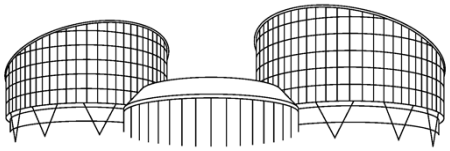

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BĂDESCU AND OTHERS v. ROMANIA

(Applications nos. 22198/18 and two others –
see appended list)

JUDGMENT

Art 7 • *Nullum crimen sine lege* • *Nulla poena sine lege* • Alleged lack of foreseeability of legal basis for judges' conviction for abuse of office • Statutes criminalising abuse of office at relevant time, together with case-law interpreting them, drafted with sufficient precision • Applicants capable, being judges, of discerning risk of criminal conviction to reasonable degree in view of circumstances, without guarantee of judicial independence being called into question • Interpretation relied on by domestic courts' to establish applicants' individual liability consistent with essence of offence in question

Prepared by the Registry. Does not bind the Court.

STRASBOURG

15 April 2025

FINAL

15/09/2025

This judgment became final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bădescu and Others v. Romania,

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

Lado Chanturia, *President*,
Jolien Schukking,
Faris Vehabović,
Ana Maria Guerra Martins,
Anne Louise Bormann,
András Jakab*, judges*,
Ioan Florin Streteanu, ad hoc *judge*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 22198/18, 48856/18 and 57849/19) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Romanian nationals, Ms Liliana Bădescu ("the first applicant"), Ms Dumitriţa Piciarcă ("the second applicant") and Ms Veronica Cîrstoiu ("the third applicant"), on the various dates indicated in the appended table;

the decision to give notice to the Romanian Government ("the Government") of the complaint under Article 7 of the Convention and to declare inadmissible the remainder of the applications;

the parties' observations;

the decision of the President of the Chamber to appoint Mr Ioan Florin Streteanu to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1), as Mr Sebastian Răduleţu, the judge elected in respect of Romania, was unable to sit in the case (Rule 28);

Having deliberated in private on 25 March 2025,

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

INTRODUCTION

1. The case concerns the alleged lack of foreseeability of the legal basis for the conviction of the applicants, who were judges, on charges of abuse of office. They relied on Article 7 of the Convention.

THE FACTS

2. The applicants were born in 1957, 1955 and 1957, respectively, and live in Bucharest. The first applicant was represented by Mr I.V. Stănoiu, lawyer, the second applicant by Ms A. Cojocaru, lawyer, and the third applicant by Mr C.L. Popescu, lawyer.

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

I. BACKGROUND TO THE CASE

4. The three applicants were judges of the Criminal Division of the Bucharest Court of Appeal ("the Court of Appeal").

5. In a final judgment of 4 April 2011 the Court of Appeal, sitting as a bench of which the applicants were not members, sentenced S.D. to seven years' imprisonment for various financial offences and ordered him, jointly and severally with other defendants, to pay damages in order to make good the pecuniary damage caused to the civil party.

6. S.D. lodged two extraordinary appeals for annulment of the final judgment of 4 April 2011 with the Court of Appeal. By law, such extraordinary appeals were heard by a bench of three judges. S.D.'s first extraordinary appeal was declared inadmissible, and he withdrew the second.

7. On 23 November 2011 S.D. lodged a third extraordinary appeal, alleging that he had been prosecuted more than once for the same acts.

8. The case was assigned randomly to a bench composed of the three applicants.

9. In a final judgment of 22 February 2012 the Court of Appeal, sitting as a bench composed of the three applicants, allowed the third extraordinary appeal (see paragraph 7 above) and set aside S.D.'s conviction, without examining the civil aspect of the case. It noted that, in the context of a separate investigation, S.D. had previously been prosecuted for acts relating in part to those for which he had been convicted in the final judgment of 4 April 2011 (see paragraph 5 above). It found that the criminal investigation in that case had resulted in a discontinuance decision, which had been upheld in a decision of the Craiova Court of Appeal delivered on 27 September 2010. The Court of Appeal concluded that, as S.D. had been prosecuted twice, there had been a breach of the *ne bis in idem* principle in the case before it.

10. On an unspecified date in 2013, following a criminal complaint by R.A., a criminal investigation was opened against the third applicant and other individuals on a number of corruption-related charges. In an indictment of 15 November 2013 the third applicant was committed to stand trial on several charges, including that of accepting bribes in connection with the delivery of the judgment of 22 February 2012 (see paragraph 9 above).

11. In a judgment of 26 March 2016, which was upheld by the High Court of Cassation and Justice ("the High Court") in a final judgment of 2 June 2016, the Constanţa Court of Appeal sentenced the third applicant to seven years' imprisonment for accepting a bribe, influence-peddling, fraud, forgery and complicity in money-laundering. She was accused of having accepted the sum of 630,000 euros (EUR) in February 2012 as a bribe for delivering, together with the other two applicants, a decision allowing S.D.'s extraordinary appeal.

12. The third applicant served her sentence until she was released on licence on 17 October 2017.

13. In the meantime, in a judgment of 25 October 2016 the Court of Appeal, ruling on an application to reopen proceedings in view of the third applicant's conviction (see paragraph 11 above), had set aside the judgment of 22 February 2012 (see paragraph 9 above) and adjourned S.D.'s third extraordinary appeal (see paragraph 7 above) for judgment at a later date. In a judgment of 15 November 2016 the Court of Appeal took note of S.D.'s withdrawal of his third extraordinary appeal.

II. THE DISCIPLINARY PROCEEDINGS AGAINST THE THREE APPLICANTS

14. On 27 April 2012 a disciplinary investigation was opened in respect of the applicants following a number of articles in the press on the setting-aside of S.D.'s conviction (see paragraph 9 above).

15. Relying on Articles 99 (t), 99^1 § 2 and 100 of Law no. 303/2004 on the status of judges and prosecutors ("Law no. 303/2004" – see paragraph 72 below), the Judicial Inspection Board sought disciplinary sanctions against the applicants, accusing them of bad faith or gross negligence in the performance of their duties on account of a serious breach of the rules of criminal procedure. It was specified that the offending acts concerned neither the applicants' interpretation of the applicable procedural rule nor the reasoning set out in the judgment but rather their failure to observe the statutory limits which the law imposed on them in examining the extraordinary appeal.

16. In a decision of 4 December 2012 the National Judicial and Legal Service Commission (*Consiliul Superior al Magistraturii* – "the CSM"), by a majority, rejected the Judicial Inspection Board's proposal, finding that the acts attributed to the applicants did not constitute a disciplinary offence. The CSM took the view that the judgment in question (see paragraph 9 above) reflected the applicants' interpretation of the procedural rule on the admissibility of the extraordinary remedy and that the manner in which they had applied the law was not subject to disciplinary inquiry, since the interpretation given in the case at hand was rational, reasoned and reasonable. The CSM explained that any other approach would have been in breach of the constitutional principles that judges were independent and that only the courts could review judicial decisions through the use of legal remedies – principles which were enshrined in Article 124 § 3 and Article 129 of the Constitution respectively (see paragraph 68 below).

17. The CSM went on to find that the applicants had not acted in a grossly negligent manner. In this connection, it found that only obvious errors which were manifestly unlawful and thus wholly unjustified could give rise to disciplinary liability. On the contrary, in the CSM's view, the judgment delivered by the applicants on 22 February 2012 reflected their interpretation of the material in the case file and the relevant legislation.

18. In a final judgment of 25 November 2013 following an appeal by the Judicial Inspection Board, the High Court, sitting as a bench of five judges, upheld the CSM's decision. It found that, by challenging the logical legal reasoning that had been developed by judges in examining the admissibility requirements of an extraordinary appeal for annulment, the Judicial Inspection Board had called into question the very interpretation and application of a rule of law by those judges. However, these aspects of a judicial decision were not subject to review by means of disciplinary proceedings. In addition, the High Court found that the public prosecutor's submissions in the decision of 7 August 2012 (see paragraph 21 below) were also relevant to the case in question.

III. THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANTS FOR ABUSE OF OFFICE

A. The criminal investigation

1. The decision ordering the discontinuance of the criminal proceedings

19. On 28 February 2012 the National Anti-Corruption Prosecution Service ("the Anti-Corruption Service"), which was the public prosecutor's office responsible for investigating corruption-related offences committed by the most senior public officials ("the public prosecutor's office"), opened a criminal investigation against the applicants of its own motion in connection with the delivery of the judgment of 22 February 2012 (see paragraph 9 above). On 3 April 2012 the Anti-Corruption Service brought a criminal prosecution against the three applicants for aggravated abuse of office against personal interests ("abuse of office") and for favourable treatment of an alleged offender. The applicants were accused of having, in the judgment of 22 February 2012, knowingly overstepped the authority vested in them by law for the purpose of hearing extraordinary appeals; of having thus failed in the proper performance of their duties; and of having thereby created a situation favourable to S.D., since his criminal conviction had been set aside.

20. The public prosecutor's office noted the following errors in the judgment of 22 February 2012 (see paragraph 9 above):

(a) The material acts of which S.D. had been accused in each of the two sets of criminal proceedings against him were not identical.

(b) In the light of the Constitutional Court's case-law, the Craiova Court of Appeal's decision of 27 September 2010 confirming the discontinuance decision (see paragraph 9 above) did not constitute *res judicata*, as it did not address the merits of the criminal charges.

(c) An extraordinary appeal for annulment could result in the setting aside of a judgment when the grounds adduced in support of the application to discontinue criminal proceedings had not been addressed though ordinary remedies. In the case at hand, however, in its judgment of 4 April 2011 (see

paragraph 5 above), the Court of Appeal had delivered a final ruling addressing the objection raised on *res judicata* grounds.

21. In a decision of 7 August 2012 the Anti-Corruption Service discontinued the criminal proceedings against the three applicants. It found that the constituent elements of the offences were indeed established in the case before it, but considered nevertheless that under Article 2 of Law no. 303/2004 (see paragraph 72 below) – which provided that judges were independent and irremovable, and that every institution was bound to respect their independence – judges could not be held criminally liable for abuse of office or neglect of official duties on the basis of the decisions they delivered in that capacity. In this connection, the Anti-Corruption Service held that the concepts of independence and security of tenure could be interpreted as establishing a certain type of immunity for judges where the offending acts, be they intentional or negligent, concerned a ruling delivered in a given case.

