

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

THIRD SECTION

CASE OF COLAC v. ROMANIA

(Application no. 26504/06)

JUDGMENT

STRASBOURG

10 February 2015

FINAL

10/05/2015

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



In the case of Colac v. Romania,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Dragoljub Popović,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 20 January 2015,

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

PROCEDURE

1. The case originated in an application (no. 26504/06) 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 Doru Colac ("the applicant"), on 6 June 2006.

2. The applicant was represented by Ms M. Smău, a lawyer practising in Iaşi. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his right to a fair trial guaranteed by Article 6 of the Convection had been breached because he had been unable to examine all the witnesses whose statements had served as the main basis for his conviction.

4. On 21 May 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Iaşi.

6. On 20 February 2003 the Iaşi Prosecutor's Office indicted the applicant and a third party for procurement and for unlawful deprivation of freedom. It held, amongst other things, that there was reasonable suspicion that the applicant and his co-accused had threatened and forced into prostitution five underage girls, namely C.R.R., M.A., F.P.D., I.A.P. and

G.S.S. It relied on testimonial evidence, including the statements of the five girls, the minutes of witness confrontations, a report of the search carried out at the applicant's home, lists of telephone calls, the applicant's medical documents, his statements and those of his co-accused.

1. Proceedings before the first-instance court

7. Between 20 March 2003 and 17 June 2004 the Iaşi District Court adjourned the proceedings fifteen times to allow, amongst other things, the summoning of the witnesses who had been heard at the pre-trial stage of the proceedings. At the hearings of 2 and 30 October 2003 the applicant's lawyer asked the court to hear the aforementioned witnesses. The court ordered that as from 27 November 2003 any witness who refused to appear should be fined.

8. Between 12 May 2003 and 3 March 2004, bailiffs tried seventeen times to enforce the warrants (*mandate de aducere*) issued by the court for some of the witnesses to appear before the court. According to the bailiffs' reports, witnesses had left the country (M.M.K., F.P.D. and I.A.P.), moved to unknown addresses (T.E.P., C.R.R., C.R. and G.C.R.) or could not be found at home (I.I.C.). I.I.C. was still living at the indicated address but was not found at home. C.R.R., as confirmed by her neighbours, had changed her name and had moved to an unknown address years earlier. T.E.P. was not living at the address known by the authorities; he had sold his flat and was not registered at a different one. According to the available information he had left for the United States of America. M.M.K., who was a foreign national, had left the country on an unspecified date and for an unknown destination, while F.P.D.'s and I.A.P.'s mothers declared that their daughters had left the country for Venice, Italy and Austria in November 2002 and on 18 March 2003, respectively, and that they did not know their addresses. According to I.A.P.'s relatives, she had married, changed her name and did not plan to return to Romania in the near future because she was pregnant. F.P.D.'s neighbours confirmed her mother's statements. G.C.R. had changed his name and according to his neighbours he had moved some time ago to an unknown address. C.R.'s address was incorrect and no one with the witness's first name lived at the available address.

9. The Iaşi District Court asked the Neamţ Population Records Office (*Serviciul de Evidenţă al Populaţiei Neamţ*), the Romanian Passport Service and the Iaşi Border Guard Service on several occasions to provide information on the whereabouts of the witnesses who had failed to appear before the court, namely T.E.P., M.M.K., C.R., F.P.D., I.A.P., G.C.R. and I.I.C. At the hearing of 27 November 2003 the court noted that the Neamţ Population Records Office had confirmed that the witness G.C.R. had changed his name to G.C.G. and continued to summon him under both names. On 22 December 2003 the Creţeşti Police Department informed the

court that according to I.A.P.'s relatives, she had left the country after marrying a Turkish national, and confirmed that she had changed her name and was residing at an unknown address in Austria. The authorities provided the courts with the available information concerning the aforementioned remaining missing witnesses, and stated repeatedly that they had no other records of their current valid addresses.

10. By interlocutory judgments of 4 September 2003, 8 January, 5 February and 3 June 2004 the Iaşi District Court held that on the basis of information provided in the enforcement reports produced by the bailiffs, the Neamţ Population Records Office, the Romanian Passport Service, the Iaşi Border Guard Service, Iaşi Prison and the Iaşi Police Department, it was impossible to hear C.R., G.C.R., F.P.D., I.A.P., T.E.P., M.M.K. and I.I.C. It relied on Article 327 of the former Romanian Criminal Procedure Code and held that the statements of G.C.R., F.P.D., I.A.P., T.E.P. and I.I.C. given at the pre-trial stage of the proceedings would be read out before the court at the end of the judicial investigation stage of the proceedings. Except for I.I.C.'s statement, there is no evidence in the case file that the statements of those witnesses were read out before the court.

