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

FIRST SECTION

CASE OF CONSTANTINESCU v. ROMANIA

(Application no. 28871/95)

JUDGMENT

STRASBOURG

27 June 2000

In the case of Constantinescu v. Romania,

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

Mrs W. THOMASSEN, *President*,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ, *judges*,
Mr Ş. BELIGRĂDEANU, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 21 March and 6 June 2000,

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

PROCEDURE

1. The case was referred to the Court by a Romanian national, Mr Mihail Constantinescu ("the applicant"), on 27 July 1999 and by the European Commission of Human Rights ("the Commission") on 11 September 1999 within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. It originated in an application (no. 28871/95) against Romania lodged by the applicant with the Commission on 4 April 1995 under former Article 25 of the Convention. The applicant complained of an infringement of his freedom of expression, contrary to Article 10 of the Convention, on account of his conviction for defamation; of the unfairness of the related proceedings, contrary to Article 6 § 1 of the Convention; and of an infringement of his freedom of association, contrary to Article 11 of the Convention.

On 23 October 1997 the Commission declared admissible the complaints of an infringement of freedom of expression and of the unfairness of the proceedings, but declared the remainder of the application inadmissible. In its report of 19 April 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry], it expressed the unanimous opinion that there had been a violation of Article 6 § 1 and held, by twenty-one votes to seven, that there had not been a violation of Article 10.

3. The applicant was granted legal aid.

4. After the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 4 thereof combined

with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber determined on 7 July 1999 that the case should be examined by a Chamber constituted within one of the Sections of the Court.

5. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, subsequently assigned the case to the First Section. The Chamber constituted within that Section included *ex officio* Mr C. Bîrsan, the judge elected in respect of Romania (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J. Casadevall, who took over the presidency of the Section and hence of the Chamber (Rules 12 and 26 § 1 (a)) at the deliberations of 21 March 2000. The other members appointed by Mr Casadevall to complete the Chamber were Mr L. Ferrari Bravo, Mr Gaukur Jörundsson, Mr R. Türmen, Mrs W. Thomassen and Mr R. Maruste (Rule 26 § 1(b)).

Subsequently Mr Bîrsan, who had taken part in the Commission's examination of the case, withdrew from sitting in the Chamber (Rule 28). The Romanian Government ("the Government") accordingly appointed Mr Ş. Beligrădeanu to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). On 6 June 2000 Mrs Thomassen took over the presidency of the Section and hence of the Chamber (Rules 12 and 26 § 1(a)). Mr Maruste, who was unable to take part in the further consideration of the case, was replaced by Mr B. Zupančič, substitute (Rule 26 § 1(c)).

6. The applicant and the Government each filed a memorial on 6 and 9 November 1999 respectively.

7. In accordance with the decision of the Chamber, a hearing took place in public in the Human Rights Building, Strasbourg, on 21 March 2000.

There appeared before the Court:

(a) *for the Government*
Mrs R.RIZOIU, *Agent*,
Mrs C. TARCEA, Ministry of Justice,
Mr T. CORLĂŢEAN, Ministry of Foreign Affairs, *Advisers*;

(b) *for the applicant*
Mr C. DINU, of the Bucharest Bar, *Counsel*.

The Court heard addresses by Mr Dinu, Mrs Rizoiu and Mrs Tarcea.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On 8 June 1992 the General Assembly of the Primary and Secondary School Teachers' Union of the second district of Bucharest ("the union") elected a new leadership. The applicant was elected General Secretary.

9. On 29 June 1992 the union lodged a complaint against A.P. and R.V., former managers, and M.M., former Secretary of the union, who were all teachers, alleging theft, misappropriation and fraudulent conversion. The union complained that the individuals in question had refused to return the union's property and accounting documents when the new leadership took up its duties and had used them to form a new trade-union organisation.

