



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

**CASE OF ROTARU v. ROMANIA**

(Application no. 28341/95)

JUDGMENT

STRASBOURG

4 May 2000



**In the case of Rotaru v. Romania,**

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mrs E. PALM,

Mr A. PASTOR RIDRUEJO,

Mr G. BONELLO,

Mr J. MAKARCZYK,

Mr R. TÜRMEŒ,

Mr J.-P. COSTA,

Mrs F. TULKENS,

Mrs V. STRÁŒNICKÁ,

Mr P. LORENZEN,

Mr M. FISCHBACH,

Mr V. BUTKEVYCH,

Mr J. CASADEVALL,

Mr A.B. BAKA,

Mr R. MARUSTE,

Mrs S. BOTOCHAROVA,

Mrs R. WEBER, *ad hoc judge*,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 19 January and 29 March 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case was referred to the Court in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”)<sup>1</sup> by the European Commission of Human Rights (“the Commission”) and by a Romanian national, Mr Aurel Rotaru (“the applicant”), on 3 and 29 June 1999 respectively (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 28341/95) against Romania lodged with the Commission on 22 February 1995 under former Article 25 of the Convention.

The applicant alleged a violation of his right to respect for his private life on account of the holding and use by the Romanian Intelligence Service of a file containing personal information and an infringement of his right of

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1. *Note by the Registry.* Protocol No. 11 came into force on 1 November 1998.

access to a court and his right to a remedy before a national authority that could rule on his application to have the file amended or destroyed.

3. The Commission declared the application admissible on 21 October 1996. In its report of 1 March 1999 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Articles 8 and 13 of the Convention. The full text of the Commission's opinion is reproduced as an annex to this judgment.

4. On 7 July 1999 a panel of the Grand Chamber determined that the case should be decided by the Grand Chamber (Rule 100 § 1 of the Rules of Court). Mr Bîrsan, the judge elected in respect of Romania, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Romanian Government ("the Government") accordingly appointed Mrs R. Weber to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The applicant and the Government each filed a memorial.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 January 2000.

There appeared before the Court:

(a) *for the Government*

Mrs R. RIZOIU,	<i>Agent,</i>
Mr M. SELEGEAN, Legal Adviser, Ministry of Justice,	
Mr T. CORLĂȚEAN, Administrative Assistant, Permanent Delegation of Romania to the Council of Europe,	<i>Advisers;</i>

(b) *for the applicant*

Mr I. OLTEANU,	<i>Counsel,</i>
Mr F. ROTARU,	<i>Representative and son of the applicant.</i>

The Court heard addresses by Mrs Rizoiu, Mr Selegean, Mr Olteanu and Mr F. Rotaru.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

#### A. The applicant's conviction in 1948

7. The applicant, who was born in 1921, was a lawyer by profession. He is now retired and lives in Bârlad.

8. In 1946, after the communist regime had been established, the applicant, who was then a student, was refused permission by the prefect of the county of Vaslui to publish two pamphlets, "Student Soul" (*Suflet de student*) and "Protests" (*Proteste*), on the ground that they expressed anti-government sentiments.

9. Dissatisfied with that refusal, the applicant wrote two letters to the prefect in which he protested against the abolition of freedom of expression by the new people's regime. As a result of these letters, the applicant was arrested on 7 July 1948. On 20 September 1948 the Vaslui People's Court convicted the applicant on a charge of insulting behaviour and sentenced him to one year's imprisonment.

#### B. The proceedings brought under Legislative Decree no. 118/1990

10. In 1989, after the communist regime had been overthrown, the new government caused Legislative Decree no. 118/1990 to be passed, which granted certain rights to those who had been persecuted by the communist regime and who had not engaged in Fascist activities (see paragraph 30 below).

11. On 30 July 1990 the applicant brought proceedings in the Bârlad Court of First Instance against the Ministry of the Interior, the Ministry of Defence and the Vaslui County Employment Department, seeking to have the prison sentence that had been imposed in the 1948 judgment taken into account in the calculation of his length of service at work. He also sought payment of the corresponding retirement entitlements.

12. The court gave judgment on 11 January 1993. Relying on, among other things, the statements of witnesses called by the applicant (P.P. and G.D.), the 1948 judgment and depositions from the University of Iași, it noted that between 1946 and 1949 the applicant had been persecuted on political grounds. It consequently allowed his application and awarded him the compensation provided for in Legislative Decree no. 118/1990.

13. As part of its defence in those proceedings, the Ministry of the Interior submitted to the court a letter of 19 December 1990 that it had

received from the Romanian Intelligence Service (*Serviciul Român de Informații* – “the RIS”). The letter read as follows:

“In reply to your letter of 11 December 1990, here are the results of our checks on Aurel Rotaru, who lives in Bârlad:

(a) during his studies in the Faculty of Sciences at Iași University the aforementioned person was a member of the Christian Students' Association, a 'legionnaire' [*legionar*]-type<sup>[1]</sup> movement.

(b) in 1946 he applied to the Vaslui censorship office for permission to publish two pamphlets entitled 'Student Soul' and 'Protests' but his request was turned down because of the anti-government sentiments expressed in them;

(c) he belonged to the youth section of the National Peasant Party, as appears from a statement he made in 1948;

(d) he has no criminal record and, contrary to what he maintains, was not imprisoned during the period he mentions;

(e) in 1946-48 he was summoned by the security services on several occasions because of his ideas and questioned about his views ...”

### **C. The action for damages against the RIS**

14. The applicant brought proceedings against the RIS, stating that he had never been a member of the Romanian legionnaire movement, that he had not been a student in the Faculty of Sciences at Iași University but in the Faculty of Law and that some of the other information provided by the RIS in its letter of 19 December 1990 was false and defamatory. Under the Civil Code provisions on liability in tort he claimed damages from the RIS for the non-pecuniary damage he had sustained. He also sought an order, without relying on any particular legal provision, that the RIS should amend or destroy the file containing the information on his supposed legionnaire past.

15. In a judgment of 6 January 1993 the Bucharest Court of First Instance dismissed the applicant's application on the ground that the statutory provisions on tortious liability did not make it possible to allow it.

