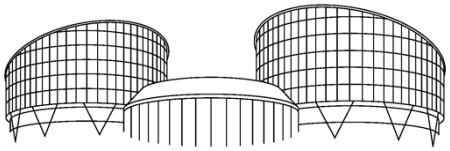

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MARILENA-CARMEN POPA v. ROMANIA

(Application no. 1814/11)

JUDGMENT

Art 6 (criminal) • Fair hearing • Acquittal overturned without rehearing a witness by final-instance court on the basis of decisive weight given to expert evidence • Direct assessment of witness evidence by final-instance court not necessitated by fair trial requirements • Applicant able to present her arguments in relation to the merits of the case before the final-instance court • Defence not undermined by re-classification by final-instance court from continuous acts to a single act of the same offence

STRASBOURG

18 February 2020

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 Marilena-Carmen Popa v. Romania,

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

Jon Fridrik Kjølbro, *President,*
Iulia Antoanella Motoc,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 14 January 2020,

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

PROCEDURE

1. The case originated in an application (no. 1814/11) 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, Ms Marilena-Carmen Popa ("the applicant"), on 15 December 2010.

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

3. The applicant alleged under Article 6 of the Convention that the criminal proceeding opened against her had been unfair because, on the one hand, she had not been properly heard by the court in view of the quashing by the High Court of Cassation and Justice of her acquittal and of the amending of the charges against her, and because, on the other hand, the aforementioned court had overturned her acquittal without a direct assessment of the relevant evidence on which it had relied. The applicant alleged further that, by fixing her probation period to three years, the domestic courts had breached Article 7 of the Convention in that they had imposed a heavier penalty than the one prescribed by law.

4. On 18 September 2015 the above-mentioned complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Bucharest.

6. Until 10 September 2010 the applicant was a notary public practising in Bucharest.

7. On 28 November 2003 the applicant authenticated a contract of sale of land concluded between two companies, namely, the seller S.C. V. S.R.L., represented by E.C., and the buyer S.C. O.E. S.R.L., represented by M.S.

8. On 1 July 2005 the prosecutor's office attached to the High Court of Cassation and Justice (hereinafter "the prosecutor's office") indicted the applicant for continuous acts of forgery and sent her case to the Bucharest Court of Appeal (hereinafter "the Court of Appeal") for trial. The prosecutor's office asserted that between 31 January 2003 and 9 February 2004 the applicant, acting as a notary public, had forged several separate contracts of sale. In particular she had authenticated a number of contracts, including the contract of sale of 28 November 2003, in the absence of the signatory parties.

A. First-instance court proceedings

9. During the proceedings, the Court of Appeal heard evidence from the applicant, who was assisted by a lawyer. It also heard evidence from thirty-nine witnesses, including E.C.

10. E.C. stated before the court that she had not been present at the notary public's office when the contract of sale of 28 November 2003 had been concluded and that the signature on the contract belonged to someone else. She further stated that she had no connection to or knowledge of the company S.C. V. S.R.L.

11. On 9 July 2008 the Court of Appeal acquitted the applicant, relying on the evidence available in the file, including a forensic expert report produced on 28 June 2005 with regard to the veracity of the signatures on the contract of 28 November 2003. The court stated as follows:

> "Witness E.C., an associate and administrator of S.C. V. S.R.L. and representative of the company, as mentioned in the contract of 28 November 2003 ..., declared that she did not know anything concerning the activity of the company [S.C. V. S.R.L.] and that she had not signed the impugned contract. Her statement is also supported by the conclusions of the forensic report of 28 June 2005, which confirm the fact that the signatures on the contract are not hers.
>
> ...
>
> Concerning the contract of sale of 28 November 2003, according to the prosecutor's office the witness E.C. was never present before a notary public to sign the documents, and the signature is not hers, [a fact proven] by the forensic report. ... E.C.

declared before this court that the documents presented to her, that is to say statements, specimen signatures, and fiscal certificate, '[had not been] signed by [her] but by [her] daughter L.C.'.

Also, ... E.C. did not recognise the signature on the statement she had given before the prosecutor's office."

12. The court held the following:

"In this situation, as long as the conclusion from the forensic report has not been confirmed also by other evidence which would rebut the defendant's statement that E.C. was present in the notary public's office on 28 November 2003 in order to finalise the contract of sale of 28 November 2003, ... the material element of the criminal offence [under examination] does not exist."

13. The prosecutor's office appealed on points of fact and law against the judgment to the High Court of Cassation and Justice (hereinafter "the Court of Cassation").

B. Final-instance court proceedings

14. At a hearing of 28 May 2010 before the Court of Cassation the applicant's lawyer made oral submissions and submitted additional documentary evidence. He did not raise any preliminary objection or ask for more evidence to be adduced in the case.

15. On the same date the Court of Cassation heard arguments from the applicant. In her statement the applicant reiterated that all the impugned contracts had been signed by the contracting parties in her presence. The court did not hear any witnesses.

16. In a final judgment of 29 June 2010 the Court of Cassation allowed the prosecutor's office's appeal on points of fact and law, quashed the judgment of the lower court and re-examined the merits of the case. It amended the charge brought against the applicant and convicted her of a single act of forgery because she had forged the contract signed on 28 November 2003. Subsequently, the court sentenced the applicant to six months imprisonment, stayed conditionally (*suspendare condiționată*) and imposed on her a period of probation (*termen de încercare*) of three years.

