



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

THIRD SECTION

DECISION

Applications nos. 37187/03 and 18577/08
Iaroslav SARUPICI against the Republic of Moldova and Ukraine
and Anatolie GANEA and Aurelia GHERSCOVICI against the Republic
of Moldova

The European Court of Human Rights (Third Section), sitting on
11 June 2013 as a Chamber composed of:

Josep Casadevall, *President*,

Alvina Gyulumyan,

Corneliu Bîrsan,

Ján Šikuta,

Nona Tsotsoria,

Ganna Yudkivska,

Valeriu Grițco, *judges*,

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above applications lodged on 28 October 2003 and
19 March 2008 respectively,

Having regard to the observations submitted the respondent
Governments and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicant in the first case, Mr Iaroslav Șarupici, is a Moldovan
national, who was born in 1969 and lives in Chișinău.

The applicants in the second case, Mr Anatolie Ganea and
Ms Aurelia Gherșcovici, are Moldovan nationals, who were born in 1961
and 1967 respectively and live in Vatra and Chișinău.

All three applicants were represented before the Court by Mr V. Țurcan, a lawyer practising in Chisinau.

A. The circumstances of the case

1. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicants' arrest and questioning

2. On 27 May 2002 Ms Gherșcovici's husband, B.G., was found dead in his house.

3. On 2 July 2002 Mr Ganea was arrested on unrelated charges. While he was in administrative detention, he was questioned about the circumstances of the death of B.G. On 10 July 2002 he made a written statement about the commission of the murder, in which he provided details of the circumstances of the murder and the identities of the persons whom he alleged were involved. A lawyer was appointed to represent him and Mr Ganea subsequently confessed to having planned the death of B.G. He later stated that Mr Șarupici had committed the murder of B.G.

4. On 15 July 2002 Ms Gherșcovici was arrested on charges of instigating, aiding and abetting the murder of B.G.

5. On 23 July 2002 an arrest warrant was issued in respect of Mr Șarupici.

6. According to Mr Șarupici, in October 2002 he was living with his uncle and aunt in Tsurupinsk, Ukraine. On 18 October 2002 he was arrested by the Ukrainian police in the presence of his uncle and aunt. He alleged that the police officers did not inform him of the reasons for his arrest or provide him with any documents attesting to its lawfulness. Despite the fact that he complied with the request of the police officers, they forcibly twisted his arms behind his back, beat him on the back and handcuffed him. He was searched without a report being drawn up and his mobile phone was seized.

7. Mr Șarupici alleged that he was then taken to Tsurupinsk police station where he was handed into the custody of the Moldovan police. The Moldovan police put the applicant in a car with Moldovan registration plates and crossed the Ukrainian-Moldovan border at the Palanca customs post. He had to sit handcuffed in the back of the car. He was not provided with any extradition request nor did the police officers present him with any document or show his identity papers to the border guards when crossing the border.

8. According to the Moldovan Government, Mr Șarupici was arrested on 19 October 2002 in Palanca, Moldova. On the same day he was brought to Chișinău and placed in the remand centre of the Ministry of Internal Affairs.

9. A lawyer was appointed to represent Mr Șarupici and on 24 October 2002 Mr Șarupici confessed that he had murdered B.G. He subsequently

claimed that police officers had exerted psychological pressure on him and tortured him to make him confess.

2. The applicants' complaints about their treatment

(a) Complaints about treatment in detention

10. Meanwhile, on 8 August 2002 Mr Ganea lodged a complaint with the prosecutor alleging that he had been ill-treated in order to make him confess and that on 2 July 2002 he had not been provided with a lawyer of his choice. His complaint was dismissed.

11. On 4 January 2003 the prosecutor registered a complaint by Mr Şarupici regarding his alleged ill-treatment by police officers while in detention. On 21 January 2003 a prosecutor informed him that his allegations of ill-treatment had not been upheld and that it had been decided not to institute criminal proceedings. Mr Şarupici challenged the decision, attaching statements from his cellmates. On 1 August 2003 the Chişinău Prosecutor informed Mr Şarupici that there were no new circumstances which could influence the lawfulness of the decision of 21 January 2003.

