



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

FOURTH SECTION

CASE OF ALEXANDRU-RADU LUCA v. ROMANIA

(Application no. 20837/18)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Pre-trial judge proceedings confirming indictment decision not weakening the applicant's position to such an extent that subsequent criminal trial against him rendered unfair from the outset

STRASBOURG

14 June 2022

FINAL

14/09/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Alexandru-Radu Luca v. Romania,

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

Gabriele Kucsko-Stadlmayer, *President*,

Faris Vehabović,

Iulia Antoanella Motoc,

Yonko Grozev,

Armen Harutyunyan,

Pere Pastor Vilanova,

Ana Maria Guerra Martins, *judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application (no. 20837/18) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Alexandru-Radu Luca (“the applicant”), on 14 September 2018;

the decision to give notice to the Romanian Government (“the Government”) of the complaint under Article 6 of the Convention concerning the alleged unfairness of the criminal proceedings against the applicant because the proceedings before a pre-trial judge which had confirmed a public prosecutor’s decision to indict him had breached his rights guaranteed by that Article, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 24 May 2022,

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

INTRODUCTION

1. The applicant complained that the criminal proceedings against him had been unfair because the proceedings before a pre-trial judge which had confirmed a public prosecutor’s decision to indict him had breached his rights guaranteed by Article 6 of the Convention.

THE FACTS

2. The applicant was born in 1978 and lives in Bucharest. He was represented successively by two lawyers, most recently by Mr D. Buruian, a lawyer practising in Bucharest.

3. The Government were represented by their Agent, Ms O. Ezer, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. THE APPLICANT'S INDICTMENT

5. On 11 November 2009 the U.Ț. private bank lodged a criminal complaint with civil claims against the applicant, I.H., C.M., I.B.C.N., C.Ș. and a company managed by the applicant for several acts of fraud allegedly committed while the applicant was working as a loans broker and assisted I.H. and C.M. to obtain loans from the bank.

6. On 7 April 2011 the National Anticorruption Directorate (*Direcția Națională Anticorupție* – “the DNA”) indicted I.H. for one act of fraud; C.M. for three acts of fraud; the applicant, I.B.C.N. and the company managed by the applicant for four acts of being an accessory to fraud; and C.Ș. for a single act of being an accessory to fraud. All the indictments relied on evidence collected by the DNA, which included the statements of the defendants, witness testimonies and documentary evidence, including specialist reports.

7. The applicant was given notice of the indictment and of the evidence supporting it.

II. THE FIRST ROUND OF COURT PROCEEDINGS

8. The first round of proceedings before the national courts were conducted in accordance with the provisions of the former Criminal Code and the Code of Criminal Procedure (“the CCP”) in force until 1 February 2014. The applicant has not denied that these proceedings, regardless of whether they concerned questions touching on points of fact or points of law or on the lawfulness of the evidence, were public, oral and adversarial and the applicant and his lawyer could have been summoned and could have attended all the hearings in person.

9. On 22 May 2013 the Bucharest County Court (“the County Court”) found the applicant and his co-defendants guilty of the respective charges brought against them (see paragraph 6 above) and sentenced the natural persons to the corresponding prison sentences and the legal person to a criminal fine. The applicant was sentenced to ten years’ imprisonment. In addition, the court allowed the civil claims brought by the bank against the applicant and his co-defendants.

10. The applicant and his co-defendants appealed against the judgment.

11. On 28 February 2014 the Bucharest Court of Appeal (“the Court of Appeal”) allowed the appeals, quashed the County Court’s judgment and remitted the case back to the lower court for a retrial. It held that the County Court’s judgment had been unlawful because it had dismissed the bank’s application for its insurer to be accepted as a party to the proceedings and had therefore not summoned the insurer to attend the hearings held in the case.

III. THE SECOND ROUND OF COURT PROCEEDINGS

A. Referral of the case to a pre-trial judge

12. At the public hearing of 5 June 2014, the County Court heard the parties' arguments on whether the case had to be referred to a pre-trial judge for examination before resuming the trial. Whereas the applicant and his co-defendants argued that the case did not have to be referred to a pre-trial judge, the DNA was of the opposite view.

13. On 6 June 2014 the County Court referred the case to a pre-trial judge. It held that the case had been remitted to it for a retrial after the provisions of the new CCP had come into force. The Court of Appeal had not established, however, what constituted the starting-point for the retrial, in particular what was the last procedural act accomplished by the County Court during the first round of proceedings which remained valid. The County Court considered that it therefore had to conclude that all the procedural acts accomplished by it during the first round of court proceedings had been quashed by the appellate court. It took the view that the retrial had to be conducted in line with the new legislation, which meant that the case also had to go through the pre-trial judge stage of the proceedings.

B. The pre-trial judge stage of the proceedings

1. The applicant's and his co-defendants' objections before the pre-trial judge

(a) The applicant's objections

14. On an unspecified date the pre-trial judge of the County Court sent the applicant a copy of the bill of indictment (see paragraph 6 above). In addition, it informed him that he could submit written comments and objections concerning the lawfulness of the criminal investigation authorities' actions and of the manner in which evidence had been gathered by them.

15. On an unspecified date the applicant raised objections before the pre-trial judge and asked for the criminal investigation of the case to be reopened. His objections concerned the alleged unlawfulness of the bill of indictment and the County Court's alleged lack of competence to examine the case.

