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country report

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Camelia Bogdan v. Romania: a case of arbitrary suspension of a judge

European Court of Human Rights: Romanian judge *Camelia Bogdan*, who was suspended from the judicial service in her home country, had no legal remedy

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The case "*Camelia Bogdan v. Romania*", involving a Romanian judge, represents a further stage in the litigations of representatives of the Romanian judiciary before the European Court of Human Rights (ECtHR). The case is to be viewed in the context of the disputes between the Romanian judiciary and the Social Democrat-led coalition in power until 2019. *Camelia Bogdan* (the applicant) was temporarily suspended from her office for questionable reasons without being able to effectively challenge the relevant decision. This is illegal according to a decision of the ECtHR of October 2020. Her right to a fair trial (Article 6 (1) ECHR) was infringed.

Background of the suspension from duty

The applicant is a judge from Bucharest who, in the line of duty, convicted the Romanian politician and businessman *Dan Voiculescu* to a long prison term for fraud and money laundering in 2014.

In 2017 (as it happens, the same year *Voiculescu* was released early from prison after serving less than three years of his ten-year sentence), Judge *Bogdan* was suspended from office. The reason given for this measure was her participation as an expert in a training course for the Romanian Ministry of Agriculture in 2014, for which she received a fee. This expert mission had previously been approved by the President of her court. A paid consulting activity was inadmissible according to the judiciary law applicable at that time. Later on, Judge *Bogdan* ruled in a case in which the Ministry was a party.

As a result, the Judicial Inspectorate began disciplinary proceedings against Judge *Bogdan* in 2016. The Judicial Inspectorate found it problematic that the ministerial department which paid the applicant an expert fee was later a party in a court case presided over by her. In the view of the Judicial Inspectorate, the judge should have taken a formal leave of absence for the duration of the training course. Her failing to show up for work during the training course was considered "unjustified". Ms. *Bogdan* unsuccessfully tried to challenge the disciplinary proceedings on the grounds that the training in question had been an

(admissible) educational activity. Based on the decision of the Judicial Inspectorate, the Romanian Supreme Council of Magistrates (hereinafter "Supreme Judicial Council") decided to suspend the applicant from office.

The judge's suspension lasted from March 21 to December 13, 2017, while her pay was stopped accordingly. In a case filed by Judge *Bogdan*, the Supreme Court of Romania later on ruled to terminate the suspension and instead transfer the judge to the Court of Appeal in Târgu-Mureş (German toponym: *Neumarkt am Mieresch*), 400 km from Bucharest. The Romanian Constitutional Court shared the views of the Supreme Judicial Council in the related proceedings, namely that the services provided against remuneration represented a consulting service, which in the case of the applicant was incompatible with her judicial function; therefore, she had violated the judicial duty of care.

As far as consenting to Ms. *Bogdan's* participation as an expert in the training course is concerned, according to media reports, the Court President of her court was unaware of the fee arrangements.

As a result, the applicant was attacked in a number of media reports, before the Bucharest court issued an official press release. According to media reports, it was insinuated that she was guilty of corruption and money laundering. The Supreme Judicial Council refused to comment on this.

In the proceedings before the European Court of Human Rights in Strasbourg, the applicant subsequently complained of a violation of (1) her right to a fair trial and (2) her personality rights. Essentially, these violations mainly consisted in the lack of judicial procedures in disciplinary proceedings, namely that the person concerned had no effective access to a court. Furthermore, due to an intense media coverage, Ms. *Bogdan* had suffered a loss of reputation, which could not be remedied at the national level.

On the first question, the Romanian Constitutional Court had already expressed its opinion in favour of the applicant prior to the ECtHR judgment of 20 October 2020: the Parliament had failed to provide a legal remedy against the disciplinary measure of a temporary suspension of judges. A review by a court of law was thus excluded. Although the respective judge was allowed to challenge the relevant measure once, the legal framework as it stood in 2017 offered no effective remedy, but rather an illusory one.

Admissibility of the complaint before ECtHR

Some of Ms. *Bogdan's* complaints were classified as inadmissible by the ECtHR, mainly for two reasons: in part there had been a general legal recourse which the applicant had not used (e.g. in the case of protection of her personality rights). Furthermore, Ms. *Bogdan's* legal views did not match the Romanian legal situation existing at the time (e.g., on the question of the existence of a statute of limitation for initiating suspension from the office of judge as a result of disciplinary proceedings). This of course does not change the fact that the legal remedies existing at that time were ineffective.

Accordingly, the ECtHR emphasized the importance of *statutes of limitation* for the certainty of legal relations: above all, to avoid injustices with regard to facts lying in the distant past, for which there would no longer be complete evidence. The existence of such statutes of limitation is one of the basic elements of the rule of law, and contributes to a certain stability of the legal situation and promotes public confidence in the judiciary.

In its decision of 20 October 2020¹, the ECtHR found that the applicant was challenging the lack of time limitations in a rather abstract manner, i.e. without having been a victim of the contested lack of limitation periods. However, the Romanian law in force in 2016 provided for two such time limitations, namely a two-year limitation for initiating disciplinary proceedings and a thirty-day limitation (after the end of the disciplinary proceedings) for implementing a disciplinary measure.

Since even the applicant did not contest this before the ECtHR, this part of the complaint was declared inadmissible.

The ECtHR expressed its views in more detail on the questions of Ms *Bogdan*'s salary during the suspension, and the possible loss of reputation. Both aspects are covered by the human rights concept of private life. The established case law of the ECtHR sets high thresholds for the determination of a disproportionate violation of private life in employment relationships. For the court to reach such a finding, the applicant should have suffered a lasting loss of social quality of life. However, since the negative consequences of the salary adjustment and the media attacks largely ceased to exist after her transfer, the above mentioned thresholds were not met either.

