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Application no. 75317/17
Dragnea v Romania

Brussels, 2 April 2019

**REPLY TO THE FUTHER OBSERVATIONS FROM BUCHAREST, ROMANIA
DATED 11 MARCH 2019**

1. On 11 March 2019, the agent of the government of Romania to the European Court of Human Rights submitted to the Court additional observations on the admissibility, merits and just satisfaction claim in this matter.
2. The Registrar invited the applicant to submit any observations on the March 2019 pleading by 2 April 2019.
3. The applicant considers that Romania's March 2019 pleading affirms both the scope and validity of the three claims made in the application and accepts that Romania has acted in breach of the Convention in respect of the applicant. The March 2019 pleading seeks to justify breaches of the Convention on the basis of national deficiencies in decision making and constitutional practice. National deficiencies cannot be a defence to a claim of a breach of the Convention.
4. The pleading is not a model of clarity. This is most likely due to difficulties in translation. Should this give rise to misunderstandings, in these observations, the applicant begs the indulgence of the Court.
5. These observations will address each of the applicant's claims in turn in light of the observations of Romania in relation to them.

The underlying legal procedure

6. In paragraph 7 of the March 2019 pleading Romania states that the '*aforementioned arguments are identical regarding the other claims made by the applicant*'. It is not

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exactly clear what these aforementioned arguments are, but it seems to be a second affirmation by Romania of the acceptance in paragraph 5 of the March 2019 pleading that the *'violation of the right to a fair trial are real'*. In paragraph 7 Romania refers to the fact that there cannot be breach of data protection law if the electoral register is public and the inappropriateness of the increase in the sanction imposed.

7. The applicant agrees with the conclusion that there cannot be a breach of data protection law in relation to matters that are in the public domain and that there cannot be a breach of law in urging supporters of a political party to 'get out the vote'. Getting out the vote is one of the core activities of political parties in democracies. Romania does not clarify why an increase in the sanction is a breach of the right to a fair trial. The applicant observes that the superior court did not justify in law the reason for the increase in the sanction, something which is a requirement for an appeal based on a claim that the lower court acted in breach of the law.
8. The applicant considers that the combination of paragraph 5 and paragraph 7 are an acceptance by Romania that the underlying legal procedure was a breach of the right to a fair trial and thus are an acceptance of a breach of Article 6 of the Convention.
9. It is a general principle of the Convention, and one that this Court has constantly emphasised, that the right to a fair trial is one of the fundamental principles of a democratic society. No one should be deprived of their liberty or reputation without due process. The idea of due process requires that the accused has the right to know the nature of the offence of which he stands accused so as to be able to exercise the right of defence. Changing the legal nature of the accusation in the course of a legal procedure, a period which must include the period of investigation by, in this case, the public prosecutor (DNA), means that due process and the right of defence is fundamentally undermined.
10. In this case the accusation was changed from electoral fraud (calling for a high turnout in an election) to the disclosure to third parties of information (which was already in the public domain) in breach of data protection laws.
11. The conviction of an accused on the basis of legal provision that was not the legal basis that started the procedure invalidates any judgment that might arise from that procedure. How can there be respect of the need to ensure that the accused, in a criminal trial, is able to know and comment on the evidence to be used against him if that evidence is used to different ends? In this situation there can be no equality of arms.

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12. To determine if a proceeding is fair, this Court must examine the proceedings in their entirety. See (*Ankerl v. Switzerland*, § 38; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 197).
13. This claim is not an attempt by the applicant to appeal the facts of the case. Rather it seeks to show that due process was not observed in this matter in breach of Article 6 of the Convention. In this matter, because the underlying accusation changed in the course of the proceedings, the applicant was not able to adduce the arguments and evidence that he considered relevant. This failure was not remedied by the appeal process in the domestic courts as the earlier convictions, on the basis of the changed accusations, were confirmed rather than re-examined.
14. The intentional prejudice against the applicant in this process was confirmed by the decision of the superior court to increase the sanction from one to two years on the basis of the attempt of the applicant to exercise the right of defence in relation to the changed accusations. This undermines public confidence in the judicial system, something which is part and parcel of the *raison d'être*, or objectives, of Article 6 of the Convention which this Court is bound to uphold.

