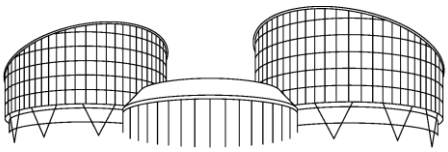

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BOTEA v. ROMANIA

(Application no. 40872/04)

JUDGMENT

STRASBOURG

10 December 2013

FINAL

10/03/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Botea v. Romania,

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

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

Having deliberated in private on 19 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 40872/04) 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 Ștefan Lucian Botea ("the applicant"), on 8 November 2004.

2. The applicant was represented by Ms M. Dumitru, a lawyer practising in Bucharest. The Romanian Government ("the Government") were initially represented by their Agent, Mr Răzvan-Horațiu Radu, and subsequently by Mrs I. Cambrea, from the Ministry of Foreign Affairs.

3. The applicant alleged, under Article 6 § 1 of the Convention, that the proceedings against him had been unfair, given that his conviction had been based mainly on transcripts of audio tapes, which he claimed should not have been used as evidence in the file. He also complained that although he had repeatedly contested the lawfulness of the tapes, neither the firstinstance nor the last-instance court had deemed it necessary to provide a reasoned answer to his arguments in that connection.

4. On 21 October 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Bucharest.

A. Background to the criminal proceedings

6. The case concerns the criminal investigations against the applicant, a police officer; two other police officers, I.U. and R.B; and two business people, H.S. and S.B. The applicant was suspected of having facilitated contact between the other two police officers and H.S., who acted on behalf of S.B., in order for the two police officers to convince a prosecutor to revoke, in exchange for a significant bribe, an international arrest warrant issued in the name of S.B. in the context of a different criminal investigation concerning financial crimes.

B. Criminal investigation stage

7. On 18 June 2002, the applicant was summoned to the office of the Military Prosecutor attached to the Supreme Court of Justice for questioning. He was informed that he was suspected of conspiracy to commit bribery and on the same date he was placed in pre-trial detention.

8. On 11 July 2002 an indictment was issued and on 12 July 2002 the file was transferred to the Bucharest Military Tribunal. The evidence submitted by the prosecutor included transcripts of recordings of telephone conversations between the accused, some of which were in Romanian and some in Hebrew.

9. The applicant's pre-trial detention was regularly extended by the competent courts and his requests to be released on bail were all dismissed.

C. First-instance proceedings

10. On 4 December 2002, the military court ruled that it did not have jurisdiction to examine the case. On 7 January 2003, the Supreme Court of Justice established that the Bucharest Court of Appeal was the competent court to hear the case.

11. By an interlocutory judgment of 12 March 2003, the Bucharest Court of Appeal ordered a technical expert examination of the audio tapes submitted to the file by the prosecutor. In a hearing held on 19 March 2003, all the accused denied that the voices on the audio tapes were theirs and disputed the authenticity of the tapes. In the interlocutory judgment issued on that date, the Court of Appeal stated the following:

> "In respect of the [prosecutor's] request to review the decision to adduce as evidence a technical expert examination of the audio tapes, the court considers that it is ill-founded, given that the basis for the indictment as well as the main evidence against the accused are precisely these audio recordings and their transcriptions and that the accused denied that the voices on the tapes were theirs or that those discussions took place; therefore it is necessary to draw up an expert report on the recordings."

12. The hearings were postponed several times, among other reasons because the technical expert report was not ready. The expert report had to be drawn up by the National Institute for Forensic Expertise ("the INEC"), an institution governed by the Ministry of Justice.

13. In a hearing on 13 October 2003, the Court of Appeal took note of the fact that the accused had requested that the audio tapes be played in court in order to establish and verify whether the transcripts from the case file corresponded with the recordings, whether the recordings had been made in line with the legal requirements, and whether some excerpts had been taken out of context. The domestic court further considered that given the fact that it had ordered a technical expert report on the tapes, the tapes could not be played in court until they had been analysed.

14. In a hearing on 24 November 2003, the parties discussed a letter sent by the INEC in which it stated that it did not have experts qualified to carry out voice identification. The accused insisted that a new date be set for the hearing once an expert report had been included in the materials of the file.

15. In a hearing on 15 December 2003, the parties were informed that the technical report was not ready. The lawyer representing S.B. insisted that if the transcripts were to remain in the case file, it was essential to have the report. The applicant's lawyer stated that the accused contested the evidence itself, as the requirements of the Code of Criminal Procedure had not been respected, and that it should be completely removed from the case file. The lawyer representing R.B. stated that the tapes could not be heard by the court until they had been analysed in order to verify their authenticity. In a last address to the court, the applicant stated that he had not been presented with the transcripts of the tapes and was not aware of their content.

16. On 22 December 2003, the Court of Appeal concluded that, given the letter from the INEC and the conditions under which the tapes had to be analysed, the time it would take and the position of the accused, it was impossible to prepare the report. Considering also that the expert report was superfluous since there was already enough evidence in the file, the court revised its decision to adduce this evidence.