16. As to the bill of indictment's alleged unlawfulness, the applicant argued that the statements made in the bill justifying his indictment had been based on a misinterpretation of the available evidence. Also, some of the statements concerning his liability for the alleged offences had been contradicted by the evidence. Moreover, his indictment had relied on the contracts containing the applicant's job description which he had signed with the bank, but these contracts had either been missing from the case file or been misread and misrepresented. Furthermore, the investigation authorities

had failed to establish or clarify whether the allegedly fraudulent documents submitted by the applicant to the bank had in fact been forged and by whom.

17. As to the County Court's alleged lack of competence to examine the case, the applicant argued that according to the new procedural rules in force since 1 February 2014, his case had to be referred for examination to a district court.

(b) The applicant's co-defendants' objections

18. The applicant's co-defendants also raised objections before the pre-trial judge and asked for the criminal investigation of the case to be reopened.

19. I.H., C.M., I.B.C.N. and C.Ș. argued that the indictment and the evidence gathered had been unlawful because the DNA had lacked the requisite competence to investigate the case given the actual value of the alleged damage suffered by the bank. Moreover, the evidence in the case file had been rendered null and void because the bank's insurer had not been summoned by the authorities to participate in the proceedings at the investigation stage.

20. The company managed by the applicant reiterated most of the arguments raised by the applicant (see paragraphs 16-17 above). In addition, it contended that all the evidence gathered against it by the investigating authorities had to be excluded from the case file because, when adducing it to the file, the DNA had not appointed a special representative to represent the company's interests and defend its rights as required by law.

2. The pre-trial judge's decision

21. On an unspecified date the objections raised by the applicant and his co-defendants were sent to the DNA, which submitted its comments in response on 14 August 2014.

22. By an interlocutory judgment of 20 August 2014, amenable to an appeal within three days from notification, the pre-trial judge of the County Court – sitting in chambers and in the absence of the parties – dismissed all the above-mentioned objections (see paragraphs 16-20) and sent the case to trial. The pre-trial judge held that given the content of the relevant criminal procedure rules and the alleged value of the damage suffered by the bank, the competent authorities to investigate and examine the case were the DNA and the County Court. It noted in this connection that only a trial court was competent to determine the actual value of the damage suffered by the bank given that such an assessment involved an examination of the merits of the case.

23. The pre-trial judge also held that the relevant procedural rules did not impose an obligation on the authorities to summon the bank's insurer at the investigation stage of the proceedings and that this alleged failure of the

authorities could not have affected in any way I.H.'s, C.M.'s, I.B.C.N.'s and C.Ș.'s rights.

24. The pre-trial judge held further that the remaining arguments of the applicant and his co-defendants, including those concerning alleged deficiencies in the manner in which the evidence had been gathered, could not result in the bill of indictment being invalidated or the criminal investigation being reopened. The pre-trial judge considered that these arguments had not actually contested the lawfulness of the criminal investigation authorities' actions or of the manner in which evidence had been gathered; rather, they concerned the question whether the available evidence could be or was sufficient to support the applicant's and his co-defendants' indictment for the alleged offences and whether the investigation authorities had duly accomplished their task of adducing all pertinent evidence to the case file and had completed the investigation. Therefore, they fell within the scope of the examination and review of the available evidence that had to be conducted by the trial court and were outside the scope of the examination that could be conducted by a pre-trial judge.

3. The applicant's and his co-defendants' challenge against the pre-trial judge's decision

25. On 3 October 2014 the applicant and his co-defendants challenged the pre-trial judge's decision of 20 August 2014 before the pre-trial judge attached to the Court of Appeal. Only I.H., C.M., I.B.C.N. and C.Ș. submitted arguments supporting their challenges. They acknowledged that the interlocutory judgment of 20 August 2014 had been notified to them and reiterated the objections they had raised before the pre-trial judge attached to the County Court as the grounds supporting their challenge (see paragraph 19 above). As to the applicant, he indicated that he was going to submit the arguments supporting his challenge no later than the date that was going to be set for the examination of the challenge. There is no evidence in the case file that the applicant actually submitted the aforementioned arguments.

26. By an interlocutory judgment of 30 October 2014 not amenable to appeal, the pre-trial judge attached to the Court of Appeal – sitting in chambers and without the parties being present – dismissed the challenges of the applicant and his co-defendants as ill-founded. As to the grounds relied on by I.H., C.M., I.B.C.N. and C.Ș. for their challenges, the judge reiterated the lower pre-trial judge's reasons for her decision of 20 August 2014. As to the challenge lodged by the defendant company, the pre-trial judge noted that it had not provided any arguments supporting its challenge and dismissed the company's allegation that the reason for that was the fact that the decision of 20 August 2014 had not been notified to it. The pre-trial judge held in this connection that the company could have consulted the decision of 20 August 2014 available in the court's registry and that therefore it was solely responsible for failing to submit the grounds in question. The pre-trial judge

held further that in such circumstances the only arguments supporting the company's challenge to be examined were the objections already raised by the company before the lower pre-trial judge, whose reasons for dismissing those objections were well founded.

4. *Extraordinary appeals brought by the applicant against the pre-trial judges' decisions*

(a) Extraordinary appeal of annulment

27. The applicant lodged an extraordinary appeal of annulment (*contestație în anulare*) against the pre-trial judge's decision of 30 October 2014. He argued that he had neither been summoned to appear before the pre-trial judge attached to the Court of Appeal, nor been notified of the date and time set for the examination of his challenge as required by the relevant procedural rules. Even though he had enquired repeatedly with the Court of Appeal's registry about the date and time set for the examination of his challenge he had been told that the case file had still not been registered on the court's docket.