10. In a letter of 2 October 1992 the applicant requested, on behalf of the union, information from the Bucharest public prosecutor's office about the progress of the investigation, but received no reply. In a further letter, of 9 December 1992, he renewed his enquiry of the same public prosecutor's office and also complained about the slowness of the criminal investigation. He received no reply to his letter.

11. On 8 February 1993 the public prosecutor gave a decision discontinuing the proceedings in respect of the union's complaint lodged against A.P., R.V. and M.M. That decision was sent on 18 January 1994 only to those three individuals.

12. In 1993 the applicant, in his capacity as representative of the union, took out a summons against R.V. in the Court of First Instance of the second district of Bucharest, seeking an order, under Articles 998 and 999 of the Civil Code governing civil liability, to return to the union 170,000 Romanian lei (ROL) in union subscription fees.

13. On an unknown date the applicant had a conversation with a journalist during which he expressed his dissatisfaction with the slow pace of the criminal investigation. On 23 March 1993 the following article was published in the *Tineretul Liber* ("Free Youth") newspaper:

> "The Primary and Secondary School Teachers' Union of the second district of Bucharest ... is the most militant union because it battles against everyone to ensure respect for the law and teachers' rights. Those are the assertions of Mihail Constantinescu, a teacher at M.S. school, who tells us: 'I have lodged a complaint against the Bucharest Schools' Inspectorate [*Inspectoratul*] for failure to comply with the collective bargaining agreement; the hearing has been listed for 29 April. We will be lodging a complaint against the police and the public prosecutor's office, who are engaging in anti-union activities by slowing down the criminal investigation in respect of certain *delapidatori* [persons found guilty of fraudulent conversion] – R.V., A.P., M.M., teachers in the second district; we have at our disposal against them written evidence and confessions by two of them to being in possession of a sum of money belonging to the union, which they have not returned. The anti-union activities are premeditated ...' "

14. On 22 April 1993 A.P., R.V. and M.M. instituted criminal libel proceedings against the applicant in the Court of First Instance (*judecatoria*) of the third district of Bucharest.

15. The trial took place on 25 February 1994. The single-judge court delivered its judgment on 18 March 1994.

16. After hearing evidence from six witnesses for the plaintiff and three for the defence, from the applicant and from the three teachers, the judge acquitted the applicant. He noted that on the date on which the article in question had appeared, the three teachers had been the subject of a criminal investigation in connection with a charge of fraudulent conversion and that they had not been informed of the decision discontinuing the proceedings until after the article had appeared, that is, on 18 January 1994. Furthermore, the judge noted, it was not disputed that the teachers had not returned certain sums of money belonging to the union. Accordingly, he considered that the applicant had not had any intention of libelling the teachers, but merely of informing the public that his union was going to lodge a complaint against the police and the public prosecutor's office, accused of slowing down the criminal investigation concerning the three teachers.

17. A.P., R.V. and M.M. appealed to the Bucharest County Court, which upheld their appeal. The court quashed the decision of 18 March 1994 and decided to re-try the case on the merits.

18. The trial took place on 26 September 1994. The Court cannot establish from the documents in its possession whether the applicant's lawyer was able to make oral submissions. However, his lawyer submitted in the written pleadings in defence that his client had expressed himself on behalf of the union; that the aim pursued was that of reconstituting the union's assets; and that the new trade-union organisation formed by the three teachers had been declared illegal by the courts. He referred to the evidence given by the witnesses before the Court of First Instance testifying to negligence on the part of the three teachers in the administration of the union's property and to their refusal to return certain sums of money and documents. He added that the article had distorted the applicant's statements to the journalists, but that the applicant did not want to sue the press.

19. Although the applicant was present at the trial, the court did not hear submissions from him. No evidence was adduced. The record of the hearing did not mention the public prosecutor's submission allegedly requesting the applicant's acquittal, but merely indicated that the parties' lawyers had been able to address the court.

