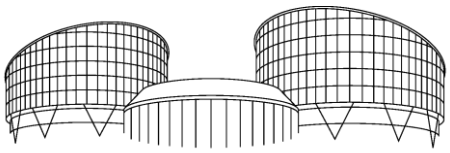

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF EMILIAN-GEORGE IGNA v. ROMANIA

(Application no. 21249/05)

JUDGMENT

STRASBOURG

26 November 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Emilian-George Igna 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 5 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 21249/05) 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 Emilian-George Igna ("the applicant"), on 6 June 2005.

2. The applicant was represented by Ms I. A. Igna, a lawyer practising in Deva. The Romanian Government ("the Government") were represented by their Agent, Ms I. Cambrea, from the Ministry of Foreign Affairs.

3. The applicant alleged that, at a hearing on 3 December 2004, his lawyer's request to be allowed to consult all of the materials submitted by the prosecutor in support of the prosecutor's proposal for the applicant's detention to be extended had been dismissed by the Alba-Iulia Court of Appeal on the grounds that the evidence in question only concerned the merits of the case.

4. On 14 October 2011 the President of the Third Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in Deva.

6. In November 2004, the prosecutor's office attached to the Alba-Iulia Court of Appeal opened criminal investigations in respect of a large number

of people, including the chief commander of the Deva police and other police officers, on suspicion of their involvement in an organised criminal group engaged in practising the illegal gambling game "alba-neagra".

7. As part of this complex set of proceedings concerning a large number of people in Deva allegedly involved in organised crime, on 2 December 2004 investigations were initiated against the applicant and three other people suspected of being members of an organised criminal group, an offence created by the Prevention and Combat of Organised Crime Act (Law No. 39/2003). The applicant and another defendant were police officers, and in this capacity were also suspected of favouring offenders and blackmail. The other two defendants were suspected of organising the gambling games.

8. In the evening of 2 December 2004, the applicant and his three co-defendants were arrested and detained for twenty-four hours.

9. The prosecutor attached to the Alba-Iulia Court of Appeal submitted a proposal for the extension of the detention for another twenty-nine days. According to the prosecution's version of events, the two police officers became members of the criminal group in 2003. They collected protection money from the network of people who were organising the gambling games in Deva and the surrounding area. In exchange, they provided information to them concerning police raids organised by their colleagues and the best places to hold the gambling games. As expressly stated in the proposal for the extension of the detention, this version of events was supported by statements of the victims, witnesses and defendants, and a summary of recorded telephone conversations.

10. At a hearing held on 3 December 2004 before the Alba-Iulia Court of Appeal, the defence requested that the prosecution and the court deciding on the application to extend the applicant's detention put at their disposal all of the materials on the basis of which the applicant's continued detention had been proposed.

11. According to the applicant's lawyer, the only evidence in the file were the statements given by the applicant and the other three defendants arrested on the previous day, which did not reveal any incriminatory facts.

12. One of the main pieces of incriminating evidence submitted by the prosecution was a summary of various telephone conversations which had been recorded. The recordings had been made by the police as part of a secret surveillance operation concerning the entire criminal group. The prosecution submitted the summary to the court during the hearing with the recommendation that it should not be consulted by the defence. The defence's request to examine the recordings was refused by the court on the grounds that the recordings concerned the merits of the case and that this was irrelevant to the extension of detention.

13. In spite of the defence lawyer's express request to have access to the rest of the evidence mentioned in the proposal for prolongation of the

detention, such as the statements of the victims, witnesses and other defendants, the Alba-Iulia Court of Appeal neither replied nor provided any explanation for their absence from the file.

14. In her final oral submissions, the applicant's lawyer stressed that she had not had access to the summary of the recorded telephone conversations or the incriminatory statements against the applicant. She therefore concluded that according to the evidence in the file, there was not the slightest indication that the applicant had committed the offences retained in his charge.

15. After hearing the oral submissions of the defendant's lawyer and of the public prosecutor, the court ordered the prolongation of the pre-trial detention for another twenty-nine days. It found that there was a strong suspicion that the applicant had committed the offences detailed in the prosecutor's proposal for detention and that he had been involved in organised crime relating to illegal gambling games.

16. On 9 December 2004 the High Court of Cassation and Justice dismissed the applicant's appeal against the decision of 3 December 2004 as groundless. It upheld the decision on the same grounds as the first-instance court.

17. On 27 April 2010 the Argeș County Court convicted the applicant as charged and sentenced him to five year's imprisonment.

18. The applicant appealed. According to the latest information provided by the parties, the proceedings against the applicant are still pending.

II. RELEVANT DOMESTIC LAW

19. The relevant provisions of the Prevention and Combat of Organised Crime Act (Law No. 39/2003) read as follows:

Section 2

"In the present law, the terms and expressions below have the following meaning:

(a) 'organised criminal group' - a structured group, formed of three or more people, that exists for a period of time and acts in a coordinated manner with the purpose of committing one or more grave offences, in order to obtain directly or indirectly a financial benefit or another material benefit. An 'organised criminal group' is not a group formed occasionally with the purpose of immediately committing one or more offences and which has no continuity or definite structure or pre-established roles for its members inside the group.

(b) 'grave offence' - an offence which belongs to one of the following categories:

...

10. offences regarding games of chance ...

