

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

FOURTH SECTION

CASE OF TĂU v. ROMANIA

(Application no. 56280/07)

JUDGMENT

STRASBOURG

23 July 2019

This judgment is final but it may be subject to editorial revision.



In the case of Tău v. Romania,

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

Paulo Pinto de Albuquerque, *President,*
Iulia Antoanella Motoc,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 4 September 2018 and 2 July 2019,

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

PROCEDURE

1. The case originated in an application (no. 56280/07) 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 Tău ("the applicant"), on 12 December 2007.

2. The applicant was represented by Mr R.L. Chiriţă, a lawyer practising in Cluj-Napoca. The Romanian Government ("the Government") were represented by their Agent, Mrs C. Brumar, from the Ministry of Foreign Affairs.

3. The applicant complained that the criminal proceedings conducted against him on charges of drug-trafficking had violated his right to a fair trial under Article 6 §§ 1 and 3 (c) and (d) of the Convention. Relying on Article 5 § 1 of the Convention he also complained that he had been unlawfully detained for the period between 3 and 10 July 2007 despite his release being ordered by the Bucharest District Court on 3 July 2007.

4. On 25 October 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1944 and lives in Cluj-Napoca.

1. Background to the criminal proceedings

6. The applicant was arrested and investigated in criminal proceedings concerning five international drug-trafficking networks. The proceedings were widely reported in the media, as they concerned one of the biggest drug-trafficking cases investigated by the Romanian authorities at the time.

7. On 7 July 2003, F.D. and P.A. were questioned by the police and the public prosecutor. They both stated that the applicant was involved in the drug-trafficking.

8. According to the applicant, the prosecuting authorities explored the possibilities of reaching an agreement whereby the accused would give statements about others involved in drug-trafficking in exchange for a reduced sentence. He suggested that such an agreement had been reached with F.D. and P.M. (the ex-wife of accused P.A.) who had not been indicted although they had recognized that they had transported drugs on several occasions.

2. The applicant's arrest and pre-trial detention

9. On 14 July 2003, at about 00.30 p.m., two police officers took the applicant into custody and transported him to the prosecutor's office attached to the High Court of Cassation and Justice located in Bucharest.

10. According to the applicant, the prosecutor took his first statement in the presence of an officially appointed lawyer, G.S.C., who had also been assisting two other co-accused, P.A. and F.D. The applicant denied any involvement in drug-trafficking. The applicant maintained the same attitude of denial of the charges throughout the proceedings.

11. At about 1.30 a.m. the prosecutor issued an arrest warrant for a period of three days in the applicant's name.

12. The next day the applicant was brought before the High Court of Cassation and Justice for the examination of the prosecutor's request concerning his pre-trial detention. He alleges that he was assisted by the same officially appointed lawyer despite the fact that he insisted to be assisted by a lawyer of his own choosing.

13. The applicant affirmed that he had complained to the prosecutor and then to the judges that he could not be assisted by a lawyer of his choice and that instead he had been assisted by an officially appointed lawyer who also had assisted his co-defendants, P.A. and F.D. However, the criminal case file contains no written trace of any such complaints.

14. According to the documents submitted by the applicant, he engaged a lawyer practicing in Cluj-Napoca on 15 July 2003.

15. On 29 July 2003 the applicant, in the presence of his lawyer, was confronted with F.D. According to the record, the latter stated that he had heard about the applicant's involvement in packing and dissimulating drugs from P.A., but that he had never seen him performing these kinds of activities.

16. The applicant's pre-trial detention was repeatedly extended by the Bucharest County Court by interlocutory decisions. The applicant, assisted by his lawyer, attended the hearings.

3. The proceedings on the merits of the case

17. On 25 September 2003 the prosecutor issued an indictment concerning twenty-six accused persons, including the applicant, and the

next day the case was registered with the Bucharest County Court. F.D. and P.M. had not been indicted although they had recognized their involvement in drug-trafficking.

18. The applicant's co-accused, P.A., was heard on 7 February 2005 by the court of first instance. He stated among other things that the applicant had helped him in packing drugs. He also stated that the applicant had been his friend since 1994 and that he had provided services for his pharmaceutical company between 1999 and 2001 on the basis of a contract.