12. On 30 June 2003 Mr Şarupici lodged a complaint about the ban on receiving visits from his family and other persons.

(b) Mr Şarupici's complaint about his arrest

13. Meanwhile, on 2 April 2003, Mr Şarupici's lawyer requested the Prosecutor General to provide him with information concerning the circumstances of Mr Şarupici's arrest and extradition. On 14 April 2003 the Chişinău Prosecutor informed him that there was no information to indicate that Mr Şarupici had been arrested on the territory of Ukraine.

14. On 16 May 2003 Mr Şarupici asked the Prosecutor General of Ukraine to conduct an investigation into his alleged unlawful arrest by the Ukrainian police and his abduction by the Moldovan police on 18 October 2002. He named his uncle and aunt as witnesses to the events of that date. By letter of 18 August 2003 the Kherson Regional Prosecutor's Office informed Mr Şarupici that no violation of the law by the Ukrainian police had been established. On 13 November 2003 the Kherson Regional Prosecutor's Office explained that on 18 October 2002 Mr Şarupici had been arrested by the Moldovan police and denied that Mr Şarupici had been brought to Tsurupinsk police station.

15. On 11 May 2005 Mr Şarupici complained in writing to the General Prosecutor's Office of Ukraine disagreeing with the replies received from the Ukrainian law-enforcement authorities. He requested the institution of criminal proceedings. His request received no response.

16. In a statement made before a notary public on 1 December 2005, Mr Şarupici's uncle and aunt stated that on 18 October 2002 their nephew

had been arrested in the town of Tsurupinsk by Ukrainian and Moldovan police officers.

3. Criminal proceedings before the domestic courts

(a) The first trial and appeal

17. On an unspecified date the trial proceedings commenced at the Botanica District Court. In its judgment of 12 September 2003 the District Court found all three applicants guilty of B.G.'s murder.

18. The applicants and the prosecutor appealed the judgment.

19. The appeals were heard before the Court of Appeal. On 14 May 2004 the court dismissed the appeals lodged by the prosecutor and by Mr Ganea and Mr Şarupici. However, it upheld the appeal lodged by Ms Gherşcovici and acquitted her.

20. Mr Ganea, Mr Şarupici and the prosecutor appealed the judgment.

21. On 21 December 2004 the Supreme Court upheld all three appeals and ordered that the case against the applicants be retried by the Court of Appeal.

(b) The first retrial and appeal

22. All three applicants were subsequently retried before the Court of Appeal. On 16 June 2005 the Court of Appeal found them guilty of the murder of B.G.

23. The applicants appealed the judgment.

24. On 13 December 2005 the Supreme Court upheld the applicants' appeals and ordered that the case be retried a second time by the Court of Appeal. It found that the Court of Appeal had not complied with the instructions of the Supreme Court when retrying the case.

(c) The second retrial and appeal

25. All three applicants were retried a second time before the Court of Appeal. On 18 April 2006 the court found Mr Ganea and Mr Şarupici guilty of the murder of B.G. and acquitted Ms Gherşcovici.

26. Mr Ganea, Mr Şarupici and the prosecutor appealed the judgment.

27. On 1 March 2007 the Supreme Court acquitted Mr Ganea and Mr Şarupici on the ground of lack of elements constituting an offence in their actions and upheld the judgment of the Court of Appeal of 14 May 2004 as regards Ms Gherşcovici.

(d) The request for annulment of the Supreme Court decision

28. On 19 September 2007 the Deputy Prosecutor General lodged a request for annulment of the judgment of 1 March 2007.

29. On 24 December 2007 the plenary of the Supreme Court upheld the Deputy Prosecutor General's request for annulment and ordered that the case be retried by the Supreme Court.

(e) The retrial before the Supreme Court

30. The applicants were retried a third time, this time before the Supreme Court. On 23 December 2008 the Supreme Court delivered its judgment in the retrial and acquitted the applicants. The decision was final.

31. In particular, the court found that Mr Ganea had signed the written statement of 10 July 2002 at a time when he had not been arrested for the crime and had not been assisted by a lawyer, which was incompatible with the law. Further, he had not been advised of his right to remain silent. As regards Mr Şarupici, the court held that he had been arrested in Ukraine by the Ukrainian police on 18 October 2002, that the authorities had failed to comply with the extradition procedure set out in the relevant mutual legal assistance treaty and that Mr Şarupici had been illegally brought into Moldova. It also found that lawyers appointed to assist him did not have licences at the relevant time and that his right to a fair trial had therefore been breached. As to the allegations of ill-treatment, the court emphasised the obligation on the authorities promptly to take all reasonable steps at their disposal to investigate allegations of ill-treatment and secure relevant evidence. The court concluded that the investigation conducted by the prosecutor did not meet the requirements of the Convention. Evidence obtained as a result of the ill-treatment was therefore inadmissible.