28. On 3 December 2014 the Court of Appeal dismissed the applicant's extraordinary appeal of annulment as inadmissible. It held that that type of appeal could only be lodged against an enforceable judgment on the merits of a case. Even though not amenable to an appeal, the decision of 30 October 2014 could not be considered as falling into that category. The court also held that according to the procedural rules in force at the relevant time, the challenge against the decision of 20 August 2014 had been correctly examined in chambers and in the parties' absence. The court acknowledged that on 11 November 2014 the rules in question had been declared unconstitutional by the Constitutional Court; nevertheless, the Constitutional Court's decision had only an *ex nunc* effect and only from the time of its publication in the Official Gazette.

(b) Extraordinary appeal to review

29. The applicant lodged an extraordinary appeal to review (*cerere de revizuire*) the pre-trial judge's decision of 20 August 2014. Relying on the findings in the Constitutional Court's judgment of 11 November 2014, the applicant argued that his right to a fair trial had been affected because the pre-trial judge had examined his challenge against the bill of indictment in chambers and in the absence of the parties.

30. On 26 June 2015 the County Court dismissed the applicant's extraordinary appeal to review as inadmissible. It held that that type of appeal could only be lodged against a judgment on the merits of a case and by a person who had been convicted of an offence and had challenged the constitutionality of the legal provisions in dispute before the Constitutional

Court. However, none of those conditions had been met in the applicant's case.

31. The applicant contested the judgment of 26 June 2015 before the Court of Appeal but eventually withdrew his appeal.

C. The trial stage of the proceedings

32. The trial proceedings before the national courts were public, oral and adversarial. The applicant and his lawyer were summoned to attend and were able to attend in person all the hearings held in the case. Like his co-defendants, he was able to and did submit comments concerning or contesting the probative value of the evidence available in the case file and to reiterate some of the arguments raised before the pre-trial judge (see paragraph 16 above). Also, he was able to and did ask for both documentary, expert and testimonial evidence to be added to the case file. His submissions and requests were examined by the national courts and were allowed or dismissed by reasoned decisions. Furthermore, the applicant was given repeated opportunities to make statements before the courts, to contest the submissions made by the other parties to the proceedings and to question his co-defendants and witnesses heard by the courts, including witnesses heard by the authorities at the investigation stage of the proceedings.

33. On 24 April 2017 the County Court, relying on the available evidence, found the applicant and most of his co-defendants guilty in part of the respective charges brought against them (see paragraph 6 above) and sentenced the natural persons to the corresponding prison sentences and the legal person to a criminal fine. The applicant was sentenced to two years and six months' imprisonment. In addition, the court allowed in part the civil claims brought by the bank against the applicant and his co-defendants.

34. The applicant, most of his co-defendants and the DNA appealed against the judgment. The applicant argued in essence that he had been convicted by the first-instance court by relying on a set of facts that had not constituted the basis for his indictment, and that the facts in question had not been criminal in nature and in any event had not been substantiated by the evidence.

35. By a final judgment of 18 December 2017, the Court of Appeal allowed the DNA's appeal against the County Court's judgment of 24 April 2017 in part and dismissed the applicant's and his co-defendants' appeals as ill-founded. It held that the applicant and most of his co-defendants were guilty of the respective charges brought against them (see paragraph 6 above) and sentenced the natural persons to the corresponding prison sentences and the legal person to a criminal fine. The applicant was sentenced to three years and six months' imprisonment.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

36. The following relevant domestic law is set out in *Mihail Mihăilescu v. Romania* (no. 3795/15, §§ 21-22, 12 January 2021): provisions of the Constitution concerning international human rights treaties (Article 20), a person's rights of free access to a court (Article 21), defence (Article 24) and use of appeals (Article 129) and the effects of a Constitutional Court decision (Article 147); and the relevant provisions of the CCP, as in force at the material time, concerning the separation of judicial functions (Article 3), a pre-trial judge's competence (Article 54) and examination of complaints (Article 341), the scope of the pre-trial judge procedure (Article 342), the preliminary steps taken by and the procedure before the pre-trial judge (Articles 344-345), the pre-trial judge's decisions (Article 346) and the challenge against such decisions (Article 347).

II. DECISION BY THE CONSTITUTIONAL COURT

37. By decision no. 641 of 11 November 2014, published in Official Gazette no. 887 of 5 December 2014, the Constitutional Court examined the unconstitutionality objections raised by private parties concerning Article 344 § 4, Article 345 §§ 1, 2 and 3, Article 346 § 1 and Article 347 §§ 1, 2, and 3 of the CCP. It held that Article 344 § 4, Article 345 § 1, Article 346 § 1 and Article 347 § 3 of the CPP were unconstitutional, and the remaining paragraphs of the above-mentioned Articles which had been challenged were constitutional. The relevant parts of the Constitutional Court's decision read as follows:

“25. ... [T]he [pre-trial judge] institution is regulated in the [CCP] in Articles 342-348 ...

26. ... [T]he abovementioned provisions must be read in conjunction with those of Article 54 of the [CCP] regulating the competencies of the [pre-trial] judge ... At the same time, the Court takes into account that, under ... Article 3 § 1 of the [CCP], the following judicial functions are exercised during the criminal proceedings ...

27. Thus, given the ... responsibilities entrusted to the [pre-trial] judge ..., the [Constitutional] Court concludes that [the pre-trial judge] has the function of reviewing [whether a case] was or was not sent to trial lawfully and that ... this new ... institution belongs neither to the criminal investigation [stage], nor to the trial [stage of the proceedings], being the equivalent of a new stage of the criminal proceedings ...

