

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

FOURTH SECTION

CASE OF BRISC v. ROMANIA

(Application no. 26238/10)

JUDGMENT

STRASBOURG

11 December 2018

FINAL

11/03/2019

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Brisc v. Romania,

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

Ganna Yudkivska, *President,*
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Iulia Antoanella Motoc,
Georges Ravarani,
Péter Paczolay, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 23 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 26238/10) 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 Ioan-Vasile Brisc ("the applicant"), on 26 April 2010.

2. The Romanian Government ("the Government") were represented by their Agent, Mrs C. Brumar, from the Ministry of Foreign Affairs.

3. The applicant alleged that his right to impart information, guaranteed by Article 10 of the Convention, was infringed.

4. On 20 October 2015 the complaint concerning Article 10 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963 and lives in Baia Mare.

A. Background to the case

6. At the relevant time, the applicant was the chief prosecutor in the prosecutor's office attached to the Maramureş County Court. He was also

the staff member in the prosecutor's office tasked with providing information to the media in relation to criminal proceedings.

7. On 21 October 2008 the prosecutor's office attached to the Maramureş County Court had caught V.F. red-handed being given money by a relative of V.T.V., who was detained in Baia Mare Prison.

8. According to statements given by the detainee, V.F. had promised to intervene and pass on the money to the prosecutors and judges who were to make the decision concerning his conditional release from prison.

9. On 22 October 2008 the file was transferred to the National Anticorruption Department ("the NAP"), which by law was competent to continue the investigation.

10. On the same day, the applicant issued a press release, which received considerable public attention.

11. The press release read as follows:

> "After being informed by police that V.F. seeks and receives money from individuals in exchange for intervening in favour of the conditional release of detainees held in Baia Mare Prison, the prosecutor's office attached to the Maramureş County Court organised a *flagrante delicto* operation on 21 October 2009.
>
> V.F. was caught red-handed while accepting the sum of 1,650 euros (EUR) from a detainee's relative...
>
> A criminal investigation into influence peddling was opened and, according to the initial findings in the case, it was found that the suspect had received EUR 9,850 of the EUR 11,000 she had sought for intervening to influence favourably the conditional release of that detainee or the allocation of his work placements.
>
> According to the detainee, the suspect claimed that the intended recipients of the money were prison employees with responsibility for the allocation of work to the detainees or members of the commission for conditional release. Moreover, the suspect told the detainee that part of the money was to go to the magistrates, judges and prosecutors responsible for the conditional release of detainees.
>
> As the object of the offence of influence peddling was a sum of money exceeding EUR 10,000, the file was transferred to the National Anticorruption Department."

12. On the same day, at the request of a local television channel, AXA TV, the applicant gave a short statement providing mainly the same information as was contained in the press release.

13. The newscaster added the following comments to the information provided by the applicant:

> "The commission for conditional release, which comprises nine members, is chaired by a delegated judge. We don't know whether it is purely coincidence that yesterday, the same day on which the *flagrante delicto* operation was organised and the detainee was conditionally released, that judge's assignment to the Baia Mare Prison came to an end..."

14. A few local newspapers wrote articles about the incident. Some of them contained images of the *flagrante delicto* operation, taken by

journalists who had been present at the operation organised by the prosecutors and police.

B. The disciplinary investigation against the applicant

15. On 3 November 2008 judge G.E. lodged a complaint with the Superior Council of the Magistracy ("the SCM") seeking the commencement of a disciplinary investigation against the applicant in connection with the manner in which he had informed the media about the incident of 21 October 2008. She contended that at the time of the incident she had been the judge delegated to Baia Mare Prison and because of the applicant's press release and interview with AXA TV it was suggested by the media that she might be the alleged recipient of the money.

16. The disciplinary commission for the prosecutors of the SCM instituted an investigation against the applicant in connection with two disciplinary offences, namely failure to observe the secrecy of deliberations or the confidentiality of documents that are of a secret nature, and adopting a disrespectful attitude towards colleagues in the exercise of his duties under Article 99 letters d) and k) of Law no. 303/2004 on the Statute of Judges and Prosecutors. The SCM also held that the applicant had breached the provisions of Article 12 § 1 let e) of Law no. 544/2001 concerning the restriction of citizens' access to information in relation to criminal proceedings at the investigation stage.

17. The applicant was questioned by the SCM's disciplinary commission for prosecutors on 23 March 2009. According to his statement, he had prepared the press release after receiving additional information about the investigation from the chief prosecutor of the NAP. He had then submitted the press release to two colleagues at the NAP, namely the prosecutor in charge of the case and the chief prosecutor, and had asked for their opinion. The first had had no objections concerning the press release; the other had advised him that he should limit its content to aspects concerning the investigation carried out by his office.

18. On 27 March 2009 the applicant's lawyer received a letter from the president of Baia Mare District Court. In that letter the president of the court had stated that he had not considered it necessary to open an investigation into corruption offences allegedly committed by judges from Baia Mare District Court because in his opinion "the press release did not make any reference to the identity of the magistrates involved".

19. At a hearing held before the SCM's disciplinary commission on 31 March 2009 the applicant was assisted by a lawyer of his choice. He proposed as evidence a video recording of the news programme presented by AXA TV concerning the incident of 21 October 2008 so that it could be compared to the press release drafted by the applicant. He also proposed that the news editor of AXA TV be questioned. As documentary evidence

he requested copies of the articles published in the local newspapers concerning the incident and the letter addressed by the National Audiovisual Council to judge G.E. in reply to the complaint she had lodged in connection with the comments made by AXA TV about her alleged involvement in the influence peddling.

20. At the same hearing the SCM's disciplinary commission heard evidence from the prosecutor who had organised the *flagrante delicto* operation. He stated that it had taken place in a public space, namely a bar, in the presence of two journalists, one of whom had taken pictures. The pictures accompanied articles published by local newspapers in the days following the events.

21. The applicant asked the SCM to question the two journalists. This request having been rejected, the journalist who had taken the pictures gave a written statement, which was joined to the case file by the applicant. The journalist maintained that he had been present at the *flagrante delicto* operation by chance: he had been attending a conference in the building in which it had been staged. Seeing masked police officers entering the bar, he had followed them and had seen suspect V.F. being caught red-handed.

22. When questioned by the SCM at the hearing of 31 March 2009, the prosecutor in charge of the case at the NAP stated that the press release issued by the applicant had not jeopardised the outcome of the criminal investigation. Moreover, the press release had only referred to "statements at the initial stage of the investigation, while the case was still at the prosecutor's office attached to the Maramureş County Court".

23. The SCM's disciplinary commission heard evidence from judge G.E. She stated that before lodging her complaint with the SCM she had asked AXA TV to retract its remarks concerning any possible connection between the termination of her mandate as the delegated judge to Maramureş prison and the case of influence peddling. As she had not received any reply she had referred the matter to the National Audiovisual Council but had not been satisfied with its response.

24. The applicant joined to the case file copies of the complaints lodged with the television channel and the National Audiovisual Council by judge G.E. and the letters she had received in reply.

The relevant part of the letter sent by the National Audiovisual Council read as follows:

> "On 11 November 2008 the Council, convened in a public meeting, examined the report prepared by the Inspection Department and watched a recording of the broadcast mentioned in your complaint....
>
> It was noted that the news item had been broadcast on 22 October 2008 at 9.30 p.m. As the information broadcast did not contain any specific reference to you, the item could not infringe your right to a protected public image.

> The members of the Council considered that the requirements for granting the right of reply or remedy, as provided for under Articles 52 and 60 of Decision no. 187/2006 concerning the regulation of audio-visual content, were not met."

25. On 6 April 2009 the applicant sent a letter to the General Prosecutor's office attached to the High Court of Cassation and Justice. He attached a copy of the press release issued by him on 22 October 2008 and asked the opinion of the Prosecutor General about the way in which he had drafted it and especially whether it had been drafted in compliance with Order no. 116 issued by the General Prosecutor on 24 May 2007 regulating activities undertaken in relation to the mass media within the public prosecutor's office (see paragraph 63 below).

