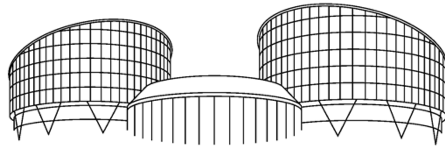

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ALEXANDRU MARIAN IANCU v. ROMANIA

(Application no. 60858/15)

JUDGMENT

Art 6 (criminal) • Impartial tribunal • Same judge sitting in two-judge appeal panels in both related sets of proceedings against applicant • Allegations of bias dismissed by domestic courts in thoroughly reasoned decisions

STRASBOURG

4 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.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Alexandru Marian Iancu v. Romania,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
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. 60858/15) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Alexandru-Marian Iancu ("the applicant"), on 4 December 2015.

2. The applicant was represented by Mr V.-E. Vasilică, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. Relying on Articles 3 and 6 § 1 of the Convention, the applicant alleged, in particular, that the conditions of his detention had been inhuman and that the appeal bench dealing with his criminal case had not been impartial.

4. On 4 May 2017 notice of the above complaints was given 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 1965 and is currently detained in Rahova Prison.

A. The first set of criminal proceedings against the applicant (case no. 171/P/2003)

6. By a decision of the prosecutor's office attached to the High Court of Cassation and Justice of 29 September 2005, the applicant was sent to trial for continuous tax evasion and conspiracy to commit money laundering. Eight other people, including foreign citizens, were also sent to trial on similar charges. The prosecutor contended that the applicant had committed the above crimes between the years 2000 and 2003 in his capacity as manager (*administrator*) or director of several private commercial companies (companies A, B and C) by falsifying accounting records in relation to acquisitions of oil products in order to place illegal products on the market, as well as to evade taxes. It was alleged that the crimes had been committed in collusion with a number of other private companies dealing with the purchase and sale of oil products. The prosecutor also decided to continue to examine additional acts committed by the applicant in cooperation with other suspects separately in another file (no. 692/P/2005) because they were not connected to the facts of the particular case being considered at trial.

7. On 28 November 2011 the Bucharest County Court convicted the applicant of the above crimes and sentenced him to ten years' imprisonment. The court had taken into account, when convicting the applicant, specific actions which had taken place within a set period of time, based on a number of invoices and bank transfers – all listed with their corresponding dates and numbers in the judgment. All parties appealed against that judgment.

8. The appeal was examined by a panel of two judges, C.B. and M.A.M., of the Bucharest Court of Appeal. The applicant requested that he be acquitted and asked the court to examine evidence collected by the prosecutors in the initial phase of the investigation and which was, by that time, the focus of case no. 692/P/2005. That evidence, which included police reports, reports from the tax authorities, and transcripts of telephone conversations between the applicant and one of the defendants in case no. 692/P/2005, proved – in the applicant's opinion – the minor role that he had had in the administration of the companies in the case before the court and hence his innocence.

9. At a hearing on 15 February 2013 the court decided to disjoin the accusations concerning one of the applicant's co-defendants, B.K.M., which fell to be examined within case no. 692/P/2005.

10. On 14 October 2014, after examining all the evidence, including the evidence mentioned in paragraph 8 above, and after hearing testimony from all the defendants, witnesses and injured parties, in an extensively reasoned judgment of 275 pages, the trial bench, composed of judges C.B and M.A.M., convicted the applicant of continuous tax evasion, conspiracy to

commit crimes and continuous money laundering, and sentenced him to twelve years' imprisonment.

B. The second set of criminal proceedings against the applicant (case no. 692/P/2005)

11. By a decision of the prosecutor's office attached to the High Court of Cassation and Justice of 24 August 2006, the applicant was sent to trial for being an accessory to fraud, two counts of incitement to commit abuse of office, two counts of instigation of an organised criminal group and two counts of money laundering. The prosecutor contended that the applicant had committed the above crimes between the years 2002 and 2003 in his capacity as manager (*administrator*) or director of several private commercial companies (namely companies A and B, mentioned in paragraph 6 above, and, in addition, companies E, F and G) thereby causing significant damage to the state budget in the context of the privatisation of a state-owned company (company D). Company D's main activity was the production of synthetic rubber. Five other people were also sent to trial on similar charges.

