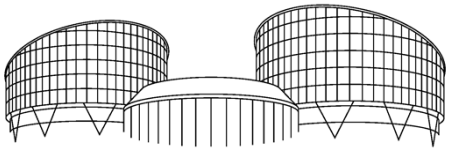

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DAN v. THE REPUBLIC OF MOLDOVA (No. 2)

(Application no. 57575/14)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Re-examination of appeal against applicant's acquittal in reopened proceedings as a result of the Court's judgment • Court of Appeal under duty to take positive measures to rehear absent witnesses, even though the applicant did not ask for a rehearing • Several deficiencies in the overall assessment of the evidence

STRASBOURG

10 November 2020

FINAL

10/02/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dan v. the Republic of Moldova (No. 2),

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli,
Peeter Roosma, *judges,*
Mihai Poalelungi, ad hoc *judge,*
and Stanley Naismith, *Section Registrar,*

Having regard to :

the application (no. 57575/14) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Moldovan national, Mr Mihail Dan ("the applicant"), on 11 August 2014;

the decision to give notice of the complaint under Article 6 § 1 of the Convention to the Moldovan Government ("the Government") and the decision to declare inadmissible the remainder of the application;

the withdrawal of Valeriu Grițco, the judge elected in respect of the Republic of Moldova, from sitting in the case (Rule 28 § 3 of the Rules of Court) and the decision of the President of the Section to appoint Mihai Poalelungi to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 (a));

the parties' observations;

Having deliberated in private on 29 September 2020,

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

INTRODUCTION

1. The case concerns the alleged fresh violation of the applicant's right to fair criminal proceedings after the domestic courts reopened the proceedings against him as a result of the Court's judgment in the case of *Dan v. Moldova* (no. 8999/07, 5 July 2011).

THE FACTS

2. The applicant was born in 1960 and lives in Chişinău. He was represented by Mr M. Lupu, a lawyer practising in Chişinău. The Government were represented by their Agent, Mr. O. Rotari.

A. Background to the case

3. At the time of the events the applicant was the principal of a high school in Chişinău. According to the materials of the domestic case-file, on an unspecified date the applicant was contacted by C., who requested that a pupil be transferred to the applicant's high school. Since the applicant allegedly requested a bribe in exchange for the pupil's transfer, C. contacted the police and, on 14 January 2004, an undercover operation was organised. For that purpose C. was instructed to meet the applicant and give him money marked with a special powder.

4. C. contacted the applicant and they agreed to meet in Chişinău central park. The scene was secretly observed by numerous police officers and filmed. However, later the police submitted that for technical reasons the actual scene of the bribe money being handed over had not been filmed. What had actually happened during the applicant's meeting with C. was a matter of dispute during the criminal proceedings.

5. According to the police, the applicant and C. had not shaken hands upon meeting and had sat on a bench for several minutes. C. had given the applicant the bribe money. When apprehended, the applicant had dropped or thrown away the file, and all of its contents, including the money, had been scattered on the ground. It was later discovered that the applicant had traces of the powder from the money on his fingers.

6. According to the applicant, he had been contacted by C. on his way to the Ministry of Education and had agreed to meet him shortly afterwards in a park in the immediate vicinity of the Ministry. He had shaken hands with C. upon meeting him and, after a brief discussion, had suggested they sit on a bench in order to be able to write. He had placed his file between him and C. and had written on a sheet of paper a list of documents necessary for the pupil's transfer. The applicant, who is missing an eye, had not seen C. put the money into his file. When apprehended, he had dropped the file. The bribe money had been picked up off the ground by a police officer, who had later handed him a pen to sign the arrest report. The traces of powder on his hands must have come either from shaking hands with C. or from the pen with which he had signed the minutes. The applicant alleged that he had been set up by the police.

B. The applicant's acquittal

7. During the course of the proceedings, the Buiucani District Court heard the applicant, the alleged bribe-giver, six prosecution witnesses who were all police officers involved in the applicant's apprehension and one forensic expert. The court also watched the video of the undercover operation and examined other evidence, such as C.'s complaint to the police, the record of the marking of the bribe money with special powder,

an expert report finding that following his apprehension the applicant had had traces of the special powder on his fingers and a report concerning the search of the applicant's office and home.