26. On 10 April 2009 the applicant received a reply to his letter from a prosecutor working at the Office for Public Information and Relations with the Mass Media based in the General Prosecutor's office attached to the High Court of Cassation and Justice.

27. In the prosecutor's view, the information provided by the applicant in the press release had been "minimal and general, but necessary so that the public could understand the facts of the case". As regards the fact that the applicant had issued the press release after the case had been transferred to the NAP, the prosecutor concluded that the action had complied with the practice observed by the public prosecutor's office. Moreover, the press release had contained only information concerning the investigation carried out by the prosecutor's office attached to the Maramureş County Court.

28. This letter, accompanied by the General Prosecutor's Order no. 116/2006, was added by the applicant to the case file to be examined by the SCM on 13 April 2009.

29. In his oral submissions before the disciplinary commission, the applicant's lawyer claimed that the applicant had acted in good faith in informing the press about the incident. His references had been general and impersonal and he had made no reference to any specific person. He also submitted that the applicant had merely fulfilled his obligation to inform the press and to protect the image of his institution and of the legal system by informing the public about a pending criminal investigation. The public had already been exposed to information about the incident as the two journalists who had been present at the *flagrante delicto* operation had published articles about the incident. The lawyer also pointed out that the applicant had observed the confidentiality of the investigation and had referred only to the activity carried out by his office without making statements which could have led to the identification of the magistrate, judge or prosecutor who was the alleged recipient of the money from V.F. The applicant's reference to "magistrates, judges and prosecutors responsible for the conditional release of detainees" was too general to have resulted in the identification of the magistrate concerned. The lawyer concluded by submitting that the information presented by AXA TV about

the incident had been more comprehensive than the information provided by the applicant in the press release and in his interview with the AXA TV channel.

30. On 5 May 2009 the SCM's disciplinary commission found the applicant guilty of two disciplinary offences under Article 99 letters d) and k) of Law no. 303/2004 and imposed a disciplinary sanction under Article 100 of Law no. 303/2004 in the form of a reprimand. The disciplinary commission noted that the applicant had issued a press release and given an interview to AXA TV revealing information about the investigation into the offence of influence peddling on 22 October 2008.

31. It further noted that the applicant had provided information about the alleged recipient of the money from V.F. without checking the accuracy of the detainee's statements and had done so one day after the case file had been transferred to the NAP. Such information had led to the identification of judge G.E. as one of the alleged recipients of the money. The disciplinary commission concluded that the applicant had therefore breached the provisions of Article 12 § 1 let e) of Law no. 544/2001 concerning the restriction of citizens' access to information in relation to criminal proceedings at the investigation stage when there was a risk that the result of the investigation would be undermined or confidential sources revealed. From the way in which the press release was drafted, "the circle of magistrates who could have been the recipients of the money was restricted and limited and made possible the identification of the judge delegated to Baia Mare Prison in the person of judge G.E." As the six-month term of her delegation expired just at the time of the events in question, the mass media made speculative suggestions that the termination was connected with the influence-peddling case.

32. Two of the five prosecutors comprising the disciplinary commission were opposed to reprimanding the applicant for the offence of adopting a disrespectful attitude toward colleagues in the exercise of his duties. They expressed their position in a dissenting opinion.

33. They noted, among other things, that:

(i) the names of the persons who were allegedly to receive money from the influence peddler were not mentioned in the press release or in the television interview; there was only a general, impersonal reference to the judges and the prosecutors who were involved with the conditional release of detainees;

(ii) individuals in this sphere included not only the judge delegated to the prison but also the judges who examine requests for conditional release at first instance and on appeal, as well as the prosecutors who attend the hearings concerning these requests. AXA TV's reference to the judge whose involvement with the prison had just ended was made in an additional comment that was not included in the press release;

(iii) the reference to the delegated judge made possible the identification of the magistrate, but since this statement was attributable exclusively to the television channel, the latter should bear responsibility for all subsequent comments and speculations;

(iv) only the additional information concerning the end of the delegated judge's mandate allowed the identification of judge G.E. Possible damage to her reputation could therefore not be imputed to the press release from the prosecutor's office;

(v) the press release from the prosecutor's office attached to the Maramureş County Court and the interview with the defendant referred to the offence of influence peddling and not to the offence of active bribery. The defendant stated that the allegations concerning the alleged recipients of the money had been made by the detainee.

C. The appeal on points of law lodged with the High Court of Cassation and Justice

34. The applicant lodged an appeal on points of law against the decision of the SCM's disciplinary commission.

35. In his appeal the applicant complained about the unfairness of the proceedings before the disciplinary commission. Relying on Article 10 of the Convention the applicant also complained that the imposition of a disciplinary sanction had infringed his right to impart information to the press.

36. He argued that questioning the two journalists who had been present at the *flagrante delicto* operation would have proved that he had not supplied any confidential information. They had published articles, accompanied by pictures of the incident, stating that "according to unofficial sources, V.F had connections in prison employees' and magistrates' circles".

37. Moreover, the main reason for issuing the press release had been to prevent possible speculation in the media about the operation – which was already known to the press – that could have been detrimental to the judiciary.

38. As regards the accusation that he had shown a disrespectful attitude towards his colleague judge G.E., the applicant submitted that the latter had not contacted him to express any displeasure about the press release before lodging her complaint with the SCM. If he had known that she had felt that her reputation and public image had been damaged by his press release of 22 October 2009, he could have clarified the matter by issuing a new one.

39. The High Court allowed a request lodged by the Association of Romanian Magistrates to intervene in the proceedings in support of the applicant's appeal.

40. The association justified its intervention in the disciplinary proceedings by referring to its role as protector of the magistrates' status and their public image, pointing out that – in its opinion – the decision delivered by the SCM against the applicant had had a serious negative impact on his professional career. It further argued that in its opinion the press release issued by the applicant had complied with the provisions of Law no. 554/2001, with the guidelines issued by the SCM concerning cooperation between courts and prosecutor's offices and the media, and with guidelines issued by the General Prosecutor's office attached to High Court. It also pointed out that the applicant had observed Recommendation Rec(2003) 13 of the Committee of Ministers of the Council of Europe in so far as he had not disclosed confidential information concerning the criminal investigation to the media and had not in any way undermined the outcome of the criminal proceedings.

41. On 23 November 2009 a panel of nine judges of the High Court of Cassation and Justice dismissed the applicant's appeal on points of law. It held that the applicant should have limited his press release to the minimum of information, which would not have allowed the identification of any magistrate as the alleged recipient of the money obtained by the influence peddler from the detainee's family. In the High Court's opinion the applicant should not have added to his press release the reference to "magistrates, judges and prosecutors responsible for the conditional release of detainees".

42. One of the judges drafted a dissenting opinion, noting that the press release drafted by the applicant contained only general and impersonal information about the *flagrante delicto* operation and the pending criminal investigation. The judge noted that the applicant had not mentioned in his press release and interview any magistrates or prison employees involved in the conditional release of detainees in Baia Mare Prison. The applicant could not be held liable for the fact that, after presenting his press release, AXA TV had made express references to the judge delegated to the Baia Mare Prison. The evidence in the file proved that judge G.E. already had a strained relationship with the local media.

D. Removal of the applicant as chief prosecutor

43. On 5 May 2009, the day on which the disciplinary action against the applicant was approved, the SCM's disciplinary commission for prosecutors issued a decision to remove him from his position as chief prosecutor in the prosecutor's office attached to the Maramureş County Court.

44. The applicant challenged this decision before the plenary of the SCM's members on 8 May 2009.

45. On 21 May 2009 in a plenary meeting, the SCM dismissed the applicant's challenge.

46. The applicant appealed against this decision before the High Court of Cassation and Justice.

47. By a decision of 8 December 2009 the High Court dismissed the applicant's appeal. It held that the applicant's removal as chief prosecutor had been the direct consequence of imposing on the applicant a disciplinary sanction pursuant to the mandatory provisions of Article 51 § 2 let c) of Law no. 303/2004. The removal of a magistrate from a leading position following imposition of a disciplinary sanction is similarly mandatory according to the law (see paragraph 50 below).

