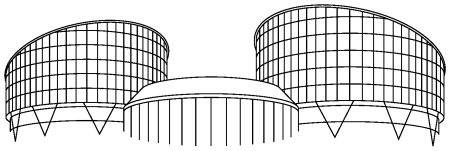

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BERARU v. ROMANIA

(Application no. 40107/04)

JUDGMENT

STRASBOURG

18 March 2014

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

In the case of Beraru v. Romania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Dragoljub Popović,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 18 February 2014,

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

PROCEDURE

1. The case originated in an application (no. 40107/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Israeli national, Mr Sorin Schumel Beraru ("the applicant"), on 12 November 2004.

2. The applicant was represented by Mr B. Schneider and Mr F. Schultehinrichs, lawyers practising in Frankfurt am Main. The Romanian Government ("the Government") were represented by their Agent, Ms I. Cambrea, from the Ministry of Foreign Affairs.

3. The applicant alleged that he had not received a fair trial in the criminal proceedings against him. He complained, in particular, that the taking of evidence by the domestic courts had not been adversarial and that the rules for the taking of evidence had been infringed by the domestic courts. He also complained that the domestic courts had not observed their obligation to disclose all the evidence and had not ensured that his lawyers had proper access to the file in order to prepare his defence.

4. On 27 January 2011 the application was communicated to the Government.

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lives in Tel Aviv.

A. Background to the criminal proceedings

6. In 2001, criminal proceedings were initiated against the applicant by the prosecutor's office attached to the Supreme Court in connection with the acquisition of a Romanian company, called CICO, sold at auction by the Romanian State. He was accused of committing several serious financial crimes.

7. In May 2001, an international arrest warrant was issued against the applicant.

8. On 18 February 2002, the prosecutor in charge of the case (H.G.) informed her superiors in writing that she had been offered a significant bribe (1.5 million United States dollars (USD)) in order to revoke the arrest warrant issued against the applicant. She added that her husband (H.D.) had been contacted by police officers who had offered to facilitate contact between the person used by the applicant as an intermediary, S.H., and her.

9. Subsequently, the prosecutor's office attached to the Supreme Court authorised the monitoring and recording of telephone conversations between the individuals involved in the bribery.

10. On 14 June 2002, two of the police officers involved in the bribery, B.R. and U.I., met the prosecutor's husband, H.D., on the terrace of a restaurant, in Bucharest, in order to give him part of the intended bribe. They were apprehended while they were handing H.D. USD 99,700.

B. The criminal proceedings against the applicant before the first-instance court

11. Criminal proceedings were initiated against the applicant, S.H. and three police officers who had acted as intermediaries.

12. By an indictment of 11 July 2002, the applicant was accused of bribery as defined by Article 255 § 1 of the Romanian Criminal Code in conjunction with Article 7 § 2 of Law 78/2000. The other four co-defendants, S.H., B.R., U.I. and B.S.L. were accused of conspiracy to commit bribery.

1. The facts as set forth by the prosecutor

13. According to the prosecutor, the applicant had asked S.H. to resolve his legal problems in Romania. Based on the applicant's instructions, S.H. had contacted B.S.L., a police officer whom he knew in Bucharest, and had asked him for help in contacting prosecutor H.G., who had been tasked with prosecuting the applicant's case. B.S.L. had helped S.H. to meet two other police officers, B.R. and U.I., who it was claimed had a close relationship with the prosecutor's husband, H.D.

14. S.H. and the two police officers, U.I. and B.R., met several times. The police officers informed S.H that the applicant's legal problems could

be resolved in exchange for payment of about USD 2-3 million, to be split among several individuals, including prosecutor H.G. As the applicant did not agree with the proposed figure, S.H., accompanied by U.I. and B.R. went to Tel Aviv in order to discuss the matter directly with the applicant. In Tel Aviv they agreed on the figure of USD 1.5 million but they did not agree about the way in which this sum would be paid.

15. On 19 March 2002 U.I. and B.R. met the prosecutor's husband and passed on the applicant's offer. The prosecutor and her husband informed the competent authorities about the offer of a bribe.

16. On 10 June 2002, S.H., accompanied by B.R. and U.I., went to Antwerp in order to get part of the money sent by the applicant from Israel through an intermediary. They came back on 14 June 2002. In the evening on the same date B.R. and U.I. met the prosecutor's husband, H.D., on the terrace of a restaurant in order to give him the money. They were apprehended by investigators, who had been tipped off by H.D., while they were handing him USD 99,700.