8. The alleged bribe-giver, C., stated that he had met the applicant in a park. They had sat on a bench and the applicant had signalled to him to put the money in a file which had been placed between them. After placing the money in the file, they had got up and gone their separate ways. He had seen the applicant looking into the file after his departure.

9. Witness M. stated that he had seen C. placing something in the applicant's file after the applicant had nodded to him. After the applicant and C. had parted ways, he and witness C.M. had apprehended the applicant.

10. Witness C.M. had only seen how C. and the applicant had met. He had not seen the moment when the money had been handed over but stated that he had apprehended the applicant together with witness M.

11. Witness B. only stated that he had been present at the marking of the bribe money with a special powder.

12. Witness V. stated that he had seen the applicant throw away the file when apprehended.

13. Witness C.C. stated that he had been in charge of filming the operation. However, he had only filmed the moment of the marking of the money and the moment of the apprehension. The moment when the money had been handed over had not been filmed for technical reasons. He did not state that he had seen the moment when the money was handed over.

14. Witness C.V. stated that he had seen C. putting the bribe money straight into the applicant's hands and then the applicant placing the money in a file. The applicant had thrown away the file when apprehended.

15. The court considered C.'s testimony to the effect that the applicant had requested a bribe from him to be unsubstantiated because there was no other evidence but C.'s statements to that effect. The court also noted that C. and two other prosecution witnesses, who were police officers, had given different accounts of the moment when the applicant and C. had met and, in particular, of the manner in which the bribe money had been passed over. In that respect the court noted that, according to C. and witness M., the money had been inserted by C. into the applicant's file, which had been placed on the bench between the two men, while according to another witness, C.V., the money had been given by C. directly into the applicant's hands. One of the witnesses (C.M.), who had been positioned directly in front of C. and the applicant during the undercover operation, had not seen the money being passed over at all. The court also found contradictions in the accounts concerning the applicant and C. shaking hands and the fact that the applicant had been made to sign a paper with a pen lent by one of the officers who had previously manipulated the marked money. The court also gave weight to the fact that the video of the undercover operation had been

interrupted precisely during the meeting between the applicant and C. and considered that fact to plead in favour of the applicant's version of events.

16. In a judgment of 24 January 2006, relying on the above reasons, the Buiucani District Court acquitted the applicant. It concluded that the prosecution had failed to provide reliable evidence in support of the contention that the applicant had requested money from C. and that the applicant had been aware that C. had placed money in his file. In so far as the presence of traces of special powder on the applicant's fingers was concerned, the court considered that it could not be ruled out that the traces had appeared as a result of his shaking hands with C. or using a pen lent to him by the police to sign the arrest report. In reaching this conclusion, the court relied on an expert report stating that the special powder could have been transmitted in any of the above-mentioned ways.

17. The Prosecutor's Office appealed against this judgment.

C. The applicant's conviction

18. On 23 March 2006 the Chişinău Court of Appeal held a hearing at which the applicant, his representative and the prosecutor were present. The court upheld the appeal lodged by the prosecutor and reversed the judgment of the first-instance court. In so doing the Court of Appeal did not hear the witnesses anew but merely made a different assessment of the testimony given before the first-instance court. The Court of Appeal considered all the witness statements to be reliable and did not find any major contradictions between them.

19. The applicant was found guilty as charged and sentenced to a criminal fine of 60,000 Moldovan lei (the equivalent of approximately EUR 3,350) and to five years' imprisonment, suspended for two years. The applicant was also prohibited from occupying any administrative post for a period of three years.

20. The applicant lodged an appeal on points of law against the judgment and argued that the witnesses on whose testimony his conviction had been based were not credible. In particular, he submitted that C. was being investigated in two separate cases by the police department which had organised the undercover operation. He also submitted that all the prosecution witnesses had been police officers. One of those witnesses could not objectively have seen what had happened from his distant position because he had serious problems with his eyesight. The applicant also argued that the police had deleted part of the video of the undercover operation because it was not favourable to the prosecution and submitted that he had been the victim of entrapment.

21. On 21 June 2006 the Supreme Court of Justice examined the applicant's appeal in the absence of the parties and declared it inadmissible.

D. The Court's judgment of 5 July 2011 in application no. 8999/07

22. On 18 December 2006 the applicant lodged an application with the Court and complained, *inter alia,* that in overturning his acquittal and convicting him, the Court of Appeal had not heard anew the witnesses but had merely read out their statements and given them a different interpretation from that given by the court that had acquitted him.