12. On 16 December 2014 the Bucharest County Court convicted the applicant of the above-mentioned crimes and sentenced him to thirteen years and eight months' imprisonment. All parties appealed against the judgment.

13. The appeal hearings started before a two-judge panel of the Bucharest Court of Appeal, composed of D.D. and C.B.

14. At the first appeal hearing, which took place on 11 May 2015, the prosecution requested that, in the interests of justice and to solve the civil aspects of the case, the matter should be examined in the light of the first set of proceedings, which had been finalised by the judgment of 14 October 2014 (see paragraphs 6-10 above). That request was granted and case file no. 171/P/2003 was attached to the case file already before the Court of Appeal.

1. The challenge of judges C.B. and D.D. for bias

15. On 15 May 2015 one of the defendants challenged the appeal panel for bias, claiming that judge C.B. had previously taken a decision in case no. 171/P/2003 which was connected to the case before the court at that time. In addition, it was alleged that judge D.D. had already expressed his opinion on the defendants' guilt.

16. On 20 May 2015 a panel of two other judges of the Bucharest Court of Appeal decided to allow the challenge, having heard from the legal representatives and the prosecutor in a hearing held in chambers. Quoting the case-law of the Court and other European materials extensively, the

decision held that there were justified doubts as regards the two judges' impartiality.

17. The doubts were firstly based on the manner in which the proceedings had been conducted by the two judges during the first two appeal hearings. More specifically, the fact that the prosecution had submitted their grounds for appeal after the designation of the appeal bench and those grounds quoted extensively the opinion of judge C.B. on the issue of confiscation, an opinion which she had made public on various occasions; the fact that a very short adjournment of only three days had been given to the defendants who, at the first appeal hearing, had requested more time to prepare their response; and the fact that certain measures had been ordered at the first appeal hearing without these having first been discussed with the parties. It was also noted that the president of the panel had stated during the same hearing that "we are informing you from the outset that this is a very old case concerning acts which either have already become statute-barred or which are about to become statute-barred, as held by the lower court, so we shall grant very short adjournments, hoping to resolve the case as soon as possible ..." It was considered that this statement created the impression that judge D.D. had adopted the opinion of the lower court on the application of the statute of limitations, which was another element which cast doubt on the impartiality of that particular judge.

18. Subsequently, as regards judge C.B., it was held that, when she had allowed case no. 171/P/2003 to be joined to the case subject to the appeal, she had implicitly admitted that there was a strong connection between the two cases. This proved that she already had an opinion on the case being appealed. Moreover, the connection between the two cases was clear since certain evidence collected by the investigators (including an expert report and the financial documents of the companies under the control of the defendants) was common to both cases. It was further noted that legal doctrine had shown that "a judge who had given a certain judgment on a case, would find it difficult to change that opinion, even in the presence of new elements."

19. In view of the above elements, it was decided that there was a reasonable suspicion that the two judges' impartiality could have been affected and they were disqualified from acting on the basis that they were incompatible with the impartial examination of the case, under Article 64 (1) (f) of the Code of Criminal Procedure ("the CCP") (see paragraph 38 below). It was ordered that the case be randomly distributed to another appeal panel.

2. The withdrawal request of judge M.A.M.

20. Following the above decision, the case was allocated to another panel, composed of judges M.A.M. and T.G.

21. On 2 June 2015 judge M.A.M. asked to withdraw from the case on the following grounds:

> "The reason for the following request is that I was a member of the appeal panel which delivered judgment no. 1207/14.10.2014 of the Bucharest Court of Appeal ..., concerning, among others, the defendant Alexandru-Marian Iancu.
>
> Although the offences on which the above-mentioned judgment was based were different from those of the current case, in order to eliminate any suspicion concerning my possible lack of impartiality in solving the current case, I submit this withdrawal request, on the basis of Article 64 (1) (f) CCP."