2. The applicant's version of events

17. The applicant's version of events differs from the version set forth by the prosecutor and fully endorsed by all domestic courts.

18. The applicant alleged that his relationship with S.H. had been strained, as he had been aware that S.H. had filed criminal complaints and given incriminating statements against him concerning the CICO case. Furthermore, the applicant had initiated eviction proceedings against S.H. because S.H. had ceased paying the rent for a flat he had rented from the applicant.

19. The applicant claimed that S.H. had contacted him in Israel offering to resolve his legal problems in Romania in exchange for a monthly salary of USD 2,000, the cessation of the eviction proceedings against him and the payment of all his debts. In this connection he had cited his relationship with prosecutor H.G. and police officers who had a close relationship with H.G. and her husband. The applicant contended that he had not accepted S.H.'s offer. On the contrary, he claimed that he had gone ahead with the eviction proceedings against S.H, submitting an eviction notice to the domestic courts.

20. Furthermore, the applicant maintained that he had never offered H.G. any money. He claimed that the police officers had met with him in April 2002 in Tel Aviv on S.H.'s initiative and had asked for USD 1.5 million in exchange for the annulment of the international warrant. After the applicant had refused to pay the money he had contacted his lawyer, A.M., and informed him about the offer and asked him to inform the Romanian authorities about this. Despite the applicant's manifest disagreement, S.H. had continued to involve himself in matters in Romania without his approval.

21. The applicant also contended that the USD 97,000 confiscated during the sting operation had not been provided by him and that, as was clear from the police officers' statements, the money had been taken from S.H.'s flat.

3. The trial proceedings

22. The file was registered with the Bucharest Military Tribunal on 12 July 2002.

23. The evidence submitted by the prosecutor included transcripts of recordings of telephone conversations between the accused, some of them in Romanian, some in Hebrew.

24. The lawyers appointed by the applicant did not have access to the file while it was before the Bucharest Military Tribunal. On 17 July 2002 the applicant's lawyers submitted a request to be allowed to photocopy the documents in the file. Initially, the request was denied without any reasons being given. The refusal was later justified by a lack of equipment and it was suggested that the lawyers prepare handwritten notes. The lawyers pointed out that the file ran to four hundred pages and was only available to the public for four hours a day, while just four working days remained until the hearings. The Bucharest Military Tribunal granted the lawyers limited additional time in which to consult the files and the opportunity to make up to thirty pages of photocopies from the file.

25. On 4 December 2002, the military court ruled that it did not have jurisdiction to examine the case. On 7 January 2003, the Supreme Court of Justice established that the Bucharest Court of Appeal was the competent court to hear the case.

26. The trial took place in the applicant's absence. According to the submissions of his lawyers, he knew about the proceedings but preferred to stay in Israel because of his medical condition. Therefore, he was represented in the proceedings by lawyers of his choice.

27. On 3 February 2003, the applicant's lawyers asked to photocopy the documents in the file. They again encountered difficulties in this connection and were not allowed to copy certain documents (for example, the transcripts of the tapped telephone calls).

28. On 21 February 2003 the applicant's lawyers submitted that the applicant should benefit from immunity from prosecution as provided for in Article 255 § 3 of the Romanian Criminal Code in the same way that the prosecutor's husband had. In this respect they submitted a written statement given before a public notary on 18 July 2002 by a New York lawyer, A.M. The lawyers maintained that the statement had been transmitted via facsimile to the Romanian Ministry of Foreign Affairs. According to the statement, A.M. had rendered legal services to the applicant in connection with his trials in Romania. In April 2002 the applicant had informed him about the offer made by two police officers to obtain the annulment of the

international arrest warrant issued against him in exchange for a bribe amounting to USD 1.5 million. The lawyer further stated that he had informed the Romanian authorities of this information on 10 May 2002 but that he had not received any reply.

The court sent a letter to the Ministry asking to be informed whether the statement had been sent and what follow-up action had been taken. The Ministry did not confirm the receipt of a facsimile or email from the applicant's lawyer.

