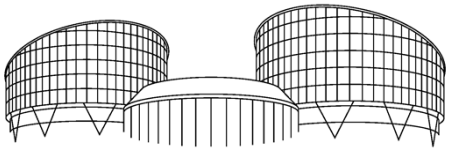

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF CORNESCHI v. ROMANIA

(Application no. 21609/16)

JUDGMENT

Art 6 § 1 (civil) • Unfair proceedings challenging withdrawal of security clearance and decision to discharge applicant from office, where classified information was not disclosed to him or his lawyer • Limitations on right to adversarial proceedings and equality of arms not counterbalanced by other safeguards

STRASBOURG

11 January 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Corneschi v. Romania,

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

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 21609/16) 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 Corneliu Corneschi ("the applicant"), on 13 April 2016;

the decision to give notice to the Romanian Government ("the Government") of the complaint concerning the unfairness of administrative proceedings in which the applicant had been unable to have sight of decisive evidence regarded as classified information and made available to the courts by the defendant, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 30 November 2021,

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

INTRODUCTION

1. The case concerns a complaint under Article 6 § 1 of the Convention that administrative proceedings had been decided on the basis of classified information, to which the applicant did not have access, in breach of the right to adversarial proceedings and to equality of arms.

THE FACTS

2. The applicant was born in 1970 and lives in Botoșani. He was represented by Mr A. Șimon, a lawyer practising in Bucharest.

3. The Government were represented by their Agent, Ms O. Ezer, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant had been an active officer with the Romanian Intelligence Service (*Serviciul român de informaţii* – "the SRI") since 1994. On account of the nature of his duties, he had held security clearance permitting his access to classified information constituting State secrets; being in possession of such security clearance had been a prerequisite for him holding his post.

II. CRIMINAL PROCEEDINGS INITIATED AGAINST THE APPLICANT

6. On 12 August 2011 a search had been conducted at the applicant's home; the report noted that no unlawful goods or highly taxable products had been found.

7. In a decision by the Suceava Court of Appeal of 9 September 2011, finding that the applicant's brother, C.C., had to be investigated while in custody, the court held, *inter alia*, that the evidence indicated that the applicant had ensured relevant training for his brother for his self-protection: the latter's vigilance and discretion in communication when committing criminal acts (smuggling), as well as his recourse to specialised gadgets to record conversations or to jam other communication devices were hard evidence thereto.

8. On 22 September 2011 the applicant was informed that criminal proceedings had been initiated against him on 12 August 2011, on account of charges of aiding and abetting an organised criminal group and of smuggling. In particular, he was accused of providing support since March 2011 to a group of several people, including his brother C.C. and his father R.C., who were smuggling cigarettes from across the border of the European Union; and also of storing highly taxable goods (tobacco, alcohol and fuel) since March 2011 at the house he owned with his parents.

9. The applicant's case was heard by the investigative authorities. Audiovisual evidence, including the applicant's mobile telephone and computer data, was adduced in the file. Several witnesses were heard, including two witnesses with protected identities, one of whom gave information about "other activities performed by the applicant, activities which could not be noted down in the record of the hearing for the protection of the witness".

10. The applicant denied any involvement in the acts he was charged with, and argued that there was no joint ownership with his parents of the house that he lived in, even if his parents lived at the same address; in fact, their houses and gardens were fully separated by a fence.

11. On 4 July 2014 the prosecutor decided to terminate the criminal proceedings against the applicant on the charges of aiding and abetting an

organised criminal group. The evidence on file did not sufficiently indicate that the applicant had committed the acts that he had been charged with, although there was a reasonable suspicion that some individual smuggling activities had been committed. In that latter respect the investigative file was therefore sent for further investigation to the military prosecutor, in view of the applicant's former capacity as a military officer.

12. On 13 August 2014 the military prosecutor decided to send the case back to the civil prosecutor for further investigation. That decision has not been submitted to the Court by the parties.

13. In a report of 31 March 2013 by the relevant service for fraud investigation at the Botoșani Police Department, the police officer in charge of the investigation noted that the adduced evidence did not indicate that the applicant had been involved or had intended to be involved in the acts he had been charged with (smuggling). Even if there was an indication that third parties had transported and left some suspect parcels in the garden at the applicant's residence, there was no clear evidence whether those parcels had reached the applicant's own garden, or instead that of his father, to which the applicant's garden was joined but separated from by an interior fence (see paragraph 10 above). Consequently, the police officer proposed the termination (*clasare*) of the criminal proceedings against the applicant.

14. On 7 April 2015 the prosecutor decided to terminate criminal proceedings against the applicant in respect of the charge of smuggling, on account of the lack of evidence against him. The prosecutor referred to the arguments set out in the above-mentioned report (see paragraph 13 above), which he considered to be entirely valid.

III. WITHDRAWAL OF THE APPLICANT'S SECURITY CLEARANCE AND HIS DISCHARGE FROM OFFICE

15. On 14 November 2011 the applicant was notified orally that his security clearance had been withdrawn (*retragerea autorizației de acces la informații clasificate*). He was not given any reasons or any other information; consequently, he filed a request with the Head of the SRI, asking to be informed of the underlying reasons for the withdrawal of the clearance, and to have that decision re-examined. He received no answer to his request.

16. On 15 December 2011 the applicant was notified orally that he had been discharged from office in accordance with the provisions of Article 85 §§ 1 (m) and 2 of Law no. 80/1995 on the status of military personnel (hereinafter, "Law no. 80/1995" – see paragraph 61 below). No further explanation or indication as to the concrete facts against him was given at the time.

17. On 17 January 2012 the SRI answered two requests by the applicant (mentioned as having been registered on 21 December 2011 and 11 January 2012), and informed him that he had been discharged following the

withdrawal of his security clearance; those measures were based on the provisions of Article 43 § 1 (b) and Article 85 §§ 1 (m) and 2 of Law no. 80/1995 (see paragraph 61 below).

18. On 20 January 2012 the applicant challenged the decision to have his security clearance withdrawn and the discharge decision before the Head of the SRI.

19. On 16 February 2012 the SRI responded that, by signing, on 18 February 2008, Annex no. 15 from the national standards for the protection of classified information, as approved by Government Order no. 585/2002 (hereinafter "the GO", see paragraph 57 below), the applicant had agreed to waive his right to obtain the reasons for the decision not to grant him security clearance (*neacordarea avizului de securitate*). However, it was decided that he should be informed that the impugned decision was well founded and was in accordance with Article 160 (a) and (f) of the GO (see paragraph 56 below), while the discharge decision was based on Article 85 § 1 (m) of Law no. 80/1995 (see paragraph 61 below).

