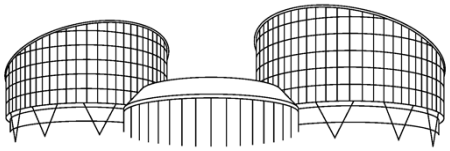

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF PANIOGLU v. ROMANIA

*(Application no. 33794/14)*

JUDGMENT

Art 10 • Freedom of expression • Fair balance struck in imposing code-of-conduct penalty on judge for publishing unsubstantiated allegations calling into question moral and professional integrity of a fellow judge • Interpretation of the Code provision reasonable and foreseeable for a professional with extensive experience in the field • Applicant expected as a judge to show restraint in exercising freedom of expression where the authority and impartiality of the judiciary are likely to be called into question • Decision permanently included on applicant's professional file and taken into account when assessing applications for promotion, but not preventing participation in promotion competitions • Penalty proportionate in the circumstances

STRASBOURG

8 December 2020

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

**In the case of Panioglu v. Romania,**

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

Yonko Grozev, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 33794/14) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Ms Daniela Panioglu ("the applicant"), on 28 April 2014;

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

the parties' observations;

Having deliberated in private on 17 November 2020,

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

# INTRODUCTION

1. The applicant complained that the sentence imposed on her following the High Court of Cassation and Justice's ("the Court of Cassation") final judgment of 1 November 2013 had automatically prevented her for years from taking part in exams to further her professional advancement. She also complained of a lack of foreseeability in respect of the Code of Conduct for Judges, in so far as it had failed to define the concept of an opinion expressed on the moral and professional integrity of a colleague, amounted to a breach of her freedom of expression. She relied on Article 10 of the Convention.

# THE FACTS

2. The applicant was born in 1968 and lives in Bucharest. The applicant was represented by Mr C.L. Popescu, a lawyer practising in Bucharest.

3. The Government were represented successively by their Agents, Ms C. Brumar, Mr V. Mocanu, and Ms S.M. Teodoroiu, of the Romanian Ministry of Foreign Affairs.

# I. BACKGROUND TO THE CASE

4. The applicant is a judge attached to the Bucharest Court of Appeal.

5. In March 2012 the applicant wrote an article about the President of the Court of Cassation under the heading "Nothing about how a Comrade Prosecutor has become the president of all judges". It read:

> "*To my great grandfather,* [*N.O.*]*, killed by the communists*
>
> In 1980, when the communist camp was becoming more unbearable, the current President of the Court of Cassation was appointed prosecutor in the town where I was born. The town had a steel industry and a shipyard, [and] therefore was crawling with members of the *Securitate*, from small informants to the most privileged and smooth torturers.
>
> I was twelve years old and I was in the sixth grade. Because she was almost always at work and in order to spend as much time as possible with us, my mother used to take me and my younger brother to the parades on 23 August. Once we were taken to a stadium to see Nicolae Ceauşescu, who had travelled to our town by helicopter. I remember that we stood for countless hours under the scorching sun. There were many people in shabby clothes. All of us were standing upright, repeating the slogans. Next to me a woman was only mouthing the ovations because she was so tired. So, when I turned my head under the scorching sun, I saw a man grabbing her arm and telling her discreetly to follow him. Only because she had mouthed the words. I was no longer interested in seeing the great leader. We left and after we had left the stadium well behind I kept asking my mum: Why? Meanwhile the President of the Court of Cassation was a rising prosecutor. How did the Comrade Prosecutor fight to root out the enemies of the socialist order and for the pursuit of the new man? Naturally, with her weapon, the case files.
>
> I started to imagine what could happen in the dungeons, from where some came out dishonoured, broken and scared, and many did not come out alive. Who was hurting them? What did those who got hurt and those who were hurting them looked like? Where are the marks? Even today there is no desire to find out.
>
> Afterwards, in the seventh grade, during my internship in agriculture, I saw female detainees on the field where we were harvesting tomatoes. They were wearing a thick uniform with a striped skirt and a scarf on their head. I wanted to memorise one of their faces. The detainee status seemed incompatible to me with being a woman. They were crying and asking us to come near them as if we had been their own children. Other women appeared, authoritarian, dressed in uniforms fitted with leather belts. My mum told me that many of them had been convicted for abortion. Women chose to kill their unborn because they did not have the means to raise them. In addition to this internal turmoil, they were being hunted down by the police [*miliție*] and the prosecutors. How did the Comrade Prosecutor manage at that time, naturally still for the pursuit of the new man?
>
> For me, the world that had already taken shape consisted of severe poverty, the silence and terror from the earth's surface, and the unknown hell from the dungeons from where screams were never heard. The prosecutors were somewhere above in an untouchable shining world, which made it impossible to see the sky for all those in my world. All these comrades, usurpers of Christ and His Law, sternly guarded the communist prison. The Comrade Prosecutor has also floated above us, omnipresent, for fourteen years, until 1994, when she transformed into a judge. That is to say when I was twenty-six years old. During all this time, I did my homework by candlelight,

> [the candle] glued to the edge of a jar[;]food was rationed; cold water only ran for two hours a day, warm water was long gone[;] we shivered with cold indoors[;] we waited at bus stops until we were freezing [and] afterwards we were lucky if we found room on the [bus's] footboard to go to school.
>
> Now I realise that all this time, long as my entire childhood and adolescence, has not been wasted because the Comrade Prosecutor has accomplished so much, as to become the president of all judges herself. The President of the country appointed her in 2010, in a European State, where the justice system is continuously being reformed. That is to say to the old man, a new face. That is why the result is and will be an eternal failure."

6. The applicant's name was in the byline, which also stated that she was a judge attached to the Bucharest Court of Appeal. The article was printed both in a national newspaper, *Cotidianul*, and on an Internet news site, *Juridice.ro*.

## II. DISCIPLINARY AND CODE-OF-CONDUCT PROCEEDINGS AGAINST THE APPLICANT

### A. Disciplinary proceedings against the applicant

7. On 8 March 2012 the Judicial Investigation Unit (*Inspecția Judiciară* – "the IJ") attached to the Superior Council of the Judiciary (*Consiliul Superior al Magistraturii* – "the CSM") opened a preliminary investigation against the applicant on its own motion on the grounds that the article published by her was referring to the professional career of the President of the Court of Cassation.

8. On 17 April 2012 the IJ produced a note concerning the article published by the applicant and proposed that the note be forwarded to the Disciplinary Commission for Judges (*Comisia de disciplină pentru judecători* – "the CDJ") attached to the CSM to establish whether a disciplinary investigation had to be opened against the applicant for breaching Article 99 (a) of Law no. 303/2004 concerning conduct of judges and prosecutors affecting their professional honour and dignity. The IJ held that the article had drawn a parallel between the oppressions of the communist regime and the rise of the President of the Court of Cassation, who had worked as a prosecutor at that time. Judge L.D.S. had been appointed President of the Court of Cassation in 2010 lawfully, after she had passed the lawfully required vetting process to ensure that she had not been a member of or had collaborated with the secret services before 1990. Suggesting that she had behaved inappropriately at the time when she had been a prosecutor without providing specific facts had made it impossible for the IJ to verify the allegations.

