


Romania, ECtHR, Application no. 40238/02, Case of Bucur ?i Toma v. Romania, 8 January 2013

Member State

 Romania

Topic

Rule of law-prohibition of arbitrariness

The guarantees against arbitrary surveillance were absent.

Deciding Court Original Language

Tribunalul Militar

Curtea Militar? de Apel

Curtea Suprem? de Justi?ie (Înalta Curte de Casa?ie ?i Justi?ie)

Deciding Court English translation

The Military Court

The Military Court of Appeal

High Court of Justice (High Court of Cassation and Justice)

Registration N

40238/02

Date Decision

8 January 2013

ECLI (if available)

ECLI:CE:ECHR:2013:0108JUD004023802

ECtHR Jurisprudence

Amann v. Switzerland [GC], no 27798/95, 16 February 2000

Artico v. Italy, no. 6694/74, 13 May 1980

Barfod v. Denmark, 22 February 1989, § 29, Series A no 149

Begu v. Romania, no 20448/02, 15 March 2011

Boldea v. Romania, no 19997/02, 15 February 2007

Buscemi v. Italy, no 29569/95, 16 September 1999

Campbell and Fell v. the United Kingdom, nos. 7819/77 and 7878/77, 28 June 1984

Cooper v. the United Kingdom [GC], no 48843/99, 16 December 2003

Dumitru Popescu v. Romania (no 2), no 71525/01, 26 April 2007

Eckle v. Germany, no 8130/78, 15 July 1982 (Merits)

Ergin v. Turkey (no 6), no 47533/99, 4 May 2006

Frydlender v. France [GC], no 30979/96, 27 June 2000

Gadi v. France (dec.), no 45533/05, 13 January 2009

Guja v. Moldova [GC], no 14277/04, 12 February 2008

Hadjianastassiou v. Greece, no 12945/87, 16 December 1992

Heinisch v. Germany, no 28274/08, 21 July 2011

Incal v. Turkey [GC], no 22678/93, 9 June 1998

Karademirci and Others v. Turkey, nos. 37096/97 and 37101/97, 25 January 2005

Klass and Others v. Germany, no 5029/71, 6 September 1978

Lavents v. Latvia, no 58442/00, 28 November 2002

Le Compte, Van Leuven and De Meyere v. Belgium, nos. 6878/75 and 7238/75, 23 June 1981 (Merits)

Marchenko v. Ukraine, no 4063/04, 19 February 2009

Maszni v. Romania, no 59892/00, 21 September 2006

Morris v. the United Kingdom, no 38784/97, 26 February 2002

Nolan and K. v. Russia, no 2512/04, 12 February 2009

Palic v. Bosnia and Herzegovina, no 4704/04, 15 February 2011

Perez v. France [GC], no 47287/99, 12 February 2004

Rekvényi v. Hungary [GC], no 25390/94, 20 May 1999

Rotaru v. Romania [GC], no 28341/95, 4 May 2000

Steel and Morris v. the United Kingdom, no 68416/01, 15 February 2005

Stoll v. Switzerland [GC], no 69698/01, 10 December 2007

Tanrikulu v. Turkey [GC], no 23763/94, 8 July 1999

Timurtas v. Turkey, no 23531/94, 13 June 2000

Van de Hurk v. the Netherlands, no 16034/90, 19 April 1994

Van Mechelen and Others v. the Netherlands, nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997 (Merits)

Wojtas-Kaleta v. Poland, no 20436/02, 16 July 2009

Yavuz v. Turkey (dec.), no 29870/96, 25 May 2000

Subject Matter

The applicants complained that the Law no. 51/1991 (the Law on national security) did not include any guarantees against arbitrary surveillance, or any guarantees that information obtained during surveillance were destroyed ex officio as soon as they were no longer necessary for the purpose they were initially collected.

Legal issue(s)

Rule of law-prohibition of arbitrariness

The second applicant and the third one complained that they did not enjoy a sufficient degree of protection against arbitrariness, as requested by Article 8 of the ECHR.

Illegal surveillance of the public

Public security versus freedom of expression

Request for expedited/PPU procedures

No

National Law Sources

The Law no. 51/1991 (The Law on national security)

The Law no. 14/1992 (The Law on the organization and the operation of the Romanian Intelligence