20. The decision was reserved until 3 October 1994, and then until 10 October 1994, on which date it was delivered in the absence of the applicant and his lawyer. The court held that the applicant had intended to injure the honour and reputation of the three teachers, contrary to Article 206 of the Criminal Code, since his remarks had been published in

the newspaper after the decision of 8 February 1993 discontinuing the proceedings. The court also noted that, after that date, the applicant had gone to the schools at which A.P., R.V. and M.M. taught and accused them of running off with the union's money.

21. The applicant was convicted of criminal libel, fined ROL 50,000 and ordered to pay ROL 500,000 to each of the three teachers for non-pecuniary damage.

22. The applicant appealed on 19 October 1994. On 18 November 1994 the Bucharest Court of Appeal declared his appeal inadmissible on the ground that no appeal lay against the decision in question and that it was final.

23. On an unknown date the applicant paid the three teachers the sums which he had been ordered to pay them. On 28 March 1995 he paid the ROL 50,000 fine.

24. On an unknown date the applicant requested the Procurator-General at the Supreme Court of Justice to lodge an application to have the judgment of 10 October 1994 set aside.

25. On 26 May 1995 the applicant was informed that the Procurator-General had refused to lodge an application to have the judgment set aside.

26. In a judgment of 28 January 1997, the Bucharest County Court, after examining the case *ex officio* and in camera, delivered a judgment rectifying the clerical errors in the record of the hearing of 26 September 1994 and the judgment of 10 October 1994.

27. The court amended the record of the hearing of 26 September 1994 to record the presence of the public prosecutor, L.S., who had requested in his written pleadings that the teachers' appeals be upheld and that the applicant be sentenced to a fine for criminal libel and ordered to pay compensation for non-pecuniary damage. Furthermore, according to the court, the applicant had addressed it last on 26 September 1994.

28. The court also decided to rectify the judgment of 10 October 1994 so as to record the adjournment of delivery date from 3 to 10 October 1994 and the presence at delivery of the public prosecutor, L.S.

29. The parties were not summoned to attend and were not present at delivery of the judgment on 28 January 1997.

30. In a judgment of 12 March 1997, the Bucharest Court of First Instance upheld the action for damages brought by the union against R.V. in 1993 and ordered R.V. to return ROL 170,000 plus interest. The court noted that R.V. had been the Treasurer of the union from 1990 to 1992 and that, in that capacity, she had received ROL 170,000 in subscriptions from the members of the union during that period. The court also noted that, after leaving her post, R.V. had refused to return to the union the documents relating to the deposit of the said sum at the bank, so that the union had never been able to retrieve it.

31. On 6 January 1998 the Government provided the Commission, at its request, with a copy of the Bucharest County Court's hearings register for 3 and 10 October 1994. The register mentions only the adjournment of delivery from 3 to 10 October 1994 and the finding of guilt in respect of the applicant.

32. In a letter of 14 December 1998 the Government informed the Commission that they could not provide it with a copy of the notes taken by the registrar (*caietul grefierului*) during the hearing of 26 September 1994 because, pursuant to the Ministry of Justice's Circular no. 991/C/1993 (*Ordinul ministrului*), registers containing the registrar's notes are sealed and archived for three years.

33. On 11 December 1998 the Procurator-General at the Supreme Court of Justice lodged an application to have the judgment of 10 October 1994 set aside. He requested that the applicant be acquitted on the ground that the constituent elements of the offence of libel had not been made out.

34. At the hearing on 21 March 2000 the Government submitted to the Court a decision of 4 February 2000 of the Supreme Court of Justice granting the application lodged by the Procurator-General to have the decision of 10 October 1994 set aside and acquitting the applicant on the ground that intent to defame, a constituent element of the offence of libel, had not been established.

35. The Government also submitted to the Court a copy of a letter of 6 March 2000 in which the Bucharest Court of First Instance requested the tax office of the third district of Bucharest to refund the applicant the ROL 50,000 fine paid by him following his conviction of 10 October 1994.