9. The article the applicant had put her name to had introduced the idea that Judge L.D.S. had carried out her professional duties unlawfully between 1980 and 1994, when she had worked as a prosecutor. The

distorted presentation of Judge L.D.S.'s professional activity and the suggestion of questionable moral behaviour on her part had resulted in the President of the Court of Cassation's professional reputation being damaged. The applicant's personal opinions expressed in the article had constituted behaviour calling into question the honour and professional integrity of Judge L.D.S.

10. Under relevant national and international law free speech was subject to exceptions when a person's right to honour, reputation, and personal image were affected. Also, when exercising it, judges had to behave in such a way as to preserve the dignity of their office and the independence and impartiality of the judiciary. By expressing publicly her opinions about the professional activity of a judge, the applicant had breached the boundaries of the duty of discretion which had implied moderation and restraint in presenting her opinions.

11. The IJ took the view that in the applicant's case there had been evidence suggesting that the disciplinary offence set out in Article 99 (a) of Law no. 303/2004 had been committed. It considered that the boundaries of the right to freedom of expression had been overstepped and that the applicant's assessment of the Court of Cassation's President's professional activity had been conducted in a manner capable of creating a negative image about the way she had behaved as a prosecutor.

12. On 19 April 2012 the CDJ ordered that a disciplinary investigation be initiated against the applicant for the disciplinary offence set out in Article 99(a) of Law no. 303/2004.

13. On 18 May 2012 the IJ produced a note about the outcome of the disciplinary investigation concerning the applicant and proposed that the note be forwarded to the CDJ to establish whether disciplinary proceedings had to be instituted against the applicant. By relying on some of the arguments of the note of 17 April 2012 (see paragraphs 8-11 above), the IJ took the view that there was evidence in the case that might suggest that the elements of the disciplinary offence set out in Article 99 (a) of Law no. 303/2004 had been met in the applicant's case.

14. On 21 May 2012 the CDJ closed the proceedings against the applicant in so far as they concerned the commission by the applicant of the alleged disciplinary offence set out in Article 99 (a) of Law no. 303/2004. However, the CDJ referred the case to the judges' section of the CSM (*Secția pentru judecători a Consiliului Superior al Magistraturii* – "the SJCSM") for it to determine whether the applicant had breached Article 18 § 2 of the Code of Conduct for Judges ("the Code"). It held that Article 99 (a) of Law no. 303/2004 concerned circumstances where a judge or prosecutor had affected his or her own professional honour and dignity or the reputation of the justice system by his or her own actions and conduct. This had not been the applicant's case. Her article had been written in a literary manner, had referred to aspects of the communist era which had

been well known, and had reflected the restrictions imposed on the rights of the people during those times, which the applicant had been recalling. The article had also contained accurate information concerning the fact that Judge L.D.S. had worked as a prosecutor and as a judge and that starting from 2010 she had been appointed President of the Court of Cassation. The applicant had not used violent or foul language capable of disturbing public opinion and her article had not had a significant media impact.

15. However, the manner in which the applicant's article had been written had created a negative image of how Judge L.D.S. had carried out her duties as a prosecutor during communism. By using the expression "Comrade Prosecutor" in the title of the article the applicant had implied that the President of the Court of Cassation had been at fault for having become "the president of all judges" even though she had been a prosecutor during the communist regime. By contrasting the situation of the people who were "poor, silent, and oppressed" with that of the prosecutor L.D.S. – who was characterised "untouchable" and "rising" – the applicant had practically held L.D.S. guilty for the fact that she had had a superior status because of her position as a prosecutor.

16. Also, from the content of the article it could be understood that the case files processed by L.D.S. during communism had been used as a means of oppression in order to "root out the enemies of the socialist order and for the pursuit of the new man" or to convict women for abortion. In addition, the applicant stated generically in the article that "all these comrades", implying also "the Comrade Prosecutor" mentioned in the title of the article, had been "usurpers of Christ and His Law" and had "sternly guarded the communist prison".

17. Lastly, the article noted L.D.S.'s appointment as President of the Court of Cassation and referred to the fourteen years she had worked as a prosecutor during the communist regime when she "has accomplished so much, as to become the president of all judges herself".

18. The CDJ took the view that by writing the article in the above-mentioned manner the applicant had brought into question her compliance with the relevant legal provisions concerning the professional conduct of legal professionals. By relying on, amongst other things, Article 18 § 2 of the Code, Article 10 of the Convention, the case-law of the European Court of Human Rights ("the Court"), and on the applicant's statements, the CDJ held that the applicant had overstepped the limits of expression that had to comply with the duty of discretion. Thus, the balance between an individual's right to freedom of expressions and a democratic State's legitimate interest in ensuring that a person holding public office had complied with the scope of Article 10 of the Convention had been broken.

19. The CDJ held furthermore that by expressing opinions which could make a reasonable observer – that is to say a well-intentioned, disinterested, and informed person – doubt a colleague's professional integrity and

morality, the applicant had overstepped the limits of freedom of expression in relation to that person's right to personal image, honour and reputation. Therefore, there had been evidence suggesting that the applicant had breached Article 18 § 2 of the Code because in the article under her name she had implied that L.D.S. had not performed her professional duties lawfully between 1980 and 1994, when she had been working as a prosecutor.

20. The CDJ lastly held that the malicious and distorted presentation of L.D.S.'s professional activity and the suggestion that her behaviour had been questionable, without any supporting evidence in that regard, had caused unfounded suspicions to be raised about L.D.S.'s professionalism. The personal opinions expressed by the applicant in her article had amounted to conduct that had affected the right to personal image, honour, and reputation of the judge.

## B. Conduct proceedings against the applicant

### *1. Decision by the SJCSM*

21. In a decision of 16 October 2012 the SJCSM held that the applicant's article had breached Article 18 § 2 of the Code, which set out one of the limitations imposed on an officer of the court's right to freedom of expression. By relying on similar arguments to the ones relied on by the CDJ (see paragraphs 15-17 above), the SJCSM held further that the applicant's article had been written in a manner that had created a negative image of how Judge L.D.S. had carried out her duties as a prosecutor during communism.

22. The SJCSM dismissed the applicant's argument that her article had merely been a literary essay and found that she had overstepped the limits of freedom of expression that had to comply with the duty of discretion. Thus, the balance between her individual right to freedom of expression and a democratic State's legitimate interest in ensuring that a person holding public office had complied with the scope of Article 10 of the Convention had been broken.

23. The applicant's argument that Article 18 § 2 of the Code could not be read without taking into account the definition of good faith set out in Article $99^1$ § 1 of Law no. 303/2004 could not be accepted given that that article defined bad faith and serious negligence and concerned exclusively the exercise of professional functions by judges or prosecutors.

24. The SJCSM also reiterated the CDJ's finding concerning the applicant's conduct (see paragraphs 19-20 above).

25. In addition, the SJCSM held that in its decision of 28 March 2012 declaring unconstitutional the recently passed legislation on lustration, the Constitutional Court had noted that in their opinion submitted to the court the council of the Romanian Prosecutors' Association had stated that in

accordance with the relevant law in force during communist times civilian prosecutors had been competent to investigate only ordinary offences not political offences, and that prosecutors had not only not served the regime, but had been the only obstacle against abuses committed by repressive bodies.

26. In contrast to the above-mentioned point, the applicant had referred to the case files processed by L.D.S. during that time as being used as a means of oppression in order to "root out the enemies of the socialist order and for the pursuit of the new man" or to convict women of abortion, without presenting any concrete evidence. She was therefore practically blaming the President of the Court of Cassation simply because she had worked as a prosecutor during communism. Thus she had clearly affected the professional and moral integrity of a fellow judge.