29. On 21 and 26 February 2003 the four co-defendants gave oral statements before the court.

30. On 5 and 12 March 2003 the single judge heard six witnesses, among which were prosecutor H.G. and her husband.

31. On 11 March 2003, one of the applicant's lawyers lodged a request to obtain a taped copy of the phone conversations used as evidence in the file. The applicant submitted that this request had been dismissed and that in spite of their repeated requests to listen to the audio recordings of the conversations, the defence had never had the opportunity to listen to them in their entirety.

32. At the hearing held on 11 March 2003, when the court played the audio cassettes containing the applicant's recorded telephone conversations, the Hebrew language interpreter appointed by the court informed it that there were discrepancies between the contents of the transcripts in the file and the recordings on the tapes presented as evidence by the prosecutor, insisting on the necessity of a technical expert report for clarification. The court ordered that an expert report on the contents and the authenticity of the audio cassettes be carried out by the National Institute for Forensic Expert Opinions ("INEC"), a public body operating under the authority of the Ministry of Justice. The expert's fees were paid by the applicant and an expert appointed by the applicant was allowed to take part in the process of compiling the report.

33. On several occasions the hearings were postponed because, among other reasons, the technical expert report was not ready.

34. The Court of Appeal was initially composed of a single judge. Following the amendment of the Romanian Code of Criminal Procedure in the course of the proceedings, the court's composition included a second judge for the first time at the hearing held on 21 May 2003. At that point, most of the evidence had already been presented to the single judge. That evidence was not reheard.

35. At a hearing held on 13 October 2003, the court of appeal took note of the fact that the accused had requested that the audio tapes be played in court in order to establish whether the transcripts from the case file corresponded with the recordings, whether the recordings had been made in line with legal requirements and whether some excerpts had been taken out of context. The domestic court further considered that given the fact that it

had ordered a technical expert report on the tapes, the tapes could not be played in court until they had been analysed.

36. At a hearing held on 24 November 2003, the parties discussed a letter sent by INEC in which it stated that it did not have authorised experts in voice identification. The applicant's lawyers and the other accused insisted that a new date be set for the hearing, after an expert report had been included in the materials of the file.

37. At a hearing held on 15 December 2003, the parties were informed that the technical report was not ready. The lawyers representing the applicant insisted that the report be finalised if the transcripts were to remain in the case file.

38. At a hearing held on 22 December 2003 one of the applicant's lawyers asked for additional evidence to be taken. She submitted that more information should be obtained about the origin of the money confiscated during the sting operation. She also asked for a deposition to be taken from A.M. pursuant to a letter of request in connection with his statement made before an American public notary on 18 July 2002. The said written statement had been submitted before the court on 21 February 2003. The court dismissed these requests on the grounds that the new evidence was irrelevant.

39. At the same hearing, the Court of Appeal concluded that, given the letter from INEC and the conditions under which the tapes had to be analysed, the time it would take, and the position of the accused, it was impossible to prepare the report and revoked the order to prepare it.

40. On 8 January 2004 the lawyers appointed by the applicant sought leave from the court to withdraw their representation of the applicant on the grounds that they could not properly defend him. In this respect they relied on the fact that at the beginning of the trial they had not had any knowledge of the contents of the indictment and the evidence against their client, which had not been communicated to them. Their requests to obtain copies of the documents in the file had been systematically declined on the grounds that due to a lack of equipment only thirty pages could be photocopied (even though the file ran to several hundred pages). They had not been permitted to obtain copies of certain documents in the file. The lawyers also maintained that on 11 March 2003 they had submitted a request to obtain the transcript of the phone conversations, which had been rejected by the court by an interlocutory judgment rendered on 22 November 2003. With respect to the technical expert report concerning the tapped telephone conversations, they alleged that after the court had ordered its production on 11 April 2002, on 15 December 2003 it had reversed its decision to gather this piece of evidence, which they submitted was of overwhelming importance, without reasonable justification. They added that despite having authorised the hearing of the applicant by rogatory commission, pursuant to a letter of request by an interlocutory judgment of 19 March 2003, on

25 November 2003 the court had decided to dispense with this piece of evidence on the grounds that the defence had not taken the measures necessary for the applicant to be heard in that manner.

41. On 21 January 2004 INEC submitted its report, which concluded that the audio tapes were not original and therefore, in the absence of any supplementary information, they could be copies, mixes done with or without the intent to present a false record, or fabricated. It also stated that voice identification could only be carried out using original recordings and using the same equipment used for the recording, which had not been provided by the court despite repeated requests in this regard.