II. RELEVANT DOMESTIC LAW

The Criminal Code

36. The relevant provisions of the Criminal Code are as follows.

Article 206

"Anyone who makes any statement or allegation in public concerning a particular person which, if true, would render that person liable to a criminal, administrative or disciplinary penalty or expose them to public opprobrium, shall be liable to imprisonment for between three months and one year or to a fine."

Article 207

"Evidence of the truth of such a statement or allegation is admissible where the statement or allegation was made in order to protect a legitimate interest. Where the

truth of the statement or allegation is proved, no offence of insult or defamation will have been committed."

37. The relevant provisions of the Code of Criminal Procedure read:

Article 385-6 paragraph 2

"A court hearing a *recurs* lodged directly against a decision from which no *apel* lies [In respect of certain crimes there is only one level of appellate jurisdiction (*recurs*), rather than two levels (*apel* followed by *recurs*), before a final judgment is delivered] shall examine every aspect of the case, irrespective of the grounds of appeal and requests of the parties ..."

Article 385-9

"An appeal shall lie in the following circumstances:

...

(10) where the judgment does not deal either with one of the charges made against the accused in the committal order, or with certain evidence taken, or with certain applications that are of essential importance to a party in that they may safeguard that party's rights or have an effect on the outcome of the trial;

..."

Article 385-15

"In giving judgment on an appeal, the court may either ...:

2. uphold the appeal, quash the lower court's decision and ... (d) hold a retrial of the case ..."

Article 385-16

"Where the court which has given judgment on an appeal holds a retrial of the case in accordance with Article 385-15 (2) (d), it shall also rule on matters relating to the taking of evidence and fix a date for trial ..."

Article 385-19

"After the first judgment has been quashed, the second trial shall be held in accordance with the provisions of Chapters I (Trial – General Provisions) and II (Trial at first instance) of Title II, which shall apply *mutatis mutandis*."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

38. At the hearing of 21 March 2000 the Government submitted that the applicant's acquittal in accordance with the decision of 4 February 2000 of the Supreme Court of Justice constituted an acknowledgment "in substance of the alleged breach of the Convention". Accordingly, they requested the Court to dismiss the application on the ground that the applicant was no longer a "victim".

39. The applicant did not comment on that point.

40. The Court reiterates that "a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention" (*Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

41. In the instant case the Court observes that, on 4 February 2000, the Supreme Court of Justice granted the prosecution's application to have set aside the conviction which was the subject of the complaints lodged by the applicant under Articles 6 and 10 (see paragraph 34 above).

42. It notes that the decision to acquit the applicant, taken after the proceedings had been re-opened and more than five years after the applicant had been convicted in a final decision, was based solely on the lack of intent to defame. The decision contained no reference to the conduct of the proceedings in the Bucharest County Court or to the applicant's complaints in that regard.

In the Court's opinion, the decision of 4 February 2000 of the Supreme Court of Justice cannot be seen as an acknowledgment, whether explicit or in substance, of an alleged breach of Article 6 § 1 of the Convention and, in any event, that decision does not provide adequate redress as required by the Court's case-law, for the reasons set out below.

43. With regard to the alleged violation of Article 10, even assuming that the said decision could be seen as an acknowledgment, in substance, of such a violation, the Court considers that it does not provide adequate redress as required by the Court's case-law. In the first place, no damages were awarded to the applicant for his (wrongful) conviction and, secondly, the sums paid by the applicant to the three teachers for non-pecuniary damage were not returned to him. With regard to the criminal fine, the Court notes that, although five years had passed since the applicant had paid it, the letter of 6 March 2000 sent by the Bucharest Court of First Instance to the tax office of the third district of Bucharest requesting a refund (see paragraph 35 above) did not take account of inflation over the previous years.

44. In conclusion, the Court considers that the applicant can claim to be a "victim" within the meaning of Article 34 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

45. The applicant alleged that he had not had a fair trial in the Bucharest County Court, contrary to Article 6 § 1 of the Convention, which provides:

> "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. ..."