22. On 2 June 2015, in a hearing held in chambers, a two-judge panel of the Bucharest Court of Appeal, composed of T.G. and B.O. – who was one of the duty judges for procedural requests that week – dismissed the withdrawal request, holding that there were no reasons to doubt the impartiality of judge M.A.M.

23. The grounds for this decision were set out in a ten-page interlocutory judgment in which it was held that the principles of a fair trial being held within a reasonable time, the random distribution of cases and the continuity of the trial bench are absolute and any exceptions must be thoroughly justified. The mere fact that the judge in question had taken part in the examination of the case and the adoption of the judgment of 14 October 2014 could not raise a reasonable suspicion that his impartiality would be affected, since the two cases concerned different criminal offences and different accused (with the exception of the applicant and one other).

24. Quoting the case-law of the Court, the judges went on to examine the crimes on trial in the two sets of proceedings and concluded that the sole connection between them was that the investigation had initially started in the same criminal file but then, in view of the fact that there was no connection between the various crimes, they had been disjoined, leaving two separate files. Moreover, after examination of the two cases in question, no proof was found to support the idea that judge M.A.M. had expressed, in the first case, an opinion on the guilt of any of the accused of the case currently on trial. In addition, the judgment read as follows as regards the use of evidence common to the two cases:

> "As regards the administration of the evidence in the current case, the lawfulness, relevance and usefulness of the evidence must be examined in connection with the facts and subjects of each case; it cannot be held, *ab initio*, that in the current case the use of an expert report, which had been drafted in the context of a complex matter, concerning a large number of activities under investigation, amounted to a 'prejudgment' on the existence of all the crimes for which the accused had been sent to trial or on their guilt."

3. The continuation of the proceedings

25. The appeal proceedings then resumed before the panel composed of judges M.A.M. and T.G.

26. At the next hearing, on 3 June 2015, the applicant's representative challenged the two judges of the panel for bias, complaining that there were two contradictory judgments on the impartiality of the judges examining the case: the judgment of 20 May 2015 declaring judge C.B. disqualified on the grounds of incompatibility with the impartial examination of the case and the judgment of 2 June 2015 rejecting the request for withdrawal lodged by judge M.A.M. He requested that the two judgments be put before another panel of judges to be reconciled. Other co-defendants also challenged judge M.A.M. for bias, alleging that the same reasons for which C.B. had been disqualified also applied in M.A.M.'s case, since he had been part, alongside C.B., of the same panel which adopted the judgment of 14 October 2014. The prosecutor asked the court to dismiss those challenges, arguing that there was no contradiction between the decisions taken on the impartiality of the judges determining the case. The appeal panel, presided by M.A.M., decided to reject the challenges, holding that they raised the same facts and reasons which had already been extensively examined in the judgment adopted in respect of M.A.M.'s withdrawal request. As regards judge T.G., it was held that the new Code of Criminal Procedure provided that an application for the recusal of a judge who has been called to decide a challenge for bias or a withdrawal was inadmissible (see paragraph 38 below).

27. The next hearing was set for 4 June 2015. During that hearing, the applicant's representative challenged the whole panel for bias once more, arguing that the previous challenges for bias and the request for withdrawal should not have been examined by the same judges who were the subject of the challenge. The prosecution submitted that the challenge was inadmissible based on Article 67 (5) of the CCP for identical reasons to the previous challenges. The panel held that the reasons for rejecting the challenges, as set out in the record of the previous hearing, were still valid and were not to be re-examined. Therefore the challenge was dismissed as inadmissible.

28. On 8 June 2015 the Bucharest Court of Appeal, in a panel composed of judges M.A.M. and T.G., convicted the applicant with final effect of being an accessory to fraud, two counts of incitement to commit abuse of office with extremely serious consequences, instigation of an organised criminal group and two counts of money laundering, and sentenced him to fourteen years' imprisonment. The other defendants, including B.K.M. (see paragraph 9 above), were convicted of similar crimes. When convicting the applicant, the court had taken into account specific actions which had taken place on certain dates based on a number of contracts, invoices and bank transfers, which were all listed with their corresponding dates and numbers in the judgment and were different from the ones on which the judgments in the first set of proceedings had been based.