20. In reply to a further request from the applicant to have the decisions in question reassessed, on 15 March 2012 he was informed that the discharge decision had been taken in view of the fact that there were no positions available at the SRI for a person with the applicant's qualifications but who did not hold security clearance.

IV. ADMINISTRATIVE PROCEEDINGS LODGED BY THE APPLICANT

A. First round of proceedings

21. On 20 March 2012 the applicant brought administrative proceedings challenging the SRI's decisions to withdraw his security clearance and to discharge him from office; he also requested that he be rehired by the SRI and be awarded all salary that was due. Lastly, he asked that the challenged decisions be suspended pending the final outcome of the case.

22. He argued that his career had been evaluated as "very good" and "exceptional" until the moment when, in very suspect circumstances, his security clearance was withdrawn, following which he was promptly discharged from office. In so far as he was not aware of the reasons underlying the challenged decisions, he was not capable of formulating any defence. However, he argued that if those decisions had a connection with the criminal proceedings which were pending against him, and in which his brother C.C. was incriminated (see paragraphs 7-8 above), those circumstances were not, according to the law, of a nature to justify the measures taken against him.

23. He asked that all the documents related to the challenged decisions be submitted to the file; and if those documents were classified, he asked for their declassification, so that the court could render justice in his case.

24. Upon a request from the court, on 22 May 2012 the SRI indicated that the documents referred to by the applicant were classified at the "secret" (*strict secret*) level, and that they could be submitted to the court provided it had the required clearance to access such information.

25. The SRI also contended that the withdrawal of the applicant's security clearance had had regard to certain situations of incompatibility, as prescribed by Article 157 (a) and (b), Article 158, and Article 160 (a), (f) and (g) of the GO (see paragraphs 55-56 below). They also indicated to the court that among the circumstances which had justified the measures against the applicant was the fact that on 12 August 2011 criminal investigations had been initiated against him (see paragraph 8 above).

26. On 22 June 2012 the Suceava Court of Appeal dismissed the applicant's claims. Although the SRI had not provided the court with the necessary secret documents, the court considered that the information in the file was sufficient to justify the decisions taken against the applicant.

27. In particular, the court considered that by signing Annex no. 15 to the GO (see paragraph 57 below), the applicant had waived his right to obtain any reasons for the decision not to grant him security clearance. Furthermore, the situations of incompatibility set out in Article 160 (a) and (f) (see paragraph 56 below) were relevant to the applicant's case, in view of the fact that criminal investigations had been initiated against him on 12 August 2011 (see paragraph 8 above). Indeed, the measures taken against the applicant were taken on the basis of those criminal proceedings. Moreover, the court considered that the applicant had been informed of the factual and legal grounds for the measures taken against him, which had allowed him to prepare an appropriate defence.

28. The applicant appealed against the decision of 22 June 2012, challenging mainly the fact that the classified information had not been accessible either to him, or at least to the court, who could have then referred to it when addressing the applicant in adversarial proceedings.

29. On 5 March 2014 the High Court of Cassation and Justice (hereinafter, "the High Court") allowed the applicant's appeal and remitted the case to the Suceava Court of Appeal for further examination. The High Court essentially held that in the absence of the classified documents, which had not been submitted to the file, there was no substantiation for the lower court's conclusions as to the existence of any factual or legal basis for the measures taken against the applicant. The SRI's failure to submit those documents to the file could be punished by a fine and in any event, rendered the proceedings unfair, in breach of Article 6 of the Convention, as it prevented the court from fully scrutinising the parties' arguments and evidence.

B. Proceedings after remittal of the case by the High Court of Cassation and Justice

30. On 1 July 2014 the applicant lodged a request with the Suceava Court of Appeal for the declassification of the classified information relevant to his case. He argued that the decision to withdraw his security clearance and to subsequently discharge him from office were decisions concerning an individual, and thus not susceptible of producing severe damage to national security. Keeping all information classified without any disclosure breached his right to equality of arms.

31. The SRI reiterated their arguments and relied on the same legal grounds as those that they had relied on before the court in the first round of proceedings (see paragraph 25 above).

32. On 4 July 2014 the Suceava Court of Appeal dismissed as ill-founded the applicant's request to have the impugned decisions suspended. The court held that the withdrawal of the applicant's security clearance had been

> "a measure aiming to protect classified information in case there existed risks or security vulnerabilities, in the context of the provisions set out in Law no. 182/2002 [on the protection of classified information – see paragraphs 52 et seq. below]".

33. The court also held that by signing Annex no. 15 to the GO (see paragraph 57 below), the applicant had agreed not to receive any reasons for the decision not to grant him security clearance, hence, the defendant had acted in accordance with the applicant's own agreement. Furthermore, the underlying reason for the measure had been the initiation in 2011 of criminal proceedings (see paragraph 8 above) "in which the applicant had been involved", therefore the measure did not appear as untimely (*intempestivă*), but as one which had been previously verified and assessed. The applicant's discharge from office was the direct consequence of the withdrawal of his security clearance, in accordance with Article 85 § 1 (m) of Law no. 80/1995 (see paragraph 61 below).

34. As the applicant had been a military officer, the notification of the measures could also be done on an oral basis, and not necessarily in writing, as provided for by the relevant military discipline rules; nevertheless, written notifications of the nature of the measures and their legal basis were given to the applicant on 17 January and 16 February 2012 (see paragraphs 17 and 19 above).

35. On 24 July 2014 a registrar from the Suceava Court of Appeal drew up a report in which it was stated that an envelope with documents containing classified information had arrived at the court; however, because none of the registry employees had had the necessary security clearance to handle and deliver such information, the envelope was sent back to the SRI.

36. At the hearings of 9 September and 7 October 2014 the court noted that security clearance had not yet been obtained for a registry employee;

hence, it held that the case would be adjourned until that clearance had been granted.

37. On 7 November 2014 the court acknowledged receipt from the SRI of "a document" containing the requested information classified as secret, which was to be "handled by the court within the relevant legal framework regulating the access to such information".

38. On 25 November 2014 the Suceava Court of Appeal, after consulting the classified information submitted to the file by the SRI, dismissed all the applicant's requests.

39. Concerning the declassification issue, the court held that the request was ill-founded:

> "the classified information (*documentaţia*) disclosed the gravity of the acts committed by the applicant; to make such information available would have as a consequence its dissemination, with a direct impact on the lawful actions of certain state institutions which aim to ensure a climate of safety and order for an entire community".

40. On the merits of the case, the court reiterated its previous considerations already mentioned in the reasoning for the dismissal of the suspension request (see paragraphs 32-34 above).