46. The applicant complained that he had been convicted by the Bucharest County Court without evidence being heard from him in person. He submitted that the County Court had ruled solely on the basis of the evidence put before the Court of First Instance, consisting of witness statements and his own statement summarised "in five lines". During the hearing on 26 September 1994, which had lasted "at the very most four minutes", neither he nor his lawyer had been able to address the court. In that connection, he maintained that the record of the hearing of 26 September 1994 did not in any way reflect the reality of the case because his lawyer had not been able to make submissions, but had merely been authorised to file written pleadings.

47. The applicant also disputed the accuracy of the wording of the rectifying judgment delivered on 28 January 1997, alleging that he had not addressed the court at the hearing of 26 September 1994 and that the prosecutor had requested that he be acquitted, not convicted as the Government maintained. He also submitted that the judgment of 28 January 1997 had never been served on him, but that he had learned of it when the Commission had sent it to him.

48. Lastly, the applicant complained that the judgment of the Bucharest County Court of 10 October 1994 referred solely to the statements of the prosecution witnesses and omitted the statements of the four defence witnesses, whose evidence was crucial, however, because they had stated that the three teachers had not returned the money or documents belonging to the union and that the applicant had been instructed by the union to retrieve them.

49. The Government submitted that the finding of guilt in relation to the applicant, reached solely on the basis of the evidence put before the Court of First Instance, did not breach the requirements of a fair trial within the meaning of Article 6 § 1 of the Convention. That Article did not require evidence to be heard from an accused in person by an appellate court whose remit was exclusively to examine questions of law. Although the Bucharest County Court did, in theory, have jurisdiction to examine questions of fact and of law, it had not been required in the instant case to determine

questions of fact, since the facts, as established by the Bucharest Court of First Instance, had not been in dispute between the parties. The Bucharest County Court had thus been required to rule only on a question of law relating to the subjective element of the offence, that is, whether there had been an intention to defame. In order to establish whether that element had been made out, the court had not in any way needed to hear evidence from the applicant.

50. The Government contended that, in any event, the applicant had addressed the court last, as was clear from the rectifying judgment of 28 January 1997.

51. They also contested the applicant's claim that the prosecutor had requested that the appeal be dismissed. They referred in that connection to the judgment of 28 January 1997, which showed that the prosecutor had asked for the appeal to be upheld and the applicant convicted. The Government submitted that the courts were independent and that the position of the prosecutor during a trial could not influence them.

52. Lastly, the Government insisted that the applicant's lawyer had addressed the court during the hearing of 26 September 1994 and submitted that, in any event, he had filed written pleadings.

53. The Court reiterates that the manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein. Where a public hearing has been held at first instance, the absence of such a hearing may be justified at the appeal stage by the special features of the proceedings at issue, having regard to the nature of the domestic appeal system, the scope of the appellate court's powers and to the manner in which the applicant's interests were actually presented and protected before the court of appeal, particularly in the light of the nature of the issues to be decided by it (see the Botten v. Norway judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 141, § 39).

54. Before a court of appeal exercising jurisdiction as to both facts and law, Article 6 does not necessarily guarantee the right to a public hearing or, if such a hearing is held, the right to participate in person in the proceedings (see, for example, the Fejde v. Sweden judgment of 29 October 1991, Series A no. 212-C, pp. 69-70, § 33).

55. However, the Court has held that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by the accused – who claims that he has not committed the act alleged to constitute a criminal offence (see the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 14, § 32).

56. Accordingly, in order to determine whether there has been a violation of Article 6 in the instant case, an examination must be made of the role of the Bucharest County Court and the nature of the issues which it was called upon to try.

57. The Court reiterates that in the instant case the scope of the Bucharest County Court's powers, sitting as an appellate court, is set out in Articles 385-15 and 385-16 of the Code of Criminal Procedure. In accordance with Article 385-15, the County Court, sitting as an appellate court, was not required to give a fresh judgment on the merits, but could do. On 10 October 1994 the Bucharest County Court quashed the decision of 18 March 1994 and gave a fresh judgment on the merits. According to the above-mentioned legal provisions, the effect of this was that the proceedings in the Bucharest County Court were full proceedings governed by the same rules as a trial on the merits, with the court being required to examine both the facts of the case and questions of law. The County Court could decide either to uphold the applicant's acquittal or convict him, after making a thorough assessment of the question of his guilt or innocence, taking fresh evidence if applicable (see paragraph 37 above).