16. The applicant appealed.

17. On 18 January 1994 the Bucharest County Court found that the information that the applicant had been a legionnaire was false. However, it dismissed the appeal on the ground that the RIS could not be held to have

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1. That is, belonging to the Legion of Archangel Michael, an extreme right-wing, nationalist, anti-Semitic and paramilitary Romanian movement created in 1927 as a breakaway movement from a movement of similar tendencies, the League for Christian National Defence. The legionnaire movement gave birth to a number of political parties which influenced Romanian politics during the 1930s and 1940s.

been negligent as it was merely the depository of the impugned information, and that in the absence of negligence the rules on tortious liability did not apply. The court noted that the information had been gathered by the State's security services, which, when they were disbanded in 1949, had forwarded it to the *Securitate* (the State Security Department), which had in its turn forwarded it to the RIS in 1990.

18. On 15 December 1994 the Bucharest Court of Appeal dismissed an appeal by the applicant against the judgment of 18 January 1994 in the following terms:

“... the Court finds that the applicant's appeal is ill-founded. As the statutory depository of the archives of the former State security services, the RIS in letter no. 705567/1990 forwarded to the Ministry of the Interior information concerning the applicant's activities while he was a university student, as set out by the State security services. It is therefore apparent that the judicial authorities have no jurisdiction to destroy or amend the information in the letter written by the RIS, which is merely the depository of the former State security services' archives. In dismissing his application, the judicial authorities did not infringe either Article 1 of the Constitution or Article 3 of the Civil Code but stayed the proceedings in accordance with the jurisdictional rules laid down in the Code of Civil Procedure.”

#### **D. The action for damages against the judges**

19. On 13 June 1995 the applicant brought an action for damages against all the judges who had dismissed his application to have the file amended or destroyed. He based his action on Article 3 of the Civil Code, relating to denials of justice, and Article 6 of the Convention. According to the applicant, both the County Court and the Vaslui Court of Appeal refused to register his action.

In this connection, the applicant lodged a fresh application with the Commission on 5 August 1998, which was registered under file no. 46597/98 and is currently pending before the Court.

#### **E. The application for review**

20. In June 1997 the Minister of Justice informed the Director of the RIS that the European Commission of Human Rights had declared the applicant's present application admissible. The Minister consequently asked the Director of the RIS to check once again whether the applicant had been a member of the legionnaire movement and, if that information proved to be false, to inform the applicant of the fact so that he could subsequently make use of it in any application for review.

21. On 6 July 1997 the Director of the RIS informed the Minister of Justice that the information in the letter of 19 December 1990 that the applicant had been a legionnaire had been found by consulting their

archives, in which a table drawn up by the Iași security office had been discovered that mentioned, in entry 165, one Aurel Rotaru, a “science student, rank-and-file member of the Christian Students' Association, legionnaire”. The Director of the RIS mentioned that the table was dated 15 February 1937 and expressed the view that “since at that date Mr Rotaru was only 16, he could not have been a student in the Faculty of Sciences. [That being so,] we consider that there has been a regrettable mistake which led us to suppose that Mr Aurel Rotaru of Bârlad was the same person as the one who appears in that table as a member of a legionnaire-type organisation. Detailed checks made by our institution in the counties of Iași and Vaslui have not provided any other information to confirm that the two names refer to the same person.”

22. A copy of that letter was sent to the applicant, who on 25 July 1997 applied to the Bucharest Court of Appeal to review its decision of 15 December 1994. In his application he sought a declaration that the defamatory documents were null and void, damages in the amount of one leu in respect of non-pecuniary damage and reimbursement of all the costs and expenses incurred since the beginning of the proceedings, adjusted for inflation.

23. The RIS submitted that the application for review should be dismissed, holding that, in the light of the RIS Director's letter of 6 July 1997, the application had become devoid of purpose.

24. In a final decision of 25 November 1997 the Bucharest Court of Appeal quashed the decision of 15 December 1994 and allowed the applicant's action, in the following terms:

“It appears from letter no. 4173 of 5 July 1997 from the Romanian Intelligence Service ... that in the archives (shelf-mark 53172, vol. 796, p. 243) there is a table which lists the names of the members of legionnaire organisations who do not live in Iași, entry 165 of which contains the following: 'Rotaru Aurel – science student, rank-and-file member of the Christian Students' Association, legionnaire'. Since the applicant was barely 16 when that table was drawn up, on 15 February 1937, and since he did not attend lectures in the Iași Faculty of Sciences, and since it appears from subsequent checks in the documents listing the names of the members of legionnaire organisations that the name 'Aurel Rotaru' does not seem to be connected with an individual living in Bârlad whose personal details correspond to those of the applicant, the Romanian Intelligence Service considers that a regrettable mistake has been made and that the person mentioned in the table is not the applicant.

Having regard to this letter, the Court holds that it satisfies the requirements of Article 322-5 of the Code of Civil Procedure as it is such as to completely alter the facts previously established. The document contains details which it was not possible to submit at any earlier stage in the proceedings for a reason beyond the applicant's control.

That being so, the date on which the *Securitate* was formed and the way in which the former security services were organised are not relevant factors. Similarly, the fact, albeit a true one, that the Romanian Intelligence Service is only the depositary of



the archives of the former security services is irrelevant. What matters is the fact that letter no. 705567 of 19 December 1990 from the Romanian Intelligence Service (Military Unit no. 05007) contains details which do not relate to the applicant, so that the information in that letter is false in respect of him and, if maintained, would seriously injure his dignity and honour.

In the light of the foregoing and in accordance with the aforementioned statutory provision, the application for review is justified and must be allowed. It follows that the earlier decisions in this case must be quashed and that the applicant's action as lodged is allowed.”

25. The court did not make any order as to damages or costs.

## II. RELEVANT DOMESTIC LAW

### A. The Constitution

26. The relevant provisions of the Constitution read as follows:

#### Article 20

“(1) The constitutional provisions on citizens' rights and liberties shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with the covenants and other treaties to which Romania is a party.

(2) In the event of conflict between the covenants and treaties on fundamental human rights to which Romania is a party and domestic laws, the international instruments shall prevail.”

