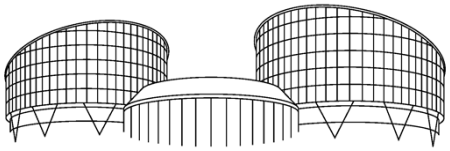

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KÖVESI v. ROMANIA

(Application no. 3594/19)

JUDGMENT

Art 6 (civil) • Access to court • Inability of chief prosecutor to effectively challenge premature termination of mandate • Both conditions of the *Eskelinen* test not met • Absence of judicial control of legality of removal decision not in interest of State • Judicial review limited to formal review not sufficient in circumstances • Essence of right of access to court impaired
Art 10 • Freedom of expression • Premature termination of chief prosecutor's mandate following public criticism of legislative reforms • Impugned measure not pursuing a legitimate aim • Criticism in context of debate of public interest, not containing attacks against the judiciary • Statements calling for high degree of protection • Chilling effect of the measure defeating the very purpose of maintaining the independence of the judiciary • Interference not accompanied by effective and adequate safeguards against abuse

STRASBOURG

5 May 2020

In the case of Kövesi v. Romania,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the above application 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 Laura-Codruța Kövesi ("the applicant"), on 28 December 2018,

the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

the comments submitted by the Open Society Justice Initiative, the International Bar Association's Human Rights Institute and the Helsinki Foundation for Human Rights, who were granted leave to intervene by the President of the Section,

Noting that on 30 January 2019 the Government were given notice of the application and that the application was granted priority under Rule 41 of the Rules of Court,

Having deliberated in private on 24 March 2020,

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

INTRODUCTION

The applicant complained that she had been denied access to a court to contest the premature termination of her mandate as chief prosecutor of the National Anticorruption Directorate. She also complained that her mandate had been terminated as a result of the views and positions that she had expressed publicly in her professional capacity concerning legislative reforms affecting the judiciary. She relied on Articles 6 § 1, 10 and 13 of the Convention.

THE FACTS

1. The applicant was born in 1973 and lives in Bucharest. She was represented by Ms N.T. Popescu, a lawyer practising in Bucharest.

2. The Romanian Government ("the Government") were represented by their Agent, Mr V. Mocanu of the Ministry of Foreign Affairs.

I. APPOINTMENT OF THE APPLICANT AS CHIEF PROSECUTOR OF THE NATIONAL ANTICORRUPTION DIRECTORATE

3. On 15 May 2013, after seventeen years of service as a prosecutor – including six years as Prosecutor General of the prosecutor's office attached to the High Court of Cassation and Justice – the applicant was appointed by the President of Romania, by Decree no. 483/2013, as chief prosecutor of the National Anticorruption Directorate (*Direcţia Naţională Anticorupţie* – hereinafter "the DNA") for a three-year term, until 16 May 2016.

4. In that capacity, the applicant carried out managerial tasks and coordinated the entire activity of the DNA, a department of the prosecutor's office attached to the High Court of Cassation and Justice specialised in the investigation of medium-to high-level corruption crimes.

5. On 12 November 2015 the section for prosecutors of the Higher Council of the Judiciary (*Consiliul Superior al Magistraturii* – hereinafter "the CSM"), the body responsible for management and disciplinary matters within the judiciary, drew up a professional appraisal report of the applicant's activity from 1 January 2005 to 2 October 2006 as chief prosecutor of the Sibiu County Department for the Investigation of Organised Crime and Terrorism, and from 16 May 2013 to 14 August 2014 as chief prosecutor of the DNA. The report mentioned that the applicant had managed to increase the efficiency of the departments under her supervision and that she had fulfilled her managerial tasks with promptness and within the set deadlines. It also mentioned that she had mobilised and motivated the personnel under her supervision through constant communication and personal example, encouraging good performances from them. In addition, she had respected the professional honour and dignity standards and had showed impartiality and objectivity in the fulfillment of her duties. The report concluded that the applicant had reached the maximum level in all parameters and her final assessment had been "Very good".

6. In the beginning of 2016 the Minister of Justice submitted for endorsement by the CSM a proposal to reappoint the applicant to the position of chief prosecutor of the DNA for a new three-year term. In support of her proposal, the Minister mentioned that the applicant had organised the institution she ran with utmost efficiency and she had tackled corruption at the highest level, facts recognised both at national and international level. Her efforts had also been oriented towards the fulfilment of the obligations assumed by Romania within the European Commission's Mechanism for Cooperation and Verification as regards the reform of the judicial system.

7. On 28 March 2016 the section for prosecutors of the CSM gave a favourable opinion to the proposal by the Minister of Justice. In order to reach its decision the CSM had examined the Minister's proposal, a report drafted by the Human Resources Department of the Ministry of Justice, the

applicant's curriculum vitae and her declarations of interest and of non-affiliation to the secret services before 1990. In addition, the applicant was interviewed by the section for prosecutors of the CSM. The CSM observed that in 2015 the number of indictments had been higher than in 2012 while the number of people in high positions sent to trial had increased compared to 2012. The number of cases solved in 2015 had also increased compared to 2014. The CSM concluded that the applicant's activity as chief prosecutor of the DNA had been remarkable, with results appreciated also at international level. The panel endorsed the Minister's proposal unanimously.

8. On 7 April 2016 the President of Romania, on the basis of the proposal by the Minister of Justice (see paragraph 6 above) and the endorsement of the CSM (see paragraph 7 above), reappointed the applicant as chief prosecutor of the DNA for a new three-year term, from 16 May 2016 to 16 May 2019.

II. PARLIAMENTARY ELECTIONS OF 2016 AND SUBSEQUENT DEVELOPMENTS

9. After the parliamentary elections which took place on 11 December 2016 a new parliamentary majority was formed and a new government was established in January 2017.

10. On 31 January 2017, the newly formed government adopted an emergency ordinance which modified certain provisions of the Criminal Code and the Code of Criminal Procedure (Government Emergency Ordinance no. 13/2017). The main amendments brought in by the Ordinance concerned the decriminalisation of abuse of office committed on the occasion of approval or adoption of all types of legislation when the damage was lower than 200,000 Romanian lei (ROL – approximately 44,000 euros (EUR)) and a lower punishment for the said crime when the damage was higher than the ROL 200,000 threshold. The Ordinance also provided for the decriminalisation of all acts of aiding and abetting committed by relatives up to the second degree.

11. The adoption of the above ordinance generated demonstrations of protest throughout the country and internationally.

12. In this context, on 2 February 2017 the DNA issued a press release informing the public that a complaint had been lodged concerning the manner in which certain pieces of legislation had been adopted and that checks were being conducted in that connection.

13. On 27 February 2017 in another press release, the DNA informed the public that, after looking into the circumstances giving rise to the above-mentioned complaint, no incidents of corruption had been revealed. Nevertheless, it had been decided to send the file to the prosecutor's office attached to the High Court of Cassation and Justice, the competent authority

to continue the investigation into possible offences consisting of intentionally presenting misleading data to Parliament or the President as regards the activity of the Government or a ministry in order to conceal the commission of acts against the State's interests, removal or destruction of documents, removal or destruction of evidence and forgery. The press release went on to summarise the facts on which the above decision had been based as revealed by the investigation. It mentioned that Ordinance no. 13/2017 (see paragraph 10 above) had been adopted by the Government without being included on the agenda of their meeting and without allowing the necessary time for endorsement by the competent institutions. Moreover, an unfavourable opinion had been destroyed and entries in the correspondence registry at the office of the Minister of Justice had been modified in order to conceal the receipt of the draft ordinance for endorsement.

14. On 3 July 2017, following a request by the Minister of Justice, the CSM ordered an inspection to be conducted at the DNA with the aim of determining the efficiency of its management and the fulfilment by the management of their duties as provided by law and internal regulations, and whether the staff respected the procedural rules and internal regulations. The inspection concerned the period between 1 January 2016 and 30 June 2017. The findings of the inspection were included in a 509-page report drafted on 15 September 2017 by the Department of Judicial Inspection for Prosecutors of the CSM. The inspection report pointed out that the applicant had fulfilled all the requirements of her position by creating a harmonious team capable of reaching a good level of performance in the investigation of corruption crimes. She was described as having good communication and conflict-resolution skills, efficiency and authority. The report concluded that the applicant fully complied with all the requirements needed to continue carrying out her role.

15. On 23 August 2017 the Minister of Justice announced that a thorough reform of the judicial system was being planned. Subsequently, on 27 September 2017 Parliament decided to create a special parliamentary commission with the purpose of recommending changes to certain legal provisions in the field of criminal and civil law and justice.

16. The work of the above commission started on 25 October 2017 with the reform of the three basic laws of the Romanian justice system: Law no. 303/2004 on the status of judges and prosecutors (see paragraph 73 below), Law no. 304/2004 on the organisation of the judiciary (see paragraph 74 below) and Law no. 317/2004 on the CSM (see paragraph 75 below).

17. The amendments to the three above-mentioned laws and the related legislative process have drawn criticism in Romania and internationally. At the domestic level, this took the form, *inter alia*, of: two negative opinions of the CSM; a memorandum for the withdrawal of the amendments signed

by almost 4,000 judges and prosecutors; silent protests of judges and prosecutors in front of the courts and public prosecutors' offices; parliamentary questions and speeches by representatives of the opposition in the Romanian Parliament, to the Constitutional Court and also to international institutions, including the Venice Commission; protests by civil society organisations.

III. REQUEST BY THE MINISTER OF JUSTICE TO REMOVE THE APPLICANT FROM HER POSITION AS CHIEF PROSECUTOR OF THE DNA

18. On 23 February 2018 the Minister of Justice sent the CSM a document entitled "Report on managerial activity at the DNA" ("the Report") which included a proposal for the applicant's removal from her position. The Report outlined its proposal in its introduction as follows:

> "The present report is the position of the Minister of Justice, determined by his constitutional role as provided by Article 132 of the [Constitution of Romania], which, referring to the status of prosecutors, establishes in paragraph 1 that 'prosecutors [must] conduct their activity in accordance with the principles of legality, impartiality and hierarchic supervision, under the authority of the Minister of Justice'. It was drafted on the basis of the debates which had grown in volume in the public space during the past year, between February 2017 and February 2018, debates which have profoundly divided public opinion, and engendered, at unprecedented levels in the recent history of Romania, personal attacks and the questioning of constitutional, European and universal values ... [They] have skewed the opinions of European and international forums in respect of Romania, have triggered evaluation mechanisms never before used against our country, threatening the fulfilment of the objectives assumed and endangering the rule of law."

19. The Report further mentioned that its findings and conclusions referred solely to the period between February 2017 and February 2018 and concerned specifically the applicant's managerial activity as chief prosecutor of the DNA. The Report mentioned that it was based on a previous report by the Minister of Justice concerning the evaluation of the managerial efficiency and the manner of fulfilment of her obligations by the chief prosecutor of the DNA as well as on the CSM's inspection report of 15 September 2017 (see paragraph 14 above). It concluded that, however, "the decision would not be taken exclusively based on the inspection report". The introduction of the Report ended as follows:

> "The conclusions of the current Report are based, therefore, on evidence gathered from the beginning of the reference period until the present, on an analysis of decisions, facts and specific actions, including of the public statements made by the chief prosecutor of the DNA, as reflected in documents drawn up by public authorities at the end of the period concerned, on which the mentioned report of the Department of Judicial Inspection for Prosecutors is based."

20. The Report continued by detailing the reasons justifying the applicant's removal from her position. Firstly, it was mentioned that, during

a period of one year, three complaints had been lodged with the Constitutional Court concerning alleged breaches of the Constitution by the DNA. In two of these cases, breaches of the Constitution had been found.

21. The first case concerned Constitutional Court decision no. 68 of 27 February 2017, from which the Report quoted as follows:

> "The public prosecution office [*Ministerul Public*], as part of the judicial authority, considered itself competent to check the utility, the compliance with the legislative process and, implicitly, the lawfulness of the adoption of a Government's emergency ordinance. Such behaviour implies a serious breach of the principle of separation of powers in the State, as guaranteed by Article 1(1) of the Constitution, because not only did the public prosecution office overstep its remit as provided by the Constitution and law but it also arrogated competences which belong to the legislature or to the Constitutional Court. ... By examining the circumstances of the adoption of Government Emergency Ordinance no. 13/2017 ... the DNA assumed the competence to conduct a criminal investigation in a field which was outside the legal framework, which might lead to institutional deadlock ... Therefore, the court acknowledges the existence of a constitutional conflict between the public prosecution office – the DNA, on one side, and the Romanian Government, on the other ..."

Based on the findings of the above decision and the fact that the applicant had publicly stated that she had personally taken responsibility for the investigation in this case, the Report concluded that the applicant had overstepped the limits of her competences as chief prosecutor.

22. The second case concerned Constitutional Court decision no. 611 of 3 October 2017, in which the court concluded that there was a constitutional conflict between the Romanian Parliament on one side and the public prosecution office on the other, generated by the applicant's refusal to appear before the Special Investigation Commission established by Parliament in order to investigate aspects concerning the organisation of the 2009 presidential elections. The Constitutional Court held that the applicant, in her capacity as chief prosecutor of the DNA, had refused to comply with three summonses to appear before the above-mentioned commission and informed the Commission in writing that she did not know of any aspects which might serve for the parliamentary investigation in question. The Constitutional Court considered that the applicant's conduct – more specifically her failure to reply to two specific questions addressed by the commission – had blocked the activity of that commission. The Report further quoted the following from the Constitutional Court's decision:

> "... [B]y her attitude, the chief prosecutor of the DNA, not only excluded *a priori* any good-faith cooperation with the authority which exercises the people's sovereignty – the Romanian Parliament – but also refused to participate in the clarification of certain aspects in connection with an event of public interest (her presence on the evening of 6 December 2009, the date on which the presidential elections took place, together with other people holding public positions – the director and the deputy director of the Romanian Information Service and senators –, at the house of Senator G.O. ..."

The Report concluded in this connection that the applicant, behaving as described in the Constitutional Court's decision, had refused to cooperate with the representative public authorities and had refused to give information that was in the public interest. This had showed the "confusion made by the DNA chief prosecutor between her private life and her important position in a State public authority".

23. The third case concerned decision no. 757 of 23 November 2017, adopted by the Constitutional Court following a request by the President of the Senate to resolve a constitutional conflict between the Government on one side and the public prosecution office on the other. The constitutional conflict had allegedly been generated by the opening of an investigation by the DNA against several public officials, including a member of the Government, for corruption in connection with the adoption of a Government decision. In this case, the Constitutional Court held that there was no constitutional conflict and that the prosecutors were competent to investigate possible criminal acts committed in connection with the adoption of an individual administrative decision, such as the decision in question. On this point, the Minister considered that the above-mentioned decision of the Constitutional Court was yet another reason justifying the applicant's dismissal, because it showed that the DNA had overstepped the limits of its competencies when it had decided to investigate the utility of the adoption of a Government decision.