C. Subsequent events

29. On 8 and 16 June 2015 three of the defendants in the second set of proceedings lodged a request before the High Court of Cassation and Justice for a change in venue for their appeals based on their suspicions of a lack of impartiality on the part of the judges of the Bucharest Court of Appeal.

30. On 16 June 2015 the High Court of Cassation and Justice informed the president of the Bucharest Court of Appeal of the request and asked for clarification, as required by the appropriate procedure.

31. On 29 June 2015 the vice-president of the Bucharest Court of Appeal responded to the High Court of Cassation and Justice as follows:

> "It is true that the suspicions of lack of impartiality as regards a member of the trial panel should have been dissipated by an adequate resolution on M.A.M.'s withdrawal.
>
> In the current situation (the judgment being final), the only procedural solution would be to allow the request, quash the judgment and change the venue of the case to another court of appeal, thereby dissipating any suspicions as to the lack of impartiality of the judges of the court where the appeal was decided.
>
> Finally, the suspicions as to the judges' impartiality were amplified by the fact that, after the dismissal of M.A.M.'s withdrawal request, the appeal panel changed the date of the hearing set for 17 June 2015 to 3 June 2015, and set the following hearing on 4 June 2015, within a very short period.
>
> Therefore, in order to avoid a possible judgment by the ECHR for a breach of Article 6 of the Convention, followed by the need for a revision of the conviction judgment after the execution of a long part of the sentence, the above suggestion would be more appropriate."

32. On 16 July 2015 the High Court of Cassation and Justice rejected the request as the reasons advanced did not justify a change of venue of the appeals.

33. On 3 July 2015 the applicant lodged a complaint before the Superior Council of Magistracy ("the SCM") – the body responsible for management and disciplinary matters within the judiciary – arguing, among other things, that the legal provisions governing the disqualification of judges on incompatibility grounds had been breached in the proceedings on his appeal, as finalised by the judgment of 8 June 2015.

34. On 23 September 2015 the Judicial Inspection Department of the SCM, after reviewing the entries in the electronic database for the file in question as well as information sent by the Bucharest Court of Appeal, found that the legal provisions and the internal regulations concerning the random distribution of files and the formation of the trial benches had been respected. All requests for recusal or withdrawal had been examined and resolved in accordance with the law, in thoroughly reasoned decisions. The specific argument concerning the participation of judge M.A.M. in previous proceedings in which he had convicted the applicant, had been thoroughly examined and rejected in accordance with the law. The remaining

arguments concerning the conduct of the appeal, such as the period between the hearings being excessively short, concerns regarding certain procedural measures or decisions taken by the judges during appeal hearings, and the evidence having been wrongfully assessed, were considered issues connected to the merits of the case that could not be the subject of a verification exercise by the SCM. Nevertheless, it was held that the conviction judgment of 8 June 2015 had been thoroughly reasoned and based on the relevant legal provisions.

D. The applicant's detention on 4 June 2015

35. During the hearing of 4 June 2015 the applicant, who had insisted on challenging judge M.A.M. and who had disobeyed the court's order to remain silent, was found in contempt of court and removed from the courtroom.

36. The applicant alleged that after his removal from the courtroom he had been held in the detention facilities of the Bucharest Court of Appeal in an insalubrious cell, infested with bugs, without ventilation, with a ceiling a little higher than two meters, without furniture and without being given water or food.

37. The Government submitted a letter from the administrative department of the Bucharest Court of Appeal explaining that their detention facilities consist of several cells provided with toilets, sinks, running water, a ventilation system, heating, artificial lighting and benches. The cells were cleaned on a daily basis. On 4 June 2015 the applicant was held alone in a cell of approximately 5 sq. m. with all the above-listed facilities for approximately seven hours. In addition, documents from the Rahova prison authorities noted that the applicant had had breakfast before leaving the prison and had been able to take his own food with him. In accordance with prison regulations, he could have filed a request with the prison administration to be provided with solid food for the day he was about to spend outside the prison but he had failed to do so.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

Article 64

Disqualification of judges on incompatibility grounds

"(1) A judge is disqualified from acting on incompatibility grounds:

a) if he was the representative or the lawyer of one of the parties or of a main subject of the trial, even in another case;

b) if he is a relative or related by affinity, up to the fourth degree, or finds himself in one of the situations mentioned in Article 177 of the Criminal Code with one of the parties, with a main subject of the trial or with their lawyer or representative;

c) if he was an expert or a witness in the case;

d) if he is the legal guardian of one of the parties or of a main subject of the trial;

e) if in the same criminal case he has carried out any measures during the investigation or has participated as a prosecutor in any proceedings before a judge or a court;

f) if there is a reasonable suspicion of bias on his part. ...

