

EUROPEAN COURT/ROMANIA: Bivolaru v. Romania

Excessive length of criminal proceedings concerning a conviction for sexual relations with a minor

Registrar of the Court (02.10.2018) – In today's Chamber judgment¹ in the case of Bivolaru v. Romania (no. 2) (application no. 66580/12) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights regarding the complaint of a failure by the High Court to take steps to hear Mr Bivolaru in person, and a violation of Article 6 § 1 (right to a fair trial within a reasonable time) with regard to the length of the proceedings.

The case concerned criminal proceedings in which Mr Bivolaru – leader of a movement known as the “Movement for spiritual integration in the absolute” (“MISA”) – was sentenced to six years' imprisonment for sexual relations with a minor.(*)

Mr Bivolaru left for Sweden, where he acquired political refugee status, while criminal proceedings against him were pending in Romania. He did not appear in person before the Romanian courts but was represented by lawyers of his choice. He was acquitted at first instance and on appeal, but convicted by the High Court, which could not hear him in person.

The Court found that the High Court had taken all the steps that could reasonably have been expected of it to ensure that Mr Bivolaru was questioned and that it could not be criticised for lack of diligence in any respect. Firstly, the High Court had offered to question Mr Bivolaru by video link but he had refused. Secondly, it had agreed to question him following a formal request for judicial assistance in Sweden, thus sending a request to the Swedish authorities and a list of questions to be put to Mr Bivolaru. However, the Swedish authorities had delayed in implementing the request despite a number of reminders from the Romanian authorities stressing its urgency. The Court also held that the overall length of the criminal proceedings had been unreasonable and that the delays had been attributable to the national authorities. In particular, the length of the first instance case (five years and three months) had had a decisive impact on the overall length of the proceedings (nine years, two months and two weeks). Mr Bivolaru also considered that he had been tried in absentia. He also complained of a violation of his right to respect for his private life on account of telephone tapping. The Court rejected those complaints.

Principal facts

The applicant, Gregorian Bivolaru (alias Magnus Auroldsson), is a Romanian national who was born in 1952. In March 2004 the Bucharest public prosecutor's office ordered criminal proceedings against Mr Bivolaru on charges of sexual relations with a minor and sexual perversion. The applicant was remanded in pre-trial detention from 30 March to 1 April 2004. After his release, on an unknown date, he travelled to Sweden, where, in 2006, he was granted political refugee status and given a new identity. In the meantime, the Bucharest public prosecutor's office committed him for trial in absentia. Mr Bivolaru, who was represented by lawyers of his choice

throughout the proceedings, was acquitted at first instance and on appeal. The public prosecutor's office successfully lodged an appeal on points of law with the High Court, which concluded that the law had been wrongly applied. The High Court also decided that it should examine directly the evidence as well as the merits of the case.

In November 2012 the High Court offered to allow Mr Bivolaru to be questioned via video link, but he refused, preferring to be questioned following a formal request from a court for judicial assistance. The High Court therefore sent the Swedish authorities a request for judicial assistance and a list of questions to put to Mr Bivolaru. However, as the Swedish authorities delayed in implementing the request despite a number of reminders, the High Court decided that it was no longer necessary to wait for their reply. On 14 June 2013 it convicted Mr Bivolaru of sexual relations with a minor, basing its decision on the evidence in the file (witness statements, documents, recordings of telephone conversations).

In February 2016 Mr Bivolaru was arrested by the French authorities in Paris and in July 2016 he was surrendered to the Romanian authorities, who remanded him in custody. He was released on licence in September 2017. His application to have the criminal proceedings reopened was dismissed.

In the meantime, in June 2012, Mr Bivolaru had brought tort proceedings against the State regarding the telephone tapping. The district court found in his favour on the grounds that the warrants authorising the telephone tapping had infringed his right to respect for his private life. The court awarded him the symbolic amount of 1 Romanian leu (RON, approximately 0.30 euros (EUR)) for the non-pecuniary damage suffered.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), Mr Bivolaru complained that he had been convicted in absentia without having been heard in person by the High Court. He also complained about the length of proceedings and the refusal of the Romanian authorities to reopen the criminal proceedings.

Relying on Article 8 (right to respect for private and family life), he complained about the tapping of his telephone. In that regard he also relied on Article 13 (right to an effective remedy), alleging that he had had no access to an effective remedy.

The application was lodged with the European Court of Human Rights on 8 October 2012. Judgment was given by a Chamber of seven judges, composed as follows:

Ganna **Yudkivska** (Ukraine), President,

Paulo **Pinto de Albuquerque** (Portugal),

Krzysztof **Wojtyczek** (Poland),

Egidijus **Kūris** (Lithuania),

Gabriele **Kucsko-Stadlmayer** (Austria),

Carlo **Ranzoni** (Liechtenstein),

Marko **Bošnjak** (Slovenia),

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

Decision of the Court

Article 6 (right to a fair trial/within a reasonable time)

Regarding the complaint about being convicted in absentia, the Court dismissed the complaint on the grounds that it was manifestly ill-founded. The Court observed, inter alia, that Mr Bivolaru had been notified of the criminal charges against him, that he had been represented throughout the proceedings by lawyers of his own choice with whom he had maintained permanent contact for the preparation of his defence, and that he had known that criminal proceedings had been brought against him. The Court also noted that there had been no denial of justice and that the Romanian justice system allowed proceedings to be reopened where the accused had been tried in absentia. In that connection it observed that the district court that had dealt with Mr Bivolaru's request to have the proceedings reopened, had carried out a detailed examination of the grounds submitted by him, and had relied on logical arguments with no trace of arbitrariness before rejecting his request.