17. The court stated as follows:

"The witness E.C. declared that she did not know anything concerning the activities of S.C. V. S.R.L. and that she had not signed the impugned contract.

Her statement was supported by the conclusions of the forensic report of 28 June 2005, which confirms the fact that the signatures on the contract are not hers.

...

The first-instance court argued that it could not definitively adjudge that the material element of the offence was present as long as the conclusion of the forensic report was not confirmed also by other evidence which would rebut the defendant's statement, specifically that E.C. had been present in the notary public's office on 28 November 2003 in order to finalise the contract of sale."

18. The court held the following:

> "However, it was ... E.C. herself who declared that she did not know anything concerning the activity of company S.C. V. S.R.L. and that she had not signed the impugned contract. Moreover, her statement is supported by the conclusions of the forensic report of 28 June 2005, which confirms that the signatures on the contract are not hers, an aspect of scientific order which erases any doubt that may arise in this case and which did not apply in the other instances, where such forensic reports were not produced."

19. The court held further that, since the applicant was guilty of a single act of forgery, the legal classification of her offence had to be changed from continuous acts of forgery to a single act of the same offence.

20. By an interlocutory judgment of 15 July 2010 the same formation of judges of the Court of Cassation decided of its own motion to rectify certain obvious errors concerning the final judgment of 29 June 2010. However, it did not examine or change the probation period imposed on the applicant.

C. Extraordinary application for annulment

21. On 2 July 2010 the applicant lodged an extraordinary application for annulment (*contestaţie în anulare*) against the final judgment of 29 June 2010. She argued that the final-instance court had quashed the acquittal decision delivered by the first-instance court and had changed the legal classification of the charge against her and had convicted her without allowing her to express her views on the question of the change of the legal classification of the charge against her and without hearing her directly. Moreover, the final-instance court had wrongfully imposed on her a probation period longer than the lawfully allowed maximum one of two years and six months.

22. In a judgment of 16 November 2010 the Court of Cassation**,** sitting in a different formation of judges than the one which had delivered the final judgment of 29 June 2010 (see paragraphs 16-19 above), rejected the applicant's extraordinary application for annulment as inadmissible. It held that the applicant had been heard by the court and her deposition had not been censured in any way. Moreover, the applicant's chosen legal representative had submitted only additional documentary evidence to the case file. The court did not expressly examine the applicant's argument concerning the probation period imposed on her.

D. Other relevant information

23. On 10 September 2010 the Ministry of Justice issued an order removing the applicant from the register of notaries public following her criminal conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant law

24. The provisions of the former Code of Criminal Procedure, as in force at the relevant time, read as follows:

Article 195

"Obvious material errors found in a procedural document shall be rectified by the ... court that produced the document following an application by the interested party or of its own motion.

In order to correct the error, the parties may be summoned for clarifications."

Article 334

"If it is estimated during the trial that the legal classification given to the offence in the act of indictment will be changed, the court must allow the parties to express their views on the question of the change of the legal classification and to inform the defendant that he or she has a right to ask for the proceedings to be delayed or possibly adjourned in order for him or her to prepare his or her defence."

Article 385[14]

...

"Upon examining an appeal on points of fact and law, the court has the obligation to hear a defendant who is present ... when he or she was not heard by the first-instance court or the appellate court, as well as when these courts have not convicted the defendant.

..."

Article 385[16]

"When a final-instance court quashes the decision and holds that the case must be re-examined ..., it takes a decision also on the evidence to be produced, setting a hearing for the retrial. At the hearing set for retrial, the court has the obligation to hear a defendant who is present ... when he or she was not heard by the first-instance court or the appellate court, as well as when these courts have not convicted the defendant.

..."

Article 386

"An extraordinary application for annulment may be lodged against a final judgment delivered by a criminal court in the following circumstances:

a) when notification of the hearing during which the final-instance court examined the case had not been sent to the party in accordance with the law;

b) if the party proves that it was impossible for him or her to participate in the hearing during which the final-instance court examined the case and to inform the court of that hindrance;

c) when the final-instance court did not examine one of the reasons for terminating the criminal trial, provided by Article 10 § 1 f) -i[1]), [if those reasons were] supported by evidence in the file;

d) when the courts rendered two final decisions for the same facts concerning the same person;

e) when, while examining an appeal on points of fact and law or upon re-examination of the case, the final-instance court did not hear a defendant who was present and his or her hearing was mandatory pursuant to Articles 385[14] or 385[16].”

25. With regard to the conditional stay of execution of the sentence and its probation period, the former Criminal Code read as follows:

Article 81

“A court may decide to stay the execution of the sentence imposed on a natural person conditionally, for a certain period of time, if the following conditions are met:

a) the penalty imposed is detention of no more than three years or a fine;

b) the offender was not sentenced before to more than six months imprisonment ...;

c) it is assessed that the purpose of the sentence may be achieved even without serving it;

The conditional stay of the execution of the sentence does not result in a stay of execution of the preventive measures and of the civil obligations set out in the judgment.

The court must provide reasons for the conditional stay of the execution of the sentence.”

Article 82

“The length of the conditional stay of the execution of a sentence amounts to a probation period for the convicted person and is composed of the length of the prison sentence imposed to which a period of two years is added ...”

