuse of office did not arise where the judge was accused of mere errors consisting in an inaccurate assessment of the evidence and/or a flawed interpretation and application of the law on a purely random and unintentional basis – which could be remedied by judicial review – but where the commission of the acts in question, giving rise to an unlawful ruling, was the result of a conscious and wilful attitude falling under the definition of bad faith.

In a judgment of 10 May 2018, which was upheld in a final judgment of the High Court on 27 March 2019, the Bucharest Court of Appeal convicted the third applicant of abuse of office.

Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), the applicants submitted that the statute applicable to abuse of office was unclear and unforeseeable. They alleged that they could not have foreseen that the delivery of a judicial decision by a judge in the performance of his or her duties might constitute the material element of an offence.

The applications were lodged with the European Court of Human Rights on 7 May 2018, 15 October 2018 and 1 November 2019.

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

Lado **Chanturia** (Georgia), *President*,
 Jolien **Schukking** (the Netherlands),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Ana Maria **Guerra Martins** (Portugal),
 Anne Louise **Bormann** (Denmark),
 András **Jakab** (Austria) and,
 Ioan Florin **Streteanu** (Romania), *ad hoc Judge*,

and also Simeon **Petrovski**, *Deputy Section Registrar*.

Decision of the Court

Article 7

After considering it appropriate to examine the applications jointly in a single judgment, the Court rejected the third applicant's application (no. 57849/19) on the grounds that the complaint was ill-founded and/or out of time.

As to the first and second applicants' applications, the Court observed that the successive statutes criminalising abuse of office were similarly worded and defined this offence as the omission or deficient performance of an act by a public official in the exercise of his or her office, thereby causing damage to or an infringement of the rights or legitimate interests of a third party.

The Court observed that the legislature had defined the punishable conduct in somewhat general terms. Consequently, the domestic legislation did not contain an exhaustive list of the forms such conduct might take. As the Court had already had occasion to make clear, the requirement of statutory precision did not preclude drafting in general terms in the field of criminal law. The role of adjudication vested in the courts was precisely to dissipate such interpretational doubts as remained and to allow changes in everyday practice to be taken into account.

The Court further observed that, in order to determine whether the acts of which the applicants were accused fell within the scope of the criminal law, the national courts had applied the statute defining abuse of office in the light of the more general context of constitutional law and the legislation governing the work of judges and prosecutors.

The Court reiterated that, from the standpoint of Article 7 of the Convention, it had to have regard to the domestic law "as a whole" and to the way it was applied at the material time.

Thus, in the present case, the national courts had taken into account the fact that judges were independent and subject only to the law in the exercise of their office and that review of judicial decisions was ensured by the use of the available remedies.

As to the requirement that the law be foreseeable as to its effects, it was clear from the examples of domestic case-law included in the case file that the national courts had consistently held that judges could not be held criminally liable for abuse of office on account of the reasoning, even when flawed, of a judicial decision. The case-law in question showed that judges could be held criminally liable only in situations where they had discharged their duties in bad faith. In order for abuse of office to be established, a distinction had to be drawn between situations where a case had been decided in good faith and those where a judge had misconstrued a legal rule deliberately and in bad faith, thereby steering the process towards an outcome contrary to law in a premeditated breach of the rules.

The Court noted more particularly that the applicants had been judges specialising in criminal law with several years of service in the judicial system. Having regard to their status and experience, it had not been unreasonable to expect that they would act with great caution and take particular care in assessing the risks involved in the exercise of their office. The Romanian legal system had, at the time, contained clear and compelling indications from which it followed that the act, by a judge, of knowingly delivering a harmful judicial decision in breach of the law was liable to constitute an offence, without thereby undermining the independence of the judiciary as guaranteed by the Constitution and international instruments. Accordingly, there should have been no doubt in the applicants' minds as to the consequences they had been liable to incur in delivering the judgment in question.

The Court further observed that the national courts had unanimously held that a judge was a civil servant within the meaning of Article 175 of the new Criminal Code and that he or she could be a perpetrator of the offence of abuse of office. They had also all found, with reference to the relevant case-law, that there was a general rule to the effect that the delivery of a judicial decision could not give rise to criminal proceedings against the judge, who was independent and whose decisions could be reviewed only through the use of the available remedies, and that a judge could be held criminally liable only where certain conditions – which were established in the case-law – were met.

The Court noted that, as the national courts had pointed out, the applicants had not been prosecuted for the delivery of a judicial decision as such, but for having adopted a particular line of conduct prior to the drafting of the judgment and having then knowingly devised legal reasoning that was in breach of the law for the purpose of delivering a predetermined ruling in the case concerning S.D. with a

prejudicial result. The national authorities had thus found that the applicants had misrepresented the facts such that the *ne bis in idem* principle could be applied to the case before them.

In this connection, the Court attached weight to the High Court's analysis according to which the purpose of a criminal investigation into abuse of office was not to examine the lawfulness and merits of a decision delivered at the end of the adjudication process – a role that fell exclusively to the competent supervisory bodies provided for by law – but to identify, beyond the decision itself, conduct that was in breach of official duties and corresponded to the material element of the offence, together with the motive for the act in question, as such conduct could, in certain cases, have an influence on the ruling to be given. Thus, the national courts had distinguished the act that had engaged the applicants' criminal liability from the delivery of a decision in good faith.

The Court paid particular attention to the fact that the applicants had raised their complaint before the highest national courts, which had responded by explaining the structure of the offence and establishing its constituent elements in the present case. The national courts had likewise examined the applicants' argument that the independence of judges, which both the Constitution and international instruments guaranteed, precluded their conviction for abuse of office in connection with the delivery of a judicial decision. The courts had laid out the manner in which the independence of judges was to be interpreted and understood in the light of the constitutional principles and international instruments which they considered relevant in the present case.

The Court concluded that the provisions criminalising abuse of office at the relevant time, together with the case-law interpreting them, had been drafted with sufficient precision to have enabled the applicants, who had themselves been judges, to discern to a reasonable degree in the light of the circumstances that their actions might lead to a criminal conviction, without calling into question the guarantee of judicial independence. Furthermore, the interpretation used by the national courts to establish the applicants' individual liability had been consistent with the essence of the offence in question.

There had therefore been no violation of Article 7 of the Convention.

The judgment is available only in French.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

We are happy to receive journalists' enquiries via either email or telephone.

Denis Lambert (tel.: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)

Inci Ertekin (tel.: + 33 3 90 21 55 30)

Neil Connolly (tel.: + 33 3 90 21 48 05)

Jane Swift (tel.: + 33 3 88 41 29 04)

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.