28. ... [T]he [Constitutional] Court notes that [the pre-trial judge's] activity does not concern the merits of the case, as the procedural act carried out by [the pre-trial judge] does not touch on or determine ... the essential elements of a dispute: the act, the person [who has committed it], and [that person's] guilt. Thus, under ... Article 342 of the [CCP] the competence of the [pre-trial] judge consists in reviewing, after [the case] has been sent for trial, the court's competence and [whether the case] was referred [to it]

lawfully, ... the lawfulness of [the manner in which] evidence has been gathered and of the criminal investigation authorities' actions ...

...

32. As to the pre-trial stage of the proceedings ... the [Constitutional] Court notes that the European Court [of Human Rights] views the criminal proceedings as a whole. On the other hand, certain requirements imposed by Article 6 [of the Convention], such as the reasonable length [of proceedings] or defence rights may be relevant also at this stage of the proceedings, in so far as the fairness of the trial could be seriously prejudiced by the initial failure to comply with these requirements ... Thus, the manner of applying these guarantees during the [pre-trial stage of the proceedings] depends on the characteristics of the procedure and the circumstances of the case ...

...

34. Furthermore, the [Constitutional] Court considers that the constitutional provisions concerning the right to a fair trial are not subject to the distinctions that emerge from the case-law of the European Court [of Human Rights] in so far as their application to certain stages of the criminal proceedings is concerned. In this connection, the Constitutional Court ruled by decision no. 599 of 21 October 2014 ... that the legislative solution ... in Article 341 § 5 of the [CCP], according to which the [pre-trial] judge ... decides on a complaint against the solutions of non-prosecution or non-indictment 'without the participation of the petitioner, of the prosecutor and of the respondent', was unconstitutional, violating the right to a fair trial from the point of view of [the rights to oral and adversarial proceedings]. Thus, [taking] the application ... of Article 21 § 3 of the [Constitution] to all legal disputes as a starting[-point] and taking into account ... the provisions of Article 20 of the Constitution and those of Article 53 of the Convention, the [Constitutional] Court found that the legislature must comply with ... Article 6 of the Convention also when it regulates ... criminal procedures not related to the examination of the merits of a case, including ... the [pre-trial judge] procedure.

35. ... [A]s to the adversarial [nature of the] proceedings, the [Constitutional] Court notes that this concept is defined ... as the right of each party to ... present, argue and prove his [or her] claims or defence as well as the right to comment on and challenge the arguments and evidence [presented] by the other party. The adversarial [nature of proceedings] translates ... into notifying the other party of factual and legal arguments and ... the possibility for ... that party to respond to them. ... [being] adversarial, first and foremost, [consists of having] a real possibility of debating everything before the judge ...

...

38. ... [T]he European Court of Human Rights has ruled that a fundamental aspect of the right to a fair trial is that, in criminal matters, also [in the aspects] connected to procedure, [proceedings] should happen in an adversarial manner, the equality of arms between the prosecution and the defence being imperative ...

39. The [Constitutional] Court ... considers that evidence is at the heart of any criminal trial and the criminal investigation body collects ... evidence both in favour and against the suspect or the defendant. At the same time, the Court notes that the objective of the [pre-trial judge] ... consists in reviewing, after the case has been sent for trial, the court's competence and whether the case was referred to it lawfully, as well as in reviewing the lawfulness of the manner in which the evidence was gathered and of the criminal investigation authorities' actions. The [Constitutional] Court also notes

that under Article 346 § 5 of the [CCP], evidence excluded by the [pre-trial] judge at this stage [of the proceedings] cannot be taken into account at the trial ...

40. At the same time, the [Constitutional] Court observes that, in the legislature's view, the ... [CCP] 'gives the [pre-trial] judge ... the competence to review [whether] the evidence gathered during the criminal investigation [stage] is compliant with the guarantees of the fairness of the proceedings. In this connection, the lawfulness of the [manner in which the] evidence [was gathered] is closely and exclusively linked to ensuring that the criminal trial is fair ...'. In the light of the [foregoing], the [Constitutional] Court concludes that the [pre-trial judge] procedure ... is very important, having a direct influence on the conduct and fairness of the subsequent procedure, including ... the trial itself.

41. [U]nder Article 344 § 4 of the [CCP], the [pre-trial] judge notifies the prosecutor's office of the requests made and objections [raised] by the defendant or the objections raised *ex officio*, [and the prosecutor's office] may respond in writing, within ten days of being notified. ... [T]he [Constitutional] Court notes that a prosecutor has access to the requests made and objections [raised] by a defendant or [those] raised *ex officio*, whereas neither the objections raised *ex officio* by the [pre-trial judge] ... nor the response of the prosecutor's office to them are notified to the defendant ...

42. In the light of the foregoing, the [Constitutional] Court considers that after [the defendant] has consulted the bill of indictment [he or she] is restricted to making requests and [raising] objections ... [and] does not enjoy a real possibility to comment on everything that is argued by the other party [on points of] law or [on points of] fact ... By regulating in this manner, the legislature has ... restricted the parties' possibility of being familiar with and debating the objections raised *ex officio* and the comments of the prosecutor's office, placing them at a disadvantage *vis-à-vis* the prosecutor.

...