E. Events following the removal of the applicant as chief prosecutor

48. On 19 May 2009 the deputy chief prosecutor in the prosecutor's office attached to the Maramureş County Court lodged a complaint against the applicant, claiming that the latter had continued to act as chief prosecutor in spite of the SCM's decision of 5 May 2009 by which he had been removed from that position (see paragraph 43 above).

49. A fresh set of disciplinary proceedings was instituted against the applicant, who alleged that he had been threatened with exclusion from the profession if he continued to exercise his duties as chief prosecutor. He had therefore decided to give up his position even though the appeal on points of law against the SCM's decision to remove him from the position of chief prosecutor had had a suspensive effect according to the law.

II. RELEVANT DOMESTIC LAW

A. Law no. 303/2004 on the status of judges and prosecutors as in force at the relevant time

50. According to Article 51 (2) (c) the SCM must remove any magistrate in a leading position if a disciplinary sanction is imposed on him/her.

51. Article 97(1) provides that every person is entitled to bring to the attention of the SCM cases concerning improper conduct, wrongful behaviour, failure to perform professional duties or any other disciplinary misconduct on the part of judges and prosecutors.

52. The disciplinary sanctions that can be imposed on a judge or prosecutor found guilty of misconduct are listed in Article 100 as follows: reprimand, withholding of increment, discharge and transfer to a different court, and removal of the magistrate from office.

53. Non-observance of the secrecy of deliberations or of legal or other documents that are of a secret nature, and adopting a disrespectful attitude towards colleagues when exercising their duties constitute disciplinary offences under Article 99 § 1 letters d) and k) respectively.

B. Law no. 317/2004 regarding the Superior Council of Magistracy

54. The SCM is organised according to Law no. 317/2004 and is a collegial body, independent of the public authorities. The SCM comprises 19 members: nine judges and five public prosecutors appointed in the general meetings of the magistrates forming the two disciplinary commissions of the SCM, namely one for judges and one for prosecutors, two representatives of civil society, appointed by the Senate, the minister of justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Prosecution Office working with the High Court of Cassation and Justice.

55. Pursuant to Article 44 (1), disciplinary proceedings against judges and prosecutors are conducted by the SCM through its disciplinary commissions.

56. An appeal on points of law is available against a decision of the SCM's disciplinary commissions to be examined by a five-judge panel of the High Court of Cassation and Justice (Article 51 (3)). At the time of the events in question, the panel of the High Court of Cassation and Justice which examined the appeal on points of law in fact consisted of nine judges.

C. Law no 544/2001 concerning access to information of public interest

57. Pursuant to Article 12 § 1 (e), citizens' access to information regarding criminal proceedings at the investigation stage is restricted when there is a risk that the result of the investigation might be undermined or confidential sources revealed.

58. The general provisions of Law no. 544/2001 regarding the system of complaints that can be filed against the authorities' refusal to provide information of public interest (contained in Chapter 3 of the law) are also applicable to prosecutors.

D. Best practice guidelines pertaining to cooperation by the courts and the prosecutor's office with the media

59. By its decision no. 277/2006 of 13 April 2006, the SCM adopted best practice guidelines regulating cooperation by the courts and the prosecutor's offices with the media. The document was published on the SCM's website and was communicated to all courts and prosecutor's offices. Recommendation no. 5 § 4 of those guidelines reads as follows:

> "Information released to journalists may not jeopardise the judicial proceedings, the principle of confidentiality, or any other right recognised by domestic laws or by international treaties on fundamental rights to which Romania is a party."

60. The guidelines were amended by Decision no. 542 of 5 June 2008.

61. According to the amended guidelines, in courts and prosecutor's offices certain structures are designated to exercise the function of public relations and cooperation with the mass media. No other members of the courts and prosecutor's offices are allowed to provide information outside the structure laid down by the guidelines.

62. During the criminal investigation, the mass media are denied access to the criminal case file and the public information is disseminated through press releases issued by the spokesperson for the prosecutor's office.

E. Order no. 116/2007 of the General Prosecutor's Office attached to the High Court of Cassation and Justice concerning the execution of activities linked to relations with the mass media within the Public Ministry.

63. Order no. 116/2007 of the General Prosecutor defines the official policy regarding prosecutors' institutional communication with the media. It encourages a permanent dialogue between journalists and the spokespersons or chief prosecutors of the prosecution services in the country, so as to provide prompt and correct information to the public.

F. Relevant European instruments

Recommendation Rec(2003)13 of the Committee of Ministers of the Council of Europe to member States on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003)

64. The relevant passages of Recommendation Rec(2003)13 read as follows:

> "...
>
> Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;
>
> Recalling that the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;
>
> Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;
>
> Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

...

Desirous to enhance an informed debate on the protection of the rights and interests at stake in the context of media reporting relating to criminal proceedings, and to foster good practice throughout Europe while ensuring access of the media to criminal proceedings;

...

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1. take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

2. disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. bring them in particular to the attention of judicial authorities and police services as well as to make them available to representative organisations of lawyers and media professionals.

Appendix to Recommendation Rec(2003)13 - Principles concerning the provision of information through the media in relation to criminal proceedings

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 - Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial.

Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

...

Principle 6 - Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

...

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses

and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

65. The applicant complained that he had been subjected to a disciplinary sanction and removed as chief prosecutor for imparting to the press information concerning pending criminal investigations in his capacity as the staff member designated to maintain contact with the press.

He relied on Article 10 of the Convention, which reads as follows:

"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."

A. Admissibility

66. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

67. The applicant submitted first of all that his press release had not been intended to disclose confidential information but rather had served the public interest, by fulfilling the obligation to inform the public about facts relating to pending criminal proceedings. The impugned press release had

not influenced the ongoing investigation or infringed the presumption of innocence.

68. As regards the interference with his right to impart information under Article 10 of the Convention, the applicant argued that the interference had not been prescribed by law since the law relied upon by the domestic authorities was not sufficiently clear and foreseeable. In particular the notions of "confidentiality of the investigation" and "disrespectful behaviour in respect of his colleagues" were not defined or explained with any greater precision.

69. The applicant argued that the sanction imposed had had no legitimate aim and, in any event, it had been disproportionate and had had a chilling effect.

70. In his view, it was difficult to conceive that any "legitimate aim" could be pursued through imposing a disciplinary sanction on a prosecutor assigned to impart information to the press since he had merely carried out his professional duty to provide prompt and accurate information to the press in relation to pending criminal proceedings of public concern.

71. The press release and his interview with AXA TV had had the purpose of protecting the very basics of the rule of law, the independence and the proper functioning of the judiciary − which were questions of public interest − by providing prompt information regarding events which attracted the public's attention.

72. The applicant further maintained that he had been under an obligation to inform the press about the case of influence peddling because information about it had already been released to the public by two journalists who had witnessed the *flagrante delicto* operation and rumours about the possible involvement of magistrates had spread in their town. Consequently, he had needed to reply to the representatives of the local press who had asked him to express the official position of his office about the incident in order to avoid speculation that he had been trying to hide information merely because there were rumours concerning the involvement of magistrates as the possible recipients of the money. He had tried to protect the image of the judiciary and specifically the image of his magistrate colleagues by reacting promptly and providing accurate information.

73. Moreover, it had been AXA TV which had added the information concerning the termination of judge G.E.'s mandate at the Baia Mare Prison and had associated it with the *flagrant delicto* operation. This information was in any case not even accurate, because the judge's mandate had expired on 18 October 2008, a few days prior to the operation and not after it. He himself had not been even aware of the termination of her mandate and should not have been held responsible for the association of the two events.

74. The applicant furthermore submitted that the NAP and other prosecutor's offices generally issue press releases which contain more

information about ongoing criminal investigations than his press release had done. In support of this allegation he had submitted to the Court several press releases issued by different prosecutor's offices which provided information about ongoing investigations concerning offences of active and passive corruption.