22. The Anti-Corruption Service concluded that as a result of the joint applicability of two statutes – one criminal and the other relating to the status of judges – "there was doubt as to the legal framework governing the criminal liability of judges for offences connected to their official duties in relation to measures ordered in judicial decisions", a doubt which had to count in the applicants' favour. Lastly, noting that disciplinary proceedings had been brought in respect of the same facts (see paragraph 15 above), it ordered the discontinuance of the criminal proceedings on the grounds that the acts of which the applicants stood accused were not prohibited under criminal law.

23. The applicants lodged a complaint with the Court of Appeal against the decision of 7 August 2012 (see paragraph 21 above). They alleged that they had been prosecuted on account of the conclusion they had reached in the judgment of 22 February 2012 (see paragraph 9 above).

24. In a final judgment of 1 October 2012 the Court of Appeal dismissed the applicants' complaint, pointing out that it did not have jurisdiction to order the public prosecutor's office to revise the reasoning on which its decision was based.

2. The re-opening of the criminal proceedings against the three applicants

25. In a decision of 29 January 2014 the Chief Prosecutor of the Anti-Corruption Service reversed the Anti-Corruption Service's decision of 7 August 2012 (see paragraph 21 above) of his own motion and ordered the reopening of the criminal proceedings against the three applicants. He took the view that the third applicant's committal for trial following the indictment of 15 November 2013 (see paragraph 10 above) constituted a new development in view of which the criminal proceedings against the three applicants for abuse of office and favourable treatment of an alleged offender could be reopened.

26. The reopened investigation made use of the evidence already contained in the prosecution file from the criminal proceedings against the third applicant on the charge of accepting a bribe (see paragraph 10 above). It was noted that the witness testimony showed as follows. The third applicant had agreed, in return for a sum of money, to deliver a decision in S.D.'s favour in the context of his extraordinary appeal for annulment. She had instructed S.D., through intermediaries, to lodge extraordinary appeals and then to withdraw them until the case file had been allocated to a bench of which she was a member. She had informed a witness that she had consulted with the other two applicants before delivering the decision and they had agreed to allow the extraordinary appeal, its being clear from the material available to them that their decision could be reasoned in a manner favourable to S.D.

3. The three applicants' committal to stand trial for abuse of office

27. In an indictment of 15 April 2014 the Anti-Corruption Service committed the three applicants to stand trial before the Court of Appeal for abuse of office, favourable treatment of an alleged offender and forgery. The public prosecutor's office accused the applicants of having neglected their legal obligations and of having delivered an ill-founded decision on account of an external factor that had influenced their decision, namely the bribe received by the third applicant from S.D.

28. In addition, the Anti-Corruption Service severed the proceedings against the first and second applicants from the rest of the proceedings in order to pursue the prosecution on the charge of accepting a bribe. That case was subsequently discontinued by the public prosecutor's office in a decision of 17 July 2017.

B. The trial at first instance

29. In the proceedings before the Court of Appeal, the applicants argued, *inter alia*, that they could not be prosecuted for the judicial opinion they had expressed in a judgment and that judicial decisions could be reviewed only through the use of legal remedies.

30. The first applicant further argued that some courts had held that decisions confirming discontinuance decisions constituted *res judicata* and that she could not be convicted for having reached a given conclusion in a context of conflicting case-law between different courts. The second applicant alleged that, in the context of her and her co-defendants' examination of the extraordinary appeal, no evidence had been adduced; neither S.D.'s criminal liability nor the civil aspect of the case had been addressed; and nothing other than the conditions for applying the *ne bis in idem* principle to the case at hand had been assessed. Lastly, the third applicant submitted that she had delivered the decision in good faith and in

accordance with the applicable legal rules, emphasising that the judgment in question had been unanimous.

1. The acquittal of the first and second applicants

31. In a judgment of 19 May 2016 the Court of Appeal acquitted the first and second applicants of all charges.

32. The Court of Appeal noted, firstly, that there was a degree of inconsistency in the case-law at the relevant time as to both the *res judicata* effects of decisions upholding discontinuance decisions and the scope of the review to be conducted in the context of extraordinary appeals for annulment. Accordingly, the two applicants in question could not be considered to have disregarded the statutory rules they had been required to apply.

33. However, it found that the judgment of 22 February 2012 (see paragraph 9 above) was ill-founded with regard to the identity of the facts in the two sets of criminal proceedings brought against S.D. The Court of Appeal nonetheless held that, even though the third applicant had since been convicted at first instance on the charge of accepting a bribe (see paragraph 11 above), there was no evidence in the case before it to suggest that the first two applicants had received any money to find as they had in the judgment of 22 February 2012.

34. Secondly, the Court of Appeal found that liability for the offence of abuse of office was attributable to judges and that they did not enjoy immunity for actions performed in the course of their duties when they carried out flawed judicial acts in bad faith and in breach of the law. It added, however, that the principle of judicial independence, the principle of the separation of powers within the State and the principle that judicial decisions should be delivered in accordance with the law and the judge's volition meant that not every flawed act amounted to abuse of office.

35. The Court of Appeal thus explained that interpreting the evidence and applying the law to a given case were part and parcel of legal reasoning, which could be overturned only through the use of legal remedies. In support of that analysis, the Court of Appeal referred to the wording of both Article 124 § 3 of the Constitution (see paragraph 68 below) and Article 16 § 2 of Law no. 304/2004 (see paragraph 73 below); Article 16 of Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (see paragraph 86 below); a judgment of 9 December 1981 of the French Court of Cassation; and, lastly, Romanian legal opinion and case-law, according to which, firstly, potential errors in the interpretation and application of the law did not amount to abuse of office and, secondly, such errors could be cured through the use of legal remedies.

36. The Court of Appeal concluded, lastly, that the evidence adduced in the case before it did not show that in interpreting and applying the statutory provisions the first and second applicants had overstepped their authority in

order to undermine the legal interests of one of the parties to the proceedings, or that they had acted in bad faith in the administration of justice.

2. The separation of the case against the third applicant from the rest of the proceedings

37. In addition, in the same judgment of 19 May 2016 (see paragraph 31 above) the Court of Appeal severed the case against the third applicant from the rest of the proceedings on the grounds that the criminal proceedings against her for accepting a bribe in connection with the delivery of the judgment of 22 February 2012 were pending before the High Court (see paragraph 11 above). In this connection, the Court of Appeal found that in order to give a decision in respect of the third applicant the full extent of her criminal activity had to be known, since the offences with which she was charged in the case before it had been committed in conjunction with the offence of accepting a bribe (the further proceedings against the third applicant on the charge of abuse of office are described in paragraphs 61-67 below).

C. The first and second applicants' trial on appeal

1. The parties' submissions and the evidence adduced

38. The public prosecutor's office and the second and third applicants all lodged appeals with the High Court.

39. The public prosecutor's office challenged the two applicants' acquittal, submitting that their guilt had been proved. In particular, it argued that the evidence showed that there had been an understanding between the third applicant and D.A. whereby the former would deliver a decision in S.D.'s favour. Although the first and second applicants had not been aware of that agreement, to the extent that the third applicant had told D.A. that the outcome of S.D.'s case depended on the influence she could exert over the other two applicants, and given that the judgment of 22 February 2012 had been delivered unanimously, the first two applicants had delivered that judgment in bad faith. The public prosecutor's office submitted that the facts established in the final judgment convicting the third applicant (see paragraph 11 above) corroborated the evidence already in the file and proved that an external factor had influenced the first and second applicants' decision in delivering the judgment of 22 February 2012.

40. In reply, the first and second applicants referred to Article 1 § 1 of the Universal Charter of the Judge (see paragraph 93 below), Article 16 of the Recommendation of the Committee of Ministers of the Council of Europe (see paragraph 86 below), the domestic case-law and a decision of the French Court of Cassation in support of their argument that the guarantee of independence was essential to the administration of justice and that judicial

decisions, even flawed ones, could be challenged solely through the use of legal remedies, not through criminal prosecution.

41. The High Court heard several witnesses, including D.A. (see paragraph 39 above), R.A. (see paragraph 10 above) and S.D.

2. The final judgment of 14 June 2017 convicting the first two applicants of abuse of office

42. In a final judgment of 14 June 2017 the High Court convicted the first and second applicants of abuse of office and sentenced them to four years' imprisonment. In addition, it gave each of them a 12-month sentence for favourable treatment of an alleged offender. Having decided on a partial concurrence of these two sentences, the High Court sentenced each applicant to a total of four years and four months' imprisonment. The applicants were also ordered to make good the damage resulting from late-payment interest accrued on the civil damages that S.D. had been ordered to pay in the final judgment of 4 April 2011 (see paragraph 5 above).

43. The High Court first determined the criminal law that was most favourable to the applicants. Having examined each applicant's situation and the successive statutes governing abuse of office (see paragraphs 69-70 below), the High Court found the applicants guilty as charged under Article 297 § 1 of the new Criminal Code (see paragraph 70 below).

44. In its judgment, which ran to 180 pages, the High Court first reiterated the principle of judicial independence and the principle that judges' decisions could be reviewed only through the use of legal remedies. It then set out the applicable provisions of criminal law, detailing the constituent elements of the offence of abuse of office (which required proof of direct intent) and noting that, as a general rule, judges could be held liable for offences committed in the performance of their duties.

45. While finding that judges and prosecutors could not be prosecuted for decisions taken in the performance of their duties, the High Court observed that it was settled case-law that this was not the case where it was determined that the judge or prosecutor had acted in breach of the principle of lawfulness, either in bad faith – in other words, where it was shown that he or she had been aware of the manifestly unlawful nature of his or her acts and had sought or accepted to undermine a person's legal interests – or as a result of gross negligence. It referred to a number of judgments in this connection, including the High Court's judgments of 27 April 2011 (see paragraphs 74-75 below) and 24 April 2012, and a judgment of the Bucharest Court of Appeal of 14 March 2013.