42. By a judgment rendered on 26 January 2004 the Bucharest Court of Appeal convicted the applicant of bribery and sentenced him to seven years' imprisonment.

43. After presenting the prosecutor's submissions at length, the court proceeded with its own reasoning. It presented the facts, as established by that evidence, which it held to be in line with the prosecutor's version of events.

44. The Court of Appeal then stated:

> "Even if all the other evidence adduced can be considered subjective to some degree, the transcripts of the phone conversations between the accused do not leave room for much doubt as to their activity, their behaviour, the way in which they intended to solve the problem, their attitude towards state institutions, as well as their opinions concerning certain colleagues (police officers), prosecutors, judges, representatives of the Intelligence Service and even leaders of the Romanian state.
>
> [...]
>
> Defendants U.I., B.R., S.H., and even B.S.L. tried to claim they had been incited to commit the offences they were charged with by the attitude and actions of the persons from whom they had asked for help, namely police officer H.D. and other police officers, as well as prosecutor H.G. [...]
>
> [...]
>
> As has been mentioned above, the telephone conversations between the accused, which were recorded over several months, show clearly and without any doubt that the accused committed with intent the crimes with which they have been charged and accepted the risks deriving from them. During the criminal trial, in an attempt to defend themselves, they argued that the recordings had been unlawfully obtained, that the transcripts did not conform to the recordings, that in parts the voices were not theirs, and that excerpts of the transcripts had been taken out of context and had not been extensively presented, all of which led to the request to hear the tapes in the presence of a Hebrew-speaking expert witness, and later to the request for a technical evaluation to be carried out. (...) At the same time, it should be noted that the only institution which had a legal obligation to carry out the analysis did not comply with that obligation and with the order of the court, rendering it impossible to admit this piece of evidence."

45. The Court of Appeal emphasised the decisive role played by S.H. in the offering of the bribe:

"With S.H.'s help, defendants U.I. and B.R. travelled to Israel, where they met defendant Sorin Beraru and discussed the problems the latter was having in Romania.

They could not establish an action plan because defendant Beraru did not have confidence in the two police officers' connections and the possible support they could obtain from such connections. On the other hand, defendants U.I. and B.R. were also unsatisfied with the result of their visit. However, the person who tried to once again establish a connection was defendant S.H., who not only bore the travel expenses and cost of accommodation for the two defendants but also obtained their visas for Israel."

C. The criminal proceedings before the High Court of Cassation and Justice

46. The applicant filed an appeal on points of law against the judgment of the first-instance court alleging, *inter alia*, that he had not been duly summoned to the proceedings, the composition of the panel of judges of the court of first instance had changed during the proceedings, the pronouncement of the judgment had not been public and that the procedural rules regarding the admission of evidence had not been observed. He also averred that there had been procedural irregularities with respect to the recording of the phone conversations and the use of their transcripts as evidence at trial. Thus, he argued that the phone conversations had not been presented in their entirety in the transcripts, as required by the Romanian Code of Criminal Procedure, and that their translation from Hebrew into Romanian had not been accurate.

47. He also claimed that there had been police entrapment in his case. He submitted that the first-instance court's findings of fact had been incorrect. He insisted that he had neither offered money in exchange for a favourable outcome in the proceedings against him nor agreed to any payment by S.H. to the prosecutor in charge of his case.

In this respect, he claimed that none of the recorded phone conversations between him and S.H. could prove that he had asked S.H. to resolve his legal problems in Romania. He had been repeatedly bombarded with proposals by S.H. and the police officers, each of them trying to gain financial advantage from him. After the prosecutor's husband had informed the Romanian authorities about the offer of a bribe, the telephone conversations he had had with S.H had no longer been recorded – despite the fact that such conversations could have been relevant as regards the conclusions drawn after the police officers' visit to Tel Aviv and the arrangements for the payment of part of the USD 1.5 million.

48. The applicant further claimed that the report of the sting operation was incomplete as it did not contain any information about the origin of the money.