24. The Minister further stated that this finding was also proved by a press release, issued by the DNA in connection with the above investigation, in which it was mentioned that the initiation of the Government ordinance in question had been done in breach of the procedure for the drafting, endorsement and presentation of legislative proposals. The Minister considered that by issuing the press release in question the applicant had overstepped the limits of her competencies. Moreover, he further alleged that the applicant had subsequently withdrawn this press release, which, in his opinion, showed that she had refused to accept her error.

25. Another reason justifying the applicant's removal from her position was the fact that she had got personally involved in the investigations conducted by the prosecutors under her supervision. In support of this statement the Minister quoted parts of a public statement made by the applicant in connection with the investigation concerning Ordinance no. 13/2017 (see paragraph 10 above) as follows:

> "I personally take responsibility for the investigation in this case together with [prosecutors] D. and U. We have not moved one millimetre to the left or to the right without me saying yes."

This, in the Minister's opinion showed that the applicant lacked managerial skills.

26. The Report continued by mentioning that the CSM inspection report (see paragraph 14 above) had found one instance of a possible disciplinary offence allegedly committed by the applicant as well as one instance of authoritarian behaviour, both in the human-resources field.

27. Another element justifying the applicant's dismissal was based on a press release issued on 12 January 2018 by the Department of Judicial Inspection of the CSM in which it was stated that disciplinary proceedings were pending against the applicant for several disciplinary offences in relation to professional honour and her behaviour towards colleagues.

28. The Report then continued, on twelve out of the remaining nineteen pages, to detail various statements made by the applicant in public. The relevant parts of the Report read as follows:

> "For instance, in a speech held at the Moldova-Romania Justice Forum, second edition, Bucharest 23-24 November 2017, in her capacity as representative of the institution she runs, the chief prosecutor of the DNA said that the Constitutional Court '[had] adopted in 2016 a decision declaring the text of law defining the crime of abuse of office constitutional only if by the phrase 'in a defective manner' was to be understood as 'by breaching the law'. **This is the reason why prosecutors [could] only investigate acts of abuse of office committed by breaching primary legislation, concluding that 'it [was] evident that society remain[ed] unprotected from such practices after last year's decision of the Constitutional Court'**. She then continued to give some examples from the cases of the DNA, emphasising that 'following the aforementioned Constitutional Court decision, in 2017, 245 files had been closed and 188 million euros [EUR] – damage caused to public funds – could no longer be recovered by the State. **Besides the losses of millions of euros to the State budget, the whole of society will watch how those in public office will be busy satisfying interests different from the interest of the community. And then we pose a legitimate question: in the context of the proposed legislative changes concerning abuse of office and when millions of euros are lost by society through these actions, is it justified to limit the investigations?**"

The Report mentioned that these statements, repeated by the applicant in the media on several other occasions, showed that she actually contested the general and binding character of the decisions adopted by the Constitutional Court and that she considered herself as being "both legislature and Constitutional Court".

29. Further on, the Report mentioned that, in the beginning of 2017, the applicant had stated to the British Broadcasting Corporation that she had been afraid of the dismantling of the DNA and talked about "daily threats against the judicial system", mentioning that she had been afraid of legislative changes which might affect the fight against corruption, modify the jurisdiction of or even dismantle the institution she ran. Moreover, the Report stated that in an interview with Euronews the applicant had "criticised harshly some draft laws which [had been the subject at that time of] parliamentary debate, accusing politicians and businessmen of being against the efforts being made to clean one of the most corrupt countries in the European Union". In addition, the Report set out that in an interview

with the newspaper *Libertatea* the applicant had stated that the legislative amendments discussed by Parliament had in fact been "a pretext to eliminate the investigators' capacity to uncover and solve crimes" and that "the fight against corruption w[ould] be terminated". The Report concluded that these statements showed the applicant's "obsessive fear" of losing her position as head of the DNA.

30. In its final part, the Report also mentioned that in the last period the number of acquittals in the cases sent to the courts by the DNA had increased, a fact which raised questions about the manner in which the fundamental rights were being respected by the chief of the DNA. Moreover, the applicant was also criticised briefly for one example of lack of involvement in identifying and eliminating abuses by prosecutors under her supervision, one example of a lack of promptness in solving a case and one example of lack of reaction to a complaint concerning alleged unprofessional behaviour lodged against a prosecutor under her supervision.

31. The Report concluded as follows:

> "The DNA is not identified with its chief prosecutor, whose actions in the past year, have showed that they may endanger the institution she runs, by excess of authority, discretionary behaviour, defying the authority of Parliament and the Government's role and competences, [and] contesting the decisions and the authority of the Constitutional Court. ... The [applicant's] behaviour has created a crisis without precedent in the recent history of this country, which has made Romania, incorrectly, the subject of concerns, actions, facts, statements, [and] institutional reactions, at the national, European and international levels, with effects in the economic and social fields.
>
> The chief prosecutor of the DNA has abused the trust of the representatives of international forums, and of the citizens of this country, spreading in the public space information without any real, legal or constitutional basis. She has created for herself an image of an anti-corruption hero based on this trust and [behind a] lack of transparency. This situation cannot continue because we are talking about the protection of the national interest ..."

32. The Report ended as follows:

> "**In view of the above-mentioned elements it has been overwhelmingly proved that the chief prosecutor of the DNA, through all the facts presented here, has exercised and is currently carrying out her role in a discretionary manner, turning the anti-corruption activities and the DNA away from their constitutional and legal role. For these facts, intolerable in a State of the rule of law, I am hereby putting in motion the procedure for the removal of [the applicant] from her position as chief prosecutor of the DNA on the basis of Article 54(4) taken together with Article 51(2) letter b of Law no. 303/2004 on the status of judges and prosecutors.**
>
> This report, accompanied by the proposal for the removal of the DNA chief prosecutor will be transferred to the section for prosecutors of the CSM and to the President of Romania for decision, in accordance with legal prerogatives."

IV. PROCEEDINGS BEFORE THE CSM

33. In a letter dated 26 February 2018 and bearing the "received" stamp of the DNA of 27 February 2018, the applicant was informed by the CSM that she was summoned to appear at a hearing of its section for prosecutors on 27 February 2018 in order to present her point of view as regards the proposal for her removal from her position made by the Minister of Justice. A copy of the Report was enclosed with the letter.

34. On 27 February 2018 a hearing took place before the section for prosecutors of the CSM, during which statements from the Minister of Justice and the applicant were heard.

35. The applicant submitted, both orally and in writing, that the Minister had never requested any point of view or clarifications from her in connection with the elements on which the removal proposal had been based. Moreover, the Report had referred to the period between February 2017 and February 2018 but the report of the Department of Judicial Inspection to which it made reference concerned a period which had ended in the first term of 2017 (see paragraphs 14 and 19 above). On this point, the applicant submitted a copy of a favourable evaluation report concerning her activity for the period between 2016 and the first term of 2017.

36. The applicant went on to reply to each of the criticisms raised in the Report.

37. As regards decisions nos. 68 and 611 of the Constitutional Court (see paragraphs 21 and 22 above), the applicant stated that on the website of that court there were fifty decisions in which constitutional breaches had been found, including the two decisions in question. However, there had been no other request for the sanctioning or dismissal of the heads of the institutions involved or of the legislative authorities which had adopted the legal provisions found to be in breach of the Constitution. The fact that, out of the thirteen constitutional conflicts found by the Constitutional Court in the past fourteen years, only two referred to the DNA did not prove that that institution had engaged in systematic breaches of the Constitution. The applicant submitted that decision no. 68, in which the Constitutional Court had found a constitutional conflict between the DNA and the Government, had been the first of its kind in the Romanian legal system and the first time that the Constitutional Court had examined the lawfulness of a decision to open an investigation. Nevertheless, as the decisions of the Constitutional Court did not have retroactive effect, at the time of the opening of the investigation in question she could not have foreseen the interpretation given by the Constitutional Court to the relevant legal provisions in its subsequent decision. In respect of decision no. 611 the applicant explained that her refusal to appear before the parliamentary commission in question and her subsequent written reply to the enquiries of that commission had

also become the object of a disciplinary investigation by the Department of Judicial Inspection of the CSM, finalised with a decision to close the case since no breach of law or of behavioural standards for prosecutors had been found.

38. As regards the criticism that she had overstepped the limits of her competencies by issuing a particular press release (see paragraph 24 above), the applicant explained that, on 22 September 2017, in reply to questions received from the media, the DNA had issued a press release informing the public that an investigation against several suspects (including a number of high office holders, members of the Government and members of parliament) for corruption crimes had been ongoing. The applicant further explained that the press release, which had contained no reference to the utility of the adoption of the Government decision in question, had never been withdrawn and it could still be consulted on the website of the DNA.

39. As regards the possible disciplinary offence and authoritarian behaviour mentioned in the CSM inspection report (see paragraph 26 above), the applicant explained that these two issues had been subsequently investigated by the CSM and found to be groundless.

40. With respect to the reference to the CSM's press release on the subject of disciplinary actions being instituted against the applicant (see paragraph 27 above) the applicant clarified that the disciplinary proceedings had not yet been finalised and thus the facts held against her were still under investigation and had not yet been proved.

41. Concerning the public statements quoted in the Report (see paragraphs 28 and 29 above), the applicant contended that she had expressed her point of view in connection with legislative proposals and the manner in which these proposals might have affected the prosecutions service's activity, which had not been prohibited by law.

42. The Report also mentioned that her statements had severely affected Romania's image (see paragraph 31 above). On that point the applicant submitted that this allegation had not been based on any objective element. In addition, it had been public knowledge that she had been joined in her statements about the legislative amendments in question by other judicial institutions as well as thousands of judges and prosecutors and their professional associations. Moreover, the CSM itself had issued a negative opinion about the same legislative amendments (see paragraph 17 above).

43. The applicant also made reference to the positive assessments of the DNA during the period she had led the institution. In that connection, she mentioned the GRECO *(Groupe d'États contre la corruption* – Group of States Against Corruption*)* Fourth round evaluation report issued on 22 January 2016 and the EU anti-corruption report issued by the European Commission on 3 February 2014, which had considered the DNA as one of the five examples of good practices in the field of anti-corruption at EU level, as well as the reports of the European Commission on Romania's

progress under the cooperation and verification mechanism of 2016 and 2017 (see paragraphs 83-86 below).

44. Lastly, the applicant made reference to statistical data showing the good results obtained by the DNA in the course of the years 2016 and 2017, especially as regards the low acquittal rate in the cases sent to trial as well as a high rate of recovery of the damage to the State budget caused by corruption offences. She concluded by giving examples which proved the efficiency of her management in several areas of activity.

45. On 27 February 2018, following a session held in the presence of the Minister of Justice and the applicant, the section for prosecutors of the CSM issued its decision, replying negatively to the Minister's proposal.

46. In the above decision the CSM held that Article 51 of Law no. 303/2004 on the status of judges and prosecutors (see paragraph 73 below) provided for a special legal framework for removal from senior positions, setting forth not only the situations in which this may occur but also the elements which must be examined for the assessment of the four managerial criteria, namely the efficient organisation of work, behaviour and communication skills, responsibility, and managerial skills. However, the CSM observed that the removal proposal did not refer to a specific breach of legal obligations and did not mention the specific managerial criteria concerned. The CSM noted that, even after clarifications offered by the Minister during the hearing, there had been no actual examples of the alleged unlawfully used resources, behavioural inadequacies, unfulfilled legal obligations or instances of inadequate management skills. Therefore, based on the documents in its possession (the Report by the Minister of Justice, the decisions of the Constitutional Court and other documents referred to in the Report, the applicant's personnel file, the decisions of the CSM and the other documents mentioned in the applicant's submissions), the CSM went on to examine the four indicators of managerial aptitude provided by law in the light of the evidence put forward by the Minister.

47. It was firstly contended that the interpretation by the DNA of certain legal provisions in a different manner than the one subsequently adopted by the Constitutional Court could not be understood as a systematic breach of the Constitution, as alleged in the Minister's Report. The CSM held that the decisions of the Constitutional Court such as the ones in question did not have retroactive effect and abidance by these decisions by public authorities could only be evaluated after the adoption of the decisions in question. The CSM further noted in that connection that the Constitutional Court decisions in question had also included dissenting opinions, which showed that the legal provisions under scrutiny had been subject to different interpretations. In addition, it was mentioned that no other decisions similar to decision no. 68, in which the Constitutional Court examined the lawfulness of a criminal investigation (see paragraph 21 above), had ever been adopted by the Constitutional Court.

48. As regards decision no. 611 (see paragraph 22 above), the CSM also noted that a disciplinary investigation had been conducted by its judicial inspectorate department, which concluded that no fault could be established on the part of the applicant for her refusal to appear before the special parliamentary commission in question. Moreover, the applicant's actions in that context had been in accordance with the previous case-law of the Constitutional Court as well as a previous decision adopted by the plenary of the CSM on 24 May 2007, the gist of both being that judges and prosecutors cannot be summoned to appear before parliamentary commissions because, according to the Constitution, they are part of the judicial authority.

49. As regards decision no. 757 (see paragraph 23 above), the CSM noted that the Constitutional Court had held that the DNA was not competent to investigate the utility of the adoption of individual administrative decisions but was, in fact, competent to investigate any actions committed or resulting facts in connection with the initiation of an individual administrative decision. Therefore, in the opinion of the CSM, this decision of the Constitutional Court could not justify the Minister's statement that the applicant had overstepped the limits of her competencies. As concerns the failure to accept responsibility for her errors, held against the applicant in the Report owing to an alleged withdrawal of a press release (see paragraph 24 above), the CSM observed that the press release in question was still available on the website of the DNA, and therefore that the allegations made had been disproved.

50. As regards the disciplinary offence and the authoritarian behaviour mentioned in the inspection report of 15 September 2017 (see paragraph 26 above), it was held that those issues had been examined and found groundless following hearings before the CSM on the occasion of the adoption of the inspection report in question.

51. With respect to the mention of the disciplinary action pending against the applicant as a reason for her dismissal (see paragraph 27 above), the CSM held that this aspect could not be examined since the disciplinary proceedings were pending.

52. The CSM continued with an analysis of the public statements made by the applicant cited as evidence justifying her removal from her position (see paragraphs 28 and 29 above). On this point it was concluded that the statements referred to in the Report could not be understood as a contestation of the binding character of Constitutional Court decisions. Furthermore, quoting from the case of *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016), the CSM concluded that:

> "Expressing a point of view on or a criticism of the text of a Law cannot be considered a contestation of the authority or of the decisions of Parliament: on the one hand because public debate is a component of the legislative process; and on the other hand because expressing a point of view (in conferences, debates, specialised articles

> or interviews) about a text proposed for adoption does not put into question the authority or the decisions of Parliament, nor their constitutional right to legislate; these represent the expression of a professional opinion over legal provisions."