46. Next, with extensive reference to a judgment delivered by the High Court on 5 December 2016 (see paragraph 77 *in fine* below), the appellate judges held that, regarding the offence of abuse of office by judges, it was clear from the aforementioned case-law of the High Court and the Bucharest Court of Appeal that errors in the interpretation and application of the law did

not amount to abuse of office and could be cured through the use of legal remedies. It added that the purpose of a criminal investigation was not to examine the lawfulness or merits of a decision taken in the course of the adjudication process – a role which fell exclusively to the competent supervisory bodies provided for by law – but to identify, beyond the decision itself, conduct that was in breach of official duties and constituted the material element of the offence under investigation, together with the motive for the act in question, as such conduct could, in certain cases, have an influence on the ruling. The High Court further clarified that in cases where judges were accused of abuse of office, it was necessary to examine whether the principle of lawfulness – which governed all rules and standards, whether procedural or substantive, and was expressly enshrined in the Code of Criminal Procedure and the laws regulating the profession – had been observed in the performance of each procedural act.

47. The High Court further emphasised that the accusations levelled at the applicants in the case before it concerned neither "the manner in which they [had] interpreted and applied the law, [nor] the manner in which they [had] interpreted the evidence". Nor did they concern "the endorsement of an isolated opinion, or even the development of a singular view on a legal issue [or] the re-examination of a matter that [had] already [been] settled in the appeal process". Rather, the accusations against them concerned "an external factor preceding [the aforementioned acts, namely] the fact of having misrepresented the factual basis in order to ensure that the principle that dictated the conclusion was applied", in other words, "the fact of having generated legal reasoning that had the appearance of soundness in order to justify a particular and otherwise unreachable conclusion".

48. The High Court found that it was clear from the evidence before it that the first and second applicants had knowingly misrepresented the factual basis that had been finally established by the lower courts in order to develop a legal argument and apply the *ne bis in idem* principle to the case before them. In so doing, the applicants had benefitted S.D. and undermined the general interest. It was true that, as sitting judges, their unlawful conduct had formed part of the adjudication process. However, in the High Court's view, such a course of action placed the judgment so delivered outside the sphere of the concept of lawfulness inherent in the delivery of a judicial decision.

49. The High Court added that it could not ignore the singularity of the judgment delivered by the two applicants with regard to the relevant case-law and that never before had there been such an "attempt to push the limits of judicial independence to the point of absurdity". The independence of the judiciary operated within the framework of the law, which had to be applied to the facts of a given case in good faith, a responsibility of which each judge was informed upon entering the profession or, at the latest, when he or she was sworn in.

50. The High Court further found that the very fact of having acted with a view to achieving a predetermined result proved that the applicants had intentionally adopted the offending conduct. In this connection, it held that the applicants had misrepresented established, pre-existing or easily identifiable information pertaining to the facts, with no objective justification, and had knowingly disregarded the relevant and decisive arguments put forward by the public prosecutor's office, as was shown by the questions they had put to the parties in open court and the manner in which the first applicant, as presiding judge, had directed the proceedings.

51. Lastly, the High Court specified which legal rules embodying basic principles the two applicants had thereby breached, namely Articles 124 and 129 of the Constitution (see paragraph 68 below); the principles of lawfulness, establishment of the truth and *ne bis in idem*, as defined in the Code of Criminal Procedure; Article 2 § 3 of Law no. 303/2004 (see paragraph 72 below); and Article 16 § 2 of Law no. 304/2004 (see paragraph 73 below).

52. The High Court's final judgment delivered on 14 June 2017 was notified to the first applicant on 18 December 2017 and was made available to the second applicant on 23 November 2017.

D. The first two applicants' appeal on points of law

1. The applicants' submissions

53. On 19 January 2018 the first and second applicants lodged an appeal on points of law with the High Court against the final judgment of 14 June 2017 (see paragraphs 42-51 above), relying on point 7 of Article 438 § 1 of the Code of Criminal Procedure (see paragraph 71 below). Referring to Articles 124 § 3, 126 § 1 and 129 of the Constitution (see paragraph 68 below) and to the Venice Commission's Report on the Independence of the Judicial System (see paragraph 87 below), the applicants argued, in particular, that developing legal reasoning following deliberations was the very essence of judicial decision-making and therefore could not constitute the material element of the offence of abuse of office. They further submitted that the legal provisions on which their conviction was based contained nothing beyond general principles of law which, in their view, were unclear and, accordingly, unforeseeable as to their application to the case at hand. Moreover, it had not been proved that they had procured a material benefit as a result of the alleged offences.

2. The final judgment of 7 November 2019

54. In a final judgment of 7 November 2019 the High Court dismissed the appeal on points of law as ill-founded. It pointed out that the independence of judges was not absolute and went hand in hand with the principle of

responsibility of members of the judiciary, the principle that all judicial acts had to comply with the law and the principle of equal rights for all citizens. It further held that judges who, in the discharge of their official duties, had performed an official act in breach of the law, either intentionally or in bad faith, and had thereby caused damage or infringed the legitimate rights of a natural or legal person, could be held criminally liable for the offence of abuse of office.

55. The High Court pursued its reasoning as follows:

> "Having regard to the provisions of the special laws governing the status of judges and prosecutors and the organisation of the judiciary, under which the essential and primary responsibility of judges is to administer justice, the High Court considers ... that the delivery of a judicial decision – which constitutes the final decision-making act and the most important part of the trial – by which the court puts an end to the dispute or criminal trial..., cannot be outright excluded from the scope of the judge's criminal liability, [and that it may], in some (admittedly exceptional) situations, constitute the material element of the offence of abuse of office.
>
> ...
>
> Criminal liability for abuse of office does not arise where the judge is accused of mere errors consisting in an inaccurate assessment of the evidence and/or a flawed interpretation or application of the law on a purely random and unintentional basis – situations which can be remedied ... through review by the courts – but where the commission [of the acts in question], culminating in an unlawful ruling, is the product of a conscious and deliberate attitude falling within the definition of bad faith.
>
> ...
>
> The concept of bad faith has been defined in the specialised literature and in judicial practice as involving a conscious and obvious misinterpretation of the law, its deliberate misapplication, the delivery by a member of the judiciary – aware of his or her error – of a manifestly unlawful decision, for the purpose of undermining the interests of one of the parties involved in a legal relationship... However, it has been recognised that it is not sufficient for the ruling in question to be obviously wrong; there must also be other indications – external factors – which convincingly show that the member of the judiciary acted with direct intent and knowingly breached the law. As to proving bad faith, it has been shown that this consists in demonstrating the obvious nature of the misinterpretation of the law, in that the judge's legal reasoning is in flagrant contradiction with the legal principles governing the relevant institution and no excusable justification can be found. From the same evidential standpoint, it has also been noted that the offending elements must be contained in the reasoning of the decision and that there must be indications to suggest that the arguments used have no basis in the case file..."

56. The High Court went on to cite a number of international documents (see paragraphs 86, 87, 90 and 91 below), concluding that European judicial institutions had accepted that where members of the judiciary had performed their duties in bad faith, they could incur criminal, disciplinary or civil liability based on the manner in which they had interpreted the law and assessed the evidence.

57. The High Court noted that, in the case before it, the acts for which the applicants had been convicted corresponded to the statutory definition of the

offence (see paragraphs 54-55 above) and that the appellate court had examined and explained at length – setting out facts and evidence – the reasons for finding that the applicants had acted in bad faith.

58. As to the foreseeability of the legal basis for the abuse-of-office conviction, after reiterating the findings made by the Romanian Constitutional Court in its decisions of 15 June 2016 and 6 June 2017 (see paragraphs 78-82 below), the High Court clarified that, in the judgment convicting the first and second applicants, the conduct of which they were accused had been examined in the light of the applicable basic laws (see paragraph 51 above).

59. The High Court also observed that in the final judgment of 25 November 2013 its bench had held that the applicants could not be subjected to a disciplinary sanction for the acts in question (see paragraph 18 above). It emphasised, however, that the factual elements examined in the two sets of proceedings – disciplinary and criminal – were different: the disciplinary proceedings had concerned the manner in which the law had been interpreted and applied in the case in question, whereas, in the criminal proceedings, the applicants had been accused of having wrongly and deliberately misrepresented the facts of the case in order to deliver a predetermined decision. Moreover, the judgment in respect of the disciplinary proceedings had not constituted *res judicata vis-à-vis* the criminal court as to the question whether a criminal offence had been committed, especially since the factual aspects under consideration were different.

60. Lastly, the High Court explained that the applicants had been accused of acts which were liable to cause damage and that, in the case at hand, this damage had consisted in undermining the proper conduct of court proceedings, the good reputation of the judiciary and, lastly, the interests of the civil party. Furthermore, the delivery of the flawed judgment amounted to "aid" given by the applicants to S.D.

E. The separate proceedings against the third applicant for abuse of office

1. The first-instance judgment

61. In its judgment of 10 May 2018 in the separate proceedings against the third applicant (see paragraph 37 above), the Court of Appeal convicted her of abuse of office and of favourable treatment of an alleged offender. Comparing the successive statutes criminalising abuse of office (see paragraphs 69-70 below), it concluded that, in the applicant's particular circumstances, the relevant provisions of the Criminal Code, as in force at the material time, namely, Article 248 of the Criminal Code (see paragraph 69 below), were more favourable to her. Taking into account – for the purpose of having it run concurrently – the penalty imposed in the final judgment of 2 June 2016 (see paragraph 11 above) the Court of Appeal handed down a

single, seven-year prison sentence to the third applicant, whose release on licence (see paragraph 12 above) was upheld.

