THIRD SECTION

CASE OF HANU v. ROMANIA

(Application no. 10890/04)

JUDGMENT

STRASBOURG

4 June 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hanu v. Romania,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Luis López Guerra,
Nona Tsotsoria,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 14 May 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 10890/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Marius Hanu ("the applicant"), on 6 January 2004.

2. The applicant was represented by Mrs A. Hanu, a lawyer practising in Constanţa. The Romanian Government ("the Government") were represented by their Agents, Mr Răzvan-Horaţiu Radu and Mrs Irina Cambrea of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the criminal proceedings against him had been unfair because the domestic appellate courts had not examined the evidence directly and had reached completely different decisions on the basis of the same evidence.

4. On 20 October 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. As Mr Corneliu Bîrsan, the judge elected in respect of Romania, had withdrawn from the case (Rule 28 of the Rules of Court), the President of the Chamber appointed Mrs Kristina Pardalos to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lives in Constanţa.

7. On 22 March 2000 criminal proceedings were instituted against the applicant, a bailiff by profession. He was charged with bribery, abuse of power and forgery, on the basis of criminal complaints lodged by M.M. and G.A (hereinafter "the complainants"), two individuals he had assisted as a bailiff in enforcement proceedings. M.M. alleged that the applicant had requested money from her in exchange for him asking a judge to assist with the enforcement of a title deed, while G.A. stated that the applicant had requested a certain amount of money from him to assist with the enforcement of a judgment.

8. On 22 March 2000 an operation was set up in respect of the applicant. The police gave M.M. a tape recorder and money which was marked with a fluorescent substance. She and her cousin met the applicant in a bar. According to the report of the operation, M.M. had wanted to hand the money to the applicant, but he had made a signal to her to put it into his briefcase. Her cousin had not been there when this had happened. After the envelope containing the money had been placed in the applicant's briefcase, the police had appeared. The report of the operation stated that there had been no fluorescent substance found on the applicant's hands, but that money had been found in the briefcase.

9. The applicant was held in pre-trial detention from 30 November 2001 until 27 December 2001, when he was released following a court order dismissing a request by a prosecutor to keep him in custody.

10. On 3 December 2001 the prosecutor attached to the Constanţa Court of Appeal ("the Court of Appeal") issued an indictment against the applicant for bribery and abuse of power. The charges against him were based on statements of the complainants and other witnesses, and the report of the operation.

11. On 24 September 2002 the Constanţa County Court acquitted the applicant of all charges after hearing evidence from the witnesses, the complainants and the applicant.

12. In reaching its decision, the court noted that the only prosecution evidence available was the statements of the complainants and other witnesses, some of whom were the complainants' relatives, who could only state what they had been told by them. Moreover, none of the witnesses actually saw the money being given to the applicant. Secondly, the court noted that no mention was made in any of the evidence submitted to it of the tape recorder that had been used during the police operation. It held, therefore, that none of the evidence was conclusive proof as to the applicant's guilt.

13. The prosecutor appealed. In a hearing held on 10 January 2003 before the Court of Appeal, the prosecutor sought conviction of the applicant, while the applicant's lawyer asked for the appeal to be dismissed. The applicant did not give evidence before the court, but he was given the opportunity to address the court at the end of the hearing and declared that he was innocent. No witnesses were heard and no additional evidence was adduced at that stage of the proceedings. Neither the applicant nor his lawyer submitted written observations.

14. In a decision of 23 January 2003, the Court of Appeal overturned the acquittal and found the applicant guilty of both charges, sentencing him to three years' imprisonment suspended. It concluded that the witness statements were proof that the applicant had committed the offences alleged.

15. The applicant lodged an appeal on points of law, claiming, *inter alia*, that the appellate court had failed to hear the witnesses directly regarding the statements on which it had relied and had failed to take into account other evidence in his defence; that the prosecution had withheld the tape-recording of the operation from the case file even though the applicant had asked for it to be assessed by the courts and the prosecutor had authorised the recording himself; and that none of the evidence adduced was conclusive proof that he had committed the offences alleged.

16. A hearing was held on 27 June 2003 before the Supreme Court of Justice ("the Supreme Court"). The applicant did not attend the hearing, but his lawyer was present. No witnesses were heard and no new evidence was adduced during the hearing. On that day, the court concluded the proceedings and set a date for the public delivery of its final decision.