54. The Court notes further that the right to oral proceedings and to a public hearing is particularly important in the criminal context, in which case a person charged with a criminal offence must generally have the opportunity to attend a hearing at first instance ... In the event of a case being examined at only one level of jurisdiction and in the event that the proceedings are not 'extremely technical' or [do not concern a] 'purely legal [matter]' an oral procedure is mandatory ...

55. By contrast, using a written procedure before appellate courts is generally accepted as being compatible with Article 6 [of the Convention]. An oral procedure may not be necessary before an appellate court as long as there are no problems with the credibility of witnesses, the facts are not disputed, [and] the parties are afforded adequate opportunity to argue their cases in writing and to challenge the evidence brought against them ...

56. Thus, as stated above, given that the standard of protection afforded by the Convention's provisions and the case-law of the European Court [of Human Rights] is a minimal one [and] that the [Constitution] or the Constitutional Court's case-law can afford a higher level of protection of rights ... the [Constitutional] Court has concluded that the guarantees provided for by Article 6 § 1 of the Convention and Article 21 § 3 of the Constitution are applicable, in criminal matters, not only to the procedure on the merits of a case, but also to the [pre-trial judge] procedure, providing for an increased protection [compared] to that afforded by the Convention.

57. As to the right to an oral procedure, the [Constitutional] Court notes that the proceedings can be followed by the parties effectively ... only during oral deliberations. At the same time, the right to an oral procedure includes ... a defendant's right ... to

appear before the court. This principle ensures direct contact between a judge and the parties, ensuring that the parties' arguments ... [are presented] in a certain order which facilitates the correct determination of facts.

...

59. For all of the reasons stated above, from the point of view of the review of the lawfulness of the manner in which the evidence was gathered, the [Constitutional] Court finds, on the one hand, that the evidence, once excluded [from the case file], can no longer be taken into account during the trial ..., and, on the other hand, that the [pre-trial] judge is the only person who can decide on the lawfulness of the manner in which the evidence was gathered and of the criminal investigation authorities' actions ... Thus, the [pre-trial judge's] actions ... directly influence the conduct and fairness of the trial itself. Once the trial has started, the first-instance judge can no longer decide on the excluded evidence or the lawfulness of the manner in which the remaining evidence was gathered ... Once the [pre-trial] judge's decision is final the defendant can no longer rely on any legal basis in order to [make] requests or raise objections concerning the points already examined by the [pre-trial] judge.

60. The [Constitutional] Court notes also that, ... the rules concerning the [pre-trial] judge ... suggest that it is impossible for a [pre-trial] judge ... to collect evidence in order to determine the lawfulness of the evidence gathered at the criminal investigation stage [of the proceedings], [and since the proceedings] are not oral or adversarial, the only possibility [open to him or her] is the formal acknowledgement of the lawfulness of the evidence or [of] the need for some of [the evidence] to be removed. However, as indicated above, the criminal investigation body gathers ... evidence both in favour and against the ... defendant[. Therefore], in the event there are several defendants in the [same] case the evidence favourable to one of them may be detrimental to another [or others].

61. ...[T]he [Constitutional] Court [also] notes that in certain circumstances the factual elements behind the gathering of certain evidence are directly and implicitly relevant for the lawfulness of the evidence ... [T]he impossibility for the [pre-trial judge] to collect new evidence or to order for certain documents to be presented, as well as the lack of an oral debate on these matters, puts him or her in a position of being unable to clarify the factual situation, an aspect that can implicitly have consequences for the examination [on] points of law. From this angle, the [Constitutional] Court considers that the outcome of the [pre-trial] judge proceedings concerning the lawfulness of [the manner in which] evidence was gathered and of the criminal investigation authorities' actions directly influences the conduct of the trial and may be decisive for determining a defendant's guilt [or] innocence.

...

63. The [Constitutional] Court ... notes that under Article 347 § 3 of the [CCP] ... Articles 343-346 ... apply ... also to the challenge [brought against] the decision of the [pre-trial] judge. In these circumstances, the [Constitutional] Court considers that its above considerations apply *mutatis mutandis* ... to the procedure [concerning] the challenge [brought against] the decision of the [pre-trial] judge. ..."

III. COMPARATIVE LAW MATERIAL

38. Extracts of the comparative study conducted by the Court concerning the legislation of twenty-five member States of the Council of Europe

regarding the institution of a pre-trial or investigating judge are set out in *Mihail Mihăilescu*, cited above, §§ 46-50.

THE LAW

I. PRELIMINARY REMARKS

39. The applicant contended that the Government had submitted their observations on the admissibility and merits of the case on 24 February 2021, outside the time-limit of 18 February 2021 set by the Court.

40. In so far as the applicant's argument may be viewed as suggesting that the Government's observations were invalid and should therefore be ignored, the Court notes that according to the evidence in the case file the Government submitted their observations on the admissibility and merits of the case on 12 February 2021, well within the time-limit of 18 February set in this connection. A copy of the Government's submissions was notified to the applicant by a letter dated 24 February 2021.

41. In this context, the Court sees no reason to conclude that the Government's observations were submitted out of time. It follows that the applicant's allegation is ill-founded and must be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

42. The applicant complained that the criminal proceedings against him had been unfair because (i) the pre-trial judge proceedings had not been adversarial and had taken place in chambers, in his and his lawyer's absence and without the applicant or his lawyer being summoned or the applicant being represented, and (ii) he had been deprived of the opportunity to challenge the pre-trial judge's decision because he had not had the opportunity to submit arguments supporting his challenge against the above-mentioned decision as the reasons for the pre-trial judge's decision had not been available to him at the time when he had drafted his challenge. The proceedings had therefore breached his rights guaranteed by Article 6 of the Convention, the relevant part of which reads as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal established by law ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ...;

..."

