

Austria, Tribunalul Caraş Severin (Caraş Severin County Court), Albu şi alţii c. Agenţia Judeţeană pentru Ocuparea Forţei de Muncă din Caraş Severin (Albu and Others v. Caraş Severin District Employment Agency), instance (ordinary), 10 September 2008, publication series (not applicable)

Member State

 Austria

Topic

TRIAL topics: rule of law (fair trial, non-discrimination and equality before the law), accountability (predictive justice). Divergent cases within the Romanian judiciary

Deciding Court Original Language

Tribunalul Caraş Severin

ECtHR

Albu and Others v. Romania

Applications 34796/09 and 63 other cases

Judgement of 10 May 2012

Deciding Court English translation

Caraş Severin County Court

Registration N

Unknown

Date Decision

10 September 2008

ECLI (if available)

National Follow Up Of (when relevant)

The national case is NOT the direct follow up of a CJEU or ECtHR decision.

EU legal sources and CJEU jurisprudence

None

ECtHR Jurisprudence

Albu and Others v. Romania

Applications 34796/09 and 63 other cases

Judgement of 10 May 2012

Subject Matter

The applicants alleged a breach of their rights under Articles 6 and 14 of the Convention on account of the extended divergence of case-law on the issue of granting specific allowances to public servants.

Legal issue(s)

Accountability (predictive justice) & Rule of law (fair trial, non-discrimination and equality before the law)

The applicants complained of a breach of the principle of legal certainty and predictive justice on account of conflicting case-law. The approach taken by the domestic courts in their case had contradicted other court rulings, on the basis of which they could reasonably have expected a finding in their favour.

Request for expedited/PPU procedures

NO

Interim Relief

The national court/applicant did NOT ask the CJEU/ECtHR for interim relief

National Law Sources

The Public Servants' Statute

Judgement of High Court of Cassation and Justice, of 21 September 2009, following an appeal in the interest of the law

The Labour Code

Law no. 161/2003 of 16 April 2003

Law no. 188/1999

The Constitution

Facts of the case

The applicants are civil servants employed by the Cara? Severin District Employment Agency. On 5 May 2008 they filed a petition with their employer asking to have their entitlement to certain wage-related rights acknowledged. Their petition was dismissed as ill-founded.

On 30 May 2008 the applicants contested that decision before the Cara? Severin County Court. but it dismissed their claim, on 10 September 2008.

The applicants appealed to the Timi?oara Court of Appeal, stating inter alia that the County Court's interpretation of the relevant laws was discriminatory and in breach of Article 14 of the European Convention of Human Rights, in so far as there was consistent national case-law granting other claimants (also civil servants) the right to the same financial supplements. Moreover, another person, S.S.M., employed by the same institution as them, had obtained the allowances following a decision of 21 March 2008 given by the same Cara? Severin County Court. That decision had been upheld by the Timi?oara Court of Appeal on 2 October 2008.

However, on 21 January 2009 the Timi?oara Court of Appeal dismissed the applicants' appeal.

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

The County Court acknowledged that, according to the provisions of the Labour Code, the applicants were entitled to receive, in addition to their other salary entitlements, the supplements in question.

The two supplements were provided for, but without any indication as to the exact amount. Hence, the determination of these rights was left to the executive, which was entitled to set out rules for the application of the law. Consequently, the court held that in the absence of a legal act issued or adopted by the executive in which the amount of the two allowances claimed was defined, the court did not have jurisdiction to determine by itself the amounts, as that would undermine the separation of powers principle by encroaching on the powers of the administrative authorities. The court therefore held that in such circumstances, the respondent cannot be ordered to pay the allowances claimed before their amount has been determined.

The Timișoara Court of Appeal noted that in order to be able to determine the exact amount of the allowances in question, additional legislation was needed, either in the form of legal provisions adopted by the legislature, or in the form of instructions issued by the Government in a separate legal text designed to explain how the law should be applied.

The Court of Appeal also referred to the Constitutional Court's case-law to the effect that the courts did not have jurisdiction to repeal or to refuse to apply specific normative acts which they considered to be discriminatory, and thus to replace them with norms created by judicial intervention or with provisions contained in other normative acts. Therefore, the court considered that it could not allow the applicants' claims, in so far as those claims had not been determined by the competent authorities.

Regarding the divergent case-law referred to by the applicants in their arguments, the court held that in the Romanian legal system, legal precedents were not a source of law and therefore could not be taken into consideration.

The case ended before the European Court of Human Rights, which examined it under the provisions of Article 6 of the Convention, taken alone and in conjunction with Article 14 (relevant for the purpose of this template) and under the Article 1 of the Protocol 1 of the Convention.