23. In a judgment of 5 July 2011 the Court held that the criminal proceedings against the applicant had been unfair and found a breach of Article 6 § 1 of the Convention.

24. The Court found that the Court of Appeal, when convicting and sentencing the applicant – and, in doing so, overturning his acquittal by the first-instance court – could not, as a matter of fair trial, properly examine the case without a direct assessment of the evidence given by the prosecution witnesses. The Court stated that those who have the responsibility for deciding the guilt or innocence of an accused ought, in principle, to be able to hear witnesses in person and assess their trustworthiness and that the assessment of the trustworthiness of a witness is a complex task which usually cannot be achieved by a mere reading of his or her recorded words. No reasonable grounds that would dispense the Court of Appeal from that obligation were found.

E. Subsequent proceedings before the Moldovan courts

25. After the Court had delivered the above-mentioned judgment, the applicant applied to the domestic courts to have set aside the domestic judgments finding him guilty. On 22 October 2012 the Supreme Court of Justice quashed the judgments of the Chişinău Court of Appeal and Supreme Court of Justice of 23 March and 21 June 2006 respectively and ordered a fresh examination of the appeal against the judgment of 24 January 2006.

26. On 5 June 2013 the Chişinău Court of Appeal upheld the prosecutor's appeal and reversed the judgment of the Buiucani District Court of 24 January 2006. It found the applicant guilty as charged and sentenced him to a criminal fine of 30,000 Moldovan lei and to five years' imprisonment, suspended for two years. The applicant was also prohibited from occupying any administrative post for a period of two years.

27. In reaching its decision, the Court of Appeal heard the applicant and three witnesses out of the seven heard by the Buiucani District Court in 2006. The court did not hear the alleged bribe-giver, C., because he had died in the meantime, or witnesses M., B., and V. for reasons which were not stated in the decision. The court read out the statements given by the four absent witnesses before the first instance court.

28. Witness C.M. began by stating that he maintained his initial declarations of 2006 (see paragraph 10 above) and submitted that he had seen the moment when C. passed the money to the applicant without, however, saying whether the money had been placed in a file or handed directly to the applicant. He also stated that the moment the money had been handed over had been filmed and that he had seen the film.

29. Witness C.C. began by stating that he maintained his initial declarations of 2006 (see paragraph 13 above) and submitted that during the police operation he had been involved in the apprehension of the applicant and that he did not remember who was in charge of filming. He also stated that he had seen C. give the money to the applicant in a file or envelope and that he did not remember seeing the applicant shake hands with C.

30. Witness C.V. began by stating that he maintained his initial declarations of 2006 (see paragraph 14 above) and submitted that he had seen the moment when the money was passed over but that he could not remember exactly how it had been done. He did remember, however, that the handing over of the money had been filmed and that he had not seen the film afterwards.

31. The Chişinău Court of Appeal read out the rest of the witness statements but did not examine the video of the police operation because the cassette had been lost. Nevertheless, in reaching its decision, the court relied also on the video of the police operation. The court held that the possibility that the special powder had been on the applicant's hand because he had shaken hands with C. or used the pen could not rule out his guilt, because what mattered was the fact that the money had been given to him. The court did not accept the applicant's version according to which C. had acted as an *agent provocateur* and had placed the money in his file without his knowledge.

32. The applicant lodged an appeal on points of law against the above-mentioned judgment and argued, *inter alia,* that the Court of Appeal had failed to hear all the witnesses heard by the first-instance court. The Court of Appeal had only selected three witnesses, who had made statements contradicting their initial statements before the first-instance court. Moreover, the applicant stated that all witnesses in the case were unreliable because they were all police officers, while the alleged bribe-giver, C., had two criminal investigations pending before the unit in which the same officers worked. The applicant also submitted that the whole operation had been nothing but a police incitement, that C. had acted as an *agent provocateur* and that the Court of Appeal had not directly examined the rest of the evidence examined by the first-instance court. In particular, the Court of Appeal had relied, *inter alia,* on the video of the operation without even seeing it and without giving the defence a chance to have the final statement.

