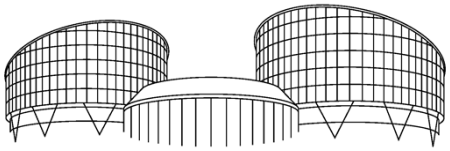

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BULIGA v. ROMANIA

(Application no. 22003/12)

JUDGMENT

Art 6 §§ 1 and 3 (d) (criminal) • Fair hearing • Applicant's conviction for minor offences by a court based on decisive evidence from absent witnesses • General guarantees of fairness of Art 6 applicable to all criminal proceedings irrespective of the offence • Inability of the domestic court to hear witnesses not a good reason for their non-attendance • No sufficient counterbalancing factors to compensate for the handicap created for the defence
Art. 41 • Just satisfaction • Reopening of domestic proceedings most appropriate form of redress given the nature of the applicant's complaints • Distress only compensated by non-pecuniary damages

STRASBOURG

16 February 2021

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 Buliga v. Romania,

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

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

Having regard to:

the application (no. 22003/12) 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 Ionel Petrică Buliga ("the applicant"), on 3 November 2011;

the decision to give notice to the Romanian Government ("the Government") of the application;

the decision to grant the applicant leave to represent himself (Rule 36 § 2 of the Rules of Court) and use Romanian in the written proceedings (Rule 34 § 4);

the parties' observations;

considering that Ms Iulia Antoanella Motoc, the judge elected in respect of Romania, was unable to sit in the case (Rule 28 of the Rules of Court), the President of the Chamber decided to appoint Mr Krzysztof Wojtyczek, the judge elected in respect of Poland, to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1);

Having deliberated in private on 9 November 2020 and 12 January 2021,

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

INTRODUCTION

1. The case concerns allegations that the criminal proceedings against the applicant for a minor offence were unfair, in so far as the court relied on the statements of witnesses whom he had not been able to question.

THE FACTS

2. The applicant was born in 1984 and lives in Giera.

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

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

5. On 31 March 2010 the prosecutor's office attached to the Deta District Court instituted criminal proceedings against the applicant for several acts of theft of a metal fence, an offence which, at the time, was punished by Articles 208 § 1 and 209 § 1 (g) of the Criminal Code ("the CC") read in conjunction with Article 41 § 2 of the CC (see paragraph 13 below).

6. In a decision of 18 June 2010 the prosecutor's office discontinued the proceedings. It considered that the applicant had committed the acts he was accused of, but that they were not serious enough to constitute a criminal offence. Consequently, it imposed an administrative fine of 350 Romanian lei (RON – approximately 85 euros (EUR) at the time). The applicant challenged the conclusion and on 16 July 2010 the decision was upheld by the chief prosecutor of the prosecutor's office attached to the Timiş County Court.

7. On 6 August 2010 the applicant challenged the decisions of the prosecutor's office before the Deta District Court under Article 278[1] of the Code of Criminal Procedure ("the CCP", see paragraph 15 below). He offered to submit additional evidence and requested that the witnesses be heard by the court, in order to prove his innocence.

8. In a final decision of 21 October 2010 the District Court dismissed the applicant's request for evidence, on the grounds that the court could not hear witnesses. It considered however that the evidence gathered by the prosecutor's office was insufficient and for that reason allowed the objection and referred the case back to the prosecutor's office. It instructed the prosecutor's office to continue the investigation and hear evidence from the applicant and the witnesses proposed by him.

9. On 8 March 2011 the applicant was summoned to appear before the prosecutor's office. He was informed of the charges against him and interviewed. He denied the theft, proposed witnesses and requested two expert examinations to prove that the fence on his property was different to the one that had been stolen. Several witnesses were interviewed, including some of those proposed by the applicant, and evidence provided by him to justify the purchase of the metal fence was examined. On 27 April 2011 the chief prosecutor from the prosecutor's office attached to the District Court dismissed the applicant's request for expert reports, stating that enough evidence had already been gathered (notably witness statements) for making the decision and that due to the passage of time an expert examination was no longer useful. This decision was upheld by the chief prosecutor from the prosecutor's office attached to the County Court. It appears that all the statements were taken in the absence of the applicant or a lawyer representing him.