11. On 8 January 2004 I.I.C. attended a hearing before the Iaşi District Court, but he was not heard by the court because the applicant's chosen legal representative was missing. The court adjourned the proceedings until later that day pending the arrival of the applicant's legal representative. I.I.C. informed the court that he could not wait because he had to undergo surgery. He asked to be summoned for the following hearing, and promised to present documentation attesting to his need for medical treatment. The court noted that the witness was living without being registered at an address in the town of Iaşi. By the time the proceedings were reopened that day, I.I.C. had left the court. He did not attend any subsequent hearings and the authorities failed to find him, although they also attempted to summon him at the aforementioned unregistered address.

12. Some of the witnesses who testified against the applicant at the pre-trial stage of the proceedings were located by the authorities and brought before the court.

13. On 2 and 30 October, 27 November 2003 and 1 April 2004 the Iaşi District Court heard M.A, G.S.S., D.V.D., F.H.A. and J.L.A. The court dismissed M.A.'s request to be heard in the applicant's absence. M.A. stated amongst other things that the applicant had threatened her and had forced her into prostitution. She had not met any other girls apart from C.R.R. and had been sold to the applicant by I.I.C. G.S.S. withdrew her previous statement given at the pre-trial stage of the proceedings and declared that the authorities had forced her to accuse the applicant of procurement. D.V.D. confirmed his previous statements given at the pre-trial stage of the proceedings. He contended that he knew the applicant and that although he had met some of the girls, they did not live with him. F.H.A. stated that he

did not know the applicant. Although he had had sex with several of the girls he had met at the club allegedly run by the applicant, he had not paid for it. L.A.J. withdrew his statement given at the pre-trial stage of the proceedings, denied that he knew the applicant or that he had previously been asked by the authorities if he had paid for sexual relations.

14. By an interlocutory judgment of 3 June 2004 the Iaşi District Court dismissed, among other things, a request lodged by the applicant's lawyer to adjourn the proceedings in order to allow him to locate I.I.C. and to bring him before the court as a witness. Having assumed that I.I.C. would be heard by the court, he had not examined the file thoroughly enough to be able to submit oral observations on behalf of the applicant. The court refused his request, holding that it had already decided that it was impossible to have I.I.C. heard and that the absence of the witness did not hinder the examination of the merits of the case.

15. On the same date the statement given by I.I.C. at the pre-trial stage of the proceedings was read out before the court. Subsequently, the court allowed the parties to submit oral observations on the merits of the case and allowed a request submitted by the applicant's lawyer to adjourn the proceedings in order to allow the parties to submit written observations on the merits of the case.

16. By a judgment of 22 June 2004 the Iaşi District Court acquitted the applicant of unlawful deprivation of freedom, convicted him of procurement and sentenced him to nine years' imprisonment. It held that the facts of the case had been established on the basis of the statements given by C.R. and G.C.R.; the statements of the girls forced into prostitution, namely C.R.R., G.S.S., F.P.D. and M.A. – the girls described how they had met the applicant and his co-defendant, and how they had prostituted themselves; they provided details on how they had been contacted by clients, the money given to the applicant, and the appearance of some of the clients; the report of the search carried out at the applicant's home; the description of the objects found in the applicant's home which belonged to C.R.R.; the letter received by I.A.P. from her mother, which referred to rumours that her daughter and the other girls had been prostituting themselves; the list of telephone calls made from the applicant's phone, which established the phone contact between the applicant, his co-defendant and some of the clients who had contacted the applicant's co-defendant or with whom she had had sexual relations, namely M.M.K., S.S., K.S.E., N.K., Y.F., F.H.A., T.E.P. and O.K.; and the witness testimonies of I.I.C., D.V.D., T.E.P., F.H.A., J.L.A. and M.M.K. made at the pre-trial stage of the proceedings, which established, with the help of the list of telephone calls and the statements of the five underage girls, the applicant's involvement in procurement. The court noted that only M.A. and D.V.D. had confirmed their own statements given at the pre-trial stage of the proceedings. It also noted that C.R., G.C.R., I.A.P., F.P.D., I.I.C. T.E.P. and M.M.K. could not