4. The civil compensation claims

(a) The applicants' claim under Law no. 87

32. On 30 December 2011 the applicants lodged a civil action at the Court of Appeal claiming damages the violation of their right to a fair hearing within a reasonable time pursuant to Law no. 87 of 21 April 2011 (see paragraph 38 below).

33. On 7 June 2012 the Court of Appeal rejected the applicants' claim. It considered that the criminal proceedings against the applicants were particularly complex, highlighting the seriousness of the charge; the number of accused in the case; the prejudicial character of the offence; and the importance of the process.

34. On 25 October 2012 the applicants lodged an appeal. On 5 December 2012 the Supreme Court upheld the appeal. It considered that the proceedings had begun on 27 May 2002 and had terminated on 23 December 2008, when the final judgment acquitting the applicants had been handed down. It found the length of the proceedings to be excessive and attributable to the acts of the authorities. Taking into account the

complexity of the case and this Court's case-law under Article 41 of the Convention, including the Court's award of 600 euros (EUR) for proceedings which lasted six years in *Deservire SRL v. Moldova*, no. 17328/04, 6 October 2009, it awarded each of the applicants 10,000 Moldovan lei (approximately EUR 625) in damages.

(b) The applicants' claim under Law no. 1545

35. On 14 December 2011 the applicants lodged a civil action at the Botanica District Court claiming damages for violations of their Convention rights pursuant to Law no. 1545 of 25 February 1998 (see paragraph 37 below). They claimed non-pecuniary damage in respect of, *inter alia*, unlawful detention; unlawful arrest; unlawful subjection to criminal responsibility; unlawful conviction; unlawful search and seizure of property; and unlawful secret investigative measures.

36. On 17 December 2012 the applicants were asked by the judge rapporteur, pursuant to Rule 49 § 3 (a) of the Rules of Court, to confirm whether their claim under Law no. 1545 of 25 February 1998 sought compensation in respect of all the complaints lodged before this Court; and if not, for which alleged violations of the Convention compensation was sought. In their response, the applicants did not provide the details sought. However, they confirmed that notwithstanding the Supreme Court's judgment of 5 December 2012 in respect of their claim under Law no. 87 (see paragraph 34 above), it was open to them to seek compensation for moral damages suffered as a consequence of the excessive length of the proceedings in the context of their pending civil claim. They also confirmed that the claim remained pending before the Botanica District Court.

B. Relevant domestic law and practice

1. Relevant Moldovan law

37. Law No. 1545 of 25 February 1998 provides for compensation for damage caused by the illegal acts of the criminal investigation organs, prosecution and courts to be paid to persons acquitted in criminal proceedings. The relevant provisions of the Law were set out in this Court's judgment in *Sarban v. Moldova*, no. 3456/05, § 54, 4 October 2005.

38. Law no. 87, which created a new remedy to address complaints of unreasonable length of proceedings, entered into force on 1 July 2011. Further details of the Law are set out in this Court's decision in *Balan v. Moldova* (dec.), no. 44746/08, 24 January 2012.

2. *Relevant Ukrainian law*

39. The Prosecution Service Act of 1 December 1991 provides a mechanism to challenge acts of authorities involved in conducting searches, inquiries and pre-trial investigations. Section 5 provides that the Public Prosecutor's Office is entrusted with a number of functions, including supervision of the observance of laws by organs conducting operative search activities, inquiries and pre-trial investigations.

40. Section 12 of the law provides that the public prosecutor is responsible for examining applications and complaints about violations of rights of individuals and legal entities, except for those complaints which are within the competence of the court. It further stipulates that a decision taken by the public prosecutor can be appealed to a higher public prosecutor or a court.

41. Article 94 of the Code of Criminal Procedure in Ukraine, in force until 12 June 2003, allowed criminal proceedings to be instituted on the basis of, *inter alia*, applications or communications from individuals. Pursuant to Article 97, upon receipt of an application the prosecutor could agree or refuse to institute criminal proceedings, if necessary after a preliminary inquiry into the facts. Article 99 allowed an appeal against the prosecutor's decision to a higher prosecutor. Refusal of that prosecutor to annul the decision could be appealed to the court under the procedure set out in Article 236-1 of the Code.

