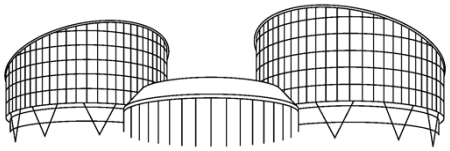

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ELISEI-UZUN AND ANDONIE v. ROMANIA

(Application no. 42447/10)

JUDGMENT

STRASBOURG

23 April 2019

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 Elisei-Uzun and Andonie v. Romania,

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

Ganna Yudkivska, *President,*
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Georges Ravarani,
Péter Paczolay, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 4 September 2018 and 5 March 2019,

Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

1. The case originated in an application (no. 42447/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Romanian nationals, Mr Constantin Elisei-Uzun and Mr Adrian Vlad Andonie ("the applicants"), on 9 April 2010.

2. The applicants were represented by Ms B.L.A. Elisei-Uzun, a lawyer practising in Târgu Mureş. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, a breach of their right to a fair trial and of their right to respect for their possessions, as well as discrimination on the grounds of their profession.

4. On 5 February 2016 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1975 and live in Târgu-Mureş.

6. At the time of the facts of the present case, the applicants were working as judicial officers at the Mureş County Court (hereinafter "the County Court"). They had held those positions since 29 June 2000.

A. Ordinary proceedings

7. On 18 December 2007, relying on the provisions of the Anti-discrimination Ordinance (Government Ordinance no. 137/2000 on preventing and punishing all forms of discrimination) and of Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, the applicants brought an action in the Mureş County Court seeking compensation equivalent to the "loyalty bonus" (*spor de fidelitate*) to which they felt they had been entitled in respect of their salary since December 2004. They complained that, although they had met the same requirements as all the other categories of judicial and non-judicial court staff (including judges and ancillary personnel) who had received the loyalty bonus in accordance with Article 4 of Ordinance no. 27/2006 as in force at that time, they had been excluded by Article 16 of the Ordinance from benefitting from that bonus. The action was brought against the applicants' employer and against the Ministry of Justice and the Ministry of the Economy and Finance.

8. In a judgment of 14 February 2008 the County Court allowed the claim. It found that the relevant law created a difference in treatment between the applicants and the rest of the judicial and non-judicial court staff and that there was no justification for that different treatment. The court concluded that Article 14 of the Convention and Article 1 Protocol No. 12 to the Convention were applicable and declared that the applicants had been discriminated against because they had not been awarded the loyalty bonus. The court ordered that the applicants be paid compensation for the discrimination suffered, representing 5% of their monthly salary for the period running from December 2004 until 31 March 2006 and 15% for the period running from 1 April 2006 until the day the discrimination ended. The judgment was immediately enforceable.

9. On 16 and 25 April 2008 the Ministry of Justice and the Ministry of Finance appealed, arguing in the main that the court had overstepped the limits of its judicial authority and had acted as a "lawmaker" when it had awarded the applicants a right which had not been provided to them by law. On this point, they argued that the Anti-discrimination Ordinance did not apply to the manner in which social relations were regulated by law; it only concerned the applicability in practice of those laws.

10. In a final decision of 30 May 2008 the Târgu Mureş Court of Appeal (hereinafter "the Court of Appeal") dismissed the appeal as unfounded in so far as it concerned the Ministry of Justice and as out of time in so far as it concerned the Ministry of Finance. It considered firstly that the Anti-discrimination Ordinance applied to the applicants' situation and on this point it dismissed the defendant party's allegations of a breach of the principles of the separation of powers by the courts. It further considered that, in the light of Article 2 of the Anti-discrimination Ordinance and of the

Court's case-law on Article 14, the applicants had proved their allegations of discrimination, particularly that they had been treated differently from individuals in similar situations, without justification. In the court's view, the protected right at stake was the principle of equality of treatment in the system of remuneration for work. On the merits of the case, the court relied on the laws regulating "confidentiality bonus[es]" (*spor de confidenţialitate*), noting that the applicants had to respect the confidentiality of the information to which they had access and for this reason concluded that they should be entitled to a "confidentiality bonus", like other members of the judiciary and ancillary staff. It therefore awarded the applicants such a "confidentiality bonus".

11. The use of the term "confidentiality bonus" in the court's decision was brought to the court's attention on 20 November 2008 by the defendants by means of an extraordinary appeal (subsection C below) and on 27 November by the applicants by means of an application for correction of material errors (subsection B below).

12. Meanwhile, on 14 October 2008 the authorities paid each of the applicants 30% of the amount they were entitled to receive as compensation for the period from December 2004 to July 2008.

B. Application for correction of material errors in the decision of 30 May 2008

13. On 27 November 2008 the applicants lodged an application for correction of material errors in the final decision adopted by the Court of Appeal in their case. They asked in particular that the word "confidentiality" be replaced with the word "loyalty" throughout the whole decision.

14. In an interlocutory judgment of 4 December 2008 the same bench – sitting in camera – of the Court of Appeal allowed the application, without notifying the parties. The court considered that the use of the phrase "confidentiality bonus" stemmed from a technical error and did not affect the reasoning of the judgment.

C. Extraordinary appeal against the final decision

15. On 20 November 2008 the Ministry of Justice lodged an extraordinary appeal against the final decision of 30 May 2008, claiming that the Court of Appeal had failed to examine the grounds of appeal as stated by the defendants. It pointed out that the subject matter of the dispute was not a confidentiality bonus, as wrongly established by the court, but rather a loyalty bonus. It relied on the provisions of Article 318 § 1 of the Code of Civil Procedure ("the CCP") (see paragraph 27 below).

16. On 7 January 2009 the applicants, who had received a copy of the defendant party's submissions, added their observations to the file. They

argued that the defendant had failed to observe the time-limits set by law for lodging the appeal. They further argued that all the reasons for appeal had been thoroughly examined by the Court of Appeal, which had resolved the legal matter brought before it, that is to say – the right to compensation for the damage caused by discrimination. They also raised an objection of unconstitutionality of Articles 318 and 319 of the CCP, which in their view, by allowing for an open-ended possibility of lodging the extraordinary appeal, contradicted the right of access to court guaranteed by Article 21 of the Constitution and by Article 6 § 1 of the Convention, the latter having been incorporated into domestic law by Article 20 of the Constitution. Their objection was dismissed by the Constitutional Court on 12 May 2009, on the grounds that the said provisions did set the time-limits for the extraordinary appeal and that in any case, the enforcement proceedings were subject to the general statutes of limitation.

17. The Court of Appeal sitting in a different formation held a hearing on 14 October 2009. The applicants were not present, but requested that the extraordinary appeal be decided in their absence. The Court of Appeal ruled that the subject matter of the dispute had been wrongly determined as being an entitlement to a confidentiality bonus. In its view, the matter could not be considered as a simple material error:

> "It cannot be considered that this is a simple material [or] typographical error, which arose because of the striking similarity between the words 'confidentiality' and 'loyalty', as it had been adjudged in the interlocutory judgment of 4 December 2008 whereby this court ordered the correction of this material error by replacing the word 'confidentiality' with the word 'loyalty'. The court of appeal referred to a completely different legal matter, which had not been brought before it by the parties, and thus dismissed as unfounded the appeal lodged by the Ministry of Justice without examining the arguments put before it by [the Ministry of Justice] by mistakenly copying the reasoning from a different decision, in which it had examined the issue of awarding a confidentiality bonus."