10. On 9 June 2011 the prosecutor's office attached to the District Court again decided to discontinue the criminal prosecution and imposed an administrative fine of RON 800 (approximately EUR 190 at that time). On

29 June 2011 this decision was upheld by the chief prosecutor from the prosecutor's office attached to the County Court.

11. The applicant raised an objection, arguing that his offer of evidence had been rejected by the investigators. He also contested the accuracy of some of the witness statements which, in his view, had been obtained under duress by the police officer in charge of the investigation.

12. In a final decision of 23 August 2011 the District Court dismissed the objection. Firstly, it dismissed the applicant's request for an expert examination on the grounds that that evidence did not represent "new documents", which was the only type of evidence the court could hear (in accordance with Article 278[1] § 7 of the CCP, cited in paragraph 15 below). The court further noted that the two witnesses initially interviewed by the prosecutor had been interviewed again, and that seven new witnesses, some of them proposed by the applicant, had also made statements to the prosecutor. It considered that the evidence in the case file had been correctly gathered and interpreted. The court concluded as follows:

> "The court concludes that the prosecutor correctly found ... that [the applicant] had stolen ... the metal fence ..."

RELEVANT LEGAL FRAMEWORK

13. The relevant provisions of the Criminal Code ("the CC") in force at the time of the events in the present case were worded as follows:

Article 1 – Aim of the criminal law

> "Criminal law protects, against crimes, Romania, the sovereignty, independence, unity and indivisibility of the State, the person, its rights and freedoms, property and the rule of law."

Article 17 – Essential characteristics of a criminal offence

> "A criminal offence is an act which presents a danger to society, is committed with culpable intent (*vinovăţie*) and is provided for by criminal law.
>
> A criminal offence is the sole basis of criminal liability."

Article 18 – Social danger of an act

> "An act presenting a danger to society for the purposes of criminal law shall be understood to mean any action or inaction which undermines one of the values mentioned in Article 1 and for which the imposition of a sentence is required."

Article 18[1] – Acts not having the social danger of a criminal offence

> "1. An act punishable by criminal law shall not constitute a criminal offence if, in view of its minimal interference with one of the values safeguarded by criminal law and the manifestly insignificant nature of its specific content, it does not present the degree of danger to society associated with a criminal offence.

2. In determining the degree of danger to society, account must be taken of the manner and means by which the act was committed, the aim pursued, the circumstances in which the act was committed, the result which was or could have been produced, and the character and conduct of the perpetrator, if known.

3. In the event of such an act, the public prosecutor or the court shall impose one of the administrative sanctions provided for in Article 91."

Article 41 – Continuous and complex offences

"(2) An offence is considered to be continuous when a person commits, at different times, but to achieve the same purpose, actions or inactions each presenting the content of the same offence."

Article 90 – Conditions for replacement [of criminal liability]

"(1) The court may replace criminal liability with ... an administrative sanction, if the following conditions are met:

(a) the sentence prescribed by law for the offence is imprisonment for a maximum of one year or a fine or for the offences provided for in Articles 208, 213, Article 215 § 1, Article 215[1] § 1, Article 217 § 1, Article 219 § 1, if the value of the damage does not exceed 10 Romanian lei or, for the offence provided for in Article 249, if the value of the damage does not exceed 50 Romanian lei;

(b) because of its specific content and the circumstances in which it was committed, the act presents a low degree of social danger and did not produce serious consequences;

(c) the damage caused by the offence has been fully repaired pending the delivery of the decision;

(d) the perpetrator regrets the act;

(e) there is sufficient information indicating that the perpetrator can be redeemed without punishment.

(2) Criminal liability cannot be replaced if the perpetrator has previously been convicted or has twice been subject to administrative sanctions..."

Article 91 – Administrative sanctions

"Where a court orders the replacement of criminal liability, it shall impose one of the following administrative sanctions:

...

(c) a fine of between 10 and 1,000 lei."

Title III: Crimes against property
Article 208 – Theft

"(1) Taking movable property from the possession or detention of another, without [his or her] consent, in order to misappropriate it, shall be punishable by imprisonment of one to [twelve] years."

Article 209 – Aggravated theft

"(1) Theft committed in any of the following circumstances:

...

(g) at night;

...

shall be punishable by imprisonment of [three] to [fifteen] years."

