



## Conviction of a mayor on the basis of a new, more lenient, criminal law was not foreseeable and violated the Convention

In today's Chamber judgment<sup>1</sup> in the case of [Tristan v. the Republic of Moldova](#) (application no. 13451/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 7 (no punishment without law) of the European Convention on Human Rights.**

The case concerned a former mayor who complained that she had been convicted of an offence with which, in her submission, she could no longer be charged, following an amendment to the provisions of the Criminal Code while the criminal proceedings against her were still pending. In other words, she alleged that, unlike the criminal law in force at the relevant time, the offences of which she had been accused were no longer punishable under the new law.

The Court noted that the only difference between the wording of the new and old versions of the law was that the terms used to define the perpetrator had changed, the penalties having remained the same. As such, the new definition of a “public official” delimited the group of persons liable to be prosecuted for the offence with which the applicant had been charged. It was therefore a constituent element of this offence, and the domestic courts should have been particularly careful when specifying its scope. However, in the present case, this requirement had not been satisfied, since the Chişinău Court of Appeal had not provided any explanation as to why the new definition was equivalent to the former one, although the wording was substantially different, and had failed to respond to the question of whether mayors, including the applicant, fell into one of the two categories of persons set out in the new definition.

The Court therefore held that, after the entry into force of the new criminal law, the applicant could not reasonably have foreseen that she would be prosecuted and convicted on the basis of Article 328 § 3 (b) of the Criminal Code. It followed that the domestic courts' findings had not been reasonably foreseeable.

### Principal facts

The applicant, Tatiana Tristan, is a Moldovan national who was born in 1954. She lives in the municipality of Valea Perjii, where she was mayor between 2003 and 2007.

In 2008 the applicant was charged with abuse of power committed by a “person holding a position of responsibility”, an offence under Article 328 § 1 of the Criminal Code.

In 2011 the public prosecutor amended the charge against the applicant, classifying the acts of which she was accused as abuse of power by a “person holding a high-level position of responsibility”, an offence under Article 328 § 3 (b) of the Criminal Code as it stood at the relevant time. In December of the same year, a new law (no. 245 of 2 December 2011) amended, *inter alia*, the provisions of Article 328 § 3 (b) of the Criminal Code by, in particular, replacing the term “person holding a high-level position of responsibility” with the term “public official”.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

In 2012 the public prosecutor issued an order specifying that the applicant was accused of having committed the offence provided for in Article 328 § 3 (b) of the Criminal Code, in its new wording. The same year, the applicant was convicted of that offence.

In 2013 the appeal court dismissed the applicant's appeal, considering that the new wording of the law had replaced the former version. The Supreme Court of Justice rejected the applicant's subsequent appeal and upheld the appeal court's judgment.

## Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law) of the European Convention, the applicant alleged that, unlike the criminal law in force at the relevant time, the offences of which she had been accused were no longer punishable under the new law.

Under Article 6 (right to a fair trial) of the Convention, she complained that the domestic courts, in particular the Supreme Court of Justice, had not addressed her argument concerning the principle of the retrospective application of the more lenient penalty.

The application was lodged with the European Court of Human Rights on 4 March 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Arnfinn Bårdsen (Norway), *President*,  
Egidijus Kūris (Lithuania),  
Pauliine Koskelo (Finland),  
Saadet Yüksel (Türkiye),  
Lorraine Schembri Orland (Malta),  
Frédéric Krenc (Belgium),  
Diana Sârcu (the Republic of Moldova),

and also Dorothee von Arnim, *Deputy Section Registrar*.

## Decision of the Court

### Article 7

The Court noted that the domestic courts had applied the provisions of a criminal law which had come into force after the events in issue. It also noted that the only difference between the wording of the new and old versions of the law was that the terms used to define the perpetrator had changed, the penalties having remained the same.

During her trial, the applicant had argued that she did not fulfil the criteria set out in the new definition of the perpetrator. The Chişinău Court of Appeal had found that the new definition – specifying the persons in a position to have committed the offence – had replaced the former, and that they were equivalent.

The Court noted that the question whether these new criminal provisions were applicable to mayors had been a new one, and that there had been no previous case-law on the matter. It further noted that neither the domestic courts nor the parties to the proceedings before it had raised the question of why the Moldovan legislature had decided to amend the wording of the criminal provisions relevant to the present case. Nevertheless, the fact remained that the legislature had amended the wording of Article 123 of the Criminal Code, making a distinction between the former definition – a “person holding a high-level position of responsibility” – and the new definition – a “public official”. Unlike the former definition, which covered only one category of persons, the new definition referred to two. Furthermore, it no longer referred to the organic laws as the rules which regulated

the manner in which the persons coming under its scope were elected. However, in contrast to the legislature, the Chişinău Court of Appeal had not distinguished between the two definitions in issue in the applicant's case. The Court considered that the fact that the domestic courts, without providing any justification, had not distinguished between these two concepts, although the legislature had done so, could not be considered an interpretation that was in keeping with the wording of the provisions in question. It also found that by interpreting the provisions in this way, the appeal court had generated more uncertainty, whereas its task had been to dispel the ambiguity surrounding the relevant criminal provisions.

The Court also noted that the new definition of a "public official" delimited the group of persons liable to be prosecuted for the offence with which the applicant had been charged. It was therefore a constituent element of this offence, and the domestic courts should have been particularly careful when specifying its scope. However, in the present case, this requirement had not been met, in that the Chişinău Court of Appeal had provided no explanation as to why the new definition was equivalent to the former one, although the wording was substantially different, and had failed to respond to the question whether mayors, including the applicant, fell into one of the two categories of persons set out in the new definition.

Furthermore, after the applicant's trial had ended, the contested provisions had been the subject of further judicial interpretation. On the one hand, in its explanatory decisions, the Supreme Court of Justice had interpreted the provisions in a manner which would have been favourable to the applicant. On the other hand, when ruling on an extraordinary appeal by the applicant, the Supreme Court of Justice had given yet another interpretation of the relevant provisions, and had dismissed her appeal.

In addition, the ensuing case-law had also given rise to uncertainty, and did not apply the interpretation given by the Chişinău Court of Appeal in the applicant's criminal trial. Having regard to the particular circumstances of the present case, the Court considered that this fact confirmed that the Chişinău Court of Appeal's interpretation of the provisions had not been foreseeable.

As to the Government's argument that the applicant was in any event a public figure who had been accountable under criminal law for acts performed in that capacity, the Court pointed out that abuse of power committed by a public figure was an offence punishable under a different provision of the Criminal Code, namely Article 328 § 1, and that the penalties provided for that offence were substantially more lenient than those provided for in Article 328 § 3 (b) of the Criminal Code. The Court also considered that the fact that the offences of which the applicant had been accused were punishable under a different criminal-law provision had no bearing on its findings as set out above, namely that, after the entry into force of the new criminal law, the applicant could not reasonably have foreseen that she would be prosecuted and convicted on the basis of Article 328 § 3 (b) of the Criminal Code.

It followed that the domestic courts' findings had not been reasonably foreseeable, and that **there had been a violation of Article 7 § 1 of the Convention.**

### [Other Articles](#)

The Court considered that there was no need to examine separately the complaint under Article 6 of the Convention.

### [Just satisfaction \(Article 41\)](#)

The Court held that the Republic of Moldova was to pay the applicant 3,600 euros (EUR) in respect of non-pecuniary damage, and EUR 2,500 in respect of costs and expenses.

*The judgment is available only in French.*

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