17. At the following hearing on 4 July 2003, the Supreme Court dismissed the applicant's appeal on points of law with final effect. It concluded that the Court of Appeal had assessed the evidence correctly and that the applicant's submissions were not corroborated by any of the other evidence adduced. It emphasised that besides the statements of the complainants, the Court of Appeal had also relied on statements of witnesses who knew that G.A. had attempted to secure money to pay the applicant. It also considered the fact that no fluorescent substance had been found on the applicant's hands to be irrelevant, given that he had requested the money which was found in his briefcase. No reference was made to the applicant's submissions regarding the tape recorder or to the appellate court's failure to hear the complainants and the witnesses directly.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of the Romanian Code of Criminal Procedure concerning the authority of the appellate courts, as in force at the material time, read as follows:

Article 378

"(1) The court deciding the appeal shall examine the contested decision on the basis of the case file and any new written documents adduced to it.

(2) In deciding the appeal, the court may make a new assessment of the evidence in the case file and may order any new evidence that it deems to be necessary ..."

Article 379

"In deciding the appeal, the court shall decide to:

...

(2) uphold the appeal and:

(a) quash the decision of the first-instance court, deliver a new decision and proceed in accordance with Article 345 et seq. to its judgment on the merits ... "

19. The relevant provisions of the Code of Criminal Procedure concerning the authority of courts ruling on appeals on points of law, as in force at the material time, as well as amendments introduced in September 2006, are described in the case of *Găitănaru v. Romania* (no. 26082/05, §§ 17-18, 26 June 2012). In particular, article 385^{15} of the Code, as in force at the material time, provided for the Supreme Court of Justice, when allowing an appeal on points of law, to refer the case to a lower court if it was necessary to hear evidence in the case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained that the criminal proceedings against him had been unfair because the domestic courts had not examined the evidence directly and had reached completely different decisions on the basis of the same evidence. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

21. The Government raised the preliminary objection of non-compliance with the six-month rule. They argued that the applicant had not complained of any unfairness in the criminal proceedings against him in his initial letter to the Court, and that the first time he had mentioned this aspect of his complaint had been in his letter to the Court of 24 February 2010.

22. The applicant contested this argument. He referred to his initial letter and application form, contending that he had complained repeatedly that the proceedings had been unfair on account of the fact that the domestic courts had not assessed any of the evidence in his defence.

23. The Court reiterates that it is master of the characterisation to be given in law to the facts of the case and that it is not bound by the characterisation given by an applicant or a Government (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). Moreover, a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172).

24. Turning to the facts of the instant case, the Court notes that in one part of his application form, the applicant relied on Article 6 § 1 to argue that the proceedings against him had been unfair and unreasonably lengthy. In another part of his application he outlined the exact nature of his complaint, requesting, *inter alia*, that the proceedings against him be declared unfair on the grounds that all the evidence in his defence had been ignored and the domestic courts had delivered different decisions on the basis of the same evidence. Therefore, the Court is satisfied that the applicant did raise this complaint in substance in his application form.

25. It follows that the Government's objection must be dismissed.

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The applicant argued that the criminal proceedings against him had not met the requirements of a fair trial. Referring to the cases of *Constantinescu v. Romania* (no. 28871/95, ECHR 2000-VIII) and *Dănilă v. Romania* (no. 53897/00, 8 March 2007), he complained that the Court of Appeal had not heard him or the witnesses and that his conviction had been based on the same evidence that had led to his being acquitted by the court of first instance. He argued that, as the court of final appeal, the Supreme Court should have dealt more carefully with his case, and ordered that he himself and the other witnesses be heard once more.

28. Furthermore, relying on the principle that the judicial bodies must play an active role (*rolul activ al instanţei*), the applicant argued that the courts had been under an obligation to hear all the evidence necessary to the case, even if the parties had not expressly asked for specific evidence to be

examined. In conclusion, he claimed that his right to a fair trial had been violated.

29. The Government argued that the present case differed from the case of *Constantinescu* (cited above, § 55) in that the applicant had been duly heard by the Constanţa County Court, acting as the court of first instance, and that the transcript of his evidence had been attached to the case file. The applicant had not asked before the Court of Appeal that the evidence be heard directly. In addition, since the Supreme Court had ruled on the applicant's appeal on points of law, its authority had been limited to matters of law and it could not have examined the facts of the case.