Section 7

(1) The initiation or constitution of an organised criminal group, or joining or supporting in any way such a group, shall be punishable by a prison sentence of 5 to 20 years and the restriction of certain rights.

(2) The punishment for the acts stipulated in paragraph (1) may not be greater than the sanction provided for by the law creating the gravest offence within the purpose of the organised criminal group.

(3) If the acts stipulated in paragraph (1) have been followed by a grave offence, the rules concerning the concurrence of several offences shall be applied."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

20. Relying on Article 6 § 1 of the Convention, the applicant complained that the proceedings for the extension of his pre-trial detention had not been truly adversarial. In this respect, he claimed that without full access to the file and knowledge of the tape recordings included in the file, his lawyer had been unable to defend him against the charges of being a member of an organised criminal group, blackmail and favouring offenders.

21. As the Court is master of the characterisation to be given in law to the facts and can decide to examine the complaints submitted to it under a different Article from that cited by the applicant (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), it will examine the complaint under Article 5 § 4 of the Convention, which reads as follows:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

22. 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

23. The applicant claimed that on 3 December 2004 he had not had an opportunity to present his case in circumstances which did not put him at a

disadvantage *vis-à-vis* the other party. He submitted that the proposal for the prolongation of his detention had referred to several statements and a summary of recorded telephone conversations which could not be found in the case file.

24. The Government submitted that the applicant's lawyer had been offered the opportunity to examine all the relevant evidence in the file. As regards the recordings of the telephone conversations, they contended that it had not been necessary to examine them at that stage of the proceedings as they mainly concerned the merits of the case.

2. The Court's assessment

(a) Relevant principles

25. The Court reiterates that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial as guaranteed by Article 6 of the Convention (see, *inter alia*, *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001; and *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III (extracts)).

26. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151, and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II).

27. The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer (see *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009).

(b) Application of these principles to the present case

28. In the instant case the Court needs to determine whether information which was essential for the assessment of the lawfulness of the applicant's detention was made available in an appropriate manner to the applicant's lawyer.

29. First, the Court observes that the Alba-Iulia Court of Appeal reached its conclusion that there was a strong suspicion that the applicant had

committed the offences retained in his charge by reference to the prosecutor's proposal for the extension of detention. This proposal was only an account of the facts as construed by the prosecutor's office on the basis of all the evidence collected by it. It made reference to a summary of telephone recordings, but also to statements made by the victims, witnesses and other defendants.

30. According to the applicant, the file at his disposal on 3 December 2004 contained only the statements of the three co-defendants arrested at the same time as him, and they did not reveal any incriminatory facts against him.

31. The Court notes that the prosecution submitted the summary of the recorded telephone conversations during the hearing of 3 December 2004 with the recommendation that it should not be consulted by the defence. The applicant's request to examine the summary was dismissed by the court on the grounds that it concerned only the merits of the case. In the absence of other evidence in the file, apart from the statements given by the three co-defendants, it appears that the summary of the recorded telephone conversations played a key role in the Alba-Iulia Court of Appeal's decision to prolong the applicant's detention. However, while the public prosecutor and the court were familiar with the recordings, the applicant and his counsel did not have cognisance of their precise content at that stage.

32. Furthermore, the Court notes that the defence lawyer's express request to have access to the rest of the evidence mentioned in the proposal for the prolongation of the detention was ignored by the Alba-Iulia Court of Appeal without providing any explanation for its absence from the file.

33. The Court does not lose sight of the fact that the refusal to grant the applicant's counsel access to all the documents in the case file was based on the risk that the success of the ongoing investigations might be compromised. However, that legitimate goal may not be pursued at the expense of substantial restrictions on the rights of the defence. Counsel must therefore be given access to those parts of the case files on which the suspicion against the applicant was essentially based. It follows that the applicant, assisted by counsel, did not, at that stage of the proceedings, have an opportunity adequately to challenge the findings referred to by the Public Prosecutor or the courts as required by the principle of "equality of arms".

34. The foregoing considerations are sufficient to enable the Court to conclude that the procedure by which the applicant sought to challenge the lawfulness of his pre-trial detention violated the fairness requirements of Article 5 § 4 of the Convention.

There has accordingly been a violation of Article 5 § 4 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

35. Lastly, the applicant complained under Article 5 § 1 of the Convention that the criminal investigation had been performed by a prosecutor who had no material jurisdiction for the types of offence of which he had been accused.

36. However, 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 this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this complaint is 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

37. 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

38. The applicant claimed 700 Romanian lei (ROL) per month starting from 18 October 2007 until the delivery of the Court's decision in respect of pecuniary damage. Such amount represents the difference between the monthly salary which he could have earned as a policeman and the monthly pension he received after he had been released from prison. The applicant also claimed ROL 1,000,000 in respect of non-pecuniary damage.

39. The Government averred that there was no causal link between the requested amounts and the alleged violation of Article 5 § 4 of the Convention.

40. 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 awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

41. The applicant also claimed EUR 14,240 for the costs and expenses incurred before the domestic courts and EUR 8,000 for those incurred before the Court.

42. The Government noted that the applicant's lawyer was his wife and that the requested amounts were unreasonably high.

43. 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 documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,000 for the proceedings before the Court.

C. Default interest

44. The Court considers it appropriate that the default interest 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 equality of arms before the domestic courts admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 4 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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses before the Court;
   (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 26 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President