be heard as witnesses by the court. In addition, witnesses G.S.S., J.L.A. and F.H.A., like the applicant's co-defendant, had significantly changed the statements they had given at the pre-trial stage of the proceedings by affirming that they had never paid for sex. Having regard to the conflicting witness and co-defendant statements, the court decided to rely on those testimonies which had been confirmed by the other evidence available in the file. Consequently, it considered that the testimonies given by the witnesses and the co-defendant at the pre-trial stage of the proceedings were accurate as they had been made closer to the date of the unlawful acts and had also been corroborated by the remaining available evidence. Furthermore, it dismissed G.S.S.'s statement and those of the defendants given before the court because they contained several inaccuracies.

17. The applicant appealed against the judgment, arguing that the court had summoned as witnesses, but had failed to summon as victims, the five girls who had allegedly been forced into prostitution. In addition, the statements of the five girls were not supported by any other evidence, and all the victims of his alleged unlawful acts should have been heard by the court.

2. Proceedings before the second-instance court

18. By a judgment of 17 October 2005 the Iaşi County Court allowed in part the applicant's appeal in so far as the classification of his offence was concerned, upheld his sentence and dismissed the remaining points of his appeal. It held that given the nature of the unlawful act with which the applicant had been charged, it would not have been justified to summon as victims the girls he had forced into prostitution. Moreover, the applicant could not rely on the court's failure to do so as long as his personal interest was not affected. As for the facts established by the first-instance court, the appeal court held that they had been confirmed by the evidence in the file. In particular, the testimonies of the five girls, C.R.R., M.A., I.A.P., F.P.D. and G.S.S. had been corroborated by the testimonies of T.E.P., Y.F., N.K., K.S.E. and S.S. that with the help of the applicant's co-defendant, they had paid for sexual relations with several girls. I.I.C. had testified that the applicant had been interested in meeting girls who wanted to leave the country and work as dancers in bars, and G.C. had repeatedly driven the applicant and the girls to various hotels. Consequently, the appeal court considered that the first-instance court had correctly convicted the applicant of procurement.

19. The applicant appealed on points of law (*recurs*) against the judgment. He argued, amongst other things, that the court had summoned as witnesses, but had failed to summon as victims the five girls who had allegedly been forced into prostitution. In addition, the judicial investigation of the case had been insufficient because the evidence had not been administered publicly.

3. Proceedings before the last-instance court

20. At a hearing of 9 February 2006 before the Iaşi Court of Appeal the applicant's lawyer reiterated some of the arguments which he had raised before the second-instance court. Moreover, he contended that some witnesses, including A.P., G.C., O.P., had not been heard directly by the first-instance court and that the court had not provided reasons for its failure to hear them. Also, the address on the summons intended for I.I.C. had been incomplete. The summons had been sent to a town in the county of Neamț, even though the Neamţ Population Records Office had stated that the witness was not registered there. The courts had failed to hear other witnesses as well, including C.Z., and to take measures to bring those witnesses before them. Consequently, he asked the court to quash the judgments of the lower courts and to order a review of all the evidence in the file.

21. By a final judgment of 21 February 2006 the Iaşi Court of Appeal allowed in part the applicant's appeal on points of law in so far as it reduced his sentence to eight years' imprisonment, and dismissed the remainder of the appeal. It held that the lower courts had correctly established the facts of the case and the applicant's guilt on the basis of the evidence administered at the pre-trial stage of the proceedings and re-confirmed at the trial. The fact that the girls forced by him into prostitution had been summoned during the trial not as victims but as witnesses was not an argument the applicant could rely on as long as his personal interest had not been affected. As for the evidence establishing the facts of the case, the court reiterated the reasoning of the second-instance court. Moreover, the applicant's arguments that the court had failed to administer and examine directly all the evidence raised during the pre-trial stage of the proceedings, that his rights of defence had been breached and that the debate had not been adversarial were unsubstantiated. A court could rely either on the testimonies given at the pre-trial stage of the proceedings or on the ones given before the court if it was convinced that only some of them reflected the truth and were corroborated by the evidence in the file. A court could rely on the testimonies given at the pre-trial stage of the proceedings if it was impossible to hear the witness directly. A judgment could not be quashed on the grounds that a witness had not been heard directly by the court, unless a party had been prejudiced. In the present case, the lower courts had allowed the applicant's requests to hear the witnesses who had testified at the pre-trial stage of the proceedings and had taken measures to secure their attendance at the trial. The judgments of the lower courts could not be quashed because they had provided reasons for their inability to hear some of the witnesses, namely that they had left the country, and the testimonies had been read out at a public hearing. Consequently, the lower courts had followed the correct procedure in establishing the applicant's guilt by using

evidence collected both at the pre-trial and the trial stages of the proceedings.