53. Further on, the remaining arguments in the Report as well as the statistical data on which they were based were disproved one by one by the CSM, who concluded that there was no evidence that the applicant's management was inadequate.

54. In view of the above, the CSM decided by a majority of votes (the exact record of the vote is not in the public domain) not to endorse the removal proposal by the Minister of Justice, based on the provisions of Article 54(4) taken together with Article 51(2) letter b, (3)-(6) of Law no. 303/2004 (see paragraph 73 below).

V. THE PRESIDENT'S REFUSAL TO SIGN THE REMOVAL DECREE IN RESPECT OF THE APPLICANT AND THE COMPLAINT TO THE CONSTITUTIONAL COURT

55. On 16 April 2018 the President of Romania gave a press statement in which he explained that in view of the lack of endorsement from the CSM and owing to the unconvincing reasons put forward, he would not sign off on the proposal to remove the applicant from her position submitted by the Minister of Justice.

56. On 23 April 2018 the Prime Minister lodged with the Constitutional Court an application to resolve the constitutional conflict firstly between the Minister of Justice and the President and secondly between the Government and the President, caused by the President's refusal to follow up on the request for removal of the chief prosecutor of the DNA. In the application it was stated that in the procedure for appointment and removal of chief prosecutors the main role is held by the Minister of Justice, while the President, who does not have the right to veto such a proposal, is obliged to sign off on the proposal.

57. The request was forwarded by the Constitutional Court to the President of Romania and the Minister of Justice, who were asked to send their comments.

58. The President of Romania argued that, in fact, by using the term "proposal of the Minister of Justice", Law no. 303/2004 gave the President as an administrative authority the power to examine the lawfulness and the advisability of such a proposal. He considered that there was no constitutional conflict in the current case and that he had the right by law to refuse to sign off on the proposal by the Minister, especially in the absence of the endorsement by the CSM.

59. The Minister of Justice submitted that the request as lodged by the Prime Minister should be admitted and the Constitutional Court should

order the President what conduct to follow, namely to issue the removal decree.

60. A hearing was held on 10 May 2018, in a public session in the presence of the Minister of Justice and the representative of the President of Romania.

61. On 30 May 2018 the Constitutional Court, sitting as a panel of nine judges, adopted its decision on the matter with three dissenting opinions.

62. In reply to an allegation by the President of Romania that his refusal to sign the removal decree should have been challenged by the Minister of Justice before the administrative courts, the Constitutional Court held that the relationship between the President and the Minister of Justice fell within the sphere of constitutional law. The administrative courts were competent to examine only the lawfulness of an administrative decision, more specifically in the current case the lawfulness of the procedure for the applicant's removal from her role. In this context the court explained as follows:

> "69. A decree of the President is an administrative decision but this does not mean that the relationships with the other public authorities leading to the adoption of the decree fall within the ambit of administrative law ...
>
> 72. In the light of the above it is apparent that, in a first phase, between the Minister of Justice and the President, constitutional-law relationships are established, and a decision issued by the President or a refusal to issue the decision entails an administrative-law relationship only as regards the examination of the lawfulness of the removal procedure. This is why, in the first phase the Constitutional Court has competence and, in a second phase, the administrative courts [are competent].
>
> 73. The legal issue put before the Constitutional Court is to determine the limits and meaning of the phrase 'under the authority of the Minister of Justice', as provided in Article 132(1) of the Constitution taken in conjunction with Article 94 letter c) of the Constitution, an issue which concerns a pure constitutional-law relationship. Depending on the interpretation given by the [Constitutional] Court to this phrase, the limits of the Minister's and the President's competencies are set. Therefore, the two authorities must apply the decision of the Constitutional Court, and the control over the enforcement and respect of that decision cannot be done by the administrative courts but again by the Constitutional Court. Hence, **the administrative courts have competence to examine *stricto sensu* the lawfulness of the decree or the refusal to issue the decree as follows: its issuing authority, its legal bases, the existence of the removal proposal by the Minister of Justice and the forwarding of this proposal to the CSM for its endorsement, the signature and, if needed, its publication in the Official Gazette. The Constitutional Court is competent to resolve conflicts of competence between the two authorities arising out of their different interpretation of the applicable constitutional provisions, as in the current case**. ...
>
> 78. ... Therefore, having in mind the magnitude, the importance and the scope of the constitutional-law relationship found, the administrative-law relationship must be reduced only to the legality aspects referred to in paragraph 73 above."

63. The court further held that it was evident from the examination of the President's submissions that he had in fact acknowledged the regular

nature and lawfulness of the proposal in question, but had objected to its utility. On that point the court held that, in the context of removal from a leading position held on the basis of Article 94 letter c) of the Constitution (see paragraph 71 below), the President could only check that the proceedings were regular and did not have discretionary powers with regard to the utility of the removal. As regards the CSM's decision not to endorse the Minister's proposal, the court held that its value was just to assist the Minister in his decision on whether to follow through or not on that proposal. Nevertheless, the court held that none of those elements could affect the Minister's authority in the matter of proposals for appointment or removal of senior prosecutors, as provided by the Constitution. It was emphasised that neither the President nor the Constitutional Court were authorised to verify the reasons put forward by the Minister of Justice in his proposal.

64. The court concluded as follows:

> "117. ... [T]he President of Romania openly considered himself entitled to a discretionary power, which does not exist under the Constitution, and which consequently annulled the minimum discretionary competences of the Minister of Justice, this representing *eo ipso* a breach of Article 132(1) of the Constitution.
>
> 118. Therefore, examining the constitutional texts and the relevant legal framework, the Court considers that the removal procedure initiated by the Minister of Justice, taking into account that the President had no objections as to its regular nature, fulfills the legality criteria such that the President should have issued the decree for the [applicant's] removal. ... As a result, the position of the President of Romania not to exert his constitutional powers led to the impossibility for the Minister of Justice to exert his own constitutional powers conferred by Article 132(1) of the Constitution. Thus, it led to institutional deadlock between the two authorities, which prevented the putting into use and the finalisation of the Minister's proposal for removal by virtue of Article 132(1) of the Constitution, in the sense that the proposal would come into full force, in line with the relevant constitutional provisions. As a consequence, the removal proposal by the Minister of Justice has produced only procedural effects as it has been initiated, reviewed by the CSM and sent to the President of Romania, but its substantial effects have been denied. ..."

65. In view of the above, the Constitutional Court confirmed the existence of a constitutional conflict and ordered the President to sign off on the decree for the applicant's removal from her position as chief prosecutor of the DNA.

66. The decision was published in the Official Gazette on 7 June 2018, the date on which it became final and generally binding.

VI. THE APPLICANT'S REMOVAL FROM HER POSITION AS CHIEF PROSECUTOR

67. On 9 July 2018 by Decree no. 526 ("the presidential decree") the President of Romania removed the applicant from her position. The

presidential decree was published in the Official Gazette and entered into force the same day.

VII. OTHER ASPECTS

68. Following the adoption by the CSM of its decision of 27 February 2018 (see paragraphs 45-54 above), several non-governmental organisations lodged with the courts applications for the suspension of the removal proposal and of the Report of the Minister of Justice. These applications were rejected, without being examined on the merits, as being devoid of purpose after the adoption of the presidential decree (see paragraph 67 above).

69. In letters of 20 May 2019 in reply to an enquiry by the Government's Agent, the High Court of Cassation and Justice and the Bucharest Court of Appeal stated that there was no case registered on their role concerning a complaint by the applicant against the Report, Constitutional Court decision no. 358/2018 or the presidential decree. The Bucharest Court of Appeal furthermore stated that it had had no other previous cases with similar situations.

70. In a letter of 20 May 2019 in reply to a request by the Government's Agent the CSM mentioned that the section for prosecutors had resolved in the past two disciplinary actions lodged by their Department of Judicial Inspection against the applicant. In both cases the disciplinary actions had been dismissed as unfounded. The letter further mentioned that at that time there were two other disciplinary actions pending against the applicant. According to information made public by the CSM, on 13 and 24 June 2019 these two disciplinary actions were also dismissed by its section for prosecutors.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

A. Constitution of Romania

71. The relevant articles of the Constitution provide as follows:

Chapter II – The President of Romania
Article 94 - Other powers

"The President of Romania has the following other powers:

...

c). appoints to public functions, under the conditions provided by law;

..."

Chapter VI – The Judiciary
Section I – The courts
Article 126 - Courts of law

"...

(6) Judicial control over all administrative decisions issued by public authorities is guaranteed before the administrative courts with the exception of those decisions concerning the relationship with Parliament and the military. ..."

Section II – The public prosecution office [*Ministerul Public*]
Article 131 - Role of the public prosecution office

"(1) Within the judiciary, the public prosecution office represents the general interests of the society and protects the rule of law as well as the rights and freedoms of citizens."

Article 132 - Status of public prosecutors

"(1) Public prosecutors shall carry out their activity in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice."

Section III – Higher Council of the Judiciary [the CSM]
Article 133 - Role and structure of the CSM

"(1) The CSM shall guarantee the independence of the judiciary."

Title V - The Constitutional Court
Article 146 - Powers

"The Constitutional Court has the following powers:

...

e). it decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the CSM; ..."

Article 147 - Decisions of the Constitutional Court

"(4) The decisions of the Constitutional Court shall be published in the Official Gazette. From their publication date, they are generally binding without retroactive effect."

B. Law no. 47/1992 on the organisation and functioning of the Constitutional Court

72. Law no. 47/1992, as in force at the relevant time, provides as follows:

Article 11

"(1) The Constitutional Court shall render decisions, rulings and it shall issue advisory opinions, as follows:

A. Decisions, in cases in which:

a) it shall pronounce on the constitutionality of Laws, before their promulgation, when a case has been submitted by the President of Romania, by one of the Presidents of the two Chambers of Parliament, by the Government, by the High Court of Cassation and Justice, by the ombudsman, by a number of at least fifty deputies or of at least twenty-five senators, as well as automatically on proposals to revise the Constitution;

b) it shall pronounce on the constitutionality of the treaties or other international agreements, before their ratification by Parliament, when a case has been submitted by one of the Presidents of the two Chambers, by a number of at least fifty deputies or of at least twenty-five senators;

c) it shall pronounce on the constitutionality of the standing orders of Parliament when a case has been submitted by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or of at least twenty-five senators;

d) it shall decide on the exceptions raised before courts of law or of commercial arbitration regarding the unconstitutionality of Laws and ordinances, as well as on those brought up directly by the ombudsman;

e) it shall resolve the legal disputes of a constitutional nature between public authorities when a case has been submitted by the President of Romania, by one of the Presidents of the two Chambers, by the Prime Minister, or by the President of the CSM;

f) it shall decide on the objections regarding the constitutionality of a political party.

Article 34

"(1) The Constitutional Court shall resolve legal disputes of a constitutional nature between public authorities, following a request by the President of Romania, or one of the Presidents of the two Chambers, or the Prime Minister, or the President of the CSM. ..."

Article 35

"(1) Upon receipt of the request, the President of the Constitutional Court shall notify the parties in conflict of it, asking them to express in writing their viewpoint on the subject matter under dispute and the possible ways for it to be resolved, to be submitted within a certain time-limit. The President shall appoint a judge-rapporteur.

(2) At the date when the last viewpoint has been received, but not later than twenty days following the receipt of the request, the President of the Constitutional Court shall set the date for a hearing to which he or she shall summon the parties involved in the dispute. The hearing shall take place on the day set by the President of the Constitutional Court regardless of whether either of the public authorities involved has failed to meet the deadline for presenting its point of view.

(3) The hearing shall take place on the basis of the report presented by the judge-rapporteur, of the request submitted to the Court, of the viewpoints presented in accordance with paragraph (1) above, of the evidence given and the parties' arguments."

Article 36

"The decision which resolves the legal conflict of a constitutional nature shall be final and it shall be served on both the applicant, and the parties in dispute before its publication in the Official Gazette of Romania, Part I."

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

73. At the relevant time, Law no. 303/2004 included the following provisions as regards the career of prosecutors:

Article 1

"[The activities of officers of the court (*magistratura*) are those] performed by judges with the aim of ensuring justice and by prosecutors with the aim of protecting the general interests of society, the rule of the law and the rights and freedoms of citizens."

Article 3

"(1) Prosecutors appointed by the President of Romania enjoy tenure and are independent, in accordance with the law.

(2) Prosecutors who have tenure may be transferred, seconded or promoted only with their agreement. They can be demoted, suspended or dismissed from their positions only in accordance with the provisions of the current law."

Article 11

"(1) Judges and prosecutors may participate in writing for publications, may write articles, specialist papers, literary or scientific works and may participate in audiovisual broadcasts, except for those of a political nature.

(2) Judges and prosecutors may be members of examination commissions or of committees for drafting legislation, internal or international documents.

(3) Judges and prosecutors may be members of scientific or academic societies, as well as of any legal entities of private law that do not have a pecuniary-related purpose."

Article 51

"...

(2) The removal of the judges from senior positions shall be decided by the CSM, either automatically or following a proposal by the general assembly [of judges] or of the court president, for the following reasons:

a) if they no longer fulfil one of the requirements for appointment into a leading position;

b) in the event of inappropriate exercise of management duties relating to effective organisation, to behaviour and communication, to the assumption of responsibilities and to management skills;

c) following application of a disciplinary sanction.

(3) When examining the effective organisation, the following main criteria are to be taken into account: appropriate use of human and material resources; evaluation of needs; crisis management; relation between invested resources and obtained results; management of information; organisation of professional training; and improvement and assignment of tasks within the courts or prosecutor's offices.

(4) When examining behaviour and communication skills, the following main aspects are to be taken into account: behaviour and communication with judges, prosecutors, auxiliary personnel, the users of the legal system, individuals involved in the justice system, other institutions, the media, ensuring access to information of public interest in that court or prosecutor's office and transparency in leadership.

(5) When examining the assumption of responsibility, the following main aspects are to be taken into account: fulfilment of duties provided in legislation and regulations; implementation of national and sequential strategies in the field of the judiciary; and the observance of the principle of random case distribution or, the case being, of cases distribution based on objective criteria.

(6) When examining management skills, the following main aspects are to be taken into account: organisational ability; quick decision-making ability; resistance to stress; self-improvement; analytical ability; systematic working; foresight; strategy and planning in the short, medium and long term; initiative; and capacity to adapt quickly. ..."

Article 54

"(1) The Prosecutor General of the prosecutor's office attached to the High Court of Cassation and Justice, his or her first deputy and deputy, the chief prosecutor of the National Anticorruption Directorate, his or her deputies, the chiefs prosecutors of the sections within these prosecutor's offices, and the chief prosecutor of the Directorate for Investigation the Offences of Organised Crime and Terrorism and her or his deputies, shall be appointed by the President of Romania, following proposals by the Minister of Justice, with the endorsement of the CSM from among the prosecutors with at least ten years' length of service as judges or prosecutors, for a three-year term of office which is renewable only once.