33. On 28 January 2014 the Supreme Court of Justice dismissed the applicant's appeal on points of law and upheld the judgment of the Court of Appeal. It noted that the Court of Appeal had not heard four out of the initial seven witness; however, it did not consider that to be a problem since one of the witnesses had died (C.) and another one no longer worked for the police force (M.) and his address was unknown. Moreover, the court found that neither the applicant nor the prosecutor had objected to not hearing the rest of the witnesses anew.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

34. Article 419 of the Code of Criminal Procedure provides that the procedure for rehearing a case on appeal must follow the general rules for the examination of criminal cases at first instance.

35. The explanatory judgment of the Plenary Supreme Court of Justice No. 22 of 12 December 2005, in so far as relevant, reads as follows:

> "Bearing in mind the provisions of Article 6 of the European Convention on Human Rights, after an acquittal judgment pronounced by a first-instance court, the appeal court cannot order the conviction for the first time without hearing the accused and without the direct administration of the evidence."

THE LAW

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

36. The applicant complained that in examining the appeal against the acquittal judgment for the second time, the Court of Appeal had not examined anew all the evidence and had not heard anew all the witnesses. The witnesses who were heard had given statements which contradicted their initial statements and the Court of Appeal had relied on evidence which was no longer available in the case file, namely the video of the police operation. The applicant relied on Article 6 § 1of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

37. The Court notes that the application raises a new grievance distinct from the one related to the proceedings decided in 2006, namely the conduct and fairness of the proceedings which were reopened after the Court's judgment of 5 July 2011 in application no. 8999/07 and which culminated in the judgment of the Supreme Court of Justice of 28 January 2014. Accordingly, the Court is not prevented by Article 46 of the Convention

from examining the applicant's new complaint concerning the unfairness of the reopened proceedings (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, §§ 36-39, ECHR 2015; *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 47-49, 11 July 2017).

38. The Court notes further that the application 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

39. The Government submitted that the applicant's allegations were ill-founded and that the complaint had to be dismissed. The Court of Appeal could not hear C. and M. because the first had died and the second had left his job and moved home and, therefore, could not be located. The Government also referred to a witness V.P. who could not be located either and who had not been among the witnesses heard in the proceedings before the first-instance court. Moreover, the Government submitted that the Court of Appeal was entitled to continue the examination of the case because the applicant and his lawyer had not opposed the continuation of the proceedings without hearing the remaining accusation witnesses in person.

40. The Government agreed that in the present case the witness statements were the most important evidence because the rest of the evidence was indirect evidence and could not warrant the applicant's conviction on its own. Nevertheless, they submitted that the Court of Appeal had not taken its decision solely based on the witness statements, but had corroborated those statements with other evidence in the case file. The Government also submitted that the applicant had not presented a plausible explanation for the presence of the special powder on his fingers. Referring to the applicant's contention that the new statements given by the three witnesses in the reopened proceedings were different from their own statements and even contradicted them, the Government stressed that the three witnesses had also maintained their old statements and left it to the Court to interpret the applicant's allegations. They also submitted that, in their view, there were no tangible differences between the old and the new statements of the three witnesses and expressed the opinion that the applicant's allegations in that respect were somewhat abusive.

41. The applicant submitted that C. had acted as an *agent provocateur* at the request of the police unit which, at the time, had been investigating two criminal cases with his involvement. The operation had been carefully prepared by the police but neither the video recording of the meeting between the applicant and C. nor the intercepted telephone communications between them proved the police version that the applicant had asked for a

bribe. Therefore, the video recording had been manipulated and the part of it showing the alleged handing over of the bribe money had been deleted.

42. After the Court had found a breach of Article 6 on account of the fact that in reversing the applicant's acquittal the Court of Appeal had not heard anew all the witnesses, the Court of Appeal had heard only three out of seven witnesses. Two of those witnesses had had a better recollection of the facts in 2013 than they had had in 2006. The third witness had contradicted his previous statements and the statements of the alleged bribe-giver, C.

43. The Court of Appeal had not attempted to reconcile all the discordant witness statements but had merely reversed the acquittal judgment and convicted the applicant. After in principle accepting the bribe-giver's theory according to which he had placed the money in the applicant's file and the applicant had not touched the money, the courts still held against the applicant the fact that he had had traces of special powder on his hands.