62. In convicting the applicant of abuse of office, the Court of Appeal pointed out, firstly, that a judge could be held criminally liable only in so far as he or she had discharged his or her duties in bad faith. Secondly, it emphasised that the applicant had not been prosecuted for having interpreted and applied the law and evidence in a particular manner, but for having "generated seemingly sound legal reasoning in order to deliver a decision which could not otherwise have been reached". In the Court of Appeal's view, in the case before it, the applicant's bad faith was proved both by her criminal conviction for accepting a bribe (see paragraph 11 above) and by the absence of any justification whatsoever for the legal reasoning developed in the judgment of 22 February 2012 (see paragraph 9 above). It further held that in acting as she had, the applicant had impaired the proper administration of justice and undermined the interests of the civil party.

2. The judgment on appeal

63. Both the public prosecutor's office and the third applicant appealed against the judgment of 10 May 2018 (see paragraph 61 above).

64. The applicant sought an acquittal, arguing that no damage had been caused by the delivery of the final judgment of 22 January 2012 and, consequently, that the acts for which she had been convicted did not constitute an offence. Moreover, she relied on the *res judicata* effects of the final judgment of 25 November 2013 (see paragraph 18 above), which had established that the bringing of that case had amounted to challenging the very reasoning of a judicial decision. Since the criminal proceedings concerned the same facts as those which had given rise to the judgment in the disciplinary proceedings, the applicant submitted that those facts could not be re-examined from the standpoint of criminal law.

65. In a final judgment of 27 March 2019, which was notified to the applicant at her place of detention on 6 May 2019, the High Court dismissed her appeal. It held that damage had indeed been caused in the case at hand and, with regard to the third applicant's ground of appeal based on the *res judicata* effects of the final judgment of 25 November 2013, that that judgment had concerned the disciplinary liability of members of the judiciary, not a criminal offence. The High Court added that the two types of liability – disciplinary and criminal – had different legal bases and consequences.

3. The third applicant's appeal on points of law

66. Relying on point 7 of Article 438 § 1 of the Code of Criminal Procedure (see paragraph 71 below), the third applicant lodged an appeal on points of law against the final judgment of 27 March 2019 (see paragraph 65 above). She argued that, in her case, the prosecution for abuse of office

concerned the delivery of a judicial decision and that the acts of which she stood accused were not such as to cause damage, concluding that they did not fall within the scope of criminal law.

67. In a final judgment of 18 September 2020, the High Court dismissed the applicant's appeal on points of law as ill-founded. It held that the setting-aside of a conviction conferred an advantage on the convicted person, given that the basis for his or her liability under the civil limb was thereby negated. Moreover, the damage in the present case lay in the interference with the proper administration of justice, which had undermined both the interests of the State and the civil party's interest in securing compensation for the damage it had sustained.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. The Constitution

68. The relevant articles of the Constitution read as follows:

Article 16 - Equality of rights

"(1) Citizens are equal before the law and public authorities, without privilege or discrimination.

(2) No one is above the law.

..."

Article 124 - Administration of justice

"(1) Justice shall be rendered in the name of the law.

(2) Justice shall be one, impartial and equal for all.

(3) Judges are independent and subject only to the law."

Article 126 - Courts of law

"(1) Justice shall be administered by the High Court of Cassation and Justice and the other courts established by law.

..."

Article 129 – Legal remedies

"Judicial decisions may be challenged by the parties concerned and the public prosecutor's office through the legal remedies provided for by law."

2. The Criminal Code

69. The relevant provisions of the Criminal Code, as in force until 1 February 2014, read as follows:

Article 248
Abuse of office against the public interest

"It shall be an offence punishable by six months' to five years' imprisonment for a public official, in the discharge of his or her duties, to knowingly (*cu ştiinţă*) refrain from performing an act or to perform it improperly, thereby impairing or significantly disrupting the proper functioning of a State body or institution."

Article 248-1
Aggravated abuse of office

"Where the offences defined in Articles ... and 248 have had serious consequences, they shall be punishable by five to fifteen years' imprisonment and the forfeiture of certain rights."

70. The relevant provisions of Law no. 286/2009 implementing a new Criminal Code, which entered into force on 1 February 2014, provide as follows:

Article 175
Public officials

"For the purposes of criminal law, a public official shall mean a person who, on a permanent or temporary basis, with or without remuneration:

(a) is vested with the powers and duties established by law for the purpose of exercising legislative, executive or judicial authority. ..."

Article 297
Abuse of office against personal interests

"(1) It shall be an offence, punishable by two to seven years' imprisonment and disqualification from office, for a public official, in the discharge of his or her duties, to refrain from performing an act or to perform it improperly, thereby infringing or undermining the rights or legitimate interests of a natural or legal person."

3. The Code of Criminal Procedure

71. Point 7 of Article 438 § 1 of the Code of Criminal Procedure, as in force since 1 February 2014, regulates the instances in which an appeal may be lodged on points of law. The relevant provisions of that Code read as follows:

"1. Decisions may be quashed in the following cases:

...

7. The accused has been convicted of an offence for which the criminal law did not provide."

4. Law no. 303/2004 on the status of judges and prosecutors

72. The relevant Articles of Law no. 303/2004 on the status of judges and prosecutors ("Law no. 303/2004"), as in force at the relevant time (February 2012) and until 18 October 2018, read as follows:

Article 2

"1. Judges appointed by the President of Romania shall have security of tenure, in accordance with the conditions laid down herein.

...

3. Judges shall be independent, subject only to the law and impartial."

Article 94

"Judges and prosecutors shall be held to account [for their acts] in civil, disciplinary or criminal proceedings, as [provided for by] law."

Article 99

"the following shall constitute disciplinary offences:

...

(t) bad faith or gross negligence in the performance of duties."

Article 99[1]

"1. A judge or prosecutor acts in bad faith where he or she knowingly breaches the rules of substantive or procedural law while seeking or accepting to cause damage to a person.

2. A judge or prosecutor acts with gross negligence where, through negligence, he or she gravely, flagrantly and inexcusably breaches the rules of substantive or procedural law."

Article 100

"The following disciplinary sanctions [may] be imposed on judges and prosecutors in proportion to the seriousness of the offences [that they commit]:

(a) a warning;

(b) a reduction of up to 20% of their gross monthly remuneration for a period of up to one year;

(c) a disciplinary transfer to another court...;

(d) suspension from their duties for up to six months;

(e) indefinite removal from office."

5. Law no. 304/2004 on the organisation of the judiciary

73. In so far as relevant, Article 16 § 2 of Law no. 304/2004 on the organisation of the judiciary, as in force from 27 September 2004 to 15 March 2023, provided:

> "Judicial decisions may be quashed or varied only by means of the legal remedies provided for by law, exercised in accordance with the law."

B. Domestic case-law

1. Case-law of the courts of appeal and High Court

74. The parties submitted to the Court numerous final domestic judgments upholding discontinuance decisions in favour of judges who had been accused of abuse of office by litigants who were dissatisfied with the rulings delivered in their cases. It is clear from those judgments that the interpretation and assessment of evidence form part of a judge's duties and that the lawfulness and merits of a decision delivered in the adjudication process are subject to review through the use of legal remedies and cannot give rise to criminal proceedings for abuse of office, failing which judicial independence would be impaired (see, for example, the High Court's final judgments of 28 April 2009, 15 May 2009, 26 May 2009, 1 July 2009, 26 October 2009, 22 January 2010, 3 February 2010, 26 February 2010, 3 March 2010, 8 December 2010, 27 April 2011, 14 June 2011 and 30 May 2012).

75. In a number of the judgments in question, the domestic courts also pointed out that judges could be held criminally liable for abuse of office only where it was proved that they had performed their duties in bad faith, that is, that they were aware of the manifestly unlawful nature of their acts and had sought or accepted to undermine a person's legal interests (see the final judgments of the High Court of 28 April 2009, 3 December 2009, 3 and 26 February 2010, 3 March 2010, 27 April 2011, 14 June 2011 and 30 May 2012, and the final judgments of the Bucharest Court of Appeal of 16 January 2012 and 14 March 2013).

76. The parties also produced judgments in which judges had been convicted of abuse of office in conjunction with other offences such as forgery in connection with abuse of office and accepting bribes (final judgment of the High Court of 9 April 2014), forgery (final judgment of the High Court of 17 April 2015), use of forged documents (final judgments of the High Court of 21 October 2016 and 31 October 2017), or accepting bribes (final judgments of the High Court of 13 June 2019 and 6 July 2020). Furthermore, in one of the judgments in the case file, the High Court convicted a judge of abuse of office in connection with decisions he had delivered in April and June 2008 (final judgment of the High Court of 2 October 2020).

77. Lastly, it can be seen from the case-law submitted by the parties that where a judge has committed a criminal offence in connection with the decision delivered in a given case, he or she is liable for that offence and not for his or her ruling, which cannot in itself give rise to a criminal penalty where there is no proof that the judge in question was acting in bad faith (final judgments of the High Court of 3 May 2018 and 26 June 2018). In a final judgment of 5 December 2016 the High Court acquitted a judge charged with of abuse of office on the grounds that it had not been proved that she had acted with intent to harm.

2. Case-law of the Constitutional Court

(a) Decision no. 405 of 15 June 2016

78. In a separate case from that of the applicants, the Constitutional Court was asked to rule on an objection raised in relation to the provisions of Article 297 § 1 of the new Criminal Code (see paragraph 70 above). The petitioners had argued that these provisions were unforeseeable and inaccessible because, in their view, the conduct referred to as "refrain[ing] from performing an act or [performing] it improperly" could not be clearly defined and, consequently, the material element of the offence was uncertain.

79. In its decision no. 405 of 15 June 2016 the Constitutional Court held that Article 297 § 1 of the new Criminal Code was compatible with the Constitution in so far as the words "to perform it improperly" were understood to mean "performance in breach of the law". The Constitutional Court also pointed out that the concept of "law" referred to laws enacted by Parliament and other instruments that counted as such in view of their effects.

80. In that decision, the Constitutional Court dismissed the objection in so far as it sought to question the word "act" and the wording concerning the undermining of a person's legitimate interests. As to the concept of an "act", in particular, the Court noted that legal opinion was unanimous in considering that it referred to the sphere of a public official's powers and duties.

81. The Constitutional Court further clarified that, in accordance with the *ultima ratio* principle, responsibility for regulating and applying the provisions on abuse of office fell both to the legislative authority and to the bodies of the judiciary.

