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*Contact: John Darcy*
*Tel: 03 88 41 31 56*

**Date**: 13/04/2018

**DH-DD(2018)395**



Meeting: 1318th meeting (June 2018) (DH)

Item reference: Action report (12/04/2018)

Communication from the Republic of Moldova concerning the cases of GUTU, BREGA and MUSUC v. the Republic of Moldova (Applications No. 52100/08, 20289/02, 42440/06)

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Réunion : 1318e réunion (juin 2018) (DH)

Référence du point : Bilan d'action

Communication de la République de Moldova concernant les affaires GUTU, BREGA et MUSUC c. République de Moldova (requêtes n° 52100/08, 20289/02, 42440/06) ***(anglais uniquement)***

**MINISTRY OF JUSTICE OF THE REPUBLIC OF MOLDOVA**

**GOVERNMENT AGENT**

**ACTION REPORT**

for the execution of judgments
in the *Mușuc* group (no. 42440/06)*, Guțu* case (no. 20289/02) and *Brega* group (no. 52100/08)
v. the Republic of Moldova

This communication comes to supplement the information submitted by the Government of the Republic of Moldova in the Action Plan of 7 April 2016 (see DH-DD(2016)458).

## I. DESCRIPTION OF CASES

These groups of cases mainly concern the applicants' arrest and detention on remand in criminal and administrative proceedings not based on a reasonable suspicion that the applicants committed an offence (violations of Article 5 § 1 of the Convention).

The case of *Stepuleac* also concerns the failure to investigate the applicant's complaints about the intimidation in his prison cell during his detention in the remand centre of the General Directorate for Fighting Organised Crime (GDFOC) of the Ministry of Interior (procedural limb of Article 3 of the Convention). The *Gutu* case also concerns the infringement – by the police – of the inviolability of the applicant's house without proper authorization (Article 8 of the Convention) and the lack of an effective remedy in respect of unlawful actions of the police (Article 13 of the Convention in conjunction with Articles 5 and 8).

Other violations found by the Court in these cases are supervised in the context of other groups of cases, as follows:

- Article 5 § 3: insufficient reasons for the applicant's detention (*Musuc*) – *Sarban* group;
- Article 5 § 4: unjustified refusal by domestic courts to give access to the case-files to the applicant and to his lawyer with a view to challenging the lawfulness of the detention (*Musuc*) – *Sarban* group;
- Article 3: poor conditions of pre-trial detention and the lack of medical assistance during detention (*Stepuleac*) – *I.D.* case;
- Article 3: inefficient investigation of the applicant's intimidation in his cell (*Stepuleac*) – *Corsacov* group;
- Article 6 § 1: inadequate notification procedure in administrative proceedings (*Gutu*) – *Ziliberberg* group.

## II. LIST OF CASES

| Case | No. | Judgment of | Final on |
|---|---|---|---|
| MUSUC | 42440/06 | 06/11/2007 | 06/02/2008 |
| STEPULEAC | 8207/06 | 06/11/2007 | 06/02/2008 |
| LEVA | 12444/05 | 15/12/2009 | 15/03/2010 |

| Case | No. | Judgment of | Final on |
|---|---|---|---|
| GUTU | 20289/02 | 07/06/2007 | 07/09/2007 |

| Case | No. | Judgment of | Final on |
|---|---|---|---|
| BREGA | 52100/08 | 20/04/2010 | 20/07/2010 |
| BREGA AND OTHERS | 61485/08 | 24/01/2012 | 24/04/2012 |

## III. ISSUES RESOLVED

It is recalled that at its 1259th meeting (June 2016) (DH) the Committee of Ministers decided to close its examination of three cases examined in these groups in which all individual and general measures had already been taken, and adopted the Final Resolution CM/ResDH(2016)147 in this respect:

- the *Cebotari* case (no. 35615/06), which, besides detention not based on reasonable suspicion, also concerned the applicant's arrest for a purpose other than that prescribed in Article 5 § 1 (c) (violation of Article 18 in conjunction with Article 5), and the lack of confidentiality of lawyer-client communications at the remand detention facility of the Centre to Fight Economic Crimes and Corruption (CFECC, currently the National Anticorruption Centre) due to the existence of a glass partition in the meeting room (violation of Article 34).
- the *Ganea* (no. 2474/06) and *Cristina Boicenco* (no. 25688/09) cases, which concerned the violations of Article 5 §§ 1 and 5 on account of the insufficient amount of compensation awarded by the domestic courts for the applicants' illegal arrest.