#### Article 21

“(1) Anyone may apply to the courts for protection of his rights, liberties and legitimate interests.

(2) The exercise of this right shall not be restricted by any statute.”

### B. The Civil Code

27. The relevant provisions of the Civil Code are worded as follows:

#### Article 3

“A judge who refuses to adjudicate, on the pretext that the law is silent, obscure or defective, may be prosecuted on a charge of denial of justice.”

**Article 998**

“Any act committed by a person who causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it.”

**Article 999**

“Everyone shall be liable for damage he has caused not only through his own act but also through his failure to act or his negligence.”

**C. The Code of Civil Procedure**

28. The relevant provision of the Code of Civil Procedure reads as follows:

**Article 322-5**

“An application may be made for review of a final decision ... where written evidence which has been withheld by the opposing party or which it was not possible to submit for a reason beyond the parties' control is discovered after the decision has been delivered ...”

**D. Decree no. 31 of 1954 on natural and legal persons**

29. The relevant provisions of Decree no. 31 of 1954 on natural and legal persons are worded as follows:

**Article 54**

“(1) Anyone whose right ... to honour, reputation ... or any other non-economic right has been infringed may apply to the courts for an injunction prohibiting the act which is infringing the aforementioned rights.

(2) Similarly, anyone who has been the victim of such an infringement of rights may ask the courts to order the person responsible for the unlawful act to carry out any measure regarded as necessary by the court in order to restore his rights.”

**Article 55**

“If a person responsible for unlawful acts does not within the time allowed by the court perform what he has been enjoined to do in order to restore the right infringed, the court may sentence him to pay a periodic pecuniary penalty to the State ...”

**E. Legislative Decree no. 118 of 30 March 1990 on the granting of certain rights to persons who were persecuted on political grounds by the dictatorial regime established on 6 March 1945**

30. At the material time, the relevant provisions of Legislative Decree no. 118/1990 read:

**Article 1**

“The following periods shall be taken into account in determining seniority and shall count as such for the purpose of calculating retirement pension and any other rights derived from seniority: periods during which a person, after 6 March 1945, for political reasons –

(a) served a custodial sentence imposed in a final judicial decision or was detained pending trial for political offences;

...”

**Article 5**

“A committee composed of a chairman and at most six other members shall be set up in each county ... in order to verify whether the requirements laid down in Article 1 have been satisfied ...

The chairman must be legally qualified. The committee shall include two representatives from the employment and social-welfare departments and a maximum of four representatives from the association of former political detainees and victims of the dictatorship.

...”

**Article 6**

“The persons concerned may establish that they satisfy the conditions laid down in Article 1 by means of official documents issued by the relevant authorities or ... of any other material of evidential value.

...”

**Article 11**

“The provisions of this decree shall not be applicable to persons who have been convicted of crimes against humanity or to those in respect of whom it has been established, by means of the procedure indicated in Articles 5 and 6, that they engaged in Fascist activities within a Fascist-type organisation.”

**F. Law no. 14 of 24 February 1992 on the organisation and operation of the Romanian Intelligence Service**

31. The relevant provisions of Law no. 14 of 24 February 1992 on the organisation and operation of the Romanian Intelligence Service, which was published in the Official Gazette on 3 March 1992, read as follows:

**Section 2**

“The Romanian Intelligence Service shall organise and carry out all activities designed to gather, verify and utilise the information needed for discovering, preventing and frustrating any actions which, in the eyes of the law, threaten Romania's national security.”

**Section 8**

“The Romanian Intelligence Service shall be authorised to hold and to make use of any appropriate resources in order to secure, verify, classify and store information affecting national security, as provided by law.”

**Section 45**

“All internal documents of the Romanian Intelligence Service shall be secret, shall be kept in its own archives and may be consulted only with the consent of the Director as provided in law.

Documents, data and information belonging to the Romanian Intelligence Service shall not be made public until forty years after they have been archived.

The Romanian Intelligence Service shall, in order to keep and make use of them, take over all the national-security archives that belonged to the former intelligence services operating on Romanian territory.

The national-security archives of the former *Securitate* shall not be made public until forty years after the date of the passing of this Act.”

**G. Law no. 187 of 20 October 1999 on citizens' access to the personal files held on them by the *Securitate*, enacted with the intention of unmasking that organisation's nature as a political police force**

32. The relevant provisions of Law no. 187 of 20 October 1999, which came into force on 9 December 1999, are worded as follows:

**Section 1**

“(1) All Romanian citizens, and all aliens who have obtained Romanian nationality since 1945, shall be entitled to inspect the files kept on them by the organs of the *Securitate* ... This right shall be exercisable on request and shall make it possible for

the file itself to be inspected and copies to be made of any document in it or relating to its contents.

(2) Additionally, any person who is the subject of a file from which it appears that he or she was kept under surveillance by the *Securitate* shall be entitled, on request, to know the identity of the *Securitate* agents and collaborators who contributed documents to the file.

(3) Unless otherwise provided by law, the rights provided in subsections (1) and (2) shall be available to the surviving spouses and relatives up to the second degree inclusive of a deceased.”

## Section 2

“(1) In order to provide for a right of access to information of public interest, all Romanian citizens ..., the media, political parties ... shall be entitled to be informed ... if any of the persons occupying the following posts or seeking to do so have been agents or collaborators of the *Securitate*:

- (a) the President of Romania;
- (b) member of Parliament or of the Senate;
- ...”

## Section 7

“A National Council for the Study of the Archives of the *Securitate* ... (hereinafter 'the Council'), with its headquarters in Bucharest, shall be set up to apply the provisions of this Act.

The Council shall be an autonomous body with legal personality, subject to supervision by Parliament. ...”

## Section 8

“The Council shall consist of a college of eleven members.

The members of the college of the Council shall be appointed by Parliament, on a proposal by the parliamentary groups, according to the political composition of the two Chambers ... for a term of office of six years, renewable once.”

## Section 13

“(1) The beneficiaries of this Act may, in accordance with section 1(1), request the Council –

(a) to allow them to consult the files ... compiled by the *Securitate* up to 22 December 1989;

(b) to issue copies of ... these files ...;

(c) to issue certificates of membership or non-membership of the *Securitate* and of collaboration or non-collaboration with it;

...”