17. The final hearing was held on 12 January 2004. The prosecutor declared that the applicant's guilt had been proved by the statements of the co-accused and by the recordings of the applicant's phone conversations, the transcripts of which were available in the investigation file. The applicant was charged with having put H.S. in contact with two of his fellow officers, who were closer to the husband of the prosecutor who was to be bribed, in the knowledge that the purpose of the introduction was to bribe the prosecutor to revoke the arrest warrant in the name of S.B. The co-accused changed their statements during the judicial proceedings, stating that the applicant had not been aware of the reason why H.S. had wanted to get in touch with the prosecutor and that he had never attended the meetings

at which they had discussed the matter. The prosecution held that they were aware that the statements had been changed and considered the new statements to be insincere.

18. In his final submissions before the first-instance court, the applicant asked to be acquitted on the ground that he had not committed any offence. He insisted that he had never taken part in any discussion between S.H. and the prosecutor's husband.

19. From the information submitted by the applicant, it appears that on 21 January 2004 the INEC submitted its report, which concluded that the audio tapes were not original. It stated that in the absence of any additional information, the tapes could be copies, mixings done with or without the intent to present a false reality, or fabricated. It also stated that voice identification could only be carried out on original recordings using the same equipment as that used for the recording.

20. By a first-instance judgment of the Bucharest Court of Appeal of 26 January 2004, the applicant was sentenced to two years' imprisonment for conspiracy to commit bribery. After presenting at length the prosecutor's submissions, the court proceeded with its own reasoning. It presented the facts, as established by the evidence in the file, and then stated:

> "Even if all the other evidence adduced can be considered subjective to some degree, the transcripts of the phone conversations between the accused do not leave room for much doubt as to their activity, their behaviour, the way in which they intended to solve the problem, their attitude towards the State institutions, as well as their opinions concerning certain colleagues (police officers), prosecutors, judges, representatives of the Secret Services and even leaders of the Romanian State.
>
> ...
>
> As has been mentioned above, the telephone conversations between the accused, which were recorded over several months, show clearly and without any doubt that the accused committed with intent the crimes with which they have been charged and accepted the risks deriving from them. During the criminal trial, in an attempt to defend themselves, they argued that the recordings had been unlawfully obtained, that the transcripts did not conform to the recordings, that in parts the voices were not theirs, and that excerpts of the transcripts had been taken out of context and had not been extensively presented, all of which led to the request to hear the tapes in the presence of a Hebrew-speaking assistant witness, and later to the request for a technical evaluation to be carried out. (...) At the same time, it should be noted that the only institution which had a legal obligation to carry out the technical evaluation of the recordings did not comply with that obligation and with the order of the court, rendering it impossible to adduce this piece of evidence."

21. The applicant and all the other accused lodged an appeal on points of law. The applicant asked for the quashing of the first-instance judgment on several grounds: that the courts examining the case had lacked jurisdiction and the composition of the courts had been unlawful; that his arguments concerning the evidence adduced in the case had not been addressed; that

the constitutive elements of the crime for which he was convicted had been lacking; and that the decision was contrary to the law.

22. By a final decision of 14 May 2004, the High Court of Cassation and Justice dismissed the appeal on points of law. It confirmed the facts established by the first-instance court and concluded that the latter had duly analysed all the evidence before it and correctly defined the crimes and the sentence. The final decision did not include any statement in respect of the lawfulness or admissibility of the tapes and their transcripts.

II. RELEVANT DOMESTIC LAW

23. The legal provisions concerning the use of audio tapes as evidence in a criminal trial, in force at the time of events, as well as the subsequent amendments, are detailed in the judgment *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, §§ 44-46, 26 April 2007).

24. The Romanian Code of Criminal Procedure provides in its Article 385^{9} § 1, sub-paragraph 11, that an appeal on points of law may be lodged if the first-instance court failed to state its opinion on certain evidence or on certain essential requests, which would guarantee the rights of the parties and influence the outcome of the proceedings. Article 385^{15} of the CCP further provides that if the Supreme Court of Justice allows an appeal on points of law, when it is necessary to adduce evidence it must refer the case back to the lower court or settle the case itself.

THE LAW

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

25. The applicant complained that the proceedings against him had been unfair, given that his conviction had been based mainly on transcripts of audio tapes which he claimed should not have been used as evidence. He also complained that despite the fact that he had raised that issue in his grounds for appeal, the High Court of Cassation and Justice had not addressed it in its decision of 14 May 2004.

He relied on Article 6 § 1 of the Convention, which reads as follows:

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

26. The Government contested that argument.

A. Admissibility

27. 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 that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The Government submitted that the use of the recordings as evidence had not deprived the applicant of a fair trial. They also submitted that the applicant had had access to the evidence and the opportunity to challenge the recordings and to object to their use during the domestic proceedings.

29. The Government maintained that the recordings had been made in accordance with the applicable domestic legislation. As regards the applicant's complaint that the High Court of Cassation did not address his ground for appeal concerning the use as evidence of the telephone recordings, they pointed out that the court of last instance had not based its decision only on the recordings.

