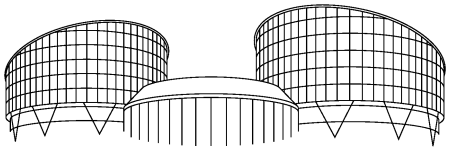

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF IURCOVSCHI AND OTHERS v. THE REPUBLIC OF MOLDOVA

(Application no. 13150/11)

JUDGMENT

STRASBOURG

10 July 2018

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

In the case of Iurcovschi and Others v. the Republic of Moldova,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Paul Lemmens, *President,*
Valeriu Griţco,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 19 June 2018,

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

PROCEDURE

1. The case originated in an application (no. 13150/11) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Moldovan nationals, Mr Oleg Iurcovschi, Mr Vitalie Sîrbu and Mr Alexandru Smoliacov ("the applicants"), on 28 February 2011.

2. The applicants were represented by Mr S. Pavlovschi, a lawyer practising in Chișinău. The Moldovan Government ("the Government") were represented by their Agent at the time, Mr M. Gurin.

3. The applicants complained in particular that their rights guaranteed by Article 5 §§ 3 and 4 of the Convention had been breached.

4. On 22 February 2016 the complaints concerning Article 5 §§ 3 and 4 were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1969, 1977 and 1980, respectively, and are currently absconding from the Moldovan authorities.

A. Background

6. At the time of the events, the applicants were police officers. According to the materials of the domestic judgments, the applicants found out that a person from the Transdniestrian region of Moldova, P., intended to come to Chișinău on 8 December 2010, carrying a large amount of cash

money, in order to conclude a transaction concerning immovable property. On 8 December 2010, the applicants attempted to apprehend P. in the staircase of an apartment block building. P. managed to escape, however he was chased and apprehended by the applicants, was thrown to the ground and severely beaten up until he lost consciousness. After that, he was carried by the applicants and put into a car. Several persons witnessed P.'s apprehension and beating. P. was never seen alive after that and several years later his body was found in a well.

7. The applicants claimed that they believed P. to be a criminal and intended to take him to the police station for questioning. After chasing him, they arrested him and drove him to the police station. However, P. managed to escape from their car at a busy road crossing and ran away after having waded across a small river. They submitted that they did not chase him again because the traffic light turned green and because they did not want to soil their cloths chasing P. across the river.

B. The applicants' arrest and pre-trial detention

8. On 7 February 2011 the applicants were arrested and charged with kidnapping, murder and abuse of their authority as police officers.

9. The same day the public prosecutor applied to the Centru District Court for a warrant for the applicants' detention in custody. The reasons relied upon by the public prosecutor were that the applicants could abscond from prosecution, interfere with the criminal investigation and re-offend. The applicants' representative sought access to the materials submitted by the public prosecutor in support of his requests but to no avail.

10. The same day the Centru District Court issued a detention order for thirty days. In court the applicants argued that the allegations presented by the public prosecutor were not supported by any facts or materials and that no materials whatsoever were presented by the prosecution. The court found that in view of the gravity of the accusations against the applicants, of the fact that the investigation was at its initial stage and of the applicants' position in the Ministry of Internal Affairs, there was a serious risk of absconding and of interfering with the investigation by influencing witnesses, misleading the investigation and increasing the volume of work.

11. On 9 February 2011 the applicants appealed and argued, *inter alia*, that the orders for detention lacked reasoning and that the court had relied only on suppositions. The applicants further noted that the court had refused to provide their representative with any materials from the file other than the prosecutor's requests.

12. On 17 February 2011 the Chișinău Court of Appeal dismissed the applicants' appeals. The court found that the materials in the file provided sufficient grounds for a reasonable suspicion that the applicants had committed the crimes they were charged with. The risk of interference with

the investigation was determined by the fact that the investigation had just started and the risk of absconding resulted from the fact that the applicants were police officers and thus knew how the investigating authorities operated. The Court of Appeal did not answer the applicants' complaint about the alleged lack of access to the materials in the case-file, relied upon by the first instance court to order their detention.

