

[TRANSLATION]

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THE FACTS

The applicants, Mr Sorin Roșca Stănescu and Mrs Cristina **Ardeleanu**, are Romanian nationals, born in 1949 and 1975 respectively and living in Bucharest (**Romania**). They were represented before the Court by Mr Vasiliu, of the Bucharest Bar.

The facts of the case, as submitted by the parties, may be summarised as follows.

A. The circumstances of the case

The applicants are journalists. At the material time they were working for the newspaper *Ziua*.

On 11 May 1995 the Bucharest police commenced a judicial investigation concerning a number of articles the applicants had published in *Ziua*. According to the police, certain statements made about the then Romanian President, Mr Iliescu, amounted to an insult to authority, an offence punishable under Article 238 of the Criminal Code.

At their trial in the Bucharest Court of First Instance, the applicants pleaded that Article 238 of the Criminal Code was unconstitutional. The Constitutional Court dismissed their objection in a decision of 6 March 1996, noting that the purpose of Article 238 of the Criminal Code was to uphold the authority of the State and that it was necessary to punish such an offence as the authority of the State was a prerequisite for the exercise of State power. The offence therefore involved an insult aimed at authority, not an individual. Furthermore, whether the offence had taken place or not depended on the status of the victim, who had to be someone holding high office within the State. Article 238 was necessary to create an ideal climate of order and perfect security for people entrusted with important duties under the Government's programme. The crucial requirement for the charge of insult to authority to be made out was that the offence committed should have been such as to undermine authority, for if that condition was not satisfied, the offence did not constitute an insult to authority but an offence against an individual, even if it had been committed against a person holding high office within the State.

The applicants appealed against the Constitutional Court's decision.

On 24 October 1996 the Bucharest Court of First Instance found the applicants guilty of the offence of insult to authority provided for in Article 238 of the Criminal Code on the ground that in articles published from 9 May 1995 onwards in *Ziua* they had denigrated or even insulted the Romanian President, Mr Iliescu, through tendentious or false statements. The court noted, in particular, that in an article published on 9 May 1995, the first applicant had called the Romanian President, Mr Iliescu, a murderer, accusing him of having ordered the distribution of arms on 22 December 1989 and hence of having deliberately triggered off the ensuing "genocide". The Court of First Instance also noted that the applicants had stated in an article published on 31 May 1995 that Mr Iliescu had been recruited by the KGB while he was studying in Moscow.

The court sentenced the first applicant to one year's imprisonment and the second to two years' imprisonment.

The applicants appealed against that decision.

On 19 November 1996 the Constitutional Court dismissed the applicants' appeal against its decision of 6 March 1996, holding that Article 238 of the Criminal Code was compatible with the Constitution and Article 10 of the European Convention on Human Rights.

The appeal against the judgment of 24 October 1996 was allowed by the Bucharest County Court in a decision of 24 March 1997 against which no further appeal lay. The County Court acquitted the applicants, holding that the provisions of Article 238 of the Criminal Code were not applicable to the press, as the statements in question related to political matters, for which the freedom of expression as safeguarded by Article 10 of the Convention was broader. Lastly, the County Court considered that the applicants could not be punished otherwise than by the application of rules of professional conduct.

B. Relevant domestic law and practice

The relevant provisions of the Criminal Code are the following:

OFFENCES AGAINST DIGNITY

Article 205 – Insult

“Anyone who disparages the reputation or honour of another through words, gestures or any other means, or by exposing him to mockery, shall be liable to imprisonment for between one month and two years or to a fine. ...

The prosecuting authorities are seised of the case on a complaint by the victim. ...”

Article 206 - Defamation

“Anyone who makes any statement or allegation in public concerning a particular person which, if true, would render that person liable to a criminal, administrative or disciplinary penalty or expose them to public opprobrium, shall be liable to imprisonment for between three months and one year or to a fine.”

Article 207 – Evidence of truthfulness

“Evidence of the truth of such a statement or allegation is admissible where the statement or allegation was made in order to protect a legitimate interest. Where the truth of the statement or allegation is proved, no offence of insult or defamation will have been committed.”

OFFENCES AGAINST AUTHORITY

Article 238 – Imputation of dishonour

“Public disparagement of or threats against a person belonging to one of the categories referred to in Article 160 in connection with their activity and of a nature to undermine authority shall be punished by imprisonment for between six months and five years. ...”

Article 239 – Insulting a civil servant

“Insults, defamation or threats uttered directly or by direct means of communication against a civil servant holding an office which involves the exercise of State authority in the performance of his duties or on account of acts carried out in the performance of his duties shall be punished by imprisonment for between three months and four years.

Assault or any other act of violence together with infliction of bodily harm on the persons referred to in the first paragraph during the performance of their duties or on account of acts carried out in the performance of their duties shall be punished by imprisonment for between six months and seven years and, in the case of serious bodily harm, by imprisonment for between three and twelve years.

Where the offences referred to in the preceding paragraphs have been committed against a member of the national legal service, police officer, gendarme or other member of the military, the maximum sentence shall be increased by three years”.

COMPLAINTS

The applicants submitted that Article 238 of the Criminal Code constituted a breach of Article 10 of the Convention and complained in that connection about the Constitutional Court's decision of 19 November 1996, in which it had concluded that Article 238 of the Criminal Code was compatible with the Romanian Constitution and the Convention.