19. On 9 September 2005, I.I., an under-cover agent, gave a statement before the court. She was asked to mention the members of the drug-trafficking network and the role played by each of them. She did not mention anything about the applicant although in her initial statement given before the prosecutor on 9 June 2003 she had stated that many drug transports had left from the applicant's home. She finished her testimony by stating that "there were no other persons involved in drug trafficking*"*. The judge did not ask her additional questions to clarify the role played by the applicant in the drug-trafficking network.

20. On 29 September 2005 the judicial investigation was closed and the lawyers of the accused and the accused themselves submitted their arguments on the merits of the case; the delivery of the first-instance judgment was postponed to 4 October 2005.

21. By a first-instance judgment of 4 October 2005 the Bucharest County Court found the applicant guilty and convicted him to sixteen years' imprisonment. He was found guilty of taking part in international drug trafficking by facilitating the transport of drugs.

22. His conviction was based on statements given by undercover agent I.I., co-accused P.A. and witness F.D. The latter did not give any evidence before the court. Therefore, the court relied on his witness' pre-trial statements accusing the applicant.

23. The relevant part of the judgment stated as follows:

> "The drugs transported by P.A., P.M. and F.D. had been packed at T.I.'s (the applicant) home. This aspect was revealed by defendant P.A. and witness F.D. The latter stated during the confrontation with defendant T.I. that he had been sent by P.A. to T.I.'s home to have returned special material used for packing the drugs as well as a device used to glue plastic foil; both had been handed to him by defendant T.I.
>
> The involvement of defendant T.I. in the packing and marking of the drugs throughout the year 2002 is confirmed by co-defendant P.A., witness F.D. and undercover agent I.I."

24. The applicant appealed against the conviction. He disputed his involvement in the criminal offence and disagreed with the way the trial court had established the relevant facts. He submitted in particular that the trial court had mainly based its decision on statements made by the co-accused before the prosecutor. He pointed out that I.I. had changed her

statement before the court and that he could not confront F.D. in open court despite his repeated requests.

25. On 7 June 2006 the Bucharest Court of Appeal reversed the judgment in respect of the applicant and his sentence was reduced to eight years' imprisonment on the grounds that he was an accomplice, had no criminal record and he was more than sixty years old. The Appeal Court held that the applicant had just supported the activities of the gang by providing help with the packing of the drugs which were to be transported, by storing them on the premises of his home and then allowing them to be collected by other members of the network. The court made no reference to the applicant's complaints that he could not confront in open court F.D.

26. On 14 June 2007, the High Court of Cassation and Justice dismissed an appeal on points of law by the applicant. It upheld the decision of 7 June 2006 endorsing the Bucharest Court of Appeal's reasoning. It concluded by stating that the applicant's allegations that he had not committed any offence related to drug-trafficking had been contradicted by the statements of witness F.D., co-accused P.A. and undercover agent I.I.

27. By an interlocutory judgment of 3 July 2007, the Bucharest District Court ordered the release of the applicant under probation. He was released from prison on 10 July 2007.

II. RELEVANT DOMESTIC LAW AND PRACTICE

28. The relevant domestic law and practice concerning unlawful detention are set out in *Dragomir v. Romania* (dec.), no. 59064/11, §§ 9-14, 3 June 2014.

29. Excerpts from the relevant provisions concerning the hearing of witnesses are described in *Bobeş v. Romania*, no. 29752/05, §§ 22-24, 9 July 2013.

THE LAW

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

30. Relying on Article 6 §§ 1 and 3 (c) and (d) of the Convention, the applicant complained of a number of breaches of the guarantees of fair trial. In particular, he complained that on the first two occasions when he had been questioned he had been assisted by an officially appointed lawyer who had also been assisting the co-accused P.A. and F.D. in spite of the fact that he had requested to be assisted by a lawyer of his own choosing. The applicant also claimed that he had not been given the opportunity to confront in open court witness F.D. whose statements had been relied upon in convicting him.

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

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

A. Admissibility

32. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

33. The Government contended that the applicant had not been denied the right to appoint a lawyer of his own choice during the first two sessions of questioning. Moreover, the legal representation ensured by the lawyer appointed *ex officio* had been practical and effective. They acknowledged that lawyer G.S.C., who had assisted the applicant on 14 and 15 July 2003, had previously assisted the applicant's co-accused P.A. and F.D. However they contended that P.A. had appointed a new lawyer on 15 July 2003 and that F.D., who appointed G.S.C. on 27 May 2003, had not had competing interests with the applicant until 29 July 2003, when they were confronted.