13. On 5 March 2011 the Centru District Court extended the applicants' detention by thirty days for the same reasons as it had done earlier. The court noted that on this occasion the applicants' representative had been given access to the materials in the file.

14. The applicants appealed and argued, *inter alia,* that the investigation was not advancing as claimed by the public prosecutor and that the risk of interference could just as well be mitigated by the applicants' house arrest. On 14 March 2011 the Chișinău Court of Appeal upheld the decision of the Centru District Court of 5 March 2011 for the same reasons as it had done earlier.

15. On 16 March 2011 the charges of murder were dropped in respect of all applicants because the victim's body was not yet found. On 29 March 2011 the case was committed for trial.

C. Applicants' detention after the case was committed for trial

16. On 29 March 2011 the prosecutor applied for the extension of the applicants' detention by ninety days. The prosecutor cited the same reasons as before: risk of absconding, of interfering with the investigation and of re-offending.

17. On 7 April 2011 the applicants lodged a *habeas corpus* request, arguing that the risk of interfering with the investigation was no longer valid because the criminal investigation had been concluded and that there had not been any evidence indicating that the applicants might abscond.

18. The same day, judge V. of the Rîșcani District Court extended the applicants' detention by ninety days considering that the three risks invoked by the public prosecutor resulted from the character of the charges against the applicants.

19. The applicants appealed and argued, *inter alia,* that the court had failed to refer to any evidence in support of the alleged risks justifying their detention.

20. On 20 April 2011 the Chișinău Court of Appeal upheld the decision of the Rîșcani District Court of 7 April 2011. The court relied on the fact that the applicants were police officers and considered that they could influence the witnesses or destroy evidence. The court also cited the risk of absconding.

21. On 10 May 2011 the applicants lodged a *habeas corpus* request, arguing that there were no grounds to assume that the applicants would abscond, re-offend or interfere with the trial.

22. On 25 May 2011 judge V. had withdrawn from the case because he had previously worked together with the third applicant. It is not clear from the materials of the case-file in which manner that fact affected judge V.'s impartiality and when did he realise that.

23. On 6 June 2011 the applicants lodged another *habeas corpus* request, noting that their previous request had still not been examined. They argued that, on 25 May 2011, judge V. had withdrawn from the case, whereas his ineligibility had existed on 7 April 2011, when he had ordered the extension of their detention and thus affected the lawfulness of that order.

24. On 5 July 2011 judge M. from the Rîșcani District Court extended the applicants' detention by ninety days for the same reasons as had been done earlier. The court rejected the applicants' *habeas corpus* request of 6 June 2011 by noting that none of the previous grounds for detention had lost their validity because the trial had not yet started. The court did not make any reference to the *habeas corpus* request of 10 May 2011.

25. On 6 July 2011 the applicants appealed and argued, *inter alia*, that the court had not examined their *habeas corpus* requests "speedily" as required under Article 5 § 4 of the Convention and had not replied to their contention that the detention order of 7 April 2011 had been unlawful because it had been ordered by judge V. who lacked impartiality.

26. On 15 July 2011 the Chișinău Court of Appeal upheld the decision of the Rîșcani District Court of 5 July 2011 for the same reasons as it had done before.

27. On 30 September 2011 the Rîșcani District Court acquitted the applicants of all charges and released them in the court room.

28. On 11 March 2013 the Chișinău Court of Appeal quashed that judgment, convicted the applicants of kidnapping and abuse of office and sentenced them to seven years of imprisonment. On 12 November 2013 the Supreme Court of Justice upheld that judgment *in absentia*.

29. It appears that on an unspecified date after the victim's body was found, a new set of criminal proceedings based on murder charges was initiated against the applicants. The parties did not inform the Court about the outcome of those proceedings.

II. RELEVANT DOMESTIC LAW

30. The relevant domestic law concerning detention on remand has been set out in the Court's judgment in *Buzadji v. the Republic of Moldova* [GC] (no. 23755/07, §§ 42-43, ECHR 2016 (extracts)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

31. The applicants complained that their detention on remand had not been based on relevant and sufficient reasons and had been excessively long, in violation of Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

32. The Government pointed to the fact that the applicants eventually fled Moldovan justice, a fact which proved that the reasons relied upon by the Moldovan courts to order their detention were relevant and sufficient and that the detention was not excessively long.