18. Consequently, in the same hearing, the Court of Appeal allowed the extraordinary appeal and quashed the final decision. It observed that on 3 July 2008 the Constitutional Court had declared the relevant provisions of the Anti-discrimination Ordinance to be unconstitutional (decisions nos. 818 and 821 of 2008; see paragraph 24 below). It concluded that there were no longer any legal grounds to support the applicants' action. The Court of Appeal thus allowed the appeal, quashed the judgment rendered by the County Court and rejected the applicants' initial action. It found as follows:

> "In their initial action, the [applicants] argued firstly that they had been discriminated against [*vis-à-vis*] the remaining judicial staff, because they had been excluded from the benefit of the loyalty bonus. They relied on the provisions of Articles 1-6 and 27 § 1 of the [Anti-discrimination Ordinance] and of Articles 5 and 154 § 3 of the Labour Code.
>
> The provisions of Articles 27 § 1 as well as those of Article 1 and 2 of the [Anti-discrimination Ordinance] were declared unconstitutional by Decision no. 821

of 3 July 2008, as well as by Decision no. 818/2008 of the Constitutional Court. According to Article 31 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the decisions rendered in verification of the constitutionality of a law are binding on everyone. This means that the provisions of Article 27 § 1 of the [Anti-discrimination Ordinance] can no longer be applied.

In these conditions, the first-instance [court's] decision to allow the [applicants'] action can no longer be justified on these legal provisions which have been declared unconstitutional. Therefore, ... the decision lacks legal basis.

For this reason the court will not examine the remaining grounds of unlawfulness, will ... allow the appeal, and will ... reject the action lodged by the [applicants]."

19. The applicants unsuccessfully lodged several extraordinary appeals against that decision, all of which were rejected by final decisions of the Court of Appeal (19 January 2010, 20 January 2010, and 4 February 2010). For instance, on 19 January 2010 the Târgu Mureş Court of Appeal rejected the applicants' argument that the Ministry of Justice had lodged its extraordinary appeal outside the time-limit set by law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Employment situation of judicial officers

20. Judicial officers are law graduates with at least five years' work experience, who are appointed by the Ministry of Justice on the basis of a recommendation from the Economic and Social Council for a five-year mandate. The Council is a consultative body of the Government and Parliament whose role is to ensure dialogue between employers, trade unions and civil society. It was regulated at that time by Law no. 109/1997, and later by Law no. 248/2013.

21. Judicial officers' status is regulated by Law no. 304/2004 on the organisation of the judiciary (Articles 55 and 110 to 115). In accordance with that Law, judicial officers, along with judges, form the benches which settle labour-law and social-insurance conflicts as first-instance courts. They give an advisory opinion in the cases they sit in. Judicial officers are subject to the same obligations, restrictions and rules on discipline, conflicts of interest and termination of office as judges and prosecutors. Their work experience counts towards the accumulation of seniority in the court system. In accordance with Government Decision no. 616 of 23 June 2005, judicial officers can be transferred permanently or on a secondment basis to other courts. Nothing prohibits the renewal of their mandate.

22. At the material time, judicial officers did not receive a loyalty bonus with their monthly salary, unlike judges, prosecutors, and specialist and non-specialist ancillary personnel, which included court clerks, probation officers, prison guards, administrative staff, as well as civil servants working in the courts and in the Ministry of Justice.

B. Discrimination under Romanian Law

23. Discrimination is prohibited by Article 16 of the Constitution. Discrimination is defined in Article 2 § 1 of the Anti-discrimination Ordinance (Government Ordinance no. 137/2000 on preventing and punishing all forms of discrimination) and in Article 5 §§ 2 and 3 of the Labour Code. Under Article 27 § 1 of the Anti-discrimination Ordinance, a person who alleges discrimination may bring a court action to seek compensation and to have the discriminatory treatment brought to an end.

24. On 3 July 2008 the Constitutional Court rendered four decisions, – nos. 818, 819, 820, and 821 – declaring Articles 1, 2, and 27 § 1 of the Anti-discrimination Ordinance unconstitutional in so far as they could be read as granting domestic courts the power to repeal laws which they found to be discriminatory. The decisions were adopted following the examination by the Constitutional Court of the constitutional complaints lodged by the Ministry of Justice in four sets of proceedings in which the domestic courts had declared discriminatory various legal provisions concerning salary adjustments. These decisions were published in the Official Gazette on 16 July 2008. In all four decisions, the Constitutional Court held:

> "Reading the provisions of the [Anti-discrimination Ordinance] so as to allow the courts to have the power to repeal legal provisions and to replace them by new provisions or by existing provisions from other laws is evidently unconstitutional as it breaches the principle of the separation of powers enshrined in Article 1 § 4 of the Constitution as well as in Article 61 § 1, which states that Parliament is the only legislative body in the country.
>
> ...
>
> Accordingly, the Constitutional Court ... rules that the provisions of Articles 1, 2 § 3, and 27 § 1 of Government Ordinance no. 137/2000 on preventing and punishing all forms of discrimination are unconstitutional in so far as they can be interpreted as allowing the courts to revoke or refuse to apply [laws] on the grounds that they are discriminatory, and to replace them with provisions created on the basis of case-law or provisions from other laws which were not considered by the legislature when adopting the discriminatory provisions."

C. Binding effect of judicial decisions

25. Article 31 of the Constitutional Court Act provides that any decision by the Constitutional Court which declares a legal provision unconstitutional is binding. From the date of the publication of the decision, the provisions declared unconstitutional are suspended and have no juridical effect. Likewise, the decisions rendered by the High Court of Cassation and Justice when examining an appeal in the interest of the law are binding on all domestic courts.

26. Conversely, decisions adopted by the domestic courts in individual cases are not binding on any other domestic courts and do not constitute as

such a primary source of law. This principle, which existed at the time of the facts of the present case (for instance, Article 261 § 1 of the CCP provided that decisions had to be adopted on the basis of the law), has since been inscribed in Article 1 of the new Civil Code, in force since 1 October 2011, which instituted as sources of law, in order of precedence: civil law, custom, and the general principles of law; there is no mention of court decisions or of judicial precedent as such in this provision of the Civil Code.

D. Relevant provisions of the former Code of Civil Procedure ("the CCP")

27. Under the provisions of Article 281 § 1 of the former Code of Civil Procedure ("the CCP"), in force at the relevant time, domestic courts have the power to correct material errors in their decisions:

Article 281 § 1

> "Errors or omission concerning the name, the quality of the parties, the [parties'] submissions, or those concerning calculations, as well as any other material errors from decision or interlocutory judgments may be corrected on [the court's] own initiative or by request."

28. At the relevant time, Article 304 of the CCP enumerated nine reasons for which an appeal could be lodged. They all pertained to the legal basis of the decision appealed against. Article 304[1] of the CCP extended as follows the scope of the appeal proceedings in cases where the appeal was lodged directly against a decision rendered by a first-instance court, as was the situation in the present case:

Article 304[1]

> "The appeal lodged against a decision [rendered by the first-instance court] is not limited to the reasons provided in Article 304, the court having the power to examine the case under all its aspects."

29. The relevant provisions concerning the examination of an ordinary appeal read as follows:

Article 312

> "(4) If the decision is quashed, the courts will re-examine the merits of the action either in the same hearing in which they declared the appeal admissible, and in this case only one decision will be rendered, or at a different hearing which will be set for that purpose.
>
> (5) If the decision is appealed against on the grounds that the [lower] court did not examine the merits ... the court, after quashing that decision, will remit the case to the lower court."

30. The relevant provisions of the CCP concerning the quashing of a final decision by means of an extraordinary appeal read as follows:

Article 318 § 1

"Decisions rendered by a court of final instance may also be contested when the decision was based on a material error or when the court, when it dismissed or partially admitted the appeal, omitted by mistake to examine one of the reasons for ... appeal."

Article 319

"(1) An [extraordinary appeal] is lodged with the court which rendered the decision under review.

(2) A final decision may be contested at any point before the start of the enforcement proceedings, and during the enforcement proceedings until the deadline set by Article 401 § 1 (b) or (c)."

Article 320

"(1) The appeal shall be examined expeditiously and shall have priority.

...

