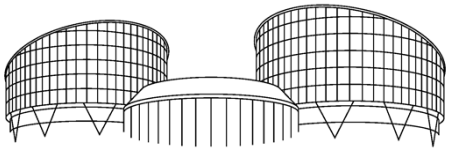

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF LILIAN ERHAN v. THE REPUBLIC OF MOLDOVA

(Application no. 21947/16)

JUDGMENT

Art 6 (criminal) and Art 6 § 3 (b) • Adequate facilities • Unfairness of criminal proceedings involving accusation of drink-driving, where applicant was placed in a position making it impossible for him to secure proof of his sobriety

STRASBOURG

5 July 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lilian Erhan v. the Republic of Moldova,

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

Jon Fridrik Kjølbro, *President,*
Carlo Ranzoni,
Egidijus Kūris,
Branko Lubarda,
Gilberto Felici,
Saadet Yüksel,
Diana Sârcu, *judges,*
and Hasan Bakırcı, *Section Registrar,*

Having deliberated in private on 14 June 2022,

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

INTRODUCTION

1. The case concerns the alleged unfairness of criminal proceedings in which the applicant was found guilty of drink-driving and in which he was not afforded adequate facilities for the preparation of his defence.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant was born in 1974 and lives in Chișinău.

3. At the time of the events, he was a driver employed by a State organisation. On 3 September 2015, at 7 a.m., he was stopped in traffic by the police and given a breathalyser test. According to the results of the test, which was based on an analysis of the air which the applicant exhaled, he had been driving under the influence of alcohol. The applicant disagreed with the results of the test and wrote on the document, which was filled in by the police officer, "I disagree" (*nu sunt de acord*) in the space reserved for his signature, and then put his signature. The space on the document reserved for tested persons' objections contained the words "no objections", written apparently by the police officer. The document contained a pre-printed note stating that, in the event that a person who had been tested disagreed with the result of the test, he or she had the right to challenge it by undergoing a blood test at the nearest medical facility, accompanied by a police officer, within two hours of the initial test. The note made reference to sections 13 and 14 of Government decision No. 296 (see paragraph 16 below).

4. According to the applicant, he verbally asked the police officer to accompany him to a hospital, but the police officer refused, arguing that he was busy. The Government contested the assertion that the applicant had asked to be accompanied to a hospital.

5. The police officer filled in three other documents: one concerned the findings of the breathalyser test and two concerned the removal of the applicant's vehicle. In all three documents, in the spaces reserved for signatures, the applicant wrote that he did not agree, and signed.

6. Immediately after the incident the applicant went to a hospital alone, where he underwent a blood test at 8.58 a.m. The results of the blood test showed that he was sober.

7. On 18 November 2015 the Râșcani District Court found the applicant guilty of drink-driving and fined him 3,000 Moldovan lei (MDL – approximately 150 euros (EUR)). The court also ordered the suspension of the applicant's driving licence for a period of two years.

8. During the proceedings the applicant argued that, in accordance with the law, a police officer was obliged to accompany a suspect who disagreed with the results of a breathalyser test to a hospital in order to confirm or invalidate those results within two hours of the suspect being tested. He contended that he had clearly expressed his disagreement with the results of the test and that he had made a note to that effect in the records. He also stressed that he had asked for a police officer to accompany him to the nearest hospital so that he could have a blood test, but the police officer refused because he had to attend to another urgent call. He had then had no other choice but to go to hospital alone within the two-hour time-limit, where a blood test had revealed his sobriety.

9. The representative of the police stated during the hearing that the results of the biological test which the applicant had undergone could not be taken into consideration, because that test was not carried out in the presence of a police officer, as prescribed by the law. He did not deny the applicant's allegations concerning the police officer's refusal to accompany him to a hospital.

10. In reaching its decision, the court relied only on the results of the breathalyser test and declared the results of the blood test inadmissible. In dismissing the latter results, the court reasoned that since the applicant had not been accompanied to the hospital by a police officer, the results of the blood test were not admissible as evidence. Moreover, the applicant had failed to prove that the police officer had refused to accompany him to a hospital, and the applicant had not made a note to that effect on the document he had been given to sign after taking the breathalyser test.

11. The applicant appealed against the judgment and reiterated his position. He stressed that, in accordance with the law, after stating in clear terms his disagreement with the results of the test, the police had had an automatic obligation to accompany him to the hospital.

12. On 23 December 2015 the Chişinău Court of Appeal dismissed the applicant's appeal, relying on the same reasons as those given by the first-instance court. Moreover, the Court of Appeal considered that the applicant had not disagreed with the result of the breathalyser test, because

he had not made objections in the section of the records reserved for objections. On the contrary, that section contained the words "no objections".

II. RELEVANT DOMESTIC LAW

13. The relevant parts of Government Decision No. 296 of 16 April 2009 read as follows:

> "...
>
> 6. Biological tests shall be conducted in respect of:
>
> (a) persons who present high concentration of alcohol in the exhaled air as a result of a breathalyser test;
>
> ...
>
> (e) persons who disagree with the result of a breathalyser test or contest it;
>
> ...
>
> 13. A person subjected to a breathalyser test and who disagrees with the testing procedure, the functioning of the testing equipment, or the results of the test, has the right to challenge it by undergoing a biological test. In this case, he or she shall be accompanied by a police officer to the nearest medical facility within two hours of the breathalyser test.
>
> 14. A person's refusal to undergo such a [blood] test constitutes a waiver of [his or her] right to contest the results of the breathalyser test and shall be considered grounds for confirming the latter's results.
>
> ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

14. The applicant complained that the criminal proceedings against him had been unfair, because he had been placed in a position where it had been impossible for him to secure the relevant proof in breach of the principle of legality and equality of arms. He had had to prove his sobriety in circumstances where that had been impossible. The applicant invoked Article 6 §§ 1 and 3 (b) of the Convention, which provides, in so far as relevant, as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (b) to have adequate time and facilities for the preparation of his defence ..."