*2. The applicant's challenge against the SJCSM decision*

27. On 3 December 2012 the applicant challenged the decision before the Plenary of the CSM. She argued that Article 18 § 2 of the Code concerned the expression of an opinion, but failed to define the concept. In the absence of a definition of this concept it could be reasonably argued that it meant expressing a subjective point of view. However, in order to affect a person's image, honour, and reputation such a personal opinion had had to clearly and expressly concern concrete acts and facts capable of compromising the professional integrity or the morality of that person. Her article had not contained any explicit clear statement concerning the morality and professional integrity of Judge L.D.S. Her essay had contained only several rhetorical questions which had not amounted to a categorical opinion. Also, by using the expression "Comrade Prosecutor" she had referred to an undeniable fact within the framework of portraying the communist times.

28. Relying on international and European instruments concerning judges, the applicant argued further that those instruments required special diligence in cases concerning the disciplinary investigation of judges, including a careful selection and assessment of strictly objective and essential elements so that any exposure of a judge to unacceptable pressure would be avoided. The same requirements had to be complied with in cases of a conduct investigation, given that pursuant to domestic law an acknowledgement of a breach of the Code amounted to a disciplinary sanction which would prevent her career advancement. Unlike in other European states, the Romanian Code had not been merely a guide on moral issues but a disguised disciplinary code.

29. Her conduct, which had consisted in her publishing a literary article depicting her personal experiences, had been examined in a deficient manner by breaching the highly important objectivity criteria set out in the relevant international instruments. Thus some segments and expressions

from the text had been assessed excessively and had been given subjectively a certain meaning which had been preferred by the investigators. Also, the rules and principles concerning a judge's duty of discretion had been misunderstood and had been interpreted very rigidly by relying on arguments that had had no connection to the text. The fact that the disciplinary proceedings had been diverted into code-of-conduct proceedings supported the argument of the pressure imposed of its own motion by an independent body which had not been created to investigate judges.

30. The applicant also argued that her essay had concerned the post of President of the Court of Cassation and had not referred to a colleague because she had not had any interest in L.D.S. as a person. Under the relevant international rules concerning judges, a judge had to be more tolerant and open to questions and criticism since he or she was very exposed to the public. That was even more so in cases of judges exercising an official State function. The person exercising an official State function was a subject of public interest and therefore it was natural that all aspects concerning that person's past and present career be debated publicly by any person.

31. Lastly, the applicant argued that her essay had been part of a series of other essays that she had already published and had not been a single and isolated work.

*3. Decision by the CSM's Plenary*

32. By a decision of 23 January 2013 the CSM's Plenary dismissed the applicant's challenge. It held that the applicant's status as an officer of the court had not deprived her of her right to freedom of expression. However, her conduct consisting of the statements she had made in her article published in the press had breached an officer of the court's duty of discretion. Thus, the balance between an individual's right to freedom of expressions and a democratic State's legitimate interest in ensuring that a person holding public office had complied with the scope of Article 10 of the Convention had been broken.

33. An officer of the court's duty of discretion implied moderation and restraint in presenting his or her opinions. The applicant had been entitled to express her opinion on some aspects concerning the activity of the justice system. However, the manner of making some of her statements had broken the above-mentioned balance, especially since there was no evidence suggesting that under the circumstances the expressions used had represented for her the only way of conveying the information she had intended to present.

34. By publishing the article, by the manner of presenting the events, and the expressions used, the applicant had affected the moral and professional integrity of a fellow judge. Her statements had not been value

judgments but had in fact conveyed certain specific points and had been a clear and unequivocal personal opinion concerning the moral and professional integrity of the President of the Court of Cassation. Her argument that her article had concerned exclusively the post of President of the Court of Cassation had been ill-founded. The opinions expressed in the article had concerned the person holding that post since a distinction could not be made between the post and the person holding it.

35. Moreover, presenting the realities of communist times could have been done in a less intense manner which would not have affected a colleague's professional integrity and honour and with a focus on the problems faced by the justice system.

36. The Plenary also held that the applicant's statements had to be examined in the context of the lack of trust in the justice system that had been apparent for a long time and which had seriously affected its authority and the appearance of impartiality. Clearly a judge should have known better than anyone the risks of statements which could have a significant impact on the reputation of the system. In this context using balanced language with an objective presentation of the system's deficiencies was better than making statements breaching professional conduct about a colleague. Therefore the applicant's argument that her essay had not contained a categorical opinion but only literary rhetorical questions could not be accepted.

37. The manner in which the applicant had chosen to express her opinion about the realities of the communist regime in suggesting that a fellow magistrate had had questionable conduct and professional evolution had resulted in unjustified doubts being raised about the morals and professional integrity of the President of the Court of Cassation.

38. Lastly, the CSM's Plenary concluded that the personal opinions expressed by the applicant in her article had amounted to conduct that had affected the right to personal image, honour, and reputation of Judge L.D.S.

*4. The applicant's appeal against the decision by the CSM's Plenary*

39. The applicant appealed against the CSM's Plenary's decision before the Court of Cassation and reiterated the arguments of her challenge of 3 December 2012 against the SJCSM's decision of 16 October 2012 (see paragraph 27-31 above).

*5. Judgment of the Court of Cassation*

40. In a final judgment of 1 November 2013 the Court of Cassation dismissed the applicant's appeal as ill-founded. It held that the applicant's article had presented in a distorted way the professional activity of the President of the Court of Cassation, suggesting that she had behaved questionably, without presenting supporting evidence. The expressions used

by the applicant, such as "Comrade Prosecutor", "all these comrades", "usurpers of Christ and His Law", and "have sternly guarded the communist prison" may have caused a reasonable observer – that is to say a well-intentioned, disinterested, and informed person – to doubt the moral and professional integrity of the person targeted by the article and clearly overstepped the boundaries of the applicant's duty of discretion.

41. According to the relevant international instruments and the Court's case-law the freedom of expression of officers of the court was exercised mainly under the umbrella of the Court's case-law and of the Convention both as regards the duties and responsibilities incumbent on those who serve justice and as regards the limitations imposed on their rights which were necessary to guarantee the authority and impartiality of the justice system. As a result, the applicant's argument that by presenting in an exclusively literary manner her personal life experiences she had not tarnished the dignity of the position of judge or the independence and impartiality of the judiciary could not be accepted, because the article had contained clear references to the professional activity and the behaviour of the President of the Court of Cassation and had made references to the communist period when she had worked as a prosecutor.

42. The court held furthermore that the applicant's argument that the disciplinary proceedings had been diverted into conduct proceedings on the motion of an independent body which had not been created to investigate alleged misconduct by judges could also not be accepted. The rules and regulations concerning the organisation and functions of the CSM and its bodies provided expressly for a procedure concerning the examination of alleged breaches of the Code which was different from the procedure set out for the examination of alleged disciplinary offences. Also, the manner in which the decisions taken during these separate sets of proceedings could be challenged was different. Therefore, the CDJ's decision of 21 May 2012 (see paragraph 14 above) had not represented a diversion of the disciplinary proceedings into code-of-conduct proceedings.