30. Moreover, the Government insisted that neither the applicant nor his lawyer had specifically requested further evidence to be heard by the appellate courts. In this connection, they pointed out that the applicant's case did not reveal special circumstances that would have required further evidence to be examined *ex officio*. In conclusion, the Government argued that there had been no violation of Article 6 § 1 of the Convention in the present case.

2. The Court's assessment

31. The Court reiterates that the manner of application of Article 6 to proceedings before appellate courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.

32. The Court has held that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by the accused who claims that he has not committed the act alleged to constitute a criminal offence (see *Ekbatani v. Sweden*, 26 May 1988, § 32, Series A no. 134, *Constantinescu*, cited above, § 55, and *Lacadena Calero v. Spain*, no. 23002/07, § 36, 22 November 2011).

33. Article 6 of the Convention does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts, and the Court's task is to verify the fairness of the domestic proceedings, taken as a whole, including the manner in which the evidence was assessed (*García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Moreover, although it is normally for the national courts to decide whether it is necessary or advisable to call a witness, exceptional circumstances could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6 (*Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158).

34. Turning to the present case, the Court finds that it is not disputed that the applicant was first acquitted by the County Court but was afterwards convicted by the Court of Appeal and the Supreme Court despite the fact that neither court had actively heard him or any other evidence directly. Although the Court of Appeal allowed the applicant to make a statement at the end the hearing, it should be noted that the Court has already found that the use made of such an opportunity is not sufficient to the purpose of Article 6 of the Convention (*Constantinescu*, cited above, § 58). Accordingly, in order to determine whether there was a violation of Article 6, an examination must be made of the role of these two levels of jurisdiction and the nature of the issues which they were called upon to try (see *Popa and Tănăsescu v. Romania*, no. 19946/04, § 47, 10 April 2012).

35. Firstly, the Court notes that the provisions of the Code of Criminal Procedure in force at the material time did not require the appellate court to rule on the merits of the case, but that it nonetheless had the possibility to do so (see paragraph 18 above). In the instant case, the Court of Appeal availed itself of this possibility and, relying solely on the evidence the applicant and the witnesses had given in the County Court, quashed the applicant's acquittal. The matters that the Court of Appeal examined in order to decide whether the applicant was guilty were of a factual nature which would have justified a new examination of the evidence, especially since it was the first court to convict him.

36. Secondly, the procedure in force at the material time permitted the Supreme Court to give a new judgment on the merits even when examining an appeal on points of law. In the cases of *Popa and Tănăsescu* (cited above, § 48) and *Găitănaru* (cited above, § 30), the Court has already had the opportunity to examine the scope of the Supreme Court's powers, and found that proceedings before it were full proceedings governed by the same rules as a trial on the merits, with the court being required to examine both the facts of the case and questions of law. The Supreme Court could decide either to uphold the applicants' acquittal or convict them, after making a thorough assessment of the question of their guilt or innocence. If the necessity to hear evidence directly arose from the circumstances of the case, the Supreme Court could refer the case to a lower court in accordance with the provisions of the Code of Criminal Procedure in force at the material time (see paragraph 19 above).

37. In the instant case, the Supreme Court did not avail itself of these possibilities but judged the case on the basis of the evidence given before the prosecutor and the County Court. Moreover, the matters that the Supreme Court examined in order to declare the applicant guilty were of a factual nature: the Supreme Court had to establish if the applicant had requested money from the complainants in order to assist them with their enforcement proceedings (see paragraph 17 above). Contrary to the Government's arguments (see paragraph 29 above), the Court notes that the

Supreme Court gave its own interpretation of the factual situation in the case. Its decision was not therefore limited to matters of law.

38. Furthermore, with regard to the Government's argument that neither the applicant nor his lawyer had specifically asked the domestic courts to hear him or the witnesses, the Court notes that the applicant based his appeal on points of law on the appellate court's failure to hear the witnesses directly and on the prosecution's refusal to admit the tape-recording of the operation to the case file (see paragraph 15 above). The Court takes the view that the applicant gave the domestic courts sufficient information to justify a new examination of the evidence, especially since he had been acquitted by the County Court. In any event, the Court reiterates that the domestic courts are under an obligation to take positive measures to such an end, even if the applicant has not requested it (see *Dănilă v. Romania*, no. 53897/00, § 41, 8 March 2007, and *Găitănaru*, cited above, § 34).

