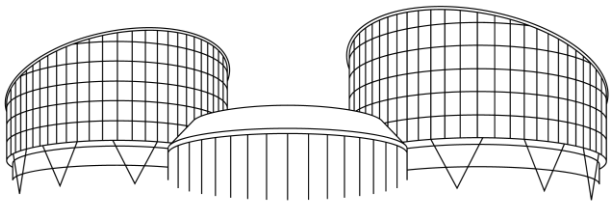

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF CREANGĂ v. ROMANIA

(Application no. 29226/03)

JUDGMENT

STRASBOURG

23 February 2012

This judgment is final but may be subject to editorial revision.

In the case of Creangă v. Romania,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Nina Vajić,
Dean Spielmann,
Lech Garlicki,
Peer Lorenzen,
Alvina Gyulumyan,
Egbert Myjer,
Mark Villiger,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
Giorgio Malinverni,
Mirjana Lazarova Trajkovska,
Nebojša Vučinić,
Guido Raimondi,
Ganna Yudkivska, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 30 March 2011 and 18 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 29226/03) 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, Mr Sorin Creangă ("the applicant"), on 4 September 2003.

2. The applicant was represented by Mr S. Cus, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their acting Agent, Ms C. Ciută, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his deprivation of liberty from 9 a.m. to 10 p.m. on 16 July 2003 had been unlawful, as had his subsequent placement in pre-trial detention. He relied in particular on Article 5 § 1 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 November 2004 the Court

changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed Third Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 19 February 2009 the President of the Third Section decided to communicate the application to the Government.

5. On 15 June 2010 the Chamber, composed of Josep Casadevall, Elisabet Fura, Corneliu Bîrsan, Boštjan M. Zupančič, Ineta Ziemele, Luis López Guerra and Ann Power, judges, and Santiago Quesada, Section Registrar, delivered its judgment. It unanimously declared the application admissible as to the complaints under Article 5 § 1 of the Convention and inadmissible as to the remainder. The Chamber also found, unanimously, that there had been a violation of Article 5 § 1 of the Convention as regards the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 and his placement in detention on 25 July 2003 following the application to have the judgment of 21 July 2003 quashed. Lastly, the Chamber found that there had been no violation of Article 5 § 1 of the Convention as regards the insufficient reasons given for the applicant's placement in temporary detention from 16 to 18 July 2003. The Chamber also decided that the respondent State was to pay the applicant EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage and EUR 500 (five hundred euros) in respect of costs and expenses.

6. On 3 September 2010 the Government requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

7. On 22 November 2010 a panel of the Grand Chamber decided to accept that request (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. On 3 November 2011 Jean-Paul Costa's term as President of the Court came to an end. Nicolas Bratza succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Jean-Paul Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4. Following the withdrawal of Mr Corneliu Bîrsan (Rule 28), the judge elected in respect of Romania, the President of the Grand Chamber appointed Mr Guido Raimondi to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

9. The applicant and the Government each filed additional written observations (Rule 59 § 1).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 March 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms C. CIUTA, *acting Agent*;
Ms M. MORARIU, *Counsel*;

(b) *for the applicant*
Mr S. CUS, of the Bucharest Bar, *Counsel*.
The applicant was also present.

The Court heard addresses by Mr Cus, Ms Ciută and Ms Morariu and their answers to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1956 and lives in Bucharest.

12. In 1985 the applicant joined the Bucharest police force. In 1995 he became an officer in the criminal investigation department of Bucharest police section no. 5.

A. The circumstances surrounding the applicant's first period of pre-trial detention

1. The applicant's version

13. On his application form, the applicant stated that on 16 July 2003 he was informed by his hierarchical superior that he was required to go to the National Anti-Corruption Prosecution Service headquarters ("the NAP") for questioning.

In his written observations to the Grand Chamber of 10 February 2011 the applicant stated that at about 5 p.m. on 15 July 2003, while he was on leave, a colleague from Bucharest police section no. 5 informed him by telephone that he was required to attend the NAP on the following day; he was not given any additional information.

14. At about 8.45 a.m. on 16 July 2003 the applicant met twenty-five colleagues in the courtyard of the NAP headquarters. They were then asked to enter the building at about 9 a.m. At the entrance, a police officer entered the particulars of the applicant and his colleagues in a logbook.

15. The applicant and his colleagues were taken to a meeting room on the ground floor of the building. Shortly afterwards V.D., a military prosecutor, entered and asked them to make written statements on the circumstances in which they had met three individuals: I.D., S.B. and M.I. The prosecutor then left the room and returned at approximately 9.30 to 9.40 a.m. to collect the statements. After reading them, the prosecutor

allegedly began to threaten the applicant and his colleagues with pre-trial detention. The prosecutor left the room again. Four or five masked and armed gendarmes burst in. One of the gendarmes asked the applicant and his colleagues to take out their mobile phones and to put them on a table next to another gendarme. They were also informed that they were allowed to leave the room to go to the toilet or smoke a cigarette only individually and if accompanied by an armed gendarme.

16. At about 3 p.m. the applicant and his colleagues asked for permission to leave the room to purchase water and food. After obtaining the prosecutor's permission, a gendarme collected money from the police officers and went to buy the requested groceries.

17. Throughout this time, the applicant was not assisted by either a lawyer of his own choosing or an officially appointed lawyer. He was unable to contact anyone outside the building.

18. On the application form, the applicant stated that he had managed to contact a lawyer at around 8 p.m.

In his written observations to the Grand Chamber, the applicant alleged that towards 11 p.m., he and one of his colleagues had been taken to the prosecutor's office on the first floor. The prosecutor, another man and two women were present in the office. The prosecutor allegedly suggested to the applicant that he state that the commanding officers at Bucharest police section no. 5 were guilty of corruption. He added that in exchange, the applicant would not be placed in pre-trial detention and would be able to see his family again soon. The applicant asked for assistance from a lawyer of his choosing. The prosecutor replied that the two women present were officially appointed lawyers and asked him to select one of them to assist him. The applicant refused. He claimed that the prosecutor began to "insult him" and to threaten that if he did not cooperate, he would be placed in detention and would be forbidden family visits. He was taken out of the office by a gendarme, who was instructed to prevent him from speaking to anyone and from going to the toilet without the prosecutor's permission.

At the public hearing on 30 March 2011 the applicant stated that at an unspecified time his family, who knew that he was to go that day to the NAP and who had not seen him come home, had contacted the lawyer C.N., who asked his colleague, Mr Cus, to assist the applicant at the prosecution service premises. Mr Cus arrived at 10 p.m. and was allowed to meet with the applicant.

19. At about 1.15 to 1.30 a.m. on 17 July 2003 the applicant was again taken into the prosecutor's office. The prosecutor filled in a pre-printed form setting out the charges against the applicant and read it to him. In response, the applicant stated that he did not acknowledge the acts of which he was accused and that he stood by his initial statement. The applicant signed the form in the presence of an officially appointed lawyer, Ms M.S. The prosecutor also served on him a warrant for his pre-trial detention,

issued on 16 July 2003, which mentioned that his detention had been ordered for three days, namely from 16 to 18 July 2003.

20. At about 1.40 a.m., in the presence of Mr Cus, the lawyer chosen by the applicant, the prosecutor informed him of the order for his pre-trial detention. He also outlined to the applicant the evidence against him in support of his detention, namely statements by his colleagues. The order was based on Article 148 § 1 (h) of the Code of Criminal Procedure ("the CCP"). Referring to the relevant legal texts, the prosecutor indicated that the acts of which the applicant was accused amounted to the offences of criminal conspiracy, accepting bribes and aiding and abetting aggravated theft. The relevant part of the order was worded as follows:

> "On an unspecified date in 1999 or 2000, a date that will be determined precisely [at a later stage], [the applicant], along with several colleagues from police section no. 5, caught several persons in the Bucureştii Noi district in the act of transporting in a Dacia van more than two tons of petrol that had been siphoned from pipelines. They then asked for and received the sum of 20,000,000 lei from S.B. and M.I. in exchange for not opening a criminal investigation against them and allowing them to continue their unlawful activity.
>
> The fact that the suspect/accused committed these criminal acts is proved by the following evidence:
>
> - witness statements;
>
> - records of confrontations;
>
> - statements by the accused persons;
>
> - audio recordings;
>
> - photographs;
>
> - records of photo-based identification procedures.
>
> Given that the conditions laid down in Article 148 § 1 (h) CCP have been met, namely that the offence committed is punishable by between four and eighteen years' imprisonment and that the accused's release would pose a threat to public order and to the conduct of the investigation in this case, since the accused is a police officer and could use this fact to influence the persons who are to be questioned;
>
> On the basis of Article 136 § 5, Article 146 § 1, Article 148 § 1 (h), Article 149^1 and Article 151 CCP [the prosecutor] decides that:
>
> The suspect/accused is to be held in temporary pre-trial detention ... for a period of three days;
>
> Pursuant to Article 146 § 3 and Article 149^1 § 3 CCP, the detention referred to above shall commence at 10 p.m. on 16 July 2003 and end at 10 p.m. on 18 July 2003.
>
> A warrant for temporary pre-trial detention will be issued ... from 16 July 2003 ..."

21. At about 2.30 a.m. the applicant was taken to a room in the basement of the building where thirteen other colleagues were present. Shortly afterwards he was transferred to Rahova Prison.

2. The Government's version

22. During the autumn of 2002 the NAP was informed of thefts of petroleum products from Petrotrans S.A. pipelines on the outskirts of Bucharest, committed in close collaboration with gendarmes and police officers. The questioning of several individuals on 9 and 11 July 2003 and photographic identification revealed the applicant's involvement in the operation. The prosecutor responsible for the case, V.D., decided to summon around fifty people to give evidence on 16 July 2003.

23. On 15 July 2003 the applicant and sixteen police colleagues were summoned at their workplace (Bucharest police section no. 5) to appear before the NAP in order to make statements for the purpose of a criminal investigation. The head of police of the 1st District of Bucharest was also informed so that he would be aware of the police officers' absence from work on the following day and in order to ensure their presence at the NAP.

