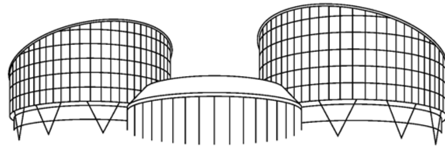

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ANTOHI v. ROMANIA

(Application no. 48093/15)

JUDGMENT

STRASBOURG

24 September 2019

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

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COUNCIL OF EUROPE
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In the case of Antohi v. Romania,

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

Faris Vehabović, *President,*
Iulia Antoanella Motoc,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 48093/15) 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 Sorin Antohi ("the applicant"), on 24 September 2015.

2. The applicant, who had been granted legal aid, was represented by Mr A. Grigoriu, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. On 20 April 2016 notice of some of the applicant's complaints under Articles 3 and 6 of the Convention was given to the Government, and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. The Government objected to the examination of the application by a Committee. Having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and is detained in Jilava Prison.

A. Criminal proceedings against the applicant

6. On 31 October 2011 the Bucharest prosecutor's office indicted the applicant for embezzlement, fraud and the forgery of signed documents (*fals în înscrisuri sub semnătură privată*) and sent his case for trial.

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7. The applicant was assisted by his chosen legal representative throughout the proceedings.

8. During hearings held between 15 November 2011 and 3 December 2013 the Bucharest District Court ("the District Court"), sitting in a single-judge formation (Judge O.R.N.), heard the applicant. The court also heard twenty-seven witnesses in the case, including the witnesses L.B. and I.O.

9. During hearings held between 3 December 2013 and 25 February 2014 the District Court's single-judge formation which examined the applicant's case changed repeatedly.

10. At a hearing on 23 September 2014 the District Court, sitting in a single-judge formation (Judge F.M.P.), heard a financial expert in respect of objections raised by the applicant to the expert financial report which had been produced in the case, and dismissed the applicant's objections. In addition, the court dismissed an application by the applicant to have the witnesses F. H., L.B., and I.O. heard by the court. It held that hearing these witnesses was unnecessary, because there was sufficient evidence in the file for the applicant to support his defence. The court dismissed an application by the applicant for him to be allowed to give a supplementary statement (*supliment de declarație*). It held that there were no new elements that would require the applicant to be heard again. It also held that, during the deliberations, he could have presented precise arguments in his defence by relying on all of the available evidence.

11. On 29 October 2014 the District Court, sitting in a single-judge formation (Judge F.M.P.), convicted the applicant of embezzlement, fraud and the forgery of signed documents, sentenced him to thirteen years' imprisonment, and ordered him to pay compensation in respect of the pecuniary damage caused as a result of his actions. It held that the applicant's actions had been proved by the evidence adduced in the case. Thus, the testimonies of the representatives of the injured parties and the available documents had been corroborated by the witness testimonies, the expert financial report, the financial expert's oral and written submissions, the available financial documents, a graphology report, other documents, and partly by the applicant's statements. The court noted that in his statements given to the authorities the applicant had acknowledged committing the offence of forging signed documents. However, his statements concerning the offences of embezzlement and fraud had been inconsistent and had tried to minimise the criminal aspect of his actions and the damage caused.

12. The applicant appealed against the judgment. He argued that the single-judge formation of the court which had examined his case during the first-instance proceedings had changed repeatedly (see paragraph 9 above). Consequently, the judge who had convicted him had not been the judge who had heard him and the witnesses directly. Moreover, the District Court had

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dismissed his application to hear the witnesses F. H., L.B., and I.O. (see paragraph 10 above), even though they could have provided relevant clarification as to the embezzlement offence and how much damage had actually been caused by the fraudulent acts of which he had been accused.

13. At a hearing on 19 March 2015 the Bucharest Court of Appeal ("the Court of Appeal"), sitting as a panel of two judges, namely Judges C.B. and I.C, heard the applicant with regard to the charges which had been brought against him. Amongst other things, the applicant acknowledged that he had committed the offences of fraud and the forgery of signed documents. However, he stated that he had not intended to cause damage by committing fraud. With regard to the embezzlement offence, he also acknowledged only that he had appropriated some funds in order to pay off a debt, because a creditor had been blackmailing him. The applicant signed his statement and certified that he had read and agreed with its contents.