(3) The decision rendered in the extraordinary appeal may be challenged through the same means of appeal as the decision under review."

31. In addition, the following provisions of the CCP are also applicable:

Article 401 § 1

"The enforcement proceedings may be contested within fifteen days of the date when: ...

(b) the interested party received notice of the attachment of the financial assets [*poprire*]. ...

(c) the debtor who contests the enforcement received notice [of the enforcement proceedings] or from the date when he or she became aware of the first act of enforcement, in those cases in which he or she did not receive notice of enforcement or when the enforcement was done without notice."

Article 405

"(1) The enforcement proceedings must be started within three years, unless the law provides otherwise. ...

(2) The time-limit starts running from the date when the right to seek enforcement begins."

E. Relevant provisions of the new Code of Civil Procedure

32. The new Code of Civil Procedure, applicable since 2012, provides, in its Article 508, the procedure for examination of extraordinary appeals. The relevant parts of this provision read as follows:

Article 508

"(1) The appeal shall be examined expeditiously and as a priority, and will follow the procedure applicable to the to the appeal proceedings which were finalised with the decision under review.

...

(3) If the reason for the [extraordinary appeal] is grounded, the court adopts a single decision whereby it quashes the decision under review and decides on the initial action. If is it not possible to re-examine the initial action on the same day, the court renders a decision quashing the decision under review and sets a new date when the initial action will be examined and a separate decision will be rendered. In this latter case, the decision ordering the quashing [of the decision under review] may not be appealed against separately.

(4) The decision rendered in an extraordinary appeal may be challenged through the same means of appeal as the decision under review."

33. In accordance with Article 509 § 10 of the new Code of Civil Procedure, the applicants can seek the reopening of the proceedings if the Court adopts a judgment in their favour.

Article 509 Object and reasons for revision

"(1) Revision of a decision which examines or reiterates the merits may be sought if: ...

10. The European Court of Human Rights found a violation of the fundamental rights and freedoms because of a court decision, and the severe consequences of this violation are still ongoing."

F. Domestic practice on judicial officers' right to receive bonuses with their monthly salary

34. The Government directed the Court's attention to several domestic decisions whereby the courts had ruled against judicial officers in claims of discrimination in relation to the attribution of the loyalty bonus. For instance, in a final decision of 14 March 2008 the High Court of Cassation and Justice had considered that the fact that the plaintiffs had not been entitled by law to a loyalty bonus had not constituted discrimination in so far as they had been appointed only for a fixed five-year mandate, which had been by its nature incompatible with the notion of stability. The High Court had also considered that it had not been possible to use the Anti-discrimination Ordinance to grant rights which had not been recognised by law.

In a final decision of 22 August 2007 the Suceava County Court had ruled that judicial officers and magistrates had not been in a similar situation for the purpose of the loyalty bonus in so far as the former had been appointed for a five-year mandate whereas the latter had been permanent in their posts. The same conclusion had been reached in similar cases by the

Bacău County Court (final decision of 5 June 2008), the Suceava Court of Appeal (final decision of 4 June 2009), the Bacău Court of Appeal (final decision of 19 March 2008), the Ploieşti Court of Appeal (final decision of 20 May 2009), the Piteşti Court of Appeal (final decision of 18 March 2009), and the Alba Iulia Court of Appeal (final decision of 9 April 2009).

35. The applicants also submitted two final decisions in which the Cluj Napoca Court of Appeal found in favour of the judicial officers in cases similar to the one at hand (final decisions of 16 April 2009 and 21 May 2009).

36. In a final decision of 21 February 2008 the Tulcea County Court found that magistrates (save for military magistrates) were not entitled to a confidentiality bonus, which was only granted to military personnel and to the civil servants with special status.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 § 1 OF THE CONVENTION AND 1 OF PROTOCOL NO. 1 TO THE CONVENTION ON ACCOUNT OF THE QUASHING OF THE DECISION OF 30 MAY 2008

37. The applicants complained that the decision of 14 October 2009 of the Court of Appeal had breached the principle of legal certainty since it had set aside a final and binding judgment which, in addition, had been partially enforced.

They relied on Article 6 § 1 of the Convention and on Article 1 of Protocol No. 1 to the Convention, which read as follows, in so far as relevant:

Article 6 (right to a fair hearing)

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

Article 1 of Protocol No. 1 (protection of property)

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

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

B. Merits

1. The parties' submissions

39. The applicants submitted that the Ministry of Justice had lodged its extraordinary appeal out of time. As for the legitimacy of the extraordinary appeal, the applicants argued that the Ministry should rather have sought correction of the material errors by means of an application for correction. In their view, the Ministry's sole aim in lodging its appeal had been to re-argue the case. They reiterated that the mere fact of there having been different views on the subject had not been valid grounds for reopening the proceedings. They relied in their argument on *Ryabykh v. Russia* (no. 52854/99, ECHR 2003-IX). Lastly, they pointed out that the domestic practice on the issue of loyalty bonuses for judicial officers had not been consistent at that time.

40. Relying on *Mitrea v. Romania* (no. 26105/03, § 25, 29 July 2008), the Government reiterated that the requirements of legal certainty were not absolute and that the Court itself sometimes recommended the reopening of proceedings as the most appropriate reparatory measure when the domestic proceedings had not satisfied the Article 6 requirements.

41. The Government argued that the extraordinary appeal had been lodged by the Ministry of Justice in its capacity as party to the proceedings. Its right to appeal had been regulated by the second basis provided in Article 318 § 1 of the CCP (see paragraph 30 above). The appeal had been meant to correct the essential error made by the Court of Appeal in its decision of 30 May 2008, in which it had omitted to examine the reasons for appeal raised by the Ministry, and had instead examined issues which had not been brought before it by the parties (see paragraph 10 above). In their view, the Court of Appeal had committed an error of judgment which should not have been corrected through the procedure set forth in Article 281 § 1 of the CCP, which had been meant solely for simple material or typographical errors. Moreover, the appeal had been examined in a relatively short period of time.

2. The Court's assessment

(a) General principles

42. The Court reiterates that the right to a fair hearing before a tribunal, as guaranteed by Article 6 § 1 of the Convention, must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, that the rule of law is part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII).

43. Legal certainty presupposes respect for the principle of *res judicata* (ibid., § 62), that is to say the principle of the finality of judgments. This principle emphasises the fact that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. A review should not be treated as an appeal in disguise and the mere possibility of two views on the subject is not grounds for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see, for instance, *Ryabykh*, cited above, § 52). Higher courts' powers to quash or alter binding and enforceable judicial decisions should be exercised for the purpose of correcting fundamental defects. That power must be exercised so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of justice (see *Giuran v. Romania*, no. 24360/04, § 30, ECHR 2011 (extracts)).

(b) Application of those principles to the facts of the case

44. Turning to the facts of the case under examination, the Court notes that the applicants' action concerned loyalty bonuses and while the County Court judgment of 14 February 2008 decided on that claim (see paragraph 8 above), the court of appeal, in its final decision, referred to "confidentiality bonus[es]" instead (see paragraph 10 above). In this context, the Court considers valid the reasoning put forward by the domestic authorities, that the final decision had been quashed because the Court of Appeal had failed to examine the arguments put before it by the parties (see paragraphs 17 and 41 above).