58. In the instant case the Court notes that, having quashed the decision to acquit reached at first instance, the Bucharest County Court determined a criminal charge against the applicant, convicting him of criminal libel, without hearing evidence from him. The Court is not satisfied with the Government's argument according to which the fact that the accused addressed the court last was sufficient in the present case. It notes, first, that the Government and the applicant disagree as to whether the applicant did in fact address the court last. Secondly, it stresses that, although an accused's right to address the court last is certainly of importance, it cannot be equated with his right to be heard by the court during the trial.

59. Accordingly, the Court finds that the Bucharest County Court determined a criminal charge against the applicant and found him guilty of libel without his having the opportunity to give evidence and defend himself. It considers that the Bucharest County Court should have heard evidence from the applicant, having regard, in particular, to the fact that it was the first court to convict him in proceedings brought to determine a criminal charge against him.

60. Since that requirement was not satisfied, the Court considers that there has been a violation of Article 6 § 1. In the circumstances, it does not consider it necessary to examine, additionally, whether other aspects of the proceedings in the Bucharest County Court did or did not comply with that provision.

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

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

62. The applicant argued that his conviction for libel had infringed his right to freedom of expression guaranteed by Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

63. The applicant contended that his conviction was contrary to the provisions of Article 10 of the Convention. The Bucharest County Court had not allowed him to prove the truth of his assertions and the prosecution's decision to discontinue the proceedings against the three teachers (which had never been served on him by the authorities) did not in any way mean that the teachers had returned the money belonging to the union.

64. The Government submitted that the applicant's conviction complied with the requirements of the second paragraph of Article 10 of the Convention. Firstly, the intention had been to protect the reputation and rights of others because the applicant had called the three teachers "*delapidatori*" despite the fact that they had not been convicted by a court. The sentence he had been given was not in any way excessive, given the reasonable amount of the fine and damages he had been ordered to pay.

65. The Commission had found that the interference was "necessary in a democratic society" because the applicant could have expressed his criticism otherwise than by calling the teachers "*delapidatori*" when they had not been convicted by a court.

66. The Court notes that it is not disputed in the instant case that the applicant's conviction for libel constitutes an interference by the public authorities with the applicant's exercise of freedom of expression for the purposes of Article 10 of the Convention.

67. The issue is whether that interference can be justified under paragraph 2 of that provision. It is therefore necessary to examine whether it was "prescribed by law", pursued a legitimate aim under that paragraph and was "necessary in a democratic society" (see the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, pp. 24-25, §§ 34-37).

68. The Court considers that the interference was "prescribed by law", which, moreover, has not been disputed before it; the applicant's conviction was based on Article 206 of the Romanian Criminal Code (see paragraph 36 above). That restriction pursued a legitimate aim under paragraph 2 of Article 10, that is, the protection of the reputation and rights of others. It remains to be examined whether the restriction complained of was "necessary in a democratic society" to achieve that aim.

69. According to the Court's established case-law, it must therefore be determined whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. The Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see *Dalban* cited above, § 47). The Court must therefore examine the comments in question in their correct context, having regard to the circumstances of the case.

70. The Court notes that there are two aspects to the applicant's statements: criticism of the police and the prosecution, whom the applicant criticised for not wanting to conclude the investigation in connection with the complaint lodged against A.P., R.V. and M.M., and the applicant's assertion that the latter were "*delapidatori*".

71. The Court notes that the infringement of the applicant's freedom of expression concerns only the second aspect. The Bucharest County Court based its decision to convict him on the term used by Mr Constantinescu to describe the three teachers, which was considered to be defamatory, and not on the fact that the applicant had expressed criticism of the functioning of the courts' handling of union disputes.