24. At 9 o'clock the following morning the applicant and his colleagues went to the NAP premises. The military prosecutor V.D. greeted them in a room on the ground floor of the building and informed them that they were to be questioned in the context of a preliminary investigation (*acte premergătoare*) into their suspected involvement in the fraudulent removal of petroleum products from oil pipelines. All of the police officers verbally denied any involvement in such activity, but agreed to make a written statement on the subject. As a result, they received a ten-point questionnaire which they answered on a plain sheet of paper. During this period the prosecutor left the room and went to his office, on the first floor of the building, to continue procedural formalities with regard to other individuals involved in the case.

25. Towards 12 noon, when all of the officers had finished writing their statements, the prosecutor returned to the room and informed them that, by a decision of the same day, a criminal investigation had been opened in the case against ten of the police officers, including the applicant, for accepting bribes, aiding and abetting aggravated theft and criminal conspiracy. The other seven police officers were free to leave the NAP premises.

26. The prosecutor asked the ten police officers concerned to make new statements and to take part in confrontations with other persons. He also informed them that they were entitled to be assisted by counsel of their own choosing. Some of the police officers contacted lawyers, while the prosecution service asked the Bucharest Bar to ensure that lawyers could be officially appointed for the others, including the applicant.

27. The applicant waited voluntarily in the NAP premises in order to have his legal situation clarified. He was not obliged to stay there, and was free to leave the premises at any point in order, for example, to purchase water or cigarettes; indeed, two police officers, A.A. and G.C., left that day and did not return.

28. The applicant was at no time supervised or guarded. Gendarmes were present in the NAP premises on that day purely for the purpose of

maintaining order. Furthermore, there was no separate entrance or special room for persons placed in police custody or in pre-trial detention.

29. At about 1 or 2 p.m., after their chosen lawyers (for five of the police officers) or officially appointed lawyers had arrived at the NAP headquarters, the prosecutor began questioning each of the officers in turn. This process lasted three to four hours.

30. At an unspecified time while being questioned, the applicant, assisted by M.S., an officially appointed lawyer, added to his initial statement made on a plain sheet of paper, confirming that he was a colleague of officers C.D. and M.G.M. and that he had a normal relationship with them. On that occasion, the prosecutor noted on the sheet that the initial statement had been made at 10 a.m.

31. At an unspecified time the applicant made a new statement in the presence of the same officially appointed lawyer, this time on a pre-printed form bearing the words "suspect/accused". The form indicated that the applicant had been informed of the acts of which he was accused and their legal classification, and of his procedural rights. A record was accordingly drawn up and signed by the prosecutor, the applicant and the officially appointed lawyer.

32. The prosecutor subsequently carried out several confrontations between suspects, accused persons and witnesses.

33. At 10 p.m., by an order, the prosecutor decided to charge several police officers, including the applicant, with accepting bribes, aiding and abetting aggravated theft and criminal conspiracy.

34. At the same time, the prosecutor decided, by an order, to place the applicant in temporary pre-trial detention. A warrant for pre-trial detention was issued and served on him at an unspecified time. During the night of 16 to 17 July 2003 the applicant was transferred to Rahova Prison.

35. The Government observed that the logbooks recording persons entering and leaving the NAP premises in 2003 had been destroyed well before the present case had been communicated on 19 February 2009, the retention period being three to five years, in accordance with the legal provisions in force.

B. The applicant's release

36. On 17 July 2003, on the basis of Article 148 § 1 (c), (d) and (h) CCP, the NAP asked the Bucharest Military Court to extend by twenty-seven days the pre-trial detention of the applicant and his thirteen co-accused, starting on 19 July 2003.

37. At 10 a.m. on 18 July 2003 the applicant was taken to court. He alleged that his lawyer was given access to the case file only while the prosecution was presenting its request for an extension of the pre-trial detention. The Military Court ordered that the case be referred to the

Military Court of Appeal, which, in view of the military rank of one of the co-accused, had jurisdiction.

38. By a judgment delivered in private on the same date, the Military Court of Appeal, sitting as a single judge, granted the prosecution's request and extended the pre-trial detention of the applicant and the other co-accused by twenty-seven days.

39. The Military Court of Appeal held, having regard to the case file, that there was evidence that the accused had committed the offences of criminal conspiracy, taking bribes, aiding and abetting aggravated theft and inciting others to give false evidence. It held that it was necessary to place the accused in pre-trial detention on grounds of public order, noting that they could influence witnesses and that they had taken steps to evade criminal proceedings and execution of the sentence. Lastly, it noted that the complexity of the case, the large number of accused and the difficulty in obtaining evidence were also to be taken into account.

40. On the same day, a warrant for pre-trial detention identical to that of 16 July 2003 was issued in respect of the applicant.

41. The applicant and his co-accused lodged an appeal against the judgment, arguing that the court which had delivered it had not been legally constituted. The prosecution likewise submitted that the court had been incorrectly constituted.

42. By a final judgment of 21 July 2003 the Supreme Court of Justice upheld the appeal, set aside the judgment and ordered the release of the applicant and his co-accused. It held that, in order to ensure greater transparency in the fight against corruption, Law no. 161 of 21 April 2003 had amended, with immediate effect, the procedural provisions set out in Law no. 78/2000 on the prevention, discovery and punishment of acts of corruption ("Law no. 78/2000"). Thus, Article 29 §§ 1 and 2 of Law no. 78/2000 provided that a court ruling at first instance on the offences set out in that Law had to be composed of two judges.

43. The applicant was not informed of the reasoning of that judgment.

44. The applicant was released on the same day.

C. Procurator General's application for quashing of the decision ordering the release of the accused

45. On an unspecified date, the Procurator General of Romania lodged an application with the Supreme Court of Justice to have the final judgment of 21 July 2003 quashed. He submitted that the Supreme Court had committed serious errors of law in its interpretation of the domestic legislation, resulting in an unsatisfactory solution to the matter.

46. The applicant stated that he had learned only on 24 July 2003, through the media, of the existence of the application to have the judgment

quashed, and of the fact that the hearing had been scheduled for 25 July 2003.

47. At 9.30 a.m. on 25 July 2003 the applicant attended the hearing, accompanied by two lawyers who requested that the case be adjourned on the ground that neither the reasoning of the judgment of 21 July 2003 nor the application to have that judgment quashed had been communicated to the applicant. The Supreme Court of Justice granted this request and, referring to the urgent nature of the case, adjourned the hearing until 12.30 p.m.

48. When the proceedings resumed the applicant submitted that the final judgment of 21 July 2003 could only be challenged by means of an appeal in the interests of the law and not by an application to have it quashed, and that there were no plausible reasons to justify his pre-trial detention.

49. By a final judgment of 25 July 2003 the Supreme Court of Justice, sitting as a bench of nine judges, upheld the application, quashed the judgment of 21 July 2003 and, on the merits, dismissed the applicant's appeal on the ground that the aforementioned judgment had incorrectly interpreted Article 29 §§ 1 and 2 of Law no. 78/2000. It considered that the application of the amendments to Law no. 78/2000 and to the CCP led to the conclusion that the legislature's intention had been to ensure a single set of rules concerning pre-trial detention, namely that it was to be ordered by a single-judge bench sitting in private, whatever the nature of the offence.

50. Having regard to the case file, which contained sufficient information to suggest that each of the persons under criminal investigation could have committed the offences with which they had been charged, the Supreme Court of Justice also held that their pre-trial detention was justified.

51. On 25 July 2003 the applicant was placed in pre-trial detention.

52. By an interlocutory judgment of 29 June 2004, upheld on 2 July 2004 by the Military Court of Appeal, the territorial Military Court ordered that the applicant be released and replaced his pre-trial detention by an order prohibiting him from leaving the country.

53. By a judgment of 22 July 2010 the Bucharest Court of Appeal sentenced the applicant to three years' imprisonment, suspended, for taking bribes (Article 254 § 2 of the Criminal Code taken together with Article 7 of Law no. 78/2000) and harbouring a criminal (Article 264 of the Criminal Code). By the same judgment, M.T. and G.S., whose statements had been produced by the applicant, were sentenced to two years' and five years' imprisonment respectively for taking bribes and criminal conspiracy, and taking bribes and harbouring a criminal.

D. Written statements produced by the applicant

54. At the request of the Court, on 8 March 2011 the applicant produced the statements of two of his police colleagues, M.T. and G.S., who had also been present in the NAP premises on 16 July 2003. Their statements had been taken by the applicant's lawyer on 3 March 2011.