The Court reiterated the main principles applicable in cases concerning the issue of conflicting court decisions:

(i) It is not the Court's function, save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence

of those courts must be respected;

(ii) The possibility of conflicting court decisions is an inherent trait of any judicial system. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention;

(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts ruling at last instance are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect;

(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law;

(v) The principle of legal certainty, guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law;

(vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law. Case-law development is not, in itself, contrary to the proper administration of justice.

In *Albu and Others v. Romania*, the Court noted that from 2008 onwards conflicting approaches emerged across the country, concerning the interpretation and implementation of the legal provisions granting all public servants specific allowances, in the absence of precise criteria for the calculation of those allowances. The High Court of Cassation and Justice gave more than 100 judgments on appeals in the interests of the law between 2008 and 2011, designed to ensure the uniformity of the case-law.

Divergences of approach may arise between the courts as part of the process of interpreting legal provisions and may be tolerated in isolated cases. However, when the divergence involves judicial matters affecting large parts of the public, their confidence in the judicial system may be undermined. It is why the system must put in place effective mechanisms that need to be fully and promptly implemented via the highest courts responsible for ensuring the uniformity of the case-law.

In *Albu and Others v. Romania*, the Court examined whether the national system provided a mechanism capable of ensuring consistency in the practice of the national courts, notwithstanding the fact that the process of unifying and ensuring the consistency of the case-law may require a

certain amount of time. In this respect, the Court noted that on 21 September 2009 an appeal in the interests of the law was granted by the Romanian High Court of Cassation and Justice, which laid down binding guidelines for the uniform interpretation of the legal provisions in issue.

The High Court's ruling brought the divergence on this subject to an end. The impugned judgment dismissing the applicants' claims was given before the High Court's ruling, but the approach adopted by the domestic courts in the applicants' case was similar to that advocated by the High Court a few months later.

Therefore, even though the impugned judgment was given at a time when the divergence still existed, the Court noted the effectiveness of the appeal in the interests of the law, a mechanism which was set in motion relatively promptly, as it was lodged with the High Court around one year after the onset of the impugned divergence. The High Court, in its turn, assessed the matter promptly and gave unequivocal guidelines on the correct interpretation of the legal text, as a result of which the divergence ceased rapidly and the domestic courts' interpretation became uniform. Achieving consistency of the law may take time, and periods of conflicting case-law may therefore be tolerated without undermining legal certainty, provided that the domestic legal system proves, as in the present cases, capable of accommodating them.

Therefore, the Court considered that there was no breach of the principle of legal certainty in the applicants' cases.

* **The European Convention has been invoked in the case solely in relation to Article 1 of Protocole 1 (possession/legitimate expectation to be granted the financial supplements) and not in relation to divergent case law.

Relation of the case to the EU Charter

The EU Charter was not invoked.

Relation between the EU Charter and ECHR

The (would be) protection granted through the EU Charter is mostly similar to that stemming from ECHR in the particular case. However, such similarity has not been mentioned during the proceeding and the EU Charter has not been invoked..

Use of Judicial Interaction technique(s)

Although not specifically mentioned, the national courts aimed at a consistent interpretation of the

law with the case law of the ECtHR.

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

The national court refused to engage with an assessment of other national judgments, on the ground that case law is not a source of law.

None of the national courts involved in the evaluation of this case cited any case law of a foreign Constitutional Court.

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

The applicants' request to have the financial supplements granted has been evaluated by the Court of Appeal with reference to Article 1 of Protocol 1 (possession/legitimate expectation). However, no case law of The ECtHR has been invoked and the national courts did not mention any Article of the Convention or case law of the Court, in relation to divergent case law.

The case did not involve a referral to Constitutional Court. However, the Court of Appeal referred to the Constitutional Court's case-law to the effect that "the courts do not have jurisdiction to repeal or to refuse to apply specific normative acts which they consider to be discriminatory, and thus to replace them with norms created by judicial intervention or with provisions contained in other normative acts."

The judgement of the High Court of Cassation and Justice, aiming at unifying the divergent case law on the matter of civil servants' financial supplements, was issued after the final decision in the applicants' case. Therefore, the lower national courts could not have "communicated" with the HCCJ through the latter's judgement.

The Court of Appeal referred to the Constitutional Court's case-law, when evaluating the discrimination issue, invoked by the applicants.

There was no special interaction between the ordinary and appellate court, other than the one that stems naturally from the evaluation of the ordinary court's judgement, made by the appellate court. In this case, the applicants challenged the county court's judgement before the Court of Appeal of Timisoara, which consequently evaluated the former's judgement and dismissed the applicants' appeal.

The case ended up before the ECtHR.

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

The case involved no strategic use of judicial interaction techniques, since there was no actual interaction between national courts and European or foreign national courts. The only type of “interaction” was the national courts’ concern of interpreting the case (facts and law) in accordance with the general scope of Article 1 of Protocol 1 of the Convention.

