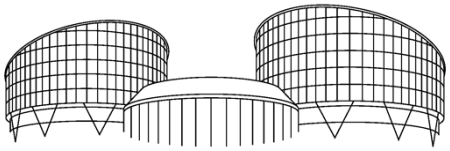

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF O.P. v. THE REPUBLIC OF MOLDOVA

(Application no. 33418/17)

JUDGMENT

Art 5 § 1 • Lawful detention • Remand in custody in the absence of reasonable suspicion that applicant had committed an offence Art 5 § 4 • Failure to speedily review applicant's *habeas corpus* request

STRASBOURG

26 October 2021

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 O.P. 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,
Valeriu Griţco,
Egidijus Kūris,
Branko Lubarda,
Pauliine Koskelo,
Marko Bošnjak, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 33418/17) 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 a Moldovan national, Ms O.P. ("the applicant"), on 27 April 2017;

the decision to give notice to the Moldovan Government ("the Government") of the complaints concerning Article 5 §§ 1, 3 and 4 and to declare inadmissible the remainder of the application;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 21 September 2021,

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

INTRODUCTION

1. The case is about the applicant's remand in custody for almost one year in the absence of a reasonable suspicion that she had committed the offence imputed to her. It also concerns the courts' two weeks delay before examining a *habeas corpus* request lodged by her. It raises issues under Article 5 §§ 1 and 4 of the Convention.

THE FACTS

2. The applicant was born in 1972 and lives in Chișinău. She was represented by Mr V. Munteanu, a lawyer practising in Chișinău.

3. The Government were represented by their Agent, Mr O. Rotari.

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

5. In December 2016 a criminal investigation was initiated in respect of false payment orders being presented to courts as proof of payment of court fees upon initiating court proceedings against bank M.'s debtors between 2013 and 2016. It was alleged that lawyers employed by a law firm acting on behalf of the bank had initiated two hundred and thirty-five court actions

without paying court fees, after providing the courts with false payment orders, allegedly bearing false stamps. Since the courts were not in the habit of verifying the actual payment of the money but trusted the payment orders annexed to the court actions, the State had allegedly been prejudiced in an amount of 4,047,606 Moldovan Lei (MDL) (the equivalent of approximately 189,000 Euro (EUR)).

6. At the material time the applicant worked in the marketing department of bank M. She worked there until February 2015, when she left the bank. On 20 January 2017 she was arrested on charges of abuse of office in relation to the above facts, an offence provided for by Article 335 (3) of the Criminal Code (see paragraph 26 below). Later, the prosecution requalified the accusation under Article 190 of the Criminal Code, i.e. fraud (see paragraph 25 below).

7. On 21 January 2017 the Buiucani District Court ordered the applicant's remand in custody pending trial for a period of thirty days. In so doing, the court considered that there was a reasonable suspicion that she had been involved in the scheme relating to false payment orders. In that context it referred to several documents attached by the prosecutor to his application for remand, but without describing their content. The court also considered that there was a risk of the applicant's absconding or hindering the investigation.

8. The applicant challenged the above decision and argued, *inter alia*, that there was no reasonable suspicion that she had committed the offence imputed to her. She submitted that the court decision of 21 January 2017 contained no evidence in support of the existence of a reasonable suspicion and argued that the defence had not had access to the materials submitted by the prosecutor to the court together with his application for remand.

9. On 26 January 2017 the Chişinău Court of Appeal dismissed the applicant's appeal. The court held that the reasonable suspicion that the applicant had committed the offence imputed to her was contained in some of the documents attached to the prosecutor's application. The court did not, however, give any details about the content of those documents and did not comment on the applicant's complaint concerning the defence's lack of access to them.

10. On 3 February 2017 the applicant lodged a *habeas corpus* request in which she complained again *inter alia* that her lawyers did not have access to the materials of the case on the basis of which the prosecutor had justified the necessity to remand her in custody.

11. On 10 and 11 February 2017 the prosecutor in charge of the case questioned A.T., one of the lawyers working for the law firm allegedly involved in the presentation of false payment orders on behalf of bank M. A.T. gave details about the contract between the bank and the law firm and submitted *inter alia* that he and other senior lawyers from the law firm used to be in contact *via* Skype with Mr. P., believed to be the owner of the

bank, whose nickname on Skype was I.I.I. He further submitted that he had also been in contact with other employees of the bank, including the applicant, whom he had met on several occasions in the bank's lobby and who had given him cash for the needs of the law firm.