42. Article 248 of the Code of Civil Procedure of 18 July 1963 ("1963 CCP"), in force until 1 September 2005, set out the right to complain to a court about decisions, acts and omissions of public authorities. Article 2 of the Code of Administrative Justice of 6 July 2005 ("2005 CAJ"), which entered into force on 1 September 2005, provides that decisions, actions or inaction on the part of public authorities can be challenged in administrative courts. Article 1167 of the Civil Code sets out the right to payment of non-pecuniary damage for unlawful decisions, acts or omissions. Non-pecuniary damage is to be paid irrespective of guilt in cases concerning illegal imprisonment.

COMPLAINTS

A. **Complaints against Moldova**

43. Mr Şarupici complained that the conditions of his detention in the remand centre of the Ministry of Internal Affairs and his ill-treatment by Moldovan police during questioning infringed his rights under Article 3 of the Convention.

44. All three applicants complained that the judge hearing the case before the Botanica District Court was not independent. Mr Şarupici also complained under Article 6 § 2 of the Convention that his arrest was based solely on the assumption that he had committed murder and that he was convicted as a result of a confession obtained as a result of ill-treatment. The Court *ex officio* raised a concern under Article 6 § 3 (c) of the Convention regarding the applicants' legal assistance following their arrest.

45. The applicants also complained under Article 6 § 1 of the Convention about the length of the criminal proceedings against them. They further complained under Article 13 that they had no effective remedy in respect of their complaints.

46. The applicants further complained that the quashing of the Supreme Court's decision of December 2007 acquitting them of offences in respect of the murder of B.G. breached the principle of "legal certainty" inherent in Article 6 § 1 of the Convention and that their retrial before the Supreme Court violated their rights under Article 4 of Protocol No. 7 to the Convention.

47. Mr Şarupici also complained under Article 8 about restrictions on his contact with his family and lawyer during detention and under Article 1 of Protocol No. 1 to the Convention about the fact that his mobile phone was taken during his arrest in Ukraine and has not been returned to him.

B. Complaints against Moldova and Ukraine

48. Mr Şarupici further complained under Article 5 § 1 of the Convention, in respect of both Moldova and Ukraine, that he was unlawfully arrested on the territory of Ukraine and brought to Moldova by Moldovan police officers in breach of the correct extradition procedure.

THE LAW

A. Joinder of the applications

49. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

B. The complaints against Moldova

1. The parties' submissions

50. The Moldovan Government pointed to the civil action lodged by the applicants in the Botanica District Court pursuant to Law no. 1545 (see paragraph 35 above). They argued that this court action was capable of providing full redress to the applicants for the damage suffered and invited the Court to declare the applications inadmissible in so far as they were directed against Moldova on the basis of the pending domestic proceedings.

51. The Government further pointed out that in a civil action lodged pursuant to Law No. 87, the Supreme Court had upheld the applicants' complaints concerning the length of the criminal proceedings and had awarded damages (see paragraph 34 above). The Government submitted that the applicants could therefore no longer be considered victims in respect of this complaint.

52. The applicants confirmed that their civil claim under Law no. 1545 remained pending before the Botanica District Court but claimed that it would not be upheld by that court or by the Court of Appeal. Although they accepted that it might be successful in the Supreme Court, they argued that it was likely that only nominal damages would be awarded. They therefore contended that they did not have an effective remedy at domestic level.

53. The applicants added that although their action under Law no. 87 as regards the length of the proceedings was upheld by the Supreme Court, the amount of the damages awarded was far inferior to that which would have been awarded by this Court. They argued that they could still be considered victims of a violation. However, they acknowledged that they were able to raise their complaints in this respect before the domestic courts in the context of their civil action lodged under Law no. 1545.

2. The Court's assessment

54. Article 35 § 1 of the Convention provides:

“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

55. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. Those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV; and *Demopoulos and Others*

v. Turkey (dec.) [G.C.], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, § 69, 1 March 2010).

56. The only remedies which Article 35 § 1 of the Convention requires to be used are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. In some cases there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others*, cited above, §§ 66-68 and 71; and *Balan*, cited above, § 14).

57. An assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Balan*, cited above, § 15).

58. The question for the Court is whether Law No. 1545 offers an effective remedy to the applicants as regards their complaints against Moldova.