(2) Article 48 paragraphs (10)-(12) shall apply accordingly.

(3) The President of Romania may refuse only in a reasoned form appointments to the positions in paragraph (1), while notifying the public of the reasons for the refusal.

(4) The removal of prosecutors from the positions in paragraph (1) is effected by the President of Romania following a proposal by the Minister of Justice, who may act *proprio motu*, following a request by the general assembly [of prosecutors], or ... at the request of the Prosecutor General of the prosecutor's office attached to the High Court of Cassation and Justice or of the chief prosecutor of the National Anticorruption Directorate, with the endorsement of the CSM, for the reasons provided in Article 51 paragraph (2), which shall apply accordingly."

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

74. Article 66(2) of Law no. 304/2004 on the organisation of the judiciary, as in force at the relevant time, provides that the prosecutor is independent as regards the decisions adopted. Moreover, Article 69 of the Law reads as follows:

Article 69

"(1) The Minister of Justice, when he or she considers it necessary, on his or her own motion or at the request of the CSM, exercises his or her oversight over prosecutors, through prosecutors specially appointed for this by the Prosecutor General of the prosecutor's office attached to the High Court of Cassation and Justice, or by the chief prosecutor of the National Anticorruption Directorate, by the chief prosecutor of the Department for the Investigation of Organised Crime and Terrorism, or by the Minister of Justice.

(2) Oversight consists of the examination of managerial efficiency, the manner in which prosecutors carry out their work and the manner in which they interact professionally with litigants and other individuals involved in the activities conducted by the prosecutors' offices. Oversight does not concern measures ordered by the prosecutor in the course of investigations or the decisions adopted.

(3) The Minister of Justice may ask the Prosecutor General of the prosecutor's office attached to the High Court of Cassation and Justice, or the chief prosecutor of the National Anticorruption Directorate to submit reports about the activity of prosecutors' offices and may give written guidelines as to the measures to be adopted in order to prevent and combat crime in an efficient manner."

E. Law no. 317/2004 on the functioning and organisation of the CSM

75. Article 29(7) of Law no. 317/2004 provides that decisions adopted by the CSM with respect to the career and the rights of judges and prosecutors are subject to appeal by any interested person to the administrative section of the High Court of Cassation and Justice.

F. Law no. 554/2004 on administrative proceedings

76. The relevant provisions of Law no. 554/2004, as in force at the relevant time, read as follows:

Article 1

"(1) Individuals who consider themselves injured in respect of a legitimate right or interest by a public authority, through an administrative decision, or as a consequence of such an authority's failure to resolve a petition within the timeframe provided by law may lodge before the competent administrative court an application to annul the contested decision, to acknowledge the claimed right or the legitimate interest, and to repair the damage sustained as a consequence thereof. The legitimate interest may be both private and public. ..."

G. Relevant domestic practice

77. The Government submitted several examples of domestic case-law as follows. Three examples of judgments adopted by the courts in cases in which judges applied for, on the basis of Article 1 of Law no. 554/2004 (see paragraph 76 above), the annulment of presidential decrees adopted following decisions of the CSM for termination of their employment due to

retirement, resignation and on disciplinary grounds, respectively. In all these cases, the presidential decrees, together with the decisions of the CSM, were considered administrative decisions which could be challenged under administrative law. In two of these cases the applicants' requests have been dismissed as all legal requirements for the adoption of the contested decrees have been followed. In one case, the presidential decree had been annulled since the judge in question had, in the meantime, withdrawn his resignation. Two examples of judgments adopted by the courts in cases in which the applicants contested presidential decrees withdrawing decorations or honours. One example of a judgment in which the court annulled a presidential decree concerning the applicant's dismissal from the Ministry of Interior since, at the moment of the adoption of the decree, the applicant was on sick leave and in such situations dismissal was forbidden by law.

78. In decision no. 375 adopted on 6 July 2005, the Constitutional Court had the opportunity to examine the President's powers in the procedure for the appointment of prosecutors to senior positions. In reply to complaints concerning the conformity with the Constitution of certain provisions of Law no. 303/2004, the court held that the appointment of prosecutors was done following a proposal by the CSM. If the President of Romania did not have any right of examination and evaluation of proposals to fill certain senior positions or, if she or he could not refuse such appointments even having given reasons and even just once, the powers of the President, as provided by Article 94 letter c) taken together with Article 125(1) of the Constitution, would be meaningless.

79. In decision no. 866 adopted on 28 November 2006 the Constitutional Court held that the public prosecutor's office (*Ministerul Public*) is by virtue of Articles 131 and 132 of the Constitution a component of the national justice system which is part of the judiciary. Prosecutors and judges have the same status under the Constitution (*magistraţi*). The court further held that Law no. 303/2004 had established, based on the above-mentioned constitutional principles, identical or similar rules applicable both to judges and prosecutors concerning the grounds for recusal and restrictions, their admission in their profession (*în magistratură*), their appointment, their rights and obligations or their legal responsibilities. In the circumstances of the case, the court found that judges and prosecutors were on the same level owing to their similar constitutional status and noted that a prosecutor may be promoted to the position of judge at the High Court of Cassation and Justice.

II. RELEVANT INTERNATIONAL MATERIALS

A. Relevant international materials concerning the independence of prosecutors

1. Council of Europe

80. The relevant extracts from the Opinion on Amendments to Law no. 303/2004 on the status of judges and prosecutors (see paragraph 73 above), Law no. 304/2004 on judicial organisation (see paragraph 74 above) and Law no. 317/2004 on the CSM (see paragraph 75 above) adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018) read as follows:

> "12. The overall functioning of the Romanian judiciary has been the subject of yearly assessment (and recommendations) under the EU Mechanism of Cooperation and Verification, established upon Romania's accession to the EU. While previous reports prepared in the context of this mechanism had noted that important progress in the reform of the judiciary had been made, the most recent report (in November 2017) expressed concern that this progress might be affected by the political situation and developments such as the adoption, in January 2017, of a Government Emergency Ordinance to de-criminalise certain corruption offences, and, lately, the controversy created around the revision of the three draft laws.
>
> 13. The legislative process took place in a context marked by a tense political climate, strongly impacted by the results of the country's efforts to fight corruption. The Anti-Corruption Directorate (DNA) carried out a high number of investigations against leading politicians for alleged corruption and related offenses and a considerable number of Ministers or members of parliament were convicted. This successful fight against corruption was widely praised on an international level....
>
> 15. At the same time, there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns. Pending amendments to the Criminal Code and Criminal Procedure Code, which will be the subject of a separate opinion of the Venice Commission, are alleged to have the potential of undermining the fight against corruption.
>
> 16. In these circumstances, the recent controversy over the dismissal of the Chief anti-corruption prosecutor, beyond the questions that it raises about existing and future mechanisms of dismissal (and appointment) from/to leading positions within the Romanian judiciary, is a clear illustration of existing difficulties and blockages in terms of inter-institutional dialogue and co-operation.
>
> 17. This context makes any legislative initiative, which has the potential of increasing the risk of political interference in the work of judges and prosecutors, particularly sensitive. ..."

81. As regards appointments or dismissals from senior positions in the prosecution service the above-mentioned opinion states as follows:

> "46. The Venice Commission notes in its Rule of Law Checklist, concerning the prosecution service, that '[t]here is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However,

sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. ...'

47. The Venice Commission, when assessing existing appointment methods, has paid particular attention to the necessary balance between the need for the democratic legitimacy of the appointment of the head of the prosecution service, on the one hand, and the requirement of depoliticisation, on the other. From this perspective, in its view, an appointment involving the executive and/or the legislative branch has the advantage of giving democratic legitimacy to the appointment of the chief prosecutor. However, in this case, supplementary safeguards are necessary to diminish the risk of politicisation of the prosecution office. As in the case of judicial appointments, while different practical arrangements are possible, the effective involvement of the judicial (or prosecutorial council), where such a body exists, is essential as a guarantee of neutrality and professional, non-political expertise. ...

55. This being said, the proposed appointment system may not be considered without taking into account recent developments related to the proposal made by the Minister of Justice for the dismissal of the DNA chief prosecutor, and its refusal by the Romanian President, as well as the related Decision of the Constitutional Court (CCR Decision no. 358 of 30 May 2018**)**.

56. In its decision, the Court explicitly stated, thereby interpreting Article 94 (c) and Article 132 (1) of the Constitution (these provisions are silent on the issues of appointment / [removal] of chief prosecutors, which are regulated by Law no. 303/2014), that the President has no refusal power in the [removal] process. The Court explained, in particular, that the President's power in the dismissal procedure is limited to examining the legality of the procedure ... and does not include a power for the President to analyse, on the merits, the dismissal proposal and its opportunity. In the view of the Court, by assessing the evaluation made by the Minister of Justice of the work of the DNA Head, the President had placed himself above the Minister's authority in this procedure, which was unconstitutional.

57. The Court further established that the position expressed by [the CSM] (in the future, Prosecutors' Section), shall serve, for the Minister of Justice, as an advisory reference regarding both the legality and the soundness of the dismissal proposal, while for the President, in view of the President's – more limited – competence in the procedure, it shall only serve as advice in respect of legality issues (paragraph 115 of the Decision).

58. These are interpretations of high importance for relevant future [removal] regulations and, it seems also, for the appointment of chief prosecutors. To sum up, the decision gives the Minister of Justice the crucial power in removing high-ranking prosecutors, while confining the President in a rather ceremonial role, limited to certifying the legality of the relevant procedure. The weight of [the CSM] (under the system which is currently proposed, its Prosecutors' Section) is also considerably weakened, taken into account the increased power of the Minister of Justice and the limited scope of the influence that it may have on the President's position (only on legality issues).

59. In a previous decision, the Constitutional Court examining the constitutionality of the draft law amending Law no. 303/2014, had concluded that the amendment reducing (to one refusal) the power of the President to refuse the appointment proposal made by the Minister of Justice for the function of chief prosecutor, did not raise issues of constitutionality. In that context, the Court had stressed that the Minister of Justice plays a central role in the appointment of chief prosecutors. By contrast, in an earlier decision of 2005, the Court had ruled that the role of the

President in the appointment procedure of prosecutors could not be purely formal. These different judgments are hard to reconcile and the precise constitutional situation for appointments remains therefore somewhat unclear.

60. Nevertheless, the impact of the decision is even likely to go beyond the issue of chief prosecutors' removal, since it also contains elements of interpretation of constitutional provisions of relevance for the relationship between the prosecution service/prosecutors and the executive. In particular, the role and powers of the Minister of Justice vis-à-vis the prosecution service and the prosecutors are largely addressed in the decision (as already indicated, the Court analysed in particular Article 132 paragraph (1) of the Constitution, in relation to Article 94 (c) of the Constitution).

61. The judgment leads to a clear strengthening of the powers of the Minister of Justice with respect to the prosecution service, while on the contrary it would be important, in particular in the current context, to strengthen the independence of prosecutors and maintain and increase the role of the institutions, such as the President or the [CSM], able to balance the influence of the Minister. The Constitutional Court has the authority to interpret the Constitution in a binding manner and it is not up to the Venice Commission to contest its interpretation of the Constitution. The Constitutional Court based its decision on Article 132 (1) of the Constitution ("Public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice"), in relation to Article 94 (c) of the Constitution, stating that the President has, *inter alia*, "to make appointments to public offices, under the terms provided by law". To strengthen the independence of the prosecution service and individual prosecutors, one key measure would therefore be to revise, in the context of a future revision of the Romanian Constitution, the provisions of Article 132 (1) of the Romanian Constitution. At the legislative level, it could be considered, as far as dismissal is concerned, to amend Law no. 303 in such a way as to give to the opinion of the [CSM] a binding force."

63. The Venice Commission acknowledges that there are no common standards requiring more independence of the prosecution system, and that "a plurality of models exist" in this field. However, only a few of the Council of Europe member states have a prosecutor's office under the executive authority and subordinated to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands) and "a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive" may be observed. ...

65. More generally, in view of the difficulties highlighted during the exchanges it had in Romania, the Commission stressed the importance "of a unified and coherent regulation of the status of prosecutors, with clear, strong and efficient guarantees for their independence" and invited the Romanian authorities "to review the system" in order to address the shortcomings. The Commission also suggested that, in the context of a more comprehensive reform, the independence principle be added to the list of principles related to prosecutors' functions.

66. To date, no such comprehensive change has taken place in Romania, while in the current situation of conflict between prosecutors and some politicians, due to the fight against corruption, this change would be even more important."

82. In its recent Opinion adopted at its 119th Plenary Session (Venice, 21-22 June 2019) on the Emergency Ordinance amending the three laws of

the justice system (see paragraph 17 above), the Venice Commission mentioned that:

> "... [T]he scheme of appointment and dismissal of the top prosecutors remains essentially the same, with the Minister of Justice playing a decisive role in this process, without counter-balancing powers of the President of Romania or the [CSM]. It is recommended to develop an appointment scheme which would give the Prosecutors' Section of the [CSM] a key and pro-active role in the process of the appointment of candidates to any top position in the prosecution system;"

83. The Fourth Round Evaluation Report on Corruption prevention in respect of members of parliament, judges and prosecutors in Romania adopted in December 2015 by GRECO reads as follows in its relevant parts:

> "3. ... [T]he conditions for the appointment and dismissal of some of the holders of top prosecutorial functions exposes them excessively to possible influence from the executive....
>
> 13. ...In recent years, there have been several attempts by the parliament to amend the criminal law mechanisms, also to undermine the authority and powers of such agencies as the National Integrity Agency and the National Anti-corruption Directorate. Such attempts have often failed thanks to timely opposition and reactions both from within and from outside the country.
>
> 130. In The GET's view, although the individual independence of prosecutors is guaranteed in legislation, the subjection to the Ministry of Justice still bears a risk of undue political pressure, for instance through the renewal of the term of office (limited to three years) and through the mechanism of revocation, which mirrors the appointment process. ...**GRECO recommends that the procedure for the appointment and removal for the most senior prosecutorial functions other than the Prosecutor General, under article 54 of Law 303/2004, include a process that is both transparent and based on objective criteria, and that [the CSM] is given a stronger role in this procedure.**"

84. A subsequent GRECO Evaluation Report on Corruption prevention in respect of members of parliament, judges and prosecutors in Romania adopted in December 2017 reads as follows in its relevant parts:

> "11. GRECO recalls that excessively hasty legal amendments without proper consultations, whether by the government or the parliament (the distinction is not always clear either – see the contextual information in recommendation xiii) remains a problematic area in Romania, especially when the measures are perceived as undermining the country's integrity and anti-corruption efforts and as serving partisan interests. There have been several such examples recently, for instance with regard to the definition of the offence of abuse of office which triggered large street protests and was repealed a few days later, with two ministers resigning including the justice minister. ...
>
> 77. GRECO recommended that the procedure for the appointment and revocation for the most senior prosecutorial functions other than the Prosecutor General, under article 54 of Law no. 303/2004, include a process that is both transparent and based on objective criteria, and that [the CSM] is given a stronger role in this procedure. ...
>
> 79. In the update submitted on 13 November, the authorities merely refer to the fact that on 31 October 2017, a legislative proposal for amending and supplementing Law no. 303/2004 on the status of judges and prosecutors, was initiated by

10 deputies and senators and submitted to the Chamber of Deputies. This proposal aims at providing [the CSM] ... a stronger role for the appointment to and [removal from] the senior prosecutorial functions. However, the procedure for the appointment of a) the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, b) his first deputy and deputies, c) the chief prosecutor of the National Anticorruption Directorate, the chief prosecutor of the Directorate for the Investigation of Organised Crime and Terrorism and d) their deputies, remains the same as the one stipulated by the legislation currently in force.