14. On the same date the court dismissed an application by the applicant for the court to hear the financial expert, F.H., R.S. and nine other witnesses. It held that the points that could be proved by the testimonies of the expert and those witnesses had already been covered by other evidence which had been added to the case file, in particular documents and other testimonies. The court took into account a statement by the applicant that he was asking for the evidence to be added to the file because he intended to prove that he had not been an administrator, and therefore could not have committed the offence of embezzlement.

15. By a final judgment of 26 March 2015 the Court of Appeal, sitting as a panel of two judges, namely Judges C.B. and I.C, dismissed the applicant's appeal. The court held that the procedural guarantees set out by the new Code of Criminal Procedure (the "CCP" – see paragraph 20 below) had been respected in the applicant's case. In particular, the single judge who had convicted the applicant had also been present during the oral arguments (*dezbatere*) in the case. Therefore, the changes in the single-judge formation of the court had not affected the applicant's right of defence, including his right to have evidence adduced before a judge.

16. The court further held that according to the available evidence – namely documents, the testimonies of the witnesses heard by the investigating authorities and the courts, and the expert financial report – the elements of the offence of embezzlement had been present. In addition, the court held that the elements of the offence of fraud had also been present. In this connection, the court relied on L.B.'s testimonies (see paragraph 8 above) in conjunction with the conclusions of the expert financial report. Lastly, the court held that the elements of the offence of forgery of signed documents had been present, relying on the applicant's repeated admissions that he had committed this offence, other documents, and the conclusions of the expert graphology report produced in the case.

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B. Conditions of detention

17. In his initial letters to the Court, the applicant complained under Article 3 of the Convention of the conditions of his detention after 1 July 2013 in Bucharest police station no. 15 and central remand facility no. 1, Jilava Prison, and the cells he had been quartered in at the courthouse, including the failure to separate smokers from non-smokers. He referred to: overcrowding, squalid cells, being detained with smokers even though he was a non-smoker, insufficient light, and sanitary facilities lacking privacy.

18. On 24 April 2018 the applicant informed the Court that he wished to withdraw his above-mentioned complaint because his prison sentence had been reduced on account of the inadequate conditions of his detention, as required by recently adopted domestic legislation on the serving of prison sentences.

II. RELEVANT DOMESTIC LAW

19. The relevant provisions of the former CCP concerning the composition of judicial panels, in force until 31 January 2014, are set out in the case of *Cutean v. Romania* (no. 53150/12, § 37, 2 December 2014).

20. Article 354 §§ 2 and 3 of the new CCP, in force from 1 February 2014 onwards, provide that a judicial panel must remain the same throughout a trial. Where this is not possible, the panel may be changed before the oral arguments on the merits of the case begin. If the panel changes after the oral arguments have begun, the oral arguments must be heard again.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

21. The applicant complained of the conditions of his detention after 1 July 2013 in Bucharest police station no. 15 and central remand facility no. 1, Jilava Prison, and the cells he had been quartered in at the courthouse, including the failure to separate smokers from non-smokers. He relied on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

22. The Court notes that the applicant informed the Court that he no longer intended to pursue this part of his application (see paragraph 18 above). It must therefore examine whether it can strike out this part of the

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applicant's case in accordance with Article 37 § 1 of the Convention, which, in so far as relevant, reads:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; ...
>
> ...
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

23. Given the applicant's explicit statement, the Court takes the view that his intention to withdraw this part of his application has been unequivocally established (see, *mutatis mutandis*, *Berlusconi v. Italy* [GC] (dec.), no. 58428/13, § 65, 27 November 2018). In accordance with Article 37 § 1 (a) of the Convention, the Court concludes that the applicant does not intend to pursue this part of his application.

24. Taking into account the principles set out in its case-law (see *Berlusconi*, decision cited above, § 68), the facts of the case, in particular the reduction in the applicant's sentence (see paragraph 18 above), and his unequivocal wish to withdraw this part of his case, the Court concludes that no special circumstances relating to respect for human rights require it to continue the examination of the applicant's complaint in accordance with Article 37 § 1 *in fine*.

25. Accordingly, it is appropriate to strike the case out of the list in respect of the applicant's complaint under Article 3 of the Convention concerning the conditions of his detention after 1 July 2013 in Bucharest police station no. 15 and central remand facility no. 1, Jilava Prison, and the cells he had been quartered in at the courthouse.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicant complained that the criminal proceedings against him had been unfair, in so far as he and the witnesses had not been heard directly by the judge who had convicted him or the judges who had upheld his conviction. He relied on Article 6 of the Convention, which, in so far as relevant, reads:

> "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."