(b) Decision no. 392 of 6 June 2017

82. In decision no. 392 of 6 June 2017 the Constitutional Court reaffirmed that the *actus reus* consisting in the improper performance of an official act had to be assessed solely in the light of the duties expressly established in a piece of "primary" legislation, namely, a law, an order or an emergency order issued by the Government, such that prohibited conduct under the internal rules and regulations of the employing authority fell outside the sphere of abusive acts within the meaning of criminal law.

(c) Decision no. 54 of 7 February 2018

83. The Constitutional Court was also asked to examine an objection of unconstitutionality seeking to secure a finding that the term "act", as used in Article 297 § 1 of the new Criminal Code (see paragraph 70 above), did not encompass the delivery of a judicial decision. It dismissed that objection in its decision no. 54 of 7 February 2018.

84. Referring to various international instruments and domestic case-law, the Constitutional Court allowed that judges could not be held criminally liable for acts committed in the performance of their duties without due regard for the principle of their independence. However, due consideration was also to be given to the fact that the judge's role was to administer justice (*înfaptuirea justitiei*) in the name of the law and that all citizens were equal before the law. The Constitutional Court thus found that the principle of the independence of judges entailed that of their liability, which was necessary to ensure the quality of the administration of justice. In this context, and having regard to constitutional and European standards, it concluded that the delivery of a judicial decision did not outright exclude a judge's criminal liability.

85. Lastly, the Constitutional Court took the view that a judge could not as a rule be held criminally liable for delivering a judicial decision but that there was an exception to this rule whereby his or her criminal liability could be incurred when it was established that he or she had acted with intent and in bad faith.

II. INTERNATIONAL MATERIAL

A. The Council of Europe

1. The Committee of Ministers

86. The relevant parts of the Appendix to Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, adopted on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, read as follows:

"*Chapter II – External independence*

11. The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.

...

15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.

16. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.

...

Chapter III – Internal independence

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. ...

...

Chapter VII – Duties and responsibilities

...

Liability and disciplinary proceedings

66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.

...

68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.

...

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen."

2. *The European Commission for Democracy through Law (Venice Commission)*

87. The relevant part of the Venice Commission's Report on the Independence of the Judicial System Part I: the Independence of Judges, adopted at its 82nd Plenary Session (Venice, 12-13 March 2010, CDL-AD(2010)004) reads as follows:

"61. It is indisputable that **judges** have to be protected against undue external influence. To this end they **should enjoy functional – but only functional – immunity** (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)."

88. In its *amicus curiae* brief for the Constitutional Court of Moldova on the immunity of judges, adopted at its 94th Plenary Session (Venice, 8-9 March 2013, CDL-AD(2013)008), the Venice Commission stated as follows:

"16. The Venice Commission has consistently argued in favour of a limited functional immunity of judges:

'Magistrates (judges, prosecutors and investigators) should not benefit from a general immunity as set out in the Bulgarian Constitution. According to general standards they certainly need protection from civil suits for actions done in good faith in the course of their functions. However, they should not benefit from a general immunity protecting them against prosecution for criminal acts for which they should be answerable before the courts.'"

89. In the *amicus curiae* brief for the Constitutional Court of Moldova on the criminal liability of judges, adopted at its 110th Plenary Session (Venice, 10-11 March 2017, CDL-AD(2017)002), the Venice Commission observed as follows (footnotes omitted):

"33. Above all, a judge should not be limited to applying merely existing case-law. The essence of his or her function is to interpret legal regulations independently. Sometimes, judges may have an obligation to apply and interpret legislation contrary to '*uniform national judicial practice*.' Such situations may occur, for instance, as a result of international treaties, and where decisions from international courts supervising international treaties may require altering the current national judicial practice. A judge's legal interpretation, which may not be in line with the established case-law, should not in itself become a ground to impose disciplinary sanctions, unless it is done in bad faith, with intent to benefit or harm a party to the proceedings or as a result of gross negligence. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider it right to do so. Only stubborn resistance against an enhanced practice, which leads to a repeated overturning of cases, for which there is a well-established and clear case-law, may result in disciplinary sanctions.

...

44. In order to hold a judge personally liable for his or her decisions, it is not sufficient to refer to the fact that the decisions have been overturned by a higher court. Any decision on the competency and professionalism of a judge based on cases being overturned on appeal, must be made on the basis of an actual assessment of the cases concerned. In any case, judges can only be held criminally liable for their decisions if individual guilt is proven and the error is due to malice or gross negligence.

...

46. European standards require individual guilt to be ascertained to a level of wilful intent or gross negligence. Judges are only criminally liable for the 'wilful issuance' of illegal decisions, sentences, rulings and court orders.

47. A provision setting out the criminal liability of judges can only be compatible with the independence and impartiality of judges if it is formulated precisely enough to guarantee the independence of judges and the functional immunity of the individual judge in his or her interpretation of the law, assessment of facts or weighing of evidence.

48. Vague, imprecise and broadly-worded provisions that define judges' liability may have a chilling effect on their independent and impartial interpretation of the law, assessment of facts and weighing of evidence. Regulations of judges' liability that lack these qualities may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality. In general, and in light of the European Court of Human Rights' case-law, provisions on criminal liability for judges should be interpreted in such a way as to protect judges from arbitrary interference in their judicial functions.

49. The conclusions drawn in the two previous questions also apply here: 1) judges should not be held individually liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law; 2) nor should it be sufficient for judges to incur individual criminal liability to define a judicial decision as illegal by referring to the fact that his or her decisions have been overturned at higher instance.

50. Finally, criminal liability of judges may be compatible with the principle of the independence of judges, but only pursuant to the law, which has to be narrowly tailored and cannot rely merely on the fact that a case was overturned on appeal. To that end, it is important that the relevant law not be in conflict with the overriding principle of the independence of judges.

..."

3. The Consultative Council of European Judges (CCJE)

90. Opinion No. 3 (2002) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, reads as follows, in so far as relevant:

"51. The corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course. The need for caution in the recognition of any such liability arises from the need to maintain judicial independence and freedom from undue pressure. Against this background, the CCJE considers in turn the topics of criminal, civil and disciplinary liability. In practice, it is the potential disciplinary liability of judges which is most important.

a. Criminal liability

52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).

53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has became common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

...

5º) Conclusions on liability

75. As regards criminal liability, the CCJE considers that:

i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;

ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions."

..."

91. The relevant part of the CCJE's Opinion No. 18 (2015) on "the position of the judiciary and its relation with the other powers of the state in a modern democracy" reads as follows (footnotes omitted):

"37. With respect to civil, criminal and disciplinary liability (what has been called above 'punitive accountability'), the CCJE stresses that the principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges' accountability in respect of criminal, civil and disciplinary liability. The tasks of interpreting the law, weighing of evidence and assessing the facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of malice, wilful default or, arguably, gross negligence. Furthermore, in the event that the state has had to pay compensation to a party because of a failing in the administration of justice, only the state, not a litigant, should have the power to establish, through court action, any civil liability of a judge."

B. The United Nations

92. In so far as relevant, the United Nations Convention against Corruption, adopted in New York on 31 October 2003, provides as follows:

Article 19 - Abuse of functions

"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."

C. Other international bodies

93. The relevant parts of the Universal Charter of the Judge, which was adopted by the Central Council of the International Association of Judges on 17 November 1999, in Taiwan, read as follows (original English):

Article 1 - Independence

"Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence."

Article 2 - Status

"Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary."

Article 3 - Submission to the law

"In the performance of the judicial duties the judge is subject only to the law and must consider only the law."

THE LAW

I. JOINDER OF THE APPLICATIONS

94. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

95. The first and second applicants submitted that the statute governing abuse of office (see paragraph 70 above) was unclear and unforeseeable. In particular, they argued that the article in question was drafted in overly general terms and therefore failed to determine the conduct prohibited by law, such that they could not have foreseen that the delivery of a judicial decision by a judge in the performance of his or her duties could constitute the material element of the offence.

96. The third applicant complained that the applicable statute (see paragraph 69 above) was imprecise and unforeseeable. In this connection, she argued that the provision criminalising abuse of office had been declared unconstitutional by the Constitutional Court in a number of successive decisions, adding that it followed from its decision of 15 June 2016 (see paragraphs 78-81 above) that where the acts in question were not such as to incur the judge's disciplinary liability, they could not be regarded as criminal either.

97. The applicants relied on Article 7 of the Convention, which provides:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Admissibility

98. The Court notes that although all three applicants complained that the criminal statute governing abuse of office was unclear and unforeseeable, they put forward different arguments in support of their complaint. Accordingly, the Court will now consider their complaints separately.

1. *Application no. 57849/19 (Ms Cîrstoiu, the third applicant)*

(a) The parties' submissions

(i) The Government

99. The Government have made no observations as to the admissibility of the application.

(ii) The third applicant

100. In her application, the third applicant complained that the law criminalising abuse of office was unforeseeable, arguing that the statute in question had been reviewed on a number of occasions by the Constitutional Court, which had declared it partly unconstitutional. Referring in particular to that court's decision of 15 June 2016 (see paragraph 81 above), and relying on the *ultima ratio* principle, she concluded that where it was established, as in the present case, that the acts in issue did not constitute a disciplinary offence, they could not engage the criminal liability of the person who had committed them.

101. In her observations of 3 March 2023 in reply to those of the Government, the applicant submitted that the only issue raised in the present case regarding the foreseeability of the applicable law was whether or not the administration of justice by a judge came within the scope of the offence of abuse of office. She submitted that, prior to her and the other two applicants, no judge had ever been convicted of abuse of office for having delivered and given reasons for a judicial decision, and that the Government had not provided any examples of relevant case-law.

102. The applicant further argued that the Anti-Corruption Service had expressly found the criminal law to be manifestly unforeseeable in its decision of 7 August 2012 (see paragraph 21 above). Relying on the constitutional principles of the separation of powers and of equality, together with judicial independence and the immunity of members of parliament from legal proceedings, she submitted that judges could not be prosecuted on the basis of the reasoning of a judicial decision. Moreover, she submitted that a judgment arising from abuse of office by a judge was necessarily an

extraordinary occurrence, yet nothing extraordinary was to be found in the present case, since the judgment in question had been delivered by three judges specialising in criminal law who sat on a court of appeal and had given their ruling independently.