49. By a final decision of 14 May 2004, the High Court of Cassation and Justice dismissed the appeal on points of law. It confirmed the findings of fact made by the first-instance court and concluded that that court had duly

analysed all the evidence before it and correctly determined that the offences charged had been made out and imposed the sentence. It based its decision on the evidence adduced before the court of first instance. It repeatedly made reference to the recorded phone conversations between the applicant and S.H., holding that it was clear from those records that the applicant had been informed by S.H. about all the steps he had taken in connection with the bribe and had given indications to S.H. as to how to act on his behalf. The final decision did not include any statement in respect of the lawfulness or admissibility of the tapes and their transcripts.

II. RELEVANT DOMESTIC LAW

50. The legal provisions concerning the use of audio tapes as evidence in a criminal trial, in force at the time of the events, as well as the subsequent modifications of the law are detailed in the judgment in the case of *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, §§ 44-46, 26 April 2007).

51. The Romanian Code of Criminal Procedure (CCP) provides in its Article 385^9 § 1, sub-paragraph 11, that an appeal on points of law may be lodged if a first-instance court has failed to state its opinion on certain evidence or rule on motions which would guarantee the rights of the parties and influence the outcome of the proceedings. Article 385^{15} of the CCP further provides that if the Supreme Court of Justice allows an appeal on points of law and it is necessary to admit further evidence in order to settle the case, it shall refer the case back to the lower court or settle the case itself.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

52. Relying on Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention, the applicant complained of a number of breaches of the guarantees of fair trial, in particular:

(a) The applicant complained that his right to be judged by an independent and impartial tribunal had been infringed because five months after the commencement of the proceedings before the Bucharest Court of Appeal the initial panel of a single judge had been supplemented by a second judge after most of the evidence had been heard by the court, and the second judge had deliberated and signed the judgment without hearing the evidence in person.

(b) The applicant complained that the domestic courts had not observed their obligation to disclose all the evidence and had not ensured that his lawyers had proper access to the file in order to prepare his defence.

(c) The applicant further complained that the taking of evidence by the domestic courts had not been adversarial and that the rules for the taking of evidence had been infringed by the domestic courts. He also complained that his conviction had mainly been based on transcripts of audio tapes which he claimed should not have been used as evidence in the file.

53. Article 6 of the Convention provides as follows, in the relevant parts:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. Admissibility

54. The Government argued that the applicant had not exhausted domestic remedies in respect of the complaint concerning the infringement of the principle of immediacy by the domestic courts, as he had never raised this issue before the first-instance or the appellate courts.

55. The applicant contested the Government's objections.

56. The Court notes that the applicant raised the issue of the change in the composition of the panel of judges of the court of first instance during the proceedings before it in his appeal on points of law (see paragraph 46 above). Although the applicant did not raise this issue before the court of first instance he did not waive his right to raise this issue later. Therefore, the Court dismisses the Government's objection. It further notes that this complaint and the other complaints raised under Article 6 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government's submissions

57. The Government pointed out that the change of the panel's composition had only consisted of the appointment of a second judge as from the hearing of 21 May 2003, while the first judge had remained unchanged. They also submitted that the newly-appointed judge had had access to the files and tapes of the previous hearings and had been able to obtain precise knowledge of the statements of each defendant and witness. Moreover, the first-instance court had delivered its judgment on 26 January 2004, eight months after his appointment.

58. As regards the denial of access to the file to the applicant's defence lawyers by the Bucharest Territorial Military Court, the Government admitted that the applicant's chosen lawyers had encountered certain difficulties in copying documents from the case file. However, they added that the applicant's chosen lawyers had had unrestricted access to the case file during the proceedings before the Bucharest Court of Appeal. All their requests concerning the studying or copying of documents in the file had been granted by the court.

59. The Government submitted that the applicant had had access to the evidence in the file and had had the opportunity of challenging the recordings and opposing their use during the domestic proceedings.

They submitted that the recordings had been made in accordance with the applicable legislation, namely Articles 91(1) – (5) of the CCP. They further contended that the transcriptions in the file had contained the recorded conversations in their entirety and the fact that the recordings had not been heard in court had not prevented the admission of that evidence.

They pointed out that the recording of the phone conversations had not been the only evidence assessed by the domestic courts. The courts had heard evidence from the applicant, his co-accused and witnesses, and had examined official documents attached to the case file. The Government contended that the fact that the domestic courts had not allowed all of the applicant's witnesses to be heard in court had not infringed the right to a fair trial as that term was understood in accordance with the well-established case-law of the Court. They further pointed out that the applicant had not complained before the appellate court that the first-instance court had dismissed his request to adduce evidence concerning the origin of the money offered as a bribe.