72. Even if the context in which the applicant's comments were made was within a debate on the independence of the unions and the functioning of the courts, and was thus of public interest, there are limits to the right to freedom of expression. Notwithstanding the particular role played by the applicant in his capacity as union representative, he had a duty to react within limits fixed, *inter alia*, in the interest of "protecting the reputation or rights of others", including the presumption of innocence. It therefore needs to be determined whether he overstepped the limits of permissible criticism.

73. In the Court's opinion, the term "*delapidatori*", which refers to persons found guilty of the offence of fraudulent conversion, was of a kind to offend the three teachers because they had not been convicted by a court.

74. The Court considers that the applicant could perfectly well have expressed his criticism – and thus contributed to free public debate of union affairs – without using the word "*delapidatori*".

75. Accordingly, the legitimate interest of the State in protecting the reputation of the three teachers did not conflict with the applicant's interest in contributing to the above-mentioned debate.

76. The Court is therefore satisfied that the grounds relied on by the national authorities were "relevant and sufficient" for the purposes of paragraph 2 of Article 10.

77. It also notes that, in the circumstances of the case, the resulting interference was proportionate to the legitimate aim pursued. The Court considers that the penalty imposed, that is, a fine of ROL 50,000 and an order to pay ROL 500,000 for non-pecuniary damage to each teacher, was not disproportionate.

78. Accordingly, since it does not appear that the Bucharest County Court exceeded the margin of appreciation left to the national authorities, no violation of Article 10 of the Convention has been established.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant sought an award of one hundred million United States dollars in compensation for the non-pecuniary damage sustained as a result of being discredited following his conviction. Under the head of pecuniary damage, the applicant requested repayment of the criminal fine he had paid following his conviction and of the sums paid to the three teachers. He also claimed that he had sustained loss of earnings because, having regard to the stress and anxiety caused by the various proceedings in which he had been involved, he had been unable to publish a book he had written which had been accepted by a publishing house. He accordingly requested two thousand million Romanian lei (ROL) for pecuniary damage.

81. The Government submitted that the finding of a violation constituted in itself just satisfaction.

82. The Court notes, firstly, that the applicant has not in any way supported his allegation that he sustained loss of earnings. It notes that the only basis on which an award of just satisfaction can be calculated in the present case is the fact that the applicant did not have a fair trial in the Bucharest County Court. Admittedly, the Court cannot speculate as to the outcome of the trial had the position been otherwise, but it does not find it

unreasonable to regard the applicant as having suffered a loss of real opportunity in the said trial (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). Ruling on an equitable basis, as provided by Article 41, the Court awards the applicant 15,000 French francs (FRF) to be converted into Romanian lei at the rate applicable on the date of settlement.

B. Costs and expenses

83. The applicant claimed reimbursement of the costs and expenses of all the proceedings before the national authorities, that is, the equivalent of ROL 200,000 in 1994.

84. The Government did not make any observation on the question.

85. The Court notes that the applicant defended himself before the Commission and that, before the Court, he was represented at the hearing. It also notes that the Council of Europe paid Mr Constantinescu FRF 10,806.10 in legal aid. Having regard to the finding of a violation of Article 6 § 1 of the Convention, the Court, ruling on an equitable basis, awards the applicant FRF 20,000, less the above-mentioned sum already paid by the Council of Europe. The balance is to be converted into Romanian lei at the rate applicable on the date of settlement.