41. Lastly, the court held that in view of the gravity of the acts committed by the applicant (acts not referred to in the judgment), the severe measures taken against him were lawful and proportionate to the degree of social danger of his acts.

42. The applicant appealed against the two decisions given by the Suceava Court of Appeal (see paragraphs 32-34 and 38-40 above). He reiterated all his previous arguments, also emphasising that the procedure for not being granted security clearance was different from the one in which security clearance had already been granted and subsequently withdrawn. Consequently, by signing Annex no. 15 to the GO (see paragraph 57 below), he had not agreed to not being provided with reasons for the withdrawal of his security clearance.

43. He also argued that, contrary to the instructions of the High Court in its judgment of 5 March 2014 (see paragraph 29 above), there was no clear indication in the file as to what documents the SRI had submitted and consequently as to what information the court had had at its disposal so as to scrutinise the reasons which had constituted the basis for the measures taken (see also paragraphs 35, 37 and 39 above). This lack of clarity had rendered the court's examination of the case illusory, as reflected by the fact that the decision was not reasoned and only referred to general aspects, without responding *in concreto* to the applicant's essential arguments.

44. On 29 July 2015 the Suceava Court of Appeal transmitted to the High Court "documents classified as secret and which were available for consultation by the court, under the conditions provided for by the relevant law".

45. On 12 October 2015 the applicant filed written submissions in which he reiterated his concern that the classified documents which had been adduced in the file were in fact only the two decisions which he had challenged, without any additional document setting out the underlying reasons thereto (see paragraph 43 above). He therefore asked that the SRI be requested to submit all documents pertaining to the challenged decisions.

46. On 14 October 2015 the High Court dismissed the applicant's appeal.

47. In connection with the applicant's request concerning the classified information that had been adduced in the file (see paragraphs 43 and 45 above), the court considered that what was already in the file was sufficient for the purposes of examining the case.

48. The court further held that even though the lower court's reasoning was very brief, it still answered the main issues raised by the applicant, proving that it had properly scrutinised the case. In addition, the declassification request had been correctly dismissed, because the conditions provided for by the law for such a request had not been fulfilled, having regard to the acts held against the applicant and to the consequences to public order or to the private or public interests involved which such declassification entailed.

49. The applicant's incompatibility with his office had been correctly established, which resulted from the fact that he had committed acts which were incompatible with the position he had held and which determined the withdrawal of his security clearance. No further information could be provided thereto, in view of the fact that the relevant information had been classified as secret, and that the applicant had waived his right to be informed of the reasons justifying the refusal of security clearance. Nevertheless, the decisions to withdraw the clearance and to discharge the applicant had been notified to him on an oral basis (see paragraph 16 above), as provided for by the military discipline rules, and the legal basis for the decisions had been notified in writing to the applicant on 17 January and 16 February 2012 (see paragraphs 17 and 19 above).

50. While noting the prosecutors' decisions to terminate criminal proceedings against the applicant on all charges (see paragraphs 11 and 14 above), the High Court pointed out that the withdrawal of the applicant's security clearance had not been determined by the criminal acts he had been suspected of having committed; and that the withdrawal had been determined by the situations of incompatibility set out in Article 160 (a) and (f) of the GO (see paragraph 56 below), found to be relevant to the applicant's situation.

51. Concerning the right of access to a court, the High Court concluded that the applicant had been made aware of the legal grounds for the decisions taken against him; furthermore, he had had the opportunity to challenge those decisions, and the court had had the opportunity to assess itself the classified information which had been made available by the SRI.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

A. Legislation concerning classified information

52. The main relevant provisions of Law no. 182/2002 on the protection of classified information, and of the national standards for the protection of classified information in Romania, as approved by GO no. 585/2002, and the procedure for obtaining certificates from the Office of the national register for State secret information (hereinafter, "ORNISS") are summarised in *Muhammad and Muhammad v. Romania* ([GC], no. 80982/12, §§ 51 and 53-58, 15 October 2020) and they essentially read as follows:

1. Law no. 182/2002 on the protection of secret information

53. The relevant provisions of Law no. 182/2002 on the protection of secret information read as follows:

Section 15

"The following terms shall be defined as follows, within the meaning hereof:

...

(b) classified information: any information, data, documents having a national security interest, which, in view of their level of importance and any consequences they may have on account of their unauthorised disclosure and dissemination, must be protected;

(c) the categories of classified documents are: State secrets [*secret de stat*] and service secrets;

(d) information [constituting] State secrets: information related to national security, the disclosure of which may harm national security and the defence of the nation;

...

(f) the following levels of classification [*de secretizare*] are attributed to classified information within the category of State secret:

– top secret [*strict secret de importanță deosebită*]: information of which unauthorised disclosure is capable of causing harm of exceptional seriousness to national security;

– secret [*strict secrete*]: information of which unauthorised disclosure is capable of causing serious harm to national security;

– confidential [*secrete*]: information of which unauthorised disclosure is capable of causing harm to national security; ..."

Section 20

"Any Romanian person or legal entity has the possibility of objecting to the classification of information, the duration of the classification and the way in which the level of classification was determined, before the authority responsible for classifying

it. Such objections are settled in accordance with the laws governing administrative disputes."

Section 21

"(1) The Office of the national register of State secret information [ORNISS] shall be a subordinate body [*în subordinea*] directly reporting to the Government.

(2) The Office of the national register of State secret information shall keep a record of the lists and information belonging to this category, of the time-frame within which a certain level of classification is maintained, of the staff vetted and approved to work with State secret information, and of the authorisation registers ..."

Section 24

"(4) Classified information under section 15 (f) hereof may be declassified by order of the Government upon a reasoned request of the issuing body (*emitentul*).

...

(10) Declassification or relegation to a lower level of classification shall be carried out by individuals or public authorities with power to approve the classification and level of classification of the information at issue."...

Section 28

"(1) Access to State secret classified information shall be possible only by written authorisation of the director of the legal entity which holds the information, after giving prior notice to the Office of the national register of State secret information.

(2) Authorisation shall be given depending on the levels of classification provided for in section 15 (f), after vetting of the person concerned, with his or prior written consent. Legal persons, ... shall inform the Office of the national register of State secret information of the issuance of access authorisation.

...

(4) The validity of the authorisation shall last for four years; during that period, vetting may be resumed at any time.

...".

Section 36

"(1) Persons to whom classified information is entrusted shall ensure its protection in accordance with the law and shall comply with the provisions of schemes for the prevention of leaks of classified information.

..."

Section 39

"(1) Any breach of the rules concerning the protection of classified information shall engage disciplinary, administrative, civil or criminal liability, as the case may be.