12. On an unspecified date at the beginning of February 2017 the applicant's defence obtained access to the materials annexed by the prosecutor to his remand application. Those materials contained *inter alia* a copy of an exchange of messages *via* Skype between one of the lawyers employed by the law firm working for the bank, I.D., and a person with a Skype nickname I.I.I., who the prosecutors believed to be Mr P., a businessman who they considered to be the shadow owner of the bank.

13. In that exchange of messages obtained by the prosecutors from I.D.'s computer, on 28 July 2014 I.D. had written to I.I.I.: "I need a court fee of MDL 50,000. Should I contact O.P. or should I pay it?! Thanks." Some time later, I.D. had written again to I.I.I., as follows: "Please call O.P. about the court fee. She said she won't do anything without your order. Thanks."

14. Another document was an expert report concerning the false payment orders annexed to court actions between 2013 and 2016. Out of the initial two hundred and thirty-five payment orders believed to be false, the report only found forty-one false orders and found that no false payment orders had been issued between November 2013 and April 2015.

15. The applicant's defence having obtained access to the materials of the case on the basis of which the prosecutor had justified the necessity to remand her in custody, she supplemented her *habeas corpus* request of 3 February 2017 with new written submissions in which she argued, *inter alia*, that the alleged Skype communication between I.I.I. and I.D. only proved her lack of involvement in the matter of the false payment orders. In particular, there was no evidence that any false payment orders had been issued between 28 July 2014, when the conversation had allegedly taken place, and April 2015, when she no longer worked at the bank.

16. On 13 February 2017 the prosecutor in charge of the case applied to the court for the prolongation of the applicant's remand in custody for another thirty days. In so far as the reasonable suspicion that the applicant had committed an offence was concerned, the prosecutor referred to the statements made by A.T. (see paragraph 11 above) and submitted that those statements proved her involvement in the matter of the false payment orders.

17. On 17 February 2017 the court upheld the above application and dismissed the applicant's *habeas corpus* request. In so far as the reasonable suspicion was concerned, the court held that it was based on the statements made by A.T., who had confirmed the applicant's involvement in the matter of the false payment orders.

18. The applicant lodged an appeal against the above decision and argued *inter alia* that, in breach of Article 5 § 4, the court had examined her

habeas corpus request of 3 February 2017 only two weeks later, i.e. on 17 February 2017. Moreover, the new evidence concerning the existence of the reasonable suspicion relied upon by the prosecutor and upheld by the court was of no value because A.T. had not stated anything that could be interpreted as meaning that she had been involved in the matter of the false payment orders.

19. On 27 February 2017 the Chișinău Court of Appeal dismissed the applicant's appeal and upheld the decision of 17 February 2017.

20. On 15 March 2017 the prosecutor in charge of the case applied for the prolongation of the applicant's remand in custody for another thirty days. He submitted that the reasonable suspicion that the applicant had committed an offence was based on the Skype messages between I.D. and I.I.I. (see paragraph 13 above) and on A.T.'s statements (see paragraph 11 above).

21. The court upheld the application and the Court of Appeal dismissed the applicant's appeal.

22. On 4 April 2017 the prosecutor in charge of the case applied again for the prolongation of the applicant's remand in custody.

23. On 7 April 2017 the court accepted the prosecutor's application and ordered the prolongation of the applicant's remand in custody. Subsequently the applicant's detention on remand was prolonged numerous times on exactly the same grounds until 3 January 2018, when she was found guilty as charged and convicted on the strength of the same reasons that had served as a ground for the reasonable suspicion in the proceedings concerning her remand in custody. The applicant was sentenced to imprisonment of eight and a half years.

24. After the investiture of a new Prosecutor General in 2019, he stated that he had discovered that many criminal cases were politically motivated and that many innocent persons had been abusively convicted. The applicant's case was among the cases referred to by him. On 6 March 2020 the Prosecutor General decided to initiate a procedure for revision of the applicant's conviction and ordered the suspension of the execution of her sentence pending the revision proceedings. The applicant was released on 25 June 2020 and the revision proceedings are pending to date.

RELEVANT LEGAL FRAMEWORK

25. Article 190 of the Criminal Code reads as follows:

Fraud *(Escrocheria)*

"(1) Fraud, [that is] the unlawful obtaining of the goods of another by means of deception or abuse of trust, shall be punishable ...

...

(5) ... with [eight] to [fifteen] years' imprisonment and a ban on occupying certain functions and practising certain activities for a period of [five] years ...".