55. M.T.'s statement read as follows:

> "At around 9.30 p.m. on 15 July 2003 the duty officer of police section no. 5 informed me by telephone that I was to attend the NAP at 9 a.m. on 16 July 2003, but I was given no additional information. At 8.45 a.m. on 16 July 2003, outside the NAP premises, I met several colleagues including Sorin Creangă. Shortly afterwards, we were invited to enter the building. At the entrance, a gendarme asked us for our identity documents so as to note down our particulars in the logbook. I was taken with my colleagues to a room on the ground floor of the building. Shortly afterwards, a person entered the room and introduced himself as V.D., the military prosecutor. He gave us sheets of paper and pens and asked us to state whether and in what circumstances we had met three people: I.D., S.B. and M.I. He left the room, leaving us alone.
>
> After approximately forty minutes, V.D., the prosecutor, came back into the room and gathered up the statements. [After having read the statements] and noted that some [of us] had responded negatively, he became angry and very tense and threatened to place us in detention with our colleagues who had already been arrested. He then left the room. Four or five armed gendarmes (masked and armed with machine guns and wearing bulletproof vests) burst into the room. One of the gendarmes, who had the rank of officer, asked us to get out our mobile phones and place them on a table next to another gendarme; we were also told that we were authorised to leave the room only if accompanied by a gendarme. That situation lasted until 5 p.m., when we asked for permission to leave the room to purchase food and water. We were asked to collect the money so that a gendarme could go and buy the groceries we had requested.
>
> We were forbidden from contacting our families or anyone on the outside. Until 10 p.m. we were authorised to leave the room to use the toilet only individually and accompanied by an armed gendarme. We were not assisted by lawyers of our own choosing or officially appointed lawyers. At about 10.30 p.m. to 11 p.m., a gendarme took me with Sorin Creangă to an office on the first floor. Present in the office were the prosecutor V.D., the person who had taken us to the NAP premises, another man and two women. The prosecutor suggested to me and to Sorin Creangă that we state that the officers in charge of police section no. 5 were guilty of corruption and were accepting bribes from thieves ... and assured us that if we were to make such a statement no action would be taken against us. Otherwise, we would be arrested. That being so, my colleague Sorin Creangă asked to be assisted by a lawyer of his choosing. The prosecutor replied that the two women present, who were officially appointed lawyers, would assist them. Sorin Creangă refused their assistance and said that he would not make a statement. The prosecutor started to insult him, calling him a peasant, and told him that he would be arrested even if he didn't make a statement and that he would never see his family again if he didn't cooperate. Sorin Creangă was then taken from the office.
>
> Approximately forty minutes later, when I was taken to a room in the basement of the building, I saw Sorin Creangă in the corridor, near the door of the prosecutor's office, being guarded by an armed gendarme. At around 2.30 a.m. on 17 July 2003 Sorin Creangă was taken to the basement room. Shortly afterwards, we got into a

windowless vehicle and were taken to Rahova Prison in Bucharest, escorted by gendarmes.

I would point out that I was not allowed any contact with my family and was not allowed to be assisted by a lawyer of my choosing."

56. In his statement, S.G. confirmed the truth of M.T.'s statement and described the course of events after 16 July 2003.

E. Statement of the prosecutor, V.D., produced by the Government

57. At the request of the Court, on 7 March 2011 the Government produced the statement of the prosecutor V.D., responsible for the proceedings brought against the applicant. Dated 17 January 2011, the relevant parts read as follows:

"After having consulted 'the records' of the file on the criminal investigation, I wish to clarify the following:

- The following '*făptuitori*' ['alleged perpetrators' or 'suspects', at a stage prior to the opening of proceedings against them], officers of police section no. 5, were summoned on the aforementioned date [16 July 2003] by a written request sent to the head of police of the 1st District of Bucharest: G.S., D.M., Sorin Creangă, M.T., C.M., C.O., L.S., S.T., D.A., M.G., S.T., C.B., N.T., C.S., G.R., L.C. and G.D.

- The aforementioned persons were informed that they were to be questioned as '*făptuitori*' (in the context of the preliminary investigation) in connection with their involvement in the fraudulent extraction of petroleum products from oil pipelines. From the outset, all the police officers summoned verbally denied any involvement in this activity but agreed to make a statement in that regard. Consequently, they were given a ten-point questionnaire to which they responded in writing.

After having obtained their agreement and in the interests of the efficiency of the investigation, I decided that the statements would be made simultaneously in the NAP meeting room because it would have taken several hours to question them individually. I left the room while the statements were being drawn up because, as I was the only prosecutor working on the case, I had other investigative formalities to complete in my office.

- At around 12 noon, when all the officers had finished writing their statements, I re-entered the room and informed them that a criminal investigation had been opened in the case against G.S., D.M., Sorin Creangă, M.T., C.M., C.O., L.S., S.T., D.A. and M.G. I asked those persons to make new statements and to take part in confrontations. I explained to them that they were entitled to be assisted by lawyers of their own choosing and that, for those who did not have lawyers, officially appointed lawyers would be requested from the Bucharest Bar.

Accordingly, the persons wishing to be assisted by a lawyer of their own choosing were permitted to contact their lawyers, and officially appointed lawyers were requested from the Bucharest Bar for the others. The first lawyers arrived at the prosecution headquarters one hour after having been contacted and they were allowed to meet with their clients in the corridors of the building before the hearings and confrontations.

The police officers in respect of whom no criminal investigation had been opened were free to leave the NAP and return to their place of work.

In addition to the above-mentioned '*făptuitori'*, police officers D.M., C.M.E., I.E. and D.C.B were summoned to appear as '*făptuitori*' at the prosecutor's office on the same day. The same procedure was followed in respect of those police officers, since they were also the subject of a criminal investigation.

- Before the lawyers for the fourteen police officers under investigation arrived (that is, before 1 p.m.), I completed other investigative formalities in my office such as questioning, re-examination or confrontation, in respect of other persons, for example M.I., S.B., D.C., G.M.M. and G.A., some of whom were already in pre-trial detention.

- A series of witnesses, including M.P., M.B. and D.A.I., were summoned on the same day in the same case.

- At around 1 or 2 p.m. I started questioning the fourteen police officers, as suspects, in the presence of their lawyers. Each suspect made two separate statements (one written on a plain sheet of paper and another on the form designed for suspects), signed by their lawyers.

I recall that none of the fourteen suspects admitted any involvement in the criminal activities at issue, even though their involvement had been established on the basis of evidence gathered earlier.

The fourteen suspects were questioned for at least three to four hours.

- Because several confrontations were needed, the fourteen suspects, assisted by lawyers of their choosing or officially appointed lawyers, participated voluntarily in at least twenty confrontations, during which they were presented with extracts of transcripts of their telephone conversations which had been intercepted and recorded.

The confrontations went on for several hours, until 10 p.m., when a prosecution was brought against the fourteen suspects and an order for their detention was made.

Note: The special nature of the criminal investigation in this case required that repeated questioning and confrontations be carried out on the day in question, that being the only way in which the truth could be established.

Another reason for carrying out all those measures on the same day was the need to ensure the confidentiality of the results of the investigation, given that there was already sound evidence that the suspects and the accused were transmitting information about the investigation with a view to concealing the truth and obstructing the criminal investigation.

- ... as far as I recall, in 2003, just as now, the identity cards of people summoned to attend the prosecutor's office were not retained at the entrance since the prosecutor had to identify each person before every interview.

- ... the accused Sorin Creangă completed the formalities described above. ... Thus, until 11 a.m. or 12 noon, alongside his colleagues, he drew up his first statement without the prosecutor being present in the room; the room was on the ground floor of the building. Later, Sorin Creangă waited for his lawyer to arrive; after that, he took part in two sets of questioning and various confrontations (the gendarmes were indeed present, but their purpose was to keep order, and no one was guarded individually; anyone could, without being guarded and without having to advise anyone, leave the prosecution service headquarters because no permission was required at the exit).

Personally, as the prosecutor, I do not remember the names of the two police officers who left the prosecution service headquarters during that period without advising anyone but I do remember that they disappeared and could not be found, which is why a general search warrant covering the whole country was issued in respect of them. They were found several days later and brought to the prosecution service, which detained them. They were then brought before the court, which ordered that they be placed in pre-trial detention.

- ... there was not in 2003, nor is there now, a separate entrance for persons under investigation or arrest, nor is there any special room in which such persons could wait to be called into the prosecutor's office in connection with activities forming part of criminal investigations.

- ... the accused, Sorin Creangă, was summoned on 16 July 2003 by a letter sent by the NAP to the head of police of the 1st District of Bucharest (a copy is attached to this report), that being a legal form of service of a summons under the Code of Criminal Procedure.

Once charged, Sorin Creangă was provided with legal assistance, in accordance with the procedural requirements, given that before a criminal investigation is opened, the law does not require the presence of a lawyer and he did not request the assistance of a lawyer. Furthermore, neither did the other police officers request assistance from a lawyer when drawing up their initial statements.

Sorin Creangă did not specifically ask for permission to leave the NAP headquarters as he was under no obligation to do so and there were no checks on anyone wishing to leave the building without informing the investigating prosecutor.

Sorin Creangă was therefore never specifically told that he could leave the NAP headquarters but he was asked, along with other police officers, to participate in the activities forming part of the criminal investigation and he agreed to do so.

... Sorin Creangă was provided with information and legal assistance as was his entitlement in law; he agreed to participate in activities forming part of the criminal investigation.

Before Sorin Creangă was charged, several other accused, for example S.B., M.I., G.F.P., V.B.D., D.C., G.M.M., G.A.A., F.C., A.G.B., C.U., M.L., M.V., N.B., L.S. and I.D., had admitted committing the offences with which they had been charged and confirmed the offences committed by Sorin Creangă.

- ... I worked alone on this case file on 16 July 2003 and was not assisted by other prosecutors or police officers."

II. RELEVANT DOMESTIC LAW AND PRACTICE

58. The relevant provisions of the CCP, in force at the material time, read as follows:

A. Commencement of the criminal proceedings, the parties and other participants in the criminal proceedings

Article 23
The accused

"The person against whom a prosecution is brought is a party to the criminal proceedings and is referred to as the accused."

Article 78
The witness

"Any person who has knowledge of a fact or circumstance that might be useful in establishing the truth in the criminal proceedings may be heard as a witness."

Article 224 §§ 1 and 3
The preliminary investigation

"1. The criminal investigation authorities may conduct any preliminary investigation measures.

...

3. The record of execution of any preliminary investigation measure shall constitute evidence."

Article 228 § 1
Opening of the criminal investigation

"The criminal investigation authority to which an application is made in accordance with any of the arrangements set forth in Article 221 shall order, by decision (*rezoluţie*), the opening of a criminal investigation where the content of that application or the preliminary investigation do not disclose any of the grounds not to prosecute, as provided for in Article 10, with the exception of the ground set out under letter (b)[1]."

Article 229
The suspect (*învinuitul*)

"The suspect is a person who is the subject of a criminal investigation, until such time as a prosecution is brought."

Article 235 §§ 1 and 2
Prosecution

"1. The prosecutor shall decide to prosecute [on a proposal by the criminal investigation authority] after having examined the case file.

2. If the prosecutor agrees with the proposal, he or she shall bring the prosecution by means of an order (*ordonanţă*)."