75. The fact that the prosecutors who had issued such press releases had not been disciplined by the SCM made him suspect that there had perhaps been other reasons for having him disciplined and removed from the position of chief prosecutor. He added that, despite the fact that the appeal on points of law against the SCM's decision had had a suspensive effect, he had been forced to give up to his position of chief prosecutor before a final decision had been handed down by the High Court of Cassation and Justice because new disciplinary proceedings had been opened against him and he had been threatened with exclusion from the magistracy if he continued performing his duties in that position (see paragraph 49 above).

76. The applicant added that he had been in charge of providing information to the press for about five years and accordingly had extensive experience in this kind of activity. In all that time he had never had any problems regarding the manner in which his press releases were drafted.

77. The applicant disagreed with the Government's allegation that the domestic authorities had duly examined his complaints against the disciplinary sanction and his removal from the position of chief prosecutor. In his view, they had not tried to establish the truth as they had rejected most of his requests for evidence in support of his claims.

78. The journalists who had witnessed the *flagrante delicto* operation had not been questioned before either the SCM or the High Court of Cassation and Justice. Moreover, no account had been taken of the letters received by judge G.E. from the television channel and the National Audiovisual Council, or of the letter received by the applicant from the General Prosecutor's office confirming his claim that his press release had been compliant with the applicable guidelines and regulations (see paragraphs 24 and 27 above).

79. As regards judge G.E.'s allegation that her public image had been tarnished by his press release, the applicant referred to the letter his lawyer had received from the president of Baia Mare District Court on 27 March 2009. In that letter the president of the court had stated that he had not considered it necessary to open an investigation into corruption offences allegedly committed by judges from Baia Mare District Court because in his opinion "the press release did not made any reference to the identity of the magistrates involved" (see paragraph 18 above).

(b) The Government

80. The Government submitted that the disciplinary action against the applicant, followed by his removal from the position of chief prosecutor on

account of the manner in which he had presented to the press information concerning the pending criminal investigation, could be considered as interference with the applicant's right under Article 10 of the Convention. They pointed out that such interference was provided for by law. The disciplinary offences of which the applicant had been accused and the sanction imposed on him were defined in Law 303/2004. Moreover, in his capacity as the staff member assigned to impart information to the press, the applicant should have complied with the practice guidelines regulating cooperation by the courts and prosecutors with the media adopted by the SCM (Decision no. 277/2006) and with the provisions of Order no. 116/2007 of the General Prosecutor.

81. In the Government's view the legal provisions applicable to the applicant were sufficiently clear and foreseeable. In addition they were published in the Official Gazette and were therefore easily accessible to all magistrates.

82. According to the Government the applicant, in his capacity as chief prosecutor and the staff member assigned to impart information to the press, should have acted with more diligence when informing the press about an investigation that was in its initial stages. Moreover, at the time he had issued the press release, the case was no longer being handled by the prosecutor's office attached to the Maramureş County Court as it had already been transferred to the NAP.

83. In connection with the authorities' obligation to keep criminal case files confidential during investigations, the Government referred to the cases of *Căşuneanu v. Romania* (no. 22018/10, 16 April 2013), *Voicu v. Romania* (no. 22015/10, 10 June 2014) and *Apostu v. Romania* (no. 22765/12, 3 February 2015). In those cases, the Court had found violations of the Convention for infringement of the right to private life on the grounds that in the initial stages of the investigations the press had had access to information concerning the applicant's private life contained in the case files and that, in spite of the public interest aroused by the subject matter, the divulging of information at that stage of the investigation had prevented the applicant from defending his reputation or challenging the accuracy of the revealed information.

84. The interference had been necessary for the protection of the reputations of others, to uphold respect for the presumption of innocence, as well as for maintaining the authority and impartiality of the judiciary.

85. As regards the proportionality of the sanctions imposed on the applicant, the Government argued that they had been necessary for protecting the above-mentioned legitimate aims.

86. The applicant had provided more information than necessary; by inserting the information that the alleged recipients of the money were magistrates, judges and prosecutors involved with the conditional release of

detainees, he had prompted a lot of speculation about the involvement of judge G.E. in the influence peddling.

87. The applicant's complaints against the disciplinary sanction had been duly examined by the disciplinary body and the High Court of Cassation and Justice. They had provided sufficient and relevant reasons for upholding the sanctions.

88. Moreover, the sanction applied to the applicant in the present case was not disproportionate compared with the sanctions applied to applicants in other cases examined by the Court.

2. The Court's assessment

(a) Existence of an interference

89. It is not in dispute between the parties that there had been an interference with the applicant's right to freedom of expression under Article 10 of the Convention. For its part, the Court sees no reason to find otherwise.

90. Such interference will be in breach of Article 10 unless it fulfills the requirements of paragraph 2 of that Article. It therefore remains to be determined whether the interference was "prescribed by law", pursued one or more of the legitimate aims referred to in that paragraph, and was "necessary in a democratic society".

(b) Justification of the interference

(i) Lawfulness

91. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V, and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I).

92. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice

(see *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 131-33, ECHR 2015 (extracts), and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 143, ECHR 2017 (extracts)).

93. In the present case, the disciplinary offences with which the applicant was charged were provided for in Article 99 letters d) and k) of Law no. 303/2004 and the imposed penalty in Article 100 of the same law (see paragraphs 52 and 53 above). The applicant mentioned the ambiguity of the notions of "confidentiality of the investigation" and "disrespectful behaviour in respect of his colleagues" contained in the definitions of the disciplinary offences he had been charged with.

94. The Court is not convinced by his argument that legal provisions were worded so vaguely that he could not foresee its applicability to his case. The wording of Article 99 letters d) and k) of Law no. 303/2004 was sufficiently clear to enable the applicant, who, being a prosecutor, was nonetheless informed and well-versed in the law, to understand its meaning.

95. The Court therefore considers that the interference with the applicant's right to freedom of expression complied with the requirement of lawfulness.

(ii) Legitimate aim

96. Next, the Court has to ascertain whether the interference complained of pursued a legitimate aim.

97. The Government submitted that the interference had been necessary for the protection of the reputations of others, to uphold respect for the presumption of innocence, as well as for maintaining the authority and impartiality of the judiciary. The applicant argued that the sanction imposed had had no legitimate aim.

98. The Court observes that the domestic authorities based their decisions on the applicant's breaching of the secrecy of the judicial investigation and adopting a disrespectful attitude towards judge G.E., which harmed the latter's public image.

99. Having regards to the parties' submissions and the particular circumstances of the case the Court considers that the interference had the aim of guaranteeing respect for the right of a person who had not yet stood trial to be presumed innocent. It also had the aim of ensuring the proper administration of justice by preventing any extraneous influence on that administration. These aims correspond to the protection of "the reputation or rights of others" and to the maintaining of "the authority and impartiality of the judiciary (see *Ernst and Others v. Belgium*, no. 33400/96, § 98, 15 July 2003, and *Dupuis and Others v. France*, no. 1914/02, § 32, 7 June 2007).

100. The Court therefore accepts that the impugned interference sought a legitimate aim within the meaning of Article 10 § 2 of the Convention and will proceed to examine whether it was "necessary in a democratic society".

(iii) Necessary in a democratic society

101. The general principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law (see, among recent authorities, *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016).

102. In assessing whether the decision to apply a disciplinary sanction and remove the applicant from the position of chief prosecutor – a measure taken in response to his press release and interview with the local television channel – was "necessary in a democratic society", the Court has to examine the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.

103. The Court will also attach particular importance to the office held by the applicant, the statements or views that he expressed publicly, the context in which they were made, and the reaction thereto (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 63, ECHR 1999-VII).

(α) The applicant's status and the context in which he made his statements

104. The Court notes that the applicant made the impugned statements to the press in the context of discharging his duties as the staff member designated to provide information to the press, a position which he had occupied for the preceding five years. In this capacity he had a professional duty to provide information to the press about investigations which attracted media attention, as did the case of influence peddling revealed during the *flagrante delicto* operation organised by his office.

105. The Court reiterates that the status the applicant has enjoyed as chief prosecutor does not deprive him of the protection of Article 10 (see *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, §§ 91-92, 13 November 2008).