(3) A judge who has taken part in the delivery of a decision cannot be involved in the delivery of a judgment in respect of the same case by means of an appeal or in a retrial of the same case after the quashing of the decision in question. ...”

Article 66

Withdrawal

“(1) Persons affected by incompatibility grounds are obliged to inform the president of the court, the case prosecutor or the hierarchically superior prosecutor, that they intend to withdraw from the examination of a case and to disclose the reasons for their withdrawal.”

Article 67

Recusal

“(1) In the event that the person who is disqualified from acting did not withdraw, the parties, the main subjects of the trial, or the prosecutor may file an application for recusal, as soon as they find out about the existence of an incompatibility ground.

(2) ... An application for the recusal of the judge or prosecutor who has been called to decide upon the recusal application in respect of another judge is inadmissible. ...

(4) The recusal application must be formulated orally or in writing, indicating separately for each person concerned, the disqualification grounds and the factual grounds on which the application is based as known at the time of the application. ...

(5) A recusal application which does not respect the conditions set forth in paragraphs 2-4 above or which has been lodged in respect of the same person for the same reasons and based on the same factual grounds as the ones relied on in a previous request that has already been rejected is inadmissible. The inadmissibility of such a request shall be decided by the prosecutor or the trial panel to which the request was submitted. ...”

Article 68

Examination of the withdrawal or recusal

“(2) The withdrawal or recusal of a judge who is part of a panel shall be examined by another panel. ...

(5) A decision on the withdrawal or recusal shall be delivered in chambers, within a maximum of twenty-four hours of the request. If it is considered necessary, the judge

> or panel may carry out any verification required and may hear arguments from the prosecutor, the main subjects of the trial, the parties and the person who is the subject of the withdrawal or recusal application. ...
>
> (7) The interlocutory judgment by which the withdrawal or recusal is determined is not subject to any appeal."

39. The High Court of Cassation and Justice, in a decision no. 17/2012, published in the Official Journal on 6 December 2012, examined an appeal lodged in the interests of law, and held that a judge who has determined a case in accordance with the simplified procedure for the admission of guilt as regards one of the defendants, does not become automatically disqualified from determining the case as regards the remaining defendants, in a case where all defendants have been sent to trial by the same decision of the prosecutor for connected crimes. The judge's position becomes incompatible with an impartial examination of the case only if he has expressed his opinion as regards the outcome to be adopted for the remaining defendants in the reasoning of the judgment delivered in the admission of guilt proceedings.

III. COMPARATIVE LAW MATERIAL

40. The Court conducted a comparative study of the legislation of twenty-eight member States of the Council of Europe (Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Lithuania, North Macedonia, Norway, Poland, Portugal, the Russian Federation, Serbia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom). The comparative study suggests that in the criminal legal systems of all these member States there are four common grounds requiring the withdrawal of judges:

(a) if the judge in question is a victim of the offence at issue;

(b) if the judge had or has a relationship (as a spouse or relative up to the third degree) with the accused, the victim or any person participating in the proceedings;

(c) if the judge has previously been involved in the case in a different capacity (for example as a prosecutor, police officer, legal representative, witness, and so on);

(d) if the judge has previously participated in the examination of the case in his or her function as a judge, for example, if he or she has issued a ruling concerning arrest or detention as a preliminary investigation judge.