A. Admissibility

43. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

44. The applicant argued that both his application before the pre-trial judge and his challenge against the pre-trial judge's decision had been examined in chambers and in the absence of the parties and had not been adversarial. Moreover, the pre-trial judge attached to the Court of Appeal had failed to notify the applicant of the date set for the examination of his challenge and of the time-limit allowed for the submission of the arguments supporting his challenge. Therefore, he had been unable to submit those arguments or any other documents supporting his case.

45. Reiterating some of the arguments relied on by the Constitutional Court in its decision no. 641 of 11 November 2014 (see paragraph 37 above), the applicant argued further that the Constitutional Court had unequivocally demonstrated, based also on the case-law of the European Court of Human Rights, that a pre-trial judge's examination of a case in chambers, in the parties' absence and during proceedings which had not been adversarial, had had serious effects on the right to a fair trial of defendants and other parties in criminal proceedings.

(b) The Government

46. The Government argued that the criminal proceedings brought against the applicant, viewed overall, had been adversarial and fair and had complied with the principle of equality of arms.

47. They explained that on 1 February 2014 a new CCP had come into force which had changed the manner in which a criminal trial was conducted by introducing a new procedural step, namely a procedure before a pre-trial judge. That judge had clear objectives, namely to examine the lawfulness of the evidence adduced, the indictment and the acts carried out by the investigating authorities, and to prepare the case for examination at the trial stage of the proceedings.

48. As established by the Constitutional Court in its decision of 11 November 2014, the institution of a pre-trial judge was not part of the investigation stage or trial stage of the proceedings, given the procedural tasks given to such a judge. The activity of a pre-trial judge did not concern the merits of a case, and his or her procedural acts did not touch on or determine

the essential elements of a dispute, in particular, the act in question, the person who had committed it, and his or her guilt.

49. Proceedings before a pre-trial judge could end, among other things, in the case being referred back to the prosecutor's office or being sent for trial. In the latter scenario, the trial court could no longer refer the case back to the prosecutor's office.

50. The Government also explained that after the Constitutional Court had declared Article 345 § 1 and Article 347 § 3 of the CCP unconstitutional, the authorities had changed the text of these Articles by Law no. 75/2016, which had come into force on 2 May 2016.

51. The Government contended that the County Court had notified the bill of indictment to the applicant. It had also informed him of his rights to submit written observations and to raise objections before the pre-trial judge. The applicant had eventually raised objections concerning the alleged unlawfulness of the bill of indictment and the competence of the court charged with the examination of the case. The pre-trial judge had examined all the arguments raised by the applicant and had dismissed them by providing comprehensive reasons.

52. Given the express provisions of Article 345 § 1 of the CCP in force at the material time, it could not be said that the proceedings before the pre-trial judge at all levels of jurisdiction had lacked equality of arms, as long as none of the parties to these proceedings, including the prosecutor's office, had been present during the proceedings. Moreover, as was the case for all the parties, the applicant's physical absence from the proceeding had not meant that he had not been able to submit written observations. It was true that the applicant had not had the opportunity to present the arguments he had raised in his written submissions orally directly before the judge in an attempt to persuade him or her to reach a solution favourable to him. Nevertheless, the applicant had had the opportunity to exercise his procedural rights by submitting written observations and raising objections.

53. The Government contended further that the pre-trial judges and courts called upon to examine the applicant's case had simply applied the relevant law in force at the material time. They pointed out that under the relevant Constitutional law provisions, the Constitutional Court's decision of 11 November 2014 had been mandatory and had applied only *ex nunc* from the moment of its publication in the Official Gazette.

54. The Government argued that the exceptional circumstances which might justify dispensing with an oral hearing essentially came down to the nature of the issues to be dealt with by the competent court – in particular, whether these raised any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing might not be required where there were no issues of credibility or contested facts which necessitated the oral presentation of evidence or the cross-examination of witnesses, and where the accused had been given an adequate opportunity to

put forward his or her case in writing and challenge the evidence against him or her.

55. Given that in the applicant's case the decision of the pre-trial judge had not touched on the merits of the case, his defence rights had not been affected. At the investigation and trial stages of the criminal proceedings opened against him, the applicant had been heard by the relevant authorities. In addition, he and his chosen legal representative had had access to all the documents in the case file, he had been able to participate actively in the proceedings and to comment on the observations submitted and the evidence adduced by the other parties and he had had the opportunity to ask for witnesses to be heard and for other evidence to be adduced to the case file. Furthermore, the trial courts had provided ample reasons for their decision to convict the applicant.

2. *The Court's assessment*

(a) **General principles**

56. The Court reiterates that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1. However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016).

57. Whereas the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", the guarantees of Article 6 are applicable from the moment that a "criminal charge" exists within the meaning of this Court's case-law and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them. The investigation or pre-trial stage may be of particular importance for the preparation of the criminal proceedings. For instance, the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial (see *Ibrahim and Others*, cited above, § 253, with further references, and *Haarde v. Iceland*, no. 66847/12, § 78, 23 November 2017). The manner in which

Article 6 §§ 1 and 3 is to be applied during the investigation or pre-trial stage of proceedings depends on the special features of the proceedings involved and on the circumstances of the case (see *Ibrahim and Others*, cited above, § 253, and, *mutatis mutandis*, *Mihail Mihăilescu v. Romania*, no. 3795/15, § 80, 12 January 2021).