39. It therefore appears that when they convicted the applicant neither the Court of Appeal nor the Supreme Court relied on any new evidence. Instead, they based their decisions on the evidence given by the applicant and the witnesses before the prosecutor and the County Court. However, the latter, after having heard the witnesses in person, had held that none of the evidence was conclusive proof as to the applicant's guilt, and acquitted him (see paragraph 12 above). Even if the appellate courts could, in principle, have given their own interpretation of the evidence adduced before them, in the instant case the applicant was found guilty on the basis of witness testimony that had been found insufficient by the County Court and had justified his acquittal.

40. In these circumstances, the omission of the Court of Appeal to hear the witnesses in person, and the failure of the Supreme Court to redress the situation by referring the case back to the Court of Appeal for a fresh examination of the evidence, substantially reduced the applicant's defence rights (*Destrehem v. France*, no. 56651/00, § 45, 18 May 2004 and *Găitănaru*, cited above, § 32). The Court reiterates that its case-law underlines that one of the requirements of a fair trial is the possibility for the accused to confront the witnesses in the presence of a judge who must ultimately decide the case, because the judge's observations on the demeanour and credibility of a certain witness may have consequences for the accused (see *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002; *mutatis mutandis*, *Pitkänen v. Finland*, no. 30508/96, §§ 62-65, 9 March 2004; and *Milan v. Italy* (dec.), no. 32219/02, 4 December 2003).

41. The foregoing considerations are sufficient to enable the Court to conclude that in the instant case, the domestic courts failed to comply in the applicant's case with the requirements of a fair trial.

42. Since that requirement was not satisfied, the Court considers that there has been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

43. Lastly, the applicant complained under Article 5 of the Convention that he had been unlawfully arrested on 30 November 2001 and kept in pre-trial detention until 27 December 2001. Furthermore, relying on Article 6 § 1, he claimed that the proceedings against him had been unreasonably lengthy.

44. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

46. The applicant claimed 150,000 Euros (EUR) in respect of pecuniary damage and EUR 100,000 in respect of non-pecuniary damage. With regard to the claim for pecuniary damage, the applicant argued that his criminal conviction had led to him losing a very lucrative job and that because his professional reputation had been tarnished he could only obtain poorly paid temporary work. Concerning the claim for non-pecuniary damage, he alleged that he had been suffering from depression and health problems, had been experiencing family difficulties, and had lost all confidence in the legal system.

47. The Government argued that there was no causal link between the alleged pecuniary damage and the alleged breach of the Convention. With regard to the claim for non-pecuniary damage, they asked the Court to rule that the acknowledgment of the violation of the applicant's right to a fair trial represented in itself just satisfaction. In any event, they argued that the amount claimed by the applicant was speculative, excessive and not proven.

48. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6.

49. Therefore, ruling on an equitable basis, in accordance with Article 41, it awards him EUR 3,000 in respect of non-pecuniary damage.

50. Moreover, the Court reiterates that when a person, as in the instant case, was convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the inflicted violation (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003, and *Tahir Duran v. Turkey*, no. 40997/98, § 23, 29 January 2004). In this connection, it notes that Article 408^1 of the Romanian Code of Criminal Procedure provides for the possibility of a retrial or the reopening of domestic proceedings where the Court has found a violation of an applicant's fundamental rights and freedoms (see *Mircea v. Romania*, no. 41250/02, § 98, 29 March 2007).

B. Costs and expenses

51. The applicant also claimed EUR 180 for postage costs and expenses incurred before the Court. He submitted copies of three invoices issued by DHL Romania, one of which was dated 23 February 2010 and the other two of which were dated 7 April 2011.

52. The Government admitted that some of the applicant's allegations had been proven but claimed that the date of one of the invoices, supposedly dated 7 April 2011, had been written illegibly.

53. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 180 for the proceedings before the Court.

C. Default interest

54. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the fairness of the proceedings under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 180 (one hundred and eighty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President