41. In seventeen member States, including Austria, Bulgaria, Croatia, France, Germany, Italy and Poland, the relevant criminal codes lay down a general clause which requires a judge to withdraw in all other circumstances which may cast doubt on his or her impartiality. In addition, in France a judge must withdraw if there have been other legal proceedings between

him or her, or one of his or her close relatives, and one of the participants in the proceedings or one of his or her close relatives and also if the judge is involved in proceedings in a court where one of those participants is a judge. In Italy a judge must also withdraw if he or she has a financial interest in the proceedings or if any of the parties or the legal representatives is a debtor or creditor in respect of him or her, or his or her spouse or children.

42. In most States an application for withdrawal lodged by a member of a panel of judges is examined in chambers by another panel which does not include the judge in question. In Austria, Norway and Estonia the withdrawal application is examined by the president of the court.

43. In only eight member States (Azerbaijan, Croatia, Estonia, Finland, Norway, Poland, Slovenia and Sweden) is there a legal obligation to give reasons for the dismissal of an application for withdrawal. In thirteen member States (Austria, Bosnia and Herzegovina, Czech Republic, Germany, Greece, Hungary, Iceland, North Macedonia, Portugal, Russian Federation, Spain, Turkey and the United Kingdom) such an obligation is not explicitly provided for but can be inferred from the relevant legal framework. In Belgium, Bulgaria, France, Italy and Lithuania there is no legal obligation, either explicit or inferred, to give reasons for the dismissal of an application for withdrawal.

IV. RELEVANT INTERNATIONAL MATERIALS

44. Relevant international materials concerning the impartiality of judges can be found in the judgment in the case of *Harabin v. Slovakia* (no. 58688/11, §§ 104-10, 20 November 2012).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

45. The applicant complained that on 4 June 2015 he had been detained for several hours in inhuman conditions in breach of Article 3 of the Convention which reads as follows:

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

46. The applicant alleged that the cell in which he had been held in the detention facilities at the Bucharest Court of Appeal had been insalubrious, had not had any ventilation and had had a low ceiling. In addition, he

alleged that he had not been given water or food for the entire day he had spent outside the prison.

47. The Government contended that the applicant had been held in adequate conditions (see paragraph 37 above).

48. The Court notes that there is considerable disagreement between the parties as to the conditions of detention the applicant had to face on 4 June 2015. At the same time, the Court observes that the Government's submissions are detailed and supported by various documents (see paragraph 37 above).

49. In addition, the Court notes that except for the applicant's allegations there is no evidence in the file to support his claims. In this connection, the Court observes that the applicant, who was represented by a lawyer (see paragraph 27 above), failed to raise any complaint with the relevant domestic authorities concerning the conditions of his detention of 4 June 2015. Without analysing its effectiveness, the Court has already held that such a complaint would have served the applicant as evidence to substantiate his claim (see *Tirean v. Romania*, no. 47603/10, § 50, 28 October 2014, and *Mureşan v. Romania* [Committee], no. 2962/13, § 42, 8 November 2016).

50. Moreover, it is not clear from the file whether the applicant ever complained of any effects that the allegedly inadequate detention conditions of that day may have had on his health.

51. In these circumstances the Court is not convinced that the treatment the applicant was subjected to on 4 June 2015 had reached the minimum threshold of severity required to constitute inhuman and degrading treatment.

52. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

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

53. The applicant complained of the lack of impartiality of the trial panel in breach of the guarantees of Article 6 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

54. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

55. The applicant argued that judge M.A.M., who had first delivered a ruling convicting him in a previous case and then participated in and convicted him in a second set of criminal proceedings, could not be seen as impartial. The two sets of proceedings were connected and the judge himself had sought to withdraw from the second set. He alleged that the decision to reject M.A.M.'s withdrawal request had been a judicial error. He pointed out that the Court had previously held in a number of cases (see, for example, *De Cubber v. Belgium*, 26 October 1984, Series A no. 86, and *Altay v. Turkey,* no. 22279/93, 22 May 2001) that even appearances may be of a certain importance in this context. He concluded that his doubts as regards M.A.M.'s lack of impartiality were objectively justified by the similar factual elements of the two cases as well as by the fact that the judge in question had decided that the applicant was also guilty in the second set of proceedings.