34. As regards the applicant's complaint that he and his lawyer had not been able to cross-examine all the witnesses whose statements served as the main basis for his conviction, the Government maintained that although some co-accused and witnesses had been heard in the applicant's absence at the investigation stage, he had had the opportunity to cross-examine them in the presence of the lawyer of his choice before the courts. The Government submitted that although co-accused F.D. had not been re-heard in court in the applicant's presence, the applicant had the opportunity to confront him before the investigation authorities on 29 July 2003 (see paragraph 15 above). Witness P.M., who gave statements on his former husband's involvement in the criminal activity and on the identity of his accomplices,

including the applicant, refused to be present in court. Therefore, the Court of Appeal put aside her statements. Moreover, the applicant's conviction had not been exclusively based on the witnesses' statements. The domestic courts based their rulings on other evidence, such as research on the spot and documentary evidence. They had made an overall assessment of the evidence adduced in the case file. They discarded part of the statements given by co-accused P.A. because they could not be corroborated with other pieces of evidence.

(b) The applicant

35. The applicant submitted that on the first two occasions when he had been questioned by the prosecutor he had been denied the assistance of the counsel of his own choosing and had been assigned an *ex officio* lawyer who had been already representing two of the co-accused (F.D. and P.A.), who had made incriminatory statements against him. Such legal assistance could not be considered as effective.

36. As regards the fact that his sentencing was based to a large extent on the statements of F.D., whom he could not question or confront in open court, the applicant contended that his situation was similar to that of the applicant in the case *Melnikov v. Russia* (no. 23610/03, 14 January 2010). Moreover, his confrontation with F.D. at the investigation stage had been conducted by an investigator who did not meet the requirements of independence and impartiality of a judge.

37. The applicant concluded by pointing out that apart from the statements of F.D. his conviction had been based on the contradictory statements of protected witness I.I. and the statements of one of his co-accused, P.A., who had obviously had an interest in involving him in the crime network.

2. The Court's assessment

(a) The applicant's legal assistance on the first two occasions when he had been questioned (Article 6 §§ 1 and 3 (c) of the Convention)

(i) General principles

38. The Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008, and *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015). Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the

investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54, and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 255, ECHR 2016).

39. Article 6 § 3 (c) does not secure an autonomous right but must be read and interpreted in the light of the broader requirement of fairness of criminal proceedings, considered as a whole, as guaranteed by Article 6 § 1 of the Convention. In particular, compliance with the requirements of a fair trial must be examined in each case with regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (*see Ibrahim and Others*, cited above, §§ 250 and 251). Article 6 § 3 (c) leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial system, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 113, CEDH 2017 (extracts), and *Salduz*, cited above, § 51).

40. From the outset the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Salduz,* cited above § 54). It also emphasises that a person charged with a criminal offence should already be given the opportunity at this stage to have recourse to legal assistance of his or her own choosing (see *Dvorski,* cited above, § 108; see also *Martin v. Estonia*, no. 35985/09, §§ 90 and 93, 30 May 2013).

(ii) Application of the above principles to the circumstances of the present case

41. The present case concerns a situation where the applicant was afforded access to a lawyer from his first interrogation, but not – according to his complaint – a lawyer of his own choosing. Moreover, the lawyer assigned to the applicant was already representing two co-accused, P.A. and F.D., whose interests conflicted with his (see paragraph 10 above).

42. The parties disagreed on whether the applicant had requested to be assisted by a lawyer of his own choice during the first two sessions of his questioning, namely on 14 and 15 July 2003.

43. In this respect the Court notes that there is no evidence in the file to corroborate the applicant's allegations that he had requested to be assisted by a lawyer of his choosing and that his request had been ignored (see paragraph 13 above). Therefore, the Court dismisses the applicant's complaint that he was prevented from being represented by a lawyer of his own choosing at any of the first two hearings.

44. The applicant further complains that the *ex* officio lawyer who had been assigned to him for the first two hearings had been already

representing two other suspects who had made incriminatory statements against him. In his view, such legal assistance could not be considered effective. The Court will therefore seek to establish whether this particular circumstance affected the effectiveness of legal assistance provided to the applicant.