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A. Admissibility

27. The Court notes that the applicant's 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

28. The applicant argued that the last-instance court had not remedied the deficiencies in the first-instance proceedings. It had dismissed his repeated applications for witnesses to be heard and had limited his ability to make statements by preventing him from reiterating or clarifying his previous statements.

29. The Government acknowledged that the testimonies of the witnesses summoned by the domestic courts in the applicant's case had been important for justifying his conviction. However, the witness testimonies had not been the only evidence supporting the conviction. The first-instance court had also attached particular weight to the expert report produced in the case and the expert's testimony before the court. Judge F.M.P. had allowed the applicant's objections to the expert report and had heard the expert directly (see paragraph 10 above). Also, the applicant had been convicted of forgery on the basis of a technical report and his own statements.

30. The last-instance court had remedied the deficiencies in the first-instance proceedings in part by hearing the applicant (see paragraph 13 above). Moreover, as regards the applicant's conviction, like the lower court, the last-instance court had not relied exclusively on the witnesses' testimonies. It had also relied on the accused's own statements and the available documents.

2. The Court's assessment

31. The Court reiterates the general principles set out in its case-law as regards circumstances where judges who have failed to hear witnesses and a defendant directly deliver a verdict convicting the defendant (see, amongst other authorities, *Cutean v. Romania*, no. 53150/12, §§ 60-61, 2 December 2014).

32. In the instant case, the Court notes that it is not disputed by the Government that the formation of the District Court changed during the course of the first-instance proceedings against the applicant (see paragraph 9 above). In addition, the judge who convicted the applicant only heard the financial expert who produced the expert financial report in the

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case (see paragraph 10 above), and did not hear the applicant or the witnesses directly.

33. The Court notes that O.R.N., the judge who was initially involved in the proceedings and who heard the applicant and the witnesses at the first level of jurisdiction (see paragraph 8 above), did not stay on to continue with the examination of the case (see, *mutatis mutandis*, *Cutean*, cited above, § 64; contrast and compare *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002, and *Beraru v. Romania*, no. 40107/04, § 66, 18 March 2014).

34. The Court further notes that while the applicant's conviction was not based solely on the testimony of the witnesses or on his own statement, the Government acknowledged that the above-mentioned evidence had played an important role in justifying his conviction (see paragraph 29 above). Moreover, F.M.P., the single judge who convicted the applicant, dismissed the accused's applications for him to hear three of the witnesses directly and for the applicant to be allowed to give a supplementary statement (see paragraph 10 above).

35. It is true that the applicant did not ask the above-mentioned judge to hear all the witnesses in the case directly, and that he may have given only a brief indication as to why hearing these three witnesses and his giving supplementary statements might have been relevant for the case. It is also true that the judge considered the applicant's applications and dismissed them, providing reasons for his decision (see paragraph 10 above). However, given the weight which the courts attached to the witness testimonies and the applicant's statements in justifying the conviction decision, and the fact that the first-instance judge was tasked with carrying out an assessment of the elements of the alleged offences, including the applicant's intention to commit them, the Court takes the view that hearing the applicant and the witnesses directly was significantly relevant in the circumstances of the applicant's case.

36. The Court observes that the applicant did not dispute that the first-instance court judge who ultimately convicted him was also the judge who heard the oral arguments on the merits of the case. In addition, it seems that the same judge heard the applicant's submissions during the oral arguments in respect of the merits of the case, and examined the applicant's submissions before the first-instance court prior to the judgment. While it is unclear from the available evidence whether the applicant was allowed to be the last party to directly address the first-instance court, it appears that he was given the opportunity to present precise arguments in his defence by relying on all of the available evidence (see paragraph 10 above).

37. However, the Court reiterates that although an accused's right to address a court last and submit pleadings and written observations during oral arguments and prior to the judgment in respect of the merits of the case are certainly of importance, they cannot be equated with his right to be

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heard during the trial (see, amongst other authorities, *Cutean*, cited above, § 69, with further references).