## III. OTHER RELEVANT INFORMATION

### A. Other CSM and administrative proceedings brought by the applicant

43. On 15 December 2015 the applicant asked the CSM to remove from her professional file the SJCSM's decision of 16 October 2012, the CSM's Plenary's decision of 23 January 2013, the Court of Cassation's judgment of 1 November 2013, and any other information concerning the alleged breach of the Code by her. In addition she asked the CSM to annul its decision to introduce the Code. She argued that the CSM's Plenary's decision to introduce the Code and the Code itself had been unconstitutional and

therefore any information concerning an alleged breach of the Code by her in her professional case file had been unconstitutional.

44. On 21 January 2016 the CSM's Plenary dismissed the applicant's requests as ill-founded, reasoning that there had been no legal grounds for removing the documents indicated by her from her professional file. In addition, the decision to introduce the Code and the Code itself had not been unconstitutional.

45. On 29 April 2016 the applicant brought administrative proceedings against the CSM seeking to have the relevant documents and any other information concerning the alleged breach of the Code by her removed from her professional file and the CSM's decision to introduce the Code annulled and Article 18 § 2 of the Code struck down. In addition, she raised an unconstitutionality objection concerning the decision to introduce the Code. She argued that, amongst other things, Article 18 § 2 of the Code was unlawful because it was unclear and lacked precision in so far as the person who was protected by this article was concerned. In particular, it was unclear whether the protection provided by the article in question concerned a "colleague" who was working for the same court as the officer of the court under investigation or one who was working for any other court in the country. A finding that an officer of the court had breached the Code could have negative consequences on his or her career in so far as professional evaluations and career advancement were concerned.

46. On 19 September 2016 the Piteşti Court of Appeal ("the Court of Appeal") referred the applicant's unconstitutionality objection concerning the CSM decision to introduce the Code to the Constitutional Court. The Constitutional Court proceedings appear to be still pending.

47. In a judgment of 4 October 2016 which was amenable to appeal the Court of Appeal rejected the administrative proceedings brought by the applicant against the CSM as ill-founded. There is no evidence in the file whether this set of proceedings ended in a final judgment.

## B. Information submitted to the Court by the parties

### *1. The applicant's participation in competitions for posts at the Court of Cassation*

48. On 3 February 2017 the CSM asked the IJ to produce a report on the professional integrity of the candidates, including the applicant, who had been declared eligible to participate in a competition organised from 3 January to 31 May 2017 for promotions to the Court of Cassation.

49. On 7 April 2017 the IJ produced the report concerning the applicant. It noted that: (i) following press allegations about unlawful rent reimbursement claims made by the applicant, the relevant authorities had stopped paying for her rent and she had initiated court proceedings against the authorities; (ii) the SJCSM had decided to impose a disciplinary penalty

on the applicant following a conflict she had had with a colleague in 2016, but the decision had not been final at the time of the report; (iii) and that according to the final SJCSM decision of 16 October 2012 (see paragraph 21 above) the applicant had breached Article 18 § 2 of the Code.

50. Subsequently, the IJ concluded that the applicant had not met the necessary requirements of conduct, duties, and integrity to compete for a Court of Cassation post.

51. On 22 January and 8 November 2019 the CSM informed the Government that the applicant had met the lawful conditions for participation in the 2017 competition (see paragraph 48 above), but she had failed to attend the actual exams. The outcome of the conduct proceedings against her had not prevented her from applying for promotions. According to the relevant legal provisions the SJCSM's decision of 16 October 2012 had been attached to the applicant's professional file, had to be taken into account during her professional evaluation, and would be effective for three years. The applicant's professional appraisals for 2011-13 and 2014-16 had not been finalised because of objective administrative reasons.

52. On 18 June 2019 the CSM informed the applicant that a judge's possible promotion to the Court of Cassation was assessed in the light of a candidate's last three finalised professional appraisals attached to his or her professional file. The rating of a judge's activity in each of the appraisals had to be "very good" for him or her to be eligible to participate in the competition. An appraisal report's finding concerning a judge's integrity was effective only for the three-year period under assessment and did not have any effect on subsequent reports. Given the manner in which the ratings were calculated, a code-of-conduct penalty could not result on its own in the officer of the court not being given a "very good" rating in his or her appraisal report. Since 2012 the CSM had examined seven cases concerning possible breaches of Article 18 § 2 of the Code by judges and prosecutors. In two cases, including the applicant's case, the SJCSM had found that Article 18 § 2 of the Code had been breached, while in the remaining five cases it had been decided in final decisions that the aforementioned article had not been breached.

53. On 8 November 2019 the President of the Bucharest Court of Appeal informed the Government that the applicant would not be eligible to apply for promotions to the Court of Cassation until January 2021 regardless of the outcome of her appraisals because in 2018 the Court of Cassation had confirmed the disciplinary penalty imposed on the applicant for the events which had taken place in 2016 (see paragraph 49 above).

### *2. The Court of Cassation's judgment of 17 April 2019*

54. In a final judgment of 17 April 2019 published in the Official Gazette No. 149 of 25 February 2020 the Court of Cassation allowed the administrative proceedings brought by Judge G.B., who was attached to a

County Court – who had been found to have breached Article 18 § 2 of the Code following a public statement concerning the moral integrity of L.D.S., who had been the President of the Court of Cassation at the time of the statement – against the CSM seeking to have Article 18 § 2 of the Code struck down and an order that the judgment be published in the Official Gazette. The court held that the article in question was unlawful because it was unclear and had lacked precision in so far as the person who was protected by this article was concerned. In particular, it was unclear whether the protection provided by the article in question concerned a "colleague" who was working for the same court as the judge under investigation or who was working for any other court in the country. A finding that an officer of the court had breached the Code could have had negative consequences on his or her career in so far as the professional evaluations and career advancement were concerned.

55. In a final judgment of 19 December 2019 the Court of Cassation allowed the proceedings brought by Judge G.B. seeking to have the final SJCSM decision finding her responsible for breaching Article 18 § 2 of the Code annulled with reference to the final judgment of 17 April 2019 (see paragraph 54 above).

### C. Information concerning the Government's former Agent

56. On 25 January 2019 the Government asked the Court for an extension of the initial time-limit set for the submission of their observations on the admissibility and merits of the applicant's case in a letter which was signed on Ms Brumar's behalf. The Court granted the requested extension and the Government eventually submitted their observations to the Court on 23 April 2019.

57. Ms Brumar was replaced from the post of Government Agent on 13 February 2019.

58. On 15 February 2019, following an enquiry submitted by the applicant's representative about Ms Brumar's appointment to the post of Government Agent, the Government's General Secretariat's public relations department sent him an email informing him that the manner in which Ms Brumar had been appointed to the post had been unlawful.

## RELEVANT LEGAL FRAMEWORK

59. The relevant provisions of the Code of Conduct for Judges and Prosecutors, as in force at the relevant time, read as follows:

**Article 18**

"(1) The judges' and prosecutors' relations within the groups they belong to must be based on respect and good-faith, regardless of their work experience and position.

(2) The judges and prosecutors were prohibited from expressing their opinion with regard to the moral and professional integrity of their colleagues."

# THE LAW

## I. PRELIMINARY REMARKS

60. On 18 February 2019, following Ms Brumar's removal from the post of Government Agent, the applicant asked the Court to hold that all the procedural documents submitted by the Government in the case were null and void and that the Government were estopped from raising any inadmissibility objections because their former Agent had not been appointed lawfully. She relied on the Government's General Secretariat's public relations department's email of 15 February 2019 confirming the unlawfulness of the appointment in question (see paragraph 58 above).