(β) Contribution of the impugned statements to a public-interest debate

106. There is, as the Court has consistently held, little scope under Article 10 § 2 of the Convention for restrictions on matters of debate on public interest. The margin of appreciation of States is thus reduced where a debate on a matter of public interest is concerned (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 167, and the cases cited therein).

107. In this connection the Court has already held that the public has a legitimate interest in being informed about ongoing criminal proceedings,

and that remarks concerning the functioning of the judiciary constitute a matter of public interest (see *Morice v. France* [GC], no. 29369/10, § 152, ECHR 2015).

108. The Court thus accepts that the subject matter of the applicant's press release and interview, namely the criminal investigation into the *flagrante delicto* operation organised by the prosecutor's office attached to the Maramureş County Court, was a matter of public interest. This incident had triggered interest at local level, and the applicant in his capacity as the staff member assigned to inform the press regarding ongoing criminal investigations had seen fit to inform the press of certain aspects of the ongoing inquiry into the offence of influence peddling.

(γ) Whether the impugned statements breached the secrecy of the criminal investigation

109. While emphasising that the rights guaranteed by Article 10 and Article 6 § 1 deserve equal respect in principle, the Court reiterates that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. It emphasises that the secrecy of investigations is geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, particularly from the angle of the presumption of innocence, and more generally, his or her personal relations and interests. Such secrecy is also justified by the need to protect the opinion-forming and decision-making processes within the judiciary (see *Bédat*, cited above, § 68).

110. Assessing the impact of the applicant's press release and interview, the Court sees nothing in the applicant's statements that would justify the accusation of disclosure of a pending criminal investigation. The Court considers that the applicant proceeded with caution, refraining from identifying by name any of the individuals involved pending completion of the judicial investigation.

111. The Court also notes that the prosecutor working at the Office for Public Information and Relations with the Mass Media, who assessed the press release at the applicant's request, concluded that the information provided by the applicant had been "minimal and general, but necessary so that the public could understand the facts of the case" and that the applicant had limited his press release to imparting information concerning the investigation carried out by his office (see paragraph 27 above).

112. The applicant did not adopt any stance as regards the guilt of any of the persons involved but simply provided a summary description of the prosecution case at its initial stage. His press release, as confirmed by the

statements of the prosecutor in charge of the file after the transfer to the NAP, was not prejudicial to the proper conduct of the investigation (see paragraph 22 above).

113. Furthermore, the Court observes that the applicant did not use or cite any documents protected by the secrecy of a judicial investigation or otherwise reveal confidential information relating to ongoing criminal proceedings (compare *Dupuis and Others*, cited above, § 43). At the time the applicant issued the press release, the information concerning the *flagrante delicto* operation was no longer confidential; the two journalists present at the incident had published articles, accompanied by photographs taken on that occasion (see paragraph 20 above).

114. The applicant's conduct was therefore in keeping with the Principles concerning the provision of information on criminal proceedings through the media, as outlined in the Committee of Ministers' Recommendation Rec(2003)13 (see paragraph 64 above) and the guidelines pertaining to cooperation by the courts and the prosecutor's office with the media, adopted by the SCM (see paragraphs 59-62 above).

115. The Court finds nothing in the applicant's statements that would allow the domestic authorities to accuse him of breaching the secrecy of the criminal investigation.

(δ) Alleged impact on judge G.E.'s professional reputation

116. The Court notes that the sole purpose of the impugned press release and interview was to inform the public about an ongoing criminal investigation of evident concern to the local public and not at all to accuse magistrates of offences.

117. However, the domestic disciplinary authorities found the applicant's press release and his interview with the AXA TV to have been disrespectful towards judge G.E. as they made possible her identification by the press as the alleged recipient of the money (see paragraph 31 above).

118. The Court has consistently held that when examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation ... of others", it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see, among many other authorities, *Annen v. Germany*, no. 3690/10, § 55, 26 November 2015, and *Cheltsova v. Russia*, no. 44294/06, § 79, 13 June 2017).

119. The Court emphasises that, in order for Article 8 of the Convention to come into play, an attack on a person's reputation must attain a certain level of seriousness and its manner must cause prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*,

no. 28070/06, § 64, 9 April 2009, and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012). It is not convinced, however, in the circumstances of the present case, that the impugned press release and interview could be considered as an attack reaching the requisite threshold of seriousness and capable of causing prejudice to G.E.'s professional reputation.

120. As regards judge G.E.'s claim that the applicant's press release and his interview with the television channel had harmed her reputation, the applicant submitted that the domestic authorities' acceptance of judge G.E.'s complaint against him had not been sufficiently well founded, given that she had not been identified in the press release or the interview.

121. In this connection the Court notes that the applicant's diligence in exercising his duties as the staff member assigned to impart information to the press had been defended by two of the prosecutors from the SCM's disciplinary commission and one judge of the panel of the High Court of Cassation and Justice who had been opposed to reprimanding the applicant (see paragraphs 33 and 42 above). They contended that the names of the supposed recipients of the money from the influence peddler had not been mentioned in the press release or in the television interview and that the press release had contained only a general, impersonal reference to the judges and prosecutors who were involved with the conditional release of detainees. The reference to judge G.E. – whose position as the judge delegated to the prison had ended – had been made by AXA TV.

122. The National Audiovisual Council, which examined judge G.E's complaint about the way in which AXA TV had broadcast the news about the *flagrante delicto* operation, had concluded that the reputation of judge G.E. had not been harmed (see paragraph 24 above).

123. The Court further observes that in finding the press release and the interview defamatory of judge G.E., the domestic authorities did not heed the fact that the statements did not emanate from the applicant but were clearly identified as having been made by another party; the applicant never claimed that it was the official position of the prosecutor's office that the alleged recipients of the money were magistrates; he had simply cited what the detainee claimed that he had been told by the suspect caught red-handed (see paragraph 11 above).

124. The Court notes that there is no evidence that the domestic authorities conducted a balancing exercise between the need to protect the reputation of judge G.E. and the applicant's right to impart information on issues of general interest concerning ongoing criminal investigations. They confined their analysis to a mere discussion of the damage to the plaintiff's reputation without answering the applicant's and the CSM's point that the impugned statements had been made by a third party and without taking into account the criteria set out in the Court's case-law.

125. Assessing the impact of the applicant's press release and interview, the Court sees nothing in the applicant's statements that would allow the domestic authorities to accuse him of infringing any of his magistrate colleagues' right to a protected public image.

(c) Conclusion

126. Having regard to the foregoing, the Court considers that the standards applied by the domestic courts were not compatible with the principles embodied in Article 10 and that the domestic courts did not adduce "relevant and sufficient" reasons to show that the interference complained of was necessary in a democratic society for the protection of the authority of the judiciary and the protection of the reputation or rights of others. Having in mind that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest, the Court finds that the interference was disproportionate to the aim pursued and was thus not "necessary in a democratic society".

127. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. 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

129. The applicant claimed that as a consequence of the premature termination of his mandate, his professional career and reputation had been damaged. He sought an award of just satisfaction in respect of non-pecuniary damage in the amount of EUR 50,000.

130. The applicant also claimed that as a result of the premature termination of his mandate as chief prosecutor, he had lost his allowance attached to that position. He provided a detailed calculation of his claim for pecuniary damage, which amounted to EUR 1,825.

131. As regards the pecuniary damage sought by the applicant, the Government noted that the applicant had submitted documents to support his claim. Therefore, they did not oppose granting it to him.

132. The Government further considered the amount requested by the applicant in respect of non-pecuniary damage to be excessive. Making reference to the case *Karácsony and Others v. Hungary* [GC] (nos. 42461/13 and 44357/13, § 181, ECHR 2016 (extracts)), they asked the

Court to decide that the finding of a violation of Article 10 would in itself constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

133. As regards the claim in respect of pecuniary damage, the Court observes that the applicant has incurred pecuniary loss having regard to the allowances which he would have received if the violation of the Convention had not occurred and he had been able to remain in the post of chief prosecutor until the end of his mandate. Accordingly, it considers that the applicant is entitled to recover the full amount claimed by him, namely EUR 1,825.