80. Regarding all the other senior prosecutorial functions, the appointment is proposed to be done exclusively by the [section for prosecutors] of the [CSM]. The legislative proposal submitted to the Chamber of Deputies also stipulates that the revocation of the prosecutors from all the senior prosecutorial functions is done exclusively by the [section for prosecutors of the CSM].

81. GRECO takes note of the information submitted by the Romanian authorities. It understands that the above proposal from [the CSM] ..., mentioned in Romania's submission of information in June 2017, was not endorsed by the government despite the fact that it addressed underlying concerns which had led to this recommendation.

82. GRECO cannot disregard the fact that subsequently to the information provided to GRECO in June, the government presented in August 2017 a legislative proposal/package on the judiciary, which led to yet another wave of massive protests and negative reactions, considering that the proposals were a threat to the independence of the judiciary. The profession of magistrates largely joined the protests. In a move described as unprecedented, more than half of Romanian judges and prosecutors signed a memorandum calling to abandon this legislative project, pointing out that it had been launched without proper prior consultations, impact assessments, details on the content and motives etc. The proposals aimed at giving a more central role to the Government, i.e. by abolishing the involvement of the President in appointments (and thus giving a greater responsibility to the Minister of Justice) and by integrating the judicial inspectorate under the umbrella of the Ministry of Justice.

83. Bearing in mind the specific purposes of the present recommendation xiii, these proposals appeared to take at first sight the opposite direction. On 19 October 2017, media reported that the controversial draft proposals of the government – despite largely negative opinions – were still going to Parliament and in the beginning of November 2017, public protests (involving also opposition parties and personalities) against the proposals in Parliament, were reported in Romanian media. ..."

2. European Union

85. The Report from the Commission to the European Parliament and the Council on progress in Romania under the cooperation and verification mechanism ("the CVM") of 27 January 2016 mentioned as follows in its relevant parts:

"The track record of the institutions involved in fighting high-level corruption remains strong, with regular indictments and conclusion of cases concerning senior politicians and civil servants. The National Anti-Corruption Directorate (DNA) reported an increased number of signals from the public: this seems to reflect a public confidence in the institution which is also reflected in opinion polls. ... The track record of the key judicial and integrity institutions to address high-level corruption has remained impressive."

86. In the following year's Report from the Commission to the European Parliament and the Council on progress in Romania under the CVM published on 25 January 2017 it was stated that:

> "CVM reports have been able to report a steadily growing track record in terms of investigating, prosecuting and deciding upon high-level corruption cases over the years, with a clear acceleration after 2011. ... The National Anti-Corruption Directorate (DNA) and the High Court of Cassation and Justice (HCCJ) have established an impressive track record in terms of solving high and medium-level corruption cases."

87. Recommendation no. 1 of the European Commission CVM Report of 15 November 2017 reiterated the recommendation put forward by the European Commission in previous CVM reports to Romania to "put in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission." In the view of the European Commission, the fulfilment of this recommendation would "also need to ensure appropriate safeguards in terms of transparency, independence and checks and balances, even if the final decision were to remain within the political sphere."

88. On 23 February 2018 the European Commission issued the following statement in connection with the Romanian Justice Minister's proposal to remove the chief prosecutor of the DNA from her position:

> "The Commission is following the latest developments closely and with concern. The independence of Romania's judicial system and its capacity to fight corruption effectively are essential cornerstones of a strong Romania in the European Union as reminded by the President and First Vice-President in their joint statement just last month. The Commission will follow developments on the ongoing procedures engaged against the Chief DNA prosecutor closely.
>
> In previous CVM reports, the fact that the DNA had maintained its track record in the face of intense pressure was noted as a sign of sustainability. The Commission also noted in its report that, were that pressure to start to harm the fight against corruption, the Commission may have to reassess this conclusion."

3. United Nations

89. In its Concluding observations on the fifth periodic report of Romania of 11 December 2017, the Human Rights Committee stated as follows:

> "7. The Committee is concerned about allegations of persistent corruption in all branches of Government, including the judiciary and prosecutors, and its negative impact on the full enjoyment of the rights guaranteed by the Covenant and by parliamentary initiatives to reverse anti-corruption legislation. The Committee is also concerned about reports that the head of the National Anti-Corruption Directorate (DNA) was subjected to harassment in connection with her work....
>
> **The State party should strengthen its efforts to combat corruption in all branches of Government and provide the necessary protection to officials involved in anti-corruption efforts."**

B. Relevant international materials concerning the freedom of expression of prosecutors

90. In its recommendation on the role of public prosecution in the criminal-justice system (REC(2000)19, adopted on 6 October 2000 at the 724th meeting of the Ministers' Deputies), the Committee of Ministers of the Council of Europe recommended that member States took measures to "ensure that disciplinary proceedings against public prosecutors [were] governed by law and guarantee[d] a fair and objective evaluation and decision which should be subject to independent and impartial review and that public prosecutors ha[d] access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status [was] affected". As regards freedom of expression the Committee of Ministers recommended as follows:

> "6. States should also take measures to ensure that public prosecutors have an effective right to freedom of expression, belief, association and assembly. In particular they should have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings in a private capacity, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. The rights mentioned above can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional position of the public prosecutors. In cases where the rights mentioned above are violated, an effective remedy should be available.
>
> ...
>
> 16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law."

As regards the relationship between public prosecutors and the executive and the legislature, the Committee of Ministers recommended the following:

> "11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out."

91. The Consultative Council of European Prosecutors in its Opinion No. 9 (2014) on European norms and principles concerning prosecutors of 17 December 2014 recognised that prosecutors enjoyed the right to freedom of expression and association in the same manner as other members of society, and pointed out that in exercising these rights, "they must take into account the duty of discretion and be careful not to jeopardise the public image of independence, impartiality and fairness which a

prosecutor must always uphold". As regards the independence of prosecutors, the Council of European Prosecutors stated as follows:

> "IV. The independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged.
>
> V. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability. ...
>
> 33. Independence of prosecutors – which is essential for the rule of law - must be guaranteed by law, at the highest possible level, in a manner similar to that of judges. In countries where the public prosecution is independent of the government, the state must take effective measures to guarantee that the nature and the scope of this independence are established by law. In countries where the public prosecution is part of or subordinate to the government, or enjoys a different status that the one described above, the state must ensure that the nature and the scope of the latter's powers with respect to the public prosecution is also established by law, and that the government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law. ...
>
> 35. The independence of prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.
>
> 36. States must ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
>
> 37. Prosecutors should, in any case, be in a position to prosecute, without obstruction, public officials for offences committed by them, particularly corruption, unlawful use of power and grave violations of human rights.
>
> 38. Prosecutors must be independent not only from the executive and legislative authorities but also from other actors and institutions, including those in the areas of economy, finance and media. ...
>
> 53. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, salaries, discipline and transfer (which must be affected only according to the law or by their consent). For these reasons, it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal."

92. The United Nations Guidelines on the Role of Prosecutors adopted in 1990 (session from 27 August until 7 September) contain the following relevant provisions:

> "8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional

disadvantage by reason of their lawful action or their membership in a lawful organization."

93. In its Report on freedom of expression, association and peaceful assembly of judges and prosecutors, submitted before the United Nations Human Rights Council in 24 June 2019, the UN Special Rapporteur on the independence of judges and lawyers recommended that:

"98. Any charge or complaint against judges or prosecutors relating to the exercise of their fundamental freedoms should be brought before an independent authority, such as a judicial or prosecutorial council, or a court. Disciplinary proceedings should be determined in accordance with the law, the code of professional conduct and other established standards and ethics.

99. Removal from office should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process hearing granting all guarantees to the accused.

100. Decisions in disciplinary proceedings should be subject to an independent review.

102. As a general principle, judges and prosecutors should not be involved in public controversies. However, in limited circumstances they may express their views and opinions on issues that are politically sensitive, for example when they participate in public debates concerning legislation and policies that may affect the judiciary or the prosecution service."

THE LAW

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

94. The applicant complained that she had been denied access to a court to defend her rights in relation to her disciplinary dismissal from the position of chief prosecutor of the DNA. She relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

1. Applicability of Article 6 § 1 of the Convention

(a) The Government's objection

95. The Government submitted that Article 6 § 1 of the Convention was not applicable in the current case.

96. They explained that the proceedings finalised with decision no. 358 of the Constitutional Court (see paragraphs 61-66 above) had not concerned the applicant, neither directly nor indirectly, but the public authorities involved in the constitutional conflict, namely the President of Romania and the Minister of Justice. The applicant, not being a public authority, could

not lawfully have been considered party to the above-mentioned proceedings. The Government contended that in the Romanian legal system the Constitutional Court pursued an objective norms-related adjudication in so far as it determined or clarified, in terms of the constitutional rule the extent and limits of the competence of public authorities and the conduct they had to follow. Such proceedings did not involve any subjective individual rights. The fact that the decisions of the Constitutional Court were generally binding on the public authorities involved in the proceedings and that the latter authorities had to act in accordance with the decisions the Constitutional Court did not mean that the respective decisions concerned a subjective individual right.

97. The Government explained that the proceedings finalised with the decision of 30 May 2018 had been governed by the provisions of Articles 34-36 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court (see paragraph 72 above). Pursuant to these provisions the Constitutional Court ruled only over disputes involving public authorities. Therefore, in the current case the Constitutional Court had not examined the merits of the case against the applicant, considering that such an analysis would not have fallen within its jurisdiction (see paragraph 63 above). Hence no civil rights had been addressed in the said proceedings. Accordingly, those proceedings could not be examined from the standpoint of Article 6 of the Convention. The Government also noted on this point that no request for intervention or for the submission of an amicus brief had been lodged by the applicant with the Constitutional Court. However, they further asserted that the possibility of an intervention before the Constitutional Court by a person concerned by a decision of that court had never been raised and indeed could not have been raised as there was no subjective right at stake in this type of proceedings.

98. In the light of the above, the Government did not deny that the applicant may have had a civil right at stake in the current case but concluded that she could and should have exercised her civil right before the administrative courts.

(b) The applicant's reply

99. The applicant maintained that Article 6 § 1 was applicable in her case since the right to carry out her functions as chief prosecutor until the expiry of her three-year mandate had been clearly provided by the relevant domestic law, specifically Article 54(1) of Law no. 303/2004 (see paragraph 73 above).

100. The applicant further argued that there had also been a right to challenge her removal decree provided by Article 54(4) of Law no. 303/2004 (ibid.), but in the specific circumstances of her case, this right had been limited by the Constitutional Court's decision no. 358 of 30 May 2018.

101. The dispute in the current case had involved a disciplinary sanction. The reasons put forward by the Minister for her removal had been examined by the judiciary disciplinary body and considered unfounded. In these circumstances, she concluded that the current case clearly concerned a dispute over a civil right which fell within the scope of Article 6 § 1 of the Convention.

102. The applicant further submitted that her second mandate as chief prosecutor would have expired on 16 May 2019 (see paragraph 8 above); however, it had been prematurely terminated eight months before its end as a result of an order by the Constitutional Court. This situation had been unique in Romania's contemporary history. Nevertheless, relying on the Court's extensive case-law amongst which the cases of *Baka v. Hungary* ([GC], no. 20264/12, 23 June 2016), *Olujić v. Croatia* (no. 22330/05, 5 February 2009) and *Kamenos v. Cyprus* (no. 147/07, 31 October 2017), the applicant submitted that the criteria set out by the Court in the *Vilho Eskelinen and Others* judgment ([GC], no. 63235/00, ECHR 2007-II) were also applicable in her case.

(c) The third-party intervener's position

103. Open Society Justice Initiative submitted that the dismissal of a chief prosecutor was a dispute over a civil right and fell under the scope of Article 6 § 1 of the Convention as it had to be surrounded by the guarantees provided by the said Article in order to safeguard the independence of chief prosecutors as a component of the rule of law.

(d) The Court's assessment

104. The Court first recalls that as the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, the general rule of dealing with applications should be respected and the relevant analysis should be carried out at the admissibility stage unless there is a particular reason to join this question to the merits (see, in relation to the applicability of Article 8 of the Convention, *Denisov v. Ukraine* [GC], no. 76639/11, §§ 93-94, 25 September 2018). No such particular reason exists in the present case and the issue of the applicability of Article 6 § 1 falls to be examined at the admissibility stage.

(i) General principles

105. The Court reiterates that for Article 6 § 1 to be applicable under its "civil" limb, there must be a "dispute" regarding a right which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, lastly, the

result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see *Regner v. the Czech Republic* ([GC], no. 35289/11, § 99, 19 September 2017, and *Baka*, cited above, § 100).

106. With regard to the existence of a right, the Court has consistently held that the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts. Article 6 § 1 does not guarantee any particular content for "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Regner*, cited above, § 100 and further references cited therein).

107. In that connection the Court observes that the rights thus conferred by the domestic legislation can be substantive, or procedural, or, alternatively, a combination of both. Where a substantive right recognised in domestic law is accompanied by a procedural right to have that right enforced through the courts, there can be no doubt about the fact that there is a right within the meaning of Article 6 § 1. The mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right. Indeed, the Court found that Article 6 applies where the judicial proceedings concern a discretionary decision resulting in interference with an applicant's right (ibid., §§ 101-02).

108. The Court has also held that in some cases, national law, while not necessarily recognising that an individual has a subjective right, does confer the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities. This is the case regarding certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they find that the decision was unlawful, may annul it. In such a case Article 6 § 1 of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right (ibid., § 105).

109. As regards public servants employed in the civil service, the Court has held that the applicant's status as civil servant does not automatically exclude the protection embodied in Article 6 unless two conditions have been fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer (ibid., § 107; see also *Vilho Eskelinen and Others*, cited above, § 62).