58. The Court reiterates further that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a “fair hearing” within the meaning of Article 6 § 1 of the Convention. They require a “fair balance” between the parties: each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent (see, among other authorities, *Salov v. Ukraine*, no. 65518/01, § 87, ECHR 2005-VIII, and *SA-Capital Oy v. Finland*, no. 5556/10, § 66, 14 February 2019). According to the right to adversarial proceedings the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision (see *Gregačević v. Croatia*, no. 58331/09, § 50, 10 July 2012, with further references). In this respect, the Court notes that it is possible that a procedural situation which does not place a party at any disadvantage *vis-à-vis* his or her opponent still represents a violation of the right to adversarial proceedings if the party concerned did not have an opportunity to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision (see *Krčmář and Others v. the Czech Republic*, no. 35376/97, §§ 38-46, 3 March 2000, and *Gregačević*, cited above, § 50).

59. The rights deriving from these principles are not absolute. While the Contracting States enjoy a certain margin of appreciation in this area, it is for the Court to determine in the last instance whether the requirements of the Convention have been complied with. Even in criminal cases the Court has held that there may be competing interests which must be weighed against the rights of the party to the proceedings. However, only measures restricting the rights of a party to the proceedings which do not affect the very essence of those rights are permissible under Article 6 § 1. For that to be the case, any difficulties caused to the applicant party by a limitation of his or her rights must be sufficiently counterbalanced in the procedures followed by the judicial authorities (see *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 45-46, ECHR 2000-II, and *SA-Capital Oy*, cited above, § 67).

60. Lastly, the Court refers to the principles set out in its case-law concerning the requirement that an oral and public hearing be held in circumstances concerning the determination of a criminal charge (see *Jussila v. Finland* [GC], no. 73053/01, §§ 40-44, ECHR 2006-XIV).

(b) Application of these principles to the instant case

61. The Court notes at the outset that the High Contracting Parties have adopted, as part of their legal framework, varied approaches to questions concerning the procedures, competences and role of investigating or pre-trial judges (see paragraph 38 above). The Court acknowledges that these issues may involve important and sensitive questions about fairness and how to strike an appropriate balance between the parties to proceedings, and that the solutions adopted are linked with complex procedural matters specific to each constitutional order. This being so, it is not for the Court to seek to impose any particular model on the Contracting Parties. Its task is to conduct a review of the specific circumstances of the case, on the basis of the complaints brought before it (see, *mutatis mutandis*, *Haarde*, cited above, § 84, and *Mihail Mihăilescu*, cited above, § 78).

62. In the instant case the Court notes that it has already established that the proceedings before a pre-trial judge concerned the preliminary stage of criminal proceedings. The main purpose of those proceedings was to decide whether to commence a criminal trial in a case or whether to end a criminal-law dispute. Among other things, the pre-trial judge was called upon to examine the lawfulness of the bill of indictment. Where, like in the present case, the pre-trial judge decided to commence the trial, the judge's activities did not concern the merits of the case, and his or her decisions were neither aimed at determining the essential elements of the alleged criminal offence, namely the act in question, the person who had committed it, and that person's guilt, nor any civil claim lodged by a civil party within criminal proceedings. These points could be determined by the criminal court only at the trial stage of the proceedings (see, *mutatis mutandis*, *Mihail Mihăilescu*, cited above, § 79, and the remarks made in this respect by the Constitutional Court, cited in paragraph 37 above).

63. Given that under the national legal framework the applicant could have had the merits of the criminal charges brought against him determined only within the context of the criminal trial (see paragraph 62 above), the Court will have regard to the proceedings as a whole, assessing the handling of the case by the pre-trial judge in light of the subsequent trial, when determining whether the rights of the applicant were prejudiced. As part of that determination, it needs to be assessed whether any measures taken during the proceedings before the pre-trial judge weakened his position to such an extent that all subsequent stages of the proceedings were unfair (see *Haarde*, cited above, § 79, and, *mutatis mutandis*, *Mihail Mihăilescu*, cited above, § 81).

64. In this connection, the Court notes that – in line with the relevant legal framework in place at the time when the applicant's case was examined – the proceedings before the pre-trial judge were conducted in chambers and in the absence of the parties. Also, the applicant could make only written submissions before the pre-trial judge concerning the competence of the court

charged with the examination of the case and the lawfulness of the bill of indictment, the criminal investigation authorities' actions and the manner in which evidence had been gathered by them. He could not rely on any legal provision expressly giving him the opportunity to ask for a public and oral hearing to be held by the pre-trial judge, or ask the pre-trial judge to administer again the available evidence. In addition, there was no procedural requirement to be notified either of the objections raised *ex officio* by the pre-trial judge or about the response of the prosecutor's office to such objections, and any possible challenge against the pre-trial judge's decision was examined under similar circumstances (see paragraphs 36-37 above).

65. The Court further notes that the above-mentioned legal framework was eventually declared partly unconstitutional by the Constitutional Court and subsequently changed. However, the Constitutional Court's decision and the subsequent legislative changes had no impact on the proceedings in the applicant's case, because they only came into force after those proceedings had ended and did not have a retroactive effect (see paragraphs 27-30 above).