Article 83

“If the convicted person commits a new offence during the probation period, for which the person was convicted by a final judgment delivered even after the lapse of the probation period, the court shall revoke the conditional stay and order the execution of the full sentence, which cannot be joined to the sentence delivered for the new offence.

...”

Article 86

“If the convicted person has not re-offended during the probation period and the stay of execution has also not been revoked ..., the said person is considered lawfully rehabilitated.”

B. Relevant practice

26. The Government submitted two judgments of the Court of Cassation delivered on 20 June 2008 and 2 May 2012.

27. In its judgment of 20 June 2008, the Court of Cassation upheld an interlocutory judgment delivered by a lower court of its own motion in order to correct an obvious material error concerning the length of the probation period imposed on a convicted person. The Court of Cassation held that the probation period was provided for by law and the court had only to determine its length. Since the lower court, by mistake, had not calculated the length of the probation correctly, it had acted lawfully by correcting the error of its own motion.

28. In its judgment of 2 May 2012, the Court of Cassation held, *inter alia*, that in the legal sense material errors were exclusively those errors which did not regard the content of the procedural document, in particular the meaning of what was contained in the procedural document. An error was obvious when it was apparent without any doubt and without being necessary to prove its existence by adducing evidence or to determine it by deliberating or expressing views.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant complained that the criminal proceedings opened against her had been unfair. She relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
>
> ..."

A. Admissibility

30. The Court notes that 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

(a) The applicant

31. The applicant acknowledged that she had been able to present her case directly before the final-instance court. However, she argued that the criminal proceedings opened against her had been unfair because of the failure of the final-instance court to hear evidence directly from E.C. and to order a new forensic expert report to be produced in the case. The forensic report which substantiated her conviction had in fact been produced by a forensic expert working for the Ministry of Interior, not by an expert in graphology, therefore raising concerns as to its reliability and objectivity.

32. By re-classifying the offence she was charged with without giving her the possibility to comment on this point, the final-instance court had denied her the right to build an appropriate defence. Moreover, the final-instance court had ignored its own practice on this point.

(b) The Government

33. The Government argued that the applicant had been heard by the final-instance court on 28 May 2010. They further challenged her complaint that the criminal proceedings against her had been unfair because of the failure of the final-instance court to hear evidence from certain witnesses directly. The matter examined by the domestic courts in her case had been the probative value of the available forensic report which had concluded that the contract of sale of 28 November 2003 had not been signed by E.C. The Court of Cassation had upheld the applicant's acquittal with regard to the other acts she had allegedly committed, relying mainly on the fact that the forensic report had not established that the witnesses had not been present when the remaining contracts had been signed. Consequently, the decisive evidence against her had been the forensic report and not a witness statement.

34. The Government acknowledged that the final-instance court had not heard the applicant's arguments on the re-classification of the offence. However, they argued that this had been unnecessary. The re-classification of the offence – from a continuous act of forgery to a single act of forgery – had related to an element inherent in the initial charge brought against her.

From the initial stages of the proceedings the applicant had been aware of all the criminal acts she had been charged with and she had been aware that the national courts could have found her guilty either of one or of all of them. In her submissions to the final-instance court she had referred to all the contracts she had allegedly concluded in the absence of the signatory parties. Therefore, she could have foreseen that she could have been convicted of any of the acts which formed the continuous nature of the offence she had been charged with and which had amounted on their own to an offence. Consequently, her defence had not been affected by the re-classification since all the acts the applicant had been charged with had been identical. The fact that the final-instance court had no longer considered the offence to be a continuous one had been a natural consequence of her conviction for a single unlawful act.

2. The Court's assessment

(a) General principles

35. The Court notes that recently in *Júlíus Þór Sigurþórsson v. Iceland* (no. 38797/17, 16 July 2019) it has set out the principles in its case-law concerning circumstances relating to the conviction of a defendant by a final-instance court after he or she was acquitted by a lower court without the final-instance court having heard evidence from him or her and from witnesses directly. The relevant paragraphs of the *Júlíus Þór Sigurþórsson* judgment read as follows:

> "30. The Court reiterates that while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any specific rules on the admissibility of evidence or the way evidence should be assessed, which are therefore primarily matters for regulation by national legislation and the domestic courts (see, among other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, 21 January 1999, *Kashlev v. Estonia*, no. 22574/08, § 40, 26 April 2016, and *Lazu v. the Republic of Moldova*, no. 46182/08, § 34, 5 July 2016). It is not the function of the Court to deal with errors of fact or of law allegedly committed by a domestic court unless and in so far as they may have infringed rights and freedoms protected by the Convention. In the determination of whether the proceedings were fair the Court does not act as a court of fourth instance deciding on whether the evidence had been obtained unlawfully in terms of domestic law, its admissibility or on the guilt of an applicant. These matters, in line with the principle of subsidiarity, are the province of the domestic courts. It is not appropriate for the Court to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. The Court's only concern is to examine whether the proceedings have been conducted fairly and that in a given case they were compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case (*Murtazaliyeva v. Russia* [GC], no. 36658/05, § 149, 18 December 2018).
>
> 31. As to the scope of this case, the Court notes from the outset that the applicant complained, with reference to the general right to a fair hearing in Article 6 § 1 of the Convention, that the Supreme Court had re-evaluated the oral evidence without

hearing either the applicant in person or the witnesses. As to the latter, no reference was made to the right to hear witnesses under Article 6 § 3(d) of the Convention. The Government also centred their arguments on Article 6 § 1. The Court for its part sees no need to examine any part of the complaint under Article 6 § 3(d) of its own motion, as the application does not concern the right to hear witnesses "on the same conditions" as the prosecution, but rather the scope of the general right to a "fair hearing" in Article 6 § 1. Thus, the Court considers that the complaint may suitably be dealt with under that provision (see *Sigurþór Arnarsson v. Iceland*, no. 44671/98, § 29, 15 July 2003).