(b) The applicant's submissions

60. As regards the change of the panel's composition, the applicant submitted that most of the statements had been given in the absence of the

second judge, who therefore would not have been able to ascertain their credibility based on first-hand observation.

He also maintained that not only had the examinations of the witnesses and the defendants taken place in the absence of the second judge, but so had the playing in open court of the recorded telephone conversations, which had represented the central pillar of the evidence on which his conviction had been based. He added that the said statements had represented important pieces of evidence as the authenticity of the recordings could not be established, and highlighted that additional pieces of evidence which the defence had sought to lead after the appointment of the second judge had been rejected without reasonable explanation by the court.

61. As regards his lawyers' access to the file, the applicant pointed out that the domestic courts had not observed their obligation to disclose all the evidence and had not ensured that his lawyers had proper access to the file in order to prepare his defence. He also stressed that for the purposes of preparing the defence it had been vital for his lawyers to be given full, effective access to all the documents in the case file, especially to the transcripts of the recorded phone conversations.

62. The applicant maintained that his conviction had mainly been based on the recorded telephone conversations, which as stated in INEC's expert opinion of 22 January 2004 had not been genuine. He also submitted that his attempts to challenge the authenticity of the recordings and their inaccurate reproduction in the transcripts had not been taken into account by the trial court. The applicant complained that his conviction had largely been based on transcripts of audio tapes which he claimed should not have been used as evidence in the file.

2. The Court's assessment

63. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see, among other authorities, *F.C.B. v. Italy*, 28 August 1991, § 29, Series A no. 208-B and *Krombach v. France*, no. 29731/96, § 82, ECHR 2001-II). In doing so, the Court will examine, in turn, each of the various grounds giving rise to the present complaint, in order to determine whether the proceedings, considered as a whole, were fair (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 143, ECHR 2011).

(a) The composition of the panel of the first-instance court

64. The Court considers that an important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy is an important guarantee in criminal proceedings in

which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Therefore, a change in the composition of the trial court after the hearing of an important witness should normally lead to the rehearing of that witness (see *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002).

65. In the instant case the Court notes that the single judge had heard all of the applicant's co-defendants and the witnesses in February and March 2002. After the appointment of the second judge the co-defendants and witnesses previously heard were not heard again.

66. The Court accepts that while the second judge was appointed in May 2003, five months after the proceedings commenced, the first judge, who heard most of the evidence alone, remained the same throughout the proceedings. It also accepts that the second judge had at his disposal the transcripts of the hearings at which the witnesses and the co-accused had been heard. However, noting that the applicant's conviction was based solely on evidence not directly heard by the second judge, the Court considers that the availability of those transcripts cannot compensate for the lack of immediacy in the proceedings.

67. Furthermore, the Court is aware that the possibility exists that a higher or the highest court might, in some circumstances, make reparation for defects in the first-instance proceedings (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86). In the present case the Court notes that the court of last resort not only upheld the judgment of the first-instance court, but also based its decision on the evidence adduced before the court of first instance without a direct hearing of it.

68. Nonetheless, in the Court's view, the circumstances surrounding the impugned change in the composition of the panel of the Bucharest Court of Appeal do not appear to be such as to make its impartiality open to doubt. On the other hand, the change does have to be considered as regards its possible consequences for the fairness of the proceedings as a whole.

(b) The applicant's lawyers' access to the files and evidence

69. The Court points out that Article 6 § 3 (b) of the Convention secures to everyone charged with a criminal offence the right to have adequate time and facilities for the preparation of his defence. Moreover, the "facilities" to be provided to everyone charged with an offence include the possibility of being informed, for the purposes of preparing his defence, of the result of the investigations carried out throughout the proceedings.

70. The Court reiterates that it has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached (see *Matyjek v. Poland*, no. 38184/03, §§ 59

and 63, ECHR 2007-V, and *Luboch v. Poland*, no. 37469/05, §§ 64 and 68, 15 January 2008).

71. In the present case the Court notes that the applicant's lawyers were unable to gain direct access to the case file until a late stage; they were not initially provided with a copy of the indictment (see paragraphs 24 and 40 above). Moreover, they could not obtain either a copy of the transcripts of the recordings of the tapped phone calls or a taped copy of the tapped phone calls used as evidence in the file. In this respect, the applicant's lawyers submitted numerous requests to the domestic courts for access to the file. The Court also notes that the lack of access to the file, which caused difficulties in the preparation of the defence, was exactly the reason advanced by the applicant's lawyers for seeking to withdraw their representation of the applicant.