#### **Section 14**

“(1) The content of certificates under section 13(1)(c) may be challenged before the college of the Council ...”

#### **Section 15**

“(1) The right of access to information of public interest shall be exercisable by means of a request sent to the Council. ...

...

(4) In response to requests made under section 1, the Council shall verify the evidence at its disposal, of whatever form, and shall immediately issue a certificate ...”

#### **Section 16**

“(1) Any beneficiary or person in respect of whom a check has been requested may challenge before the college of the Council a certificate issued under section 15. ...

The college's decision may be challenged ... in the Court of Appeal ...”

## **THE LAW**

### **I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS**

#### **A. Applicant's victim status**

33. As their primary submission, the Government maintained – as they had done before the Commission – that the applicant could no longer claim to be the “victim” of a violation of the Convention within the meaning of Article 34. They pointed out that the applicant had won his case in the Bucharest Court of Appeal, since that court had, in its judgment of

25 November 1997, declared null and void the details contained in the letter of 19 December 1990 from the Romanian Intelligence Service (*Serviciul Român de Informații* – “the RIS”), and, in the Government's view, the only infringement of the applicant's rights stemmed from that letter.

At all events, the Government continued, the applicant now had available to him the procedure put in place by Law no. 187 of 20 October 1999, which afforded him all the safeguards required by the Convention for the protection of his rights.

34. The applicant requested the Court to continue its consideration of the case. He argued that the circumstances that had given rise to the application had not fundamentally changed following the decision of 25 November 1997. Firstly, the mere fact of acknowledging, after the Commission's admissibility decision, that a mistake had been made could not amount to adequate redress for the violations of the Convention. Secondly, he had still not had access to his secret file, which was not only stored by the RIS but also used by it. It was consequently not to be excluded that even after the decision of 25 November 1997 the RIS might make use of the information that the applicant had supposedly been a legionnaire and of any other information in his file.

35. The Court reiterates, as to the concept of victim, that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him (see the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, pp. 18-19, § 34). Furthermore, “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention” (see the *Amuur v. France* judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

36. In the instant case the Court notes that the applicant complained of the holding of a secret register containing information about him, whose existence was publicly revealed during judicial proceedings. It considers that he may on that account claim to be the victim of a violation of the Convention.

The Court also notes that in a judgment of 25 November 1997 the Bucharest Court of Appeal found that the details given in the letter of 19 December 1990 about the alleged fact that the applicant had been a legionnaire were false, in that they probably related to someone else with the same name, and declared them null and void.

Assuming that it may be considered that that judgment did, to some extent, afford the applicant redress for the existence in his file of information that proved false, the Court takes the view that such redress is

only partial and that at all events it is insufficient under the case-law to deprive him of his status of victim. Apart from the foregoing considerations as to his being a victim as a result of the holding of a secret file, the Court points to the following factors in particular.

The information that the applicant had supposedly been a legionnaire is apparently still recorded in the RIS's files and no mention of the judgment of 25 November 1997 has been made in the file concerned. Furthermore, the Court of Appeal expressed no view – and was not entitled to do so – on the fact that the RIS was authorised by Romanian legislation to hold and make use of files opened by the former intelligence services, which contained information about the applicant. A key complaint made to the Court by the applicant was that domestic law did not lay down with sufficient precision the manner in which the RIS must carry out its work and that it did not provide citizens with an effective remedy before a national authority.

Lastly, the Bucharest Court of Appeal in its judgment of 25 November 1997 did not rule on the applicant's claim for compensation for non-pecuniary damage and for costs and expenses.

37. As to Law no. 187 of 20 October 1999, which the Government relied on, the Court considers, having regard to the circumstances of this case, that it is not relevant (see paragraph 71 below).

38. The Court concludes that the applicant may claim to be a “victim” for the purposes of Article 34 of the Convention. The objection must therefore be dismissed.

### **B. Exhaustion of domestic remedies**

39. The Government also submitted that the application was inadmissible for failure to exhaust domestic remedies. They argued that the applicant had had a remedy which he had not made use of, namely an action based on Decree no. 31/1954 on natural and legal persons, under which the court may order any measure to restrain injury to a person's reputation.

40. The Court notes that there is a close connection between the Government's argument on this point and the merits of the complaints made by the applicant under Article 13 of the Convention. It accordingly joins this objection to the merits (see paragraph 70 below).

## **II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

41. The applicant complained that the RIS held and could at any moment make use of information about his private life, some of which was false and defamatory. He alleged a violation of Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.



2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### A. Applicability of Article 8

42. The Government denied that Article 8 was applicable, arguing that the information in the RIS's letter of 19 December 1990 related not to the applicant's private life but to his public life. By deciding to engage in political activities and have pamphlets published, the applicant had implicitly waived his right to the “anonymity” inherent in private life. As to his questioning by the police and his criminal record, they were public information.

43. The Court reiterates that the storing of information relating to an individual's private life in a secret register and the release of such information come within the scope of Article 8 § 1 (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 22, § 48).

Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings: furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of “private life” (see the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and the *Halford v. the United Kingdom* judgment of 25 June 1997, *Reports* 1997-III, pp. 1015-16, §§ 42-46).

The Court has already emphasised the correspondence of this broad interpretation with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 and whose purpose is “to secure ... for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him” (Article 1), such personal data being defined in Article 2 as “any information relating to an identified or identifiable individual” (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II).

Moreover, public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.

44. In the instant case the Court notes that the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than fifty years

earlier. In the Court's opinion, such information, when systematically collected and stored in a file held by agents of the State, falls within the scope of "private life" for the purposes of Article 8 § 1 of the Convention. That is all the more so in the instant case as some of the information has been declared false and is likely to injure the applicant's reputation.

Article 8 consequently applies.

## **B. Compliance with Article 8**

### *1. Whether there was interference*

45. In the Government's submission, three conditions had to be satisfied before there could be said to be interference with the right to respect for private life: information had to have been stored about the person concerned; use had to have been made of it; and it had to be impossible for the person concerned to refute it. In the instant case, however, both the storing and the use of the information relating to the applicant had occurred before Romania ratified the Convention. As to the alleged impossibility of refuting the information, the Government maintained that, on the contrary, it was open to the applicant to refute untrue information but that he had not made use of the appropriate remedies.