22. On 3 October 2006 the applicant lodged an extraordinary appeal (*contestaţie în anulare*), seeking the quashing of the final judgment of 21 February 2006. He argued that his right of defence had been breached on 9 February 2006 because he had been unable to attend the hearings held before the last-instance court on account of his serious medical condition and therefore he had been unable to ask for additional evidence.

23. On 31 October 2006 the Iaşi Court of Appeal allowed the applicant's extraordinary appeal, quashed the judgment of 21 February 2006 and ordered the last-instance court to re-examine the appeal on points of law lodged by the applicant against the judgment of 17 October 2005 because he had been unable to attend the hearings before the last-instance court on account of his medical condition.

24. On 1 March 2007 the applicant submitted his reasons for appeal on points of law before the last-instance court. He argued, among other things, that some of the witnesses, including A.P., G.C., O.P., had not been heard. In addition, the first-instance court had dismissed the request to re-summon the witness I.I.C., whose testimony had been relevant for the case. Other witnesses, including C.Z., had also not been heard and no steps had been taken to bring them before the first-instance court.

25. By a final judgment of 21 December 2010 the Iaşi Court of Appeal allowed in part the applicant's appeal on points of law against the judgment of 17 October 2005 and reduced his sentence to seven years' imprisonment. It held that the first and second-instance courts had been active and had collected all the relevant evidence for the case. They had diligently taken all the necessary steps in order to hear the evidence directly and to verify the applicant's defence arguments. They had valid reasons for not having directly heard all the victims and witnesses in the case, namely that the individuals in question had left the country. Consequently, the courts had applied Article 327 of the Romanian Code of Criminal Procedure. The factual circumstances had been established on the basis of C.R.'s and G.C.R.'s statements; the statements of the girls forced into prostitution, namely C.R.R., G.S.S., F.P.D. and M.A., who described how they had met the defendants and how they had prostituted themselves, and provided details on how they had been contacted by clients and on the money given to the applicant; the report of the search carried out at the applicant's home; the report containing a description of the objects belonging to C.R.R., which had been found in the applicant's home; the letter received by I.A.P. from her mother, which had been found in the applicant's home; the list of telephone calls made from the applicant's phone, which had established the phone contact between the defendants and some of the clients who had contacted the applicant's co-defendant or with whom she had had sexual

relations; and the witness testimonies of I.I.C., D.V.D., T.E.P., F.H.A., J.L.A. and M.M.K.

4. Other relevant information

26. On an unspecified date the Iaşi Prosecutor's Office instituted criminal proceedings for perjury against the witness G.S.S. who had changed her testimony before the first-instance court in the applicant's favour.

27. By an order of 15 June 2006 the Iaşi Prosecutor's Office discontinued the criminal proceedings for perjury against G.S.S. on the grounds that her action had not met the level of severity required for an offence and the domestic courts had disregarded her statement given at the trial. However, it fined G.S.S. the sum of RON 1,000 (approximately EUR 200) for her behaviour. G.S.S. did not challenge the order before the domestic courts.

II. RELEVANT DOMESTIC LAW

28. Article 327 § 3 of the former Romanian Criminal Procedure Code provided that when it was impossible for a court to hear a witness it should read out his or her testimony given at the pre-trial stage of the proceedings and take it into consideration when examining the case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant complained that his trial had been unfair in that he had been unable to cross-examine all the witnesses whose statements had served as the main basis for his conviction. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

30. 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

31. The applicant submitted that in his case it had been crucial that the witnesses for the prosecution be heard directly by the court in his and his legal representative's presence, because the witnesses had been heard only at the pre-trial stage of the proceedings by a prosecutor without the attendance of himself or his legal representative. In addition, the relevant domestic legislation in force when the prosecution witnesses had been heard had not allowed the accused to attend the hearing of witnesses at the pre-trial stage of proceedings.

32. The applicant contended that the domestic courts had failed to directly hear almost all of the witnesses. Only M.A. had been brought before the court and had confirmed her previous testimony. In addition, he contested the Government's submission that he had had the opportunity to examine the witnesses before the court.