61. In addition, the applicant argued that the Government had submitted several facts concerning the relevant domestic rules and laws applicable at the time the applicant had published her article which had been manifestly erroneous and had clearly proved the Government's intention to mislead the Court.

62. The Court notes that according to Rule 35 of the Rules of Court the Contracting Parties are represented by Agents who may be assisted by advocates or advisers. It notes further that none of the information available in the instant case file suggests that an official decision, administrative or judicial, has been taken with regard to the alleged unlawful appointment of Ms Brumar to the post of Government Agent. Also, the Government have not informed the Court, either before or after Ms Brumar was replaced, of a potential impediment to her standing on their behalf. Moreover, the Court has not identified any procedural incident that would have raised doubts about her status as Government representative. Therefore, the Court sees no reason to conclude that the Government's observations or any other documents were not validly submitted.

63. As to the applicant's allegation that the Government have provided erroneous or misleading information, the Court notes that there is no indication in the case file of any intention to mislead the Court.

64. In the light of the above, the Court considers that the applicant's above-mentioned request (see paragraph 60) and allegation (see paragraph 63) are ill-founded and must be rejected.

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

65. The applicant complained that the measure imposed on her that was automatically preventing her from taking part in exams that would have furthered her professional advancement and the lack of foreseeability of

Article 18 § 2 of the Code in so far as it had failed to define the concept of an opinion expressed on the moral and professional integrity of a colleague had amounted to a breach of her freedom of expression. She relied on Article 10 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

## A. Admissibility

### *1. Submissions by the parties*

#### (a) The Government

66. The Government argued that the applicant had not suffered any significant disadvantage and had not had any interest in pursuing her application before the Court. As indicated also by the Court of Cassation's judgment of 1 November 2013 the code-of-conduct penalties had to be distinguished from the disciplinary penalties because they were covered by different laws and had different effects. In particular, a code-of-conduct penalty had not had an automatic effect on a judge's option to apply for a promotion. Even assuming that such a penalty would have made it virtually impossible for an officer of the court to obtain the "very good" rating which was needed for his or her promotion application to be validated, the applicant's allegation that the officer of the court would have been automatically prevented from sitting the actual exams was unsubstantiated.

67. The authorities' conclusion that the applicant had breached Article 18 § 2 of the Code had not prevented her from applying for and participating in the 2017 competition. Therefore, the applicant's failure to sit all the actual exams organised during the aforementioned competition raised questions as to what interest she could still have in pursuing her application before the Court.

68. The applicant had not provided any argument and had not shown any actions that she had taken that would support her allegations. Therefore she had been unable to prove any actual damage that she had suffered following the decision of 16 October 2012.

#### (b) The applicant

69. The applicant contested the Government's submissions.

70. The applicant contended that the code-of-conduct penalty imposed on her could have negative effects on her career indefinitely. Since she was already a judge with the Court of Appeal the only promotion that she could still pursue was that of judge with the Court of Cassation. However, her application for such a competition would be conditional on receiving a "very good" rating in her last three professional appraisals.

71. Moreover, the decision imposing the code-of-conduct penalty had been permanently included in her professional file and would be taken into account every time she applied for a promotion to the Court of Cassation. Also, her chances of passing the competition organised by the Court of Cassation in 2017 had been rather theoretical, even though it was true that the above-mentioned decision had not made it automatically impossible for her to obtain a "very good" rating in her 2011-13 appraisal.

*2. The Court's assessment*

72. The Court reiterates that it has considered the rule contained in Article 35 § 3 (b) of the Convention to consist of three criteria. Firstly, has the applicant suffered a "significant disadvantage"? Secondly, does respect for human rights compel the Court to examine the case? Thirdly, has the case been duly considered by a domestic tribunal (see *Smith v. the United Kingdom* (dec.), no. 54357/15, § 44, 28 March 2017)?

73. The first question of whether the applicant has suffered any "significant disadvantage" represents the main element. Inspired by the general principle *de minimis non curat praetor*, this first criterion of the rule rests on the premise that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case. In other words, the absence of any "significant disadvantage" can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant. However, the applicant's subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds (see, with further references, *C.P. v. the United Kingdom* (dec.) no. 300/11, § 42, 6 September 2016). A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest (see *Margulev v. Russia*, no. 15449/09, § 40, 8 October 2019, with further references).

74. The Court reiterates the key importance of freedom of expression as one of the preconditions for a functioning democracy (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 39, ECHR 2003-VI, and

*Margulev*, cited above, § 41). In cases concerning freedom of expression the application of the admissibility criterion contained in Article 35 § 3 (b) of the Convention should take due account of the importance of this freedom and be subject to careful scrutiny by the Court. This scrutiny should encompass, among other things, such elements as contribution to a debate of general interest and whether a case involves the press or other news media (see, with further references, *Sylka v. Poland* (dec.), no. 19219/07, § 28, 3 June 2014).

75. In the instant case, the Court notes that the applicant's subjective perception of the alleged violation was that it has affected her prospects of career advancement and had penalised her for participating in a debate of general interest concerning ultimately the reform and the functioning of the justice system (see paragraphs 70-71 above and 82 below). Seen in the context of the essential role a functioning justice system has in ensuring the proper functioning of any democratic society (see, among other authorities, *Narodni List D.D. v. Croatia*, no. 2782/12, § 59, 8 November 2018), the alleged violation of Article 10 of the Convention in the present case concerns, in the Court's view, "important questions of principle". Moreover, the Government have not contested the applicant's assertions that the penalty imposed on her had been permanently recorded in her professional file and that it would be an element taken into account if she applied for a promotion to the Court of Cassation. The Court is thus satisfied that the applicant suffered a significant disadvantage as a result of the code-of-conduct proceedings opened against her regardless of whether her pecuniary interests were actually affected or not and does not deem it necessary to consider whether respect for human rights compels it to examine the case or whether it has been duly considered by a domestic tribunal (see *mutatis mutandis*, *Margulev*, cited above, § 42).

76. Accordingly, the Court dismisses the Government's objection regarding the alleged lack of a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention.

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

## B. Merits

### *1. Submissions by the parties*

#### (a) The applicant

78. The applicant contended that even though, over time, many officers of the court had publicly criticised other such officials, only the applicant and Judge G.B. had been found guilty by the SJCSM of breaching Article 18 § 2 of the Code. Both judges had publicly criticised L.D.S. when

she had been the President of the Court of Cassation. However, the SJCSM's decision concerning Judge G.B. had been overturned by the courts following the Court of Cassation's judgment of 17 April 2019. Thus, the applicant had remained the only judge found guilty of breaching Article 18 § 2 of the Code and would remain the only judge punished for breaching that Article because the Article was no longer in force.

79. The code-of-conduct penalty imposed on the applicant had been an interference with her right to freedom of expression. As proven also by the Court of Cassation's judgment of 17 April 2019, the interference with the applicant's right had not been provided for by law because Article 18 § 2 of the Code had been unclear and unforeseeable. This judgment had had an *erga omnes* effect.

80. Also, even assuming that the interference had pursued a legitimate aim, it had not been necessary in a democratic society, had not been required by a pressing social need, had not been proportionate, and the reasons provided for it had been unconvincing and subjective.