45. Moreover, the extraordinary appeal was lodged by a party to the proceedings, and not by a third-party State official with no connection to the case proceedings, as was the case, for instance, in *Androne v. Romania* (no. 54062/00, § 47, 22 December 2004), where the extraordinary appeal had been lodged by the Procurator General. It was lodged within a relatively

short period of time, that is to say less than six months after the date of the contested decision (see paragraph 15 above and, *mutatis mutandis*, *Trapeznikov and Others v. Russia*, nos. 5623/09 and 3 others, § 36, 5 April 2016, with further references). The Court further notes that the extraordinary appeal proceedings did not last unreasonably long: the application was lodged on 20 November 2008 (see paragraph 15 above) and the decision was rendered on 14 October 2009 (see paragraph 17 above). As a result, the extraordinary appeal, as applied in the particular circumstances of this case, constituted the next logical element in the chain of domestic remedies at the disposal of the parties in the case, rather than an extraordinary means of reopening proceedings (see, *mutatis mutandis*, *Trapeznikov and Others*, cited above, § 37, with further references) and was therefore not incompatible with the principle of legal certainty enshrined in the Convention.

46. There has, accordingly, been no violation of Article 6 § 1 of the Convention on this point.

47. Having regard to the above conclusion, the Court further considers that the special circumstances of the present case can be regarded as exceptional grounds justifying the quashing of the final decision of 30 May 2008, and the dismissal of the applicants' claim for compensation. The Court finds that the domestic courts struck a fair balance between the applicant's rights to protection of property and the general interest in correcting miscarriages of criminal justice (see, *mutatis mutandis*, *Giuran*, cited above, § 48).

48. There has, accordingly, been no violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE OVERALL FAIRNESS OF THE PROCEEDINGS

49. The applicants complained that their rights under Article 6 § 1 of the Convention had been breached for the following reasons:

(i) in the proceedings following the quashing of the final decision of 30 May 2008, the Court of Appeal had failed to examine the merits of their action, in particular their allegations of discrimination;

(ii) the Court of Appeal had breached the principle of non-retroactivity of the law by applying the Constitutional Court's decisions of 3 July 2008, although those decisions had not been in effect when they had brought their initial action;

(iii) when deciding on the extraordinary appeal, the Court of Appeal had failed to examine their action from the point of view of the Convention Articles applicable to their case (Article 14 and Article 1 of Protocol No. 12), although they had expressly relied on those Articles in

their submissions and although in the ordinary proceedings the courts had directly applied the Convention in their favour;

(iv) the Court of Appeal had examined the extraordinary appeal by means of a closed hearing, to which they had not been invited;

(v) the Court of Appeal had not been impartial as the defendant in the case, the Ministry of Justice, had had the power to bring disciplinary proceedings against judges. Moreover, the Minister of Justice had been a member of the High Council of the Judiciary, the disciplinary authority for judges.

A. Admissibility

50. The Court reiterates that, while that Article 6 of the Convention is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 50, ECHR 2015).

51. Turning therefore to the specific circumstances of the present case, the Court notes that at the relevant time the CCP allowed the parties to the proceedings to seek the quashing of a final decision for exceptional circumstances (see paragraph 30 above, and ibid., § 51). Moreover, the procedure followed by the Court of Appeal is akin to that of a court examining an ordinary appeal. In particular, after examining the extraordinary appeal, the Court of Appeal quashed the impugned decision and then looked at the case anew (see paragraph 18 above, and ibid., § 51). By virtue of the kind of judicial review that it provided for, the extraordinary appeal brought by the applicants can be viewed as a prolongation of the original civil proceedings. Thus, what occurred in the proceedings after the quashing on 14 October 2009 (see paragraph 17 above), can well be compared to the proceedings leading to the adoption of the final decision of 30 May 2008 (see paragraph 10 above and ibid., § 54).

52. In conclusion, in the light of both of the relevant provisions of Romanian legislation and of the nature and scope of the proceedings culminating in the Court of Appeal's decision of 14 October 2009 in relation to the applicants' extraordinary appeal, the Court considers that those proceedings were decisive for the determination of the applicants' civil rights and obligations. Consequently, the relevant guarantees of Article 6 § 1 applied to those proceedings (ibid., § 56).

53. The Court also notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

54. The applicants argued that their right to a fair trial had been breached. In particular, they contended that in its decision of 14 October 2009, the Court of Appeal had rejected their claim without examining the facts or the relevant laws, notably the Labour Code and the Convention. They argued that these laws constituted the legal basis for their action and had been examined as such by the lower court. The applicants also averred that they had not had the opportunity to present their arguments in the case after the quashing of the final decision of 30 May 2008, as the Court of Appeal had decided in the same hearing both on the extraordinary appeal and on their initial action. On this point they argued that the Court of Appeal should have rendered two separate decisions, one for each of the subsequent appeals examined: firstly the extraordinary appeal and then the ordinary appeal against the initial action. They relied on the provisions of Article 320 read together with Articles 309-12 of the former CCP (see paragraphs 29 and 30 above).

55. The Government pointed out that, in finding that the law relied upon by the applicants had been incompatible with the Constitution, the Court of Appeal had provided an answer to their allegations of discrimination. The Government further reiterated that, at the relevant time, the CCP had not made it an obligation for the courts to hold a separate hearing on the merits when allowing an extraordinary appeal. Consequently, it was open to the Court of Appeal to decide at the same time on both the extraordinary appeal and the ordinary appeal against the initial action. In any case, the parties had the possibility to get acquainted with the submissions in the file (see paragraph 16 above) and chose not to participate in the oral hearing (see paragraph 17 above).

56. The Government further argued that the Constitutional Court decisions did not represent new law which would become applicable during the proceedings, but rather an interpretation of existing law. Therefore the Court of Appeal could have reached the same conclusion even in the absence of the said decisions.

2. The Court's assessment

57. Having decided that in the present case the quashing of the decision of 30 May 2008 did not breach the requirements of Article 6 § 1 of the Convention on account of legal certainty (see paragraph 46 above), the Court will further look at the manner in which the applicants' rights

protected by that Article were respected in the proceedings as a whole (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 197, ECHR 2012).

(a) General principles

58. The Court makes reference to its case-law concerning the adversarial principle, the principle of equality of arms and the circumstances under which the domestic court's appreciation of the facts of a particular case may be considered to be "arbitrary" (see, among many other authorities, *Regner v. the Czech Republic* [GC], no. 35289/11, § 146, 19 September 2017, and *D.M.D. v. Romania*, no. 23022/13, § 61, 3 October 2017).

59. The Court has previously held that judges themselves must respect the principle of adversarial proceedings, in particular when they reject an appeal or decide on a claim on the basis of a matter raised by the court of its own motion. In this connection, it is important for those who bring their claims to court to rely on the proper functioning of the justice system: that reliance is based, among other things, on the certainty that a party to a dispute will be heard in respect of all items in the case. In other words, it is legitimate for the parties to a dispute to expect to be consulted as to whether a specific document, or argument as may be the case, calls for their comments (see *Duraliyski v. Bulgaria*, no. 45519/06, §§ 31-32, 4 March 2014, with further references).

60. Lastly, the Court reiterates that Article 6 § 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question of whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303-A).

(b) Application of those principles to the facts of the case

61. Turning to the facts of the case under examination, the Court notes at the outset that the two courts which had found in the applicants' favour had examined the merits of their claim for compensation and had relied, in addition to the domestic law, directly on the Convention (see paragraphs 8 and 10 above). However, the Court of Appeal in its impugned decision of 14 October 2009 considered that the applicants' initial action had been about a legislative change and relied exclusively on the decisions rendered by the Constitutional Court. In doing so the Court of Appeal failed to

explain on what grounds it considered that those decisions were relevant to the applicants' action. In addition, it made no reference to the relevant Convention provisions (which moreover had not been the object of the Constitutional Court's examination).