33. The applicant also submitted that the domestic courts had not been diligent enough when summoning the witnesses to appear before them. In particular, the summonses issued by the first-instance court had either lacked information on the witnesses' identity or had been illegible. In addition, the domestic authorities had taken measures to intimidate and influence the witnesses. In particular, they had instituted perjury proceedings against G.S.S. after she had decided before the first-instance court to change the testimony which she had given at the pre-trial stage of the proceedings.

34. The applicant contended that his conviction had been based to a decisive extent on witness statements which he had never had the opportunity to examine. In addition, the authorities had failed to make reasonable efforts to secure the presence of the relevant witnesses before the court. Even though his sentence had eventually been reduced, the domestic courts had still relied on the testimony of witnesses whom the applicant had not had an opportunity to cross-examine directly.

35. The Government submitted that although the individual right to examine witnesses whose statements served as a basis for conviction was important, it was not absolute and if necessary was amenable to some restrictions. They also contended that the applicant had been assisted by a legal representative during both the pre-trial and the trial stages of the

proceedings. Although he and his legal representative had not been present when the witnesses had been heard at the pre-trial stage of the proceedings, he had had the opportunity to examine them before the domestic courts. Thus, M.A. was heard by the domestic courts in the presence of the applicant and his lawyer. In addition, G.S.S. changed her testimony given at the pre-trial stage of the proceedings, but she was found guilty of perjury.

36. The Government argued that the applicant's conviction had not been based merely on the witnesses' testimonies. The domestic courts had also relied on other relevant evidence. They had made an overall assessment of the available evidence, corroborated the evidence against him and provided grounds for dismissing the evidence in his favour.

37. The Government emphasised that the hearing of the witnesses by the domestic courts had been made even more difficult given the peculiar relationship between the applicant and his victims. In particular, they were scared of him, as attested also by M.A.'s request to be heard in the applicant's absence.

38. The Government maintained that the proceedings instituted against the applicant had not been arbitrary. The applicant and his chosen lawyer had the opportunity to submit any arguments in his defence before the courts and to ask M.A. any questions in order to clarify the circumstances of the case. The courts directly heard all the witnesses who attended the hearings, discarded any unconvincing statements by providing relevant reasons and made substantial efforts to find those witnesses who had failed to appear before them, before concluding that it had been impossible to hear them. In addition, one crucial witness testimony given at the pre-trial stage of the proceedings had been read out before the court.

2. The Court's assessment

39. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. For this reason, the Court considers it appropriate to examine the complaint under the two provisions taken together (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and *Aigner v. Austria*, no. 28328/03, § 33, 10 May 2012).

40. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among other references, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010). In making this assessment the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Doorson v. the Netherlands*,

26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II). It is also recalled in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Al-Khawaja and Tahery*, cited above, § 118).

41. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Gabrielyan v. Armenia*, no. 8088/05, § 76, 10 April 2012, and *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X).

42. The Court notes that the present application does not concern witnesses whose identity were concealed from the accused. In the instant case a significant number of the victims of and witnesses to the impugned events, namely C.R., G.C.R., C.R.R., F.P.D., I.A.P., I.I.C., T.E.P., M.M.K., Y.F., N.K., K.S.E., S.S. and G.C., refused to testify in court and could thus not be heard by the trial court. Nor was the defence able to examine them or observe their demeanour under questioning with a view to forming their own impression of their probity and credibility. Notwithstanding the judgment of the Iaşi Court of Appeal of 21 February 2006, except for the testimony of I.I.C. there is no evidence in the file that the statements made at the pre-trial stage of the proceedings by the aforementioned witnesses in the presence of a prosecutor were actually read out at trial before being admitted as evidence by the domestic courts. It appears from the available evidence and the parties' submissions that when the witnesses were examined at the pre-trial stage of the proceedings, the applicant and his legal representative were not present. Thus the defence had no opportunity to confront those witnesses at any stage of the proceedings.

43. As regards the introduction of testimonies by witnesses who did not appear in court and who could not be questioned by the accused at any stage of the proceedings, the Court has clarified in its judgment in the case of *Al-Khawaja and Tahery* (cited above, §§ 119 and 147) that in determining whether the admission of such evidence was compatible with the right to a fair trial, it had first to be established that there was a good reason for the non-attendance of the witnesses. Secondly, where the evidence of an absent witness was the sole or decisive basis for a conviction, sufficient

counterbalancing factors were required, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, §§ 119 and 147).