A. Admissibility

15. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

16. The applicant submitted that the policemen disregarded the provisions of Article 6 (e) of Government decision no. 296 which obliged them to subject the applicant to a biological test as soon as he expressed his disagreement with the result of the breathalyser test. That breach resulted in the impossibility for the applicant to effectively contest the results of the breathalyser test and to defend himself in the proceedings. The courts which examined the case admitted the breathalyser test result as evidence in spite of it having been obtained with a breach of the procedural rules contained in Article 6 of Government decision no. 296. The above facts constituted a breach of the principles of legality and equality of arms.

17. The applicant disagreed with the position of the Government according to which he should have expressly requested a biological test and submitted that under Article 6 of Government decision no. 296 a disagreement with the breathalyser test is sufficient ground for the police officer to accompany the tested person to a hospital for a biological test.

18. The Government argued that there was no evidence that the applicant requested that the police officer accompany him to a hospital and that the handwritten mention “I disagree” made by him on the documents did not prove that.

19. The Court recalls that Article 6 § 3 (b) of the Convention guarantees the accused “adequate time and facilities for the preparation of his defence” and therefore implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings. The provision is violated only if this is made impossible. The “rights of defence”, of which Article 6 § 3 (b) gives a non-exhaustive list, have been instituted, above all, to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence (see *Mayzit v. Russia*, no. 63378/00, § 78, 20 January 2005). As the requirements of Article 6 § 3 concerning the rights of the defence and the principle against self-incrimination are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 (see

Gäfgen v. Germany [GC], no. 22978/05, § 169, ECHR 2010), the Court will examine the complaint under these two provisions taken together.

20. Turning to the circumstances of the present case, the Court notes in the first place that the applicant clearly wrote the words "I disagree" on every document prepared by the police. The Court notes from the wording of section 6 (e) of decision no. 296 (see paragraph 17 above) that this in itself would have been sufficient reason for being accompanied to a hospital by a police officer. Secondly, the representative of the police who was present at the hearing of the first instance court did not contest the applicant's submission to the effect that he had requested to be accompanied to a hospital and that the police officer in question refused to go because he had another urgent matter to attend to (see paragraph 13 above). In such circumstances, the Court sees no reason to call into question the fact that the applicant did request to be accompanied for a biological test but without success. The fact that the applicant did not make that request in writing is, in the Court's eyes, devoid of importance because the Government did not indicate to any piece of domestic legislation or practice imposing a written form for such requests. On this point, the Court wishes to emphasise that the conduct of the applicant, who rushed to a hospital in order to have his blood alcohol level checked, speaks in favour of his credibility and of his genuine intention expressed in the note "I disagree" affixed to the disputed documents.

21. Against the above background, the Court notes that the domestic courts refused to accept as evidence the results of the applicant's biological test exactly because it had not been carried out in the presence of a police officer, as required by the law. In such circumstances, the Court considers that by refusing to accompany the applicant to a hospital and to accept the results of the applicant's biological test, the domestic authorities made it impossible for him to defend himself against the accusation of drink-driving. This undermined the requirements of a fair trial and equality of arms, contrary to the requirements of Article 6 §§ 1 and 3 (b) of the Convention.

There has therefore been a breach of those provisions.

OTHER COMPLAINTS

22. The applicant claimed that there had been a violation of Article 8 of the Convention on account of the fact that he had lost his employment as a result of his driving licence being suspended for a period of two years. However, having regard to the facts of the case, the submissions of the parties and its findings under Article 6 of the Convention, the Court considers that it is not necessary to examine either the admissibility or the merits of the complaints under Article 8 (see *Kaos-GL v. Turkey*, 450 no. 4982/07, § 65, 22 November 2016; *Ghiulfer Predescu v. Romania*, 451 no. 29751/09, § 67, 27 June 2017; *Political Party "Patria" and Others v. the Republic of Moldova*, nos. 5113/15 and 14 others, § 41, 4 August 2020).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. The applicant claimed 70 euros (EUR) in respect of pecuniary damage, an amount representing the value of the fine he had paid. He also claimed EUR 6,000 in respect of non-pecuniary damage.

25. The Government considered that those amounts were excessive.

26. The Court cannot speculate as to whether the applicant would have suffered any pecuniary damage had the breach of Article 6 not taken place; it therefore rejects that claim. However, the Court awards the applicant EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

27. The applicant also claimed EUR 1,050 for costs and expenses incurred before the Court.

28. The Government considered that that amount was excessive.

29. Regard being had to the documents in its possession, the Court considers it reasonable to award the sum of EUR 800 for costs and expenses.

C. Default interest

30. 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 complaint under Article 6 §§ 1 and 3 (b) of the Convention admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (b) of the Convention;

3. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 8 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 800 (eight hundred euros), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 5 July 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Jon Fridrik Kjølbro President