(2) Any individuals working in the sector of intelligence, in the security services or in the army, or for the department of foreign relations, or those persons who have been specially entrusted with the protection of State secret information, who are found guilty

of wilful disclosure or acts of negligence giving rise to the disclosure or leaking of classified information, shall irrevocably be dismissed from their posts [*calitatea*]."

2. Government Order no. 585/2002

54. The relevant provisions of the national standards of protection of classified information in Romania, as approved by Government Order no. 585/2002, read as follows:

Article 19

"Information [classified] as a State secret may be declassified by order of the Government, upon the reasoned request of the issuing [body]."

Article 20

"(1) [Classified] information shall be declassified where:

(a) the classification time-limit has expired;

(b) the disclosure of the information can no longer cause harm to national security ...;

(c) [the classification] had been carried out by a person without legal authorisation [*neîmputernicită*].

(2) Declassification or relegation to a lower level of classification of State secret [classified] information shall be decided by authorised persons or senior civil servants entitled by law to attribute different levels of classification, subject to the prior opinion of the institutions which coordinate activities concerning the protection of classified information and the supervision of related measures ..."

Article 26

"Classified information may be transmitted to individuals who hold security clearance certificates or access permits corresponding to the level of classification [of the information in question]."

55. Articles 157 -158 of GO no. 585/2002 set out the main criteria on the basis of which security clearance may be granted to a claimant (*solicitantul*):

Article 157

"The decision concerning the granting of security clearance shall be taken on the basis of all available information and shall have regard to:

(a) the unquestionable loyalty of the claimant

(b) the claimant's character, habits, relations and discretion, capable of providing safeguards concerning

- the correct behaviour in handling State classified information

- the opportunity for unaccompanied access in places where classified information is to be found

- respect for the rules concerning the protection of classified information in his or her field of activity."

Article 158

"(a) The main criteria for the assessment of the claimant's compatibility for the granting of security clearance refer both to character traits and to situations or circumstances which may determine risks and security vulnerabilities.

(2) The character of the claimant's wife, husband or partner, professional or social conduct, opinions and lifestyle will be relevant and will be taken into consideration for the granting of security clearance."

56. Article 160 of GO no. 585/2002 spells out the situations of incompatibility with regard to the right to have access to classified information:

Article 160

"Any of the following circumstances constitutes a situation of incompatibility for the claimant's access to State classified information:

(a) whether he or she deliberately concealed, misinterpreted or forged information relevant to national security or lied when filling in the standard application for security clearance or during the security clearance interview; ...

(f) manifesting [showing proof of] disloyalty, dishonesty, lack of discretion or fairness;

(g) breaching the rules concerning the protection of classified information ..."

57. Article 161 § 2 sets out, *inter alia*, that the request to obtain security clearance must be accompanied by a statement (Annex no. 15) that must be filled in by the claimant; security clearance will be dependent on the veracity of the information thus provided (which essentially relates, according to Annex no. 15, to background data concerning both professional and private aspects of the claimant and of his or her family). In the Annex, the claimant accepts that all data provided may be subjected to further scrutiny and that he or she accepts all the consequences of providing false information or knowingly omitting relevant information. The last sentence of the Annex reads as follows:

"I hereby agree that a refusal to grant me security clearance does not need to contain any reasons (*Sunt de acord ca neacordarea avizului de securitate să nu-mi fie motivată*)."

3. The procedure for obtaining an ORNISS certificate

58. Concerning the procedure for obtaining an ORNISS certificate, the situation since 2010 is that lawyers may ask to be granted a security clearance certificate or access permit delivered by the ORNISS ("the ORNISS certificate"), in order to gain access to classified documents. For that purpose the lawyer must submit his application to the Chair of the Bar of which he is a member, who forwards it to the National Union of Romanian Bars ("the UNBR"). The lawyer must attach to his application, among other documents, a copy of the authority form given to him by the client in order to represent

him in a case and a note from the body that is dealing with his client's case which attests that classified material has been submitted in evidence and that, in order to have access to that material and prepare his client's defence, the lawyer needs that certificate. The UNBR then initiates the procedure, which involves the competent authority carrying out preliminary checks on the lawyer's situation. The duration of the vetting procedure for persons who have requested access to "secret" classified information is 60 working days (Article 148 of Government Order No. 585/2002). Following the checks, the competent vetting authority forwards its conclusions to the ORNISS, which will issue its opinion to be forwarded to the UNBR. The latter will then have five days within which to issue the decision on access to classified documents.

59. Upon receipt of the ORNISS certificate, the lawyer to whom it is issued must sign a confidentiality agreement for the protection of any classified information brought to his knowledge. Once issued, the ORNISS certificate is valid for four years. During the period of validity, vetting of the lawyer may be resumed at any time.

60. From 6 February 2014 the access of judges to classified information in the files they were required to examine was granted without subjecting them to the procedure for obtaining an ORNISS certificate, but with a simpler procedure deployed at the level of each court.

B. Legislation on the status of military personnel

Law no. 80/1995

61. Law no. 80/1995 on the status of military personnel set out in its relevant parts:

Article 43

"(1) the decision to discharge from office shall be made by

...(b) for military officers, an order of the Minister of Defence; ..."

Article 85

"(1) a discharge may take place when

...

(m) the application for access to classified information or for security clearance has been refused or has been withdrawn or when those documents are no longer revalidated for reasons attributable to the officer under the law.

(2) the discharge from office shall be automatic in the situations described under letters ... (m) ..."

II. RELEVANT DOMESTIC PRACTICE

A. Relevant rulings of the Constitutional Court

62. The Constitutional Court was seised on various occasions of requests seeking to establish that the criminal procedures whereby relevant information for a trial was classified and/or declassified on a discretionary basis by an administrative authority, and not by a judge, with the consequence that the access of the claimant was arbitrarily, partly or fully restricted, were not in compliance with the Constitution and with Article 6 of the Convention.

63. By a decision of 18 January 2018, the Constitutional Court decided that in the context of criminal proceedings against an individual, it should only be for the (preliminary chamber) judge to declassify relevant information which was adduced as evidence in the criminal proceedings. The court considered:

> "The protection of classified information cannot take precedence over the right of an accused to be informed of the charges against him or her and all the safeguards relating to a fair criminal trial, unless specific and limited restrictions are set out in the law. Such restrictions may be accepted only when they genuinely and justifiably aim to protect legitimate interests in connection with the fundamental rights and freedoms of citizens or national security, the right to decide on any such restriction on granting access to relevant information always belonging to a judge."

This approach was confirmed in a more recent decision of the Constitutional Court on 18 June 2020, similarly in the context of criminal proceedings against an individual.