66. As pointed out by the Constitutional Court it is clear that the pre-trial judge proceedings could have an impact on the manner in which a criminal trial court that was called upon to determine the merits of the case following an indictment would examine the case and review evidence which had been deemed lawful or unlawful by the pre-trial judge (see paragraph 37 above). In particular, once the pre-trial judge had decided to actually exclude evidence from the case file or to accept it, the criminal trial court was no longer able to take into account during the trial the excluded evidence or decide on the lawfulness of the manner in which the accepted evidence had been gathered. Nevertheless, nothing in the Constitutional Court's judgment suggests that the pre-trial judge's decision imposed any pre-determined weight on the probative value of the evidence that he or she deemed lawful, prevented the trial court from administering directly the evidence in question, and prevented the parties from contesting the weight or probative value of such evidence or from asking for new evidence to be adduced to the case file.

67. Turning to the circumstances of the applicant's case, the Court observes that according to the evidence in the case file, there is no reason to doubt that the applicant and his legal representative could have actively participated in the proceedings at the criminal investigation stage, asked for evidence to be adduced to the case file and submitted comments, applications and challenges. Moreover, the applicant had access to the case file and the evidence therein and before each round of trial court proceedings he was given a copy of the bill of indictment and duly informed of his rights, including those concerning the pre-trial judge proceedings.

68. The Court notes that the applicant took advantage of his rights and submitted written comments and objections before the pre-trial judge concerning the evidence and the County Court's competence to examine the case. He was joined by his co-defendants who submitted similar arguments

as well as additional ones concerning the DNA's competence to investigate the case and failure to summon the bank's insurer (see paragraphs 15-20 above).

69. The pre-trial judge dismissed the applicant's and his co-defendants' arguments contesting the DNA's and the County Court's competence to examine the case and the investigating authorities' failure to summon the bank's insurer by pointing to the relevant criminal procedural rules (see paragraphs 22-24 above). In the Court's view, it can hardly be said that it was not possible to have adequately resolved these issues of interpretation of the national law on the basis of the case file alone.

70. At the same time, the Court notes that the pre-trial judge examined and dismissed the comments made and objections raised by the applicant and his co-defendants with regard to the available evidence by pointing to the fact that the comments and objections in question had not actually contested the lawfulness of the criminal investigation authorities' actions and of the evidence which had been gathered. The pre-trial judge indicated that they concerned the question whether the available evidence could be or was sufficient to support the applicant's and his co-defendants' indictment for the alleged offences and whether the investigation authorities had duly accomplished their task of adducing all pertinent evidence to the case file and had completed the investigation. She was therefore of the view that they fell within the scope of the examination and review of the available evidence that had to be conducted by the trial court and outside the scope of the examination that could be conducted by a pre-trial judge (see paragraphs 22-24 above).

71. The Court notes further that the applicant has not argued that following the pre-trial judge's decision he was estopped from reiterating the above-mentioned arguments (see paragraph 70) before the trial court. In any event, it appears that in so far as both he and his co-defendants did so, the trial court examined them and allowed or dismissed them by reasoned decisions. The trial court does not seem to have taken the view that the points in question had been settled by the pre-trial judge decision with *res judicata* effect or that they no longer fell within the scope of the examination that could be conducted by the trial court (see paragraphs 32-35 above). Therefore, the pre-trial judge's decision was of little consequence for the manner in which the criminal trial court could examine the case (see the remarks made in this respect by the Constitutional Court, cited in paragraph 37 above).

72. The Court also notes that the pre-trial judge did not raise any arguments or objections concerning the applicant's case *ex officio* and therefore neither party could have been placed at a disadvantage *vis-à-vis* the other party by being denied the opportunity to comment on those objections as suggested by the Constitutional Court (see paragraph 37 above).

73. The Court observes that the applicant complained that he was deprived of the opportunity to have the pre-trial judge's decision challenged before the pre-trial judge attached to the Court of Appeal because he could not submit any arguments supporting his challenge. It is somewhat unclear whether the applicant was unable to submit the aforementioned grounds because the reasons for the pre-trial judge's decision were not available to him at the time when he drafted his challenge or because he had not been informed about the exact date when his challenge was going to be examined (see paragraphs 25-28, 42 and 44 above).

74. Be that as it may, the Court observes in this connection that the applicant's challenge lodged before the pre-trial judge attached to the Court of Appeal would have been examined under the same conditions as those applicable to the proceedings before the lower pre-trial judge and therefore would not have been able to remedy the procedural shortcomings of the proceedings complained of by the applicant (see the remarks made in this respect by the Constitutional Court, cited in paragraph 37 above). Moreover, the applicant has not pointed to any evidence suggesting that the arguments supporting his challenge would have rested on different grounds than those already raised before the lower pre-trial judge.

75. In this context – also taking into account that the applicant was able to reiterate his arguments concerning the available evidence before the trial courts and that nothing indicates that those proceedings failed to comply with all the guarantees set out in Article 6 of the Convention – the Court is not prepared to attach any weight to the impossibility alleged by the applicant to have the pre-trial judge's decision properly challenged before the Court of Appeal.

76. Having regard to the above, the Court considers that it cannot be said that the measures and decisions taken during the pre-trial judge proceedings viewed overall weakened the applicant's position to such an extent that the subsequent proceedings aimed at determining the merits of the criminal charge against him were rendered unfair.

77. In conclusion, there has been no violation of Article 6 of the Convention.

78. The Court's findings are without prejudice to the domestic authorities' actions to set up a domestic legal framework in order to ensure a heightened level of protection compared with the Convention as regards proceedings before a pre-trial judge (see the remarks made in this respect by the Constitutional Court, cited in paragraph 37 above – see also, *mutatis mutandis*, *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 172, 25 June 2019).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 14 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth,
Deputy Registrar

Gabriele Kucsko-Stadlmayer
President