During her suspension from office, she was also not prohibited from pursuing any other occupation in a legal profession. With regard to the alleged loss of reputation, Ms. *Bogdan* should have taken action against the respective media through the general civil law remedies instead of relying on the role of the Supreme Judicial Council.

Having mentioned that, this does not say anything about the role of the Supreme Judicial Council under constitutional law or legal policy in defending magistrates against unjustified media attacks on the judiciary (which have undoubtedly damaged the reputation of the judiciary as a whole in a lasting manner).

Suspension of office without right of defence

The applicant was however right in another, decisive question:

Although Romanian law provides for legal remedies to challenge suspension decisions by the Supreme Judicial Council, the applicant has not made use of them. This would normally result in the inadmissibility of the complaint in question before the ECtHR. An important exception to this rule is when the legal remedy, although formally existing, ultimately offers *only insufficient protection*. A legal remedy should not only be available by law, but must also offer chances of success in the respective dispute. In the present case, however, precisely this standard was not met.

The ECtHR found that the existing legal remedies did not allow the appellant an efficient judicial review of the suspension, because the case-law existing at the time in similar cases would have led to the mere rejection of the complaint on formal grounds. Furthermore, in a number of cases the Supreme Judicial Council had refused to examine the complaint of the respective judge, as the current decision-making practice of the Council showed. In similar cases, neither the Supreme Judicial Council nor the Supreme Court of Romania at that time actually checked if suspensions were necessary and proportional.

Just as in the *Kövesi v. Romania* case, which was recently brought before the ECtHR,² the Court of Justice applied the so-called *Eskelinen criteria*. According to these criteria, although a

civil servant must normally have access to legal recourse, it is up to the respective government to prove that the absence of an appeal is justified. Since in the present case of Ms. *Bogdan* the judicial remedy was only formally accessible to her, the ECtHR decided to find that a legal remedy was *not* available to her, with the Romanian government failing to provide any justification for this. The Strasbourg Court emphasizes that even the Romanian Constitutional Court took this view (see above). In this way, Romania had violated the core of the applicant's right to a fair trial.

Note: In the meantime, Romania has changed the legal framework in favour of the applicant. However, this change did not have any retroactive effect on Ms Bogdan's case.

Evaluation

The case *Camelia Bogdan v. Romania* above all compels the Romanian Supreme Judicial Council to review its role as a defender of judicial prestige and judicial independence. The most recent reports of the EU Commission in the Cooperation and Verification Mechanism for Romania have made it clear that in the recent past, media and political actors have frequently put pressure on judges and other institutions of the judiciary in Romania. The EU Commission concluded that the Supreme Judicial Council had not effectively fulfilled its task of defending the independence of the judiciary.

The present case clearly illustrates the pressure that is being exerted on individual judges by the use of an almost unpredictable legal instrument to block effective justice. In this sense, this ruling also shows the tendency already observed in the *Kövesi* case, whereby judges or prosecutors who are "critical" of the political system are removed from their positions or suspended.

Judge *Bogdan's* suspension, which lasted almost a year, took place in 2017, that is during the time of a social-democratic-liberal government (which is no longer in office). Such an action can be described as censorship of justice; perhaps not as evidently as in the case of *Kövesi*, where freedom of opinion was directly affected, but in a broader sense - to further weaken a justice system that was already impaired. In both cases, the judicial representatives concerned were unable to effectively protect their infringed rights on the national level. With its decision in the case of *Bogdan v. Romania*, the ECtHR sheds light on another case that illustrates the harsh action taken against Romanian judges and prosecutors. This phase, characterized by high level political pressure on the judiciary, could be observed from the beginning of 2017 until the fall of 2019 (during which Romania was ruled in short succession by three cabinets of the PSD and ALDE party coalition).

In this context the evolution of the cases brought "against Romania" before the European Court of Human Rights may be mentioned. From 8920 complaints in 2008 (chronology of facts: Romania joined the EU in 2007), the number initially rose to 12286 by 2011, but then fell significantly to 3536 complaints (2015). Since then, however, the number of complaints has risen sharply again, to 8500 (2018) and has remained at a similarly high level ever since.

In the meantime, the Romanian government has changed the legal framework on the basis of which Ms. *Bogdan* was suspended from office. Guarantees still missing in 2017 have been introduced, which gives reason for optimism.

Further judgements in cases brought by judges and prosecutors whose rights have been infringed are expected³ in the near future, both at the European Court of Human Rights (in Strasbourg) and at the European Court of Justice (in Luxembourg).

¹ Camelia Bogdan v. Romania, 36889/18, <http://hudoc.echr.coe.int/eng?i=001-205668>

² Splavnic / Rank, KAS Country Report "The Case of Kövesi v. Romania" of 12.05.2020, available at:
<https://www.kas.de/documents/252038/7938566/The+case+of+KO%CC%88VESI+v.+ROMANIA.pdf/015f2e0e-7d69-3982-2ef0-30fdfce47dfc?version=1.0&t=1589448481766>;
Case 3594/19, <http://hudoc.echr.coe.int/fre?i=001-202415>

³ Pending before the ECJ are, among others, cases C-357/19, C-547/19, C-859/19 concerning the Romanian judiciary; see also: Zidaru, Romanian judiciary before the ECJ and the ECtHR, DRIZ 11/20, p. 378f.

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