103. Lastly, it followed from the Constitutional Court's findings in its decision of 15 June 2016 regarding the application of the *ultima ratio* principle (see paragraph 81 above), taken together with the provisions governing the different types of liability that judges could incur, that the criminal prosecution of judges was barred in cases where they had incurred no disciplinary liability. Thus, in the present case, since she had not been found liable for any disciplinary offence, she could not be convicted by the domestic criminal-law authorities.

(b) The Court's assessment

104. The Court notes at the outset that, on the application form, the applicant complained that the criminal law on abuse of office was unforeseeable. Referring, in particular, to the Constitutional Court's decision of 15 June 2016, she argued that the absence of disciplinary liability in the present case necessarily entailed the absence of any criminal liability for the same acts (see paragraph 100 above).

105. In this connection, the Court notes, firstly, that in her grounds of appeal to the High Court the third applicant put forward an argument in support of the alleged impossibility of a criminal conviction for acts in respect of which she had been cleared of disciplinary liability (see paragraph 64 above) based on the *res judicata* effects of that court's judgment of 25 November 2013 (see paragraph 19 above), without expressly raising the applicability of the *ultima ratio* principle to her case, as she did in her application and her observations in reply (see paragraphs 100-101 above). In her appeal on points of law, she argued only that the delivery of a judicial decision could not cause damage, which was a necessary element of the offence (see paragraph 66 above).

106. The Court notes that in the complaint raised before it, the applicant challenged the domestic courts' classification of the acts of which she stood accused as abuse of office, notwithstanding the decision in her favour in the disciplinary proceedings. As to her argument based on the application of the *ultima ratio* principle to her case, in addition to the fact that it is not for it to question the criminal policy implemented in the respondent State (see, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, § 44, ECHR 2006-IV), the Court notes that, under the applicable domestic law, judges could be subject to criminal or disciplinary proceedings in respect of their acts in the circumstances laid down by law (see Article 94 of Law no. 303/2004 cited in paragraph 72 above). Moreover, it is clear from the relevant domestic case-law that judges can be held criminally liable for abuse of office under certain conditions (see paragraph 75 above). Furthermore, the Court observes that in

the two sets of proceedings – disciplinary and criminal – the domestic courts examined the facts before them from different perspectives. Thus, the High Court replied to the applicant's argument concerning the *res judicata* effects of the final judgment of 25 November 2013, finding that the two types of proceedings differed in so far as they had different legal bases and consequences (see paragraph 65 above). Moreover, the facts and evidence submitted to the criminal courts in the present case were different from those examined in the disciplinary proceedings (see paragraphs 15 and 25-26 above).

107. In so far as the third applicant complained – under Article 7 of the Convention – of the domestic courts' legal classification of the facts in the present case (having regard also to the fact that, in her view, one of the constituent elements of the offence, namely the damage caused by the conduct in question, had not been made out), the Court reiterates that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015). Moreover, the High Court showed that such damage had in fact been caused (see paragraphs 48 and 67 above).

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

109. Moreover, the Court would observe that, as set out on the application form, the third applicant's arguments in support of her complaint concerning the lack of foreseeability of the criminal law by no means concerned the matter of its applicability to a judge where the accusations were linked to the reasoning of a judicial decision. If the applicant wished at that stage to raise the issue of the State's responsibility for the law's lack of foreseeability on that ground, she should have stated so clearly in her application form, similarly to what she did subsequently in her observations of 3 March 2023, which were submitted after the Court had given the Government notice of the application (see paragraphs 101-102 above) under Article 7 of the Convention (compare *Grosam v. the Czech Republic* [GC], no. 19750/13, § 95, 1 June 2023; *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, no. 16812/17, § 246, 18 July 2019; and *Huci v. Romania*, no. 55009/20, § 43, 16 April 2024). The Court would add, if need be, that the third applicant's novel argument under Article 7 of the Convention in the observations she submitted after the Government were given notice of the application cannot be regarded as linked to or flowing from the complaint submitted in the application (see, *mutatis mutandis*, *Grosam*, § 96 *in fine*, and *Huci*, § 93, both cited above).

110. The Court would further point out that while nothing prevents an applicant from raising a new complaint in the course of the proceedings before the Court, such a complaint must, like any other, comply with the

admissibility requirements (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 135 *in fine*, 20 March 2018). Even assuming that the third applicant has exhausted the domestic remedies in respect of these new arguments (see *Fu Quan, s.r.o. v. the Czech Republic* [GC], no. 24827/14, § 123, 1 June 2023, with a further reference), the Court notes that the complaint she raised for the first time in her observations submitted on 3 March 2023 was not lodged in compliance with the six-month rule laid down by Article 35 § 1 of the Convention, which is applicable in the present case.

111. It follows that this complaint was submitted out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

2. Applications nos. 22198/18 and 48856/18 (Ms Bădescu and Ms Piciarcă, the first and second applicants)

112. The Court notes that the first two applicants submitted their complaint under Article 7 of the Convention to the domestic courts (see paragraph 95 above), including by means of an appeal on points of law (see paragraph 53 above), and that those courts examined it (see *Secară v. Romania* (dec.), no. 56658/22, §§ 33 and 36, 20 February 2025). The Court notes that these applications are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The first and second applicants

113. Both applicants submitted that neither Article 246 § 1 of the Criminal Code in force at the material time (see paragraph 69 above) nor Article 297 § 1 of the new Criminal Code (see paragraph 70 above) defined the conduct prohibited by law with sufficient clarity and precision. Explaining that at the relevant time they had been serving as judges for thirty-two and seventeen years respectively, they submitted that, even for such experienced members of the judiciary as they were, the conviction of a judge for having delivered a judicial decision was by no means foreseeable. They relied on the Anti-Corruption Service's decision of 7 August 2012 in which, they argued, it had found that the applicable legal framework was unclear (see paragraphs 21-22 above), and on the judgment of 25 November 2013 (see paragraph 18 above) in which the High Court had ruled out any disciplinary liability. The applicants further argued that the law had been interpreted differently at the appeal stage of the criminal proceedings, which proved that it had not been foreseeable.

114. Both applicants submitted that it could not be an offence to develop reasoning in the course of deliberations once the judicial investigation and court proceedings had been concluded and once the evidence had been assessed, each of which were acts that fell within the judge's exclusive powers and competence in accordance with the principle of the rule of law. In their view, the use of criminal proceedings to challenge such acts jeopardised the independence of judges and, moreover, called into question the very purpose of legal remedies. The second applicant added that there was no evidence that she had acted under pressure from an external factor and that she could therefore not be held criminally liable, for lack of proof of bad faith.

115. Furthermore, referring to the domestic case-law submitted by the parties, the applicants argued that judicial practice at the relevant time had been unanimous in finding that a judge could not be prosecuted for abuse of office on account of the manner in which he or she had decided a case (see paragraph 74 above). The first applicant therefore submitted that the conclusion reached by the judges in her own case represented a departure from precedent which she could not have foreseen. As to the second applicant, she alleged that her conviction stood in isolation at the domestic level and was incompatible with settled domestic case-law. Both applicants further argued that the examples submitted from the case-law subsequent to the events in question were irrelevant to the present case. They added that it had been necessary for the Constitutional Court to intervene in order to clarify the wording of Article 297 § 1 of the new Criminal Code (see paragraphs 78-81 above) and observed that its decision of 7 February 2018 (see paragraphs 83-85 above) post-dated their conviction on appeal.

116. Lastly, referring to Article 97 § 2 of Law no. 303/2004 and Article 16 § 2 of Law no. 304/2004 (see paragraphs 72-73 above), together with a number of international documents (see paragraphs 86, 87, 89, 91 and 93 above), they submitted that the threshold above which judges could incur criminal liability for acts committed in the performance of their duties was very high. In their view, the criminal statute on abuse of office failed to meet the prudential standard set by international norms governing the liability of judges.

(b) The Government

117. The Government submitted that the offences of which the applicants had been convicted were punishable under criminal law, namely under Article 248 of the Criminal Code and, from 1 February 2014 onwards, Article 297 of the new Criminal Code (see paragraphs 69-70 above). They added that Article 175 of the new Criminal Code (see paragraph 70 above) defined the concept of a public official and Article 94 of Law no. 303/2004 (see paragraph 72 above) expressly provided that judges were criminally liable for their acts in the circumstances laid down by law.

118. Referring to the principle that laws must be of general application, the Government submitted that when the acts attributed to the applicants had been committed it was already settled case-law that a judge could not be held criminally liable for the manner in which he or she had interpreted and applied the law, unless it was proved that he or she had performed his or her duties in bad faith. The constitutionality of the legislative provision punishing abuse of office had been reviewed on a number of occasions (see paragraphs 78-85 above), and even though the Constitutional Court's decisions had been delivered after the dates on which the acts in question had been committed, they were based on Romanian legislation and on international and European instruments that were already in force at the relevant time. They added that the Constitutional Court's decision no. 54/2018 (see paragraphs 83-85 above) had settled the question whether a judge could be held criminally liable for abuse of office on account of the particular manner in which a judicial decision was reasoned.

119. Referring to the applicants' status as legal professionals, the Government submitted that, in view of the relevant Romanian case-law and the applicable legal framework, they could not, at the material time, have been unaware of the way in which the principle of judicial independence was interpreted or what acts performed in the discharge of their duties were likely to engage their criminal liability.

120. Lastly, the Government alleged that in the present case the domestic courts had consistently held that liability for the offence of abuse of office was attributable to a judge on the basis of the delivery of a judgment, provided certain conditions were met. In conclusion, they considered that the offence of which the applicants had been convicted was defined with sufficient clarity for it to have been foreseeable that, in certain circumstances, it could be applied to a judge on the basis of the reasoning of a judgment delivered in the performance of his or her duties.