134. The Court also considers that the applicant must have sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. Therefore, making an assessment on an equitable basis and in the light of all the information in its possession, the Court considers it reasonable to award the applicant EUR 4,500 in respect of non-pecuniary damage.

B. Costs and expenses

135. The applicant also claimed EUR 140 for the costs and expenses incurred before the Court.

136. The Government did not contest this claim.

137. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 140 for the costs and expenses incurred before it.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaint under Article 10 admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by five votes to two,

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

(i) EUR 1,825 (one thousand eight hundred and twenty-five euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 140 (one hundred and forty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 11 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Ganna Yudkivska
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Yudkivska and Kūris is annexed to this judgment.

G.Y.
M.T.

DISSENTING OPINION OF JUDGE KŪRIS, JOINED BY JUDGE YUDKIVSKA

I

1. It may seem somewhat bewildering that, having voted against the admissibility of the application under Article 10 of the Convention and against the finding of a violation of that Article, I nevertheless take satisfaction in the fact that the applicant has won his case in Strasbourg. I really do. The way the applicant was treated by the domestic authorities does not hold water against any standards of due process, let alone reasonableness.

2. The applicant complained under Article 10 and some other provisions of the Convention, including those of Article 6 §§ 1 and 2. The case was communicated to the Government only under Article 10. The other complaints were declared inadmissible.

3. What prompts my objection to the instant judgment is the fact that the applicant's situation has been assessed from the angle of Article 10.

But before I come to this point, let me address the gist of the case.

II

4. The applicant was a chief prosecutor at county level. He was tasked with keeping the press informed about pending criminal investigations. A disciplinary action was instituted against him on account of the information he had imparted to the press about a case which clearly concerned a matter of general interest. He was found guilty of two disciplinary offences and was officially reprimanded. On top of that, as a direct consequence of being sanctioned in disciplinary proceedings, he was also removed from the position of chief prosecutor.

5. The criminal investigation about which the applicant officially informed the press in a press release and, soon afterwards, in a TV interview concerned alleged influence peddling within the judiciary, related to the presumably conditional release from prison of a detainee in exchange for money. Information about the incident had already been disseminated in the media before the applicant intervened. In particular, the public had been informed that a suspect was caught red-handed while accepting the money. Apparently, the suspect was not himself in a position to order a release from prison, and thus he would either have pocketed the money without having done what he promised to do for the detainee in question, or intended to share the money with someone who was in a position to take such decisions. No wonder that the incident, a clear harbinger of a high-profile corruption case, attracted public attention. Consequently, some kind of official

communication to the public regarding the incident was a matter of course. The press release issued by the applicant contained a mention that the suspect had told the detainee in question that part of the money was to go to the "magistrates, judges and prosecutors responsible for the conditional release of detainees". It was not asserted that this statement by the suspect was reliable. The TV news programme which interviewed the applicant added its own comment to the official communication. It alluded to one specific judge (who had until then chaired the commission for conditional release), raising speculation as to whether the ending of her assignment to the prison in question was (not) related to the alleged criminal activity. The allusion was most inappropriate and unprofessional, because it was based on inaccurate information that, indisputably, was not provided to the programme by the applicant. The judge's name, however, was not revealed in that programme. Nonetheless, as is often the case, such secrets remain unknown for but a short time.

Quite understandably, the judge concerned was not happy about the hints dropped during the news programme. Quite understandably, she initiated proceedings to have retracted the information linking her to the alleged influence peddling. No less understandable was her displeasure at the silence on the part of the TV channel and the formalist response given by the National Audiovisual Council. What was less understandable was that she then directed her dissatisfaction against the applicant, who had not in any way alluded to her (or any other judicial officer) specifically, but only referred to the suspect's words (the veracity of which he did not endorse) pointing to a broad, vague and indeterminate group of "magistrates, judges and prosecutors". Even less understandable was that a disciplinary investigation against the applicant was commenced – unless such a procedural step was needed before the judge's complaint could be dismissed. And what was not at all understandable, even jaw-dropping, was the sanctioning of the applicant for something that was not his, but the news programme's, doing.

6. When questioned by the disciplinary commission, the applicant asserted that his press release had been prepared on the basis of information received in discharging his functions. The applicant's lawyer claimed that the applicant had acted in good faith in informing the press about the incident, his references had been general and impersonal, and no reference had been made to any specific person; he had merely fulfilled his obligation to inform the press about a pending criminal investigation, of which the public was already aware. It was the TV channel which had expanded on the matter, providing more information in its news programme than it had received from the applicant.

7. This stance was corroborated by various institutions and officials. The National Audiovisual Council found that the TV broadcast did not contain any specific reference to the judge who had complained to them. The

prosecutor at the Office for Public Information and Relations with the Mass Media held that the information provided by the applicant in the press release had been "minimal and general, but necessary so that the public could understand the facts of the case", and that the applicant's action had complied with the practice followed by the public prosecutor's office. In the opinion of the president of the district court, the press release did not make any reference to the identity of the magistrates allegedly involved in the influence peddling. The prosecutor in charge of the case considered that the press release had not jeopardised the outcome of the criminal investigation.

8. Notwithstanding these elements, the disciplinary commission found against the applicant. It held that the applicant had provided information about the alleged recipient of the money for influence peddling without checking the accuracy of the suspect's statements (as though the applicant could have verified this accuracy when he was not in charge of the case, which, incidentally, was in its early stages). In the commission's opinion, it was precisely this "non-checking" which had led to the identification of one particular judge as the alleged recipient of the money and the media speculation as to whether the termination of her assignment could be related to the crime in question. It further held that the "way" in which the press release was drafted posed a risk that the result of the investigation would be undermined or confidential sources revealed (this being in contradiction to the explicit statement of the prosecutor in charge of the case).

9. The commission did not burden itself with explanations as to what would have been the proper "way" to draft the press release. It simply imposed on the applicant the disciplinary sanction of a reprimand, having found him guilty of failure to observe the confidentiality of documents of a secret nature and of adopting a disrespectful attitude toward colleagues in the exercise of his duties. On the latter count the decision was reached by three votes to two. The logic of the dissenters' arguments could hardly be rebutted, but it is the majority's opinion which has legal force.

10. The commission's action came into effect instantly after its approval. On the very same day the commission, as a result of *its own* finding, decided to remove the applicant from his position as chief prosecutor. This decision was taken before the applicant had even had a chance to challenge the disciplinary commission's findings before anybody – even before the plenary of the members of the Superior Council of the Magistracy itself. When he applied to the plenary, his removal was already a *fait accompli*, because he had had to resign as chief prosecutor after new disciplinary proceedings were opened against him, threatening him with complete exclusion from the profession. His challenge was dismissed.

11. The High Court of Cassation and Justice also dismissed his appeal. The reasoning of the High Court was that once disciplinary sanctions had been imposed, even if this was in the form of a reprimand, a prosecutor had necessarily to be removed from his position. This was so irrespective of the

fact that a reprimand appears to be the mildest of a number of disciplinary sanctions provided for in the law, and bears no comparison with removal from office as an autonomous – and the heaviest – sanction.

Where does such reasoning leads us? If a prosecutor is necessarily removed from his or her position no matter what disciplinary sanction is imposed, then all sanctions milder than removal from office are *fictitious*, as they all lead to the prosecutor's removal from office: either immediately, or as a result of the imposition of any milder sanction. *Tertium non datur.* In fact, *secundum non datur*: the choice is between dismissal and dismissal. Great standard. If such uncompromising, unbending rules are consistently applied (are they? *felicitări*!), the Romanian prosecutorial corps must indeed consist of exclusively flawless, infallible, squeaky-clean officers.

12. Be that as it may, the applicant lodged an appeal on points of law with the High Court of Cassation and Justice against the commission's decision to find him guilty of two disciplinary offences and to impose a reprimand. He averred that he had not supplied the press with any confidential information. On the contrary, the press release was aimed at preventing possible speculation about the incident, already known to the press, which could have been detrimental to the judiciary. He also dismissed the accusation that he had shown a disrespectful attitude towards the judge in question. The Association of Romanian Magistrates intervened in the proceedings in support of the applicant, contending that he had observed the relevant regulations, both domestic and those of the Council of Europe.