44. The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined. This is because as a general rule witnesses should give evidence during the trial and all reasonable efforts should be made to secure their attendance. Thus, when witnesses do not attend to give live evidence, there is a duty to enquire whether that absence is justified (see *Gabrielyan*, cited above, § 78).

45. Therefore, the preliminary question for the Court to examine in the present case is whether there was a good reason for admitting in evidence the pre-trial statements of C.R., G.C.R., C.R.R., F.P.D., I.A.P., I.I.C., T.E.P., M.M.K., Y.F., N.K., K.S.E., S.S. and G.C. without having them questioned at the trial.

46. The reason relied on by the domestic authorities for admitting in evidence the testimonies of those witnesses without having them questioned at the trial was that the trial court had been unable to secure their presence. They relied on Article 327 of the former Romanian Criminal Procedure Code, which provided for such a possibility.

47. The Court notes that the authorities' inability to locate a witness may, under certain conditions, justify the admission of the witness's statement in evidence, even though the defence has had no opportunity to question him or her (see *Tseber v. the Czech Republic*, no. 46203/08, § 48, 22 November 2012). However, the domestic authorities must take positive steps to enable the accused to examine or have examined witnesses against him (see *Lučić v. Croatia*, no. 5699/11, § 79, 27 February 2014), which means that they should actively search for the witnesses (see *Rachdad v. France*, no. 71846/01, § 24, 13 November 2003). The Court must therefore satisfy itself that the domestic authorities did everything reasonable to secure the presence of the witness. In other words, the Court must establish whether the absence of the witness is imputable to the domestic authorities (see *Lučić*, cited above, § 79).

48. The Court is ready to accept that the domestic courts made certain efforts to enquire about the reasons for the absence of the witnesses whom the defence was never able to examine, and to secure their attendance. The first-instance court appears to have repeatedly summoned the witnesses unsuccessfully and subsequently resorted to the help of bailiffs in order to force some of the witnesses to appear (see paragraphs 7 and 8 above). In

addition, it repeatedly asked the relevant domestic authorities to provide information on the potential whereabouts of some of the witnesses (see paragraph 9 above). The domestic authorities appear to have made efforts to find the current location of some of the witnesses and to enquire about the reasons for their absence. In particular, the authorities established that I.A.P. and F.P.D. had left the country for Austria and Italy, respectively. In addition, they established that M.K.K., a foreign national, was also absent from the country and that some of the absent witnesses had changed their names or had left the addresses at which they had been registered for years and were potentially residing abroad.

49. However, the authorities appear to have made no further efforts to establish the whereabouts of the witnesses. They accepted the reply they received from the mothers of I.A.P. and F.P.D. – that their daughters were living in Austria and Italy, respectively, at unknown addresses – without making any further enquiries, and it does not appear from the available evidence that they made any attempts to establish their exact location by resorting to international legal assistance mechanisms, if that was indeed the case. As regards M.M.K., the domestic authorities made no attempt to ask the authorities in his country of origin –also by resorting to international legal assistance mechanisms – to establish his whereabouts. Nor was the information about T.E.P.'s potential departure to the United States of America verified (see paragraph 8 above). In addition, the allegations made by the applicant's lawyer that I.I.C. had been summoned at an incorrect address do not appear to have been dealt with by the domestic authorities, although it appears from the available evidence that I.I.C. had been living without being registered at an address in a town outside the county of Neamț (see paragraphs 8 and 11 above). Furthermore, no summonses seem to have been issued for Y.F., N.K., K.S.E., S.S. or G.C. and there is no evidence in the file that the authorities made reasonable efforts to locate those witnesses or to secure their presence before the domestic courts.

50. The Court therefore is not convinced that the efforts made by the authorities can be said to have been sufficient in the circumstances of the case (see *Artner v. Austria*, 28 August 1992, § 21, Series A no. 242-A, where the Austrian police were instructed by the trial court to make every effort to find a missing witness; *Berisha v. the Netherlands* (dec.), no. 42965/98, 4 May 2000, where the Dutch authorities tried to call a witness residing in the Slovak Republic through the Slovak authorities; and *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005, where the German authorities made considerable efforts to secure the attendance of a witness serving a prison sentence in Lebanon). Thus, it cannot be said that there were good reasons for the failure to have the missing witnesses examined or that the domestic authorities complied with their duty to enquire whether their absence was justified.