110. Lastly, the Court has held that, while access to employment and to the functions performed may constitute in principle a privilege that cannot be legally enforced, this is not the case regarding the continuation of an employment relationship or the conditions in which it is exercised. In the private sector, labour law generally confers on employees the right to bring legal proceedings challenging their dismissal where they consider that they have been unlawfully dismissed, or unilateral substantial changes have been made to their employment contract. The same is applicable, *mutatis mutandis*, to public-sector employees, save in cases where the exception provided for in *Vilho Eskelinen and Others* (cited above) applies (see *Regner*, cited above, § 117). In *Baka*, for instance, the Court recognised the right of the President of the Supreme Court of Hungary to serve his full term of six years in the absence of the specific grounds for its termination provided for under Hungarian law (see *Baka*, cited above, §§ 107-11).

(ii) Application of the above principles to the present case

(1) Existence of a right

111. The applicant complained of the lack of judicial review for what she considered as an unfair removal from the position she occupied.

112. The Court must firstly examine whether the applicant could rely on a right or whether she was in a situation in which she aspired to obtain a mere advantage or privilege which the competent authority had a discretion to grant or refuse her without giving reasons for its decision (see *Regner*, cited above, § 116).

113. The Court observes that on 7 April 2016 the applicant was appointed by the President of Romania as chief prosecutor of the DNA for a period of three years in accordance with Article 54(1) of Law no. 303/2004 on the status of judges and prosecutors (see paragraph 8 above). The above-mentioned Article provided that the chief prosecutor of the DNA had to be appointed for a period of three years, a term which was renewable only once (see paragraph 73 above). Therefore, the applicant's term of office should in principle have been three years, from 16 May 2016 to 16 May 2019. However, on 9 July 2018 the applicant was dismissed from this position (see paragraph 67 above).

114. The Court further notes that the applicant's employment conditions were governed by Law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 on the organisation and functioning of the CSM. Article 51(2)-(6) of Law no. 303/2004 contained an exhaustive list of reasons and elements to be taken into consideration for removal from a senior prosecutorial or judicial position (see paragraph 73 above). Moreover, Article 29(7) of Law no. 317/2004 provides that the decisions adopted with respect to the career and the rights of judges and prosecutors are subjected to appeal by any interested person before the administrative

section of the High Court of Cassation and Justice (see paragraph 75 above). It thus transpires from the terms of the said provisions that there existed a right for the chief prosecutor of the DNA to serve a term of office until his or her judicial mandate came to an end; should the office be terminated at an earlier stage against that person's consent by way of dismissal, specific reasons must be put forward, and he or she would have standing to apply for judicial review of that decision.

115. In these circumstances, the Court considers that, although access to the functions performed by the applicant in the present case constitutes in principle a privilege that can be granted at the relevant authority's discretion and cannot be legally enforced, this cannot be the case regarding the termination of such an employment relationship (see, *mutatis mutandis*, *Regner*, cited above, § 117). Furthermore, the Court observes that the applicant's premature removal from her position had a decisive effect on her personal and professional situation preventing her from continuing to carry out certain duties at the DNA (see, *mutatis mutandis*, *Regner*, cited above, § 115).

116. In the light of the foregoing the Court considers that in the present case there was a genuine and serious dispute over a "right" which the applicant could claim on arguable grounds under domestic law, notably the right not to be dismissed from her functions outside the cases specifically provided for by law (see, *mutatis mutandis*, *Regner*, cited above, §§ 118-19, and *Denisov*, cited above, §§ 47-49).

(2) Civil nature of the right

117. The Court must now determine whether the "right" claimed by the applicant was "civil" within the autonomous meaning of Article 6 § 1, in the light of the criteria developed in the *Vilho Eskelinen* judgment.

118. The Court reiterates that, according to its case-law, disputes between the State and its civil servants fall in principle within the scope of Article 6 except where both the cumulative conditions referred to in paragraph 109 above are satisfied.

119. As regards the first condition of the Eskelinen test, that is to say whether national law "expressly excluded" access to a court for the post or category of staff in question the Court notes that in the few cases in which it has found that that condition had been fulfilled, the exclusion from access to a court for the post in question was clear and "express". For instance, in *Suküt v. Turkey* ((dec.), no. 59773/00, 11 September 2007), which concerned the early retirement of an army officer on disciplinary grounds, Turkish constitutional law clearly specified that the decisions of the Supreme Military Council were not subject to judicial review. The same was true for the decisions of the Turkish Supreme Council of Judges and Public Prosecutors (see *Serdal Apay v. Turkey* (dec.), no. 3964/05, 11 December 2007, and *Nazsiz v. Turkey* (dec.), no. 22412/05, 26 May

2009, concerning respectively the appointment and the disciplinary dismissal of public prosecutors; see also *Özpınar v. Turkey*, no. 20999/04, § 30, 19 October 2010, concerning the removal from office of a judge on disciplinary grounds). In *Nedeltcho Popov v. Bulgaria* (no. 61360/00, § 38, 22 November 2007) a provision of the Bulgarian Labour Code clearly provided that the domestic courts did not have jurisdiction to review disputes regarding dismissals from certain posts in the Council of Ministers, including the post held by the applicant (chief adviser). Although that restriction was later declared unconstitutional with no retroactive effect, the Court noted that "at the time of the applicant's dismissal" he had not had a right of access to a court under national law to bring an action for unfair dismissal.

120. The Court considers that the present case should be distinguished from the above-mentioned cases in that there was no provision in the domestic legal system "expressly" excluding the applicant from the right of access to a court. On the contrary, domestic law expressly provided for the right to a court in matters concerning the career of prosecutors (see paragraph 114 above).

121. Accordingly, in the light of the domestic legislative framework, the Court considers that the applicant could arguably claim to have had an entitlement under Romanian law to protection against alleged unlawful removal from her position as chief prosecutor of the DNA during her mandate (see, *mutatis mutandis*, *Baka*, cited above, § 109).

122. On this point it must also be noted that, by claiming that the applicant had not exhausted the domestic remedies available in her situation (see paragraph 132 below), the Government had confirmed that national law did not formally exclude access to a court in the applicant's case. It should be added that the Constitutional Court did not, in its decision no. 358 (see paragraphs 61-66 above), exclude as a general rule the applicant's right to seek judicial redress, but only limited the competence of the administrative courts to an examination *stricto sensu* of the lawfulness of the administrative decision at stake, namely the presidential decree.

123. Therefore, in the light of the foregoing, it cannot be concluded that national law "expressly excluded access to a court" for a claim based on the alleged unlawfulness of the termination of the applicant's mandate. The first condition of the Eskelinen test has therefore not been met.

124. This, in itself, is sufficient to conclude that Article 6 § 1 of the Convention is applicable under its civil limb (see, for example, *Baka*, cited above, § 118). However, in the circumstances of the current case the Court considers it useful to continue its examination also to the second condition of the Eskelinen test. Hence, even assuming that access to court in the applicant's situation was expressly excluded by national law, applying the Eskelinen test further, the Court considers that the second condition – consisting of the existence of an objective justification for this exclusion in

the State's interest – was also not fulfilled in the current case. In a legal framework where the removal from office of the chief prosecutor of the DNA was decided on by the President following a proposal by the Minister of Justice with the endorsement of the CSM, the absence of any judicial control of the legality of the decision of removal cannot be in the interest of the State. Senior members of the judiciary should enjoy – as other citizens – protection from arbitrariness from the executive power and only oversight by an independent judicial body of the legality of such a removal decision is able to render such a right effective. The Constitutional Court's ruling concerning the respective competencies of the constitutional bodies does not deprive these considerations of their pertinence.

125. In these circumstances the Court considers that Article 6 applies under its civil head and that the Government's objection of lack of jurisdiction *ratione materiae* should be dismissed.

2. Six months

(a) The Government's objection

126. The Government further raised an objection of non-compliance with the six-month time-limit. They argued that the relevant documents and facts challenged in the current application had occurred more than six months before its submission. More specifically, the Report of the Minister of Justice was dated 22 February 2018 (see paragraph 18 above) and in respect of this document the six-month time-limit had started to run from 26 February 2018, when the applicant had been informed of its content (see paragraph 33 above). As regards decision no. 358 of the Constitutional Court, the Government maintained that the six-month time-limit had started to run on 30 May 2018, the date of its adoption (see paragraph 61 above).

(b) The applicant's reply

127. The applicant contended that the six-month time-limit had started to run on 9 July 2018, the date of the entry into force by publication in the Official Gazette of presidential decree no. 526/2018, which had been the official decision revoking her from her position (see paragraph 67 above). Neither the Report of the Minister of Justice nor the decision of the Constitutional Court had had any immediate effect on her mandate as chief prosecutor. She pointed out that under the Constitution the appointment and removal of judges and prosecutors from their position was done by presidential decree. Therefore, she asked the Court to reject the Government's objection and to conclude that she had complied with the six-month time-limit.

(c) The Court's assessment

128. The Court observes that the applicant's complaint under Article 6 § 1 concerns the lack of access to a court in respect of her removal from her position as chief prosecutor of the DNA, removal which she considered had been based on her views concerning the proposed or adopted legislative reforms affecting the judiciary.

129. The Court further notes that, in accordance with Article 54(4) of Law no. 303/2004 on the status of judges and prosecutors (see paragraph 73 above), removal of prosecutors from senior positions is "effected by the President of Romania". The Report of the Minister of Justice and decision no. 358 of the Constitutional Court were elements prior to the applicant's removal from her position only. This conclusion is supported by the fact that complaints lodged by several non-governmental organisations against the Report were rejected by the domestic courts, without having been examined on the merits, as devoid of purpose after the adoption of the presidential decree (see paragraph 68 above). Moreover, the Constitutional Court in its decision specifically mentioned that the substantial effects of the Minister's removal proposal could only be produced upon the signing of the removal decree by the President of Romania (see paragraph 65 above).

130. Therefore, the Court considers that the start of the six-month time-limit in connection with the object of the current case is the date of the adoption and publication in the Official Gazette of the presidential decree removing the applicant from her position, namely 9 July 2018.

131. It follows that the present application, introduced on 28 December 2018, complied with the above-mentioned time-limit. The Government's objection in this respect must therefore be rejected.

3. Exhaustion of domestic remedies

132. The Government further submitted that the applicant had failed to exhaust the available domestic remedies in connection with her complaints under Article 6 § 1 of the Convention.

133. The Court considers that in the particular circumstances of the case, the Government's objection is so closely linked to the substance of the applicant's complaint under Article 6 § 1 of the Convention that it should be joined to the merits.

4. Other grounds for inadmissibility

134. The Court notes that the complaint under Article 6 § 1 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions and third-party comments

(a) The applicant

135. The applicant firstly explained that, under the specific circumstances of her case, there had been no effective remedy available in the domestic legal system.

136. She argued that the Report of the Minister of Justice could not be considered an administrative decision within the scope of administrative law as it had not produced any effects in itself, instead requiring the intervention of the President or the Constitutional Court. The Report had been merely a preliminary act, a proposal which had to pass first through the scrutiny of the CSM and subsequently to be transposed in a decree issued by the President of Romania. The applicant mentioned that even the Constitutional Court had acknowledged this fact in its decision no. 358 of 30 May 2018 (see paragraph 64 above).

137. As regards the presidential decree, the applicant contended that Article 126(6) of the Constitution and Law no. 544/2004 guaranteed the right to complain in general against any administrative decision (see paragraphs 71 and 76 above). Therefore, the presidential decree could have been challenged before the administrative courts. However, in her case the courts would have been limited in their review by the binding order given by the Constitutional Court in its decision of 30 May 2018.

138. In the applicant's view, her access to court had been obstructed not by means of an express exclusion but by the fact that the measure subject to challenge – the premature termination of her mandate of chief prosecutor – had been imposed by a generally binding decision of the Constitutional Court and therefore, could not have been reviewed by an administrative court. She made reference in that connection to the operative provisions of the Constitutional Court decision in question (see paragraph 65 above).

139. The applicant pointed out that the context in which the above-mentioned decision had been adopted (see paragraphs 80-89 above) was also important for the examination of her case. Referring to reports of the European Commission, the United Nations, decisions of the CSM and numerous newspaper articles, she also pointed to the fact that her achievements and those of the DNA during the time she had been its chief prosecutor had been widely praised both at domestic and international level. The applicant asked the Court to take note of the reference to her alleged controversial dismissal made by the Venice Commission (see paragraph 81 above).

140. The applicant further submitted that throughout the entire evaluation and removal process initiated by the Minster of Justice, she had never been asked to present any documents or information and she had not

been given the opportunity to present her own views. Therefore, in her view, the process leading to the Minister's proposal for her removal had lacked transparency and integrity, and had failed to comply with the legal requirements. Subsequent to the lack of endorsement of the Minister's proposal by the CSM and then the President's refusal to adopt the removal decree, proceedings before the Constitutional Court had been initiated by the Minister of Justice and the Prime Minister. Those constitutional proceedings, by their specific nature provided by Law no. 47/1992, had not involved the applicant in any way. However, they had touched on the lawfulness of the removal procedure and had had a direct effect on her due to the order given to the President to issue the removal decree. Therefore, in the applicant's opinion, she had been deprived of the guarantees of a fair trial as provided by Article 6 § 1.

141. Finally, the applicant argued that the premature termination of her mandate as chief prosecutor of the DNA had been requested by the Minister of Justice without the endorsement by the relevant professional body, despite the fact that Article 54(4) of Law no. 303/2004 (see paragraph 73 above) clearly allowed the Minister to propose removal to the President only with such an endorsement. It had been enforced following an order adopted by the Constitutional Court in proceedings in which she had not been and could not have been a party to. Therefore, her removal from the position she had occupied had not been reviewed by a court within the meaning of Article 6 § 1 of the Convention.

(b) The Government

142. The Government maintained that the applicant could have vindicated her civil rights before the administrative courts. They submitted that the applicant could have contested, directly before the administrative courts, the Report of the Minister of Justice, the decision of the CSM of 27 February 2018 (see paragraphs 45-54 above) or the removal decree issued by the President.

(c) The third-party intervener

143. The Open Society Justice Initiative submitted that there was a general consensus that the appointment and dismissal process of chief prosecutors should be robust in order to secure their independence and should avoid political nominations or dismissal processes that expose them to political pressure or influence. In this regard, international and regional bodies, such as the Venice Commission, GRECO, the United Nations Office on Drugs and Crime (UNODC), the United Nations Special Rapporteur on the independence of judges and lawyers, the Inter-American Commission on Human Rights, and the European Commission had linked the independence of prosecution services with the existence of merit-based, transparent and

accountable appointments and dismissals procedures in respect of their heads.

144. The Open Society Justice Initiative also observed that a number of international and regional bodies had recognised the right of prosecutors to an effective remedy in dismissal and disciplinary proceedings. For example, the UN Guidelines on the Role of Prosecutors set out that decisions made in the context of disciplinary hearings had to be subject to "independent review". In their report on the status and role of prosecutors, the UNODC cited and confirmed this standard set out in the Guidelines. Also, the UN Special Rapporteur on the independence of judges and lawyers stressed that "the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities". As a consequence, prosecutors "should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings". The Inter-American Commission on Human Rights held that, there should be a possible review of a prosecutor's dismissal decision by a higher body, which would examine the facts of the case and the law, and ensure "a suitable and effective judicial recourse against possible violations of rights that [had] happened during the disciplinary process". The Commission also highlighted the importance of the right to a review in cases where dismissal "may be an implied sanction", constituting a "misuse of power to punish a justice operator for some action or decision he or she [had taken]".