81. The article published by the applicant had been essentially a literary text which had portrayed mainly her feelings as a child during the communist regime. The applicant's value judgments concerning the activity of the public prosecutors during the communist period had had a solid factual basis, specifically the historical truth and the relevant legislation at that time.

82. Her article had been part of a larger debate in Romanian society concerning the prosecutors' role in the totalitarian regime. It had been published one day after the Court of Cassation, at a hearing presided by L.D.S., had asked the Constitutional Court to examine the unconstitutionality of a Law enacted by Parliament concerning the lustration of the prosecution service. Also, the article had concerned a debate of general interest, specifically around the suitability of a former communist prosecutor to lead a pro-European reform process of the justice system as president of the highest court in the country. It had not concerned L.D.S. in her capacity of judge, but in her capacity as president of the highest court.

83. The article had contained factual information, namely that L.D.S. had worked as prosecutor during the communist regime. The applicant had not accused the President of the Court of Cassation of having committed unlawful acts in her capacity as a prosecutor, but had only wondered whether L.D.S. had committed such acts and whether as a member of an oppressive communist establishment, she had been apt to represent the Romanian justice system. The applicant had stated that L.D.S. had applied the legislation in force during the communist regime which – it was a notorious historical fact – had breached human rights. The applicant had never stated that L.D.S. had breached the law.

84. The language of the applicant's article had not been violent or defamatory. It had contained rhetorical questions and no accusations, and

had concerned a person that had not been immune to criticism and for whom the level of acceptable criticism had been higher than for an ordinary judge. The expression "Comrade Prosecutor" had been inspired by the relevant legislation in force at the time of the communist regime when the use of the word "comrade" had been mandatory.

85. The applicant argued that even though she had been able to apply for the 2017 Court of Cassation competition, any new element that would have appeared during that competition would have affected its outcome. She had realised during the competition that her application would certainly be invalidated for reasons which had included the conclusion of the IJ's report of 7 April 2017 relying exclusively on the measure taken against her in 2012. The latter report had been the main point of discussion during an oral exam assessing the candidates' integrity and conduct the applicant was required to take part in. To avoid public humiliation she had decided to withdraw from the competition. However, in all future Court of Cassation competitions a candidate's integrity was assessed by taking into account all the IJ's reports produced during past competitions, which in her case would include the 2017 report.

**(b) The Government**

86. The Government argued that even though the applicant had not been a journalist, she had decided to publish the article on a website specialising in judicial matters and the article had been subsequently reproduced by ordinary newspapers.

87. They acknowledged that the SJCSM decision of 16 October 2012 which was subsequently confirmed by the Court of Cassation's judgment of 1 November 2013 could be viewed as an interference with the applicant's right to freedom of expression. However, the interference had been provided for by law, had pursued a legitimate aim and had been necessary in a democratic society.

88. The relevant rules concerning the organisation and functions of the CSM as well as Article 18 § 2 of the Code had been accessible and foreseeable to the applicant and therefore she would have been able to adjust her conduct accordingly. It could not be argued that Article 18 § 2 of the Code had been unclear to the point where the applicant could not have expected a code-of-conduct investigation being opened against her. Even though concise, the Article in question had been clear that officers of the court had to refrain from expressing opinions that could have raised doubts about a colleague's professional and moral integrity. It had been sufficient to know the definition of the word integrity in order to be able to comprehend the meaning of the impugned Article. It did not seem that the applicant had contested the lawfulness and foreseeability of Article 18 § 2 of the Code in her appeal against the decision of 16 October 2012 or had asked for the impugned Article to be struck down. Her arguments concerned

rather the absence of the elements of the offence regulated by the aforementioned article.

89. The CSM had examined several alleged breaches of Article 18 § 2 of the Code. Also, the Court of Cassation's judgment of 17 April 2019 (given in the context of proceedings brought by another judge) had only held that the word "colleague" had lacked clarity and precision within the meaning of Article 18 § 2 of the Code. The aforementioned judgment had not questioned the need to have in place legal provisions which punished opinions expressed by officers of the court on the professionalism and integrity of other judges or prosecutors. In addition, the Court's case-law had not prohibited the national authorities from limiting a judge's or prosecutor's freedom of expression.

90. The Government argued that in the applicant's case the domestic authorities had acted within their discretion. The issue raised in the present case was the lack of foreseeability of the Code in so far as it had failed to define the concept of an "opinion expressed on the moral and professional integrity of a colleague". However, the Court of Cassation's judgment of 17 April 2019 had focused on the meaning of the concept of a prosecutor's or judge's "colleague" and not on the question of the concept of "opinion expressed on the moral and professional integrity of a colleague".

91. The measure taken against the applicant had sought to protect the rights and reputation of others as well as the prestige of the justice system. The domestic court had struck a fair balance between the competing interests at stake and had justly concluded that the applicant's statements had overstepped the limits of acceptable criticism in respect of a person who at that time had held the highest position in the justice system.

92. The applicant had accused L.D.S. of having taken advantage of an abusive and undemocratic system where the prosecutors had been "untouchable" in a language which, even though phrased in the form of rhetorical questions, had gone beyond simple satire or speculation. She had portrayed L.D.S. as a young "Comrade Prosecutor" "rising", working in the service of a system promoting social injustice until she had been appointed to lead the highest court in the country.

93. Even though the applicant's statements could be considered to have been made within the framework of a debate of general interest and to concern a subject of general interest, namely the justice system, her freedom of expression had not been absolute. She had been bound to act in good faith and to provide credible and accurate information.

94. As in other similar cases examined by the Court, the applicant's article had contained factual allegations which had not been confirmed by a sufficient factual basis. The applicant's statements had been made with the intention to cast doubt on L.D.S.'s honesty and reputation. She had never openly denied that her statements had concerned L.D.S. or claimed that her statements had been taken out of context or misinterpreted. She had never

retracted or limited the scope of her statements in a manner that would have convinced the court to deliver a judgment favourable to her.

95. The Government contended that the applicant had not been prevented from applying to participate in the 2017 Court of Cassation competition by the fact that she had breached Article 18 § 2 of the Code. Also, in its report of 7 April 2017 the IJ had reached its conclusions concerning the applicant by relying not only on the fact that she had breached Article 18 § 2 of the Code, as suggested by the applicant, but also on the fact that she had committed a disciplinary offence in 2016 and had been punished for it. According to the information provided by the relevant domestic authorities, it was the aforementioned disciplinary punishment and not the fact that she had breached Article 18 § 2 of the Code that currently prevented the applicant from applying to participate in promotion competitions to the Court of Cassation.

96. Unlike in other similar cases examined by the Court, the applicant in her article had not touched on questions concerning the commission of an offence by another officer of the court, an element which could have been considered to warrant on its own the interest of the public, but had tried merely to associate a judge's career with the communist regime in full knowledge of the negative connotation prompted by such an association. Also, the byline of the article included the applicant's full name and her position of judge, even though she had alleged that the article had only been a recount of her childhood memories and not of aspects connected to her professional life. By signing off on the article in this manner the applicant had accepted that the arguments exposed in her article would gain a certain weight in the eyes of readers given that statements made about a system by a person working within the system were always perceived to be more accurate.