33. The Court refers to the general principles established in its case-law on Article 5 § 3 of the Convention regarding, in particular, the need for relevant and sufficient reasons for depriving someone of his or her liberty and the obligation of display of "special diligence" by the national authorities (see, among others, *Buzadji*, cited above, §§ 84-91).

34. In the present case, when ordering and prolonging the applicants' detention, the domestic courts considered that, in view of the seriousness of the accusations against them, they might abscond. The courts also considered that the applicants' capacity as police officers increased the risk of their interfering with the investigation (see paragraph 10 above). Having examined the materials of the case-file, the Court does not find the reasons relied upon by the domestic courts to be insufficient or irrelevant. In any event, the Court cannot but notice that the domestic courts' fear about the risk of the applicants' absconding appeared to have been justified, since after their release they indeed absconded and are still at large.

35. In so far as "special diligence" is concerned, the Court notes that the applicants were detained for approximately six months and three weeks and that the criminal case against them was a very complex one, involving many witnesses and a body which could not be found for a long time. In the light of the above circumstances and bearing in mind the reasons relied upon by the courts in ordering the applicants' detention, it cannot be said that the courts did not act with sufficient diligence and that the applicants' detention was excessively long.

36. In conclusion, the Court dismisses the applicants' assertion that the reasons relied upon by the domestic courts were not relevant and sufficient and that the detention was excessively long (see *Haritonov v. Moldova*, no. 15868/07, § 44, 5 July 2011; *Murat Karalar v. the Republic of Moldova*, (dec.), 55809/08, 24 November 2015).

Accordingly, this complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

37. The applicants complained that judge V., who had ordered their detention on 7 April 2011 lacked impartiality. They also complained about the courts' refusal to present them with materials from the criminal file and about the refusal to examine their *habeas corpus* request of 10 May 2011 and the unjustified delay in the examination of their *habeas corpus* request of 6 June 2011. Article 5 § 4 of the Convention reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

38. In so far as the impartiality of judge V. is concerned, the Government submitted that the applicants had failed to exhaust domestic remedies. In particular, the applicants failed to challenge judge V. during the hearing of 7 April 2011 when he examined the public prosecutor's application for the prolongation of their remand in custody.

39. The applicants argued that they could not have challenged him then, because they were not aware of the circumstances which affected his independence and impartiality.

40. Since this complaint is in any event inadmissible as being manifestly ill-founded (see below), the Court does not consider it necessary to examine whether domestic remedies have been exhausted by the applicants.

41. The Court recalls that Article 5 § 4 of the Convention guarantees the right to an impartial court in proceedings concerning the right to liberty (see *D.N. v. Switzerland* [GC], no. 27154/95, § 42, ECHR 2001-III).

42. It further notes that Judge V. withdrew because he had previously worked together with the third applicant. Thus, the first and second applicants were in principle not concerned by his alleged lack of impartiality. Nevertheless, even when it comes to the third applicant, it is not clear from the parties' submissions and/or from the documents submitted by them what were the precise reasons for which judge V. considered that his impartiality might be called into question and the exact moment when he realised that. It is not clear whether he was merely an acquaintance of the third applicant or had some kind of relationship with him in the past, not to mention the nature of their relationship. In the absence of such vital information, the Court is unable to determine whether judge V. lacked impartiality for the purposes of Article 5 § 4 when ordering

the applicants' remand in custody on 7 April 2011. Accordingly, the complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

43. In so far as the remaining complaints under Article 5 § 4 of the Convention are concerned, the Government argued that the applicants had failed to complain in their appeal, lodged against the court order of 7 February 2011, about the lack of access to the materials in the case-file. Therefore, they submitted that that complaint should be declared inadmissible for failure to exhaust domestic remedies.

44. The Court notes that the applicants did raise this issue in their appeal. Therefore, the Government's objection must be dismissed. Moreover, the Court notes that the remaining complaints under Article 5 § 4 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Access to the materials of the case-file

45. The applicants argued that, contrary to domestic law, they had been refused access to the documents regarding the application for their detention and were thus unable to properly challenge the reasons for their detention.