14. On 1 February 2014 a new Criminal Code ("the NCC") entered into force in the Respondent State. The provisions which would be applicable to a situation similar to that raised in the present case read as follows:

Article 80 – Conditions for waiving sentencing

"(1) The court may decide to waive the imposition of a sentence if the following conditions are met:

(a) the criminal offence committed is of reduced severity, considering the nature and extent of the consequences produced, the means used, the manner and circumstances in which it was committed, the motive and the aim pursued;

(b) with regard to the offender, their prior conduct, the efforts made by [him or her] to remove or reduce the consequences of the criminal offence, as well as their possibility of correction, the court considers that the imposition of a sentence would be inappropriate because of the consequences it would have for the offender.

(2) It is not possible to waive the imposition of a sentence if:

(a) the offender has previously been convicted, except in the cases stipulated in Article 42 (a) and (b) [deeds which are no longer prohibited by criminal law, and offences which have been amnestied] or where rehabilitation has taken place or the time-limits for rehabilitation have been met;

(b) the offender has benefitted from a waiver of sentence in the two years preceding the date of commission of the offence for which he [or she] is currently being tried;

(c) the offender has evaded the criminal investigation or trial, or attempted to prevent the discovery of the truth or the identification and prosecution of the perpetrator or other participants;

(d) the punishment set by law for the criminal offence committed is imprisonment of more than five years.

(3) In the event of concurrent offences, a waiver of imposition of a sentence may be ordered if, for each concurrent offence, the conditions set out in paragraphs (1) and (2) above are met."

15. The relevant provisions of the Code of Criminal Procedure ("the CCP"), as in force at the material time, provided as follows:

Article 10 – Cases when a criminal prosecution is not started or is dropped

"1. Criminal proceedings cannot be instituted or continued if:

...

(b^1) the act did not present the degree of social danger required to be classified as a criminal offence;"

Article 11 – Termination of criminal investigation, prosecution, acquittal and termination of criminal trial

"Where any of the cases set out in Article 10 is found to exist:

1. During the criminal proceedings, the public prosecutor, on an application by the prosecuting authority or *proprio motu*, shall order: ...

(b) the discontinuation of the proceedings (*scoaterea de sub urmărire*) in favour of the suspect or accused, in the cases set out in Article 10 (a) to (e).

..."

Article 172 – Rights of the defence

"(1) During the criminal investigation, the defence counsel of the accused or defendant has the right to participate in any investigative activities and may make requests and submit documents. An investigative activity may take place even in counsel's absence, if there is evidence that counsel was notified of the date and time of the activity. Notification shall be made by telephone, fax, Internet or other such means, and a report shall be concluded in this regard.

...

(3) If the [defence] counsel is present during an investigative activity, his [or her] presence shall be noted, and the [relevant document] shall also be signed by counsel.

...

(6) Counsel has the right to complain, under Article 275, if his [or her] requests are not accepted..."

Article 275 – Right to lodge a complaint

"Anyone may lodge a complaint in respect of measures and decisions taken during a criminal investigation, if they have harmed his or her legitimate interests ..."

Article 278 – Complaint against the prosecutor's activities

"Complaints against measures or decisions taken by a prosecutor or implemented at the latter's request shall be examined by ... the chief prosecutor of the relevant department ..."

Article 278[1] – Complaint before the judge against the prosecutor's decisions or decision not to prosecute

"(1) Following the dismissal by the prosecutor of a complaint lodged under Articles 275 to 278 in respect of decision to discontinue a criminal investigation ... or a decision not to prosecute (*neurmărire penală*) ..., the injured party, or any other person whose legitimate interests have been harmed, may complain within twenty days of notification of the decision, to the judge of the court that would normally have jurisdiction to hear the case at first instance.

...

(7) The judge ruling on the complaint shall verify the prosecutor's decision or order, on the basis of the material and evidence in the file and any new documents submitted.

(8) The judge shall take one of the following decisions:

(a) reject the complaint, by means of a decision, as out of time, inadmissible or unfounded, and uphold the contested decision or order;

(b) allow the complaint, by means of a decision, set aside the prosecutor's decision or order and refer the case to the prosecutor's office, in order to start or reopen the criminal investigation, as appropriate. The judge shall give reasons why he [or she] has referred the case to the prosecutor, and shall indicate the facts and circumstances to be verified and the evidence to be collected;

(c) allow the complaint, by an interlocutory judgment, set aside the prosecutor's decision or order and, if the evidence in the case file is sufficient, examine the case as a court of first instance, the provisions concerning the procedure at first instance and appeal proceedings being applicable.

...

(10) A decision rendered under paragraph 8 shall be final."