30. The applicant submitted that an assessment of the Bucharest Court of Appeal's decision of 26 February 2004 had shown that the recordings had been decisive in establishing his guilt. He also noted that the legislation concerning telephone surveillance in force at the material time was not in accordance with the Court's case-law, as the surveillance had been authorised by a prosecutor and not by a judge.

2. The Court's assessment

31. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports* 1997-VIII and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

32. It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible. The Court has already found in

particular circumstances of a given case, that the fact that the domestic courts used as sole evidence transcripts of unlawfully obtained telephone conversations, did not conflict with the requirements of fairness enshrined in Article 6 of the Convention (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX).

33. Therefore, the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (*Heglas v. the Czech Republic*, no. 5935/02, § 85, 1 March 2007).

34. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009).

35. In the instant case, the Court is aware that the use of the audio tapes might firstly raise an issue under Article 8 of the Convention. However, the applicant did not raise such a complaint in his initial application. Nevertheless, when undertaking an analysis under Article 6, account should be taken of the Court's findings under Article 8 concerning the substance of the Romanian relevant provisions regarding telephone surveillance in force at that time in *Dumitru Popescu (no. 2)*, cited above. The Court stated that at the time of the proceedings the applicable law did not provide sufficient safeguards against arbitrary interference with the applicant's private life (ibid. § 61). It was established, *inter alia*, that the prior authorisation of the telephone surveillance had been given by a prosecutor instead of an independent and impartial tribunal.

36. The Court reiterates that the evidence does not have a pre-determined role in the respondent State's criminal procedure. The courts are free to interpret it in the context of the case and in the light of all the elements before them (see *Dumitru Popescu*, cited above, § 110).

37. In the case at hand, the evidence used as proof of the offence by the domestic courts were the statements of the co-accused given before the investigation body and the courts and the recordings of the applicant's phone conversations.

38. The Court observes that the recordings played an important role in the body of evidence assessed by the courts. Thus, at the beginning of the proceedings the first-instance court considered a technical expert report on the recordings as absolutely necessary (see paragraph 11) and ordered *ex officio* that such a report be produced.

39. The Court further notes that the first-instance court based its reasoning on the transcripts of the recordings, concluding that they "leave little room for doubt" as regards the accused's guilt, while acknowledging that the statements given by the other co-accused were not totally reliable, as they could "be considered subjective" (see paragraph 20). It noted that when questioned before the court, the co-accused had retracted their previous statements and denied any involvement on the part of the applicant.

40. In the light of the above the Court considers that the recordings were, if not the sole, at least the decisive evidence against the applicant, without which securing his conviction would either not have been possible or the possibility would have been remote.

41. Despite the importance of the recordings in the assessment of evidence the first-instance court changed her initial position concerning the necessity of a technical report in order to establish the authenticity of the recordings. At the end of proceedings it considered the report as superfluous and revised its decision to adduce this evidence (see paragraph 16). In addition, the Court notes that despite that INEC submitted a technical report stating that there were doubts about the authenticity of the recordings (see paragraph 19) before the delivery of its judgment, the first–instance court relied on the transcripts instead of re-opening the proceedings in order to allow the parties to submit their observations on the report.

42. The Court notes that not only did the domestic courts base their decision on recordings of dubious authenticity, but they did not reply to the applicant's submissions that he had not been presented with the transcripts and therefore was not aware of their content. Moreover, the domestic courts neither played the audio tapes at the hearings in the presence of the accused nor provided any answer to the applicant's repeated complaints concerning the unlawfulness of the recordings.

43. Having examined the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, and the use to which the material obtained through the recording of his phone conversations was put, the Court finds that the proceedings in the applicant's case, considered as a whole, were contrary to the requirements of a fair trial.

44. It follows that there has been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. Lastly, the applicant raised, under Article 5 of the Convention, several complaints regarding his pre-trial detention. The Court notes that the applicant's pre-trial detention ended with the adoption of the judgment on 26 January 2004. The applicant lodged his complaint on 8 October 2004,

that is, more than six months after the date on which the alleged violations ended.

46. The applicant also raised several complaints under Article 6 § 1 of the Convention in connection with the duration of the proceedings and the prosecutor's lack of impartiality. 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

47. 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

48. The applicant claimed pecuniary damage for lost earnings while he was detained in prison, without indicating any amount. He also requested to be reinstated in his former position of police officer. He claimed 1,000,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government submitted that the applicant had not presented any documents in support of his claims. They averred that the amount claimed by the applicant was excessive and asked the Court to rule that the mere acknowledgment of a violation of the Convention would represent in itself just satisfaction in respect of non-pecuniary damage.

50. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Considering the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage.

51. 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.

B. Costs and expenses

52. The applicant also claimed the costs and expenses incurred before the domestic courts, without indicating any amount.

53. The Government pointed out that the applicant had failed to submit any supporting documents.

54. 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. In the present case, regard being had to the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings.

C. Default interest

55. 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 unfairness of the criminal proceedings 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, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non–pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
   (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 10 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President