46. The Court points out that both the storing by a public authority of information relating to an individual's private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1 of the Convention (see the following judgments: *Leander* cited above, p. 22, § 48; *Kopp v. Switzerland*, 25 March 1998, *Reports* 1998-II, p. 540, § 53; and *Amann* cited above, §§ 69 and 80).

In the instant case it is clear beyond peradventure from the RIS's letter of 19 December 1990 that the RIS held information about the applicant's private life. While that letter admittedly predates the Convention's entry into force in respect of Romania on 20 June 1994, the Government did not submit that the RIS had ceased to hold information about the applicant's private life after that date. The Court also notes that use was made of some of the information after that date, for example in connection with the application for review which led to the decision of 25 November 1997.

Both the storing of that information and the use of it, which were coupled with a refusal to allow the applicant an opportunity to refute it, amounted to interference with his right to respect for his private life as guaranteed by Article 8 § 1.

## 2. *Justification for the interference*

47. The cardinal issue that arises is whether the interference so found is justifiable under paragraph 2 of Article 8. That paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be interpreted narrowly. While the Court recognises that intelligence services may legitimately exist in a democratic society, it reiterates that powers of secret surveillance of citizens are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions (see the *Klass and Others* judgment cited above, p. 21, § 42).

48. If it is not to contravene Article 8, such interference must have been “in accordance with the law”, pursue a legitimate aim under paragraph 2 and, furthermore, be necessary in a democratic society in order to achieve that aim.

49. The Government considered that the measures in question were in accordance with the law. The information concerned had been disclosed by the RIS in connection with a procedure provided in Legislative Decree no. 118/1990, which was designed to afford redress to persons persecuted by the communist regime. By the terms of Article 11 of that legislative decree, no measure of redress could be granted to persons who had engaged in Fascist activities.

50. In the applicant's submission, the keeping and use of the file on him were not in accordance with the law, since domestic law was not sufficiently precise to indicate to citizens in what circumstances and on what terms the public authorities were empowered to file information on their private life and make use of it. Furthermore, domestic law did not define with sufficient precision the manner of exercise of those powers and did not contain any safeguards against abuses.

51. The Commission considered that domestic law did not define with sufficient precision the circumstances in which the RIS could archive, release and use information relating to the applicant's private life.

52. The Court reiterates its settled case-law, according to which the expression “in accordance with the law” not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see, as the most recent authority, *Amann* cited above, § 50).

53. In the instant case the Court notes that Article 6 of Legislative Decree no. 118/1990, which the Government relied on as the basis for the impugned measure, allows any individual to prove that he satisfies the requirements for having certain rights conferred on him, by means of official documents issued by the relevant authorities or any other material of evidential value. However, the provision does not lay down the manner in which such evidence may be obtained and does not confer on the RIS any power to gather, store or release information about a person's private life.

The Court must therefore determine whether Law no. 14/1992 on the organisation and operation of the RIS, which was likewise relied on by the Government, can provide the legal basis for these measures. In this connection, it notes that the law in question authorises the RIS to gather, store and make use of information affecting national security. The Court has doubts as to the relevance to national security of the information held on the applicant. Nevertheless, it reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see the Kopp judgment cited above, p. 541, § 59) and notes that in its judgment of 25 November 1997 the Bucharest Court of Appeal confirmed that it was lawful for the RIS to hold this information as depositary of the archives of the former security services.

That being so, the Court may conclude that the storing of information about the applicant's private life had a basis in Romanian law.

54. As to the accessibility of the law, the Court regards that requirement as having been satisfied, seeing that Law no. 14/1992 was published in Romania's Official Gazette on 3 March 1992.

55. As regards the requirement of foreseeability, the Court reiterates that a rule is “foreseeable” if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. The Court has stressed the importance of this concept with regard to secret surveillance in the following terms (see the *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, p. 32, § 67, reiterated in *Amann* cited above, § 56):

“The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the 'law', requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ... The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...

... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”

56. The “quality” of the legal rules relied on in this case must therefore be scrutinised, with a view, in particular, to ascertaining whether domestic law laid down with sufficient precision the circumstances in which the RIS could store and make use of information relating to the applicant's private life.

57. The Court notes in this connection that section 8 of Law no. 14/1992 provides that information affecting national security may be gathered, recorded and archived in secret files.

No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, the aforesaid Law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept.

Section 45 of the Law empowers the RIS to take over for storage and use the archives that belonged to the former intelligence services operating on Romanian territory and allows inspection of RIS documents with the Director's consent.

The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.

58. It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision.

59. The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it (see the *Klass and Others* judgment cited above, pp. 23-24, §§ 49-50).

In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure (see the *Klass and Others* judgment cited above, pp. 25-26, § 55).

60. In the instant case the Court notes that the Romanian system for gathering and archiving information does not provide such safeguards, no supervision procedure being provided by Law no. 14/1992, whether while the measure ordered is in force or afterwards.

61. That being so, the Court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.

62. The Court concludes that the holding and use by the RIS of information on the applicant's private life were not "in accordance with the law", a fact that suffices to constitute a violation of Article 8. Furthermore, in the instant case that fact prevents the Court from reviewing the legitimacy of the aim pursued by the measures ordered and determining whether they were – assuming the aim to have been legitimate – "necessary in a democratic society".

63. There has consequently been a violation of Article 8.

### III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

64. The applicant complained that the lack of any remedy before a national authority that could rule on his application for destruction of the file containing information about him and amendment of the inaccurate information was also contrary to Article 13, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

65. The Government argued that the applicant had obtained satisfaction through the judgment of 25 November 1997, in which the details contained in the RIS's letter of 19 December 1990 had been declared null and void. As to the destruction or amendment of information in the file held by the RIS, the Government considered that the applicant had not chosen the appropriate remedy. He could have brought an action on the basis of Decree no. 31 of 1954, Article 54 § 2 of which empowered the court to order any measure to restore the right infringed, in the instant case the applicant's right to his honour and reputation.

