

Romania, Bucharest Court of Appeal, File no.39435/3/2009, appeal, Judgement no. 726 from 03.10.2011/ High Court of Cassation and Justice, File no. 39435/3/2009, appeal on points of law, Judgement 3806/07.11.2013**

Member State

 Romania

Topic

Rule of law - Prohibition of arbitrariness,

Impartiality and accountability - Predictive Justice

Deciding Court Original Language

Curtea de Apel Bucureşti/Înalta Curte de Casaţie şi Justiţie

Deciding Court English translation

Bucharest Court of Appeal/ High Court of Cassation and Justice (HCCJ)

Registration N

File no. 39435/3/2009 - Bucharest County Court

Application no. 53028/14 - ECtHR

Date Decision

Bucharest Court of Appeal Judgement no. 726 from 03.10.2011

ECtHR Judgement from 28 July 2020

National Follow Up Of (when relevant)

No. The ECtHR case is a direct follow up of the national case

EU legal sources and CJEU jurisprudence

Not the case

ECtHR Jurisprudence

- Axel Springer AG v. Germany [GC], no. 39954/08, § 84, 7 February 2012 - the domestic authorities must struck a fair balance between the freedom of expression protected by Article 10 and the right to respect for his reputation under Article 8
- Sokołowski v. Poland, no. 75955/01, § 45, 29 March 2005; Kwiecień v. Poland, no. 51744/99, § 51, 9 January 2007; and Paraskevopoulos, cited above, § 36 - the manner in which a locally elected official carries out his or her official duties and issues touching on his or her personal integrity are matters of general interest to the community
- Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV; and Instytut Ekonomichnykh Reform, TOV v. Ukraine, no. 61561/08, § 44, 2 June 2016 - there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debate on matters of public interest
- Morice v. France [GC], no. 29369/10, § 125, 23 April 2015; and Instytut Ekonomichnykh Reform, TOV, v. Ukraine, no. 61561/08, § 50, 2 June 2016 - the authorities had a particularly narrow margin of appreciation in assessing the need for the interference with the applicant's freedom of expression
- Jalbă v. România, no. 43912/10, § 33, 18 February 2014 - the national courts are, in principle, better placed than an international court to assess the intention behind impugned phrases and statements and, in particular, to judge how the general public would interpret and react to them
- Reznik v. Russia, no. 4977/05, § 46, 4 April 2013; and Rungainis v. Latvia, no. 40597/08, § 63, 14 June 2018 - a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the applicant's statements and allegations must be established
- Do Carmo de Portugal e Castro Câmara v. Portugal, no. 53139/11, § 43, 4 October 2016 - persons taking part in a public debate on a matter of general concern are allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements
- Wille v. Liechtenstein [GC], no. 28396/95, § 50, ECHR 1999-VII; Nikula v. Finland, no. 31611/96, § 54, ECHR 2002-II; and Elci and Others v. Turkey, nos. 23145/93 and 25091/94, § 714, 13 November 2003 - the chilling effect that a fear of sanction may have on the exercise of freedom of expression
- Lombardo and Others v. Malta, no. 7333/06, § 61, 24 April 2007, and Ghiulfer Predescu v. Romania, no. 29751/09, § 61, 27 June 2017 - under certain circumstances, the sanction imposed may have a dissuasive effect on the exercise of the right to freedom of expression (all of the above cited by the ECtHR)
- Sipos v. Romania, no. 26125/04, 3 August 2011, Petrina v. Romania, no. 78060/01, § 42, 14 October 2008 - the fact of accusing certain persons implies the obligation to provide a sufficient real basis and that even a value judgment may prove excessive if it is totally devoid of a real basis (cited by the Bucharest Court of Appeal and by the High Court of Cassation and Justice)

Subject Matter

The applicant claimed that the defamation proceedings had violated her right to freedom of expression under Article 10. She argued that her statements had a sufficient factual basis, the appeal courts had not taken into account the evidence proving the existence of such a reasonable factual basis; the sanctions imposed and 'financial losses suffered by her' had been

disproportionate.

