

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 29568/06
by Nicolae GALUŞCHIN
against Moldova

The European Court of Human Rights (Third Section), sitting on 23 August 2011 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Mihai Poalelungi,
Kristina Pardalos, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 5 July 2006,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant was born in 1975 and lives in Brăneşti. He was represented before the Court by Mr S. Burduja, a lawyer practicing in Chişinău. The Moldovan Government ("the Government") were represented by their Agent, Mr V. Grosu.

1. The main criminal proceedings against the applicant

2. The applicant was charged with indecent acts committed on a five-year old girl, following a report made by her mother on 7 April 2003. On 30 October 2003 the Criuleni District Court acquitted him of all charges, finding that there had been no evidence that he had committed an offence. The court noted that the girl's mother had testified before it that she had had a dispute with the applicant on the morning in question and had filed the complaint against him in revenge, and not because he had in fact committed any offence. She had also coached her daughter on how to testify in order to incriminate the applicant. However, the court noted that both mother and daughter had later withdrawn their statements.

3. The judgment was upheld by the Chişinău Court of Appeal on 26 February 2004. The court noted the discrepancies between the statements made on 7 April 2003 by the child and her mother and the subsequent change to their statements. It also noted that a psychiatric report on the girl had shown that she was prone to adult influence, while the testimony given by the girl to the investigating authority had ended after a teacher assisting the girl had noted her difficulty in formulating phrases and logically explaining her thoughts, which had made the continuation of the interview pointless. Statements made by two witnesses during the investigation had confirmed the girl's tendency to be influenced by adults, but the prosecutor had not asked for their presence at the court hearing and they had therefore not been able to be questioned about their statements.

4. On 1 June 2004 the Supreme Court of Justice quashed the judgment of 26 February 2004 and ordered a rehearing of the case by the Chişinău Court of Appeal. The reason for the rehearing was that the lower court had failed to directly examine all the relevant evidence, such as hearing from the victim, her representative and other witnesses, but rather had simply relied on the documents in the case file.

5. The victim and her mother were summoned to the hearing at the Chişinău Court of Appeal on 22 September 2004, but they did not appear. In the meantime, on 9 September 2004, the mother sent a letter to the court stating that she fully supported her statements and those made by her child

during the investigation. She did not ask for the case to be tried in her absence.

6. On 22 September 2004 the Chişinău Court of Appeal found the applicant guilty of the crime with which he had been charged. The applicant was absent from the hearing, even though he had been summoned to attend it. He claims that he never received the summons. A court-appointed defence lawyer was present.

7. The court did not hear any witnesses, including the girl and her mother. After the applicant's conviction, the mother wrote to the Supreme Court of Justice stating that she had never received a summons for the hearing of 22 September 2004 and that she withdrew her declaration of 9 September 2004. The applicant claimed that the letter of 9 September 2004 had been written by someone else, because the mother could not write in Latin script, yet the letter had been written in Latin script. No expert report to verify whether she had written the letter was ordered.

8. On 6 December 2004 the lawyer appointed by the applicant lodged an appeal on points of law. In his appeal, the lawyer drew the court's attention to the reason for which the Supreme Court of Justice had sent the case for a rehearing on 1 June 2004, namely the failure of the Court of Appeal to directly examine all the evidence. However, that court had allowed the same irregularity to occur in convicting the applicant. He also submitted that the absence of the victim, the mother and other witnesses, as well as the applicant, from the court hearing of 22 September 2004 had prevented the defence from properly challenging the prosecutor's evidence. The prosecutor had simply read out the statements made by various individuals during the investigation, and the court had ignored the statements made by the mother and daughter before the first-instance court rejecting their previously made statements. The lawyer questioned the authorship of the letter of 9 September 2004. He finally relied on Article 6 of the Convention.