B. The appearance of witnesses, suspects or accused

Article 83
Obligation [on witnesses] to appear

"A person who is called upon to testify as a witness must appear at the place, on the date and at the time indicated in the summons. He or she is bound to reveal everything that he or she knows about the facts of the case."

Article 176 § 1 (b)
Content of the summons

"1. The summons ... contains the following wording:

...

(b) the first name and surname of the person summoned, the capacity in which that person is being summoned and the subject matter of the case."

Article 183
The warrant to appear

"Any person who, despite having been summoned to appear, has not done so and whose testimony is deemed to be necessary may be brought before the criminal investigation authorities or before a court by virtue of a warrant to appear drawn up in accordance with the provisions of Article 176 CCP.

The suspect or accused may be the subject of a warrant to appear even before a summons has been issued if the criminal investigation authority or the court finds, by a reasoned decision, that such a measure is required.

[Provision inserted by Law no. 281/2003, which entered into force on 1 January 2004] Any person appearing by virtue of the warrant referred to in paragraphs 1 and 2 of this Article shall be available to the judicial authorities only for such time as is required to question them, save where an order has been made for them to be placed in police custody or pre-trial detention."

C. Police custody and pre-trial detention

Article 136 §§ 1, 3, 5 and 8
Purpose and categories of preventive measures

"1. In cases concerning offences which are punishable by life imprisonment or an prison sentence, in order to ensure the proper conduct of the criminal proceedings and to prevent the suspect or accused from evading the criminal investigation, trial or execution of the sentence, one of the following preventive measures may be taken:

(a) police custody;

(b) prohibition on leaving the district;

(c) prohibition on leaving the country;

(d) detention.

...

3. The measure provided for in paragraph 1 (a) of this Article may be imposed by the criminal investigation authority or by the prosecutor.

...

5. The measure provided for in paragraph 1 (d) of this Article may be imposed by the court or, in the cases provided for by law, as a temporary measure, by the prosecutor within the framework of a criminal investigation.

...

8. In selecting the measure to be imposed, the authorities in question shall take account of its purpose, the danger to society posed by the offence, and of the health, age and previous record of the person involved and any other relevant circumstances."

Article 137
Content of the decision by which a preventive measure is adopted

"The decision by which a preventive measure is adopted must list the facts which gave rise to the charges, their legal basis, the sentence provided for in the legislation governing the offence in question and the specific reasons for adoption of the preventive measure."

Article 137[1] § 1
Communication of the reasons for preventive measures and of the suspicions

"Any person held in police custody or pre-trial detention shall be informed immediately of the reasons justifying such a measure. That person shall be informed at the earliest opportunity, in the presence of a lawyer, of the suspicions against him or her."

Article 143
Police custody

"1. The criminal investigation authority may place a person in police custody if there are reasonable indications or evidence that he or she has committed an offence prohibited by the criminal law.

2. Police custody must be ordered in the cases provided for in Article 148, irrespective of the length of the applicable sentence for the alleged offence.

3. Reasonable evidence exists where, having regard to the existing information on a given case, the person under investigation may be suspected of having committed the alleged offence."

Article 144
Duration of police custody

"1. Police custody may last for a maximum of twenty-four hours. The period during which the person was deprived of liberty as a result of the administrative measure of being taken to the police premises must be deducted from the duration of the police custody, as provided for by Law no. 218/2002 on the organisation and functioning of the Romanian police.

2. The order for placement in police custody must state the date and time at which police custody began and the order for release must state the date and time at which police custody ended.

3. Where the criminal investigation authority considers pre-trial detention necessary, it shall make a reasoned request to the prosecutor within the first ten hours of police custody ... If the prosecutor considers that the statutory requirements have been met, he or she shall order the pre-trial detention within the time-limit set out in the first paragraph of Article 146.

4. Where the prosecutor has ordered police custody and considers that pre-trial detention is required, he or she must make the relevant order within ten hours of the commencement of the police custody, in accordance with Article 146."

Article 146 §§ 1, 2, 3 and 11
Detention of the suspect during the criminal investigation

"1. Where the requirements of Article 143 are met, where any of the cases provided for in Article 148 is shown to exist, and where it is considered necessary for the

purpose of the criminal investigation, the prosecutor, acting of his or her own motion or at the request of the criminal investigation authority, may, by a reasoned order setting out the grounds for and the duration of the measure and after having questioned the suspect in the presence of his or her lawyer, order that the party concerned be placed in temporary pre-trial detention for a maximum period of three days.

2. The prosecutor shall also draw up a warrant for the temporary pre-trial detention of the suspect. ...

3. If the suspect is already in police custody, the three days shall be calculated from the date of the police custody warrant.

4. Within twenty-four hours of issuing the warrant for temporary pre-trial detention, the prosecutor shall submit the case file to the court ..., with a reasoned proposal as to pre-trial detention ...

11. If the conditions set out in the first paragraph of this Article are met, the court shall make an interlocutory order for the pre-trial detention of the suspect before expiry of the period of detention ordered by the prosecutor, indicating the specific reasons for that measure and its duration, which may not exceed ten days."

Article 148 § 1
Conditions to be met and situations in which detention of the accused may be ordered

"1. Detention of the accused may be ordered where the conditions set out in Article 143 are met and in any of the following cases:

...

(d) sufficient evidence exists to conclude that the accused has attempted to impede the discovery of the truth by exerting pressure on a witness or an expert, by destroying or tampering with evidence or by taking other similar action;

(e) the accused has committed another offence or there is sufficient evidence to fear that he or she will commit another offence;

...

(h) the accused has committed an offence for which the law prescribes a prison sentence of more than four years, where there is clear evidence that his or her continued liberty would constitute a threat to public order."

Article 149 § 1
Duration of detention of an accused

"The duration of the detention of an accused may not exceed thirty days, except where it is extended in accordance with a procedure prescribed by law ..."

Article 149^1 – 1
Detention of the accused in the course of a criminal investigation

"1. Where the requirements of Article 143 are met, where any of the cases provided for in Article 148 is shown to exist, and where it is considered necessary for the purpose of the criminal investigation, the prosecutor, acting of his or her own motion or at the request of the criminal investigation authority, may, by a reasoned order setting out the grounds for and the duration of the measure and after having questioned the accused in the presence of his or her lawyer, order that the party

concerned be placed in temporary pre-trial detention for a maximum period of three days."

Article 150 § 1
The questioning of the accused

"The detention of the accused may only be ordered after he or she has been questioned by the prosecutor and by the court, save where the accused has disappeared, is abroad or is evading the investigation or the trial ..."

D. Assistance by a lawyer

Article 6
Guarantee of the rights of the defence

"1. The suspect, the accused and the other parties to the criminal proceedings are guaranteed the rights of the defence.

2. During the criminal proceedings, the judicial authorities shall ensure that the parties are fully able to exercise their procedural rights in the conditions laid down by law, and shall take the evidence necessary for their defence.

3. The judicial authorities shall inform the suspect or accused [at the earliest opportunity and before they are questioned – provision inserted by Law no. 281/2003, which came into force on 1 January 2004] of the charges against them and of their classification in law and shall afford them the opportunity to prepare and conduct their defence.

4. All parties are entitled to be assisted by counsel during the criminal proceedings.

5. The judicial authorities shall inform the suspect or the accused, before they make their initial statement, of their right to be assisted by counsel and shall take due note in the record of the hearing. In the conditions and in the cases provided for by law, the judicial authorities shall take all measures to ensure that the suspect or accused are provided with legal assistance where they have no counsel of their own choosing."

Article 171 §§ 1, 2 and 4
Legal assistance for the suspect or accused

"1. The suspect or accused is entitled to be assisted by defence counsel during the criminal investigation and before the court and the judicial authorities are required to inform him or her of that right.

2. Legal assistance is mandatory where the suspect or accused is a minor, is carrying out military service, is a called-up reservist, is a pupil in a military institution, is held in a rehabilitation centre or a medical and educational institution or is being detained, even in connection with a different case.

...

4. Where legal assistance is mandatory and the suspect or accused has not taken the necessary steps to choose his or her defence counsel, measures shall be taken to designate an officially appointed lawyer."

Article 172 §§ 2, 4 and 8
Rights of counsel for the defence

"2. Where legal assistance is mandatory, the criminal investigation authority shall ensure that defence counsel is present while the accused is being questioned.

...

4. An accused who has been placed in pre-trial detention is entitled to contact his or her lawyer. Exceptionally, and in the interests of the investigation, the prosecutor, of his or her own motion or at the request of the investigation authority may, by a reasoned order, prohibit any contact with his or her lawyer, on a single occasion and for a maximum period of five days.

...

8. The lawyer chosen by the suspect or accused or the officially appointed lawyer is required to provide that person with legal assistance. The criminal investigation authority or the court may bring to the attention of the relevant bar association any failure to fulfil that obligation in order that measures may be taken."

E. Action to have a decision quashed

Article 409
Action to have a decision quashed

"The Procurator General at the Supreme Court of Justice may, of his own motion or on an application by the Minister of Justice, apply for any final decision to be quashed."

Article 410 § 2
Cases in which an action to have a decision quashed may be brought

"Final decisions other than those referred to in the first paragraph [the first paragraph concerns decisions to convict, to acquit or to discontinue proceedings] may only be contested by an application to have them quashed if they are inconsistent with the law."

59. The Articles of the CCP governing applications to have decisions quashed were repealed by Law no. 576 of 14 December 2004, which was published in the Official Gazette of 20 December 2004 and entered into force on 23 December 2004.

60. As regards the preliminary investigation (*acte premergătoare*), the criminal investigation authority is under no obligation to provide the party concerned, who at that stage has the status of "*făptuitor*", with the assistance of a lawyer in respect of the measures taken during that period. That obligation arises only once the criminal proceedings during which the party concerned acquires the status of suspect or accused have been opened (judgments no. 2501 of 14 April 2005 and no. 3637 of 7 June 2006 of the High Court of Cassation and Justice, Criminal Division). At the preliminary investigation stage, the authorities are not authorised to carry out prosecution activities, but merely to take measures that do not require a legal decision strictly speaking (judgment no. 5532 of 26 September 2006 of the High Court of Cassation and Justice, Criminal Division). If evidence is taken at that stage, such as, for example, witness statements, the

questioning of the accused, or court-ordered expert reports, the proceedings will be null and void (judgment no. 806/2006 of the High Court of Cassation and Justice, Criminal Division).