97. The authorities had not imposed a disciplinary penalty on the applicant nor was the code-of-conduct penalty imposed on her severe, excessive or disproportionate. In addition, the applicant's article had not contained any general criticism concerning the functioning of the justice system and had not presented any information about a judge or prosecutor which had been based on her direct personal experience.

### *2. The Court's assessment*

#### (a) Whether there was an interference

98. The Court notes that the parties agreed that the SJCSM's decision of 16 October 2012 which was subsequently confirmed by the Court of Cassation's final judgment of 1 November 2013 amounted to an "interference" with the applicant's right to freedom of expression as guaranteed by Article 10 § 1 of the Convention (see paragraphs 79 and 87 above). The Court sees no reason to hold otherwise.

**(b) Whether the interference was prescribed by law and pursued a legitimate aim**

99. According to the Government, the interference complained of was provided for by law, in particular Article 18 § 2 of the Code, which was accessible, foreseeable, and sufficiently clear. Moreover, the interference complained of pursued a legitimate aim, namely that of protecting the rights and reputation of others as well as the prestige of the justice system (see paragraphs 87 and 88 above). The applicant did not seem to contest that Article 18 § 2 of the Code had been accessible, but she argued that it had lacked sufficient precision and foreseeability. She seemed to be prepared to accept though that the interference had pursued a legitimate aim (see paragraphs 79 and 80 above).

100. The Court notes that, in the present case, the interference was based on Article 18 § 2 of the Code, as in force at the relevant time, and that this provision was accessible. The parties' views, however, diverge as far as the precision and foreseeability of the said provision are concerned. The Court must thus examine whether the provision in question fulfilled the precision and foreseeability requirements.

101. The Court reiterates that a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the individual to regulate his or her conduct: he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice (see *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30; *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 131-133, ECHR 2015 (extracts)); and *Karapetyan and Others v. Armenia*, no. 59001/08, § 39, 17 November 2016). The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (*Chauvy and Others v. France*, no. 64915/01, § 44, ECHR 2004-VI).

102. As concerns the provisions in question at the relevant time, the Court finds no ambiguity in the contents of Article 18 § 2 of the Code: it provides that judges were prohibited from expressing an opinion with regard to the moral and professional integrity of their colleagues. It is true that the impugned article did not define precisely the concepts of "opinion expressed on the moral and professional integrity" and "colleague". However, the Court notes that the SJCSM, the CSM Plenary, and the Court of Cassation have regarded the points made by the applicant in her article as

falling within the concept of "opinion expressed on the moral and professional integrity" which does not appear to be an arbitrary or unpredictable interpretation.

103. Likewise, they considered implicitly that the concept of "colleague" included judges who worked in other courts than the one the applicant was working for (see paragraphs 21-42 above). The approach of the authorities in the applicant's case appears to have been consistent, at least in so far as the interpretation of the concept of "colleague" was concerned, with the approach the same authorities had in regard to Judge G.B. when they imposed a final code-of-conduct penalty on the aforementioned judge (see paragraph 54 above). In any event, the Court notes that, in the code-of-conduct proceedings the applicant had not raised any argument regarding the alleged lack of precision of the term "colleague" used in Article 18 § 2 of the Code.

104. It is true that in April 2019 the Court of Cassation eventually found during administrative proceedings brought by Judge G.B. against the CSM that the concept of "colleague" was not defined with sufficient precision as it could either mean a "colleague" working in the same court or one who was working in any other court, and therefore considered the impugned legal provision was unclear (see paragraph 54 above). However, the Court has repeatedly held that the mere fact that a legal provision is capable of more than one construction does not necessarily mean that it does not meet the requirement of foreseeability (see *Perinçek*, cited above, § 135). Moreover, the Court of Cassation's judgment was delivered years after the applicant had published her article or the code-of-conduct proceedings against her had ended with a final court judgment.

105. The applicant pointed out that there had been very few cases in which Article 18 § 2 had been applied. However, even assuming that at the time when the applicant published her article there was no case-law concerning the interpretation of Article 18 § 2 of the Code, this would not render the domestic authorities' application of that provision unpredictable or arbitrary (compare, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 150, 27 June 2017). The Court considers that the possibility that a code-of-conduct penalty could be imposed on her on the basis of the concept of "opinion expressed on the moral and professional integrity of a colleague" must have been foreseeable for the applicant.

106. The impugned legal provision was enacted to cover the conduct of judges, who formed a specific and restricted group, more specifically opinions expressed by them about the integrity of other colleagues. At the time of the impugned events, the legal provision in question had been in force for several years and the applicant, who was a professional judge and who had extensive experience in the field, could not claim to be ignorant of its content. As a result, had she had doubts about the exact scope of the provision in question, she could have refrained from publishing the article

(see, *mutatis mutandis*, *Karapetyan and Others*, cited above, § 41). It seems that she has not pursued the aforementioned avenue.

107. In the light of the above, the Court is of the opinion that Article 18 § 2 of the Code was formulated sufficiently clearly in order to fulfil the requirements of precision and foreseeability under Article 10 § 2 of the Convention.

108. The Court therefore concludes that the impugned interference was "prescribed by law". In addition, it accepts that the interference pursued the legitimate aim of protecting the rights and reputation of others and of maintaining the authority of the judiciary within the meaning of Article 10 § 2 (see paragraph 99 above).

109. What remains to be determined, therefore, is whether the interference was "necessary in a democratic society".

**(c) Whether the interference was necessary in a democratic society**

110. The Court reiterates the general principles set out in its case-law concerning the necessity of an interference with freedom of expression, the maintenance of the authority of the judiciary, and the freedom of expression of judges (see *Morice v. France* [GC], no. 29369/10, §§ 124-31, ECHR 2015, and *Baka v. Hungary* [GC], no. 20261/12, §§ 158-67, 23 June 2016).

111. Turning to the present case, the Court notes that the applicant published the impugned article under her own name, with her title as a judge attached to the Bucharest Court of Appeal alongside it (see paragraph 6 above). Therefore, in examining the interference in question the Court will attach particular importance to the position held by the applicant, her statements, and the context in which they were made (see *Di Giovanni v. Italy*, no. 51160/06, § 75, 9 July 2013, and *Baka*, cited above, § 166).

112. The Court notes further that the ultimate aim of the applicant's article was to raise questions about the role public prosecutors had had during the communist regime and about the aptness of a person who had occupied such a position for reforming a modern justice system and ensuring its proper functioning. It appears that the applicant wrote the article in the context of a larger public debate about legislation concerning the lustration of the prosecution service (see paragraphs 25 and 82 above) and she focused her attention on the career of the President of the Court of Cassation at the time when she published her article, namely Judge L.D.S., who had worked as a prosecutor during communism. The applicant's article did not concern Judge L.D.S.'s private life, but rather her professional activity and rise to the highest judicial position in the country (see paragraph 5 above). In these circumstances, the Court takes the view that the applicant's article concerned matters of general interest regarding the functioning and the reform of the justice system (see *Morice*, cited above, § 128).

113. The Court also notes that the applicant's article concerned the professional activity of an officer of the court, who may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner (see *Morice*, cited above, § 131), and may be subject to wider limits of acceptable criticism than ordinary citizens when acting in his or her official capacity (ibid.). That was especially true, when the judge or prosecutor in question was, like in the instant case, occupying a very visible public office, namely that of President of the Court of Cassation.