The breach of the 30-day rule

15. To the extent that the applicant's understanding of the meaning of paragraphs 5 and 7 are correct, Romania again accepts that the breach of the 30-day rule is a breach of the right to a fair trial and therefore a breach of Article 6 of the Convention.
16. A rule providing that courts of law must deliver the written reasoning of their judgments within a limited period (in Romania's case – 30 days) is fundamental to the administration of justice in a democratic state upholding the rule of law. A party must know the reasons for the imposition of sanctions, and in particular a sanction that can deprive a party of their liberty, so as to be able to challenge, or in other words to appeal, the legality of the sanction.
17. Failure to respect this rule is a *de jure* breach of Article 6 of the Convention. Formally, the applicant need not make further argumentation on this point. However, the circumstances of the case show why this rule must be strictly applied. The applicant had to make various applications to the sentencing court to have the underlying reasoning of the ruling handed down in writing. During this time the applicant could not challenge the legality of the sentence which was already in the public domain, impacting significantly on the private and public activities of the applicant.

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The appointment of the panel of judges

18. In paragraphs 3, 4 and 5 of the March 2019 pleading, Romania accepts that the 'issues raised by the complainant - concerning the right to a fair trial ... are real'. Romania goes on to say that the pleading will only address the third issue, namely the issue of the signatures. This breach of the right to a fair trial was brought about by the fact that the panel of judges appointed to hear the matter was not legally formed raising 'a point on the independence and objective fairness of' the panel and 'thus affecting the legality of the decision adopted'.
19. The legality of the constitution of the five-judge panel is a claim that is distinct from the other claims in this application. An illegally constituted tribunal cannot, by virtue of that illegality, legally hand-down a sanction impinging on the rights of an individual. Questions relating to Romanian constitutional and procedural law particularly in relation to the prospective application of Constitutional law judgments are not relevant in this respect.
20. In addition, the time limits set out in Romanian procedural law for contesting the legality of the earlier judgment sanctioning the applicant have expired and therefore the applicant is not in a position to benefit from the effects of the Constitutional Court ruling.

The signing and delivery of the written judgement

21. In paragraph 25 of the March 2019 pleading, Romania seems to accept that the articles of law by virtue of which the assistant magistrate wrote down the reasoning of the court nearly one year after the handing down of the judgment orally, 'injures the right to a fair trial'. This reasoning seems to be based on judgement 33/2018 of the Romanian Constitutional Court, the reasoning of which was only handed to the government of Romania on 28 February 2019 (see paragraph 24 of the March 2019 pleading).
22. The applicant has argued that the breach of Article 6 of the Convention lies not only in the fact that two judges did not sign the written judgment but also that there is no evidence that the assistant magistrate who finally did write down the reasoning of the court was in fact present during the oral procedure and partook in the gathering of evidence and the hearing of the witnesses. The need to have the written pleadings written by a judge (or in exceptional cases by an assistant) who has heard the evidence and has had the opportunity to evaluate that evidence and the credibility of those presenting the evidence has been held to be a fundamental part of the right to a fair trial within the terms of Article 6 of the Convention.

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23. ~~This new finding by the Constitutional Court of Romania in case 33/2018 merely compounds the applicants understanding of the correct interpretation of Article 6 and applies irrespective of the prospective or retrospective application of rulings of the Constitutional Court.~~

Conclusions

24. The applicant requests this court to find in his favour in relation to the distinct claims that have been made and to award his claim in just satisfaction.
25. The lawyers for the applicant remain available to this Court to answer any questions the Court may have in relation to this application.

For Liviu Dragnea


Bernard O'Connor
Brussels
2 April 2019