64. Relying on the above-mentioned decision from 2018, the High Court of Cassation and Justice raised, within the context of a criminal case pending before it, an objection to the compliance with the Constitution of the relevant provisions of the Criminal Procedure Code, which still made the access of the accused's chosen lawyer to classified information conditional on the prior obtaining of an ORNISS certificate (see paragraphs 52 – 58 above). The High Court considered that in the situation when the relevant authority refused to declassify or to lower the classification level of the information which was essential for the examination of the criminal trial, the court itself was entitled to allow the accused's chosen lawyer access to that information, without subjecting the lawyer to the condition of obtaining an ORNISS certificate, because such a condition was contrary to the Constitution and to the case-law of the European Court of Human Rights.

In a decision of 9 June 2020 the Constitutional Court considered that the objection raised by the High Court did not refer to the provisions of the Criminal Procedure Code, but to those of Law no. 182/2002 (see paragraphs 52-53 above) and was with regard to the procedure set out therein for the granting of security clearance and access to classified information; hence, the objection was inadmissible. However, the Constitutional Court held:

> "...the restrictions imposed for the granting of access to classified information [including the condition for the lawyer to obtain an ORNISS certificate] could not be regarded as obstacles to an effective and absolute access to information essential in the examination of the case, but [on the contrary], they create a framework within which the two conflicting interests – the individual interest of the accused, relying on the fundamental right to defence, and the general interest of society, relying on the need to protect national security – coexisted in a fair balance capable of satisfying both interests so as not to harm the substance of either one."

B. Domestic case-law

65. Both parties have submitted various judgments given by the domestic courts in cases raising, according to them, similar issues to those that need to be examined in the present case.

66. The Government submitted several domestic judgments, notably:

(a) a decision of 10 April 2017, in which the Alba-Iulia Court of Appeal stated that with regard to the procedure of granting, revoking or upholding security clearance, national security interests prevailed over any personal interest;

(b) a judgment of 25 October 2018, in which the Tulcea County Court decided that the signature given on an Annex no. 15 to the GO statement also implied a waiver of the right to obtain reasons when the refusal of the application for security clearance occurred with regard to a revalidation procedure (a formal procedure whereby the person aspiring to obtain such a clearance is reverified);

(c) a summary judgment (*încheiere*) of 21 January 2020, in which the Brașov Court of Appeal decided to postpone the examination of the case until that claimant's representative's request to be granted an ORNISS certificate could be examined. However, the representative had subsequently decided to withdraw her request and hence access to the classified information was no longer granted;

(d) a decision of 25 February 2020, in which the Brașov Court of Appeal decided, *inter alia*, that the agreement not to receive any reasons for the decision not to grant security clearance also implied agreement with regard to the decision to have that security clearance withdrawn.

67. The applicant submitted two judgments:

(a) a judgment given by the Craiova Court of Appeal on 17 June 2015 concerning proceedings relating to the refusal to issue a gun permit to the claimant, based on information classified as secret (*secret de serviciu*); that claimant's representative had had the certificate allowing him to consult the classified information, but not to use that information, hence he was not allowed to have access to the relevant documents;

(b) a judgment given by the Cluj Court of Appeal on 3 November 2016 in civil proceedings brought by the claimant against the SRI, which concerned his discharge based on, *inter alia*, an annual appraisal report classified as top

secret; in that case, the SRI had submitted excerpts of the relevant documents to the case-file, which implied that such a possibility existed and was acceptable to both the SRI and the courts.

THE LAW

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

68. The applicant complained of the unfairness of the proceedings which he had brought to challenge the decision to withdraw his security clearance, and the decision to discharge him from office. In particular, he argued that the administrative courts had refused him access to evidence classified as confidential by the defendant, which had been decisive in his case. He considered that this had violated his rights to an adversarial hearing, to equality of arms, and to a reasoned decision.

He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' submissions

69. The Government submitted that in so far as the applicant complained that he had not had access to the information underlying the decision to withdraw his security clearance, the right of access to State secrets as such was not guaranteed by the national law. Indeed, it was the right of the authority responsible for decisions regarding security clearance to fully or partly limit or grant access to such information, based on national security considerations, in the circumstances and under the procedures provided for by the relevant law.

70. Moreover, the applicant himself had waived any possible right to be informed of the reasons justifying a refusal to be granted security clearance, and implicitly, a decision to have his clearance withdrawn, when he had signed the Annex no. 15 to the GO statement (see paragraph 57 above). This implicit waiver had been accepted as valid by the domestic courts, as proved by the examples of domestic judgments submitted by the Government (see paragraph 66 (b) and (d) above).

71. The Government therefore argued that no "civil right" was determined by the decision to refuse security clearance, having particular regard to the fact that the national law did provide for a right of access to a court, which could examine the well-foundedness of such a decision in conditions which were fully compliant with the requirements of Article 6.

72. The applicant submitted that he had rights under Article 6 to have access to a court capable of assessing the decisions which had unjustifiably put an end to eighteen years of his military career, and to have his professional reputation properly respected. These rights, which had had an impact on his employment status and professional income, had a definite civil nature.

2. The Court's assessment

73. Having regard to the applicant's complaint, as he formulated it (see paragraph 68 above), the Court notes that what is at stake for him in the present case is not a right to access State secrets, which is, as such, not guaranteed by the Convention (see *Ternovskis v. Latvia*, no. 33637/02, § 44, 29 April 2014), but the applicant's rights that were affected as a consequence of the withdrawal of the clearance for such access. The Court notes that the withdrawal in question had a decisive impact on the applicant's personal situation – in the absence of the required clearance, he was discharged from the position in which he had served for eighteen years (see paragraph 17 above), which undeniably had, at the very least, clear pecuniary repercussions for him. The link between the decision to withdraw the applicant's security clearance and his loss of income was certainly more than tenuous or remote, indeed it was straightforward.

74. In the light of the above and noting that Romanian domestic law did not bar access to a court to people occupying the post hold by the applicant, the Court considers, in the light of its case-law, that Article 6 under its civil limb is applicable in the present case (see *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012; *Ternovskis*, cited above, § 44; *Fazliyski v. Bulgaria*, no. 40908/05, § 52, 16 April 2013; *Miryana Petrova v. Bulgaria*, no. 57148/08, §§ 31, 32 and 35, 21 July 2016; and *Regner v. the Czech Republic* [GC], no. 35289/11, §§ 119 and 122-24, 19 September 2017).

75. The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

76. Arguing that the procedures before the domestic courts did not comply with Article 6, the applicant advanced several arguments concerning the unfairness of the proceedings, the use of special lawyers holding an ORNISS certificate (see paragraph 52-58 above) and the absence of any strict necessity to conduct secret proceedings in his case.