16. On 1 February 2014 a new Code of Criminal Procedure ("the NCCP") entered into force in the Respondent State. The procedure provided for in Article 278[1] of the CCP was replaced with a new procedure, described in Article 340 of the NCCP, which reads as follows:

Article 340 – Complaint against the decision not to prosecute or not to indict

"(1) Anyone whose complaint against the decision not to prosecute (*clasare*), taken in a prosecutor's order or an indictment, has been rejected in accordance with Article 339 [complaints against prosecutor's activities or decisions] may complain, within [twenty] days of the date the decision was notified, to the preliminary chamber judge from the court that would, by law, hear the case at first instance."

17. In two decisions rendered in 2004 and 2006, the Romanian Constitutional Court ruled that the limitation of the evidence that could be examined in the procedure provided for by Article 278[1] of the CCP was justified by the specific nature of that procedure. In particular, the procedure (used by the applicant in the present case) did not concern the merits of the criminal case, and was only meant to verify the lawfulness of decisions taken by the prosecutor. The Constitutional Court considered that, under the procedure, this verification was done by examining the documents in the criminal file which had formed the basis of the prosecutor's decision.

18. Enforcement of an administrative fine imposed under Article 18[1] of the CC was carried out in accordance with the procedure provided for by Government Ordinance no. 2/2001, which at the material time read as follows:

Article 39

"Enforcement of the sanction of a fine shall be done as follows:

(a) by the authority to which the administrative officer belongs, whenever the appeal against the administrative decision concerning the contravention is not exercised within the time-limits prescribed by law;

(b) by the court, in any other cases."

Article 39[1]

"(1) If the offender has not paid the fine within [thirty] days of the date [the decision imposing] the fine became final, and there is no possibility of enforcement, he [or she] shall notify the court within whose territorial jurisdiction the offence was committed, in order to obtain replacement of the fine with the sanction of community service, taking into account, where appropriate, the part of the fine that has been paid.

(2) If the offender, summoned by the court, has not paid the fine within the time-limit prescribed in paragraph (1), the court shall replace the fine with community service for a maximum duration of [fifty] hours, and for minors over the age of 16, [for a maximum duration of twenty-five] hours.

(3) A decision imposing community service may be appealed against.

(4) The civil enforcement service attached to the district court within whose territorial jurisdiction the contravention took place shall be responsible for the enforcement of such decisions, in collaboration with special departments of the local public authorities."

19. At the time of the events in the present case, it was not possible for the courts to replace an unpaid administrative fine with days in prison. This option, which had been available in the past, was removed from the law in 2003 (for further details, see *Anghel v. Romania*, no. 28183/03, §§ 39 and 52, 4 October 2007, and *Nicoleta Gheorghe v. Romania*, no. 23470/05, §§ 16 and 31, 3 April 2012).

20. At the material time, the Criminal Records Act (Law no. 290/2004) contained the following provisions:

Section 9

"A person's criminal record shall contain the following information:

(a) criminal sanctions ... imposed by a final court decision;

(b) ... administrative fines imposed under the provisions of the Criminal Code, ..."

Section 17

"A criminal record certificate shall contain the criminal sanctions imposed by final court decisions."

Section 21

"(2) When a copy of the criminal record is sent to a judicial authority, information about administrative sanctions imposed under the provisions of the Criminal Code shall also be appended."

Section 27

"(1) Anyone may obtain their own criminal record certificate."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

21. The applicant complained that the criminal proceedings against him had been unfair, contrary to the requirements of Article 6 §§ 1 and 3 (d) of the Convention, which read 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:
>
> ...
>
> (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

1. *The Court's jurisdiction* ratione materiae

(a) The parties' submissions

22. The Government argued that the domestic proceedings giving rise to the final decision of 23 August 2011 had not been criminal proceedings for the purposes of Article 6 of the Convention. In their view, the complaint was thus incompatible *ratione materiae* with the requirements of the Convention.

23. The applicant did not comment on this issue.

(b) The Court's assessment

(i) General principles

24. The concept of a "criminal charge" in Article 6 § 1 is an autonomous one (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 122, 6 November 2018). The Court's established case-law sets out three criteria, commonly known as the "Engel criteria", to be considered in determining whether or not there was a "criminal charge" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate

analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, among other authorities, *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X). The fact that an offence is not punishable by imprisonment is not by itself decisive for the purposes of the applicability of the criminal limb of Article 6 of the Convention since, as the Court has stressed on numerous occasions, the relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character (see *Ramos Nunes de Carvalho e Sá*, cited above, § 122).