62. More importantly, the applicants were not given the opportunity to discuss the applicability of the Constitutional Court decisions, as in the same hearing the court examined the extraordinary appeal and re-tried the applicants' initial action (see paragraphs 18 and 28 above and, in contrast, *Zelca v. Romania* (dec.), no. 65161/10, §§ 5, 14 and 15, 6 September 2011, where the Court accepted as valid under Article 6 of the Convention the fact that the domestic courts had applied during the appeal proceedings a new interpretation made by the High Court of Cassation and Justice by means of an appeal in the interest of the law which had been binding on all the domestic courts). Admittedly, the applicants asked the court to examine the case in their absence. However, it appears from the material presented before the Court that the Ministry of Justice did not rely on the Constitutional Court decisions in their submissions. In addition, the observations filed by the parties with the Court of Appeal referred only to the admissibility of the extraordinary appeal, and not to the merits of the initial action (see paragraphs 15 and 16 above). Therefore, that court should have sought the parties' opinion on the merits of the original action in the light of the recent developments brought by the Constitutional Court decision, in particular since the interpretation of the legal provisions at stake was a contentious point during the first set of proceedings which took place before the adoption of the said decisions (see paragraphs 9 and 10 above).

63. However, in fact the Court of Appeal examined in the same hearing both the extraordinary appeal and the initial action lodged by the applicants (see paragraphs 17 and 18 above). The applicants had no possibility to argue their case on the merits and in particular to comment on the possible consequences of the Constitutional Court's decisions of 3 July 2008.

64. Admittedly, the CCP at that time did not explicitly regulate the procedure to be followed in extraordinary appeals (see paragraph 30 above). The applicants argued that the Court of Appeal should have held a separate hearing after the quashing of the decision of 30 May 2008 (see paragraph 54 above). The Government refuted that argument, alleging that the Court of Appeal was free to decide on the number of hearings to be held (see paragraph 55 above). While noting that Article 508 of the new Code of Civil Procedure explicitly provides that in special circumstances separate hearings can be held (see paragraph 32 above), the Court reiterates that it is not its task to solve, as such, problems of interpretation of domestic procedural law (see, *mutatis mutandis*, *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013).

65. In any event, even assuming that, after quashing the decision of 30 May 2008, the Court of Appeal was not obliged to hold a separate

hearing on the initial action, the Court cannot but emphasise that the parties to the proceedings have the right to present the observations which they regard as relevant to their case. In other words, the domestic courts have a duty to allow the parties to present their arguments and to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (see the case-law quoted in paragraph 59 above). In the particular circumstances of the present case, the Court considers that the introduction, in the Court of Appeal's reasoning, of the argument based on the unconstitutionality of the provisions of the Anti-discrimination Ordinance took the applicants by surprise and breached the principle of adversarial proceedings.

66. In addition, the Court cannot find any argument in the Court of Appeal's decision of 14 October 2009 which would explain why that court considered that it could not rely directly on the provisions of the Constitution, which enshrines the principle of equality and non-discrimination (see paragraph 23 above), and of the Convention, as the County Court had done (see paragraph 8 above), in order to decide the merits of the applicants' complaint. It is not clear from the reasoning of the Court of Appeal whether that question was considered not to be relevant to the case, to have been already absorbed by the assessment of the domestic legislation, or whether it was simply ignored (see, *mutatis mutandis*, *Dhahbi v. Italy*, no. 17120/09, § 33, 8 April 2014). The Court observes in this connection that the reasoning of the Court of Appeal also contains no reference to the Court's case-law on Article 14 of the Convention or Article 1 of Protocol No. 12.

67. In the light of the above, the Court considers that the Court of Appeal in its final decision of 14 October 2009 has dismissed the applicants' action without allowing them the opportunity to present their case and without giving sufficient reasons for dismissing their claim. It has thereby violated the applicant's right to a fair trial.

68. There has accordingly been a violation of Article 6 § 1 of the Convention.

69. The Court also considers that there is no need to give a separate ruling on the remaining aspects of the complaints raised under Article 6 of the Convention (see paragraph 49 above).

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

70. Lastly, the applicants complained that the denial of a loyalty bonus had constituted discrimination on the grounds of their profession, in violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention, as well as of Article 1 of Protocol No. 12 to the Convention.

71. The applicants argued that they had been victims of discrimination based on their profession, as they had been the only category of judicial staff excluded from receiving the loyalty bonus. In their view, the distinction between the categories of staff had not been based on objective and reasonable justification.

72. The Government argued that the salary regime of different categories of employees had come within the exclusive scope of the national legislature and its choice for a difference in treatment between categories of judicial staff should be respected. Furthermore, the Government noted that the domestic courts had considered that because of the significant difference in status between the categories, judicial officers had not been in the same situation for the assessment of alleged discrimination. The Government reiterated that the domestic courts were better placed to asses and interpret domestic law.

73. The Court notes that the complaint raised under Article 14 of the Convention was based on the consideration that the applicants had been discriminated against in the attribution of bonuses (see paragraph 71 above). Therefore this complaint is related to the one already examined under Article 1 of Protocol No. 1 to the Convention. Having found no violation of Article 1 of Protocol No. 1 (see paragraph 47 above), the Court considers that no separate issue arises under Article 14 of the Convention (see, *mutatis mutandis, Hirst v. the United Kingdom (no. 2)*, no. 74025/01, § 87, 6 October 2005). The same applies for the complaint raised under Article 1 of Protocol No. 12 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicants claimed the following amounts in respect of pecuniary damage, representing compensation for damages awarded in the decision of 14 February 2008 (see paragraph 8 above) for the period from December 2004 to August 2016 (the date on which the claims were submitted to the file):

(a) 21,680 euros (EUR) for Mr Elisei-Uzun; and

(b) EUR 21,537 for Mr Andonie.

They requested that these amounts be adjusted to take account of inflation and the interest rate.

76. The applicants further asked to be granted EUR 50,000 each in respect of non-pecuniary damage.

77. The Government argued that no award should be made in respect of pecuniary damage, as the applicants can seek the reopening of the proceedings under Article 509 § 10 of the new Code of Civil Procedure. They relied on *S.C. Uzinexport S.A. v. Romania* (no. 43807/06, § 41, 31 March 2015).

78. The Court notes that Article 509 § 10 of the new Code of Civil Procedure allows for the reopening of the domestic proceedings in order to remedy the breaches found by it. Given the nature of the applicants' complaint under Article 6 of the Convention, the Court considers that in the present case the most appropriate form of redress for the pecuniary damage would be, at the request of the applicants, to reopen the proceedings complained of in due course (ibid., § 41). On the other hand, the Court considers that the applicants 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 (see, *mutatis mutandis*, *Siegle v. Romania*, no. 23456/04, §§ 47-48, 16 April 2013). Having regard to the nature of the violation found, and making its assessment on an equitable basis, the Court awards EUR 4,000 to each applicant in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

79. The applicants also claimed EUR 1,350 each, for the costs and expenses incurred before the Court. They sent invoices issued by their lawyer in respect of these costs.

80. The Government argued that the claim was excessive and unsubstantiated.

81. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,350 to each applicant covering costs for the proceedings before the Court.

C. Default interest

82. 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 complaints concerning Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention in respect of the quashing of the final decision of 30 May 2008;

3. *Holds*, by six votes to one, that there has been no violation of Article 1 of Protocol No. 1 to the Convention in respect of the quashing of the final decision of 30 May 2008;

4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention in respect of the overall fairness of the proceedings;

5. *Holds*, by six votes to one, that there is no need to examine the remainder of the complaints under Article 6 § 1 of the Convention;

6. *Holds*, by six votes to one, that no separate issue arises concerning Article 1 of Protocol No. 1 to the Convention taken together with Article 14;

7. *Holds*, unanimously, that no separate issue arises concerning Article 1 of Protocol No. 12 to the Convention;

8. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 4,000 (four thousand euros) for each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,350 (one thousand three hundred and fifty euros) for each applicant, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, by six votes to one, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President

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

GY
ANT

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

1. Unlike the majority, I do not find that there has been no violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention in respect of the quashing of the final decision of the Târgu Mureş Court of Appeal of 30 May 2008. I also disagree with the conclusions that there is no need to examine the "remainder" of the complaints under Article 6 § 1 and that no separate issue arises under Article 1 of Protocol No. 1 in conjunction with Article 14.