C. Default interest

86. The Court considers it appropriate to use the statutory rate of interest applicable in France on the date of adoption of the present judgment, that is, 2.47% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that the applicant may claim to be a "victim" of a violation of Article 6 § 1 of the Convention for the purposes of Article 34 of the Convention;

2. *Holds*, by five votes to two, that the applicant may claim to be a "victim" of a violation of Article 10 of the Convention for the purposes of Article 34 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*, by six votes to one, that there has not been a violation of Article 10 of the Convention;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months, FRF 15,000 (fifteen thousand French francs) in respect of pecuniary and non-pecuniary damage and FRF 20,000 (twenty thousand French francs) in respect of costs and expenses, less FRF 10,806.10 (ten thousand eight hundred and six French francs ten centimes), to be converted into Romanian lei at the rate applicable on the date of settlement;
(b) that simple interest at an annual rate of 2.47% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in French, and notified in writing on 27 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Wilhelmina THOMASSEN
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Casadevall is annexed to this judgment.

W.T.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. I have voted with the majority in finding that there has been a violation of Article 6 § 1 of the Convention. However, my approach is not the same with regard to Article 10, which, in my opinion, has also been violated.

2. Since the Court has concluded that there has been a violation of Article 6 § 1 because the court did not hear evidence from the applicant, a comprehensive analysis of the facts inevitably leads to the conclusion that there has been a violation of Article 10. The part of the judgment concerning the Government's preliminary objection, and particularly paragraph 43, confirm my view.

3. If Article 6 § 1 had not been violated, that is to say, if during the trial in the Bucharest County Court, which convicted him of criminal libel, the applicant had had the opportunity of giving evidence, defending his case, relying on his good faith and, in particular, establishing the truth of his assertions, as any accused can under Article 207 of the Romanian Criminal Code, the outcome of the criminal trial might have been different. Moreover, subsequent events confirm that proposition.

4. As the Court states (paragraph 72 of the judgment), the remarks in question were made in the context of a free debate on the independence of the first trade unions formed in Romania after the fall of the former system and on the functioning of the courts. An assessment of the term "*delapidatori*", used to describe A.P., R.V. and M.M., must be made in the light of the case as a whole and the context in which the applicant used the word, which was subsequently reproduced and published by a journalist. No one can doubt that a matter of public interest was at stake.

5. The terms used by the applicant cannot be said to be completely unfounded, since the Court of First Instance, when acquitting him, pointed out that the teachers had not returned certain sums of money belonging to the union. Nor has bad faith on the part of the applicant been established since the same court found that the prosecution's decision to discontinue the proceedings had not been sent either to the three teachers concerned or to the applicant (paragraphs 16 and 63 of the judgment) at the time when the remarks in question were made.

Those two factors (remarks not completely unfounded and lack of bad faith) were not disputed by the Bucharest County Court, which nonetheless convicted the applicant without even examining the defence of truth on which he had relied.

I consider that such an interference was not necessary; in particular, the existence of a "pressing social need" – a condition established and consistently reiterated in the Court's case-law – has not been demonstrated.

Although speculation cannot be made as to the conclusion which the Bucharest County Court would have reached if it had examined the applicant's offer to prove the truthfulness of his remarks, I consider that the County Court's failure to examine that defence, which is of undeniable importance (according to Article 207 of the Romanian Criminal Code, where the truth of the allegation is proved, no offence of defamation will have been committed for the purposes of Article 206 of that Code), is tantamount to an interference with the applicant's exercise of his freedom of expression which does not satisfy the criterion of necessity.

6. Lastly, it is revealing that, more than two years later, the Bucharest County Court delivered of its own motion a judgment rectifying a number of clerical errors (or, rather, omissions) in the record of the hearing and in the judgment of 10 October 1994 convicting the applicant. It is even more significant that, five years after his conviction, the Supreme Court of Justice, granting an application to set aside lodged by the Procurator-General, again of his own motion, acquitted the applicant on the ground that intent to defame, a constituent element of the offence, had not been made out (paragraph 34 of the judgment). That decision, unprompted by the applicant, and delivered very late in the day (only forty-five days before the hearing at Strasbourg) can only amount to an implicit acknowledgment that there has been a violation of Article 10 of the Convention.

7. Accordingly, unlike the majority, I am not satisfied that the interference was necessary or that the grounds relied on by the national authorities in the instant case were “relevant and sufficient”.