2. The Court's assessment

(a) General principles established in the Court's case-law

121. Article 7 of the Convention is not confined to prohibiting the retrospective application of criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 154, ECHR 2015; and *Advisory opinion on the applicability of statutes of*

limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an of torture [GC], request no. P16-2021-001, Armenian Court of Cassation, § 67, 26 April 2022 ("*Advisory Opinion P16-2021-001*")).

122. The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects (see *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018). This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him or her criminally liable and what penalty he or she faces on that account (see *Del Río Prada*, cited above, § 79; *G.I.E.M. S.r.l. and Others*, cited above, § 242; and *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V). When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 238, 26 September 2023).

123. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis*, cited above, § 40; *Del Río Prada*, cited above, § 92; and *Advisory Opinion P16-2021-001*, cited above, § 67).

124. The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. This is particularly true in the case of persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Vasiliauskas*, cited above, § 157, and *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, § 61, 29 May 2020, with further references ("*Advisory Opinion P16-2019-001*")).

125. However clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation in any system of law, including

criminal law. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, while certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Del Río Prada*, cited above, § 92, and *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 59, 3 December 2019). Indeed, in the Convention States, the progressive development of the criminal law through judicial interpretation is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; and *Vasiliauskas*, cited above, § 155). The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of the accused's Article 7 rights. Were that not the case, the object and purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated (see *Yüksel Yalçınkaya*, cited above, § 239).

126. The Court reiterates that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification (see *Rohlena*, cited above, § 51) or to rule on the applicant's individual criminal responsibility (see Kononov v. Latvia [GC], no. 36376/04, § 187, ECHR 2010). The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, among other authorities, *Yüksel Yalçınkaya*, cited above, § 240).

127. The Court has stressed, however, that its powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence (see *Advisory Opinion P16-2021-001*, cited above, § 71). Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with the object and purpose of that provision. To accord a lesser power of review to the Court would render Article 7 devoid of purpose (see *Yüksel Yalçınkaya*, cited above, § 241).

(b) Application of those principles to the present case

128. As a preliminary observation, the Court notes that the fact that liability for the offence of abuse of office was generally attributable to judges is not in issue before it. As the Court of Appeal and the High Court explained to the applicants, in the light of the applicable law, judges could indeed be charged with the offence of abuse of office (see paragraphs 34 and 44 above;

see also Article 175 of the new Criminal Code cited in paragraph 70 above, and Article 94 of Law no. 303/2004 cited in paragraph 72 above). Having regard to the manner in which the applicants formulated their complaint before the domestic courts and then before it (see paragraph 95 above; see also *Fu Quan, s.r.o.*, cited above, § 123), the Court must ascertain whether, in the present case, the provision of the Criminal Code prohibiting abuse of office enabled the applicants – who were judges – to foresee that their conduct in connection with the reasoning of a judicial decision could give rise to prosecution on the charge of abuse of office, without calling into question the guarantee of independence inherent in their office.

129. Before turning to the assessment of the foreseeability of the impugned criminal provisions (see the applicants' arguments, summarised in paragraph 113 above), the Court would emphasise the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if judges are to be successful in carrying out their duties (see, among other authorities, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016, and *Grzeda v. Poland* [GC], no. 43572/18, § 302, 15 Marcy 2022). This consideration, set out in particular in cases concerning the right of judges to freedom of expression (see, as an example, *Guz v. Poland*, no. 965/12, § 86, 15 October 2020), has been found to be equally relevant in relation to the adoption of measures affecting the right to liberty of members of the judiciary (see *Alparslan Altan v. Turkey*, no. 12778/17, § 102, 16 April 2019, and *Baş v. Turkey*, no. 66448/17, § 144, 3 March 2020) and also to the right of access to a court for judges in matters concerning their status or career (see *Bilgen v. Turkey*, no. 1571/07, § 58, 9 March 2021, and *Gumenyuk and Others v. Ukraine*, no. 11423/19, § 52, 22 July 2021). Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references), the Court must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy (see *Bilgen*, cited above, § 58, and *Stoianoglo v. the Republic of Moldova*, no. 19371/22, § 37, 24 October 2023). The Court reiterates that judges can uphold the rule of law and give effect to the Convention only if domestic law does not deprive them of the guarantees required under the Convention with respect to matters directly touching upon their individual independence and impartiality (see *Grzeda*, cited above, § 302).

130. The Court observes that in situations similar to the one in the present case, holding judges criminally liable could be regarded as likely to impair their professional freedom to interpret the law, examine the facts and assess the evidence in the cases before them. Moreover, it has previously found that

corruption – including in the judicial sphere – has become a major problem in many countries (see, for example, *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 50, ECHR 2008). Safeguarding the rule of law therefore requires that a balance be struck between the criminal liability of judges and the need to ensure the independence and impartiality of the judiciary. In the Court's view, it is essential in this context that the applicable criminal law be drafted with sufficient precision as to its scope that it is foreseeable in its effects. Where, as in the present case, the authorities bring criminal proceedings against a judge of their own motion (see paragraph 19 above), what is at stake is the confidence of the public in the functioning and independence of the judiciary – a confidence which, in a democratic State, guarantees the very existence of the rule of law (see, *mutatis mutandis*, *Harabin v. Slovakia*, no. 58688/11, § 133, 20 November 2012, and *Stoianoglo*, cited above, § 37).

131. The Court also notes that it is clear from the relevant international instruments in force at the material time that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice (see paragraph 68 of Recommendation CM/rec (2010)12 of the Committee of Ministers to member States on judges, cited in the paragraph 86 above) or wilful misconduct on their part (see paragraphs 87 and 90 above). In this context, the Court takes into account the text on the criminal liability of judges adopted by the Venice Commission (see paragraph 47 of that text, cited in paragraph 89 above) which, although subsequent to the events in question, emphasised that such liability could only be compatible with the principle of judges' independence and impartiality if it was based on legislation drafted with sufficient precision to guarantee that independence and the functional immunity of the individual judge in his or her interpretation of the law, assessment of facts or weighing of evidence.

132. Turning to the facts of the present case, the Court observes that the successive statutes criminalising abuse of office were similarly worded, making it an offence for a public official, in the discharge of his or her duties, to refrain from performing an act or to perform it improperly, thereby infringing or undermining the rights or legitimate interests of a third party (see paragraphs 69 and 70 above). The Court notes, with particular regard to the foreseeability of these statutory provisions and their compatibility with the rule of law, that the legislature used somewhat general wording to define the offence ("for a public official, in the discharge of his or her duties, to refrain from performing an act or to perform it improperly"). Consequently, the domestic legislation does not include an exhaustive list of the forms such conduct might take. However, the Court has previously noted that the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent,

are vague (see *Kokkinakis*, cited above, § 40, with a further reference). In this context, the Court would observe that, in examining an objection of unconstitutionality concerning the drafting of Article 297 § 1 of the new Criminal Code, the Constitutional Court confirmed that legal opinion was unanimous in defining the concept of an "act" as referring to the sphere of a public official's powers and duties (paragraph 83 above).

133. It is not for the Court to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field (see *Kövesi v. Romania*, no. 3594/19, § 192, 5 May 2020). As stated above, the Court has previously accepted that the requirement of statutory precision does not preclude drafting in general terms in the field of criminal law. Otherwise, the statute may not deal with the issue comprehensively and will require constant review and updating according to the numerous new circumstances arising in practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain and allows changes in everyday practice to be taken into account (see the case-law cited in paragraphs 123 and 125 above; see also *Cantoni*, cited above, § 32).

134. The Court further observes that, having regard to the applicants' position as judges, the statute defining the offence of abuse of office was, in the present case, applied by the domestic courts in the broader context of constitutional law and the legislation governing the activities of members of the judiciary (see paragraphs 34, 44, 49 and 54 above) in order to decide whether the acts of which the applicants stood accused fell within the scope of criminal law. The Court reiterates that, from the standpoint of Article 7 of the Convention, it must have regard to the domestic law "as a whole" and to the way it was applied at the material time (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 145, ECHR 2008, and *Del Río Prada*, cited above, § 90). Thus, in the present case, the domestic courts took into account, first, that judges were independent and subject only to the law in the performance of their duties and, second, that the review of judicial decisions was ensured through legal remedies (see Articles 124 and 129 of the Constitution cited in paragraph 73 above). The parties did not dispute the foreseeability of these legal provisions.

135. The Court must accordingly ascertain whether in the present case the wording of the criminal statutes applicable to members of the judiciary, read in the light of the accompanying interpretative case-law, satisfied the requirement that the law be foreseeable in its effects at the relevant time (see, to similar effect, *Cantoni*, cited above, § 32, and *Parmak and Bakır*, cited above, § 65).

136. In this connection, it is clear from the examples of case-law in the file, some of which are decisions pre-dating the commission of the offences by the applicants, that the domestic courts consistently found that members of the judiciary could not be held criminally liable for abuse of office on the basis of the reasoning – even if erroneous – of a judicial decision (see

paragraph 74 above). Moreover, the case-law in question shows that members of the judiciary could incur criminal liability for the offence under consideration only where they had performed their duties in bad faith (see paragraph 75 above). In other words, in order for abuse of office to be established, a distinction had to be drawn between situations where a case had been decided in good faith and those where a judge had misconstrued a legal rule deliberately and in bad faith, thereby steering the process towards an outcome contrary to law in a premeditated breach of the rules.

137. The Court therefore notes that the conditions that had to be met for a judge to be held criminally liable for abuse of office in respect of an act performed in the discharge of his or her duties were not only clearly defined but had also been consistently reiterated in the domestic case-law available at the time of the commission of the offence of which the applicants stood accused (see paragraphs 74-75 above – compare *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, §§ 55-58, 17 February 2005, and *Soros v. France*, no. 50425/06, § 58, 6 October 2011). Moreover, in the Court's view, that judicial interpretation of the scope of the offence was consistent with its essence (see, *mutatis mutandis*, *Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-III, and *Huhtamäki v. Finland*, no. 54468/09, § 51, 6 March 2012).