With regard to Mr Bivolaru's conviction by the High Court without having been heard in person and following his acquittal on the merits and on appeal, the Court found that the High Court had taken all the steps that could reasonably have been expected of it within the existing legal framework to ensure that Mr Bivolaru was questioned and that it could not be criticised for lack of diligence in any respect. There had therefore been no violation of Article 6 § 1 of the Convention.

The High Court had had recourse to international judicial assistance to hear evidence from Mr Bivolaru. Two possibilities had been open to it: a video link or a formal request for judicial assistance. Firstly, Mr Bivolaru, with the advice of his lawyers, had expressly refused to be questioned by video link, although that method of questioning could have been an appropriate means of hearing him directly and properly.

Secondly, the High Court had granted Mr Bivolaru's request to be questioned in Sweden following a formal request for judicial assistance, but on account of delays by the Swedish authorities in examining that request and the lack of information regarding when the questioning could take place, it had decided not to hear the applicant. Nor had the Swedish authorities provided an explanation for failing to comply with the successive time-limits set by the Romanian authorities.

After approximately six months of exchanges between the High Court and the Swedish authorities, examination of the request for judicial assistance had still been in its initial stage and there had been uncertainty both regarding its outcome and the date when, in the event of a positive response, the applicant would be questioned. The High Court had informed the Swedish authorities that its request was urgent. Moreover, the Swedish authorities had not informed the Romanian authorities of any procedural error in the formulation of their request for judicial assistance and the High Court had not had any other means of expediting the procedure in that regard.

Lastly, given the time taken to examine that request, which, in the light of the Swedish authorities' response, had not appeared likely to succeed, the High Court's decision not to

follow the relevant procedure, made after a number of reminders had been sent to the Swedish authorities, did not, in the Court's view, appear unreasonable. The Court therefore considered that the High Court had taken reasonable steps to offer Mr Bivolaru an opportunity to be heard following a formal request for judicial assistance. Furthermore, the High Court was able to hear the applicant's submissions through his lawyers, who had been present during the examination of the appeal and had made their submissions before it and effectively defended their client's interests.

With regard to the length of the proceedings, the Court found that the length of the first-instance case had had a decisive impact on the overall length of proceedings, which, in the present case, was unreasonable. There had therefore been a violation of Article 6 § 1 of the Convention. The Court noted that the criminal proceedings had lasted approximately nine years, two months and two weeks before three levels of court (from March 2004 to June 2013). The case had been pending for approximately five years and three months before the Sibiu District Court on the grounds, inter alia, that many adjournments had been necessary because witnesses had not been lawfully summoned and the procedure for bringing the accused before the judge had not been correctly used. With regard to the length of the proceedings on appeal and before the High Court, the Court considered that these had been conducted diligently.

Articles 8 and 13 (right to respect for private and family life/right to an effective remedy)

With regard to the complaint concerning the right to respect for Mr Bivolaru's private life on account of telephone

tapping, the Court considered that Mr Bivolaru could not claim to be a victim of a violation of Article 8 of the Convention. The complaint was therefore incompatible *ratione personae* with the provisions of the Convention. The Bucharest Court, in its final judgment of 23 June 2015, had expressly recognised a violation of Mr Bivolaru's right to respect for his private life. In that connection the Court held that although the amount awarded by the court in respect of nonpecuniary damage had been symbolic (ROL 1), the compensation thus established was not at odds with the Court's case-law: in recent cases in which the Court had found a violation on account of incompatibility of the domestic law with Article 8 of the Convention, the Court had held that the finding of a violation in itself represented sufficient redress for the non-pecuniary damage suffered.

With regard to the effectiveness of the domestic remedy, the Court found that the complaint was manifestly ill-founded: Mr Bivolaru had had an effective remedy before the domestic courts, which had found and given redress for the violation alleged in the tort proceedings brought before them.

Article 41 (just satisfaction)

The Court held, by six votes to one, that Romania was to pay the applicant 1,200 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

Separate opinion

Judge Kūris expressed a separate opinion which is annexed to the judgment.

The judgment is available only in French.

(*) HRWF Footnote

See our report about MISA school and Grigorian Bivolaru, including the case of his alleged sexual relations with a minor. HRWF interviewed her in 2013 in the presence of her husband who was her fiancé at the time of the alleged facts and she denied any such sexual relations with Grigorian Bivolaru:

<http://hrwf.eu/wp-content/uploads/2014/11/MISA-Gregorian-Bivolaru-Yoga-Practitioners-in-Romania.pdf>

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