46. The Government did not make any submissions in respect of the merits of this complaint.

47. The Court reiterates that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial (see *Shishkov v. Bulgaria*, no. 38822/97, § 77, ECHR 2003-I (extracts)).

48. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential for an effective challenge to the lawfulness, in the sense of the Convention, of his client's detention (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001). The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law, but also concerns the reasonableness of the suspicion on which the arrest is grounded, the legitimacy of the purpose pursued by the arrest, and the justification of the ensuing detention. The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that some of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the

course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence (see *Ţurcan and Ţurcan v. Moldova* no. 39835/05, § 60, 23 October 2007, and *Musuc v. Moldova*, no. 42440/06, § 54, 6 November 2007).

49. In the present case, the court which ordered the applicants' detention on 7 February 2011 did not give the applicants access to the materials presented by the public prosecutor in support of the necessity to remand them in custody. The Court of Appeal did not answer the applicants' complaint in that respect.

50. The Court notes that no reasons were given by the district court or by the Court of Appeal for withholding this information, and that, therefore the applicants were unable to challenge properly the reasons for their detention. In such circumstances, it cannot be said that the principle of "equality of arms", within the meaning of Article 5 of the Convention, was observed in the present case. There has, accordingly, been a violation of Article 5 § 4 of the Convention.

2. The promptness of the examination of the applicants' habeas corpus *requests*

51. The applicants complained that their *habeas corpus* request lodged on 10 May 2011 was never examined while the one lodged on 6 June 2011 was examined only on 5 July 2011. This, in their view, could not be considered prompt review under Article 5 § 4 of the Convention.

52. The Governemnt submitted that between 19 May and 10 June 2011 three judges withdrew from sitting in the case. Therefore, the *habeas corpus* request of 10 May 2011 was not examined in time. Since the two *habeas corpus* requests were similar, the newly appointed judge in the case examined only the last one on 5 July 2011. According to the Government, the delay in examinining the *habeas corpus* requests was justified by the interest of justice, namely by the interest of finding an impartial judge for the applicants' case.

53. The Court reiterates that Article 5 § 4 of the Convention, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Musiał v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II). The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see, *Sarban v. Moldova*, no. 3456/05, § 118, 4 October 2005).

54. The Court is prepared to accept the Government's argument that since the second request was identical to the first one, there was no need to examine both of them. Therefore, it will consider that it took the domestic courts almost two months to examine the applicant's *habeas corpus*

request. The Court considers that such a period of time cannot be considered to correspond to the requirement of a speedy judicial decision within the meaning of Article 5 § 4 of the Convention (*Rehbock v. Slovenia*, no. 29462/95, § 82 et seq., ECHR 2000-XII, and *Kadem v. Malta*, no. 55263/00, § 45, 9 January 2003).

55. Note is taken of the fact that the domestic court encountered administrative issues such as the withdrawal of three judges. However, such considerations could not justify such a lengthy delay, in view of what was at stake for the applicants.

56. There has accordingly been a violation of Article 5 § 4 of the Convention in this respect too.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicants claimed 6,000 euros (EUR) in respect of non-pecuniary damage.

59. The Government disagreed with the amount of non-pecuniary damage claimed by the applicant.

60. The Court considers that the applicants must have suffered stress and frustration as a result of the violations found. The particular amount claimed is, however, excessive. Making its assessment on an equitable basis, the Court awards the applicants EUR 4,500 for non-pecuniary damage.

B. Costs and expenses

61. The applicants also claimed EUR 2,226.49 for the costs and expenses incurred before the Court.

62. The Government claimed that the amount claimed was excessive.

63. Regard being had to the documents in its possession, the Court considers it reasonable to award the sum of EUR 1,200 for costs and expenses.

C. Default interest

64. 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. *Declares* the complaints under Article 5 § 4 of the Convention concerning lack of access to the documents of the case-file and the promptness of the examination of the applicants' *habeas corpus* requests admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non- pecuniary damage;
      (ii) EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable, in respect of 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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Paul Lemmens
Deputy Registrar	President