2. Below, I deal with the two points of my disagreement with the majority: (i) the quashing of the above-mentioned decision from the perspective of Article 6 § 1 and Article 1 of Protocol No. 1; and (ii) the alleged discrimination against the applicants from the perspective of Article 1 of Protocol No. 1 in conjunction with Article 14. I propose my alternative (albeit very condensed) assessment of the respective complaints.

3. But before addressing these issues let us have a look at something which is at the very heart of the dispute examined in the present case: a factual circumstance, the assessment of which in the majority's reasoning has gone astray.

I

4. The applicants, judicial officers, sought compensation for the loyalty bonuses which were not paid to them, but to which they felt they were entitled, as they met the same requirements as those belonging to other categories of judicial and non-judicial court staff. The court found for the applicants. It held that the difference in treatment between the applicants and the rest of the court staff was unjustified. On 30 May 2008 the appellate court ("first appellate formation") dismissed the appeals lodged by the other parties, one of which was the Ministry of Justice. Its decision was final and immediately enforceable.

In fact, it was *already* partly executed, as 30% of the adjudged amount was paid to the aggrieved party – the applicants.

5. Then something happened. What had promised to be a happy ending – for the applicants, but admittedly also for a wider group of court employees – came to an abrupt end.

6. As it soon turned out, the appellate court had made a mistake. A fatal one. Instead of using the term "*spor de fidelitate*", or "loyalty bonus", it used the term "*spor de confidenţialitate*", which meant "confidentiality bonus" and related to another type of payment.

This was so notwithstanding the fact that the applicants had not sought compensation for any confidentiality bonuses. And they could not, because they were not entitled to it under domestic law. Confidentiality bonuses were only granted to military personnel and civil servants with special status

(paragraph 36 of the judgment). The applicants were in neither of those categories.

7. Who does not err? "*Spor de confidenţialitate*" sounds very similar to "*spor de fidelitate*", at least to a foreigner like me. But no, not only to a foreigner.

When seized with this issue by the applicants, who requested the correction of the "material" error, the *Romanian* appellate court admitted that it indeed had made a clerical ("technical") error in using the term "*confidenţialitate*" instead of "*fidelitate*". It stated explicitly that the use of the wrong term had not affected its reasoning. And it corrected the error by replacing, throughout the text of the decision of 30 May 2008, "*spor de confidenţialitate*" with "*spor de fidelitate*". That was done in an interlocutory judgment, which was adopted on 4 December 2008 by the first appellate formation – the *same* composition of judges of the *same* court.

Errare humanum est, diabolicum est in errore perseverare. The payment of the adjudged compensation could continue. *Had* to continue.

8. No such luck.

The clerical error was corrected upon the request of the applicants. It is, however, not unlikely that the first to spot the error had been someone related to the parties which lost the case. Hardly the representatives of the parties themselves. Rather someone who was charged with the task of processing the second payment to the applicants. Which never happened.

9. The Ministry of Justice, a week earlier than the applicants, lodged an extraordinary appeal against the final decision of 30 May 2008, which – let it be remembered – had already been partly executed. Although the issue of the "material error" was already closed, in the formal sense, by the interlocutory judgment of 4 December 2008, the broader (and more substantial) issue of the applicant's (non-)entitlement to loyalty bonuses was re-examined in *different* proceedings: not those pertaining to the correction of "material" errors, but those triggered by extraordinary appeals. In the course of those other proceedings, the issue of the "material error" was examined anew by the *same* appellate court. That court, however, sat in a *different* formation ("second appellate formation"). On 14 October 2009 that new formation quashed the final decision of 30 May 2008 and found for the Ministry.

10. In principle, the examination of the Ministry's extraordinary appeal *could* bring about the quashing of the final decision of 30 May 2008 on the grounds provided for in domestic law, whatever they might be. There would have been nothing illegitimate about the very fact of quashing. I therefore do not object to the extraordinary appeals or quashing of final judgments as such.

What merits a critical looking into is the reasoning of the second appellate formation, or, more precisely, *what* was, so to say, established by it in the course of the examination of the extraordinary appeal. What was

established was, first and foremost, *not about law*, which was applicable or not applicable to the applicants' situation: it was about the *mind* and *conduct* of the first appellate formation, both during the examination of the applicants' case on the merits and during the correction of the "material" error, related to the reinstatement of the word "*fidelitate*" instead of the word "*confidenţialitate*".

II

11. The reasons for quashing the decision of 30 May 2008 were threefold.

The first two reasons were the following: the first appellate formation had allegedly dismissed as unfounded the appeal of the Ministry of Justice "without examining the arguments put before it by [that ministry]" and had allegedly "mistakenly cop[ied] the reasoning from a different decision, in which it had examined the issue of awarding a confidentiality bonus". Although squeezed into one sentence, these two reproaches were autonomous: the non-examination of the *party's* arguments was one thing, the mechanical copy-pasting of the *court's* own arguments another. Put together, they create an optical illusion, where they seem to strengthen each other. But they do not, because both of them hardly hold water.

Two minuses make a plus in arithmetic. Not in legal reasoning.

As to the third reason, the error in question allegedly was not clerical in nature. The second appellate formation concluded that it was not a "simple material [or] typographical error, which arose because of the striking similarity between the words '*confidenţialitate*' and '*fidelitate*'", but stemmed from the fact that the first appellate formation had wrongly determined the subject matter of the dispute under its examination: instead of deciding on the applicants' entitlement to loyalty bonuses, it decided on a very different matter – their entitlement to confidentiality bonuses.

Let us address the three reasons – or reproaches – one by one.

12. The reproach that the first appellate formation had not examined the arguments of the Ministry of Justice is a label without a basis on to which it could be affixed. This finding was reached in defiance of the fact that the dismissal of the Ministry's case as unfounded had not come out of the blue. It was preceded by a dispute on the (in)applicability of the law invoked by the applicants, which was the Anti-Discrimination Ordinance, and resulted from the first appellate formation's assessment of the parties' arguments on this matter. The Ministry argued that that ordinance was *not applicable* to the applicants' situation (paragraph 9); the applicants argued *to the contrary*; and the first appellate formation *explicitly held* that the applicants were *capable of proving* the ordinance's applicability.

Is this what leaving "without examination" looks like?!

13. If parties present their case as regards the applicability of certain legislation to a situation under examination, and the court *explicitly* sides with the party which, in its opinion, has proved its case, how can one reasonably conclude that the other party's arguments (as to the applicability of that legislation) were left unexamined?

On top of that, the first appellate formation had provided some arguments of its own, by which it had substantiated its finding (including references to the Court's case-law on Article 14) – not only as to the applicability of the ordinance, but also to the effect that the applicants had been entitled to loyalty bonuses.

These arguments might have been tenuous or even amiss, but they were *not non-existent*. The first appellate formation indeed might have supported the wrong party and thus might have erred in its assessment, but this would be not the same as leaving "without examination", that is to say, the non-addressing of the arguments of the disadvantaged party, with which it was reproached by the second appellate formation.

The latter provided no arguments to substantiate their reproach: they merely *pronounced* it. But they had the final say.

14. I now turn to the second reason for quashing the decision of 30 May 2008: that its reasoning was mistakenly copied from some other (most likely earlier) decision, which had dealt with the confidentiality bonus.

Copy-pasting, alas, is not an unknown but a routine practice in all courts, not excluding the Strasbourg Court. Even assuming that mechanical copy-pasting indeed took place in the course of the drafting of the decision of 30 May 2008, the reference to "respecting the confidentiality of information" (paragraph 10), which might have been copy-pasted from some other text, is *not alien* to the notion of loyalty. The requirement of loyalty *encompasses* that of confidentiality, which means that the employee must maintain discretion in respect of the institution's affairs. Loyalty embraces more than confidentiality and is not limited to it, but the latter still *is* one of the constitutive elements of loyalty and one of the criteria under which it can be judged, whether or not a person is loyal to his or her institution.