(c) The taking and assessment of evidence

72. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports* 1997-VIII and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

73. It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible. The Court has already found in particular circumstances of a given case, that the fact that the domestic courts used as sole evidence transcripts of unlawfully obtained telephone conversations, did not conflict with the requirements of fairness enshrined in Article 6 of the Convention (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX).

74. Therefore, the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 144).

75. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including

whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009).

76. In the instant case, the Court is aware that the use of the audio tapes might firstly raise an issue under Article 8 of the Convention. However, the applicant did not raise such a complaint. Nevertheless, when undertaking an analysis under Article 6, account should be taken of the Court's findings under Article 8 concerning the substance of the Romanian relevant provisions regarding telephone surveillance in force at that time in *Dumitru Popescu (no. 2)*, cited above. The Court stated that at the time of the proceedings the applicable law did not provide sufficient safeguards against arbitrary interference with the applicant's private life (ibid. § 61). It was established, *inter alia*, that the prior authorisation of the telephone surveillance had been given by a prosecutor instead of an independent and impartial tribunal.

77. The Court reiterates that the evidence does not have a pre-determined role in the respondent State's criminal procedure. The courts are free to interpret it in the context of the case and in the light of all the elements before them (see *Dumitru Popescu*, cited above, § 110).

78. The Court observes that the recordings played an important role in the body of evidence assessed by the courts. Thus, at the beginning of the proceedings the first-instance court considered a technical expert report on the recordings as absolutely necessary (see paragraph 11) and ordered that such a report be produced. Furthermore, the first-instance court based its reasoning on the transcripts of the recordings, concluding that they "leave little room for doubt" as regards the accused's guilt, while acknowledging that the statements given by the other co-accused were not totally reliable, as they could "be considered subjective" (see paragraph 44).

79. Despite the importance of the recordings in the assessment of evidence the first-instance court changed her initial position concerning the necessity of a technical report in order to establish the authenticity of the recordings. At the end of proceedings it considered the report as superfluous and revised its decision to adduce this evidence (see paragraph 39).

80. In addition, despite that INEC submitted a technical report stating that there were doubts about the authenticity of the recordings (see paragraph 41) before the delivery of its judgment, the first-instance court relied on the transcripts instead of re-opening the proceedings in order to allow the parties to submit their observations on the report.

81. The Court notes that not only did the domestic courts base their decision on recordings of contested authenticity, but they did not reply to the applicant's submissions that he had not been presented with the transcripts and therefore was not aware of their content.

(d) Conclusions

82. The Court notes that none of the defects noted at the pre-trial and first-instance trial stage were subsequently remedied by the appeal court. Despite having jurisdiction to review all aspects of a case on questions of both fact and law, the High Court of Cassation and Justice did not conduct a new judicial examination of the available evidence and the parties' legal and factual arguments. Both the Bucharest Court of Appeal and the High Court of Cassation and Justice merely reiterated the prosecutor's findings, and did not address the repeated complaints made by the defendants concerning various defects in the trial.

83. In view of the above findings, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair trial.

84. Accordingly, there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (b), (c) and (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

85. Lastly, the applicant complained under Article 6 of the Convention of infringements of his right to the public pronouncement of the judgment and of his right to be presumed innocent due to the media coverage of the proceedings.

86. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

88. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

89. The Government considered the applicant's claim unfounded and unsubstantiated.

90. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

91. Moreover, the Court reiterates that when a person, as in the instant case, was convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the inflicted violation.

B. Costs and expenses

92. The applicant also claimed EUR 10,000 for the costs of his legal representation. This sum corresponded to 100 hours of legal work billable by his lawyers at an hourly rate of EUR 100. The applicant also claimed EUR 20,264 for translation costs.

93. The Government contested the claim. In their view, the applicant had failed to show that the expenses were reasonable and necessary.

94. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads of claim.

C. Default interest

95. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the change of the composition of the first-instance court, the applicant's lawyers' access to the file and evidence, and the use of recordings of the applicant's phone conversations as evidence admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (b), (c) and (d) of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 March 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President