26. Article 335 of the Criminal Code reads as follows:

Abuse of Office *(Abuzul de serviciu)*

"(1) The deliberate use of an official position by a person administering a commercial, social, or other non-state organization of his/her job position for purposes of profit or for other personal interests provided that such an action caused considerable damage to public interests or to the legally protected rights and interests of individuals or legal entities shall be punished by a fine in the amount of 150 to 400 conventional units or by imprisonment for up to 3 years.

(2) The same action committed by a notary or an auditor shall be punished by a fine in the amount of 500 to 800 conventional units or by imprisonment for up to 3 years, in both cases with (or without) the deprivation of the right to hold certain positions or to practice certain activities for up to 3 years.

(3) The actions set forth in par. (1) or (2):

a) committed in the interests of an organized criminal group or a criminal organization;

b) causing severe consequences; shall be punished by imprisonment for 3 to 7 years with the deprivation of the right to hold certain positions or to practise certain activities for 2 to 5 years."

THE LAW

I. DISJOINDER OF APPLICATIONS

27. In view of similar complaints on material conditions of detention, in 2019 the Court decided to join this application with eleven others (see *Tălămbuță and others v. the Republic of Moldova* (dec.), nos. 23151/09 and 11 other applications, § 12, 9 April 2019) and declared the applications partially inadmissible.

28. The Court now considers that it is necessary to disjoin this application from the other eleven and to examine it separately.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

29. The applicant complained that her detention between 21 January 2017 and 3 January 2018 had not been based on a reasonable suspicion that she had committed a criminal offence or on relevant and sufficient reasons, as required by Article 5 §§ 1 and 3 of the Convention. Article 5 of the Convention, in so far as relevant, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

3. 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.

..."

A. Admissibility

30. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

31. The applicant submitted that while ordering and prolonging her detention, the courts had not relied on any piece of evidence which would allow an independent observer to consider that there was a reasonable suspicion that she had committed the offence imputed to her.

32. The Government argued that there were credible reasons to believe that the applicant had committed the offence imputed to her. In particular, they referred to the exchange of messages *via* Skype between the putative P. and one of the lawyers working for the bank in which, according to the Government, P. had expressly mentioned tax evasion in the courts and said that the applicant would use a forged stamp of the bank. Moreover, her role in the offence was deduced from the statements of A.T., who admitted that the applicant "satisfied every financial necessity of the criminal group, by sending financial means". The applicant's subsequent conviction was in

itself proof of the applicant's involvement in the criminal activity imputed to her.

33. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty. Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly, and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, ECHR 2016 (extracts), with further references).

34. The Court further reiterates that under the first limb of Article 5 § 1 (c) of the Convention, a person may be detained, in the context of criminal proceedings, only for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence. The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances (see *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 314, 22 December 2020).

35. The Court has also held that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Selahattin Demirtaş*, cited above, § 315).

36. Turning to the facts of the present case, the Court notes that the applicant was accused of having participated in a scheme of falsification of bank payment orders. The accusation and the courts' decisions to remand her in custody were essentially based on two pieces of evidence: an exchange of messages between the alleged owner of the bank P. with a lawyer, I.D. (see paragraph 13 above) and the statements made by another lawyer, A.T. (see paragraph 11 above). The prosecution submitted and the courts agreed that those two pieces of evidence contained proof of the applicant's involvement in the falsification of payment orders.

37. The Government went even further and submitted that in the impugned exchange of messages, the alleged owner of the bank, P., had expressly mentioned tax evasion in the courts and had said that the applicant was to use a forged stamp of the bank. Having examined carefully the impugned messages, the Court cannot but observe that the description of their content given by the Government is at odds with their real content. Indeed, there are no such statements as the one attributed by the Government to P. (see paragraph 29 above), who merely instructs I.D. to contact O.P. about a court fee without mentioning any tax evasion and/or false stamps. In any event, even if P.'s and I.D.'s communication of 28 July 2014 were to be construed as an arrangement between the two for the applicant's providing the latter with a false payment order, that interpretation would be inconsistent with the conclusions of the expert report containing a list of the false payment orders (see paragraph 14 above), according to which no false payment orders had been made between November 2013 and April 2015 (when the applicant was no longer working at the bank).

38. As to the other piece of evidence relied upon by the courts to remand the applicant in custody, namely the statements made by A.T., it appears from them that A.T. knew the applicant as an employee of the bank and that he had met her on several occasions when she had given him cash for the needs of the law firm with whom the bank had a contract. It does not contain any information which would make it possible to make a connection between the applicant and the false payment orders.