45. In this respect the Court reiterates that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. The national authorities are only bound to intervene when the failure of the legal-aid counsel to provide an effective representation is manifest or sufficiently brought to their attention in some other way (see *Czekalla v. Portugal*, no. 38830/97, § 60, ECHR 2002-VIII; *Pavlenko v. Russia*, no. 42371/02, § 99, 1 April 2010; *Mihai Moldoveanu v. Romania*, no. 4238/03, §§ 73-75, 19 June 2012; and *Janyr v. the Czech Republic*, no. 42937/08, § 68, 31 October 2013).

46. In some cases, the applicants had a specific complaint about the conduct of their court appointed lawyer, for example in *Jemeļjanovs v. Latvia* (no. 37364/05, 6 October 2016) and *Gabrielyan v. Armenia* (no. 8088/05, 10 April 2012), where the applicants complained that their court-appointed lawyer had been passive or had failed in some way to advance their case properly. Nevertheless, even in absence of an applicant's complaint, the domestic authorities are not relieved from a duty to ensure effective legal assistance (see *Mihai Moldoveanu,* cited above, § 75).

47. The Court notes that in the present case, the applicant, assisted by a lawyer of his own choice after 15 July 2003 (see paragraph 14 above), actively participated at all stages in the criminal proceedings. However, he had not, at any stage in the criminal proceedings before the domestic courts, raised any complaint concerning the efficacy of the legal assistance ensured by the officially appointed lawyer on the ground that the latter had assisted co-defendants with whom he had conflict of interests.

48. Furthermore, the Court does not perceive any shortcomings in the way the applicant was represented by the officially appointed lawyer during the first two hearing. It attaches decisive importance to the fact that during that period, no evidence capable of being used against the applicant was taken from him and included in the case file. In this connection, the Court notes that in his first two statements of 14 and 15 July 2003 respectively, given in the absence of a lawyer of his own choosing, the applicant had not confessed the commission of any offence (see paragraph 10 above). Furthermore, the applicant did not personally allege before the Court that the domestic courts had possessed evidence presented during that period and used it at the trial in order to secure his conviction (see, *mutatis mutandis*, *Simeonovi*, cited above, § 136).

49. In the light of these findings, the Court considers that the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by the fact that on the first two occasions when he

had been questioned he had been assisted by an officially appointed lawyer who had also been assisting two other co-accused.

50. Accordingly, there has been no violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.

(b) The use of untested witness evidence as a basis for the applicant's conviction (Article 6 §§ 1 and 3 (d) of the Convention)

(i) General principles

51. 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. According to the Court's case-law, the use in evidence of statements obtained at the police inquiry and judicial investigation stages is not in itself inconsistent with the provisions cited above, provided that the rights of the defence have been respected (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C). In principle, these rules require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage of proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

52. In *Al-Khawaja and Tahery* (cited above, §§ 119-147), the Grand Chamber clarified the principles to be applied when a witness does not attend a public trial. Those principles may be summarised as follows (see also *Boyets v. Ukraine*, no. 20963/08, § 75, 30 January 2018):

(i) the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

(ii) typical reasons for non-attendance are, as in the case of *Al-Khawaja and Tahery* (cited above), the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend a trial;

(iii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iv) the admission as evidence of the statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings;

(v) according to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(vi) in this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive;

(vii) however, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(viii) in particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

53. Those principles have been further clarified in *Schatschaschwili v. Germany* ([GC] no. 9154/10, §§ 110-131, ECHR 2015), in which the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the

counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see also *Boyets*, cited above, § 76, and *Valdhuter v. Romania*, no. 70792/10, § 45, 27 June 2017).

(ii) Application of the above principles to the circumstances of the present case

(α) Whether there was a good reason for the non-attendance of witness F.D. at the trial

54. The preliminary question for the Court to examine is whether there was a good reason for admitting the pre-trial statement of witness F.D. in evidence without having him questioned at the applicant's trial.

55. In cases concerning a witness's absence because he or she was unreachable, the Court requires the trial court to have made all reasonable efforts to secure the witness's attendance. They must have actively searched for the witness with the help of the domestic authorities including the police and must, as a rule, have sought to international legal assistance in cases where the witness resided abroad and such mechanisms were available. This implies careful scrutiny by the domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness (see *Schatschaschwili*, cited above, §§ 120-122).