(ii) Application of those principles to the facts of the present case

25. The Court will examine whether, in accordance with the aforementioned *Engel* criteria, the imposition of an administrative fine on the applicant for the offence of which he was accused is covered by the concept of "criminal procedure".

(1) Legal characterisation of the offence under national law

26. The Court notes at the outset that the applicant was charged with aggravated theft, an offence prohibited by Articles 208 and 209 of the CC (see paragraphs 5 and 13 below). It is thus undisputed that the offence in question was classified as criminal in domestic law.

27. However, the Court further notes the application in the present case of Article 18^1 of the CC, providing that an act falling under criminal law did not constitute a criminal offence if it did not attain the requisite level of seriousness, on account of minimal interference with one of the values safeguarded by criminal law, and its specific content (see paragraph 13 above). In such circumstances, the prosecutor could decide to discontinue the prosecution and, instead of imposing the criminal penalty provided for in the definition of the offence of which the person had been accused, impose another penalty that was likewise provided for in the CC but was designated therein as "administrative" (see *Mihalache v. Romania* [GC], no. 54012/10, § 58, 8 July 2019).

28. In the instant case, by decisions of 18 June 2010 and 9 June 2011, the prosecutor's office discontinued the proceedings against the applicant, noting that although the acts committed fell under criminal law, they did not amount to a criminal offence, and imposed an administrative fine instead (see paragraphs 6 and 10 above). Be that as it may, the characterisation under domestic law is merely a starting point, and the indications so afforded have only a formal and relative value (see, among many other authorities, *Engel and Others*, cited above, § 82). The Court will therefore undertake a more detailed analysis of the actual nature of the domestic

provision forming the legal basis of the penalty imposed on the applicant and its severity (see, *mutatis mutandis*, *Mihalache*, cited above, § 58).

(2) Actual nature of the applicable legal provisions

29. By its very nature, the offence under examination aims to protect property, a value which falls within the scope of criminal law (see paragraph 13 above). The provisions of Articles 208 and 209 of the CC were applicable, in accordance with Articles 1 and 17 of the CC, to anyone who committed, with culpable intent, an act prohibited by criminal law. It is thus important to note that although the acts of which the applicant was accused were not deemed to constitute a criminal offence by the prosecutors, they nevertheless fell within the scope of a provision of criminal law.

30. The fact that the criminal acts of which the applicant was accused were regarded as manifestly insignificant on account of their minimal interference with one of the values safeguarded by criminal law and their specific content, does not in itself preclude their classification as "criminal" within the autonomous Convention meaning of the term, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the "*Engel* criteria", necessarily requires a certain degree of seriousness (see *Ezeh and Connors*, cited above, § 104, and *Mihalache*, cited above, § 60).

31. For these reasons, the Court accepts that the legal provision on the basis of which the prosecutor's office prosecuted and punished the applicant by means of the prosecutor's decisions of 18 June 2010 (see paragraph 6 above) and 9 June 2011 (see paragraph 10 above), subsequently upheld by the final court decision of 23 August 2011 (see paragraph 12 above), was criminal in nature.

(3) Degree of severity of the penalty

32. Lastly, the Court reiterates that the degree of severity of the penalty is determined by reference to the maximum penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination but it cannot diminish the importance of what was initially at stake (see *Mihalache*, cited above, § 61, with further references).

33. In the present case, the penalty laid down in law for commission of the offence in question was up to twelve years' imprisonment (see paragraph 13 above). In addition, even though the prosecutor's office did not consider that the acts in question constituted an offence for the purposes of criminal law, it was still required by law to impose a penalty where the legal basis for discontinuing the proceedings was Article 18^1 of the CC. In the present case, the applicant was fined RON 800 (approximately EUR 190

at the time) for the acts of which he was accused, an amount which is closer to the maximum allowed by Article 91 of the CC (see paragraph 13 above).

34. The Court also notes that although the CC designates this penalty as "administrative", the purpose of the fine was not to repair the damage caused by the applicant, but to punish him and deter him from committing further criminal acts (see *Mihalache*, cited above, § 62, with further references). The fine imposed on the applicant thus had a punitive and deterrent purpose and was therefore akin to a criminal penalty, despite its domestic classification as an "administrative" fine. The fact that the applicant could not risk prison time even if he failed to pay the penalty (see paragraph 19 above) does not alter this conclusion.