32. The Court reiterates that the manner of application of Article 6 § 1 to proceedings after appeal, including to supreme courts, depends on the special features of the proceedings involved; account must be taken of the entirety of the procedural system in the domestic legal order and of the role of the particular court therein (see, *inter alia*, *Botten v. Norway*, cited above, § 39, *Sigurþór Arnarsson v. Iceland*, cited above, § 30, and *Lazu v. the Republic of Moldova*, cited above, § 33). Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 § 1, although the appellant was not given an opportunity to be heard in person by the appeal court.

33. Furthermore, even if the appellate court has jurisdiction to examine both points of law and of fact, Article 6 § 1 does not always require an oral hearing or, if a hearing takes place, that the accused is allowed to be present in person and to address the court directly (see, *inter alia*, *Botten v. Norway,* cited above, § 39, and *Sigurþór Arnarsson v. Iceland*, cited above, § 30). It may also be that the accused unequivocally has waived his right to take part in the appeal hearing (see, *inter alia*, *Kashlev v. Estonia*, cited above, § 51). However, the Court has held that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by the accused – who claims that he has not committed the act alleged to constitute a criminal offence (see *Constantinescu v. Romania*, no. 28871/95, 27 June 2000, with reference to *Ekbatani v. Sweden*, 26 May 1988, § 32, Series A no. 134; see also *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004). To this end, there is a close link to the Court's established case-law to the effect that in the determination of a criminal charge, the defendant should, as a general rule, be heard by the tribunal convicting him (see, *inter alia*, *Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 22, 29 September 2009).

34. It is true, as emphasized by the Government, that the Court has held that the fact that an appeal court is empowered to overturn an acquittal by a lower court without summoning the defendant and without hearing the latter or witnesses in person does not as such and on its own infringe the fair hearing guarantees in Article 6 § 1 (see *Botten v. Norway*, cited above, § 48).

35. However, the Court's case-law also demonstrates, in line with the Court's general approach already described (see paragraph 33 above), that if the appeal court has jurisdiction to examine afresh factual issues either as to the question of guilt or as to the sentencing, or both, the right to a fair hearing according to Article 6 § 1, may, depending on the particular circumstances of the case, bar the appeal court from convicting an accused who has already been acquitted by the lower court. Taking into account what is at stake for the accused, the overall question would be whether the appeal court could, "as a matter of fair trial, properly examine the issues to be determined without a direct assessment of the evidence" given by the accused or the witness in person (see *Botten v. Norway*, cited above, § 52).

36. Moreover, the Court's case-law on this matter, when seen as a whole and in its context, draws a distinction between situations in which an appeal court which reversed an acquittal without itself hearing the oral evidence on which the acquittal was based not only had jurisdiction to examine points of fact as well as points of law but actually proceeded to a fresh evaluation of the facts, and situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/or its application to the established facts, even if it also had jurisdiction in respect of the facts. For example, in the case of *Igual Coll v. Spain*, no. 37496/04, § 36, 10 March 2008, the Court considered that the appeal court had not simply given a different legal interpretation or another application of the law to facts already established at first instance, but had carried out a fresh evaluation of facts beyond purely legal considerations (see also *Spînu v. Romania*, no. 32030/02, §§ 55-59, 29 April 2008, *Andreescu v. Romania*, no. 19452/02, §§ 65-70, 8 June 2010, *Almenara Alvarez v Spain*, no. 16096/08, 25 October 2011). Similarly, in *Marcos Barrios v. Spain*, no. 17122/07, §§ 40-41, 21 September 2010, the Court held that the appeal court had expressed itself on a question of fact, namely the credibility of a witness, thus modifying the facts established at first instance and taking a fresh position on facts which were decisive for the determination of the applicant's guilt (see also *García Hernández v. Spain*, no. 15256/07, §§ 33-34, 16 November 2010).

37. Conversely, in *Bazo González v. Spain*, no. 30643/04, 16 December 2008, the Court found that there had not been a violation of Article 6 § 1 on the ground that the aspects which the appeal court had been called on to analyse in order to convict the applicant had had a predominantly legal character, and its judgment had expressly stated that it was not for it to carry out a fresh evaluation of the evidence; rather, it had only made a different legal interpretation from that of the lower court (contrast *Sigurþór Arnarsson v. Iceland*, cited above, § 34, and *Mihaiu v. Romania*, no. 43512/02, § 38, 4 November 2008, in which the Court emphasised the predominantly factual nature of the issues). A similar conclusion was reached in *Keskinen and Veljekset Keskinen Oy v. Finland*, no. 34721/09, 5 June 2012. However, as explained by the Court in *Suuripää v. Finland*, no. 43151/02, § 44, 12 January 2010, one must at this point take into account that "the facts and the legal interpretation can be intertwined to an extent that it is difficult to separate the two from each other."