They alleged that Article 238 of the Romanian Criminal Code, which made it an offence to insult authority, inhibited journalists wishing to write an article about a person holding high office within the State. They also complained that Article 238 treated defaming or insulting authority as a more serious crime than the offence of insulting or defaming an individual provided for in Articles 205 and 206 of the same code. Where the offence provided for in Article 238 was concerned, the prosecuting authorities dealt with the case of their own motion as it was not necessary for the victim to lodge a complaint, whereas an investigation in relation to the offences provided for under Articles 205 and 206 could be instigated only upon a complaint by the victim. Secondly, the penalties provided for in Article 238 were heavier than those provided for in Articles 205 and 206.

The applicants considered that the effect of that difference in treatment was to inhibit journalists who wished to debate public issues or disseminate information relating to dignitaries or politicians holding office within the State.

THE LAW

The applicants complained that Article 238 of the Criminal Code was incompatible with Article 10 of the Convention in that it was too vaguely worded and did not meet the requirements of being accessible and foreseeable in its effects. Furthermore, the interference provided for by Article 238 was not necessary in a democratic society. The applicants also complained that Article 238 introduced discrimination into the punishment of certain offences depending on the status of the person about whom journalists had written.

The relevant parts of Article 10 of the Convention provide as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the prevention of disorder...”

The Government maintained at the outset that the applicants could not claim to be “victims” of a violation of the Convention within the meaning of Article 34 simply because of the existence of Article 238 of the Romanian Criminal Code. The Government emphasised, firstly, that the applicants could not claim that Article 238 had been applied to their detriment, since they had been acquitted by the decision of 24 March 1997.

Secondly, they asserted that the applicants had failed to substantiate their claims to be “victims” in the absence of a specific measure applying Article 238 of the Criminal Code.

In particular, they alleged that the applicants had failed to show that there was a reasonable likelihood of a criminal conviction based on that Article simply because they had exercised their right to freedom of expression. The Government pointed out that, according to the Commission's case-law, the publication of defamatory documents is not as such protected under the Convention (see *Times Newspapers Ltd. v. the United Kingdom*, no. 14631/89, Commission decision of 5 March 1990, Decisions and Reports (DR) 65, p. 307). Lastly, the Government submitted that Article 238 was very rarely applied, the last time being in 1997

when the former Romanian President had made a complaint against a member of parliament. However, that case was still pending in the Romanian courts.

The applicants disputed the Government's argument. They contended that by finding that Article 238 of the Criminal Code was compatible with the Constitution and Article 10 of the Convention, the Constitutional Court had allowed provisions to remain in place which threatened journalists' freedom to inform the public about the activities of persons holding high office within the State. Any criticism of the activity of such a person could be considered by the Romanian authorities to be an insult to the authority of the State and therefore be punished under Article 238 of the Criminal Code. Consequently, the applicants considered that they were victims since they ran the risk of being directly affected by the provision in question in the future. In that connection they maintained that criminal proceedings against journalists under Article 238 of the Criminal Code were not rare. Although the courts sometimes did not follow the public prosecutor's recommendation and acquitted the accused, the applicants argued that the mere fact of allowing the prosecuting authorities to prosecute journalists of their own motion was a form of harassment incompatible with the freedom of expression.

By way of an example other than the proceedings against them, the applicants referred to the recent prosecution based on Article 238 of the Criminal Code and not on Article 206, which covers defamation, of a journalist who had criticised the president of a county court.

The Court notes that the applicants did not complain of the proceedings instituted against them in the Bucharest County Court, which ended with their acquittal on 24 March 1997. Their complaint was about Article 238 of the Criminal Code, which the Constitutional Court had found to be compatible with the Constitution in its decision of 19 November 1996.

The Court points out that Article 34 entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see, among many other authorities, *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246, p. 22, § 44, *Association Ekin v. France*, (dec.), no. 39288/98, 18 January 2000, unreported, and *Krone-Verlag GmbH et al v. Austria*, (dec.), no. 31564/96, 7 March 2000, unreported).

In addition, a journalist may, in certain circumstances, be regarded as a victim of a violation of Article 10 of the Convention even though no proceedings for insult to authority have been brought against him on account of articles that he is said to have written, for example where the relevant legislation is too vague to allow the risk of proceedings to be predicted (see, *mutatis mutandis*, *Times Newspapers Ltd.*, cited above).

The Court considers that that was not the case here, however.

As regards the proceedings brought against them, the applicants were acquitted by the decision of the Bucharest County Court of 24 March 1997. After that decision, the applicants did not show that they had been prosecuted under Article 238 of the Criminal Code and therefore prevented from imparting information.

Furthermore, the Court emphasises that by contrast with the aforementioned *Association Ekin v. France* case, in which it found that the risk that the legislation in issue would be applied to the applicant again was not just hypothetical but genuine and effective, the applicants in this case were no longer at risk, in their capacity as journalists, of being affected by Article 238 of the Criminal Code. In that connection, it notes that in its decision of 24 March 1997 the Bucharest County Court expressly ruled that Article 238 of the Romanian Criminal Code was not applicable to the press, regard being had to the freedom of expression as guaranteed by Article 10 of the Convention.

That being so, the Court considers that the applicants cannot claim to be victims within the meaning of Article 34 of the Convention and that the application must accordingly be

declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

ROȘCA STĂNESCU AND **ARDELEANU** v. **ROMANIA** DECISION

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