Legal issue(s)

The case is related to the impartiality and accountability of lawyers. Corruption and conflict of interest - as reasons for incompatibility of functions of lawyer and member of parliament - is the issue addressed by the analysed speech.

Request for expedited/PPU procedures

NO

Interim Relief

Not the case

Facts of the case

On 7 September 2009 two newspapers reported comments that M.M., European parliamentarian, former minister of justice, had made the previous day at a summer school organised by the Democratic Liberal Party, while reiterating her opinion on the incompatibility of the functions of lawyer and member of parliament. She stated 'Take a look at the lawyers in Parliament, there are two youngsters from the PSD for example, who have [signed] contracts worth millions of euros with State companies from the constituencies they represent [in Parliament], money that they get for legal advice. This is a typical act of corruption by political influence. It is not at all different from other acts of corruption.' Afterwards, she named V.P. and D.?. as the two PSD parliamentarians and added that this information had appeared in the press.

On 16 October 2009 D.?. brought general tort law proceedings against M.M. On 18 October 2010 the Bucharest County Court dismissed D.?. 's action. On 3 October 2011 the Bucharest Court of Appeal allowed D.?. 's appeal and ordered M.M. to pay him damages of RON 10,000 (approximately EUR 2,300) and to publish the court's judgment at her own expense in three national newspapers. On 7 November 2013 the High Court of Cassation and Justice dismissed both, M.M. 's and D.?. 's, appeals on points of law.

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

All three national courts mention ECHR norms and jurisprudence to sustain their interpretation and judgement of the case. For judging the case, the internal courts used the criteria developed by the ECtHR. They all agree, as latter, the ECtHR, that the issue at stake is the distinction between the fact statement and the value judgement.

The Bucharest County Court held, in her judgement, that the plaintiff (D.S.) cannot ask the court to condemn the defendant's attitude, which was one of suggestive caution. The first-instance court regarded the applicant's comments as mere insinuations.

The Bucharest Court of Appeal criticise, in her judgement, the lower court judgement on the way it balanced the exercise the right to free expression with the right to respect for D.S.'s reputation, on the legitimacy of the defendant's purpose, the public influence of the defendant (M.M.), the social position of the plaintiff, the qualification of M.M.'s speech as value judgement. The court qualifies the content of the statement as untruthful statement of fact about D.?.

The High Court of Cassation and Justice considers, in her judgement, that there are no grounds for illegality in the case which require that the contested decision (of the Bucharest Court of Appeal) be set aside or amended.

The requirements of tortious civil liability are met: the existence of an unlawful act, the existence of damage, the guilt and the connection between the unlawful act and damage.

- The defendant's unlawful act consists in publicly stating on September 6, 2009, of an untrue fact, respectively of an act of corruption allegedly committed by the applicant in his cumulative capacity as a lawyer and parliamentary.
- The defendant's allegations are likely to seriously damage the public image and the professional and political reputation of the applicant, and this is the damage caused to the applicant.
- The causal link between the unlawful act and the damage is given by the fact that the defendant's allegations are questioning the correctness with which he carries out his duties arising from his quality of politician, as well as the reputation of the university staff.
- The guilt is given by the attitude of the defendant who, through the direct statements made about the plaintiff, exceeds the reasonable limits of the exaggeration. The plaintiff made a direct statement of a fact of corruption while any person is the beneficiary of the effective right of presumption of his innocence.

The sanction imposed by the Bucharest Court of Appeal to the defendant was adequate.

The ECtHR holds that there has been a violation of Article 10 of the Convention, that the domestic courts failed to strike a fair balance between the relevant interests and to establish a "pressing social need" for putting the protection of D.?. 's reputation protected by Article 8 of the Convention above the applicant's right to freedom of expression under Article 10 of the Convention. The interference with the applicant's right to freedom of expression was not "necessary in a democratic society". There has accordingly been a violation of Article 10 reasoning that

- applicant's comments were directed not at D.?. 's private activities but rather at his conduct in his political capacity – issue of legitimate concern to the general public
- the authorities had a particularly narrow margin of appreciation in assessing the need for the interference with the applicant's freedom of expression

- the content of the impugned statements is qualified by the Court as a combination of value judgments and statements of fact. “Given the status of the applicant and D.?. as politicians and elected representatives of the people, the collective nature of the applicant’s statements and allegations, the overall context reflected by the press reports, namely that of promoting the need for legislation establishing an incompatibility between the functions of lawyer and member of parliament, and the existence of at least a certain factual background to her statements and allegations taken collectively, the Court considers that the applicant’s comments do not amount to an ill-fated gratuitous personal attack against D.?.” (Macovei v. Romania, para.94)
- the penalty imposed on the applicant had a chilling effect on her freedom of expression, even though the applicant has not shown whether or not she would struggle to pay the amounts required of her in order to comply with the last-instance court’s judgment.