38. Finally, if the direct assessment of the evidence is deemed necessary for the reasons explained above, the appeal court is under the duty to take positive measures to this effect, notwithstanding the fact that the applicant did not attend the hearing, ask for leave to address the court or object, through his counsel, to a new judgment being given (see *Botten v. Norway*, cited above, § 53, and *Sigurþór Arnarsson v. Iceland*, cited above, § 38). In the alternative, the appeal court must limit itself to quashing the lower court's acquittal and referring the case back for a retrial."

(b) Application of those principles to the present case

36. In the present case, the Court notes that, having quashed the first-instance court's judgment of acquittal, the Court of Cassation determined the criminal charge brought against the applicant, changed the legal classification of the offence she was charged with from continuous acts of forgery to a single act of the same offence and convicted her.

37. The Court observes that it is undisputed by the parties that the final-instance court did not inform the applicant expressly of its intention to quash the decision delivered by the lower court and to re-examine the merits

of the charges brought against her; it did not set a date for a new hearing in the case after it quashed the lower court's judgment; it did not allow her to express her views on the question of the change of the legal classification of the charge against her; and it did not examine witnesses.

38. The Court notes, however, that the applicant was assisted by a lawyer of her own choosing and that she took part in the hearings at first instance. She and the relevant witnesses, including E.C., were also examined (see paragraphs 9 and 10 above). It is not in dispute that the defence was able to put questions to the witness before the first-instance court.

39. The Court further notes that after the applicant's acquittal by the first-instance court the prosecutor's office lodged an appeal on points of fact and law with the Court of Cassation (see paragraph 13 above). The applicant has not argued that she and her lawyer were not aware of the content of the prosecutor's office's appeal on points of fact and law or that both of them were not summoned to the hearings held by the Court of Cassation in the case. It has also not been argued that the applicant, who was herself a law graduate and a practising notary public, was hindered from seeking legal advice concerning the nature of the proceedings before the Court of Cassation or their possible outcome, including the possibility that the first-instance acquittal judgment would be overturned and the applicant convicted by the Court of Cassation as requested by the prosecutor (see, *mutatis mutandis*, *Kashlev v. Estonia*, no. 22574/08, § 45, 26 April 2016, and *Chiper v. Romania*, no. 22036/10, § 61, 27 June 2017).

40. The Court also notes that the applicant acknowledged that at the hearing of 28 May 2010 before the Court of Cassation she had presented her arguments in relation to the merits of the case and the initial charges brought against her. Moreover, the court had also given the applicant the opportunity to add evidence to the case file (see paragraphs 14-15 above).

41. As regards the applicant's argument that the Court of Cassation had overturned her acquittal without a direct assessment of the evidence on which it had relied, the Court notes that, when convicting the applicant of a single act of forgery, the final-instance court cited the available expert evidence, which it had been able to assess directly, and the testimony of the witness E.C. (see paragraphs 17-18 above). The Court also notes that the final-instance court did not directly examine E.C., whose testimony the first-instance court had also taken into account when delivering its judgment.

42. The question before the Court, therefore, is whether, in these circumstances, the Court of Cassation could, as a matter of fair trial, properly examine the issues to be determined without a direct assessment of the evidence given by E.C. in person (see *Júlíus Þór Sigurþórsson*, cited above, § 39).

43. The Court observes in this connection that the final-instance court did not reinterpret the facts established by the first-instance court or give a different connotation to the applicant's actions or to E.C.'s testimony or significantly curtail or enhance the evidentiary value of the latter's testimony (compare and contrast *Mischie v. Romania*, no. 50224/07, §§ 35-38, 16 September 2014, and *Júlíus Þór Sigurþórsson*, cited above, § 39 and 42). Moreover, like the first-instance court, the appellate court considered E.C.'s statement to be insufficient to support the applicant's conviction. The only point on which the final-instance court disagreed with the reasoning of the first-instance court was the weight that could be attached to the evidentiary value of the expert evidence available in deciding the question of the applicant's guilt. Unlike the first-instance court, the Court of Cassation considered that the document in question was capable on its own to dispel any doubts that might exist in the case with regard to the applicant's guilt (see paragraph 18 above). The final-instance court also explained its departure from the first-instance court's position by providing reasons which, even though succinct, do not appear either arbitrary or manifestly unreasonable, namely that the expert evidence in question was an incontestable scientific fact. In this connection the Court reiterates that the domestic courts are best placed to assess the credibility of witnesses and the relevance of evidence to the issues in the case (see, among many other authorities, *Karpenko v. Russia*, no. 5605/04, § 80, 13 March 2012, and *Kashlev*, cited above, § 48).

44. The Court notes that the applicant expressed doubts with regard to the impartiality of the expert report in question because it had been produced by a forensic expert working for the Ministry of Interior. The Court notes, however, that the applicant did not put forward any arguments pointing to any links, hierarchical or other, between the expert in question and the judges and prosecutors who examined her case or between the said expert and any other person involved in the proceedings. Therefore, in the instant case, the Court is unable to discern any elements which could call into question either the independence of the experts appointed or the reliability of the opinions.