2. The Court's assessment

(a) The scope of the case

44. In the present case, the prosecution's task was to prove the applicant's guilt, which required establishing the reliability of the version of the events submitted by the bribe-giver, C., namely that C. had placed the money in the applicant's file after being instructed to do so by the applicant. The first-instance court did not find the evidence to be sufficiently credible. In particular, the court held against the prosecution the contradiction between the submissions of the bribe-giver, who had stated that he had placed the money in the applicant's file, and witness C.V. according to whom C. had put the money directly into the applicant's hands. That inconsistency, taken together with the fact that all the prosecution witnesses were police officers involved in the police operation against the applicant, and the fact that the part of the video of the operation showing the moment of passing the money had disappeared without any plausible explanation, strengthened the court's reluctance to accept the accusation's version of the events. Therefore, the first-instance court acquitted the applicant.

45. The reason for which the Court found a violation in application no. 8999/07 was that, in re-examining the case and reversing the judgment of the first-instance court, the Court of Appeal did not hear anew the witnesses but merely read out their statements and gave them a different interpretation from that given by the court that had acquitted him.

46. In re-examining the appeal against the acquittal judgment in 2013, the Court of Appeal had the task of ensuring a fair trial within the meaning of Article 6 of the Convention by also taking into account the findings of the Court in its judgment in application no. 8999/07. The Court shall

therefore examine whether the domestic courts succeeded to accomplish those tasks.

(b) General principles

47. The Court notes that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can only be seen to be effective if the observations are actually "heard", that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (see *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004-I).

48. The Court has already stressed on numerous occasions the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified (see *Kraska v. Switzerland*, 19 April 1993, § 32, Series A no. 254-B).

49. The Court furthermore recalls that Article 6 requires the domestic courts to adequately state the reasons on which their decisions are based. Without requiring a detailed answer to every argument put forward by a complainant, this obligation nevertheless presupposes that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see, among many other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A; *Moreira Ferreira v. Portugal (no. 2)*, cited above, § 84).

50. The Court also recalls that in the context of Article 6 § 3 (d) it has established the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (*Lucà v. Italy* no. 33354/96, §§ 39-40, ECHR 2001-II).

51. The Court has held that an important element of fair criminal proceedings is the possibility for the accused to be confronted with a witness in the presence of the judge(s) who will ultimately decide the case. This principle of immediacy is based on the notion that the observations

made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Therefore, a change in the composition of the trial court after the hearing of an important witness should normally lead to the rehearing of that witness (see *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002; *Chernika v. Ukraine*, no. 53791/11, § 47, 12 March 2020).

52. An issue related to the principle of immediacy may also arise when an appeal court overturns the decision of a lower court acquitting an applicant of criminal charges without a fresh examination of the evidence, including the hearing of witnesses and their cross-examination by the defence (*Dan v. Moldova*, cited above, § 33, *Hanu v. Romania*, no. 10890/04, § 40, 4 June 2013, and *Lazu v. the Republic of Moldova*, no. 46182/08, § 43, 5 July 2016).

53. 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 *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 119, 15 December 2011, as refined in *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 107 and 118, 15 December 2015).

54. 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. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (see *Al-Khawaja and Tahery*, cited above, § 147, and as further developed in *Schatschaschwili,* cited above, § 116).

55. The Court notes that in the present case the applicant did have an opportunity to examine the prosecution witnesses during the original trial, which may be of some relevance in reviewing the implications of the absence of the same witnesses on retrial. It considers, however, that the principles set out above should also apply, as a starting point, to a situation such as that in the present case where the right to a fair trial requires an appeal court to rehear the witness testimony on the basis of which a lower court acquitted the accused, bearing in mind that the rehearing in such cases is for the purpose of ensuring a proper examination of the case on the basis of a fresh and direct assessment of the evidence (see *Chernika*, cited above, § 47) (cf. paragraph 24 above).

56. The Court also reiterates that it stems from well-established case law of the Court that even though Article 6 does not prescribe any right of appeal, it requires that if domestic law provides for an appeal, Article 6 comes into play even in these appeal proceedings to the extent that these proceedings can reasonably be said to involve a "determination" of a criminal charge against the applicant or of his civil rights or obligations (see *Delcourt v. Belgium*, no. 2689/65, § 25, 17 January 1970; *Maresti v. Croatia*, no. 55759/07, § 33, 25 June 2009; and *Reichman v. France*, no. 50147/11, § 29, 12 July 2016). Moreover, the Court also emphasises that the manner of application of Article 6 § 1 to proceedings after appeal, including to supreme courts, depends on the special features of the proceedings involved; account must be taken of the entirety of the procedural system in the domestic legal order and of the role of the particular court therein (see *Botten v. Norway*, no. 16206/90, § 39, 19 February 1996; *Sigurþórsson Arnarsson v. Iceland*, no. 44671/98, § 30, 15 July 2003; *Hermi v. Italy* [GC], no. 18114/02, § 60, 18 October 2006; *Lazu v. the Republic of Moldova*, no. 46182/08, § 33, 5 July 2016; *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 32, 16 July 2019 and *Styrmir Þór Bragason v. Iceland*, no. 36292/14, § 63, 16 July 2019).