Facts of the case

The first applicant, Constantin Bucur, was employed by the Romanian Intelligence Service (RIS) in the phone surveillance department. From that position, he learned about illegal phone interceptions by the RIS and, in 1996, organized a press conference releasing several audio recordings of phone conversations by politicians, journalists, minors and other persons, as a proof of the illegal surveillance he had noted. Later, the first applicant was convicted by a military court for having taken the audio recordings and for having released information he had received as part of his job. The first applicant invoked no breaching of criminal law, considering that the illegal surveillance represented a breach of Romanian Constitution. He also invoked the breach of freedom of expression, in case of finding him guilty. On 20 October 1998, The Military Court convicted the first applicant to 2 years of imprisonment for breaching the national security law, by his revelations. The judge decided to suspend the sentence. The Military Court mentioned in its judgment the legality of the surveillance, which had been authorized by the Prosecutor. On 14 June 1999, The Military Court of Appeal dismissed the first applicant's appeal. The Military Court of Appeal rejected the lawyer's request to be communicated the documents regarding the surveillance authorisation issued by the Prosecutor, on the grounds that those documents were classified as state secret. On 13 May 2002, High Court of Cassation and Justice dismissed the first applicant's second appeal. High Court of Cassation and Justice rejected the first applicant's request to send the case back to the Prosecutor and to end up the procedure, although during the trial, he enjoyed parliamentary immunity, as a deputy. The second applicant, Mircea Toma, is one of the journalists placed under surveillance by the RIS, whose phone conversations were part of the audio materials released by the first applicant in his press conference. The second applicant gave statement within first applicant's trial, complaining about the illegality of the phone interceptions. The third applicant, Sorana Toma, is the second applicant's daughter and was underage at the time when her telephone conversations were taped by the RIS.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The ECtHR established that "the telephone communications" are comprised in the notions of "private life" and "correspondence" as enshrined in Article 8 paragraph 1 of the ECHR, their interception, their storage in a secret file, and the communication of data related to the private life of an individual amount to an "interference of a public authority" in the exercise of the right guaranteed by Article 8 of the ECHR. For such an interference not to breach Article 8 of the ECHR, it should be prescribed by the law, pursue a legitimate aim in accordance with Article 8 paragraph 2 of the ECHR and it must be necessary in a democratic society to achieve this aim. The ECtHR found that although the Romanian Intelligence Service (RIS) had some procedures regarding the time when a wiretapped conversation will be destroyed when it no longer serves a purpose, the procedures allowed a substantial risk that the conversations would not be destroyed and, thus, could be easily accessible at a later time. The ECtHR noted that the national law was not sufficiently predictable to be prescribed by the law. The aim of the interference (preventing and punishing offenses related to national security) was legitimate, but the interference was not necessary in a democratic society. The abuses committed by the officials affected the democratic foundations of the State. The ECtHR also noted that the first applicant, Constantin Bucur, had legitimate grounds for believing that the information he disclosed was true, that the public interest in disclosing illegal RIS conduct outweighed the interest of maintaining public confidence in the RIS and that Constantin Bucur had acted in good faith. Civil society was directly affected by the

information concerned, as anyone's telephone calls might be intercepted. The ECtHR also considered that there has been a violation of Article 38 of the ECHR, regarding the refusal of Romania to cooperate with the ECtHR. Romania refused to provide all the documents required for solving the case, on the grounds that some of them were classified as state secret and therefore, the ECtHR could not access them. The ECtHR mentioned in its judgment that, in fact, by ratifying the ECHR, Romania has the obligation to furnish all necessary facilities for the complete examination of an ECtHR case, including declassifying documents. The ECtHR decided that there has been a violation of Article 8 of the ECHR, in the absence of the guarantees against arbitrary surveillance and in the absence of the guarantees that information obtained during surveillance were destroyed ex officio as soon as they were no longer necessary for the purpose they were initially collected. Moreover, there were no legal provisions to ensure a person's control over the information collected and stocked by the RIS.

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Other case regarding the freedom of expression for journalists in classified whistleblowing:

Gîrleanu v. Romania, Application no. 50376/09, Judgment 26 June 2018

On 7 February 2006, the applicant, as a journalist, published an article drawing attention to the fact that confidential information which could threaten national security had been leaked from a military unit under the authority of the Ministry of Defence.

As a result of this, criminal proceedings were instituted against the applicant for disclosing classified information on national security under Article 169 of the Criminal Code and for the gathering and sharing of secret or confidential information under Article 19(1) of Law no. 51/1991 on national security.

The applicant was found guilty of the crime proscribed by Article 19(1) of Law no. 51/1991 and was sanctioned with an administrative fine of 800 Romanian lei (approximately 240 euro).

At the national level, he complained against the decision, submitting that Law no. 51/1991 imposed obligations only on people authorised to work with secret information, not on journalists.

Regarding the existence of an interference with the right to freedom of expression, it must be "prescribed by law", pursue one or more of the legitimate aims mentioned in paragraph 2 of Article 10 of the Convention and "be necessary in a democratic society".

The interference was "proscribed by law", as Law no. 51/1991 provides that no one has the right to make public secret activities regarding national security.

It also pursue a legitimate aim, the protection of national security.

Regarding the condition for an interference to "be necessary in a democratic society", the Court considered the interference not proportionate to the legitimate aim pursued, regarding the interests of a democratic society in ensuring and maintaining freedom of the press.

For these reasons, the ECtHR decided against Romania for breaching the Article 10 of the Convention.

(Link to) full text

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Author

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. 20 October 1998- Judgment of The Military Court
 2. 14 June 1999- Decision of The Military Court of Appeal
 3. 13 May 2002- Final Decision of the High Court of Justice (High Court of Cassation and Justice)
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