45. In these circumstances, the Court is not convinced that in the applicant's case the requirements of a fair trial necessitated the rehearing of evidence from E.C. and that therefore the Court of Cassation was under an obligation to take positive measures to such an end, even if the applicant did not ask for the witness to be reheard (contrast *Lazu v. the Republic of Moldova*, no 46182/08, § 42, 5 July 2016). In this context, the Court considers it relevant that the reliability and credibility of the witness E.C. was not in issue between the two courts and that the transcripts of her testimony had been made available to the final-instance judges (see, *mutatis mutandis* and in relation to a change in the composition of a court during the course of a trial, *Famulyak v. Ukraine* (dec.), no. 30180/11, §§ 35 and

40-47, 2 May 2019). Moreover, the applicant did not ask for additional evidence to be added to the case file, even though she was given that opportunity by the final-instance court (see paragraph 40 *in fine* above). Had she done so, pursuant to the relevant domestic law the Court of Cassation would have been obliged to provide reasons in the event of a possible decision to dismiss such a request (see *Chiper*, cited above, § 66).

46. In the light of the above, in particular the fact that the final-instance court heard evidence from the applicant in relation to the merits of the case and that the disagreement between the first and the final-instance courts concerned rather the weight that could be attached to the evidentiary value of the expert report, and not the reliability and credibility of E.C. as such, the Court takes the view that the applicant's case may be distinguished from other cases where final-instance domestic courts convicted defendants, who had been acquitted by lower courts, without directly hearing evidence from them or reviewing testimony considered relevant for the defendants' convictions (compare and contrast with, among other authorities, *Constantinescu v. Romania*, no. 28871/95, § 58, 27 June 2000; *Popa and Tănăsescu v. Romania,* no. 19946/04, § 49, 10 April 2012; *Găitănaru v. Romania*, no. 26082/05, § 32, 26 June 2012; *Mischie*, cited above, §§ 35-38; and *Júlíus Þór Sigurþórsson*, cited above, § 42).

47. Lastly, in so far as the applicant complained that the Court of Cassation had changed the legal classification of the charge against her without allowing her to express her view on this point, the Court notes that the single act of forgery for which the applicant was convicted was an element intrinsic to the initial charge brought against her of continuous acts of forgery (contrast *Adrian Constantin v. Romania*, no. 21175/03, §§ 23-25, 12 April 2011). Hence, it was known to the applicant from the very outset of the proceedings, and she was able throughout the criminal proceedings against her to express her views and to submit comments and evidence in her defence with regard to every act of forgery she had been charged with.

48. In these circumstances, the Court takes the view that the applicant must have been fully aware of the possibility that either of the domestic courts could find her, in the less severe context of a single act of forgery, guilty of the said offence and determine her sentence accordingly.

49. In the light of the above, the Court is of the opinion that in the circumstances of the present case there has no violation of Article 6 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

50. The applicant complained that the domestic courts had imposed on her a heavier penalty than the one prescribed by the law. She relied on Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

1. The Government

51. The Government acknowledged that, given the length of the applicant's prison sentence, the final-instance court had made an obvious error in setting the probation period of the sentence at three years rather than two and a half years. However, the applicant had failed to exhaust the available domestic remedies. In particular, she had failed to ask the court to rectify this obvious error under Article 195 of the former Code of Criminal Procedure. The final-instance court had corrected of its own motion several errors in the operative part of the judgment, but it had missed the error concerning the probation period.

52. The present case had to be distinguished from cases where the Court had held that if several potentially effective remedies were available, the applicant was required to exhaust only one such remedy. The extraordinary application for annulment brought by the applicant in this connection could not be considered an effective remedy in her case.

53. The Government further argued that the complaint was inadmissible *ratione materiae*. The probation period imposed on the applicant had not been a penalty within the meaning of Article 7 of the Convention. It had merely been a measure concerning the execution or the enforcement of a penalty. Probation periods were not punitive in nature and their purpose was to allow persons who had been found guilty of an offence to avoid serving prison sentences.

2. The applicant

54. The applicant argued that she had exhausted the available domestic remedies because she had brought an extraordinary appeal against the final judgment of 29 June 2010. If the said extraordinary appeal had been allowed by the domestic courts, the aforementioned final judgment and her

conviction and sentence would have been quashed and the criminal proceedings would have been re-opened.

55. According to the domestic courts' case-law, a court could not rectify an error in a judgment. Rectification proceedings were used with regard to merely formal errors, such as errors concerning parties' statements or hearing records. In the case at hand, the final-instance court had rectified of its own motion some clear errors made in its judgment, without however removing the main error and changing the length of the probation period. The latter could in any event not be changed because the error concerned the quantum of the penalty imposed on her.

56. She further argued that Article 7 was applicable to her case. The probation period had been imposed following a conviction and had been intended as a judicial measure which substituted the penalty since a convicted person was considered rehabilitated only after the said term had expired.

B. The Court's assessment

57. In the circumstances of the present case, the Court finds it unnecessary to examine the Government's argument that the measure imposed on the applicant does not constitute a penalty (see paragraph 53 above) because, even assuming that it does, this complaint is in any event inadmissible for the following reasons.