51. It is true that on 8 January 2004 the applicant failed to question I.I.C. before the trial court because his chosen legal representative was absent and that on 3 June 2004 I.I.C.'s testimony given at the pre-trial stage of the proceedings was read out in court (see paragraphs 11 and 15 above). This, however, is not sufficient for the Court to conclude that the applicant thereby waived his right to examine that witness. In this connection, the Court reiterates that any waiver of the exercise of a right guaranteed by the Convention – in so far as such waiver is permitted in domestic law – must be established in an unequivocal manner (see *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). The Court notes that the applicant complained repeatedly before the first-instance court and subsequently before the appellate court that he was being denied the opportunity to hear the witnesses in the case in general and I.I.C. in particular (see paragraphs 14, 20 and 24 above). The fact that the domestic courts made attempts, albeit unsuccessful, to ensure their appearance or dismissed the applicant's requests to that end by repeatedly claiming that it was impossible to hear them similarly suggests that the applicant was not considered to have waived his right to examine them.

52. As to the Government's argument that the hearing of the witnesses by the courts was made even more difficult given their fear of the applicant, the Court notes that M.A.'s request to be heard by the first-instance court in the applicant's absence was dismissed. In addition, there is no evidence in the file that the domestic courts considered the witnesses' fear or that they relied on it as grounds for their decision declaring the hearing of some of the witnesses impossible. Furthermore, the domestic courts did not rely on or apply any special measures allowing the witnesses not to appear at the trial; nor have the Government shown in their observations that the witnesses did not attend because such measures had been applied (contrast *Vronchenko v. Estonia*, no. 59632/09, § 58, 18 July 2013). There is therefore no reason for the Court to examine this aspect any further (see *Tseber*, cited above, § 47).

53. The foregoing considerations are sufficient, on their own, to enable the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention (see *Al-Khawaja and Tahery*, cited above, §§ 120, and *Nikolitsas v. Greece*, no. 63117/09, § 35, 3 July 2014).

54. Nonetheless, the Court notes in the instant case that the domestic courts convicted the applicant for procurement by relying on pieces of evidence other than the testimonies of the missing witnesses. However, even if the Court could accept that the statements of the missing witnesses may not have been the sole or decisive evidence on which the applicant's conviction was based, it appears from the grounds provided by the domestic courts that their testimonies carried considerable weight in the establishment of the circumstances of the case and of the applicant's guilt.

55. Also, the applicant was not given the opportunity to examine the aforementioned witnesses or to have them examined either during the pre-trial proceedings or in court. Moreover, the domestic authorities did not observe the criminal procedure rules in force at the material time, which had been put in place to counterbalance the absence of witnesses, and the pre-trial statements of the missing witnesses were not read out at trial before being admitted as evidence.

56. In the light of the above, the Court considers that there has been a violation of Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

57. Relying on Article 6 §§ 1 and 3 (b) of the Convention the applicant also raised a number of other complaints concerning alleged breaches of his rights guaranteed by the Convention.

58. The Court has examined these complaints as submitted by the applicant. However, having regard to all the material in its possession, and in so far as they fall within its jurisdiction, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicant claimed 250,000 euros (EUR) in respect of non-pecuniary damage on account of the psychological harm caused by the unfairness of the criminal proceedings instituted against him.

61. The Government submitted that the applicant's claim was excessive and that a potential finding of a violation would amount to sufficient just satisfaction.

62. The Court considers that the applicant must have suffered some distress as a result of the criminal proceedings instituted against him. Consequently, making an assessment on an equitable basis, the Court

awards the applicant EUR 2,400 in respect of non-pecuniary damage, plus any tax that may be chargeable.

63. Moreover, the Court reiterates that when a person, as in the instant case, was convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the impugned violation. In this respect, it notes that Article 465 of the Romanian Code of Criminal Procedure provides for the possibility of revision of a domestic trial where the Court has found a violation of an applicant's fundamental rights and freedoms.

B. Costs and expenses

64. The applicant also claimed EUR 200 for the costs and expenses incurred before the Court.

65. The Government submitted that although the applicant had referred in his submissions before the Court to documents supporting his claim, he had failed to attach them to his submissions.

66. 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, the above criteria and the absence of the supporting documents referred to by the applicant, the Court rejects the applicant's claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning an alleged violation of the applicant's right to examine witnesses against him admissible, and the remainder of the application inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 10 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Josep Casadevall President