35. In the same vein, even though criminal record certificates delivered to persons concerned do not contain information on administrative fines, such as the one imposed on the applicant in the present case, this information is nevertheless available to the judicial authorities on the same basis as information concerning any other criminal sanction imposed on that person (see paragraph 20 above).

(4) Conclusion concerning the nature of the *proceedings leading to the final decision of 21 June 2011*

36. Having regard to the foregoing, the Court concludes that the nature of the offence for which the applicant was prosecuted and the penalty imposed on him, render the proceedings under examination criminal in nature, for the purpose of Article 6 of the Convention. The criminal limb of Article 6 thus applies to the facts of the present case. Consequently, the Court dismisses the Government's objection of incompatibility *ratione materiae*.

2. Other grounds for inadmissibility

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

B. Merits

1. The parties' submissions

38. The applicant complained that the authorities (prosecutor's office and court) had refused to investigate the case properly and hear the evidence proposed by him.

39. The Government argued that the applicant had benefitted from all procedural safeguards expected in this type of case. For instance, the domestic court had referred the case back to the prosecutor's office when it had considered the investigation incomplete. The applicant had had the

possibility to propose evidence and his requests had been duly examined by the prosecutor. However, he had failed to request to be present during the interviews with the witnesses.

40. They also pointed out that the purpose of the proceedings before the court had not been to assess a person's guilt, but rather to examine the lawfulness of the decisions of the prosecutor's office, based primarily on the evidence already in the case file.

2. The Court's assessment

(a) Preliminary remarks

41. Having established that the case falls within the scope of the criminal limb of Article 6, the Court must ascertain whether, bearing in mind the particular characteristics of the domestic proceedings at stake, the full guarantees of Article 6 apply to the facts of the present case.

42. In this connection, it notes that in *Blokhin v. Russia* ([GC], no. 47152/06, §§ 179-82, 23 March 2016), having found that the proceedings against the applicant for the commission of a delinquent act which, due to the applicant's age, was not classified as criminal in domestic law, concerned the determination of a criminal charge, the Court examined them in the light of all the safeguards enshrined in Article 6 §§ 1 and 3 (d) of the Convention (see *Blokhin*, cited above, §§ 211-16).

43. In the same vein, in *Anghel v. Romania* (no. 28183/03, §§ 55-69, 4 October 2007), the Court applied the full set of safeguards provided by Article 6 of the Convention to domestic proceedings which, although non-criminal under domestic law, were considered by the Court to fall within the scope of the protection guaranteed by the criminal limb of Article 6 of the Convention.

44. For these reasons, and bearing in mind that the Convention guarantees rights which are practical and effective (see, among many other authorities, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37; *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 81, 21 October 2010; and *Maskhadova and Others v. Russia*, no. 18071/05, § 222, 6 June 2013), the Court considers that all the guarantees enshrined in the criminal limb of Article 6 of the Convention, as interpreted in the relevant case-law (see paragraphs 45-48 below), apply to the facts of the present case.

(b) General principles

45. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that Article, which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Schatschaschwili v. Germany* [GC], no. 9154/10,

§§ 100-01, 15 December 2015, and *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010, with further references). In making this assessment, the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victim(s) that crime is properly prosecuted (see *Schatschaschwili,* cited above, § 101, and *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). It is also notable in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Seton v. the United Kingdom*, no. 55287/10, § 57, 31 March 2016, with further references).

46. The Court has formulated the general principles to be applied in cases where a prosecution witness did not attend a trial but statements previously made by him or her were admitted in evidence; those general principles are set out in the cases of *Al-Khawaja and Tahery* (cited above, §§ 118-47). A summary of those principles can also be found in *Seton* (cited above, § 58) and *Blokhin* (cited above, §§ 200-02). In this respect, having regard to the Court's case-law, firstly, there must be a good reason for the non-attendance of a witness at the trial and, secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Blokhin*, cited above, § 201, with further references).

47. Those principles have been further clarified in *Schatschaschwili* (cited above, §§ 111-31), in which the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that its concern is to ascertain whether the proceedings as a whole were fair, the Court must not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or decisive basis for the applicant's conviction, but also in cases where it finds it unclear whether the evidence in question was sole or decisive but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the

more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair (ibid., § 116, see also *Seton*, cited above, § 59).