58. The Court notes that the parties acknowledged that the final-instance court had clearly miscalculated the length of the probation period imposed on the applicant. It also notes that the Government have not contested the fact that the applicant had attempted to vent her complaint before the domestic courts by bringing an extraordinary application for annulment. Moreover, the domestic court which had examined the extraordinary application for annulment had failed to examine expressly the applicant's claim.

59. The Court observes, however, that an extraordinary application for annulment is an extraordinary remedy provided for by domestic law and that it is subject to certain very strict admissibility conditions. In addition, it can be brought only in relation to certain clearly defined grounds which are expressly set out by the relevant domestic law and which do not include the miscalculation by the final-instance ordinary court of the length of the probation period for a conditional stay of execution of a prison sentence (see paragraph 24 above).

60. In these circumstances, since the applicant's situation is not covered by any of the grounds for lodging an extraordinary application for annulment (see paragraph 59 above), the Court cannot agree with the applicant that this remedy would have allowed her, even indirectly, to obtain redress for her specific complaint and offered, therefore, any prospect

of success. The Court therefore does not attach any relevance to the fact that the court called to examine the extraordinary application for annulment lodged by the applicant did not address expressly this part of her claims.

61. The Court notes that the error made by the Court of Cassation when determining the length of the probation period imposed on the applicant was an error which did not concern the content of the judgment, in particular the meaning of what was contained in the judgment. Moreover, the error was obvious because it was apparent without any doubt and without being necessary to prove its existence by adducing evidence or to determine it by deliberating or expressing any views.

62. Therefore, the Court takes the view that the error made by the final-instance court in determining the length of the probation period in the applicant's case amounted to an obvious material error as defined in the Court of Cassation's own case-law (see paragraph 28 above).

63. In these circumstances, the Court notes that according to the case-law of the Court of Cassation, the applicant would have been able to ask the final-instance court to rectify this obvious error under Article 195 of the former Code of Criminal Procedure. However, there is no information in the file that she lodged such an application with the Court of Cassation.

64. It is true that the aforementioned court corrected of its own motion several other obvious errors in the operative part of the judgment but did not touch on the error concerning the probation period. However, there is no evidence in the file and the applicant has not put forward any arguments which could suggest that, in spite of the failure of the final-instance court to touch on this point, she would have been unable to initiate herself a set of proceedings in that connection. The Court notes in this regard that the procedure concerning the rectification of obvious errors is an informal one and does not require deliberations. Moreover, the correction of an alleged obvious error may be requested at any point either by the court or by the interested party. While domestic law does not seem to impose any obligation on the domestic courts to identify obvious errors in a judgment, the courts remain, however, under a duty to examine such errors once they have noticed them on their own or when they have been brought to their attention (see paragraph 24 above).

65. In the light of the above, the Court takes the view that the applicant failed to exhaust the available domestic remedies.

66. It follows that the applicant's complaint is inadmissible under Article 35 § 1 for non-exhaustion of domestic remedies and must be rejected pursuant to Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint concerning Article 6 of the Convention admissible;

2. *Declares*, by a majority, the remainder of the application inadmissible;

3. *Holds*, by six votes to one, that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 18 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Jon Fridrik Kjølbro
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint partly dissenting opinion of Judges Ranzoni, Ravarani and Schukking;
(b) Dissenting opinion of Judge Ranzoni.

JFK
ANT

JOINT PARTLY DISSENTING OPINION OF JUDGES RANZONI, RAVARANI AND SCHUKKING

To our regret, we are unable to agree with our colleagues in the majority in so far as the complaint under Article 7 of the Convention was declared inadmissible for non-exhaustion of domestic remedies.

It emerges clearly from the judgment that the Court of Cassation erred in imposing an illegal sentence on the applicant, namely a three-year probation period whereas the law only allowed a period of two years and six months. Indeed, pursuant to Article 82 of the Romanian Criminal Code (see paragraph 25 of the judgment), which was applicable to the facts of the case, the probation period is composed of the length of the prison sentence (which was six months, see paragraph 16 of the judgment), to which a period of two years is added.

It is open to discussion whether the imposition of an illegal sentence is actually to be considered a material error, but apparently it is considered as such in the Romanian system and it is not for us to challenge that classification.

What is more important and was ultimately at the origin of our dissent is the means of correcting such a material error.

Pursuant to Article 195 of the former Romanian Code of Criminal Procedure, as in force at the relevant time, obvious material errors found in a procedural document had to be rectified by the court that produced the document, following an application by the interested party or of its own motion (see paragraph 24 of the judgment).

The judgment makes it very clear that the courts are "...under a duty to examine such errors once they have noticed them on their own or when they have been brought to their attention" (see paragraph 64 *in fine* of the judgment).

It is correct that an extraordinary application for annulment, the remedy that was used by the applicant in order to bring her complaint before the Court of Cassation, is subject to very strict admissibility conditions and can be used only in relation to certain clearly defined grounds which did not include miscalculation of a probation period (see Article 386 of the former Code of Criminal Procedure, quoted in paragraph 24 of the judgment). However, even if the applicant used an inappropriate legal remedy in order to have the error corrected, the fact remains that this application, although it was the wrong procedural tool to rectify what was considered a material error, nevertheless brought to the attention of the competent court the residual flaw which, at any rate, it was under a duty to correct of its own motion. Despite the case-law cited in paragraph 27 of the judgment, it then appears to us as overly formalistic to require the applicant to introduce an application in order to have material errors corrected as provided for in Article 195 of the former Code of Criminal Procedure, in a situation where

the court had previously engaged in an exercise of correcting errors without correcting an error which, by definition, was obvious and which, moreover, was extremely serious, namely an illegal sentence. How could the applicant realistically have expected that the court would perform a second correction of a flaw, especially one of such magnitude, when it had previously engaged in the exercise without correcting the most obvious error? Moreover and more importantly, once informed of the error, albeit through the wrong channel, the Court of Cassation was at any rate under an obligation to correct it of its own motion.