If the reference to "respecting the confidentiality of information" had indeed been copy-pasted from another decision, the second formation failed to *indicate* it, even though seventeen months had passed since the alleged copy-pasting took place (this makes it unlikely that at the time when the hapless error had been made, the information about the "mother decision" could not be divulged, at least in general terms).

In the absence of such indication, the reproach that the reasoning of the decision of 30 May 2008 was a mere copy can hardly be said to be substantiated.

15. Be that as it may, the issue of the wrong terminology had been brought before the first appellate formation when that formation had been seized with the request for correction of errors contained in its ill-fated decision of 30 May 2008. It would be inconceivable that the *way* in which the wrong terminology entered the text of that decision could have skipped the attention of its *authors*. If the use of the wrong terminology resulted from an over-mechanical copy-pasting at the time of drafting of the decision of 30 May 2008, that was neutralised by the replacement of "*spor de confidenţialitate*" with "*spor de fidelitate*" and an explicit assurance that the use of the wrong term had not affected the reasoning of the decision.

The second formation rejected this assurance by one argument: *non creditis*.

16. The third – the concluding and thus the crowning – reason for quashing the decision of 30 May 2008 was the *establishment* that the error in question was not clerical. What, then, was the nature of that error? The second appellate formation held that its "predecessor" "[had] referred to a completely different legal matter, which had not been brought before it by the parties".

On the surface, the conclusion as to the wrong determination, by the first appellate formation, of the subject matter of the dispute might sound convincing. But to *be* convincing it had to derive from reliable premises, in this case, the first two arguments (reasons) discussed above. As has already been shown, the first of these arguments (that the arguments of the ministry were not examined) was utterly false, and the second one (that the use of the term "*spor de confidenţialitate*" was attributable solely to copy-pasting from an unidentified source) calls for no lesser reservations. The literature on logic presents many examples of correct inferences being drawn from two false premises. However, they are presented as anomalies in their own right, and their weaponisation in judicial reasoning has probably never been recommended.

17. In addition, the second appellate formation ignored the obvious fact that the dispute before the first appellate formation (just like the one in the earlier proceedings before the county court) had not been about confidentiality bonuses, but loyalty bonuses. In particular, in the decision of 30 May 2008 it says in black and white that the applicants should be entitled to confidentiality bonuses (*sic!*) "like other members of the judiciary or ancillary staff". But, as mentioned, "other members" who were entitled to confidentiality bonuses had been confined under domestic law solely to military personnel and civil servants with special status. The applicants were not among them and were not seeking *those* bonuses.

18. The reproach to the first appellate formation that the error in question was not clerical implies more than a simple inference: it in fact amounts to a *condemnation*. To arrive at that conclusion, the second appellate formation examined not only the decision of 30 May 2008 (against

which the extraordinary appeal was lodged), as corrected by the interlocutory judgment of 4 December 2008, but also the reasoning of that interlocutory judgment, where the authors of the error had explained that that the error was of a technical nature (which points to the "striking similarity" of two Romanian words). The second appellate formation explicitly rejected that explanation.

19. This rejection effectively meant that, for the second appellate formation, the first appellate formation erred *not once, but twice*: first of all when it had mistakenly used the wrong term, and secondly when it had falsely justified that use as a technical error. It had thus either demonstrated their professional inability twice, or (worse) attempted (speaking straight from the shoulder) to cover up its one-off mistake by employing a bogus justification.

In the latter event of *perseverare diabolicum*, one could wonder whether the second error had not amounted to a deliberate miscarriage of justice. The Government provided *no information* as to whether any investigation in this regard, which could bring about any disciplinary measures, was initiated. Which is somewhat telling.

20. It is quite striking that whereas the clerical ("typographical", "technical", "material") error was admitted and corrected by the appellate court sitting in the *same* formation, the finding that the error in question was not clerical at all was made by that court sitting in a *different* formation. The judges who had initially examined the case admitted that they had erred, said sorry and corrected themselves, but that was rejected by another judicial body.

Let me reiterate: although all this bore on law (its interpretation and application), this was not about law proper. It was about the facts behind the case-law-making, but the facts that were "established" were not demonstrated to have existed.

21. In view of this, I find it impossible to agree with the majority that the reasoning put forward by the second formation was "valid" (paragraph 44). This validating statement contains no substantiating element.

It is thus not reasoned itself – just like the pronouncement which it validates.

22. To soften the impression, a few arguments are provided in paragraph 45:

– that the extraordinary appeal was lodged by a party in the proceedings – so what?

– that it was lodged within a relatively short period of time – so what? and, by the way, "relatively" to what?

– that the extraordinary proceedings did not last unreasonably long – so what?

– and, finally, that the extraordinary appeal was the next logical element in the chain of domestic remedies at the disposal of the parties.

I fully subscribe to the latter argument. However, it does not negate the fact that the judgment adopted in these extraordinary proceedings was *not reasoned*.

23. Having said that, I can now turn to my assessment of the applicants' situation and of how its important elements are passed over in silence in the present judgment, sometimes in defiance of the Court's pertinent case-law.

III

24. The applicants raised several complaints under Article 6 § 1. The central one pertains to the actual quashing of the final decision of 30 May 2008, which was allegedly in breach of the principle of legal certainty.

25. That complaint was dismissed. However, another one under the same Article was not – the one pertaining to the *overall fairness* of the proceedings.

The quashing in question thus appears to have been fair, although it was the *result* of proceedings which *as a whole were not fair*.

The quashing also appears to have been fair despite the fact that it was based on the *retroactive* application of the Constitutional Court's decisions of 3 July 2008 on the first appellate formation's final decision of 30 May 2008 (as later corrected), which was *immediately enforceable*.

That decision of the Constitutional Court raises too many questions, in particular as to the function and purpose of constitutional justice. But I shall stop here.

26. As mentioned (in paragraph 22 above), the majority based their finding that there has been no violation of Article 6 § 1 on this point on the following arguments, which in fact do not prove anything: the extraordinary appeal was lodged by a party to the proceedings, and not by a third-party State official with no connection to the case proceedings; it was lodged within a relatively short period of time (less than six months after the date of the contested decision); the extraordinary appeal proceedings did not last unreasonably long (about eleven months); and the extraordinary appeal constituted the next logical element in the chain of domestic remedies at the disposal of the parties, rather than an extraordinary means of reopening proceedings, and was therefore not incompatible with the principle of legal certainty.

However, an alternative approach could and should have been taken.

27. The second appellate formation disagreed with their "predecessor" as to what constituted a "material error". The quashing of the final decision, as corrected by the interlocutory judgment, was the result of there having been two opposing views about the interpretation of that notion (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX; see also *S.C. Textinc S.A. v. Romania* [Committee], no. 52018/10, § 26, 6 February 2018, in which the Court considered that it was not justified to quash a final

and binding decision only because two domestic courts had had different views on a matter discussed in the appeal proceedings). Nothing in the case or in domestic practice permits the belief that in allowing the application for correction of the decision the first appellate formation conducted an arbitrary interpretation of the notion of "material error". As judicial staff were not entitled to confidentiality bonuses, there was no reason to assume that the first appellate formation had examined the confidentiality bonus and not the loyalty bonus. Moreover, the benefit at stake in the case was indisputably the loyalty bonus and there was no mention of the confidentiality bonus in the applicants' submissions. The county court correctly used the term "loyalty bonus" when deciding the case. While having the power to re-examine the merits of the case, the first appellate formation in the proceedings which gave rise to the decision of 30 May 2008 was bound by the subject matter of the action as defined by the applicants in their application lodged before the county court. It therefore must be inferred that the Court of Appeal was in fact examining the matter of the loyalty bonus, as requested by the applicants in their action, and not that of the confidentiality bonus, and that the use of the term "confidentiality bonus" stemmed from a technical error, which was later confirmed by the same bench. When examining the extraordinary appeal, the second appellate formation did not rule that the confidentiality bonuses had been applicable to the applicants.