114. Bearing in mind the applicant's position as a judge, the Court reiterates that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question (*Baka*, cited above, § 164). The judicial authorities are required to exercise maximum discretion and that discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty (see *Di Giovanni*, cited above, § 80, with further references). It is important for the judiciary to enjoy public confidence if it is to be successful in carrying out its duties (ibid., § 81).

115. As to the content of the impugned article, the Court notes that the national authorities held that the applicant had breached Article 18 § 2 of the Code because of the intended meaning of her article and the expressions used in that article such as: "Comrade Prosecutor", "the president of all judges", "untouchable", "rising", "to root out the enemies of the socialist order and for the pursuit of the new man", "convict [women] for abortion", "all these comrades", "usurpers of Christ and His Law", "sternly guarded the communist prison", and "has accomplished so much, as to become the president of all judges herself". In addition, they were of the view that her article had breached her duty of discretion, moderation and restraint in presenting her opinions, had put in doubt the moral and professional integrity of a fellow judge, and that her statements had not been value judgments but conveyed specific aspects and a clear and unequivocal personal opinion concerning the moral and professional integrity of the President of the Court of Cassation. They considered that the article may have caused a reasonable observer to doubt the moral and professional integrity of the person targeted by it, had been detrimental to the reputation of the justice system, and had tarnished the dignity of the position of judge and the independence and impartiality of the judiciary. Furthermore, the applicant had not presented supporting evidence for her allegations (see paragraphs 21-42 above).

116. The Court notes that the national authorities are, in principle, better placed than an international court to assess the intention behind impugned phrases and statements and, in particular, to judge how the general public

would interpret and react to them (see, *mutatis mutandis*, concerning a complaint under Article 8 of the Convention about an alleged breach of the right to reputation, *Jalbă v. Romania*, no. 43912/10, § 33, 18 February 2014). Having regard to the balancing exercise carried out by the national authorities and the reasons advanced by them for their findings, the Court sees no reason to call their conclusion into question.

117. The Court notes in this connection that the applicant's article was mainly worded in the form of an account of her personal experiences during communism, which did not concern L.D.S. directly, and which included statements about activities carried out by prosecutors, a category to which Judge L.D.S. had belonged at the time, as well as rhetorical questions concerning her professional activity and rise. Taking into account the overall tone and wording of the applicant's article as well as the scope of the questions raised by her throughout, the Court agrees with the domestic authorities' assessment that the article actually contained allegations of specific conduct by prosecutors, in general, and L.D.S. in particular – specifically using the case files as weapons "to root out the enemies of the socialist order and for the pursuit of the new man", "hunting down" women who had been forced to abort their children, usurping "Christ and His Law" and guarding "sternly the communist prison" – detrimental to the remaining members of society. Her article therefore suggested to the public that L.D.S. had behaved in an immoral and unlawful manner, and was likely to lead it to believe that the acts constituting the conduct of which L.D.S. was accused by the applicant were established and incontrovertible facts.

118. The Court notes, however, that none of the information relied on by the applicant in her submissions – including the historical truth, the relevant legislation at that time, and the notoriety of the fact that the legislation in force during the communist regime had breached human rights (see paragraphs 81 and 83 above) – appears to support the suggestion that L.D.S. had committed any acts of the nature imputed by the applicant either at the time when she had been working as prosecutor or after she had become a judge. Also, it would appear that the legislation concerning the lustration of the prosecution service was declared unconstitutional by the Constitutional Court (see paragraph 25 above).

119. Under these circumstances, the Court is satisfied that the reasons given by the national authorities and the domestic courts in carrying out a balancing exercise between the competing rights at stake were relevant or sufficient, given the absence of a sufficiently accurate factual basis for the applicant's statements. The Court agrees with the national authorities' findings that, in that context and as a judge, the applicant should have been aware and mindful of the risks involved in publishing her article and the impact it could have had (see paragraphs 36 and 42 above) both on Judge L.D.S.'s professional life and on the authority of the judiciary.

120. What remains to be examined is the proportionality of the penalty. As to the consequences of the code-of-conduct proceedings for the applicant, the Court notes that it did not entail any concrete and imminent loss of judicial office or any pecuniary penalty for her. It is true that the Government have not disputed that the decision in the code-of-conduct proceedings was permanently included in her professional file and would be taken into account in her professional appraisal for 2011-13, which seems to be still pending. Also, during the 2017 competition for promotion to the Court of Cassation the IJ relied on the aforementioned decision when it produced its negative report concerning the applicant's professional integrity, which suggests that the impugned penalty was relevant and affected the assessment of the applicant's applications for promotions (see paragraphs 49-50 above).

121. The Court notes, however, that the IJ did not take into account only the code-of-conduct penalty when it produced its negative report of April 2017 concerning the applicant (see paragraph 49 above). Also, the applicant has accepted that the penalty in question, taken on its own, would not automatically prevent her from applying for a promotion to the Court of Cassation in the foreseeable future (see paragraph 71 above). Moreover, it does not seem that the applicant was prevented by the penalty either from applying to participate or from actually participating in the promotion competitions (see paragraph 48 above), but she nevertheless decided to withdraw.

122. The Court takes note of the reasons put forth by the applicant for her decision to withdraw from the 2017 competition (see paragraph 85 above). Given the findings above, the Court is not however prepared to speculate on the possible outcome of this or any future competitions or whether the decision finding that the applicant had breached Article 18 § 2 of the Code would result, on its own, in her automatic disqualification or dismissal from competitions.

123. Reiterating its view on the chilling effect that a fear of sanction may have on the exercise of freedom of expression (see, for instance, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003), the Court is of the view that, even if the decision taken in the code-of-conduct proceedings may have had a certain "chilling effect" on the exercise of the applicant' freedom of expression, the decision was not excessive in the circumstances of the present case (see, *mutatis mutandis*, *Antonescu v. Romania*, no. 31029/05, § 33, 21 February 2012, and *Di Giovanni*, cited above, § 83).

124. In the light of the foregoing and the particular importance it attaches to the position held by the applicant, the Court considers that the domestic authorities struck a fair balance between the need to protect the

authority of the judiciary and the reputation or rights of others, on the one hand, and the need to protect the applicant's right to freedom of expression on the other. The interference was thus "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

125. The Court's finding is without prejudice to the applicant's decision to pursue to the end the administrative proceedings she had initiated against the CSM, seeking to have Article 18 § 2 of the Code struck down (see paragraphs 45-47) above). If successful, given Judge G.B.'s experience with similar proceedings 54 and 55 above), it seems that they could give the applicant the opportunity to have the penalty imposed on her annulled and removed from her professional file.

126. There has accordingly been no violation of Article 10 of the Convention.

## III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

127. Relying on Article 14 of the Convention taken jointly with Article 10 and on Article 1 of Protocol No. 12 to the Convention the applicant complained that she had been discriminated against by the relevant authorities because as an ordinary judge she had been punished for her statements which had not been serious, while the head prosecutor of the National Anticorruption Department had not been punished at all for violent and defamatory statements concerning the activities of several magistrates that he had identified expressly or who had been easily identifiable.

128. The Court has examined the complaint as submitted by the applicant. However, having regard to all the material in its possession, and in so far as it falls within its jurisdiction, the Court finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

129. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention

# FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 10 of the Convention concerning the alleged breach of the applicant's right to freedom of expression admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 8 December 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_1} {signature_p_2}

Andrea Tamietti
Registrar

Yonko Grozev
President