9. On 1 February 2006 the Supreme Court of Justice upheld the judgment adopted by the lower court, finding that it had fully examined the case. The court referred to the same evidence as that examined by the Court of Appeal on 22 September 2004. The parties had been summoned but had failed to appear. However, their absence from the hearing had not prevented the court from continuing to examine the case. Moreover, the mother had signed a declaration in Latin script on 16 April 2003, which proved that she could write in that script and thus could have been the author of the letter of 9 September 2004.

10. On 12 June 2008 the applicant was conditionally released from prison, 17 months and 17 days before the expiry of his prison term.

2. The reopening of the proceedings against the applicant

11. After communication of the present application to the respondent Government, on 10 April 2009 the Prosecutor General's Office asked the Supreme Court of Justice to reopen the proceedings in the applicant's case.

12. On 11 May 2009 the Supreme Court of Justice accepted that request. It found that the Chişinău Court of Appeal and the Supreme Court of Justice in their judgments of 22 September 2004 and 1 February 2006 respectively had breached the applicant's rights guaranteed under Article 6 of the Convention, as well as under domestic law, by failing to directly examine witnesses and evidence before overturning the first-instance court's judgment. Moreover, they had examined the case in the applicant's absence despite the absence of evidence that he had been properly summoned and all reasonable measures had been taken to ensure his presence in court, and had done so in the absence of a clear waiver of the applicant's right to be heard by the courts. Moreover, the Court of Appeal had failed to follow the indications made by the Supreme Court of Justice in its decision of 1 June 2004, which had been aimed precisely at ensuring the observance of procedural rules and at preserving the rights of the accused to a fair trial. The court therefore annulled the judgments of 22 September 2004 and 1 February 2006 and ordered a rehearing of the case.

13. On 10 November 2009 the Chişinău Court of Appeal found the applicant guilty as charged. In reaching this conclusion, the court heard the applicant and his lawyer, the victim and her mother, as well as a teacher and has examined the psychiatric report made on the victim's intellectual development. In view of the expiry of the limitation period for the offence he had committed, the court did not impose any sanction on the applicant.

14. By the final judgment of the Supreme Court of Justice adopted on 18 January 2011, the applicant's appeal was declared inadmissible due to his failure to lodge it within the statutory time-limit of two months from the date of adoption of the lower court's judgment.

B. Relevant domestic law and practice

15. The relevant domestic law has been set out in *Popovici v. Moldova* (nos. 289/04 and 41194/04, §§ 34 and 35, 27 November 2007).

16. In a series of its judgments, the Supreme Court of Justice awarded compensation to persons whose cases had been communicated to the respondent Government and in which the latter acknowledged a violation of Convention rights (see *Ungureanu v. Moldova* (dec.), no. 78077/01, 3 October 2006; *Diviza and Others v. Moldova* (dec.), no. 24316/02, 21 November 2006; *Grosu and Others v. Moldova* (dec.), no. 21118/03, 13 March 2007; *Cumatrenco v. Moldova* (dec.), no. 28209/03, 20 March 2007; and *Guranda v. Moldova* (dec.), no. 28412/03, 20 March 2007). In

adopting these judgments, the Supreme Court of Justice expressly relied on the Convention as the legal basis for awarding compensation. The Court accepted that that the amounts awarded had been consistent with those it had made in similar cases in respect of Moldova and thus struck those cases out of its list of cases.

COMPLAINTS

17. The applicant complained under Article 6 of the Convention that the higher courts did not give sufficient reasons for their judgments.

18. He also complained, under the same Article, that the higher courts did not hear him or his representative, the victim, her representative or any of the witnesses before reversing the first-instance court judgment and convicting him.

19. He finally complained under Article 6 § 3 of the Convention because he was deprived of the possibility to question the witnesses for the prosecution.

THE LAW

20. The applicant complained of a number of violations of Article 6 §§ 1 and 3 of the Convention in the original proceedings against him.