38. The Court further observes that there is no evidence in the file suggesting that the first-instance court's composition was changed to affect the outcome of the case to the applicant's detriment, or for any other improper motives, or that the District Court's single judge lacked independence or impartiality. The Court also observes that it is undisputed between the parties that the District Court judge had at his disposal the transcripts of the hearings at which the witnesses and the applicant had been heard. However, the Court notes that it has already established that the statements of the applicant and the witnesses constituted important evidence for his conviction, and that they were relevant for determining the existence of subjective factors concerning the offences, including, amongst other things, the applicant's intention to commit them (see paragraph 35 above). Consequently, the Court takes the view that the mere availability of the statement transcripts cannot compensate for the lack of immediacy in the proceedings (see, *mutatis mutandis*, *Cutean*, cited above, § 70).

39. The Court observes that the applicant complained before the last-instance court about the failure of the first-instance court single judge to hear him and the witnesses directly. In this connection, the Court reiterates that in some circumstances it is possible for a higher or the highest court to make reparation for deficiencies in first-instance proceedings (see *Beraru*, cited above, § 67).

40. The Court notes in this regard that the panel of judges of the Court of Appeal which ultimately maintained the applicant's conviction heard him directly in respect of the merits of the case before proceeding to examine his appeal. The Court also notes that the applicant signed the statement which he gave before that panel and certified that he had read and agreed with its contents (see paragraph 13 above). Consequently, the Court sees no reason to endorse the applicant's argument that the appeal court did not remedy the deficiencies in the first-instance proceedings (see paragraph 28 above) as far as the hearing of the accused is concerned.

41. However, the Court observes that the judges of the Court of Appeal dismissed the applicant's complaint about the single judge of the first-instance court not hearing the witnesses in the case directly, and his reasoned applications to have at least some of the witnesses heard directly by the appellate court. The last-instance court held mainly that the applicant had had the opportunity to defend himself by adducing evidence before the first-instance court single judge, and that not hearing the witnesses directly had been covered by the presence in the file of, *inter alia*, other testimonial evidence (see paragraphs 14 and 15 above).

42. In this connection, the Court observes that F.M.P., the single judge of the first-instance court who convicted the applicant, heard only the financial expert in the case, and dismissed the applicant's application to

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have witness evidence added to the case file (see paragraphs 10 and 34 above). Also, none of the other testimonial evidence in the file was directly adduced before the judge who convicted the applicant at first instance or the judges who upheld his conviction. Consequently, the Court is not persuaded by the Court of Appeal's arguments that the applicant's right of defence was not hampered by the fact that neither the judge who ultimately convicted him nor the judges who upheld his conviction heard direct evidence from the large number of witnesses in his case whose testimonies played an important role in his conviction.

43. In these circumstances, the Court takes the view that the changes in the first-instance court's formation and the subsequent failure of the appellate court to hear the witnesses directly was tantamount to depriving the applicant of a fair trial (see, *mutatis mutandis*, *Cutean*, cited above, § 72).

44. It follows that there has been a violation of Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 6,000 euros (EUR) in respect of non-pecuniary damage for the breach of his Convention rights under Article 3. He also claimed an identical amount in respect of non-pecuniary damage for the breach of his Convention rights under Article 6.

47. The Government did not object to the applicant being granted the amount which he claimed in respect of non-pecuniary damage for the breach of his Convention rights under Article 3. However, they contended that the amount claimed in respect of the alleged breach of his Convention rights under Article 6 was excessive.

48. The Court notes that where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003). In this respect it notes that the applicant may apply to have the proceedings reopened under Article 465 of the CCP, should he choose to do so (see *Mischie v. Romania*, no. 50224/07, § 50, 16 September

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2014). However, the Court considers that the applicant suffered some non-pecuniary damage as a result of the violation of his rights under Article 6 of the Convention which cannot be made good by the mere finding of a violation or by the reopening of the proceedings (see, *mutatis mutandis*, *Siegle v. Romania*, no. 23456/04, §§ 47-48, 16 April 2013). Having regard to his wish to withdraw his claim in respect of the complaint under Article 3 (see paragraph 18 above), and making an assessment on an equitable basis, it awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that sum.

B. Costs and expenses

49. The applicant has not submitted any claim for costs and expenses, apart from his request to be granted legal aid (see paragraph 2 above). The Court is therefore not called upon to make any other award in this connection.

C. Default interest

50. 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. *Decides* to strike the application out of its list of cases in accordance with Article 37 §§ 1 (a) of the Convention in so far as it concerns the applicant's complaint under Article 3 of the Convention;

2. *Declares* admissible the applicant's complaint under Article 6 of the Convention;

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

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months, EUR 4,000 (four thousand 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

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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 24 September 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti — Faris Vehabović
Deputy Registrar — President

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