The Constitutional Court has confirmed on several occasions that the criminal investigation authority is not obliged to provide legal assistance when measures are taken at the preliminary investigation stage, on the ground that no evidence capable of being used during the subsequent criminal proceedings may be taken at this stage (judgments no. 141/1999, 210/2000 and 582/2005). It has refrained, on the other hand, from making any comment on the authorities' practice of conducting prosecution activities during the preliminary investigation phase, considering that that was an issue concerning the application of the criminal law and not a question of constitutionality (judgment no. 113/2006).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

61. In their written submissions to the Grand Chamber and at the hearing of 30 March 2011, the Government, for the first time in these proceedings, objected that domestic remedies had not been exhausted with regard to the complaint under Article 5 § 1 of the Convention concerning the applicant's deprivation of liberty before 10 p.m. on 16 July 2003. They argued that the applicant had not complained, at least in substance, that he had been deprived of his liberty, either in the statements made on the same day or subsequently before the prosecution service or the domestic courts.

62. The Court points out that a preliminary objection of non-exhaustion of domestic remedies should in principle be raised before the admissibility of the application is examined (see *Brumărescu v. Romania* [GC], no. 28342/95, §§ 52 and 53, ECHR 1999-VII, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, §§ 53 and 54, ECHR 2000-XI). However, because the Government raised that objection for the first time on 10 February 2011, after the application had been declared admissible on 15 June 2010, they are estopped from raising it at this stage of the proceedings. The objection must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S DEPRIVATION OF LIBERTY FROM 9 A.M. TO 10 P.M. ON 16 JULY 2003

63. The applicant complained that there had been no legal basis for his detention on 16 July 2003. He relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

A. The Chamber judgment

64. In its judgment of 15 June 2010 the Chamber noted, having regard to the particular vulnerability of persons under the exclusive control of State agents, that Convention proceedings did not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation).

65. On the basis of the evidence produced by the parties at the material time, the Chamber noted that the applicant had gone to the NAP headquarters on 16 July 2003 and that he had made statements at about 10 a.m. and again at about 8 p.m. The Chamber observed that while the first statement did not mention whether the applicant had been questioned as a person under criminal investigation, he had been informed when he made his second statement that he was suspected of having committed various offences. The Chamber also noted that the Government had submitted no tangible information on the authorities' attitude with regard to the applicant's status during the day of 16 July 2003. They had provided no document enabling the Chamber to determine whether or not the applicant had left the prosecution service headquarters, for example information recorded in logbooks regarding persons entering or leaving the NAP, or any steps taken by the authorities to inform the applicant that he was entitled to leave the building. The Chamber further noted that during that same day, the prosecution service had opened a criminal investigation in respect of the applicant and that, in the evening, it had ordered that he be placed in pre-trial detention. The sequence of the day's events as they appeared in the case file – interview, opening of the investigation, a second interview as an accused, placement in pre-trial detention – led the Chamber to conclude that the applicant had remained in the prosecution service headquarters all day

and had not been free to leave. In the light of all the foregoing, the Chamber concluded that the applicant had been deprived of his liberty from 10 a.m. to 10 p.m. on 16 July 2003.

66. Turning to whether or not that deprivation of liberty was compatible with Article 5 § 1 of the Convention, the Chamber noted that at the material time, Romanian law had provided for two temporary measures depriving a person of his or her liberty, namely police custody for a period of twenty-four hours and pre-trial detention. In the instant case, no warrant had been issued for the applicant's placement in police custody. The Chamber also pointed out that by the order of 16 July 2003, the prosecutor had instructed that the applicant was to be placed in pre-trial detention for three days. However, the period specifically indicated in that order, namely from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003, corresponded in reality to only two days of pre-trial detention. The Chamber noted in that regard that, having been issued on the basis of a prosecutor's order in accordance with domestic law, the warrant for pre-trial detention could cover only the same period as that specified in the order. In the instant case, although it did not indicate the time from which the measure took effect, that warrant could not constitute a legal basis for the preceding period, which was not mentioned in the order.

67. Consequently, the Chamber considered that the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 had had no basis in domestic law and that accordingly, there had been a breach of Article 5 § 1 of the Convention.

B. The parties' submissions

1. The applicant

68. In his written observations to the Grand Chamber, the applicant claimed that after he had entered the NAP premises at 9 a.m., he had made an initial written statement which had been forwarded to the prosecutor at around 9.40 a.m. He had remained in a room guarded by armed gendarmes from 9.40 a.m. to 11 p.m. and had not been permitted to leave that room. Moreover, it had not been possible for him to contact his family or his lawyer as he had been asked to leave his mobile telephone on a table guarded by a gendarme. He had been authorised to use the toilet or to go out for a cigarette, but only if accompanied by a gendarme. Lastly, he claimed that threats had been made that he would not see his family again as he was to be placed in pre-trial detention. He had not been informed until around 1.15 to 1.30 a.m. on 17 July 2003 that a warrant for his pre-trial detention had been issued.

Lastly, the applicant alleged that the Government had adduced no evidence of the destruction of the logbooks recording access to the NAP premises.

2. The Government

69. The Government submitted that the Chamber's conclusion that the applicant had been deprived of his liberty at the NAP headquarters before 10 p.m. on 16 July 2003 was inconsistent with the facts. They pointed to a contradiction in the applicant's account. On his application form, the applicant had stated that he had been informed by his superior on the morning of 16 July 2003, while he was at his place of work, that he was to report to the NAP. However, in his written observations to the Grand Chamber, he had stated that he had received the information from a colleague at around 5 p.m. on 15 July 2003, while he was on leave. The Government added that although the applicant had initially stated that he had reported to the NAP at around 9 a.m., he had indicated the time with pinpoint accuracy in his aforementioned written observations, that is, 8.45 a.m. The Government conceded, however, that the applicant had entered the NAP premises at 9 a.m.

70. Turning to the burden of proof, the Government pointed out that for an applicant to be able to claim victim status under Article 34 of the Convention, he or she must be able to produce reasonable and convincing evidence of a violation concerning him or her personally, mere suspicions or conjecture being insufficient in that respect. However, in his application, the applicant had merely made confused and vague assertions which were not supported by any significant details or evidence, and which, in the Government's view, had simply been intended to back up his other complaints. Furthermore, those assertions were contradicted by the documents in the case file and the applicant had produced no plausible explanation in that regard. The Government also argued that they had challenged those assertions before the Chamber and had duly drawn attention to the fact that they were neither credible nor supported by any document in the case file. They added that the applicant had submitted no written observations in the proceedings before the Chamber. In the Government's view, those factors suggested that not only did the applicant not intend to press his complaint, but that he had tacitly dropped it.

71. The Government submitted that the reasoning by which the Chamber had established that the applicant had been under the control of State agents was inconsistent since that issue was the same as the issue of the existence of a deprivation of liberty. They argued that in its judgment of 15 June 2010 the Chamber had made a serious error by reversing the burden of proof and thus establishing a presumption of deprivation of liberty against the State, a presumption which in the Government's view constituted an extremely dangerous precedent. The Government pointed out that it had not been

established in the instant case that the applicant had been deprived of his liberty; that was precisely what had to be determined.

72. The Government further complained that they had been obliged to prove a negative before the Chamber, since they had been supposed to prove that the applicant had not been deprived of his liberty between certain hours. They argued that they had been required to prove that fact seven years after the events and by means of information (evidence of whether or not the applicant had left the prosecution service headquarters or steps taken by the authorities to inform him that he was able to leave the premises) and documents (the logbooks containing information on persons entering and leaving the NAP headquarters) which had not previously been requested by the Court.

73. Lastly, the Government submitted that there could be an exception to the principle of *affirmanti incumbit probatio* only if concordant inferences in support of the applicant's allegations or sufficiently strong, clear, concordant and unrebutted presumptions existed, which was not the case in this instance. Therefore, there were no exceptional circumstances or reasons that could lead to the application of an exception to the principle that the burden of proof had to fall on the applicant.

74. The Government pointed out that the exact events of 16 July 2003 could not be established, given that seven years had elapsed since the events had taken place. They confirmed, however, that logbooks containing information on persons entering and leaving the NAP premises had existed in 2003, but stated that it was not possible to produce them before the Court as they had been destroyed well before this case had been communicated on 19 February 2009; the retention period for such logbooks, in accordance with the rules in force, was three to five years. The Government added that no specific internal instructions had been issued by the NAP management regarding access to and movement inside the prosecution service premises, the applicable rules being those covering all public institutions. They stated that there had not been in 2003 – nor was there now – a separate entrance or a special room for persons in police custody or in pre-trial detention.

75. According to the Government, the applicant, like all those summoned on 16 July 2003, had waited voluntarily in the NAP premises in order to clarify his legal situation. Indeed, he had not objected to being questioned in the context of the preliminary investigation, responding to a questionnaire on arrival at the NAP, and had not asked to be assisted by a lawyer. At around 12 noon, once the criminal investigation had been opened, he had remained in the premises of the NAP at the request of the prosecutor, who had asked him to make a further statement and to take part in confrontations.

76. In the Government's view, the applicant had not been obliged to remain at the prosecution service premises and had been free to leave the NAP at any time. In fact, there was nothing to indicate that he had actually

remained there until 10 p.m. or that he had been held against his will; furthermore, two police officers had left the NAP premises on the same day. Moreover, he had been neither supervised nor guarded at any time. The gendarmes present in the NAP premises had merely been there to maintain order.