77. In particular, he contended that the signing of the Annex no. 15 to the GO statement (see paragraph 57 above), which referred exclusively to the

situation when security clearance was not granted at all, and not when it was granted but then withdrawn, could not be taken as a waiver of the right to be informed of the reasons for withdrawal, and implicitly, for his discharge; indeed, he was entitled, according to the law regulating employment matters, to be informed of the reasons which terminated his career, even if such information was provided in a summary manner, or in an excerpt, which would have allowed for the classified information to have been left out (by anonymisation for instance). Such a possibility existed, as proved by the domestic case-law he had submitted to support his arguments (see paragraph 67 (b) above).

78. The only information he had received from his employer concerning the termination of his employment was on an oral basis, and then in writing, including from the domestic courts, by a mere indication of the relevant domestic legal provisions and their content, without any reference to specific acts or misconduct (see paragraphs 16, 17, 19, 25 and 50 above).

79. No real defence could be built on such limited information, which did not indicate any factual basis, even by a lawyer holding an ORNISS certificate. Such a lawyer would not have obtained any concrete or specific information from the applicant, who had not known what was held against him; moreover, even if a lawyer had been granted an ORNISS certificate (with the SRI's prior approval, which was improbable in view of their strong opposition to disclosing any relevant information concerning his case), he would have been unable to make concrete use of that information, because he would not have been allowed to come back to the applicant to ask further factual questions so as to correlate the classified information with the applicant's explanations (the applicant referred to the domestic case-law he had submitted to the file proving this point – see paragraph 67 (a) above); those circumstances rendered the defence completely abstract and therefore illusory.

80. Lastly, the applicant argued that the courts' decisions had lacked any concrete reasoning, because they had only indicated the general notion of national security and particular domestic legal provisions, without making a real assessment of the case, both in terms of the necessity of having all information kept classified and examining the veracity and relevance of all information relating to his case.

(b) The Government

81. The Government reiterated that the national law did not provide for the right of a claimant to be informed of the reasons justifying the withdrawal of security clearance, but only for the right to challenge that withdrawal before the courts. The applicant had made use of that possibility, and the ensuing proceedings before the domestic courts had met the standards of Article 6 § 1 of the Convention, as argued below. In this context, the Government emphasised that the nature of the applicant's employment was

not an ordinary one, because SRI employees were bound by the military regulations.

82. The applicant was in fact aware of the essence of the case built against him, the charges being, as had also been pointed out by the domestic courts, of a different sort from those of the criminal nature which had determined the initiation of criminal proceedings against the applicant (see paragraph 50 above); in particular, the withdrawal of his security clearance was a consequence of the applicant's having deliberately dissimulated, misinterpreted or forged information relevant to national security, or of his having lied in the application form or during the interview to obtain security clearance, and of his having manifested disloyalty, dishonour, lack of discretion or moral probity (the Government cited Article 160 (a) and (f) of the GO, see paragraph 56 above).

83. Moreover, the applicant had been able to put forward his arguments and requests for evidence and reply to those submitted by the defendant, including asking for the declassification of the impugned documents; he had had access to all of the documents on file except for the classified ones; the latter, however, had been scrutinised by the domestic courts under the conditions provided for by the relevant law. The margin of appreciation of the domestic authorities in the matter at stake, which involved national security issues, was a very wide one.

84. The Government pointed out that the applicant was entitled to be represented by a lawyer holding an ORNISS certificate (see paragraphs 52-58 above), who would therefore have had access to the classified information (as shown by the domestic case-law submitted by them, see paragraph 66 above), but he had failed to have recourse to that possibility.

85. Finally, in their reasoning, the courts had responded to the applicant's arguments and had informed him, in general terms and inasmuch as allowed by the relevant law, of the essence of the reasons underlying the decisions taken against him, which were found to be justified and well-founded. The present case was therefore relevantly similar to *Regner* (cited above) and the Government considered that it should similarly be dismissed.

2. The Court's assessment

(a) General principles

86. The Court has already examined and laid out the principles applicable under the civil limb of Article 6 of the Convention in *Regner* (cited above, §§ 145-49). In that case, the applicant contested the withdrawal of his security clearance, and neither he nor his lawyer had access to the classified documents or the decision to remove his security clearance, in so far as it was based on the classified documents (for the application of those general principles to the particular circumstances of that case, see *Regner*, cited above, §§ 150-62).

87. The Court had regard to the proceedings as a whole, to determine whether the restrictions on the adversarial and equality-of-arms principles were sufficiently counterbalanced by other safeguards (ibid., § 151).

88. Reiterating that the rights under Article 6 § 1 are not absolute and that the Contracting states enjoy a margin of appreciation in this area, the Court emphasised that the right to disclosure of relevant evidence is not an absolute right either. In the criminal context the Court has found that competing interests such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime must be weighed against the rights of the party to the proceedings (ibid., § 148). In the context of the civil proceedings the Court considered that the principles under Article 6 § 1 were satisfied where the domestic courts had the necessary independence and impartiality; had unlimited access to all the classified documents which justified the decision; were empowered to assess the merits of the decision revoking security clearance and to quash, where applicable, such a decision if it was arbitrary (ibid., § 152). The Court also examined whether the domestic courts duly exercised the powers of scrutiny available to them, and whether their use of a restricted procedure for reasons of security appeared arbitrary or manifestly unreasonable (ibid., §§ 156 and 159).

89. Finally, the Court emphasised the desirability of the domestic courts explaining, if only summarily, the extent of the review they had carried out and the accusations against the applicant (ibid., § 160).

(b) Application of the above-mentioned principles to the instant case

90. While the matter of precisely what classified information has been made available by the SRI to the courts is an issue of contention between the parties (see paragraphs 45, 80 and 83 above), the Court notes that on the basis of whatever classified information they had at hand, the domestic courts decided that, even though national security reasons prevented them from disclosing anything to the applicant, as excerpts or otherwise, the evidence was in any event sufficient to justify the measures taken against him by his employer, the SRI (see paragraphs 41, 47 and 49 above).

91. The Court will therefore apply the relevant principles developed in *Regner*, summarised in paragraphs 87-89 above, adapting them to the circumstances of the case before it, as presented below.

(i) The limitation of the applicant's procedural rights

92. In the instant case the Court observes that, in accordance with the requirements of national law regarding legal proceedings in which a decision revoking security clearance and the consequent decision to discharge from office are challenged, the proceedings brought by the applicant were restricted in two ways with regard to the rules of ordinary law guaranteeing a fair trial: first, the classified documents and information were not available

either to him or to his lawyer, and second, in so far as those decisions were based on those documents, the concrete grounds justifying them were never disclosed to him (see paragraphs 39 and 49 above).