(c) Application of the above principles

57. The Court notes from the outset the Government's argument that the applicant had agreed to the reading out of the statements of the absent witnesses during the hearing. The Court notes that indeed the applicant, who had been acquitted at first instance, did not object to the reading out of those statements. Nevertheless, it considers that if the Court of Appeal was to ensure a fair trial under these circumstances, it was under a duty to take positive measures in order to rehear the absent witnesses, notwithstanding the fact that the applicant did not ask for a rehearing (see *Júlíus Þór Sigurþórsson v. Iceland*, cited above, § 38).

58. The Court notes further that the three witnesses heard by the Chişinău Court of Appeal in the reopened appeal proceedings made statements which, at a first glance, did not appear to be inconsistent with the version of events as presented by the alleged bribe-giver, C. Nevertheless, upon closer examination, the Court finds these statements to present serious problems.

59. Thus, the three witnesses who, it should be recalled, were all police officers involved in the police operation conducted against the applicant, appeared to have remembered in 2013 new facts which they did not appear to have witnessed back in 2006. For instance, witnesses C.M. and C.C. recollected seeing the moment when the money was passed from C. to the applicant, while in 2006 they had not stated that they had seen the transfer (see paragraphs 10, 13, 28 and 29 above).

60. The three witnesses did not declare that they intended to change their initial statements but stated that they maintained them, the result being that their consolidated statements contradicted each other in parts. For instance, witness C.C. stated both that he had been in charge of filming the operation and that he had not known who had filmed it (see paragraphs 13 and 29).

61. Faced with the above situation, the Chişinău Court of Appeal did not consider it necessary to seek explanations and reconcile the problematic issues and inconsistencies in those statements in its judgment but merely considered the applicant's guilt proven and convicted him on the strength of them, without explaining whether it relied on the statements given back in 2006 or on the new statements and for which reasons it found one set of statements more credible than the other. In such circumstances, the Court cannot but find that the Court of Appeal did not give sufficient reasons in its judgment finding the applicant guilty (compare to *S.C. IMH Suceava SRL v. Romania*, no. 24935/04, § 40, 29 October 2013).

62. The Court further notes that four of the seven witnesses heard at first instance were not heard by the Court of Appeal in the reopened proceedings (see paragraph 27 above). Those witnesses were C., M., B. and V. The Court recalls its finding in the principal judgment according to which in convicting and sentencing the applicant – and, in doing so, overturning his acquittal by the first-instance court – the Court of Appeal could not, as a matter of fair trial, properly examine the case without a direct assessment of the evidence given by the prosecution witnesses. In view of that finding, the Court must examine whether the failure to examine four out of seven witnesses was compatible with the right to a fair hearing.

63. As to C., who was the main accusation witness, it is noted that he had died before the reopening of the proceedings and that, therefore, he could not be heard anew. Nevertheless, the reliance on his statements should have been accompanied by appropriate safeguards.

64. In so far as B. and V. are concerned, it is noted that they had not declared seeing the moment when the money was passed to the applicant in the proceedings before the first instance court. Therefore, the Court is prepared to accept that their testimonies did not amount to "decisive evidence" for the purposes of the Court's case-law (see *Schatschaschwili*, cited above, § 107).

65. However, things are different in respect of witness M., whose statements before the first instance court were the only ones corroborating C.'s version of the events (see paragraphs 8 and 9 above). The Court considers therefore that his statements amounted to "decisive evidence". Having examined the materials of the case file and the Government's submissions, the Court is not persuaded that all reasonable efforts were made to secure his attendance at the applicant's trial before the Court of Appeal.