77. The Government also submitted that criminal investigations in general, and the circumstances of the instant case in particular, required a summons, repeated questioning and the confrontation of the persons under investigation and the witnesses in a single day. In the Government's view, the confidentiality of the information obtained during the investigation also had to be ensured so as to avoid any obstruction to the proper conduct of the investigation. Lastly, the investigation of 16 July 2003 had been conducted by a single prosecutor so as to ensure a consistent approach to the operation.

78. The Government stressed that the applicant had at no time asked to leave the NAP. No document recording any such request or any refusal on the part of the authorities had been included in the case file. They pointed out, further, that the applicant had not been informed that he was able to leave the NAP since that fact had been self-evident and any such indication would have been illogical. There was no legal obligation for the prosecutor to inform a person that he or she could leave the prosecution service premises if no measure had been taken to deprive the person of his or her liberty.

79. The Government also argued that the applicant had not complained of any deprivation of liberty either to the prosecutor or, subsequently, in the proceedings challenging his placement in pre-trial detention or before the courts that had examined the merits of the charges against him, even though he had been represented by lawyers throughout the criminal proceedings.

80. Turning to the applicant's written evidence, the Government pointed out that it consisted of extrajudicial statements, certified by the applicant's lawyer and made for the purposes of the case (*declaraţii* pro causa) by two individuals who had been convicted at first instance in the same domestic proceedings as the applicant. They pointed out, furthermore, that in his statement the witness M.T. had used expressions similar to those used by the applicant.

81. On the subject of the legal system applicable to people called upon to give evidence in various capacities before the prosecution service for the purposes of a criminal investigation, the Government submitted that, with regard to the procedural guarantees provided to individuals under a preliminary investigation, which took place before the commencement of the criminal investigation, it was impossible to identify any European or universal norm. In the absence of a consensus among States, the Court could not impose guiding principles. Accordingly, States had to enjoy a wide margin of appreciation with regard to the regulations applicable at that stage of the proceedings, in accordance with their own criminal policies.

Furthermore, the Government pointed out that the State's criminal legislation should not spell out such rules in detail because the investigation authorities needed to be afforded effective means of uncovering the truth. They argued that detailed regulations, affording various guarantees to individuals summoned before the prosecution service before any criminal proceedings had been opened against them, could impede the activities of the investigation authorities and would be likely to deprive the criminal proceedings of their purpose. Romanian law set out procedural guarantees for the parties to criminal proceedings, in particular after they had commenced. In the instant case, in the framework of the preliminary investigation, the applicant had been informed of the purpose of the inquiries and had been invited to make a statement in that respect. Once the criminal investigation had been opened in respect of him, he had been fully able to enjoy his rights, having been duly informed of the nature of the proceedings and having had the opportunity to be assisted by a lawyer of his choosing when making his statements. The Government rejected the applicant's allegations concerning threats and insults made by the prosecutor, which they considered to be mere unsubstantiated assertions, made for the first time seven years after the events.

82. Lastly, the Government pointed out that the applicant had been placed in pre-trial detention from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003. The fact that the order of 16 July 2003 for his placement in pre-trial detention indicated that it covered a period of three days resulted from application of Article 188 of the CCP, in accordance with which pre-trial detention was counted on the basis of entire days. That benefited the parties concerned since whole days were deducted from any prison sentence that might subsequently be imposed by a court.

83. Having regard to the foregoing, the Government concluded that the applicant had not been deprived of his liberty from 9 a.m. to 10 p.m. on 16 July 2003.

C. The Court's assessment

1. General principles

84. The Court reiterates that Article 5 of the Convention enshrines a fundamental right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. In proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on the liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4. The Court also points out that paragraph 1 of Article 5 makes it clear that the guarantees it contains apply to "everyone".

Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, among other judgments, *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-164, 19 February 2009).

2. Application in the instant case

(a) The period to be taken into consideration

85. Firstly, the Court considers it necessary to establish the period to be taken into consideration. In this regard, two separate issues must be examined: the starting-point and the end of that period.

86. With regard to the starting-point, it must be noted that the Chamber concluded that the applicant had been deprived of his liberty without any legal basis from 10 a.m., when he was questioned by a prosecutor (see paragraph 43 of the Chamber judgment). The Court observes, however, that although the parties' respective versions of the facts contained a different sequence of events, the fact remains that they were in agreement that the applicant had entered the prosecution service premises at 9 a.m. to make a statement for the purpose of a criminal investigation.

The Court therefore considers that the starting-point for the period to be taken into consideration was 9 a.m. on 16 July 2003.

87. As to the end of that period, the Court notes that the order for the applicant's pre-trial detention on 16 July 2003 indicated that the measure took effect from 10 p.m. The Court considers that the point at which the applicant was notified of the warrant for pre-trial detention issued pursuant to the above-mentioned order – between 1.15 and 1.30 a.m. on 17 July 2003 according to the applicant – has no bearing on the lawfulness of his detention after 10 p.m.

The Court therefore considers that the period to be taken into consideration ended at 10 p.m. on 16 July 2003.

(b) The burden of proof with regard to the alleged deprivation of liberty

88. The Court reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII).

89. Furthermore, the Court agrees with the Chamber's reasoning that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. It reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; and *Rupa v. Romania (no. 1)*, no. 58478/00, § 97, 16 December 2008). The Court has already found that these considerations apply also to disappearances examined under Article 5 of the Convention, where, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible and satisfactory explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (see

Tanış and Others v. Turkey, no. 65899/01, § 160, ECHR 2005-VIII, and *Yusupova and Zaurbekov v. Russia*, no. 22057/02, § 52, 9 October 2008). Furthermore, the Court reiterates that, again in the context of a complaint under Article 5 § 1 of the Convention, it has required proof in the form of concordant inferences before the burden of proof is shifted to the respondent Government (see *Öcalan v. Turkey* [GC], no. 46221/99, § 90, ECHR 2005-IV).

90. The Court considers that these principles also apply in the instant case, on condition that the applicant provides prima facie concordant evidence capable of showing that he was indeed under the exclusive control of the authorities on the day of the events, that is to say, that he was officially summoned by the authorities and entered premises which were under their control. If that condition is satisfied, the Court will be able to consider that he was not free to leave, particularly when investigative measures were under way. It could therefore require the Government to provide a detailed hour-by-hour report on what happened in the premises in question and to account for the time spent there by the applicant. The Government would then have to provide satisfactory and convincing written evidence to support their version of the facts. Failure to provide such evidence would enable conclusions to be drawn as to the merits of the applicant's allegations.

(c) The deprivation of liberty

91. The Court reiterates that in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi*, cited above, § 92, and *Mogoş v. Romania* (dec.), no. 20420/02, 6 May 2004). Admittedly, in determining whether or not there has been a violation of Convention rights it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (see, for example, in relation to Article 5 § 1, *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50).

92. The Court would add that the characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court's conclusion as to the existence of a deprivation of liberty.

93. The Court notes that in cases examined by the Commission, the purpose of the presence of individuals at police stations, or the fact that the parties concerned had not asked to be able to leave, were considered to be decisive factors. Thus, children who had spent two hours at a police station in order to be questioned without being locked up were not found to have been deprived of their liberty (see *X v. Germany*, no. 8819/79, Commission decision of 19 March 1981); nor was an applicant who had been taken to a

police station for humanitarian reasons, but who was free to walk about on the premises and did not ask to leave (see *Guenat v. Switzerland* (dec.), no. 24722/94, Commission decision of 10 April 1995). Likewise, the Commission attached decisive weight to the fact that an applicant had never intended to leave the courtroom where he was taking part in a hearing (see *E.G. v. Austria*, no. 22715/93, Commission decision of 15 May 1996). The case-law has evolved since then as the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the Court's assessment of whether there has in fact been a deprivation of liberty. To date, the Court has taken this into account only at a later stage of its analysis, when examining the compatibility of the measure with Article 5 § 1 of the Convention (see *Osypenko v. Ukraine*, no. 4634/04, §§ 51-65, 9 November 2010; *Salayev v. Azerbaijan*, no. 40900/05, §§ 41-42, 9 November 2010; *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 71, 22 May 2008; and *Soare and Others v. Romania*, no. 24329/02, § 234, 22 February 2011).

Furthermore, the Court reiterates its established case-law to the effect that Article 5 § 1 may also apply to deprivations of liberty of a very short length (see *Foka v. Turkey*, no. 28940/95, § 75, 24 June 2008).

94. The Court notes that in the instant case, it is not disputed that the applicant was summoned to appear before the NAP and that he entered the premises of the prosecution service at 9 a.m. to make a statement for the purpose of a criminal investigation. In accordance with the principles stated above (see paragraph 89) and despite the fact that the applicant was not brought there under duress, which does not constitute a decisive factor in establishing the existence of a deprivation of liberty (see *I.I. v. Bulgaria*, no. 44082/98, § 87, 9 June 2005, and *Osypenko*, cited above, § 32), it must be acknowledged that the applicant was indeed under the control of the authorities from that moment. That argument is, moreover, confirmed by the witness evidence produced by the applicant (see paragraphs 55-56 above). Consequently, the Government must provide an explanation as to what happened at the premises of the NAP after that moment.

95. The Government stated that they were unable to produce the logbooks recording the entry and exit of persons at the NAP premises since those logbooks had been destroyed well before this case was communicated on 19 February 2009, the retention period being three to five years in accordance with the legal provisions in force (see paragraph 35 above).

96. The Government did, however, submit a statement from the prosecutor V.D., who was responsible for the investigation at the material time (see paragraph 57 above), although they did not make any specific reference to it in their observations. The statement revealed that the applicant had not asked for permission to leave the NAP premises, but that he had been free to do so, since anyone was free to leave without completing any formalities or obtaining the consent of the prosecutor. In the

statement the prosecutor V.D. acknowledged that the applicant had not been advised that he was able to leave the NAP headquarters, but argued that the applicant had remained there voluntarily in order to take part in other hearings and confrontations. However, the Court notes that that statement was contradicted not only by the statements of the applicant but also by the concordant written statements of two witnesses (see paragraphs 55-56 above).