Impact on Legislation / Policy

The divergent case law prompted an appeal in the interests of the law, granted by the High Court of Cassation and Justice, which laid down binding guidelines for the uniform interpretation of the legal provisions in issue.

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

This case involved no preliminary ruling.

The national courts did not quote case law of the ECtHR. However, it did refer more broadly to the European Convention on Human Rights

The national courts did not quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports. However, before the ECtHR, the following instruments have been cited: Report on the Rule of Law by the Venice Commission, 25-26 March 2011, Preliminary conclusions and observations by the UN Special Rapporteur on the Independence of Judges and Lawyers, Opinion no. 11 (2008) of the Constitutive Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions.

The national courts did take into account national case law on fundamental rights, although the applicants did cite divergent case law. The national courts simply mentioned that case law is not a source of law.

Impact on national case law from the same Member State or other Member States

Not applicable.

Connected national caselaw / templates

Other cases regarding divergent case-law within lower courts:

Frimu and four other applications v. Romania, (applications nos. 45312/11, 45581/11, 45583/11, 45587/11 and 45588/11, §§ 48-52, (dec.) 13 November 2012). The case concerns the reduction, pursuant to Law no. 119/2010, of the retirement pensions of former court officials in order to maintain a balanced State budget at a time of economic crisis. Several judgments by courts of appeal found that the pensions should be kept at their previous levels, whereas others held that lowering them was justified. The Court considered that there had not been any discrepancy in the practice adopted by the courts in similar situations, but rather that there had been a proportionate application of clearly defined statutory provisions to differing personal circumstances. In any event, the Court pointed out that it had deemed acceptable a period of two years, or even longer, of divergent practice by the courts before a mechanism was introduced to ensure consistency. The ECtHR decided in favor of Romania. [<http://hudoc.echr.coe.int/eng?i=001-115053>]

Zelca and Others v. Romania (no. 65161/10, §15, (dec.) 6 September 2011). The Court observed that conflicting approaches had emerged among Romanian courts concerning the interpretation of the legal provisions granting public servants specific allowances, in the absence of precise criteria for their calculation. However, in its September 2009 judgment, the Romanian High Court of Cassation had laid down binding guidelines for a uniform interpretation of the disputed provisions. The appeal court, in its decision in the applicants' case, had followed those guidelines. Moreover, the applicants had not referred to any decisions delivered after the High Court's September 2009 judgment which departed from its approach. The mechanism provided for by the Romanian Code of Civil Procedure had thus proven to be effective, by putting an end in a reasonably short period of time to the divergence in the case-law in question. It followed that the applicants' complaints under Article 6 were inadmissible as manifestly ill-founded. The ECtHR decided in favor of Romania. [<http://hudoc.echr.coe.int/eng?i=001-106410>]

Țețan and Others v. Romania (no. 38155/02, §§ 31-38, 2 November 2010). The legal uncertainty affected a clearly defined category of people (hundreds of persons from state-owned companies, collectively dismissed). The right to a fair trial includes the right to legal certainty. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is an important factor to be taken into account in assessing the State's conduct. Contradictory solutions reveal an inconsistent approach of the domestic courts in interpreting the conditions set by the law for the award of compensatory payments despite similar factual situations. In the absence of a remedy to resolve such divergences, the inconsistent adjudication of claims brought by many persons in similar situations led to a state of uncertainty, which in turn must have reduced the public's confidence in the judiciary, such confidence clearly being one of the essential components of a State based on the rule of law. The judicial uncertainty in question has deprived the applicants of a fair hearing. The ECtHR decided against Romania for breach of legal certainty due to the existence of a divergent case-law. [<http://hudoc.echr.coe.int/eng?i=001-101491>]

Tudor Tudor v. Romania (no. 21911/03, §§ 30-32, 24 March 2009). The issue of the application of restitution laws in Romania was acknowledged to be a matter which affected the whole of

Romanian society and, as such, was liable to escalate. Therefore, divergent case law regarding this issue is contrary to the fundamental aspects of the rule of law. The ECtHR decided against Romania for breach of legal certainty due to the existence of a divergent case-law.
[<http://hudoc.echr.coe.int/fre?i=001-91885>]

Driha v. Romania (no. 29556/02, §§ 38039, 21 February 2008). Unjustifiable divergent case law leads to a discrimination contrary to Article 14 of the Convention. The ECtHR decided against Romania, because of the discrimination stemming from the existence of a divergent case-law.
[<http://hudoc.echr.coe.int/eng?i=001-123110>]

Other

Cases regarding divergent case-law within the country's highest court (The High Court of Cassation and Justice / The Supreme Court) lower courts are addressed in a different template (Beian v. Romania (No. 1))

([Link to](#)) [full text](#)

<http://hudoc.echr.coe.int/eng?i=001-110805>

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