138. Above all and, in this connection, regardless of the extent of the domestic case-law available at the relevant time, the Court notes that the applicants were judges specialised in criminal law with several years' service in the judiciary (see paragraph 113 above). Having regard to their status and experience, it was not unreasonable to expect that they would act with a high degree of caution when pursuing their occupation and take special care in assessing the risks that it entailed (see *Varvara v. Italy*, no. 17475/09, § 56, 29 October 2013; see also, *mutatis mutandis*, in relation to an "institutional investor", *Soros*, cited above, § 59). There were, however, clear and compelling indications in the Romanian legal system at the material time from which it could be inferred that it was likely to be an offence for a judge to deliver knowingly and in breach of the law a judicial decision that caused damage (see paragraph 136 above), without the independence of the judiciary, as guaranteed by the Constitution and international instruments, being thereby called into question. There should thus have been no doubt in the applicants' minds as to the consequences they were liable to incur in delivering the judgment in question.

139. The Court further observes that in the present case the domestic courts were required to apply to the applicants' factual circumstances the principles established in the case-law of the time on the criminal liability of members of the judiciary for the offence of abuse of office. These courts were unanimous in holding that a judge was a public official within the meaning of Article 175 of the new Criminal Code (see paragraph 70 above) and that liability for the offence of abuse of office was attributable to him or her as

such (see paragraphs 34 and 44 above). Furthermore, referring to the relevant case-law, they all held, on the one hand, that there was a general rule to the effect that the delivery of a judicial decision could not give rise to criminal proceedings against the judge, who was independent and whose decisions could be reviewed only through the use of legal remedies (see paragraphs 35, 44 and 55 above), and, on the other, that a judge could be held criminally liable only where certain conditions – which were established in the case-law – were met (see paragraphs 35, 45 and 54 above).

140. The Court notes, moreover, that, as indicated by the domestic courts, the applicants were not prosecuted for delivering a judicial decision as such, but for having adopted a particular line of conduct prior to the drafting of the judgment and for having then knowingly devised legal reasoning that was contrary to law in order to deliver a predetermined ruling in S.D.'s case, with damage caused as a result (see paragraph 47 above). The national authorities thus found that the applicants had misrepresented the facts such that the *ne bis in idem* principle could be applied to the case before them (see paragraphs 33 and 47 above). In this connection, the Court attaches weight to the High Court's assessment according to which the purpose of a criminal investigation into abuse of office was not to examine the lawfulness and merits of a decision delivered at the end of the adjudication process – a role which fell exclusively to the competent supervisory bodies provided for by law – but to identify, beyond the decision itself, conduct that was in breach of official duties and constituted the material element of the offence under investigation, together with the motive for the act in question, as such conduct could, in certain cases, have an influence on the ruling (see paragraph 46 above). The domestic courts thus distinguished between the act for which the applicants were criminally liable and the delivery of a decision in good faith.

141. The Court is particularly attentive to the fact that the applicants raised their complaint before the highest domestic courts, which replied by explaining the structure of the offence and establishing its constituent elements in the case at hand (see paragraphs 44 and 57 above). The domestic courts likewise examined the first and second applicants' argument that the independence of judges, which was guaranteed both by the Constitution and by international instruments, precluded their conviction for abuse of office on the basis of the delivery of a judicial decision. In this connection, the courts laid out the manner in which the independence of judges was to be interpreted and understood in the light of the constitutional principles and international instruments which they considered relevant to the case at hand (see paragraphs 49 and 55 above; see, *mutatis mutandis*, *Haarde v. Island*, no. 66847/12, §§ 129-31, 23 November 2017).

142. The Court can only note that the domestic courts' reasoning in their judgments in respect of the applicants was consistent with the unanimous practice of the highest judicial authority of competent jurisdiction, namely the High Court (see paragraphs 74-75 above), and followed the line of case-

law endorsed by the Constitutional Court (see paragraphs 83-85 above). Thus, in its decision of 7 February 2018, in which it examined whether the fact that a judge had delivered a given judgment could, depending on the circumstances, constitute the material element of the offence of abuse of office (see paragraph 83 above), while acknowledging that, as a general rule, a judge could not be held criminally liable for delivering a judicial decision, the Constitutional Court nevertheless set out the guidelines to be followed in order to determine, in each case, whether the offence in question could be made out on the basis of such an act (see paragraph 85 above). In so doing, it considered the relevant provisions of domestic and international law in this area (see paragraph 84 above) and endorsed the relevant domestic case-law. Thus, while it is true that these decisions of the Constitutional Court were subsequent to the acts of which the applicants stood accused, they nevertheless constitute an element of interpretation, which the Court must take into account (see *Răducan v. Romania* (dec.), no. 83460/17, § 66 *in fine*, 6 December 2022).

143. The Court further notes that the domestic courts sought to ascertain, in the light of the background to the case and the evidence before them, whether the applicants had committed the offence of abuse of office. Although in agreement as to the applicable principles (see paragraphs 34 and 45 above), the Court of Appeal and the High Court took different approaches to interpreting the evidence and, more particularly, to the question whether there was sufficient evidence to establish the applicants' bad faith (see paragraphs 40 and 51 to 53 above).

144. The second applicant complained that she had been convicted of abuse of office without there being any evidence proving that she had been influenced with a view to delivering a judgment in S.D.'s favour (see the applicants' submissions, summarised in paragraph 114 above). In addition to the fact that this argument concerns the assessment of evidence, which is primarily a matter for regulation by national law and the national courts (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015), the Court notes, firstly, that in the present case the domestic courts were called upon to apply the relevant legal provisions to a specific factual situation and that the High Court explained why it considered the applicants to have deliberately delivered a ruling favourable to the defendant in the case in question (see paragraphs 48 and 50 above). Secondly, it must be noted that the domestic courts interpreted the provision in question in a manner that was consistent with the essence of the offence and with the letter of the criminal law, read in its context in the case-law – an interpretation, moreover, that is not unreasonable (see, *mutatis mutandis*, *Jorgic*, cited above, §§ 104-08, and *Huhtamäki*, cited above, § 51).

145. Furthermore, as regards the first applicant's allegation that there was a departure from the case-law in her case (see paragraph 115 above), the Court is of the view that the outcome complained of in the present case is not

the result of a departure from precedent, but rather of the application of the principles developed in the case-law to the applicants' particular situation. Moreover, the Court finds that it cannot be concluded that the State failed to meet the foreseeability requirement merely because the conviction stood in isolation at the domestic level (see paragraph 115 above), as this can be explained by the absence of previous cases involving a strictly identical situation (see, *mutatis mutandis*, *Soros*, cited above, § 58).

146. As to the applicants' argument that the Anti-Corruption Service's decision of 7 August 2012 stated that there was some doubt as to how the legal framework governing the criminal liability of judges for offences committed in the performance of their duties should be applied (see paragraphs 21-22 and 113 above), the Court notes that the public prosecutor's office subsequently changed its position and reopened the criminal proceedings on the basis of new factual circumstances (see paragraph 25 above; for a different situation, see *Liivik v. Estonia*, no. 12157/05, § 102, 25 June 2009). Moreover, it finds that the initial assessment of the public prosecutor's office cannot in any event be substituted for the domestic courts' interpretation of statutes, especially as these were decisions delivered successively, in the course of the same proceedings, in respect of a specific factual situation and novel evidence which the public prosecutor's office had not previously had to deal with. Moreover, under Romanian law, the jurisdiction of the court called upon to review a decision not to prosecute was limited solely to an examination of the decision's lawfulness, not its merits (see paragraph 24 above). However, unlike decisions delivered by the Constitutional Court, such a decision could not carry out an interpretation of the letter of the law (see paragraph 142 above; see also, *mutatis mutandis*, *Răducan*, cited above, § 68 *in fine*).

147. As to the applicants' submission that they should not have been convicted of a criminal offence since they had not been found liable for a disciplinary offence (see paragraph 113 above), the Court notes, firstly, that Article 94 of Law no. 303/2004 provides that judges may incur both criminal and disciplinary liability (see paragraph 72 above). Secondly, it observes that the two sets of proceedings – disciplinary and criminal – concerned different factual circumstances, the first set having concluded prior to the reopening of criminal proceedings against the applicants for abuse of office, without referring to the fact that criminal proceedings had been brought against the third applicant for accepting a bribe in connection with the delivery of the judgment of 22 February 2012 (see paragraphs 18 and 25 above). What is more, the judges dealing respectively with each of the two sets of proceedings examined different aspects of the conduct of which the applicants were accused (see paragraph 59 above). In any event, the High Court replied to this argument, which the applicants had raised before it (see paragraph 59 above).

148. The Court is mindful of the fact that in the present case the factual circumstances forming the context for the acts of which the applicants stood

accused overlapped to some extent with the main task involved in a judge's duties, namely that of delivering judicial decisions. However, the foregoing considerations are sufficient for the Court to find that the provisions criminalising abuse of office at the relevant time, read in the light of the case-law interpreting them, were drafted with sufficient precision to have enabled the applicants, who were themselves judges, to discern to a reasonable degree, in view of the circumstances, that their actions might earn them a criminal conviction, and might do so without calling into question the guarantee of judicial independence. Furthermore, the interpretation relied on by the national courts to establish the applicants' individual liability was consistent with the essence of the offence in question.

149. There has accordingly been no violation of Article 7 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* applications nos. 22198/18 and 48856/18 admissible and application no. 57849/19 inadmissible;

3. *Holds* that there has been no violation of Article 7 of the Convention.

Done in French, and notified in writing on 15 April 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Simeon Petrovski Deputy Registrar	Lado Chanturia President

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1.	22198/18	Bădescu v. Romania	07/05/2018	**Liliana BĂDESCU** 1957 Bucharest Romanian	Ion-Valeriu STĂNOIU
2.	48856/18	Piciarcă v. Romania	15/10/2018	**Dumitrița PICIARCĂ** 1955 Bucharest Romanian	Alina COJOCARU
3.	57849/19	Cîrstoiu v. Romania	01/11/2019	**Veronica CÎRSTOIU** 1957 Bucharest Romanian	Corneliu-Liviu POPESCU