97. The Court notes further that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP. In this connection, it must be noted that the Government acknowledged that the head of police of the 1st District had also been informed that several police officers had been summoned on 16 July 2003 so as to ensure their presence at the prosecution service premises. At the material time, police officers were bound by military discipline and it would have been extremely difficult for them not to carry out the orders of their superiors. While it cannot be concluded that the applicant was deprived of his liberty on that basis alone, it should be noted that in addition, there were other significant factors pointing to the existence of a deprivation of liberty in his case, at least once he had been given verbal notification of the decision to open the investigation at 12 noon: the prosecutor's request to the applicant to remain on site in order to make further statements and participate in multiple confrontations, the applicant's placement under investigation during the course of the day, the fact that seven police officers not placed under investigation had been informed that they were free to leave the NAP headquarters since their presence and questioning was no longer necessary, the presence of the gendarmes at the NAP premises and the need to be assisted by a lawyer.

98. In view of their chronological sequence, these events clearly formed part of a large-scale criminal investigation, requiring multiple investigative measures and hearings, some of which had already been conducted over previous days. That procedure was intended to dismantle a petroleum-trafficking network that involved police officers and gendarmes. The opening of proceedings against the applicant and his colleagues fits into this procedural context, and the need to carry out the various criminal investigation procedures concerning them on the same day tends to indicate that the applicant was indeed obliged to comply.

99. The Court therefore notes that the Government were not able to produce any documents establishing that the applicant had left the NAP headquarters and, furthermore, failed to demonstrate that he could have left the prosecution service premises of his own free will after his initial statement (see *I.I. v. Bulgaria*, cited above, § 87; *Osypenko*, cited above, § 32; and *Salayev*, cited above, §§ 42-43).

100. To conclude, having regard to the Government's failure to provide convincing and relevant information in support of their version of the facts

and to the coherent and plausible nature of the applicant's account, the Court considers that the applicant did indeed remain in the prosecution service premises and was deprived of his liberty, at least from 12 noon to 10 p.m.

(d) Whether the applicant's deprivation of liberty was compatible with Article 5 § 1 of the Convention

101. The Court must now determine whether the applicant was deprived of his liberty "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention. The words "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at stake and the Court must then exercise a certain power to review whether national law has been observed (see *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III). In particular, it is essential, in matters of deprivation of liberty, that the domestic law define clearly the conditions for detention and that the law be foreseeable in its application (see *Zervudacki v. France*, no. 73947/01, § 43, 27 July 2006).

102. The Court notes firstly that the applicant was summoned to appear at the NAP to make a statement in the context of a criminal investigation, and was not given any additional information as to the purpose of that statement. Domestic law on the subject required the summons to indicate the capacity in which a person was being summoned and the subject matter of the case (see Article 176 CCP, paragraph 58 above). It follows that the applicant was unaware whether he had been summoned as a witness or a suspect, or even in his capacity as a police officer carrying out investigations himself. In this connection, the Court reiterates that although the authorities are by no means precluded from legitimately using stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of individuals with a view to arresting them may be found to contravene the general principles stated or implicit in the Convention (see *Čonka v. Belgium*, no. 51564, § 41, ECHR 2002-I).

103. The Court observes further that the Government argued that the applicant had been kept in the prosecution service premises in order to ensure the proper administration of justice, since the questioning or confrontation of various persons present could have been necessary at any moment, given the circumstances of the case. They relied in that regard on the prosecutor V.D.'s statement of 17 January 2011, according to which the

applicant and his colleagues had been summoned to appear before the prosecution service as "*făptuitori*" ("alleged perpetrators" or "suspects", at a stage prior to the opening of proceedings against them).

104. The Court notes that the applicant was not formally classified as a suspect when he was asked to make his initial statement on a plain sheet of paper on entering the NAP premises. Furthermore, the information available to the Court does not enable it to conclude with any certainty that from the time of his arrival at the prosecution service headquarters, the applicant was treated as a person called to give evidence or as a witness.

105. In any event, the Court notes that, according to the Government's version of the facts, at around 12 noon, when all the police officers were completing their statements, the prosecutor came back into the room and informed them that a criminal investigation had been opened in the case in respect of ten of the police officers present, including the applicant, and that they were entitled to choose a lawyer or would otherwise be assigned an officially appointed lawyer. The other police officers were permitted to leave as no charges had been filed against them.

106. The Court observes that, when making his first statement, the applicant was unaware of his legal status and the guarantees arising therefrom. Even though, in such conditions, the Court has doubts about the compatibility with Article 5 § 1 of the Convention of the applicant's situation during the first three hours that he spent at the NAP premises, it does not intend to examine that issue since it is clear that at least from 12 noon, the applicant's criminal status was clarified as a result of the opening of the criminal investigation. From that moment, the applicant was undeniably considered to be a suspect, so that the lawfulness of his deprivation of liberty must be examined, from that point, under Article 5 § 1 (c).

107. Under Romanian law, there are only two preventive measures entailing a deprivation of liberty: police custody and pre-trial detention. For either of these measures to be ordered there must be reasonable indications or evidence that the prohibited offence has been committed (see Article 143 § 1 CCP, paragraph 58 above), that is, information leading to the legitimate suspicion that the person who is under criminal investigation could have committed the alleged offence (see Article 143 § 3 CCP, paragraph 58 above). However, neither of those measures was applied to the applicant before 10 p.m. on 16 July 2003.

108. The Court is conscious of the constraints arising in a criminal investigation and does not deny the complexity of the proceedings instituted in the instant case, requiring a unified strategy to be implemented by a single prosecutor carrying out a series of measures on the same day, in a large-scale case involving a significant number of people. Likewise, it does not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their institutions, and it understands that the national

authorities must take a firm stance against those responsible. However, with regard to liberty, the fight against that scourge cannot justify recourse to arbitrariness and areas of lawlessness in places where people are deprived of their liberty.

109. Having regard to the foregoing, the Court considers that, at least from 12 noon, the prosecutor had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and that Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention. However, the prosecutor decided only at a very late stage to take the second measure, towards 10 p.m.

110. Accordingly, the Court considers that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had no basis in domestic law and that there has therefore been a violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S PRE-TRIAL DETENTION FROM 10 P.M. ON 16 JULY 2003 TO 10 P.M. ON 18 JULY 2003

111. In his application the applicant complained that no specific reason had been given for the order for his pre-trial detention issued on 16 July 2003, particularly with regard to the threat that his release would have posed to public order. He argued that there was no reasonable suspicion that he had committed the offences in question to justify his pre-trial detention. He relied on Article 5 § 1 of the Convention.

A. The Chamber judgment

112. In its judgment of 15 June 2010 the Chamber considered that, with regard to the applicant's placement in pre-trial detention at 10 p.m. on 16 July 2003, the suspicions against him had been based on a set of concrete facts and evidence produced in the case file and communicated to him, suggesting that he could have committed the offences at issue; they had therefore reached the required level of reasonableness. As regards the specific reasoning in the order, the Chamber noted that the prosecution service had indicated that, as a police officer, the applicant might have exerted an influence on certain individuals who were due to be questioned during the investigation. In the Chamber's opinion, this was a relevant and sufficient reason to justify the applicant's placement in pre-trial detention at the outset of the investigation. Accordingly, the Chamber considered that the applicant's deprivation of liberty was justified under paragraph 1 (c) of

Article 5 and that there had been no violation of that Article during the period at issue.

B. The parties' submissions

113. In his written observations to the Grand Chamber, the applicant again submitted that there was no reasonable suspicion that he had committed the offences in question to justify his pre-trial detention, which in his view had had no basis in law. While acknowledging that the prosecutor had presented him with statements made by his colleagues indicating his participation in the alleged offences, he claimed that there was no telephonic evidence against him which would have justified his being placed in pre-trial detention, as had been the case for some of his colleagues. He did not make any further reference to the alleged lack of tangible reasoning for the order for his pre-trial detention made on 16 July 2003, and more particularly, to the threat that his release would have posed to public order.

114. The Government likewise repeated the arguments they had submitted before the Chamber.

C. The Court's assessment

115. For the reasons given by the Chamber and set out above, the Court considers that the applicant's deprivation of liberty from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003 was justified under paragraph 1 (c) of Article 5 of the Convention and that, accordingly, there has been no violation of that Article.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S PLACEMENT IN PRE-TRIAL DETENTION ON 25 JULY 2003

116. The applicant submitted that his placement in pre-trial detention following the Procurator General's intervention in the proceedings on 25 July 2003, through the extraordinary remedy of an application to have the final judgment of 21 July 2003 ordering his release quashed, had been unlawful. He also alleged that there had been a breach of the principles of equality of arms and adversarial proceedings. He relied in this regard on Article 6 § 3 of the Convention.

117. Finding that the proceedings complained of concerned the lawfulness of the pre-trial detention, the Chamber considered that this complaint fell to be examined under Article 5 § 1 of the Convention. The parties did not challenge that conclusion and the Grand Chamber sees no reason to adopt a different point of view.

A. The Chamber judgment

118. In its judgment of 15 June 2010 the Chamber considered that the method used by the authorities to correct a possible error in interpretation of the domestic law, namely an application to have a decision quashed, had been neither accessible nor foreseeable for the applicant. Firstly, the remedy in question was not directly open to the parties, since only the Procurator General could make use of it. However, the latter was the hierarchical superior of the prosecutor who had ordered that the applicant be placed in detention and who had requested the courts to extend that measure. The prosecutor had had an opportunity to present his arguments on this matter during the ordinary proceedings, but had failed to do so. Secondly, the Chamber noted that Article 410 of the CCP, by which an application to have a final judicial decision quashed could be lodged where the decision was "contrary to the law", was too vague to make intervention in the proceedings through an extraordinary remedy of this kind foreseeable. Consequently, the Chamber considered that the applicant's deprivation of liberty on 25 July 2003 had not had a sufficient basis in domestic law, in so far as it had not been prescribed by "a law" satisfying the requirements of Article 5 § 1 of the Convention, and that there had therefore been a breach of that provision.