The Government further pointed out that the applicant could now rely on the provisions of Law no. 187 of 1999 to inspect the file opened on him by the *Securitate*. Under sections 15 and 16 of that Law, the applicant could challenge in court the truth of the information in his file.

66. In the Commission's opinion, the Government had not managed to show that there was in Romanian law a remedy that was effective in practice as well as in law and would have enabled the applicant to complain of a violation of Article 8 of the Convention.

67. The Court reiterates that it has consistently interpreted Article 13 as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV). Article 13 guarantees the availability at national level of a remedy to enforce the

substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. This Article therefore requires the provision of a domestic remedy allowing the “competent national authority” both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligation under this provision. The remedy must be “effective” in practice as well as in law (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 75, ECHR 1999-VII).

68. The Court observes that the applicant's complaint that the RIS held information about his private life for archiving and for use, contrary to Article 8 of the Convention, was indisputably an “arguable” one. He was therefore entitled to an effective domestic remedy within the meaning of Article 13 of the Convention.

69. The “authority” referred to in Article 13 may not necessarily in all instances be a judicial authority in the strict sense. Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective (see the *Klass and Others* judgment cited above, p. 30, § 67).

Furthermore, where secret surveillance is concerned, objective supervisory machinery may be sufficient as long as the measures remain secret. It is only once the measures have been divulged that legal remedies must become available to the individual (*ibid.*, p. 31, §§ 70-71).

70. In the instant case the Government maintained that the applicant could have brought an action on the basis of Article 54 of Decree no. 31/1954. In the Court's view, that submission cannot be accepted.

Firstly, it notes that Article 54 of the decree provides for a general action in the courts, designed to protect non-pecuniary rights that have been unlawfully infringed. The Bucharest Court of Appeal, however, indicated in its judgment of 25 November 1997 that the RIS was empowered by domestic law to hold information on the applicant that came from the files of the former intelligence services.

Secondly, the Government did not establish the existence of any domestic decision that had set a precedent in the matter. It has therefore not been shown that such a remedy would have been effective. That being so, this preliminary objection by the Government must be dismissed.

71. As to the machinery provided in Law no. 187/1999, assuming that the Council provided for is set up, the Court notes that neither the provisions relied on by the respondent Government nor any other provisions of that Law make it possible to challenge the holding, by agents of the State, of information on a person's private life or the truth of such information. The supervisory machinery established by sections 15 and 16 relate only to

the disclosure of information about the identity of some of the *Securitate's* collaborators and agents.

72. The Court has not been informed of any other provision of Romanian law that makes it possible to challenge the holding, by the intelligence services, of information on the applicant's private life or to refute the truth of such information.

73. The Court consequently concludes that the applicant has been the victim of a violation of Article 13.

#### IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

74. The applicant complained that the courts' refusal to consider his applications for costs and damages infringed his right to a court, contrary to Article 6 of the Convention, which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] ... tribunal ...”

75. The Government made no submission.

76. The Commission decided to consider the complaint under the more general obligation, imposed on the States by Article 13, of affording an effective remedy enabling complaints to be made of violations of the Convention.

77. The Court observes that apart from the complaint, examined above, that there was no remedy whereby an application could be made for amendment or destruction of the file containing information about him, the applicant also complained that the Bucharest Court of Appeal, although lawfully seised of a claim for damages and costs, did not rule on the matter in its review judgment of 25 November 1997.

78. There is no doubting that the applicant's claim for compensation for non-pecuniary damage and costs was a civil one within the meaning of Article 6 § 1, and the Bucharest Court of Appeal had jurisdiction to deal with it (see the *Robins v. the United Kingdom* judgment of 23 September 1997, *Reports* 1997-V, p. 1809, § 29).

The Court accordingly considers that the Court of Appeal's failure to consider the claim infringed the applicant's right to a fair hearing within the meaning of Article 6 § 1 (see the *Ruiz Torija v. Spain* judgment of 9 December 1994, Series A no. 303-A, pp. 12-13, § 30).

79. There has therefore been a violation of Article 6 § 1 of the Convention also.

#### V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. The applicant sought just satisfaction under Article 41 of the Convention, which 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**

81. The applicant claimed 20,000,000,000 Romanian lei (ROL) in compensation for non-pecuniary damage caused by the discredit associated with the public disclosure of false and defamatory information about him and with the authorities' refusal for several years to admit the mistake and correct it.

82. The Government objected to this claim, which they considered unreasonable, especially as the applicant had not raised the point in the domestic courts.

83. The Court draws attention to its settled case-law to the effect that the mere fact that an applicant has not brought his claim for damages before a domestic court does not require the Court to dismiss those claims as being ill-founded any more than it raises an obstacle to their admissibility (see the *De Wilde, Ooms and Versyp v. Belgium* judgment of 10 March 1972 (*Article 50*), Series A no. 14, pp. 9-10, § 20). Furthermore, the Court notes in the instant case that, contrary to what the Government maintained, the applicant did seek compensation in the domestic courts for the non-pecuniary damage he had sustained, in the form of payment of a token sum of 1 Romanian leu, a claim which was not addressed by the Romanian courts.

It notes, further, that the Bucharest Court of Appeal declared the allegedly defamatory information null and void, thereby partly meeting the applicant's complaints. The Court considers, however, that the applicant must actually have sustained non-pecuniary damage, regard being had to the existence of a system of secret files contrary to Article 8, to the lack of any effective remedy, to the lack of a fair hearing and also to the fact that several years elapsed before a court held that it had jurisdiction to declare the defamatory information null and void.

It therefore considers that the events in question entailed serious interference with Mr Rotaru's rights and that the sum of 50,000 French francs (FRF) will afford fair redress for the non-pecuniary damage sustained. That amount is to be converted into Romanian lei at the rate applicable at the date of settlement.

### **B. Costs and expenses**

84. The applicant sought reimbursement of ROL 38,000,000 (FRF 13,450) which he broke down as follows:

(a) ROL 30,000,000 corresponding to costs incurred in the domestic proceedings, including ROL 20,000,000 for travel and subsistence in respect of visits to Iași and Bucharest and ROL 10,000,000 for sundry expenses (stamp duty, telephone calls, photocopying, etc.);

(b) ROL 8,000,000 corresponding to expenses incurred before the Convention institutions, including ROL 6,000,000 for translation and secretarial expenses, ROL 1,000,000 for travel expenses between Bârlad and Bucharest and ROL 1,000,000 for a French visa for the applicant's son.