59. In the case of *Topa v. Moldova* (dec.), no. 25451/08, 14 September 2010, in respect of a complaint under Article 5 § 3 of the Convention, the Court held that Law no. 1545 provided an effective framework of redress which the applicant had failed to exhaust after acquittal and, consequently, declared the application inadmissible. The effectiveness of the remedy under Law no. 1545 was confirmed in the case of *Mătăsar and Savițchi v. Moldova*, no. 38281/08, § 75, 2 November 2010, where the Court dismissed the applicants' complaints under Article 5 for failure to initiate civil proceedings under that law. Similarly, in the case of *Bisir and Tulus v. Moldova*, no. 42973/05, § 37, 17 May 2011, the Court rejected complaints under Article 5 § 3 and 8 on the ground that the applicants had failed to claim compensation under the law.

60. In the present case, the Court does not find any compelling reasons to depart from its findings in the cases of *Topa*, *Mătăsar and Savițchi* and *Bisir and Tulus*. Although the applicants have claimed that only nominal damages will be awarded, they have failed to substantiate this claim by reference to relevant case-law of the domestic courts in other actions brought under Law no. 1545. In these circumstances, and having regard to the terms of Law no. 1545, the Court finds no reason whatsoever to speculate that the claim for damages lodged on 14 December 2011 will not be dealt with effectively in respect of all the complaints under the Convention made by the applicants in these proceedings.

61. In conclusion, the applicants' complaints against Moldova are premature and must therefore be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention

C. The complaint against Ukraine

62. The Ukrainian Government contended that Mr Şarupici had failed to make a complaint regarding his alleged unlawful arrest and detention before the national authorities of Ukraine. He could have lodged a complaint with the prosecutor, which the latter would have been obliged to investigate. That decision could furthermore subsequently have been appealed to a higher public prosecutor or to a court on the ground that it constituted a violation of Mr Şarupici's rights or freedoms (see paragraphs 39-40 above).

63. Any decision in his favour could have served as a basis for a claim of compensation for damages arising as a result of the violation. Article 1167 of the Civil Code allowed a claim of damages to be lodged in respect of actions of officials (see paragraph 42 above). The Ukrainian Government considered that these possibilities offered an adequate and accessible remedy to Mr Şarupici in respect of his complaint under Article 5 § 1 of the Convention.

64. In the alternative, the Ukrainian Government argued that as the alleged unlawful arrest and extradition took place on 18 October 2002 and the applicant did not lodge his case at the Court until 28 October 2003, the complaint was inadmissible for failure to comply with the six-month rule.

65. Mr Şarupici contended that it would have been useless for him to commence civil proceedings as there was no procedural prospect of satisfaction. He considered that at the moment that he received the reply from the prosecutor on 18 August 2003, he had exhausted all remedies offered by Ukrainian legislation.

66. Pursuant to Article 35 § 1 of the Convention, the Court may only deal with a matter where it has been introduced within six months from the date of the final decision in the process of exhaustion of domestic remedies (see generally *Tucka (No. 1) v. the United Kingdom* (dec.), no. 34586/10, 18 January 2011). Where no effective remedy is available to the applicant, the time-limit expires six months after the date of the acts or measures complained of, or after the date of knowledge of that act or its effect or prejudice on the applicant (see *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I; and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009).

67. In the present case, the Court recalls that it had already found that the Ukrainian legislation in force at the material time had not provided for sufficient legal basis for arrest and detention of someone pending extradition (see, *Mokallal v. Ukraine*, no. 19246/10, § 39,

10 November 2011, with further references). The absence of such legal framework led the Court also to conclude on a lack of any procedure through which the lawfulness of detention could have been examined and of an opportunity to claim compensation in the domestic proceedings for such unlawful detention (see, among others, *Svetlorusov v. Ukraine*, no. 2929/05, §§ 58 and 69, 12 March 2009). Thus, it does not appear that the applicant had at his disposal any effective avenue to pursue his complaint about unlawfulness of his arrest and extradition.

68. The six month time-limit therefore began to run on the date of the applicant's arrest, detention and extradition, namely 18 October 2002. However, the applicant did not lodge his application until 28 October 2003, over a year later. The application was therefore lodged outside the six-month time-limit and must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Marialena Tsirli
Deputy Registrar

Josep Casadevall
President