93. This entailed a clear and severe limitation of the applicant's right to be informed of the factual elements and the content of the documents underlying both the SRI's decision to withdraw his security clearance and to its decision to discharge him from office.

94. At this juncture and with particular reference to the matter of whether, by signing Annex no. 15 to the GO (see paragraph 57 above), the applicant had or had not waived his right to be informed of the grounds justifying the decision to withdraw his security clearance, the Court takes note of the domestic courts' conclusion that such a waiver had been implicit and hence, valid (see paragraphs 33 and 49 above and, in the context of different domestic proceedings not involving the applicant, paragraph 66 (b) and (d) above).

95. While the Court's task is not to substitute itself for the national courts in their interpretation and application of the applicable provisions, the Court must nevertheless reiterate its cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance; additionally, it must not run counter to any important public interest (see, among many other authorities, *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, § 91, ECHR 2014 (extracts)).

96. In that respect, the manner in which the impugned waiver had been established by the Annex 15 to the GO (see paragraph 57 above), which refers expressly to the procedure of not granting security clearance, and not to the withdrawal of an existing security clearance, leaves room for interpretation so as to be considered as too equivocal to be effective for Convention purposes.

97. The Court will therefore have to examine whether all the above-mentioned limitations of the applicant's procedural rights were necessary and whether counterbalancing measures were put in place by the national authorities to mitigate those limitations, before assessing the concrete impact of the limitations on the applicant's situation in the light of the proceedings as a whole (see *mutatis mutandis*, *Regner*, cited above, § 151).

(ii) Whether the limitations of the applicant's procedural rights were necessary

98. In the present case, the national courts applied the relevant legal provisions (see paragraphs 52-58 above) and ruled from the outset that the applicant could not have access to essential parts of the file on the grounds that the documents were classified (see paragraphs 39 and 49 above). Domestic law, moreover, did not allow the courts to examine of their own

motion whether the preservation of national security required, in a given case, the non-disclosure of evidence in the file, or whether the classification of the information in question was justified. Furthermore, they were not themselves competent to declassify the secret data and information made available to them. They could only ask the competent authority to declassify those documents for the purpose of placing them on file for consultation by the interested party, in compliance with Section 24 of the Law no. 182/2002 and Article 20 of the GO no. 585/2002 (see paragraphs 52-54 and 63-64 above; see also the Government's brief presentation of the relevant law in the case of *Muhammad and Muhammad*, cited above, § 104; contrast *Regner*, cited above, § 152).

99. In that connection, the courts dismissed the applicant's request to have the decisive evidence declassified, considering that preserving the classification of that information prevented its dissemination, which would have had an impact "on the lawful actions of certain state institutions which aim to ensure a climate of safety and order for an entire community", having regard to the acts held against the applicant, and to the consequences to public order or to "the private or public interests" involved which such declassification entailed (see paragraphs 39 and 49 above).

100. However, with the lack of any indication as to the precise acts held against the applicant or the precise actions of "certain state institutions", or at least which "private or public interests" were actually involved, the Court notes the vagueness of the domestic courts' language in referring to any concrete national security reason justifying the non-disclosure of evidence in the applicant's file. It therefore cannot but conclude that the actual national security reasons which, in the authorities' opinion, precluded the disclosure of the classified evidence and intelligence concerning the applicant, were not minimally explained by the national courts (contrast *Regner*, cited above, §§ 154-55).

(iii) The existence of counterbalancing measures in the present case

101. The Court notes that, according to the Government, the applicant had access to the whole file, except for the classified information; that he had nevertheless been informed of the legal grounds underlying the decisions taken against him, which pointed to certain factual circumstances and thus to the essence of the case against him; that he was entitled to be represented by a lawyer holding an ORNISS certificate (see paragraphs 82-84 above), an opportunity which he did not use; and lastly and most importantly, that high-level impartial and independent courts had conducted the proceedings and decided on the necessity and the well-foundedness of the measures taken against him, in the light of the classified documents (see paragraphs 40-41 and 49-51 above).

(α) The extent of the information provided to the applicant about the factual elements underlying the impugned decisions

102. Having regard to the Government's first argument, the Court notes that throughout the proceedings, whether before his employer or before the domestic courts, the information given to the applicant referred exclusively to the legal provisions considered as relevant to his case, which were either indicated by their number, or sometimes also spelt out as provided in the law, without any mention of the conduct itself (see paragraphs 17, 19, 25 and 50 above; contrast *Regner*, § 157). However, for the Court, a mere enumeration of the numbers of legal provisions cannot suffice, not even *a minima*, to constitute adequate information about the reasons underlying the decisions taken against the applicant (see, *mutatis mutandis*, *Muhammad and Muhammad*, cited above, § 168).

103. In so far as the criminal case initiated against the applicant was ultimately closed on account of lack of evidence (see paragraphs 8-14 above), the High Court concluded that the alleged criminal acts were irrelevant to the withdrawal of the security clearance (see paragraph 50 above). The Court will therefore not include any reference to that criminal case in its assessment of whether sufficient information was given to the applicant. Turning to what precisely was spelt out to the applicant in terms of substantive accusations, the Court observes that according to the Government he was considered to have either "deliberately dissimulated, misinterpreted or forged information relevant to national security", or to have "lied in the application form or during the interview for obtaining security clearance", and to have "manifested disloyalty, dishonour, lack of discretion or moral probity" (see paragraph 82 above). Nevertheless, no concrete factual basis for these situations of incompatibility, quoted as such from the relevant law (see paragraph 56 above), was suggested or at least summarily indicated. The Court therefore considers that no specific accusations against the applicant were ever made by the domestic authorities throughout the proceedings disputed by the applicant (contrast *Regner*, cited above, §§ 156-57).

104. The Court further finds that, as no specific information was ever provided to the applicant in the context of court proceedings, this is not a factor which is capable of counterbalancing the limitation of the applicant's procedural rights. The Court must therefore pursue its examination to ascertain whether any other safeguards were put in place for the benefit of the applicant. Indeed, the extensive restriction of specific information entails the need for appropriate counterbalancing safeguards (see, *mutatis mutandis*, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 218, ECHR 2009).

(β) The applicant's representation in the proceedings

105. The Court acknowledges that the use of specific forms of representation, such as for instance the one ensured by special advocates, may prove to be sufficiently effective for the purposes of mounting at least some

minimal defence when those representatives have access to classified information, even if afterwards they can no longer consult with their clients or can consult them only in very limited circumstances (see, for instance, *I.R. and G.T. v. the United Kingdom* (dec.) nos. 14876/12 and 63339/12, §§ 61 and 63, 28 January 2014, where the Court was satisfied that the use of special advocates in closed proceedings before the Special Immigration Appeals Commission provided sufficient guarantees under Article 8 alone and taken with Article 13 of the Convention, and *Gulamhussein and Tariq v. the United Kingdom* (dec.) [Committee], nos. 46538/11 and 3960/12, § 85, 3 April 2018). The Court has also pointed out however, albeit in the context of Article 5 rights, that the question of whether a detainee has been provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate must be decided on a case-by-case basis (see *A. and Others v. the United Kingdom*, cited above, § 220).