85. The Government considered that sum excessive, especially as the applicant had, they said, sought judgment in default in all the domestic proceedings.

86. The Court reiterates that in order for costs to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and reasonable as to quantum (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). In this connection, it should be remembered that the Court may award an applicant not only the costs and expenses incurred before the Strasbourg institutions, but also those incurred in the national courts for the prevention or redress of a violation of the Convention found by the Court (see *Van Geyselhem v. Belgium* [GC], no. 26103/95, § 45, ECHR 1999-I).

87. The Court notes that the applicant was not represented in the domestic courts, that he presented his own case to the Commission and that in the proceedings before the Court he was represented at the hearing. It also notes that the Council of Europe paid Mr Rotaru the sum of FRF 9,759.72 by way of legal aid.

The Court awards the full amount claimed by the applicant, that is to say FRF 13,450, less the sum already paid by the Council of Europe in legal aid. The balance is to be converted into Romanian lei at the rate applicable at the date of settlement.

### **C. Default interest**

88. The Court considers it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, that is to say 2.74% per annum.

## **FOR THESE REASONS, THE COURT**

1. *Dismisses* unanimously the Government's preliminary objection that the applicant was no longer a victim;

2. *Joins to the merits* unanimously the Government's preliminary objection of failure to exhaust domestic remedies and *dismisses* it unanimously after consideration of the merits;
3. *Holds* by sixteen votes to one that there has been a violation of Article 8 of the Convention;
4. *Holds* unanimously that there has been a violation of Article 13 of the Convention;
5. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
6. *Holds* unanimously
  - (a) that the respondent State is to pay the applicant, within three months, FRF 50,000 (fifty thousand French francs) in respect of non-pecuniary damage and FRF 13,450 (thirteen thousand four hundred and fifty French francs) for costs and expenses, less FRF 9,759.72 (nine thousand seven hundred and fifty-nine French francs seventy-two centimes) to be converted into Romanian lei at the rate applicable at the date of settlement;
  - (b) that simple interest at an annual rate of 2.74% shall be payable from the expiry of the above-mentioned three months until settlement;
7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 May 2000.

Luzius WILDHABER  
President

Michele DE SALVIA  
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Wildhaber joined by Mr Makarczyk, Mr Türmen, Mr Costa, Mrs Tulkens, Mr Casadevall and Mrs Weber;
- (b) concurring opinion of Mr Lorenzen;
- (c) partly dissenting opinion of Mr Bonello.

L.W.  
M. de S.

**CONCURRING OPINION OF JUDGE WILDHABER  
JOINED BY JUDGES MAKARCZYK, TÜRMEŒ, COSTA,  
TULKENS, CASADEVALL AND WEBER**

In the instant case, the applicant complained of a violation of his right to respect for his private life on account of the holding and use, by the Romanian Intelligence Service (RIS), of a file containing personal information, dating mostly from the years 1946-48. One specific entry in the file stated that in 1937, during his studies (when the applicant in fact was barely 16 years old), he had been a member of a "legionnaire-type" movement, i.e. of an extreme right-wing, nationalist, anti-Semitic and paramilitary movement. The information in this entry, which was revealed in a letter from the Ministry of the Interior at the end of 1990, was declared to be false in 1997 by the Bucharest Court of Appeal. Nevertheless, it is apparently still recorded in the RIS's files, whereas the 1997 judgment is not mentioned there. Furthermore, no damages or costs were awarded. An action for damages against the RIS was dismissed in 1994. It would seem that Romanian law still does not make it possible to challenge the holding, by the RIS, of information on the applicant's private life, or to refute the truth of such information, or to claim that such information should be destroyed.

Against this background, our Court finds violations of Articles 8, 13 and 6 § 1. In accordance with its settled case-law (see the *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, pp. 36 and 38-39, §§ 80 and 87-88; the *Kruslin and Huvig v. France* judgments of 24 April 1990, Series A nos. 176-A, pp. 24-25, §§ 36-37, and 176-B, pp. 56-57, §§ 35-36; the *Halford v. the United Kingdom* judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1017, § 51; the *Kopp v. Switzerland* judgment of 25 March 1998, *Reports* 1998-II, p. 543, §§ 75-76; and *Amann v. Switzerland* [GC], no. 27798/95, §§ 61-62 and 77-81, ECHR 2000-II), it finds that the domestic law rules providing that information affecting national security may be gathered, recorded and archived in secret files do not afford a sufficient degree of foreseeability. The holding and use by the RIS of information on the applicant's private life were therefore not "in accordance with the law", so that Article 8 was violated. I fully subscribe to these findings.

However, I wish to add that in the instant case – irrespective of the adequacy of the legal basis – I have serious doubts whether the interference with the applicant's rights pursued a legitimate aim under Article 8 § 2. There is moreover no doubt in my mind that the interference was not necessary in a democratic society.

As regards the legitimate aim, the Court has regularly been prepared to accept that the purpose identified by the Government is legitimate provided

it falls within one of the categories set out in paragraph 2 of Articles 8 to 11. However, in my view, in respect of national security as in respect of other purposes, there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate. To refer to the more or less indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate national security concern is, to my mind, evidently problematic.

In the Rotaru case, data collected under a previous regime in an unlawful and arbitrary way, concerning the activities of a boy and a student, going back more than fifty years and in one case sixty-three years, some of the information being demonstrably false, continued to be kept on file without adequate and effective safeguards against abuse. It is not for this Court to say whether this information should be destroyed or whether comprehensive rights of access and rectification should be guaranteed, or whether any other system would be in conformity with the Convention. But it is hard to see what legitimate concern of national security could justify the continued storing of such information in these circumstances. I therefore consider that the Court would have been entitled to find that the impugned measure in the present case did not pursue a legitimate aim within the meaning of Article 8 § 2.