66. The Court must also consider whether there were sufficient counterbalancing factors, such as corroborating evidence, to compensate for the handicaps caused to the defence as a result of the admission of C.'s and M.'s statements. Given the serious contradictions in the statements of the three witnesses heard by the Court of Appeal on retrial (see paragraphs 57-58 above), this was clearly not the case. The fact that the applicant was able to examine the absent witnesses during the first trial is not sufficient to change this conclusion, given the significant changes in the testimonies of the three witnesses who were reheard.

67. The Court finally notes that in finding the applicant guilty, the Court of Appeal relied on the lost video of the special operation concerning the applicant's apprehension. Since the crucial moment – the passing of the money – had not been filmed anyway, this, in the Court's view, exacerbated the deficiencies in the overall assessment of the evidence.

68. In the light of the above considerations the Court concludes that the proceedings were not fair and that, accordingly, there has been a violation of Article 6 § 1 of the Convention. In the circumstances, it does not consider it necessary to examine, additionally, the compliance of other aspects of the proceedings with that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed EUR 2,000 for non-pecuniary damage.

71. The Government disagreed and asked the Court to reject this claim as unsubstantiated.

72. The Court considers that the applicant must have suffered a certain amount of stress and frustration as a result of the breach of his right to a fair trial. Making its assessment on an equitable basis, it awards the applicant the entire amount claimed.

B. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

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

Done in English, and notified in writing on 10 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Jon Fridrik Kjølbro
Registrar	President

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

(a) Concurring opinion of Judge Bårdsen joined by Judges Kjølbro and Bošnjak;
(b) Concurring opinion of Judge Roosma joined by Judge Jelić.

J.F.K.
S.H.N.

CONCURRING OPINION OF JUDGE BÅRDSEN JOINED BY JUDGES KJØLBRO AND BOŠNJAK

1. I agree that there has been a breach of Article 6 § 1 of the Convention in this case, but on a narrower ground than that of my esteemed colleagues.

2. Before the Court of Appeal, the applicant agreed to the statements of four witnesses – C., M., B., and V. – being read out. In his submissions to the Court he explained that "he had [had] no alternative", as the prosecution had not waived the right to use the testimony of these witnesses, and a refusal on his part to allow their statements to be read out would have resulted in dragging out the examination of the appeal for an indefinite period of time. The fact that neither the applicant nor the prosecutor had objected to the reading-out of the witnesses' statements before the Court of Appeal was emphasised by the Supreme Court of Justice when dismissing the applicant's appeal on points of law. Moreover, it transpires from the applicant's submissions to the Court that at this stage too he accepts the fact that the statements given by C. (who died before the case was reheard by the Court of Appeal) and M. (whose whereabouts were unknown) – the two key witnesses in the case – were read out during the proceedings before the Court of Appeal.

3. Taking into account the applicant's position during the proceedings before the Court of Appeal and the nature and scope of his subsequent arguments in his application, the Court is in my view not called upon to assess whether it was as such compatible with the applicant's right to a "fair hearing" under Article 6 § 1 of the Convention to allow the reading-out, during the proceedings before the Court for Appeal, of the statements that C. and M. had given to the trial court in 2006. Rather, the applicant's main line of argument before the Court is that his conviction was not justified.

4. I would point out that in the determination of whether the proceedings were fair and therefore in compliance with Article 6 § 1 of the Convention, the Court does not act as a court of fourth instance deciding on the guilt of an applicant. That is – in line with the principle of subsidiarity – the province of the domestic courts; it is generally not appropriate for the Court to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. However, the Court is called upon to assess whether the proceedings were conducted fairly and in a given case were compatible with the Convention, including whether the domestic courts provided reasoning that satisfied the requirements of a fair trial under Article 6 § 1 (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 149, 18 December 2018, and, in the context of a first-time conviction on appeal, *Júlíus Þór Sigurþórsson v. Iceland,* no. 38797/17, § 30, 16 July 2019).

5. Turning therefore to the question whether the conviction of the applicant was justified in the sense that the Court of Appeal's judgment was

accompanied by sufficient reasoning, I would reiterate that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A). Thus, it must be clear from the decision that the essential issues of the case have been addressed (see *Boldea v. Romania*, no. 19997/02, § 30, 15 February 2007). The requirement of a reasoned decision obliges the judges to base their assessment on objective arguments and to preserve the rights of the defence. Moreover, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness (see *Taxquet v. Belgium* [GC], no. 926/05, § 91-92, ECHR 2010). The reasoned decision is, moreover, important so as to allow an applicant to usefully exercise any available right of appeal (see *Hadjianastassiou v. Greece*, no. 12945/87, 16 December 1992).