2. The Court's assessment

(a) General principles

145. The Court reiterates that in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts. The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 § 1 must be read in the light of these principles (see *Golder v. the United Kingdom*, 21 February 1975, §§ 34 and 35, Series A no. 18). Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is to say the right to institute proceedings before courts in civil matters, constitutes one aspect only (ibid., § 36).

146. However, the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with

Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Baka*, cited above, § 120, and the authorities cited therein).

147. The Court also reiterates that, for the determination of civil rights and obligations by a "tribunal" to satisfy Article 6 § 1 of the Convention, the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. The requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 176, 6 November 2018).

(b) Application of those principles to the present case

148. In the present case, the Government did not dispute the lack of judicial review in the applicant's case, but contended that it had been due to the applicant's failure to exhaust the various remedies available in the situation at hand (see paragraph 142 above).

149. The Court observes, as regards the possibility for the applicant to contest before the courts the Report of the Minister of Justice, that the Constitutional Court considered that the said Report could not produce any effects by itself and was just a preliminary act leading to the adoption of the presidential decree (see paragraphs 62, 64 and 129 above). Moreover, even assuming that a complaint against this act would have been admissible before the administrative courts, it is apparent from the documents submitted by the Government that non-governmental organisations throughout the country have tried this avenue without success (see paragraph 68 above) and no other example of administrative proceedings instituted against a similar document have been submitted (see paragraph 69 above). Therefore, the Court does not find it established in the context of the current case that a complaint to the administrative courts against the Report of the Minister of Justice would have been an effective domestic remedy for the applicant.

150. Secondly, the Government contended that the applicant could have contested before the courts the decision of the CSM of 27 February 2018. On this point the Court observes that Article 29(7) of Law no. 317/2004 indeed expressly provides for the right to challenge before a court the decisions adopted by the CSM with respect to the prosecutors' careers and rights (see paragraph 75 above). However, since in the current case the decision adopted by the CSM was favourable to the applicant, the Court is of the opinion that she had no interest in contesting it.

151. Lastly, the Government alleged that the applicant should have complained against the president's removal decree before the administrative

courts on the basis of the general provisions of Law no. 554/2004 on administrative proceedings (see paragraph 76 above) and submitted examples of domestic case-law to support this allegation (see paragraph 77 above). In their opinion, these examples showed that presidential decrees in various fields, including that of judges' and prosecutors' careers, could be contested before the administrative courts.

152. The Court observes that domestic law does indeed provide for a general possibility to contest before the administrative courts any administrative decision and a presidential decree is an administrative decision within the meaning of this law (see paragraph 76 above). However, the examples submitted by the Government do not concern situations similar to the applicant's, specifically the adoption by the President of a decree for the removal of a prosecutor from a senior position following a specific order in that connection by the Constitutional Court.

153. On this point, the Court notes that in its decision of 30 May 2018 the Constitutional Court specifically mentioned that, in the particular circumstances of the applicant's case, the administrative courts had limited powers to review the presidential decree for the applicant's removal. In fact, the Constitutional Court considered that such a review was limited to the lawfulness *stricto sensu* of the decree, more specifically to its issuing authority, its legal basis, the existence of the removal proposal by the Minister of Justice and the forwarding of this proposal to the CSM for its endorsement, the signature and, if needed, its publication in the Official Gazette (see paragraph 62 above). In view of these specific limits set by the Constitutional Court, the Court considers that a complaint before the administrative courts would have been effective only for having the external legality of the presidential decree examined, hence offering only a formal review. Such an avenue would not have been an effective remedy for the core of the applicant's complaint – the fact that her removal had been an illegal disciplinary sanction triggered by her opinions expressed publicly in the context of legislative reforms – which would have called for an examination of the merits and the internal legality of the decree in question.

154. In view of the above, in the absence of domestic case-law examples of similar cases and in view of the binding and specific nature of the decision adopted by the Constitutional Court in the current case, the Court is not convinced that the applicant had an available domestic remedy for effectively attacking in court what she really intended to challenge, namely the reasons of her removal from the position of chief prosecutor of the DNA by the presidential decree of 9 July 2018 in accordance with the judgment of the Constitutional Court of 30 May 2018. All possibility of judicial review was limited to the formal review of the removal decree, while any examination of the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the fulfilment of the legal conditions for its validity, especially the endorsement of the proposal

of the Minister of Justice by the CSM in accordance with Article 54(4) of Law no. 303/2004 (see paragraph 73 above) was specifically excluded. Therefore, the extent of the judicial review available to the applicant in the circumstances of the current case cannot be considered "sufficient".

155. In the Court's opinion, this can hardly be reconciled with the essence of the right to access to a court, which includes not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 86, 29 November 2016). Where there is a serious and genuine dispute as to the lawfulness of the interference into an individual's civil rights, going either to the very existence or the scope of the asserted civil right, Article 6 § 1 entitles the individual concerned "to have this question of domestic law determined by a tribunal" (ibid., § 85).

156. In this context, the Court also notes the growing importance which Council of Europe and European Union instruments attach to procedural fairness in cases involving the removal or dismissal of prosecutors, including the intervention of an authority independent of the executive and the legislature in respect of decisions affecting the appointment and dismissal of prosecutors (see paragraphs 80-88 above).

157. On the basis of the above-mentioned considerations, the Court dismisses the Government's objection as to the non-exhaustion of domestic remedies and concludes that the respondent State impaired the very essence of the applicant's right of access to a court owing to the specific boundaries for a review of her case set down in the ruling of the Constitutional Court.

158. There has accordingly been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

159. The applicant complained that her mandate as chief prosecutor of the DNA had been terminated as a result of the views concerning legislative reforms affecting the judiciary that she had expressed publicly, in her professional capacity. She alleged that there had been a violation of Article 10 of the Convention, which, in so far as relevant, provides:

> "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

160. The Government raised the same objections as those regarding Article 6 § 1 of the Convention (see paragraphs 126 and 132 above). More specifically, they argued that the only document examining factual issues relating to the applicant's professional activity had been the Report of the Minister of Justice of 22 February 2018 (see paragraphs 18-32 above). Therefore, in their opinion, the starting-point for the running of the six-month time-limit in connection with the applicant's complaint under Article 10 had been 26 February 2018, the date the Minister's Report had been served on the applicant (see paragraph 33 above). In addition, they argued that the applicant had failed to exhaust the domestic remedies since she had failed to contest the Minister's Report before the administrative courts.

161. The applicant reiterated her arguments made under Article 6 § 1 of the Convention (see paragraphs 127 and 135-137 above).

162. The Court considers that its findings in respect of the admissibility of Article 6 § 1 of the Convention (see paragraphs 128-131, 149-154 and 157 above) are also relevant in the context of Article 10 as regards the compliance with the six-month time-limit and the exhaustion of the domestic remedies. In the light of these findings, the Government's objections in connection with the admissibility of Article 10 must also be dismissed.

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

B. Merits

1. The parties' submissions and third-party comments

(a) The applicant

164. Relying on the Court's findings in the cases of *Wille v. Liechtenstein* ([GC] no. 28396/95, 28 October 1999), *Kayasu v. Turkey* (*(No. 1)*, no. 64119/00, 13 November 2008), *Poyraz v. Turkey* (no. 15966/06, 7 December 2010) and *Harabin v. Slovakia* (no. 58688/11, 20 November 2012) the applicant contended that Article 10 had been previously applied to public servants and most importantly to members of the judiciary.

165. The applicant submitted that the Minister of Justice in his Report had in fact evaluated, from his personal point of view, her management skills based on the opinions that she had expressed publicly. She considered that these opinions, in connection with proposed or adopted legislative changes, had been expressed in accordance with the legal obligation of a

chief prosecutor to provide the public with information of a general interest. She further argued that the Minister himself had admitted that the views expressed by her had been the underlying reason for her removal from her post (see paragraphs 18 and 19 above). In her opinion this had been a clear interference with her right to freedom of expression.

166. The applicant also alleged that the interference with her rights under Article 10 had not been prescribed by law since the legal provisions on which her removal had been based had lacked predictability and clarity. She pointed out in that connection that the text of Article 51(2) letter b) of Law no. 303/2004 provided that removal from a leading position could be applied for "inappropriate exercise of management duties relating to effective organisation, to behaviour and communication" (see paragraph 73 above). In her opinion the meaning of the terms "behaviour" and "communication" had not been clear enough as to allow her to have considered that they had included expressing opinions in the public space, as had been argued in the Minister's Report.

167. Furthermore the applicant submitted that the infringement of her right to freedom of expression had not pursued a legitimate aim either. She argued that the statements made in the Minister's Report that her opinions had affected the image of Romania and undermined certain institutions had not been supported by any evidence. The applicant referred to reports by prominent international institutions (see paragraphs 80-89 above) as well as to numerous prizes and honours she had received for her achievements in the fight against corruption from non-governmental organisations, governments and diplomatic missions of European countries and the United States.

168. Lastly the applicant contended that no convincing argument had been put forward by the Government to prove that her removal from her leading position, which had obviously been a disproportionate measure, had pursued a pressing social need.

(b) The Government

169. The Government submitted that the complaint raised by the applicant did not fall within the scope of Article 10 of the Convention. In that connection they contended that, similarly to the case of *Harabin* (cited above), the applicant had been dismissed from her position essentially for reasons related to her professional qualifications and her ability to carry out her functions. More specifically, her management had not been assessed from the point of view of freedom of expression, but on the basis of the elements provided by Article 54(4) taken together with Article 51(2) letter b) of Law no. 303/2004 (see paragraph 73 above).

170. They argued that the evaluation in the Report of the Minister of Justice had addressed all aspects considered by the legislature: efficient organisation of work, behaviour, communication skills, responsibility, and

managerial skills. The applicant's public statements had been examined in accordance with the law by virtue of the Minister of Justice's legal authority to examine issues concerning communication, as part of the entire evaluation process. Also, the Government pointed out that the applicant had not been prevented from participating in television and radio programmes and that no prosecutor, much less one with such an important position, should have made appearances of a political nature and/or appearances that could have called into question the independence of the judiciary or demeaned judges and prosecutors or others. It was clear in these circumstances that the applicant's communication skills had been assessed from the point of view of the position held and the need for extremely high-level management skills.

171. They concluded that the applicant's right to freedom of expression had not been breached.

(c) Third-party interveners

(i) International Bar Association's Human Rights Institute

172. The International Bar Association's Human Rights Institute ("the IBAHRI") submitted that according to United Nations Guidelines on the role of prosecutors, prosecutors were essential agents of the administration of justice. The principle of independence of the prosecution encompassed a number of components of which first and foremost was that the office of prosecutors had to be strictly separated from judicial functions, but also independent from any other State authority and thus willing to investigate and prosecute suspected crimes committed by persons acting in an official capacity. States had to ensure that prosecutors were able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. Prosecutors were entitled to freedom of expression, belief, association and assembly. According to Guideline 8 prosecutors had "the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights" (see paragraph 92 above). The IBAHRI further stated that discussions on means of investigation, changes to legislation and threats to the independence of the judiciary and lawyers were matters covered by Guideline 8.

173. The IBAHRI also submitted that according to the Court's case-law, for example the case of *Brisc v. Romania* (no. 26238/10, 11 December 2018), interference with freedom of expression on matters of public interest could not be deemed necessary in a democratic society. Their opinion was that, when restrictions imposed on prosecutors' freedom of expression took the form of a dismissal of a person from his or her official prosecutorial duties, they were also disproportionate. Such unjustifiable restrictions were

destructive and had no place in a democratic society where respect for the rule of law and human rights were paramount.

174. Furthermore, the IBAHRI referred to the fact that it was not only a right but also a duty of all legal professionals to raise issues of public concern if the reason for that was a desire to improve the legal system. Prosecutors, as actors of the justice system, had an obligation to the legal system and to the public interest. Therefore, they were free to publicly discuss, criticise or raise allegations related to public officials, the actions of State institutions, existing poor legal or administrative practices and the justice system, if the reason for doing so was the desire to improve the legal system. They considered it went without saying that raising an issue of alleged corrupt practices, abuse of power, or major disregard or threats to the rule of law in the country had to be part of a necessary and permitted debate in a democratic society.

175. The IBAHRI also mentioned that the Guarantees for the Independence of Justice Operators, adopted by the Inter-American Commission of Human Rights, stated that "as public officials, ... prosecutors ... enjoy[ed] a right of freedom of expression that [wa]s quite broad, as this right [wa]s necessary to explain to society, for example, certain aspects of national interest and relevance". Moreover, in Advisory Opinion OC-5/85, the Inter-American Court of Human Rights emphasised that freedom of expression was "a *conditio sine qua non* for the development of ... trade unions". Therefore, in the same way, prosecutors' freedom of expression was *a conditio sine qua non* for the fair administration of justice and an effective justice system.

(ii) Helsinki Foundation for Human Rights

176. The Helsinki Foundation for Human Rights ("the HFHR") submitted an overview of the most important standards concerning the independence of prosecutors, starting with the United Nations Guidelines on the Role of Prosecutors adopted in 1990 (see paragraph 92 above) and the Status and Role of Prosecutors published in 2014 by the UN Office on Drugs and Crime and the International Association of Prosecutors. They noted that significant standards had also been developed within the system of the Council of Europe. Particularly worth mentioning here was the Recommendation of the Committee of Ministers (2000)19 on the role of public prosecution in the criminal-justice system (see paragraph 90 above). The Recommendation did not advise against making the prosecution service subordinate to government. However, governmental powers should be exercised in a transparent way and in accordance with the law. Any instructions to prosecutors should have written form and be issued with adequate guarantees. Moreover, instructions not to prosecute in specific cases should not as a principle be allowed.

177. The HFHR observed that the majority of the soft-law documents adopted within the framework of international organisations and the documents regarding prosecutorial independence developed by professional associations of prosecutors underlined the importance of respecting and protecting prosecutors' freedom of expression. For example, the Explanatory note of the Rome Statute of the International Criminal Court stated that prosecutors were free to participate "in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice", although they should not comment on pending cases or undermine the integrity of the courts.

178. The HFHR also provided examples of the excessive influence of the Government on the functioning of the prosecution service in Poland and its negative impact on the effectiveness of human-rights protection, starting with the reform of the prosecution service of 2016.