48. In this context, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny (see *Blokhin*, cited above, § 202).

(c) Application of those principles to the facts of the present case

49. Turning to the facts of the case under examination, the Court notes that the applicant was placed under investigation by the prosecutor's office (see paragraph 5 above), but that the proceedings were eventually discontinued on the grounds that the acts committed were not serious enough to constitute a criminal offence (see paragraphs 6 and 10 above). The applicant, who received a fine from the prosecutor's office, contested the outcome before the criminal courts, availing himself of the procedure under Article 278[1] of the CCP.

50. The Court reiterates that under the procedure in question the domestic courts were called upon to examine the lawfulness of the decisions of the prosecutor's offices and had no power to hear witness evidence or directly assess the merits of the case. However, the Court can only note that in finding that the applicant "had stolen ... the metal fence" (see paragraph 12 above), in its final decision of 23 August 2011, the domestic court did, in fact, make an assessment of his guilt. In doing so, it referred to statements made by witnesses who had not appeared before it.

51. The Court notes that the witnesses were only heard during the investigation (see paragraph 9 above). In this context, the Court must assess whether there was a good reason for the non-attendance of the witnesses before the court, such as death or fear, absence on health grounds or the witness's unreachability (see *Schatschaschwili*, cited above, § 119, with further references). The Court notes that the applicable law did not allow the courts to hear witness testimony in the procedure under Article 278[1] of the CCP, as they were bound to examine the complaint based on the evidence already in the file, the sole exception being the possibility to examine additional documents, if need be (see Article 278[1] § 7 of the CCP, cited in paragraph 15 above). This, however, is not a good reason justifying the non-attendance of the relevant witnesses, for the purposes of Article 6 of the Convention. It is also relevant to note that there is no indication, nor was it claimed by the Government, that the witnesses had not been available or that it would otherwise have been difficult to summon them to appear before the court (see *Blokhin*, cited above, § 213).

52. As for the significance of the evidence of the absent witnesses, the Court notes that the domestic court reached its decision in the case by relying on the statements made by those witnesses. It can be inferred from

this that they were decisive for the court's conclusion (see *Schatschaschwili*, § 141, and *Blokhin*, § 212, both cited above).

53. It remains to be determined whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of the decisive evidence of the absent witnesses (see *Schatschaschwili*, cited above, § 145). In other words, the Court must ensure that the trial, judged as a whole, was fair, bearing in mind that the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see the case-law quoted in paragraph 47 above). One important safeguard would be to have given the applicant or defence counsel an opportunity to question the witnesses during the investigation stage (see *Schatschaschwili*, cited above, § 131). However, there is no evidence in the file that the defence was informed of the date the witnesses were interviewed, and it appears that the applicant was neither present nor represented during the police questioning (see paragraph 9 above) and the Government did not put forward any justification as to why the applicant was not present during the police questioning. Moreover, it appears that the applicant received no response to his allegation that the witnesses had been intimidated by the police (see paragraphs 11-12 above). There is nothing in the case file to indicate that he was in any way informed of the date when the witnesses would be interviewed by the investigators or invited to participate.

54. The Court notes that in his complaint lodged with the domestic court the applicant requested additional evidence and contested the accuracy of certain witness statements (see paragraphs 7 and 11 above). The court nevertheless based its decision solely on the evidence in the case file (see paragraph 12 above).

55. Moreover, on this point, the Court cannot but note that even in the absence of the power to hear witnesses, the court had at its disposal other means to resolve the case which could, at least in theory, have ensured better protection of the rights of the defence. In particular, it notes that under Article 278[1] of the CCP the domestic courts had the power to set aside a decision taken by the prosecutor's office and either refer the case back to the prosecutor's office or examine it further in proper criminal proceedings, as a first-instance court (see paragraph 15 above). The domestic court, which availed itself of the possibility and referred the case back to the prosecutor's office when it considered the investigation incomplete (see paragraph 8 above), did not avail itself of the possibility to do so or to examine the case in proper criminal proceedings when it was called upon to interpret the evidence in the file, including the witness statements. Instead, the court upheld the prosecutor's decision of 9 June 2011 without hearing evidence, thus frustrating the applicant's opportunity

to cross-examine the witnesses whose testimony was of decisive importance. In doing so, the court deprived the applicant of the possibility to have his case examined by a court in compliance with the requirements of the Convention.

56. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

57. The applicant raised additional complaints under Article 3, Article 6 § 1 (impartiality of the court) and Article 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

58. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

59. Accordingly, these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

61. The applicant claimed 190,000 euros (EUR) in respect of pecuniary damage and EUR 30,000 in respect of non-pecuniary damage.

62. The Government contended that there was no causal link between the complaint brought by the applicant before the Court and the pecuniary damage sought. Furthermore, they pointed out that he could seek the reopening of the proceedings under Article 465 § 1 of the CCP. Lastly, they contended that the finding of a violation constituted sufficient just satisfaction for the alleged non-pecuniary damage.

63. The Court notes that Article 465 § 1 of the CCP allows for the reopening of the domestic proceedings in order to remedy the breaches found by it. Given the nature of the applicant's complaint under Article 6 of the Convention, the Court considers that in the present case the most appropriate form of redress would be, at the applicant's request, to reopen the proceedings complained of in due course.

64. On the other hand, the Court considers that he must have suffered a certain amount of distress which cannot be compensated solely by the

reopening of the proceedings or the finding of a violation. Having regard to the nature of the violation found, and making its assessment on an equitable basis, the Court awards him 4,000 EUR in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

65. The applicant also claimed EUR 3,000 for the costs and expenses.

66. The Government observed that he had not adduced any evidence to support the claim.

67. Regard being had to the documents in its possession and to its case-law, the Court rejects the claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning fairness of the criminal proceedings admissible and the remainder of the application inadmissible;

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

3. *Holds,*
   (a) by five votes to two, that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) unanimously, that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Yonko Grozev
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Pastor Vilanova and Schukking is annexed to this judgment.

Y.G.
A.N.T.

JOINT PARTLY DISSENTING OPINION OF JUDGES PASTOR VILANOVA AND SCHUKKING

1. Our dissenting opinion concerns, exclusively, the payment of just satisfaction to the applicant in respect of non-pecuniary damage under Article 41 of the Convention. We have drafted this joint opinion to express our disagreement with the majority position in the Chamber on this point.

2. We are of the view that the judgment in the present case: (a) does not justify its departure from the Court's case-law in such matters, and (b) in doing so it overlooks the need for reasoning under Article 45 § 1 of the Convention.

3. Firstly, it is to be noted that the Court has found on many occasions that it does not follow from its finding of a violation of Article 6 §§ 1 and 3 of the Convention that an applicant was wrongly convicted. Indeed, it is impossible to speculate as to what might have occurred had there been no breach of the minimum rights listed in Article 6 § 3. In such circumstances the Court often takes the view that a finding of a violation constitutes in itself sufficient just satisfaction (see *Sejdovic v. Italy* [GC], no. 56581/00, § 134, 2006-II; *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 315, ECHR 2016; and *Beuze v. Belgium* [GC], no. 71409/10, § 199, 9 November 2018). It is noteworthy that no less than three Grand Chamber judgments, two of which are recent, have taken such an approach. However, the Chamber now appears to be turning its back on this well-established doctrine.

4. Secondly, the Court has also taken the view that there is no need to make an award for non-pecuniary damage when the applicant is able to obtain the reopening of the domestic proceedings, after having previously been convicted. In the present case the possibility of a retrial exists under domestic law. In this respect the Court has reiterated many times that when an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, as a rule, a retrial or the reopening of the case, if requested, represents in principle the most appropriate form of redressing that violation (see, among other authorities, *Sejdovic v. Italy*, cited above, § 126; *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Cabral v. the Netherlands*, no. 37617/10, §§ 42-43, 28 August 2018; and *Chernika v. Ukraine*, no. 53791/11, §§ 82-83, 12 March 2020). Once again, this well-established case-law seems to have been ignored.

5. Lastly, Article 45 § 1 of the Convention requires that reasons must be given for the Court's judgments and decisions. This provision seems clear and no exception is permitted. As it is not otherwise stipulated, it can be

inferred that the obligation to give reasons concerns the entire text of the judgment or decision and not merely certain passages of the judicial ruling. Consequently, even if the majority wished to base their findings on a different strand of case-law, or to depart from the authorities relied upon by the minority, they were under an obligation, we respectfully submit, in terms of the duty of the European adjudicator, to explain the reasons for their position. Such reasoning would have enhanced the principle of legal certainty in the present case.