39. In the light of the above, the Court concludes that the material put forward by the prosecuting authority and relied upon by the domestic courts to detain the applicant was not sufficient to persuade an objective observer that the applicant might have committed the offence imputed to her. It concludes therefore that the applicant's detention between 21 January 2017 and 3 January 2108 was not based on a reasonable suspicion that she had committed an offence and thus there has been a violation of Article 5 § 1 of the Convention.

40. In view of the above findings the Court does not consider it necessary to examine separately whether the applicant's detention was based on relevant and sufficient reasons as required by Article 5 § 3 of the Convention.

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

41. The applicant also asserted that because of the length of time taken to examine her *habeas corpus* request of 3 February 2017 and of the failure to examine two *habeas corpus* requests from 22 December 2017 and

2 January 2018, the respondent State had breached Article 5 § 4 of the Convention, which reads:

> "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

42. The Court notes that the applicant complained for the first time about the failure of the domestic courts to examine her *habeas corpus* requests of 17 December 2017 and 2 January 2018 in her observations of 13 September 2018, that is more than six months after the alleged breaches took place. Therefore, this part of the complaint must be declared inadmissible under Article 35 §§ 1 and 4 of the Convention.

43. In so far as the complaint concerning the *habeas corpus* request of 3 February 2017 is concerned, the Court notes that it is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

44. The applicant argued that the failure by the Buiucani District Court to examine her *habeas corpus* request for two weeks amounted to a breach of her rights guaranteed by Article 5 § 4 of the Convention.

45. The Government did not contest the applicant's allegation that the delay of two weeks was excessive. They argued, however, that the delay was justified by the fact that the case-file was still at the Court of Appeal and by the fact that the applicant had failed to attach a copy of the Court of Appeal's decision of 27 January 2017 to her request.

46. The Court reiterates that Article 5 § 4, 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 *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 187, 1 June 2021). 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, *mutatis mutandis*, *R.M.D. v. Switzerland*, 26 September 1997, § 42, *Reports* 1997-VI).

47. In the present case the *habeas corpus* request was made on 3 February 2017 and it was rejected on 17 February 2017. The Government invoked administrative problems and the applicant's omission to attach a copy of the Court of Appeal's decision of 27 January 2017 to her *habeas corpus* request as an explanation for the two weeks' delay. The Court notes

that no such explanation was given by the Buiucani District Court in its decision of 17 February 2017 and that it was the Government which presented it for the first time during the Court proceedings. This submission must therefore be treated with caution (see *Nikolov v. Bulgaria*, no. 38884/97, § 74 et seq., 30 January 2003). In any event, the Government did not submit any evidence to prove that the court had taken measures in order to request the case-file from the Court of Appeal or that it had asked the applicant for a copy of its decision.

48. The Court attaches particular importance to the fact that in ordering the applicant's remand in custody on 21 January 2017 and dismissing the applicant's appeal against that decision, the courts did not indicate any reasons on which the suspicion against the applicant was based. Moreover, the applicant's defence was not initially afforded access to the materials attached by the prosecutor to his application for remand. These two elements added urgency to the request which should have been taken into account by the domestic court. In such circumstances, the Court considers that the period of 14 days which elapsed before the court examined the applicant's *habeas corpus* request did not correspond to the requirement of a speedy judicial decision within the meaning of Article 5 § 4 of the Convention (*Kadem v. Malta*, no. 55263/00, §§ 44-45, 9 January 2003 and *Rehbock v. Slovenia*, no. 29462/95, § 82 et seq., ECHR 2000-XII).

49. There has accordingly been a violation of Article 5 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

52. The Government contested the amount of non-pecuniary damage claimed by the applicant, alleging that it was excessive.

53. The Court considers that the applicant must have suffered stress and frustration as a result of the violations found and awards her EUR 9,750 in respect of non-pecuniary damage.

B. Costs and expenses

54. The applicant also claimed EUR 1,500 in respect of the costs and expenses incurred before the Court.

55. The Government considered this amount excessive.

56. Regard being had to the documents in its possession, the Court considers it reasonable to award the entire amount claimed for costs and expenses.

C. Default interest

57. 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. *Disjoins* the application from the others to which it was joined;

2. *Declares* the complaint under Article 5 § 4 of the Convention concerning the *habeas corpus* requests of 22 December 2017 and 2 January 2018 inadmissible and the remainder of the application admissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds* that there is no need to examine the complaint under Article 5 § 3 of the Convention;

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

6. 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 9,750 (nine thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,500 (one thousand five 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;

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

Done in English, and notified in writing on 26 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President