B. The parties' submissions

119. The parties repeated the arguments submitted to the Chamber. However, the Government pointed out, for the first time, that in the instant case, by allowing the Procurator General's application to have the judgment quashed, the Supreme Court of Justice had not examined the merits of the criminal charge against the applicant but had ruled exclusively on the issue of pre-trial detention. It was therefore necessary to distinguish between the instant case and cases in which the issue of observance of the principle of legal certainty had been examined under Article 6 of the Convention.

C. The Court's assessment

120. As regards the Government's new submission, the Court reiterates its established case-law to the effect that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – 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 (see *Baranowski*, cited above, § 52; *Mooren v. Germany* [GC], no. 11364/03, § 72, 9 July 2009; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 80, ECHR 2010). As regards the application of this principle to the instant case, the Court agrees entirely with the Chamber's conclusions that the applicant's deprivation of liberty on 25 July 2003 did not have a sufficient legal basis in domestic law, in so far as it was not prescribed by "a law" meeting the requirements of Article 5 § 1 of the Convention. For the reasons given by the Chamber, it considers that there has been a violation of that provision.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

121. Article 41 of the Convention provides:

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

A. Damage

1. The parties' submissions

122. The applicant claimed 20,375 euros (EUR) before the Chamber in respect of pecuniary damage, representing loss of salary, the reduction in his retirement pension and the subsistence costs which he had incurred during his detention. He submitted an accountant's report drawn up outside the framework of the proceedings. He also claimed EUR 300,000 for the non-pecuiniary damage which he had allegedly sustained. He did not alter those claims before the Grand Chamber.

123. The Government noted that the applicant had not substantiated his claim in respect of pecuniary damage and that there was no causal link between the alleged violations of Article 5 of the Convention and the pecuniary damage referred to. They also submitted that the amount claimed in respect of non-pecuniary damage was excessive.

2. The Chamber judgment

124. With regard to the claim in respect of pecuniary damage, the Chamber noted that there was no causal link between the violations found by the Court and the applicant's claim. In any event, the claim had not been accompanied by any relevant supporting documents, as the expert report submitted to the Court was too brief and did not cite its sources. The Chamber considered, however, that the applicant had undeniably sustained non-pecuniary damage and, ruling on an equitable basis, awarded him EUR 8,000 under that head.

3. The Court's assessment

125. The Court notes that an award of just satisfaction can only be based on the same violations of the Convention as those found by the Chamber, namely the violation of Article 5 § 1 of the Convention on account of the lack of legal basis for the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., and during his placement in pre-trial detention on 25 July 2003, following the application to quash the judgment of 21 July 2003. Having regard to the foregoing, for the reasons set out by the Chamber and because the applicant did not change the claim initially submitted to the Chamber, the Court rejects the claim in respect of pecuniary damage and awards the applicant the sum of EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

1. The parties' submissions

126. The applicant also claimed 890 Romanian lei (RON) and EUR 3,000 for the costs and expenses he had incurred before the national courts and in the proceedings before the Chamber. He submitted supporting documents for part of that amount. It must be noted that the applicant did not alter the claim that he had initially submitted to the Chamber but submitted a claim for legal aid for the costs and expenses incurred before the Grand Chamber.

127. The Government noted that only a part of the amount claimed had been substantiated by relevant documents and that no link had been established between a portion of the claim and the present case.

2. The Chamber judgment

128. The Chamber awarded the applicant EUR 500 for costs and expenses.

3. The Court's assessment

129. The Court notes that the applicant has received legal aid for the costs and expenses incurred in the context of the proceedings before the Grand Chamber. Consequently, it can only take into account those costs and expenses incurred before the domestic courts and before the Chamber.

130. According to its well-established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, among other authorities, *Beyeler v. Italy*

(just satisfaction) [GC] no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943, § 105, ECHR 2003-VIII).

131. In the light of the foregoing, the Court awards the applicant EUR 500 for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m.;

3. *Holds* that there has been no violation of Article 5 § 1 on account of the applicant's pre-trial detention from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's placement in pre-trial detention on 25 July 2003;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the national currency at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, for costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 23 February 2012.

Vincent Berger	Nicolas Bratza
Jurisconsult	President

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

(a) concurring opinion of Judge Bratza;

(b) joint concurring opinion of Judges Costa, Garlicki, Gyulumyan, Myjer, Hirvelä, Malinverni, Vučinić and Raimondi.

N.B.
V.B.

CONCURRING OPINION OF JUDGE BRATZA

1. I am in full agreement with the conclusions of the majority of the Court on all aspects of the case. In particular, I share the view that Article 5 § 1 of the Convention was violated on account of the applicant's deprivation of liberty on 16 July 2003, at least in respect of the period from 12 noon to 10 p.m.

2. I can also generally agree with the Court's reasoning leading up to this conclusion from paragraph 91 of the judgment onwards. Where, however, I part company with the reasoning in the judgment is in the discussion devoted to the issue of burden of proof in paragraphs 88 to 90, which appears to me to be neither necessary to the conclusion reached nor correct.

3. The traditional approach of the Court to assessing whether there has been a deprivation of liberty within the meaning of Article 5 § 1 or a mere restriction on freedom of movement falling outside that provision, is to examine the concrete situation of the applicant as it appears on the material before it, taking account of a whole range of criteria, such as the type, duration, effect and means of implementation of the measure of restraint in question. In making its assessment, the Court has not in general found it necessary to have recourse to questions of the burden and standard of proof. Where the underlying facts have been found by national courts in domestic proceedings, the Strasbourg Court will normally require cogent elements to lead it to depart from those findings, even though it is not constrained by the national court's legal conclusions as to whether or not those facts give rise to a deprivation of liberty within the meaning of Article 5 § 1. Where, as in this case, there has been no such judicial determination and there is a factual dispute between the parties, the Court's assessment has normally been made on the basis of a free evaluation of all the material before it, including such inferences as may flow from the agreed facts and the submissions of the parties.

4. The Government argued in the present case that the applicant had failed to discharge the burden of proving that he was deprived of his liberty, a burden which was said to be imposed on him in order to be able to claim victim status under Article 34. This argument is rejected in the judgment, the Court correctly noting that the Convention provisions do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio*. However, the judgment goes on to find, on the contrary, that in the present case the burden of proof shifted to the respondent Government once the applicant had provided *prima facie* concordant evidence capable of showing that he was under the exclusive control of the authorities on the day of the events in question.

5. I have not found it helpful to examine this case in terms of the burden of proof. I have considerable hesitations as to whether it is, in any event, a

case suitable for applying a reverse burden. The two categories of case cited in paragraph 89 of the judgment, in which the burden of proof is shifted to the respondent Government – namely, cases under Articles 2 and 3 of the Convention concerning deaths occurring and injuries sustained in custody and those under Article 5 § 1 concerning disappearances of persons last seen in military or police establishments to which they had been summoned to appear – are far removed from the circumstances of the present case. In particular, while there are compelling reasons, in a case where an individual has been officially summoned to premises under the control of the authorities and has not been seen since, for shifting the evidential burden to the authorities to prove that he has voluntarily left the premises, no such reasons apply in the present case, where the question is whether the factual circumstances are such that the individual is to be regarded as having been deprived of his liberty within the meaning of Article 5 § 1. The mere fact, which is relied on in the judgment, that the present applicant entered premises which were under the control of the authorities pursuant to a summons is not in my view sufficient to justify placing an evidential burden on the authorities.

6. In my view, the conclusion arrived at by the majority of the Court on the material before it that, whatever the position until 12 noon, the applicant was certainly deprived of his liberty thereafter, can and should have been reached without the need to impose an evidential burden on the Romanian authorities.

JOINT CONCURRING OPINION OF JUDGES COSTA, GARLICKI, GYULUMYAN, MYJER, HIRVELÄ, MALINVERNI, VUČINIĆ AND RAIMONDI

1. While we agree that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's deprivation of liberty on 16 July 2003, we are of the opinion that the deprivation of liberty in question did not last "at least" from 12 noon to 10 p.m. (as stated in point 2 of the operative provisions and paragraphs 100 and 109 of the reasoning), but "only" within this time span.

The applicant's situation between 9 a.m. and 12 noon amounted not to a deprivation of liberty but merely a restriction on his freedom of movement. It would have been desirable for the Grand Chamber, as the highest judicial formation of the Court, to have avoided leaving questions unanswered, where possible, and to have reached that conclusion in the light of the following information.

2. The applicant's situation between 9 a.m. and 12 noon was determined by a combination of obligations resulting from a summons issued by an investigating authority and from his subordination to military-like discipline.

3. Firstly, the presence of the applicant in the NAP premises was a consequence of a summons to appear before the NAP in order to make statements for the purpose of a criminal investigation. While it may be true that, once he had entered the NAP premises, he might have had problems in trying to leave without permission, the same applies to many persons summoned to testify before a police authority, a prosecutor or a court. Such persons are under a duty to appear and to remain in place for such time as is necessary for their depositions to be taken, which means that they are not free to leave as long as investigative measures are under way (see paragraph 90 of the judgment). This limitation applies not only to persons summoned in their capacity as a "witness", but also to those "suspects" (that is, persons already charged) who have not been detained on remand. Even if they may not be physically restrained to prevent them from leaving without permission, the law provides for sanctions, criminal as well as administrative, to secure their compliance. It is regarded as obvious, including under the Court's case-law, that in the context of a criminal investigation, both the duty to appear and the duty not to leave before being permitted to do so are regarded as restrictions on freedom of movement.

4. Secondly, the applicant, as a police officer, was subject to military discipline. He, together with several other colleagues, received an order from his hierarchical superior to report to the NAP. Hence, his presence in

the NAP premises resulted from due application of the discipline he was subject to. The very essence of military discipline consists of situations when a subordinate must go where he or she is ordered to go and remain there as long as he or she is ordered to stay. It may also include punishments for disregarding an order and even physical restraint in the event of non-compliance. Such restrictions on movement constitute an inherent part of the operation of any armed formation and have nothing to do with deprivation of liberty.