All this to no avail. The High Court, by a majority, dismissed the appeal, pointing out that the applicant should have limited his press release to the minimum of information, which would not have allowed the identification of any magistrate as the alleged recipient of the money that was changing hands. Had he not mentioned in the press release that the money in question was to be obtained by "magistrates, judges and prosecutors responsible for the conditional release of detainees", then, in the eyes of that court, everything would have been hunky-dory.

13. The High Court did not provide any explanation as to how it would have been possible to report on an investigation into the alleged unlawful conditional release of a detainee from prison in exchange for money without hinting, at least in a general way, that the alleged recipient(s) of that money was one (or more) of those taking the decisions concerning that detainee's conditional release (with the proviso that this was so only according to the words of the suspect). Who else would be taking *decisions* pertaining to the release of detainees, if not "magistrates, judges and prosecutors"? Surely not secretaries, librarians, chauffeurs or janitors working somewhere in the judicial system? This is as plain as a pikestaff.

It is easy to imagine that withholding even a slight hint that the alleged recipient *could* (assuming that the suspect's words were proved correct) be a magistrate, a judge or a prosecutor would have raised, in the eyes of the

public, suspicion that attempts were being made to protect someone. Apparently, in the High Court's opinion, withholding such "information" (which amounted to what a reasonable person could himself have concluded), and thus raising a legitimate suspicion that something fishy was going on, would have been perfectly legitimate.

III

14. The problem with which I am concerned here emerged when the applicant, in his appeal on points of law against the commission's decision, complained (not only that the disciplinary proceedings against him had been unfair, but also) that the imposition of a disciplinary sanction had infringed his *right* to impart information to the press. He relied on Article 10. Perhaps he (and his lawyer) considered that this additional argument would make his case stronger.

15. It did – if not at the domestic level, where the judges were not convinced by this argument, but certainly in Strasbourg, because the applicant has ultimately won his case here. In my opinion, however, this has been achieved at the expense of clarity with regard to what Article 10 is about.

16. Let us have a closer look at the arguments by which the applicant substantiated his claim under Article 10. I limit myself only to those which directly concern the very essence of that Article (and do not enter into considerations regarding the confidential or non-confidential status of the information disclosed; the risk which it allegedly posed for the ongoing investigation; the role of the TV news programme in raising speculations regarding a specific judge; or the adequacy or nor-adequacy of the examination of whether that judge's public image was tarnished).

17. The applicant stressed (more than once) that he imparted to the press the impugned information *in his capacity as the staff member designated to maintain contact with the press*. He had been *in charge* of providing information to the press for about five years.

No question about that. Informing the press was his job – an important function. The media had a professional duty to inform the public, and he had the professional duty to inform the media so that they could properly perform their professional duty. This is known as the public authorities acting in the public interest. It has something to do with authorities' accountability, transparency, public trust, and the rule of law, that is to say, with civic virtues which are not the least among those defended by the Convention – but also by Romanian law.

18. The applicant asserted that he was *fulfilling his obligation* to inform the public about facts relating to pending criminal proceedings. No legitimate aim could be pursued through imposing a disciplinary sanction on a prosecutor who had *merely carried out his professional duty* to provide

prompt and accurate information to the press, in a role to which he had been assigned. None of the other prosecutors who issued press releases had been disciplined by the commission, even when they imparted more information about ongoing criminal investigations than he did. They presumably discharged their duties properly, while it was considered that the applicant did not.

19. The applicant made it clear that his *obligation* to inform the press about the case was even greater because information about it had already been released to the public by the media, and rumours about the possible involvement of judicial officers had spread in the town concerned. An official reply to the media was *necessary* in order to protect the image of the judiciary. He did his best to ensure that his information was accurate.

20. The paradox is that the applicant, while asserting that his *rights* under Article 10 were violated, in fact argued that he merely performed his *duties* as a *public official* – not that he exercised any rights.

21. The duties of public officials are not the subject of Article 10. This Article guarantees the right to *freedom* of *expression*.

This right includes the freedom to hold *opinions* and to receive and impart *information and ideas*.

There must be no interference in the imparting of information and ideas *by a public authority*.

Thus, Article 10 implicitly draws a distinction between private persons and public authorities, and the latter must not interfere with the freedom of expression of private persons.

Admittedly, the expression of public persons, such as, for example, members of parliament, may also be protected by Article 10 (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016), but, as the cited case shows, that expression must be exercised independently from the performance of official functions.

In addition, the Court, in developing its case-law and enhancing the standards of human rights protection, has interpreted Article 10 to the effect that it can also be invoked to protect *access to information* (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016).

22. Freedom of expression, or speech in the widest sense of the word, is a broad concept. With the advancement of technologies and globalisation it only expands.

The notion of expression (or speech) includes not only oral or written communication, but also non-verbal communication, even silence: not expressing oneself explicitly may also convey information, opinion or ideas. These different forms of expression manifest themselves in very diverse areas, thus making the notion of freedom of expression applicable not only to everyday parlance or political speech (which remains the central target of applicability of this concept in litigation), but also to expression of religious (or non-religious) faith or the absence thereof, scholarly research and

teaching (academic freedom), artistic expression, literature and journalism, broadcasting and electronic media, even commerce and propaganda, etc. – all forms of one-to-one, one-to-many and many-to-one communication. I am unable to deal with all these issues here (but will not let pass the opportunity to refer to a great source of inspiration for thoughts on the importance of freedom of expression in its diverse manifestations: Timothy Garton Ash, "Free Speech: Ten Principles for a Connected World" (London: Atlantic Books, 2016).

The Court's case-law on the many spheres of application of the concept of freedom of expression is abundant; there is no need to cite it here.

23. Nevertheless, a broad concept is not necessarily all-encompassing. The Court has excluded the applicability of Article 10 in many cases where the applicants claimed that it was their freedom of expression which had been infringed. It is the Court which defines the ambit of the Articles of the Convention. Apart from many other things, *jura novit curia* means also that. And it is the Court which determines that something which falls within the ambit of an Article, in this case Article 10, does not, however, enjoy its protection. Hate speech, as well as speech inciting disorder and crime, is normally not protected. Commercial advertising can be restricted. Disclosure of sensitive information (including confidential information and State secrets) may be well justified. Freedom of expression must be balanced and may retreat against the right to privacy. Speech aimed at impairing the authority and impartiality of the judiciary may be prosecuted. And so on.

Thus, there may be – and indeed are – types of expression which do fall within the ambit of Article 10, but do not enjoy its protection.

24. In this case, however, we are concerned not with the *protection* of something which falls in the ambit of Article 10. What troubles me is the fact that what was held by the majority to be protected by that Article was clearly *outside* its ambit.

The *sine qua non* for an activity to fall within the ambit of Article 10 is that the activity in question must constitute an expression within the meaning of that Article. This is so banal – and yet it should not be overlooked that the activity in question must contain *two* constitutive (or determinative) elements: (i) it has to be an *expression* of something which (ii) was performed in exercise of the respective *freedom*. An expression (by words, sounds, signs, actions, writing, symbols, silence, etc.) taken alone would not suffice for it to be a manifestation of freedom of expression *in the sense of Article 10*. For this, *both elements* are needed.

A railway flagman expresses himself in the sense that he conveys a message to someone. However, does this mean that he thus exercises his *freedom of expression*? In other words, does he, by expressing himself, express his own *self*? Or: a policeman who uses a whistle to stop a speeding car is certainly engaged in expression – but does he exercise *freedom* of

expression? If one wishes to consider an opposite example, take a person who expresses himself loudly in his sleep. Would such an expression constitute an exercise of *any* freedom? (Some do express themselves in this way, and they are not always happy to learn *what* they expressed and *to whom*.) A positive answer to this seemingly rhetorical question would amount to holding that a person who sleepwalks is exercising his freedom of movement under Article 2 of Protocol No. 4. Come on.