2. The Court's assessment

(a) Existence of an interference

179. The Court has recognised in its case-law the applicability of Article 10 to civil servants in general (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323, and *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008), and members of the judiciary (see *Wille*, §§ 41-42, and *Harabin,* § 149, both cited above; see also *Brisc,* cited above, § 89, concerning a prosecutor who had been subject to a disciplinary sanction and removed as chief prosecutor for imparting to the press information concerning pending criminal investigations).

180. The Court furthermore reiterates that the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain of being dismissed if that dismissal violates one of his or her rights under the Convention (see *Wille*, § 41, and *Kayasu*, § 79, both cited above).

181. In the *Wille* case, the Court found that a letter sent to the applicant (the President of the Liechtenstein Administrative Court) by the Prince of Liechtenstein, announcing his intention not to reappoint him to a public post had constituted a "reprimand for the previous exercise by the applicant of his right to freedom of expression" (see *Wille*, cited above, § 50). The Court observed that in that letter the Prince had criticised the content of a public lecture by the applicant on the powers of the Constitutional Court and announced his intention to sanction him because of his opinion on certain questions of constitutional law. The Court therefore concluded that Article 10 was applicable and that there had been an interference with the applicant's right to freedom of expression.

182. In *Kayasu* (cited above, § 80), the Court found that the applicant's disciplinary sanctions had been based both on the content and format of texts drafted by the applicant (a criminal complaint against an army general and a decision to open a criminal investigation against the same general taken in the applicant's capacity as prosecutor) as well as on the passing of these texts onto the media, both of which were considered to have been connected to the applicant's right to freedom of expression, which included the freedom to communicate opinions and information.

183. Turning to the current case, the Court must first ascertain whether the measure complained of amounted to an interference with the applicant's exercise of freedom of expression.

184. The Court notes that the reasons put forward by the Minister of Justice for the applicant's removal from her senior position were detailed in the Report on managerial activity at the DNA, which was forwarded by the minister to the CSM on 23 February 2018 (see paragraphs 18-32 above).

185. The Court firstly observes that the Report mentioned in its introduction that it was "the position of the Minister of Justice" and that "it was drafted on the basis of the debates which had grown in volume in the public space during the past year, between February 2017 and February 2018, debates which have profoundly divided public opinion, and engendered, at unprecedented levels in the recent history of Romania, personal attacks and the questioning of constitutional, European and universal values ..." (see paragraph 18 above). The Report further mentioned in its introduction, that it was based "on an analysis of decisions, facts and specific actions, including of the public statements made by the chief prosecutor of the DNA ..." (see paragraph 19 above).

186. The Court further notes that the majority of the reasons put forward by the Minister in the Report for the applicant's dismissal referred to opinions she had expressed in her professional capacity on various occasions. More specifically, the reasons presented by the Constitutional Court's decisions nos. 68 (see paragraph 21 above) and 757 (see paragraph 23 above) referred to investigations opened under the applicant's supervision in connection with possible corruption allegedly committed by members of the Government and to the disclosure of the details of these investigations to the media by way of press releases (see paragraph 24 above). On these aspects the current case is similar to the case of *Kayasu* (cited above). Furthermore, the applicant's public statements in connection with the legislative reforms proposed by the Government and the criminal investigations connected to these reforms have been listed as specific reasons for the applicant's dismissal and have been extensively quoted and commented on twelve pages of the Report (see paragraphs 28 and 29 above).

187. The remaining arguments in favour of the applicant's dismissal as presented by the Minister were all examined by the professional body of the

judiciary, the CSM, and were found to lack any factual or legal basis or were connected to pending disciplinary investigations (see paragraphs 50, 51 and 53 above).

188. Therefore, in view of the above and having regard to the sequence of events in their entirety (see paragraphs 9-18 above), rather than as separate and distinct incidents, there is *prima facie* evidence of a causal link between the applicant's exercise of her freedom of expression and the termination of her mandate.

189. The Court has already held that once there is *prima facie* evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government (see *Baka*, cited above, § 149). In the current case, the reasons put forward by the Government to justify the impugned measure before the Court – specifically that the applicant's removal was based mainly on reasons connected to inadequate management and only in addition on reasons connected to the opinions she made public on numerous occasions (see paragraphs 169 and 170 above) – are not supported by specific evidence and therefore they cannot be considered convincing in the entire context of the case.

190. In view of the above the Court concludes that the main reasons for the applicant's removal from her position as chief prosecutor of the DNA were connected to her right to freedom of expression, which includes the freedom to communicate opinions and information (see *Kayasu*, cited above, § 80). Therefore, the premature termination of the applicant's mandate constituted an interference with the exercise of her right to freedom of expression, as guaranteed by Article 10 of the Convention (see, *mutatis mutandis*, *Baka*, cited above, § 152). It remains thus to be examined whether the interference was justified under Article 10 § 2.

(b) Whether the interference was justified

(i) Prescribed by law

191. The applicant contended that the interference with her rights under Article 10 had not been prescribed by law since the legal provisions on which her removal had been based had lacked predictability and clarity (see paragraph 166 above).

192. Regarding the requirement of foreseeability which flows from the expression "prescribed by law", the Court has previously held that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his 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. While certainty is desirable, it may bring in its train 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 questions of practice (see, for example, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 124, 17 May 2016). The Court has also held on numerous occasions that it is not its task to take the place of the domestic courts and it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. Nor is it for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate in a given field (see, among many authorities, *Gîrleanu v. Romania*, no. 50376/09, § 76, 26 June 2018).

193. Turning to the current case, the Court notes that the revocation of the applicant's mandate as chief prosecutor of the DNA was provided for by Article 54(4) and Article 51(2) of Law no. 303/2004 on the status of judges and prosecutors (see paragraph 73 above).

194. It follows from the applicant's submissions that the salient issue in this case is not whether the above-mentioned legal provisions are in principle sufficiently foreseeable, in particular in their use of the terms "behavior" and "communication", but whether the views expressed by the applicant had been the underlying reason for her removal from her post. For the Court this issue is closely related to the question whether the interference was necessary in a democratic society in the circumstances of the present case and in light of the legitimate aim pursued.

195. The Court therefore considers that it is not necessary to address the question whether Article 54(4) and Article 51(2) of Law no. 303/2004 could, *in abstracto*, constitute a foreseeable legal basis for the interference complained of and will continue the examination of the case, turning to the questions whether the interference pursued a legitimate aim and whether it corresponded to any "pressing social need".

(ii) Legitimate aim

196. The Court notes that in his Report the Minister of Justice contended that the applicant's removal from her leading position was aimed at protecting the rule of law (see paragraph 32 above). The Court also notes that the measure under dispute was put forward by the Minister of Justice after criticism by the applicant of legislative proposals initiated by the same Minister, and after the opening by the applicant of criminal investigations in connection with the initiation of certain statutory instruments in which the same Minister had been involved. Moreover, in his Report the Minister also alleged that the applicant's behaviour had created a crisis without precedent in the recent history of Romania, which had made the country a subject of concern at national, European and international level (see paragraph 31 above). The Court observes from the material submitted by the applicant that, on the contrary, concern was expressed at national, European and

international level with respect to the revocation of the applicant's mandate (see paragraphs 80, 81, 88 and 89 above). In this context, the Court considers that no evidence has been brought to show that the impugned measure served the aim of protecting the rule of law or any other legitimate aim. The measure was a consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest anticorruption office-holder in the judiciary. As stated above in the context of Article 6, it was also a measure which interfered with her right to serve her full three-year term as chief prosecutor of the DNA (see paragraphs 114 and 116 above).

197. The Court lastly notes that the Government did not put forward any legitimate aim for the interference complained of by the applicant.

198. It follows that, taking into account the parties' submissions and the documents in the file, the Court cannot accept that the interference complained of pursued a legitimate aim for the purposes of Article 10 § 2.

199. In cases where it had concluded that the interference did not pursue a "legitimate aim", the Court found a violation of the Convention without further investigating whether that interference was "necessary in a democratic society" (see, for instance and in the ambit of Article 8 of the Convention, *Khuzhin and Others v. Russia*, no. 13470/02, § 117, 23 October 2008). Nevertheless, in the circumstances of the current case the Court considers it useful to continue its examination and establish also whether the interference was necessary in a democratic society.

(iii) Necessary in a democratic society

(1) General principles

200. The general principles concerning the necessity of an interference with freedom of expression, reiterated many times by the Court, were restated, *inter alia*, in *Baka* (cited above, § 158-61).

201. As regards freedom of expression of members of the judiciary, the Court has recognised 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 (see *Wille*, cited above, § 64; *Kayasu*, cited above, § 92; *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009; and *Di Giovanni v. Italy*, no. 51160/06, § 71, 9 July 2013). The duty of loyalty and discretion owed by the judiciary requires that the dissemination of even accurate information must be carried out with moderation and propriety (see *Kudeshkina*, cited above, § 93). The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties (see ibid., § 86, and *Morice v. France* [GC],

no. 29369/10, § 128, ECHR 2015). At the same time the Court has also stressed that questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 (see *Kudeshkina*, cited above, § 86, and *Morice*, cited above, § 128). Even if an issue under debate has political implications, that is not in itself sufficient to prevent, for example, a judge from making a statement on the matter (see *Wille*, cited above, § 67). In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislature and the judiciary but also of the media and public opinion. Issues relating to the separation of powers can involve very important matters in a democratic society, which the public has a legitimate interest in being informed about and which fall within the scope of political debate (see, *mutatis mutandis*, *Guja*, cited above, §§ 74 and 88).

202. In the context of Article 10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made. It must look at the impugned interference in the light of the case as a whole, attaching particular importance to the office held by the applicant, her or his statements and the context in which they were made (see *Baka*, cited above, § 166, with further references).

203. Lastly, in order to assess the justification of an impugned measure, it must be borne in mind that the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10. The Court has already found that the absence of an effective judicial review may support the finding of a violation of Article 10 (see *Baka*, cited above, § 161, and the cases cited therein).

(2) Application of those principles to the present case

204. Turning to the current case, the Court reiterates its finding that the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in the exercise of her right to freedom of expression (see paragraph 190 above). It observes in this regard that the applicant expressed her views on the legislative reforms at issue in her professional capacity as chief prosecutor of the DNA. The applicant also used her legal power to start investigations into suspicions of corruption crimes committed by members of the Government in connection with highly disputed pieces of legislation and to inform the public about these investigations (see paragraphs 12, 13 and 24 above). She also availed herself of the possibility to express her opinion directly in the media or during professional gatherings (see paragraphs 28 and 29 above).

205. The Court attaches particular importance to the office held by the applicant (chief of the national anticorruption prosecutor's office), whose functions and duties included expressing her opinion on the legislative

reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department. It refers in this connection to recommendation (REC(2000)19 of the Committee of Ministers of the Council of Europe, which recognises that prosecutors should have the right to take part in public discussions on matters concerning the law, the administration of justice and the promotion and protection of human rights, and they should be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption (see paragraph 90 above).

206. The present case should also be distinguished from other cases in which the issue at stake was public confidence in the judiciary and the need to protect such confidence against destructive attacks (see *Kudeshkina*, cited above, § 86). The views and statements publicly expressed by the applicant did not contain attacks against other members of the judiciary (compare *Di Giovanni*, cited above, § 81); nor did they concern criticisms with regard to the conduct of the judiciary when dealing with pending proceedings (compare *Kudeshkina*, cited above, § 94).

207. On the contrary, the applicant expressed her views and criticisms on legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system and the prosecutor's competence to investigate corruption offences, all of which are questions of public interest. Her statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considers that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for her freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.

208. Furthermore, the proceedings for the applicant's removal from the office of chief prosecutor of the DNA were initiated by the Minister of Justice on 23 February 2018 (see paragraph 18 above), a little more than one year and two months before the end of the fixed term of her mandate applicable under the legislation in force at the time of her appointment (16 May 2019 – see paragraph 8 above). Although the applicant remained on as a prosecutor, she was ultimately removed from her position as chief prosecutor on 9 July 2018 (see paragraph 67 above) before the end of her mandate. This removal and the reasons justifying it can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which – according to Council of Europe and other international instruments – is a key element for the maintenance of judicial independence (see paragraphs 90-93 above). Against this background, it appears that the premature removal of the applicant from her

position as chief prosecutor of the DNA defeated the very purpose of maintaining the independence of the judiciary.

209. Furthermore, the premature termination of the applicant's mandate was a particularly severe sanction, which undoubtedly had a "chilling effect" in that it must have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary (see, *mutatis mutandis*, *Guja,* § 95, and *Kayasu*, § 106, both cited above).

210. Lastly, due account should be taken of the procedural aspect of Article 10 (see paragraph 203 above). In the light of the considerations that led it to find a violation of Article 6 § 1 of the Convention (see paragraphs 145-158 above), the Court considers that the impugned restrictions on the applicant's exercise of her right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse.

(iv) Conclusion

211. On the basis of the above arguments, and keeping in mind the paramount importance of freedom of expression on matters of general interest, the Court is of the opinion that the applicant's removal from her position of chief prosecutor of the DNA did not pursue any of the legitimate aims listed in Article 10 § 2 and, moreover, was not a measure "necessary in a democratic society" within the meaning of that provision.

212. Accordingly, the Court concludes that there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLES 6 § 1 AND 10 OF THE CONVENTION

213. The applicant also complained, under Article 13 taken in conjunction with Articles 6 § 1 and 10 of the Convention, that she had been deprived of an effective domestic remedy in relation to the premature termination of her mandate as chief prosecutor of the DNA. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

214. The Government argued firstly, that the applicant had an effective domestic remedy for her complaints available, specifically the procedure provided by the Law on administrative proceedings. Secondly, they submitted that since no violation should be found under Articles 6 § 1

and 10 of the Convention, there was no arguable complaint under Article 13 either.

215. The Court reiterates that Article 13 requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

216. The Court notes, however, that the role of Article 6 in relation to Article 13 is that of *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see, for example, *Kuznetsov and Others v. Russia*, no. 184/02, § 87, 11 January 2007, and *Efendiyeva v. Azerbaijan*, no. 31556/03, § 59, 25 October 2007). Given the Court's findings under Article 6 § 1 of the Convention (see paragraph 158 above), the present complaint does not give rise to any separate issue (see, for instance, *Baka*, cited above, § 181).

217. Consequently, the Court holds that it is not necessary to examine the admissibility and merits of the complaint under Article 13 in conjunction with Articles 6 § 1 and 10 of the Convention separately.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

218. Article 41 of the Convention provides:

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

219. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award her any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's preliminary objection as to the non-exhaustion of domestic remedies, and dismisses it;

2. *Declares* the applicant's complaints under Article 6 § 1 and Article 10 of the Convention admissible;

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

4. *Holds* that there has been a violation of Article 10 of the Convention;

5. *Holds* that there is no need to examine the admissibility and merits of the complaint under Article 13 in conjunction with Articles 6 § 1 and 10 of the Convention.

Done in English, and notified in writing on 5 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Jon Fridrik Kjølbro
Registrar	President