6. To what extent the above implies that the court must explain in detail its assessment of the evidence will depend on the particular circumstances. In the applicant's case there was indeed a need for the Court of Appeal to explain why – in contrast to the trial court – it found it proven beyond reasonable doubt that the applicant had received bribe money from C. on 14 January 2004. At this juncture, I would refer to the following findings made by the Court in *Dan v. Moldova* (no. 8999/07, 5 July 2011) concerning the first set of proceedings before the Court of Appeal in 2006:

> "31. Turning to the facts of the present case, the Court notes that the main evidence against the applicant was the witness statements to the effect that he solicited a bribe and received it in a park. The rest of the evidence was indirect evidence which could not lead on its own to the applicant's conviction (see paragraphs 13 and 15 above). Therefore the witness testimonies and the weight given to them were of great importance for the determination of the case.
>
> 32. The first-instance court acquitted the applicant because it did not trust the witnesses after having heard them in person. In re-examining the case, the Court of Appeal disagreed with the first-instance court as to the trustworthiness of the accusation witnesses' statements and convicted the applicant. In so doing the Court of Appeal did not hear the witnesses anew but merely relied on their statements as recorded in the file.
>
> 33. Having regard to what was at stake for the applicant, the Court is not convinced that the issues to be determined by the Court of Appeal when convicting and sentencing the applicant - and, in doing so, overturning his acquittal by the first-instance court - could, as a matter of fair trial, have been properly examined without a direct assessment of the evidence given by the prosecution witnesses. The Court considers that those who have the responsibility for deciding the guilt or innocence of an accused ought, in principle, to be able to hear witnesses in person and assess their trustworthiness. The assessment of the trustworthiness of a witness is a complex task which usually cannot be achieved by a mere reading of his or her recorded words ..."

7. When the case was heard for the second time by the Court of Appeal in 2013, the assessment of the trustworthiness of the witnesses was likewise front and centre in the case, just as it had been in 2006 when the case was first heard by the Court of Appeal. The Court's judgment from 2011 might also have been expected to inspire some caution when the Court of Appeal once again was about to find the applicant guilty without having heard all the witnesses. Moreover, the assessment of the evidence had become even more complex than it had been in 2006, because of the time factor itself, the disappearance of the video recordings of the applicant's meeting with C. in the park, the death of C. and what appear to be significant developments in the testimonies of the three police witnesses C.C., C.M. and C.V., who were all reheard by the Court of Appeal in 2013 during the second set of proceedings.

8. In my view, it was indeed to be expected under Article 6 § 1 of the Convention that the Court of Appeal, in its judgment finding the applicant guilty, would explicitly refer to the difficulties regarding the evidence in the case. It was also to be expected that that court would explain at least its key assessments regarding these difficulties, thereby enabling the applicant and the outside world to understand the basis for its findings. However, the Court of Appeal confined itself to stating that it considered the applicant's guilt to be proven, which was in this case clearly not sufficient to fulfil the requirements of Article 6 § 1 of the Convention.

CONCURRING OPINION OF JUDGE ROOSMA JOINED BY JUDGE JELIĆ

1. I voted for a finding that there has been a violation of Article 6 § 1 of the Convention in this case. However, I would wish to make the following brief observation as to the reasoning.

2. In my opinion, the main issue in the present case was the failure to provide sufficient reasoning in the Court of Appeal's convicting judgment. As concerns the case-law and arguments related to the absent witnesses, I consider it important that regard be had to the special features of the proceedings involved. The reasons for which a court of appeal may assess evidence differently from a lower court and reach a different conclusion may vary, depending on the specific circumstances. The Court has found that if sufficient reasons are given and adequate safeguards are in place, an appeal court's overturning of the acquittal of an accused at first instance, and his or her conviction without the re-hearing of witnesses, is not necessarily in breach of Article 6 of the Convention (see *Kashlev v. Estonia*, no. 22574/08, 26 April 2016).

3. The present case, of course, has its own specificity, as it is the second time that the Court has been called upon to examine complaints relating to this same set of domestic criminal proceedings, having found on the previous occasion a violation of Article 6 § 1 on account of the lack of direct assessment by the Court of Appeal of the evidence given by the prosecution witnesses (see *Dan v. Moldova*, no. 8999/07, 5 July 2011).