This finding would have rendered it unnecessary to determine whether the measure in question was necessary in a democratic society, because that test depends on the existence of a legitimate aim. If, however, the Court had preferred to accept the existence of a legitimate national security aim, it would have recalled that States do not enjoy unlimited discretion to subject individuals to secret surveillance or a system of secret files. The interest of a State in protecting its national security must be balanced against the seriousness of the interference with an applicant's right to respect for his or her private life. Our Court has repeatedly stressed "the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it" (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 25, § 60; see also the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, pp. 21 and 23, §§ 42 and 49, and, *mutatis mutandis*, the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, pp. 1866-67, § 131, and the *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* judgment of 10 July 1998, *Reports* 1998-IV, pp. 1662-63, § 77). This is why the Court must be satisfied that the secret surveillance of citizens is strictly necessary for safeguarding democratic institutions and that there exist adequate and effective safeguards against its abuse.

In all the circumstances of this case and in the light of what has been said above in connection with the legitimate aim, it has to be concluded that the

interference in question was not remotely necessary in a democratic society to attain an aim relating to national security.

In sum then, even if a foreseeable legal basis had existed in the Rotaru case, our Court would have had to find a violation of Article 8 nevertheless, either on the ground that there was no legitimate aim for continuing an abusive system of secret files, or because such continuation was clearly not necessary in a democratic society.

### CONCURRING OPINION OF JUDGE LORENZEN

In this case I have voted for the conclusions of the majority as well as for the reasons behind them. However, this does not mean that I disagree in substance with what is said in the concurring opinion of Judge Wildhaber concerning the other requirements under Article 8 § 2. The reason why I have not joined it is solely that the Court has consistently held that when an interference with the rights under Article 8 is not “in accordance with the law”, it is not necessary to examine whether the other requirements of Article 8 § 2 are fulfilled. I consider it essential to maintain that case-law.



## PARTLY DISSENTING OPINION OF JUDGE BONELLO

1. The majority found a violation of Article 8, having held its provisions applicable to the facts of the present case. I voted with the majority in finding other violations of the Convention, but I cannot endorse the applicability of Article 8.

2. Article 8 protects the individual's private life. At the core of that protection lies the right of every person to have the more intimate segments of his being excluded from public inquisitiveness and scrutiny. There are reserved zones in our person and in our spirit which the Convention requires should remain locked. It is illegitimate to probe for, store, classify or divulge data which refer to those innermost spheres of activity, orientation or conviction, sheltered behind the walls of confidentiality.

3. On the other hand, activities which are, by their very nature, public and which are actually nourished by publicity, are well outside the protection of Article 8.

4. The secret data held by the State security services which the applicant requested to see related in substance to: (a) the active membership of one Aurel Rotaru in a political movement; (b) his application to publish two political pamphlets; (c) his affiliation to the youth movement of a political party; and (d) the fact that he had no criminal record (see paragraph 13 of the judgment).

5. The first three items of information refer exclusively to public pursuits. Eminently public, I would add, in so far as political and publishing activism requires, and depends on, the maximum publicity for its existence and success. The records did not note that the applicant voted for some particular political party – that, of course, would have invaded his no-entry zone of confidentiality. The records, in substance, register how Aurel Rotaru manifested publicly his public militancy in particular public organisations.

6. In what way does the storage of records relating to the eminently public pursuits of an individual violate his right to privacy? Until now the Court has held, unimpeachably in my view, that the protection of Article 8 extends to confidential matters, such as medical and health data, sexual activity and orientation, family kinship and, possibly, professional and business relations and other intimate areas in which public intrusion would be an unwarranted encroachment on the natural barriers of self. Public activism in public political parties has, I suggest, little in common with the *ratio* which elevates the protection of privacy into a fundamental human right.

7. The fourth element contained in the applicant's file referred to an annotation that he had no criminal record. The Court found even that to be a violation of the applicant's right to privacy. The Court underlined that the

security services' notes (including some information which was over fifty years old) contained the applicant's criminal record, and concluded that "such information, when systematically collected and stored in a file held by agents of the State, falls within the scope of 'private life' for the purposes of Article 8 § 1 of the Convention" (see paragraph 44 of the judgment).

8. This, in my view, overreaches dangerously the scope of Article 8. Stating that the storage of a person's criminal record by police authorities (even when, as in the present case, it proves that the individual has no criminal antecedents) calls Article 8 into play can have frighteningly far-reaching consequences *vis-à-vis* "the interests of national security, public safety and the prevention of disorder or crime" – all values that Article 8 expressly sets out to protect.

9. I would accept, albeit on sufferance, that the storage of criminal records by the police may possibly amount to an interference with the right to privacy, but would hasten to add that such interference is justified in the interest of combating crime and of national security. The Court did not find it necessary to do so.

10. Of course, my unease is only focused on the censure by the Court of the *storage* of criminal records. The wanton and illegitimate *disclosure* of the contents of those records could very well raise issues under Article 8.

11. The Court seems to have given particular weight to the fact that "some of the information has been declared false and is likely to injure the applicant's reputation" (see paragraph 44 of the judgment). These concerns pose two separate questions: that of the falsity of the information, and that of its defamatory nature.

12. Some of the data in the applicant's security file actually referred to another person sharing the applicant's name, and not to him. This, undoubtedly, rendered that information "false" in the applicant's regard. But does falsity *relating to matters in the public domain* alchemise that public information into private data? The logic behind this sequence of propositions simply passes me by.

13. Again, I have no difficulty in acknowledging that the "false" data about the applicant, stored by the security services, were likely to injure his reputation. Quite tentatively, the Court seems lately to be moving towards the notion that "reputation" could well be an issue under Article 8<sup>1</sup>. Opening up Article 8 to these new perspectives would add an exciting extra dimension to human rights protection. But the Court, in my view, ought to handle this reform frontally, and not tuck it in, almost surreptitiously, as a penumbral fringe of the right to privacy.

14. Had I shared the majority's views that the right to privacy also protects outstandingly public data, I would then have proceeded to find a

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1. See the *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 50-51, § 66-68, and the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 35-36, § 37.

violation of Article 8, as I fully subscribe to the Court's conclusion that the holding and use by security forces of the information relating to the applicant were not “in accordance with the law” (see paragraphs 57-63 of the judgment).