In these circumstances, to hold that the applicant was under an obligation not only to inform the competent court of the error, but to use the remedy designed for correcting material errors, bearing in mind that the exercise of correcting the material errors had already been engaged in earlier, appears to us too formalistic a ground on which to declare the application inadmissible for non-exhaustion of an available domestic remedy.

We would like to add that if the application had been declared admissible under Article 7, we would have found a violation of that provision, as the last-instance court pronounced an illegal sentence, namely a probation period of three years whereas, as admitted by the Government themselves, the correct period would have been two years and six months. As to the Government's objection that the probation period did not constitute a penalty within the meaning of Article 7 and consequently that the complaint was inadmissible *ratione materiae*, we would argue that the probation period forms an integral part of the punishment and the penalty imposed. Therefore, Article 7 is applicable to the present case. Because there was no legal basis under the applicable domestic law for imposing a probation period of three years, the applicant's punishment was in violation of Article 7.

DISSENTING OPINION OF JUDGE RANZONI

1. I voted against the finding of no violation of Article 6 of the Convention and also against declaring the Article 7 complaint inadmissible. As far as the latter aspect is concerned, I refer to the joint partly dissenting opinion of Judges Ranzoni, Ravarani and Schukking. The present opinion deals only with the complaint under Article 6.

2. While the first-instance court acquitted the applicant of the charge of forgery, he was convicted by the second and final-instance court. The applicant alleges that that court overturned her acquittal without itself assessing the relevant evidence on which it relied, in particular the statement of witness E.C.

3. The Court in its case-law under Article 6 has set out some clear procedural principles concerning the conviction of a defendant by a higher-instance court after he or she has been acquitted by a lower-instance court. It has held, *inter alia*, that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by the accused (see *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 33, 16 July 2019, with references). However, this principle is not limited to evidence given by the defendant himself, but also applies to evidence given by witnesses (see *Ovidiu Cristian Stoica v. Romania*, no. 55116/12, § 41, 24 April 2018, with references). The main question to answer in this context is whether the higher-instance court proceeded to a fresh evaluation of the facts beyond purely legal considerations, that is, whether that court expressed itself on a question of fact, such as the credibility or the reliability of a witness statement, thus modifying the facts established at first instance and taking a fresh position on factual elements which were decisive for the determination of the defendant's guilt (see *Júlíus Þór Sigurþórsson,* cited above, §§ 36 and 42, with further references).

4. Applying these principles to the present case, the higher-instance court could not to my mind, as a matter of fair trial, properly examine the issues to be determined on appeal and convict the applicant without a direct assessment of the relevant evidence.

5. The evidence before the first-instance court consisted primarily of three pieces of evidence: the applicant's statement, the statement of witness E.C. and a forensic report. The court held that in order to rebut the applicant's version of facts, the conclusion from the forensic report had to be confirmed by other evidence (see paragraph 12 of the judgment). E.C.'s statement, which contradicted the applicant's version of events, could have constituted such "confirming" evidence, but the court seemed to have

doubts as to the witness's credibility and did not take into account her statement.

6. In contrast and in response to that assessment, the higher-instance court explicitly referred to E.C.'s statement and regarded is as an evidentiary element. It then added that the witness statement was supported by the conclusions of the forensic report. In other words, in contrast to the first-instance court, the higher-instance court found that the witness statement, together with the forensic report, rebutted the applicant's version. By so doing, it obviously attributed a higher evidentiary value to E.C.'s statement than the first-instance court had done.

7. By taking the witness statement into account and giving it evidentiary value, the higher-instance court itself proceeded to a fresh evaluation of the facts, modified the facts established at first instance and held, contrary to the applicant's account and the factual assessment at first instance, that E.C. had not signed the contract of sale. That was decisive for the determination of the applicant's guilt. He was found guilty by the higher-instance court on the basis, *inter alia*, of a witness statement which the first-instance court had assessed as being insufficient to convict him. Therefore, witness E.C., whose statement the higher-instance court explicitly referred to as a relevant piece of evidence, should have been heard by that court itself. This failure entailed the violation of the applicant's right to fair proceedings under Article 6.

8. Occasionally, the Court establishes principles which, however, in subsequent cases it dilutes by accepting various kinds of exceptions. That makes the interpretation of such principles unpredictable and causes uncertainty for the national authorities in their application. Unfortunately, that is exactly what the majority did in the present case by artificially differentiating it from other cases instead of adhering to the clear principle established by the Court in its case-law.

9. That principle is, in short: if a defendant was acquitted by a first-instance court, but subsequently convicted by a higher-instance court which, in order to modify decisive facts established at first instance, took into account as a relevant element of its factual assessment a witness statement given before the lower-instance court, then the convicting court must itself rehear that oral evidence. Full stop.