Relation of the case to the EU Charter

The EU Charter was not invoked.

Relation between the EU Charter and ECHR

The Bucharest Court of Appeal and the High Court of Cassation and Justice invoked the ECHR

- art. 10 – Freedom of expression, and the ECtHR jurisprudence, cases Sipos v. Romania, no.26125/04, 3 August 2011, Petrina v. Romania, no.78060/01, § 42, 14 October 2008, to argue on the distinction between statements of fact and value judgments - the fact of accusing certain persons implies the obligation to provide a sufficient real basis and that even a value judgment may prove excessive if it is totally devoid of a real basis - and
 - art. 13 - Right to an effective remedy, to argue that recourse to a trial empowers the national court to provide adequate compensation
-

Use of Judicial Interaction technique(s)

The list of available alternatives include: preliminary reference, consistent interpretation, disapplication of national law in favour of EU law, proportionality, comparative reasoning with foreign legislation or foreign caselaw, and mutual recognition.

All three national courts made reference to ECHR norms and jurisprudence to sustain their interpretation and judgement of the case. For judging the case, the internal courts used the criteria developed by the ECtHR.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not the case

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Bucharest County Court regarded M.M.'s comments as mere insinuations, a value statement.

The Bucharest Court of Appeal criticised, in her judgement, the lower court judgement on the way it balanced the exercise of the right to free expression with the right to respect for D.S. 's reputation. M.M. 's speech is not a value judgement but an untruthful statement of fact about D.?

The High Court of Cassation and Justice considers, in her judgement, that there are no grounds for illegality in the case which require that the contested decision (of the Bucharest Court of Appeal) be set aside or amended.

Strategic use of judicial interaction technique (purpose aimed by the national court)

Presumably, the purpose of the national court when using vertical internal judicial interaction techniques, with the lower courts, was to solve a conflict of judicial interpretation involving fundamental rights enshrined in the ECHR. However, their interpretation of the ECHR proved wrong, as they placed higher value on the right to reputation of the politician, instead of the freedom of expression on a matter of public interest. The ECtHR found the court have not struck the right balance between the protection of Article 8 and Article 10.

Impact on Legislation / Policy

Not the case

Notes on the national implementation of the preliminary ruling by the referring court

Not the case

(Link to) full text

[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-203837%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203837%22]})

Author

Roxana Prisacariu, Union of the Romanian Bar Associations

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

1. File no. 39435/3/2009,
 - a. Registered at 06.10.2009 at Bucharest County Court - IIIrd Civil Section
 - i. i.Object – general tort law proceedings (pecuniary damages for defamation)
 - ii. ii.Judgement no. 1554/18.10.2010 – rejects request
 - b. Appeal at 27.12.2010 at Bucharest Court of Appeal - IIIrd Civil, Minors and Family Section
 - i. i.Judgement no. 726/2011 din data 03.10.2011 – admits appeal

c. Appeal on points of law at 08.01.2013 at the High Court of Cassation and Justice – IIInd Civil Section, File no. 39435/3/2009**

i. i. Judgement no. 3806/07.11.2013 – rejects appeal on points of law

2. ECHR Case of Monica Macovei v. Romania (Application no. 53028/14) Judgement from 28 July 2020
 3. <https://strasbourgobservers.com/2020/08/11/defamation-proceedings-against-romanian-mep-over-anti-corruption-comments-violated-article-10> - "(Monica) Macovei - in 2001 published a book entitled 'Freedom of Expression. A guide to the implementation of Article 10 of the European Convention of Human Rights' "
-