56. The Government submitted that the applicant had failed to rebut the presumption of judge M.A.M.'s impartiality in terms of the subjective aspect of the relevant test set out by the Court as, in his withdrawal application, the judge in question had not admitted to the existence of any ground for disqualification on his part and had only formulated the request as a precautionary measure. As to the objective test of impartiality, relying on the cases of *Marguš v. Croatia* ([GC], no. 4455/10, ECHR 2014 (extracts)) and *Craxi III v. Italy* ((dec.), no. 63226/00, 14 June 2001), the Government contended that the mere participation of a judge in previous proceedings concerning the applicant could not in and of itself raise any doubts as to his impartiality. Judge M.A.M. had found himself in a different situation to that of judge C.B. The recusal of the latter had been ordered for several reasons and not only because she had rendered the judgment of 14 October 2014. The Government pointed out that the challenge against judge C.B. for bias had been submitted only after the hearing of 11 May 2015 having therefore been triggered by the measures adopted during that hearing. In addition, judge M.A.M.'s participation in previous proceedings concerning the applicant had been thoroughly examined in an extensively reasoned decision which had concluded that it did not constitute a relevant reason capable of raising suspicions concerning that judge's impartiality.

2. The Court's assessment

(a) General principles

57. The Court reiterates that Article 6 § 1 of the Convention requires a court to be impartial. Impartiality denotes the absence of prejudice or bias. In accordance with the Court's case-law, there are two tests for assessing

whether a tribunal is impartial within the meaning of Article 6 § 1. The first test (subjective) consists in seeking to determine the personal conviction of a particular judge in a given case. The personal impartiality of a judge must be presumed until there is proof to the contrary. As to the second test (objective), it means determining whether, quite apart from the personal conduct of a judge, there are ascertainable facts which may raise doubts as to his or her impartiality (see *Dragojević v. Croatia*, no. 68955/11, § 111, 15 January 2015).

58. In the vast majority of cases raising impartiality issues the Court has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Otegi Mondragon v. Spain*, nos. 4184/15 and 4 others, § 54, 6 November 2018).

59. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid., § 55).

60. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings. It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (ibid., § 56).

61. The litigants' standpoint is important but not decisive; what is decisive is whether any misgivings in that respect can be held to be objectively justified. In that respect even appearances may be of a certain importance, or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Harabin v. Slovakia*, no. 58688/11, § 131, 20 November 2012).

62. Account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to

ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality, and so serve to promote the confidence which the courts must inspire in the public (ibid., § 132).

63. In its case-law the Court has held that the mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in itself justifying fears as to his impartiality (see *Hauschildt v. Denmark*, 24 May 1989, § 50, Series A no. 154, and *Romero Martin v. Spain* (dec.), no. 32045/03, 12 June 2006 concerning pre-trial decisions; *Ringeisen v. Austria*, 16 July 1971, § 97, Series A no. 13; *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A; and *Vaillant v. France*, no. 30609/04, §§ 29-35, 18 December 2008, concerning the situation of judges to whom a case was remitted after a decision had been set aside or quashed by a higher court; *Thomann v. Switzerland*, 10 June 1996, §§ 35-36, *Reports of Judgments and Decisions* 1996-III, concerning the retrial of an accused convicted *in absentia*; and *Craxi III v. Italy* (dec.), no. 63226/00, 14 June 2001, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 59, *Reports* 1996-III, concerning the situation of judges who had participated in proceedings against co-offenders).

(b) Application of these principles to the present case

64. In the present case appeals were lodged with the Bucharest Court of Appeal in relation to two separate sets of criminal proceedings against the applicant. The first set concerned financial crimes committed by the applicant in his capacity as manager or director of several private commercial companies in respect of their relationship with other private commercial companies (see paragraph 6 above). The second set concerned the same and other types of financial crimes committed by the applicant, in the same period, in his capacity as manager or director of both the same companies as in the first case and also other companies, but in respect of their relationship with a state-owned company in the specific context of its privatisation (see paragraph 11 above). In both sets of proceedings the applicant was convicted by a panel of two judges, one of whom appeared on both panels, judge M.A.M.