56. Turning to the instant case, the Court notes that in spite of the applicant's repeated requests to be confronted with F.D., the domestic courts neither made any efforts to secure his presence at the trial nor provided any reasons for his non-attendance (see paragraphs 20 and 25 above). Furthermore, there is no evidence to suggest that F.D. was asked, and refused, to make depositions within the framework of the applicant's trial for any reason. The Court cannot, therefore, conclude that there was a good reason for the non-attendance of F.D. or that the trial court had made all reasonable efforts to secure F.D's attendance at the trial.

57. However, the absence of a good reason for the non-attendance of witness F.D. at the trial of the applicant is not of itself conclusive of the lack of fairness of a criminal trial, although it constitutes a very important factor to be weighed in the balance when assessing the overall fairness of a trial (see *Schatschaschwili*, cited above, § 113).

(β) Whether the evidence of the absent witness F.D. was the "sole or decisive" basis for the applicant's conviction

58. As regards the second step of the *Al-Khawaja* test, that is the question of whether the evidence of the absent witness whose statement was admitted in evidence was the sole or decisive basis for the defendant's conviction, the Court observes that the judgments of the domestic courts listed the statement given by witness F.D. at the pre-trial stage of the investigation in the evidence substantiating the applicant's guilt without any evaluation as to whether the applicant's conviction was based to a decisive

extent on the statement of this witness (see paragraph 23 above). The Court must therefore make its own assessment of the weight of the evidence given by the absent witness having regard to the additional incriminating evidence available (see *Schatschaschwili*, cited above, §§ 124 and 143, and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 88, 12 May 2016).

59. In this connection, the Court notes that the applicant's guilt had been established based on the statements of witness F.D., co-accused P.A. and undercover agent I.I. (see paragraphs 22 and 26 above).

60. Having regard to the evidentiary basis of the applicant's conviction on the charge of drug trafficking, the Court considers that, while the statement of witness F.D. may not have been the sole or decisive evidence on which the applicant's conviction was based, it clearly carried significant weight in the establishment of his guilt (see the case-law cited in paragraph 53 above).

(χ) Whether there were sufficient "counterbalancing factors" to compensate for the handicaps under which the defence labored

61. The Court must lastly determine whether there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of the evidence of the absent witnesses to take place. The following elements are relevant in this context: (a) whether the trial court approached the untested evidence of an absent witness with caution; (b) whether the domestic courts provided detailed reasoning; (c) whether there was corroborative evidence supporting the untested witness statement; (d) whether the applicant or his defence counsel had been given an opportunity to question the witness during the investigation stage; (e) whether the defence was offered the possibility to put its own questions to the witness indirectly in the course of the trial; and (f) whether the defendant was afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness (see *Schatschaschwili*, cited above, §§ 125-131).

62. As regards the domestic courts' treatment of the evidence of the absent witness F.D., the Court observes that there is no indication in their judgments that they approached his statement given at the pre-trial stage with any specific caution. The courts' judgments do not contain any indication that they were aware of the reduced evidentiary value of the untested witness statement (see, by contrast, *Brzuszczyński v Poland*, no. 23789/09, §§ 85-86, 17 September 2013, and *Ben Moumen v. Italy*, no. 3977/13, § 58, 23 June 2016). On the contrary, the statement of the untested witness was listed along with other evidence substantiating the applicant's guilt, without any assessment of its credibility. The Court therefore considers that the domestic courts failed to examine the reliability of the absent witness's statement in a careful manner.

63. The Court further notes that the applicant's conviction was also based on the testimonies of under-cover agent I.I. In this respect the Court notes that I.I. made statements incriminating the applicant only at the pre-trial stage. At her hearing before the first-instance court she only referred to the criminal activity carried out by the other accused. Although she did not make any statement involving the applicant in drug-trafficking, neither the judge nor the prosecutor had asked her additional questions to clarify the role played by the applicant in the offences (see paragraph 19 above). There is no evidence in the file that she had been heard again before the appellate courts.

64. Moreover, contrary to Government's submissions (see paragraph 34 above) the testimonies of witnesses F.D. and I.I. were not supported by any factual evidence. Neither the investigating authorities nor the courts referred to any drugs found at the applicant's home where allegedly the applicant carried out his illegal activity of storing and packing drugs. In this respect the Court notes that the domestic authorities had not made reference to any search at the applicant's home.

65. As regards the statements given at the public hearing by P.A., the applicant's co-accused (see paragraph 18 above), the Court points out that a higher degree of scrutiny may be required for assessing such statements, because the position in which accomplices find themselves while testifying is different from that of ordinary witnesses. They testify without being under oath, that is, without any affirmation of the truth of their statements which could render them punishable for perjury for willfully making untrue statements (see *Vladimir Romanov v. Russia*, no. 41461/02, § 102, 24 July 2008).