106. While being mindful that what is at stake for an applicant in the context of Article 5 and/or in the context of the criminal limb of Article 6, namely a person's liberty, is of a different nature from what is in question when the civil limb of Article 6, such as in the present case, comes into play, and hence, the procedural guarantees may not be as demanding for the latter as those which apply in the case of the former (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 67, 11 July 2017; and, *mutatis mutandis*, *I.R. and G.T. v. the United Kingdom*, cited above, § 61), the Court reiterates that only those measures restricting the rights of a party to the proceedings which do not affect the very essence of those rights are permissible (see *Regner*, cited above, § 148; see also the findings made at the level of the highest Romanian courts, albeit concerning criminal proceedings, referred to in paragraph 64 above).

107. Turning back to the present case, the Court cannot disregard the applicant's argument, which was not expressly contested by the Government, according to which, with the lack of any possibility, for an ORNISS lawyer, to disclose the classified information to his client and ask him factual explanation, any defence, even by an ORNISS lawyer, would have been ineffective, as it would have been too vague and not able to be related to actual facts or conduct (see paragraph 79 above; see also the viewpoint of one national court on the matter, cited by the applicant, referred to in paragraph 67 (a) above). The Court should now refer to its findings in *Muhammad and Muhammad* (cited above, § 185), where it stated that, on the one hand, the domestic authorities were not obliged under domestic law to inform the applicant that he was entitled to be represented by a lawyer holding an ORNISS certificate, and that, on the other hand, at the relevant time – which is partly relevant to the present case as well - very few lawyers held such a certificate, the names of whom were not even published by the Bar (ibid., §§ 57-58). In those circumstances, the Court estimates that the

effectiveness of such a defence in the applicant's case may be called into question.

108. In the light of the foregoing, the Court considers that the presence of the applicant's lawyer (holding or not an ORNISS certificate) before the domestic courts, without any possibility of ascertaining the accusations against his client, was not capable of ensuring the applicant's effective defence so as to be able to counterbalance, in a significant manner, the limitations affecting him in the exercise of his procedural rights (see *Regner*, cited above, § 148; and *mutatis mutandis*, in the context of criminal proceedings against the applicants, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 265, 13 September 2016).

(γ) Whether the impugned decisions were subjected to independent scrutiny

109. The Court observes at the outset that the proceedings under scrutiny in the present case were of a judicial nature and that they were held before domestic courts which enjoyed the requisite independence within the meaning of the Court's case-law, a matter which has not been questioned by the applicant.

110. The Court has already found that before the above-mentioned domestic courts, the information available to the applicant about any concrete accusations or misconduct, or indeed factual matters justifying the impugned decisions, was scarce and of a general nature, rendering his defence ineffective in practice (see paragraphs 103-04 above). In the Court's view, faced with a situation such as this, the extent of the scrutiny applied by the national courts as to the well-foundedness of the impugned decisions should be all the more comprehensive (see, *mutatis mutandis*, *Muhammad and Muhammad*, cited above, § 194).

111. Concerning the assessment made by the domestic courts, the Court has already noted that the language used in indicating the national security considerations which determined the specific procedure in the case was of a very vague nature (see paragraph 100 above; contrast *Regner*, cited above, 154). Furthermore, the approach of the domestic courts to the relevance of the criminal proceedings against the applicant to the taking of the measures challenged by him fluctuated and was contradictory, as the applicant's implication in criminal proceedings varied from being said to be quite relevant, to being finally put aside as having no connection with the measures in question (see paragraphs 27, 33 and 50 above; contrast *Regner*, cited above, §§ 156-57, where the courts relied on "comprehensive and detailed information concerning the conduct and lifestyle of the applicant" on the basis of which it had been determined whether he posed a national security risk, having regard also to the fact that at the time there were serious suspicions about his participation in organised crime, for which he was subsequently prosecuted and ultimately convicted).

112. All of the above elements, culminating in the scarcity of the courts' reasoning in dismissing the applicant's claims, make it difficult for the Court to assess the actual degree of scrutiny applied by those independent authorities in verifying the veracity and credibility of the facts submitted to them by the SRI. Indeed, with the lack of coherent explanations, however summary, of the extent of the review they had carried out and concerning the substance of the accusations against the applicant (see, for instance, *Regner*, cited above, § 160; contrast with *Gulamhussein and Tariq*, cited above, § 97,), it cannot be considered as sufficiently established that in the present case the domestic courts effectively and adequately exercised the powers vested in them for that purpose.

(δ) Conclusion

113. Having regard to the findings in paragraphs 93, 100, 104, 108 and 112 above, to the proceedings as a whole and taking account of the margin of appreciation afforded to the States in such matters, the Court finds that the limitations imposed on the applicant's rights to adversarial proceedings and equality of arms were not counterbalanced in the domestic proceedings in such a way as to preserve the very essence of his right to a fair trial.

114. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. 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

116. The applicant claimed 418,026 Romanian lei (RON – approximately 87,000 euros (EUR)) in respect of pecuniary damage. This amount represented the loss of salary from the time of his discharge from office until March 2021, when the claims were submitted. He further requested EUR 10,000 in respect of non-pecuniary damage.

117. The Government contested the applicant's claims.

118. The Court does not discern any direct causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant definitely sustained non-pecuniary damage and the finding of a violation cannot by itself constitute redress. In view of the nature of the violation, the Court, ruling on

an equitable basis, awards the applicant EUR 6,000, plus any tax that may be chargeable.

119. It must in addition be pointed out that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the breach and to redress as far as possible its effects (see, amongst many other authorities, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 311, 1 December 2020 and the references cited therein). The most appropriate form of redress in cases where the domestic proceedings challenged by the applicant have entailed breaches of the requirements of Article 6 of the Convention is, as a rule, to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial (see, *mutatis mutandis*, *Miryana Petrova*, cited above, § 50).

B. Costs and expenses

120. The applicant also claimed RON 15,485.77 (approximately EUR 3,230) for the costs and expenses incurred before the domestic courts and the Court and appended copies of invoices justifying, in his view, the amount claimed.

121. The Government contested these claims as excessive and partly unsubstantiated.

122. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,700 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

123. 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,700 (two thousand seven hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President