28. The extraordinary appeal was therefore no more than an *appeal in disguise*, which cannot be justified under the requirements of legal certainty enshrined in the right to a fair hearing (see *Ryabykh* cited above, § 52; see also *Stoişor and Others v. Romania*, no. 16900/03, §§ 13 and 23, 7 April 2009, in which the Court considered that the allegation that the court of last resort had breached legal requirements – notably that it had allegedly failed to examine some of the reasons for appeal – had not been sufficient to justify the quashing of a final decision).

29. In the case of *Brumărescu v. Romania* ([GC], no. 28342/95, ECHR 1999-VII) the Court examined a similar situation where a final decision in which the domestic courts had decided on the merits in favour of the applicant had been quashed by means of an extraordinary appeal and, as a consequence, the initial action had been rejected without an examination of the merits because of lack of jurisdiction (§§ 15, 16 and 24). The Court found that such an exclusion had been *in itself* contrary to the right of access to a court and concluded that there had been a violation of Article 6 § 1 of the Convention (ibid., § 65).

30. Incidentally, *Brumărescu*, a landmark judgment in so many respects, is cited in the "General principles" sub-section of the part of the judgment which deals with the applicants' complaints under Article 6 § 1 concerning breach of the principle of legal certainty. That case, and in particular that part of the judgment which has the *highest precedential value* for the instant

case, however, was forgotten in the sub-section entitled "Application of those principles to the facts of the case".

31. The foregoing considerations had to be sufficient to enable the Court to conclude that, by permitting the final decision of 30 May 2008 to be quashed by means of an extraordinary appeal which was an appeal in disguise and therefore was *allowed unlawfully*, the authorities failed to strike a fair balance between the interests at stake and thus infringed the applicants' right to a fair hearing, and that there has accordingly been a violation of Article 6 § 1 as a consequence of non-compliance with the legal certainty principle.

32. Had this been the case, I would perhaps have been comfortable that the Court saw no need to examine the "remainder" of the complaints under Article 6 § 1 of the Convention – and would have voted accordingly on this point.

IV

33. The majority's reasoning as to the alleged violation of Article 1 of Protocol no. 1 is especially succinct. It is limited to the consideration that, given that no violation was found of Article 6 § 1 on the point of the actual quashing of the final decision of 30 May 2008, the "special circumstances of the present case" can be regarded as exceptional grounds justifying the quashing of that decision and the dismissal of the applicants' claim for compensation.

It is nowhere explained what is meant by the "special circumstances" and why they were "special". Maybe brevity is the soul of wit, but why should the soul be crippled?

Again, an alternative approach could and should have been taken regarding the applicants' complaints under Article 1 of Protocol no. 1.

34. The applicants had their right to receive the loyalty bonuses acknowledged by a final decision issued by the domestic courts. Therefore they had a "possession" for the purposes of Article 1 of Protocol No. 1 (see *SC Maşinexportimport Industrial Group SA v. Romania*, no. 22687/03, § 42, 1 December 2005).

35. The Court has on numerous occasions dealt with similar issues, and has found a violation of Article 1 of Protocol No. 1 in a number of cases against Romania where the applicants' property rights had been reconsidered following applications for supervisory review (see *Brumărescu*, cited above, §§ 61, 77 and 80; *SC Maşinexportimport Industrial Group SA v. Romania*, cited above, §§ 32 and 46-47; and *Piaţa Bazar Dorobanţi SRL v. Romania*, no. 37513/03, §§ 23 and 33, 4 October 2007). In the instant case the Government failed to submit any argument justifying a departure from the approach described above. Despite the margin of appreciation enjoyed by the State in this field, supervisory review

proceedings cannot justify the applicants' deprivation of possessions acquired by means of a final and enforceable decision (see *Blidaru v. Romania*, no. 8695/02, § 55, 8 November 2007, and *SC Maşinexportimport Industrial Group SA*, cited above, § 46).

36. These considerations lead to a finding that there has been a violation of Article 1 of Protocol No. 1 in so far as the applicants were unable to receive the whole amount awarded to them by the domestic courts.

V

37. The majority is consistent in holding that the applicants' complaint under Article 14 had to be left unexamined as raising no separate issue, because no violation was found of Article 1 of Protocol No. 1.

I, however, am of the opinion that Article 1 of Protocol No. 1 has been violated. Accordingly, the complaint under Article 14 should have been examined and a violation found of that Article in conjunction with Article 1 of Protocol No. 1, based on, *inter alia*, the general principles concerning the protection against discrimination as they have been recently reiterated in *Carvalho Pinto de Sousa Morais v. Portugal* (no.17484/15, §§ 44-47, ECHR 2017).

Below is a synopsis of the possible alternative reasoning.

38. At the material time judicial officers were excluded from receiving the loyalty bonus, whereas the remaining court staff received it. Accordingly, they have been treated differently from other individuals working in the judicial system.

39. Regrettably, important parts of domestic legislation are not represented in the instant judgment, including the Government's Emergency Ordinance no. 27/2006 on the monthly wages of judges, prosecutors and other categories of staff from the justice system (in force since 1 April 2007), which regulated the loyalty bonuses for magistrates and ancillary personnel. It appears from that ordinance that the loyalty bonus was meant to reward time served in the same post. Judicial officers were subject to the same obligations, restrictions and rules in office as judges and prosecutors. Although they had to serve a five-year term, nothing prohibited the renewal of their mandate or their early departure. They were subject to essentially the same incentives as other judicial staff to continue their work in the same post. Consequently, for the purpose of encouraging their loyalty, for which the loyalty bonus was designed, judicial officers were in the same situation as other judicial staff involved in case processing in courts.

40. In order to be justified from the point of Article 14, the difference in question had to be based on an identifiable, objective or personal characteristic, or "status". The applicants argued that the discrimination had been based on their profession. This falls into the category of "other status"

provided by Article 14. The burden of proof for such justification lies with the Government (see *Carvalho Pinto de Sousa Morais*, cited above, § 47).

41. The Government, however, did not make any assessment of the aim pursued by the difference in treatment. Even so, the Court could not exclude that the measure complained of might had pursued a legitimate aim, broadly compatible with the general objectives of the Convention, such as, for example, the protection of the country's economic system (see, *mutatis mutandis*, *Andrejeva v. Latvia* [GC], no. 55707/00, § 86, ECHR 2009) or administrative economy and coherence (see, *mutatis mutandis*, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 57, ECHR 2006-VI).

42. The proportionality of the measure, however, was hardly defensible.

The domestic courts which examined the merits of the complaint of discrimination found for the applicants and considered that there was no justification for the difference in treatment instituted by the applicable law. It is not possible to draw any inference from the final decision of 14 October 2009, in so far as that decision rejected the applicants' initial complaint without examining its merits, thus making *no assessment* of the proportionality of the difference in treatment.

43. Accordingly, there would have been no reason to depart from the conclusion reached by the domestic courts which examined the merits of the applicants' complaint, had the majority examined this complaint.

This, however, would bring me back to the already discussed issue of Article 1 of Protocol No. 1, a violation of which, regrettably, was not found in the instant case.

44. However, I concede that no separate issue arises under Article 1 of Protocol No. 12 (and voted accordingly). But this is with the caveat that the allegation of discrimination against the applicants *vis-à-vis* other judicial and non-judicial staff *had* to be examined under Article 14 in conjunction with Article 1 of Protocol No. 1.