25. Turning to the applicant's situation, I believe that the very essence of what freedom of expression means has been overlooked in this case.

It is undisputable that the applicant never asserted that he had held any *opinion* on the case about which he informed the media. Indeed, nothing in his press release or TV interview could be interpreted as an expression of his opinion – in fact, of *any* opinion. It was a communication of the facts as they were known at that stage.

The applicant was more than clear that he had expressed no *ideas* of his own, or even someone else's ideas. Ideas were not there *at all*, unless we attribute the word "idea" to any form of speech.

And *there was no interference* in the applicant's imparting of official information to the public *by any public authority*. On the contrary, he exercised his *duty* while being himself *part of public authority*. He acted, in fact, as the mouthpiece of authority.

In theory, had he withheld this information on a matter of public interest, *he* could have violated the *public's* right to be informed or the *media's* right of access to information. This was not so in the instant case.

He would have also deviated from his official functions (and perhaps violated domestic regulations), had he not informed the public about the incident, which was related to a matter of public concern. This was not the case.

Where then is an infringement of the *applicant's* Article 10 right?

Where does *that* right exist in this case?

26. To sum up, the crux of the applicant's arguments before the Court was that he had not exercised any freedom when imparting the information to the media. He was not free *not* to impart it or, in the alternative, to impart only some of the relevant information by withholding what was essential and what was anyway understandable to any reasonable person, or at least to those who had some idea about who adopts decisions on the conditional release of detainees. He had not imparted anything that was not justified by the public interest. Such had been the general practice for years – not only the applicant's practice, but that of all officials (prosecutors) tasked with similar functions.

He had thus not engaged in an activity protected by Article 10.

IV

27. The above is not meant to argue that the applicant did not engage in an activity protected by the Convention or that he did not have a case in Strasbourg.

Of course he did.

Only this case ought to have been examined not under Article 10, but under Article 6, or Article 8, or under both of these Articles.

28. At this stage of proceedings the Court was precluded from examining the applicant's complaints under Article 6 (and those under Article 1 of Protocol No. 1) as they had been declared inadmissible by another judicial formation. It might well be that the reasons for this were perfectly valid at that stage.

29. Nonetheless, the Court's case-law is a constantly and ceaselessly developing body. Since 2015, when the application was communicated to the Government, new case-law has come into being which would indicate that the applicant's situation (especially his speedy and unconditional removal from office) clearly fell under Article 8. Perhaps the most recent authority would be *Denisov v. Ukraine* ([GC], no. 76639/11, 25 September 2018). One could also refer to *Bărbulescu v. Romania* ([GC], no. 61496/06, 5 May 2017). The doctrine contained in these two judgments (especially the former) would suggest not only that the applicant's case fell under Article 8, but that the finding of a violation of Article 8 could have been a likely outcome. But even in 2015 there were authorities (such as, for example, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 27 July 2004) which would have suggested the same.

30. The same also goes for the applicability of Article 6. To conclude so, it is enough to have a glimpse at *Oleksandr Volkov v. Ukraine* ([GC], no. 21722/11, 9 January 2013) or *Morice v. France* ([GC], no. 2969/10, 23 April 2015), or *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016).

31. However, I do not want to prejudge such examination, especially as it never took place and would be purely hypothetical.

There is another point that I wish to make.

32. The Court sometimes includes in the ambit of certain Articles something that does not belong there.

With regard to Article 8, a recent most unfortunate example was *Erményi v. Hungary* (no. 22254/14, 22 November 2016), where the Court went further than in the landmark judgment in *Oleksandr Volkov* (cited above), and where the notion of "private life" was interpreted so that it could, in principle, also include activities of a professional or business nature. The applicant, who had been dismissed from the post of Vice-President of the Supreme Court, complained under Articles 6, 13 and 14, but the Court, being "master of the characterisation to be given in law to the facts of the case" and relying on the *jura novit curia* principle, requalified his complaint

as falling under Article 8 and found a violation of that Article. The applicant's "relationships with the outside world", his social life or even his professional relations were thus considered to be fully dependent on his post, which was but an additional function to his judicial service and status as a judge. The notion of "private life" was thus extended to embrace virtually any act by the authorities *vis-à-vis* an individual, as a participant in the labour market or as member of a profession or holder of any other official function.

In *Denisov* (cited above) the Court backed away from this all-inclusive approach. It found a complaint under Article 8, in many respects similar to that examined in *Erményi*, to be incompatible *ratione materiae* with the Convention and thus inadmissible (albeit without formally denouncing *Erményi*).

33. Something similar is now happening with Article 10. The present judgment interprets the scope of Article 10 too broadly, importing into it what should be perceived as clearly lying outside it by all standards of logic.

I do not argue that this is already a general tendency. But once judgments become final, they are referred to[2] in other cases – and not always critically. The instant judgment therefore has the potential to reproduce itself by multiplying its underlying approach in future case-law.

This falls not far short of a prediction that a day will come when the Grand Chamber will have to revisit the *Brisc* approach – and to overturn it. For the new type of *Erményi* a new *Denisov* will be needed.

V

34. What should have been done? And *could* anything have been done, given that the applicant did not complain under Article 8 and his complaints under Article 6 were declared inadmissible?

35. Since *Radomilja and Others v. Croatia* ([GC], nos. 37685/10 and 22768, 20 March 2018) this does not seem to be a big problem. *Jura novit curia*. This principle (among other things) validates the requalification of applications, which has become a widespread practice.

36. Such requalification of the present applicant's complaints as falling under Article 8 would have been very logical, had the Chamber felt bound by the interpretation of private life as expounded in *Denisov* (cited above).

Consequently, Mr Brisc's case ought to have been recommunicated (even if not communicated from the outset) to the Government under Article 8.

37. Most regrettably, this option was rejected. Perhaps the case had been pending before the Court for too long. It was too old (the application dates back to 2010).

But the backlog of pending cases is a problem of a different nature, and it cannot be solved in a satisfactory way by deciding cases under the "wrong"

Articles, when there is new case-law making it clear under what Article they should be examined.

38. In view of all this, the argument set out in paragraph 89 of the present judgment is strange – but at the same time also revealing. The majority state:

> "It is not in dispute between the parties that there had been an interference with the applicant's right to freedom of expression under Article 10 of the Convention. For its part, the Court finds no reason to find otherwise."

Of course, "it is not in dispute"! So what?

A similar trick (only in a much more brutal manner) was already used in *Erményi* (cited above, § 31).

But what about *jura novit curia*?

Is it the Court which *knows* the law – above all, the law of the Convention? Or is it the parties which "know" it, and if they do not disagree, then the Court must follow their understanding, whatever that may be?

39. The above quotation, however, is indeed remarkable for one more reason.

Let it be repeated once again that the right to freedom of expression, as enshrined in Article 10, includes the freedom to hold opinions and to receive and impart information and ideas.

If the majority indeed agrees with the parties that "there had been an interference with the applicant's exercise of freedom of expression under Article 10", they could – or rather should – (leaving "information" aside, which the applicant, according to his own submissions, was not "free" not to impart) have tried to indicate *at least one* of the "opinions" or "ideas", which the applicant had allegedly expressed (please note the plural form of both words).

In the impugned press release, I found none.

The majority also have mentioned none.

Because there were none.

40. So what is it that the applicant's case is about?

It is about the "exercise" of – *what*? *Freedom*?!

41. This sends the whole opposition of rights and duties (and many other chapters of legal theory) to the waste-basket.

For the submissions from the applicant (who perhaps sincerely, but quite mistakenly, invoked Article 10, and the Government, alas, failed to notice this) to the Court, and in the domestic proceedings, radiate around one single message: *I was not free in doing what I did! I only performed my professional duty! A mere obligation! I had to do what I did – not more, not less!*

42. Every such reinterpretation leads somewhere.

So – where does the understanding of obligation as a right lead us to?

Where have we read that freedom is duty? Or – that duty is freedom?
Was it in Hegel? That freedom is a recognised necessity?
Or maybe in “1984” – that freedom is slavery?

[22 November 2018]