66. As regards the procedural measures taken to compensate for the lack of opportunity to cross-examine the absent witness at the trial, the Court observes that a confrontation had been held between the applicant and witness F.D. during the investigation (see paragraph 15 above). However, in the circumstances of the present case, the Court considers that this confrontation at an early stage of the proceedings was, of itself, insufficient to compensate for the lack of opportunity for the applicant to cross-examine this witness directly at his trial. Moreover, the applicant was not even offered the possibility, at the trial stage, to put his own questions to the witness indirectly. Eventually, although the applicant could give his own version of the events and cast doubt on the credibility of the absent witness's statement, the trial court failed to actually assess its reliability (see paragraph 63 above). Therefore, this element has no counterbalancing weight either.

(δ) Conclusion

67. Having regard to the absence of a good reason for the non-attendance of the absent witness, the insufficiency of additional

incriminating evidence and of procedural safeguards capable of counterbalancing the absence of witness F.D. at the applicant's trial, the Court finds that the criminal proceedings, looked at as a whole, were rendered unfair by the admission in evidence of the pre-trial statement of absent witness F.D.

68. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

69. The applicant complained that he had been unlawfully detained for the period between 3 and 10 July 2007 even though his release had been ordered by a court on 3 July 2007. The applicant relied on Article 5 § 1 of the Convention, which in its relevant parts read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (...)".

1. The parties' submissions

70. The Government submitted that the applicant had failed to exhaust domestic remedies as he had not availed himself of any of the avenues of redress at his disposal for the purpose of claiming compensation. They argued that domestic case-law provided adequate, effective and sufficient remedies which could have been used, such as a civil action for compensation.

71. The Government asserted that those remedies were available both in theory and in practice, and would have been accessible to the applicant. They relied on Articles 998-999 of the former Civil Code. They also contended that there was settled case-law confirming the domestic courts' tendency to apply directly the relevant provisions of the Romanian Constitution as well as Article 5 of the Convention and the Court's standards, in cases where a person had been unlawfully detained by the authorities.

72. The applicant contested the effectiveness of those remedies in his case given that the national case-law showed that a majority of such complaints were rejected as being inadmissible.

2. The Court's assessment

73. The Court reiterates that the object of the rule on exhaustion of domestic remedies is to allow the national authorities to address allegations concerning a violation of a Convention right and, where appropriate, to afford redress before those allegations are submitted to the Court (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

74. On the facts of the present case, the Court observes that the applicant did not lodge any complaint concerning his unlawful detention with any domestic authorities.

75. The Court further notes that the Government submitted examples of case-law from the domestic courts showing that actions seeking compensation for unlawful detention lodged by claimants in situations similar to that of the applicant had been allowed. Moreover, the Court has already found in the cases *Dragomir* (cited above, §§ 24-31) and *Hutanu v. Romania* ((dec.), no. 50858/09, §§ 26-28, 3 February 2015), that the interested parties had had at their disposal effective remedies to complain about their unlawful detention.

76. For all these reasons, the Court considers that the applicant should have complained to the authorities about his alleged unlawful detention.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

77. Lastly, the applicant complained under Article 3 of the Convention of an incident of ill-treatment on 14 July 2003 and under Article 8 of alleged restrictions on family visits and sending and receiving correspondence while he had been held in the Bucharest Police Inspectorate. The Court notes that these complaints deal with questions which could have been raised in the proceedings before the domestic courts. As the applicant has failed to do so, he has not exhausted all domestic remedies.

78. The applicant also raised several complaints under Article 5 of the Convention concerning his arrest and pre-trial detention. The Court notes that the applicant's pre-trial detention ended with the adoption of the judgment of 4 October 2005 that is more than six months before the lodging of this application on 12 December 2007. These complaints were therefore introduced out of time.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

80. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

81. The Government considered such amount as excessive and asked the Court to rule that the mere acknowledgment of a violation of the applicant's rights represented in itself a just satisfaction.

82. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 2,400 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

83. The applicant did not submit any claims for the reimbursement of his costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 6 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and § 3 (c) of the Convention;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, 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 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;

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

Done in English, and notified in writing on 23 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Deputy Registrar

Paulo Pinto de Albuquerque
President