65. The applicant submitted that the two sets of proceedings were connected as they had concerned similar facts and, therefore, judge M.A.M. who had been on the panel that had convicted him in the first case could not have changed his opinion in the second case.

66. The Court is not persuaded that there is evidence that judge M.A.M. (or the other member of the panel) displayed personal bias against the applicant in the framework of the second set of criminal proceedings. In the Court's view, the case must therefore be examined from the perspective of the objective impartiality test, and more specifically it must address the question whether the applicant's doubts, stemming from the specific

situation, may be regarded as objectively justified in the circumstances of the case (see, *mutatis mutandis*, *Otegi Mondragon and Others*, cited above, § 60).

67. The Court notes that the two sets of proceedings concern various financial crimes, all committed in the same time-frame. During the second set of proceedings the file from the first case was joined to that of the second case as certain evidence was common to the two cases (see paragraph 14 above).

68. The Court also notes that judge C.B., who had taken part in the first set of proceedings alongside judge M.A.M., had been disqualified from sitting in the second set of proceedings by a decision of 20 May 2015 (see paragraphs 15-19 above). However, the above decision had been based on a number of elements related to the behaviour of this judge during the first appeal hearing in the second set of proceedings, in addition to the connection between the two cases being implied from the decision of the appeal panel to join the two files and use evidence common to both cases (see paragraph 18 above).

69. For his part, judge M.A.M. sought to withdraw in order to eliminate any suspicions as to his possible lack of impartiality (see paragraph 21 above). Since he did not refer to any specific reasons for his withdrawal in his application, the Court agrees with the Government that M.A.M. sought leave to withdraw merely as a precautionary measure (contrast *Rudnichenko v. Ukraine,* no. 2775/07, §§ 36 and 117, 11 July 2013, where the judge in question had specifically mentioned in her withdrawal application that she had already expressed her opinion regarding the incident involving the applicant).

70. Judge M.A.M.'s application to withdraw was examined by a panel of two judges who delivered a reasoned decision which replied to all arguments raised by the applicant (contrast *Rudnichenko,* cited above, § 117), finding that the mere fact that he had taken part in the examination of the previous case against the applicant could not raise a reasonable suspicion that his impartiality would be affected (see paragraphs 23-24 above). The Court also notes that the judges examining the withdrawal application had concluded, after consideration of the two sets of proceedings in question, that there was no proof to support the idea that judge M.A.M. had expressed, in the first case, an opinion on the guilt of any of the accused in the case currently on trial (see paragraph 24 above).

71. The Court also observes that complaints concerning judge M.A.M.'s alleged lack of impartiality were also examined and rejected by the High Court of Cassation and Justice (see paragraphs 29-32 above) as well as by the SCM (see paragraphs 33-34 above). On those two occasions, the high court judges and the members of the disciplinary body of the judiciary examined the arguments raised before them as well as the proceedings concluded by the final judgment of 8 June 2015 and determined, on the one

hand, that there were no reasons to justify a change of venue of the appeal (see paragraph 32 above) and, on the other hand, that all requests for recusal or withdrawal had been examined and resolved in accordance with the law in thoroughly reasoned decisions and that the conviction judgment had been thoroughly reasoned and based on the relevant legal provisions (see paragraph 34 above).

72. Against this background, the Court considers that, aside from the alleged similarity between the two sets of proceedings, judge M.A.M.'s behaviour both in the first and second set of proceedings was not such as to objectively justify the applicant's fears as to his impartiality (see by contrast *Otegi Mondragon and Others*, cited above, § 65, where the judge whose impartiality was questioned had been found in bias against the applicant in a previous set of proceedings because she had publicly used expressions which implied that she had already formed an unfavourable view of that applicant's case before that case had been finally decided). In addition, in dismissing the withdrawal request, the Bucharest Court of Appeal gave sufficient and relevant reasons for its decision, which were compatible with the Court's case-law (see *Dragojević*, cited above, § 121).

73. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's misgivings about the impartiality of the judge presiding over the trial panel examining his case cannot be regarded as objectively justified.

74. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 4 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Deputy Registrar

Jon Fridrik Kjølbro
President