The relevant part of Article 6 § 1 reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The relevant part of Article 6 § 3 reads as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

21. The Government submitted that following the reopening of the proceedings by the Supreme Court of Justice on 11 May 2009 the case had been sent for a full rehearing by the Chişinău Court of Appeal. Therefore, any procedural shortcomings in the proceedings had been remedied and consequently the applicant found himself in the same position as he had been before the violation had occurred. Accordingly, the Government

submitted that the applicant could no longer claim to be a victim of a violation of his rights under Article 6 of the Convention.

22. Alternatively, the Government argued that the applicant could have claimed compensation for the alleged violations of his rights from the domestic courts under Law no. 1545, and referred to the case of *Duca*, in which a fair amount of compensation had been awarded (see *Duca v. Moldova* (striking out), no. 1579/02, 10 June 2008). In failing to appeal against the judgment of the Court of Appeal of 10 November 2009, the applicant deprived the domestic courts of the possibility to fully remedy the damage caused. He thus failed to exhaust available domestic remedies.

23. The applicant disagreed, claiming that the reopening of the proceedings could not in itself have remedied the fact that he had already served his sentence. Moreover, he could not have claimed compensation, as Law no. 1545 referred to by the Government would only have applied to him if he had been acquitted.

24. The Court must consider whether the applicant can still claim to be a victim of a violation of Article 6 within the meaning of Article 34 of the Convention. In this connection, it emphasises that it falls first to the national authorities to redress any alleged violation of the Convention. The question of whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an *ex post facto* examination of his or her situation. A decision or measure of the domestic authorities favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. The question of whether he has received compensation for the damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – is an important issue. It is the Court's settled case-law that where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-181, ECHR 2006-V, and *Ciorap v. Moldova* (no. 2), no. 7481/06, § 18, 20 July 2010).

25. In the present case, the Court notes that the reopening of the proceedings in the applicant's case was based by the Supreme Court of Justice on the need to redress procedural shortcomings which had resulted in the violation of the applicant's rights under Article 6 of the Convention. It therefore expressly acknowledged the violation of the applicant's rights and partly remedied that violation by sending the case for a full retrial.

26. The applicant was awarded no compensation for the damage caused to him. However, the Court notes that he never claimed such compensation during the proceedings. It is true that Law no. 1545, to which the Government referred *inter alia*, was inapplicable to the applicant since he

was eventually convicted and could thus not claim any compensation on that basis. However, as is clear from the case-law mentioned in paragraph 16 above, the Supreme Court of Justice could award compensation even in the absence of an express provision in the national law, relying directly on the Convention. It is also to be noted that the awards which the Supreme Court of Justice made in those cases were consistent with those awarded by the Court in similar cases in respect of Moldova, which was one of the reasons for accepting the parties' requests to strike those cases from the Court's list of cases.

27. Accordingly, in cases such as the present one, where the violation of the Convention right has been fully acknowledged by the domestic courts, in the light of the present domestic case-law, applicants have clear prospects of success in claiming compensation at the domestic level.

28. The Court also notes that the general limitation period in Moldova for defending a right, including requests for compensation, is three years from the moment when a right arose. In the applicant's case this period started from the judgment of the Supreme Court of Justice on 11 May 2009. Accordingly, he can still claim compensation from the domestic courts.

29. The Court is not persuaded by the applicant's argument that monetary compensation could not deprive him of his victim status due to the fact that he had already served his sentence. It notes that during the criminal proceedings – both prior and after the reopening – the courts had established sufficient evidence to convict him and that nothing in the file suggested any arbitrariness in those judgments. The issue before this Court was whether procedural shortcomings allowed during the original proceedings had been serious enough as to affect the fairness of the trial as a whole. However, after the elimination of those shortcomings the courts again convicted the applicant, confirming that his conviction and sentence had been lawful, and his detention in accordance with the Convention principles.

30. Since the applicant has failed to claim compensation in the present case, the Court concludes that the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for failure to exhaust available domestic remedies (see, *mutatis mutandis*, *Mătăsaru and Saviţchi v. Moldova*, no. 38281/08, § 76, 2 November 2010).

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President