In addition, the Committee decided that no other general measures were required in the *Leva* case as concerns the failure to promptly inform about charges (violation of Article 5 § 2) and in the cases of *Brega* and *Brega and others* as concerns unlawful interference with the right to assembly under domestic law on account of illegal arrests during demonstrations (Article 11).

Moreover, at its 1214th meeting (December 2014) (DH) the Committee of Ministers considered with satisfaction in the *Sarban* group of cases (no. 3456/05) that the issue on the lack of confidentiality of lawyer-client communication due to the glass partition at the CFECC in violation of Article 5 § 4 had been resolved (*Musuc* and *Leva*).

## IV. INDIVIDUAL MEASURES

It is recalled that at its 1259th meeting (June 2016) (DH) the Committee of Ministers decided that no further individual measures were necessary concerning Article 5 violations, considering that

all applicants had already been released at the time of the Court's judgments and that the just satisfaction awards had covered any non-pecuniary damage suffered.

As to the lack of an efficient investigation into the alleged psychological intimidation by unknown persons of the applicant in the *Stepuleac* case during his detention in the detention facility of the General Directorate for Fighting Organised Crime (a subdivision of the Ministry of Internal Affairs), it is recalled that in their Action Plan of 7 April 2016 the Government noted with regret that, following the Court's judgment, the Prosecutor's Office did not pursue the investigation into the applicant's complaint because at the relevant time there was no consistent practice at national level of reopening domestic proceedings *proprio motu* by the prosecutor. Following the Court's judgment the applicant has not submitted any requests to the prosecutor in this sense either. Given the amount of time that has passed since the events in the case (over 11 years), the competent authorities are of the opinion that an effective investigation at this stage would be rather illusory, and the shortcomings identified by the Court could not be redressed anymore. The detention facility at issue was closed in 2010[1] and no registers of persons detained and their visitors exist anymore. In these circumstances, a new investigation would not bring tangible results since at this stage the Prosecutor's Office would be in impossibility to gather evidence that would reasonably give information about the alleged offence.

## V. GENERAL MEASURES

*Article 5 § 1 (arrest and detention without reasonable suspicion)*

**Legislative amendments**

In 2014-2015 the Ministry of Justice prepared a set of major amendments to the Code of Criminal Procedure (the CCP), aimed at fulfilling one of the objectives set out in the Strategy for the Justice Reform 2011-2015, namely to improve the CCP so as to exclude the non-compliance with the Convention standards and the European Court's case-law on Article 5. In particular, the amendments sought to limit the use of detention on remand, to require more explicitly the need to consider the possibility of applying non-custodial preventive measures, to ensure that courts give relevant and sufficient reasons for detention orders, and to strengthen a remand prisoner's ability to challenge such orders.

At the request of the Moldovan authorities, in October 2014 the Directorate General Human Rights and Rule of Law of the Council of Europe offered its opinion on the proposed draft amendments. This opinion concerned the compatibility of these amendments with the European standards, in particular the European Convention on Human Rights, and the European best practices. According to this opinion, "overall the amendments embody a considerable advance on the protection of liberty in a criminal process in accordance with the European standards and, in particular, the Convention. There are no negative features in the objectives being pursued […]."[2] On the basis of this opinion the authorities introduced further amendments and clarifications as

[1] See also § 77 of the Action Plan in the *Ciorap*/*Becciev*/*Paladi* groups of cases submitted on 21 October 2013 (DH-DD(2013)1168).
[2] See § 4 of the Expert Opinion, https://rm.coe.int/16806f32cf.

recommended by the experts. Those amendments were adopted by the Moldovan Parliament on 26 May 2016, and they entered into force on 29 July 2016[3].

First and foremost, Article 6 point 4[3]) of the CCP introduced a clear definition of "reasonable suspicion" in line with the Court's case-law. It provides that a suspicion is reasonable when it results from the existence of facts and/or information that would make an objective observer to believe that a crime has been committed or is being prepared by a given person, and that there are no other facts and/or information that would remove the criminal character of that act or prove the person's non-involvement.

According to Articles 165 (2) point 1) and 166 of the CCP a person can be arrested for a period of up to 72 hours only if a reasonable suspicion exists that this person committed a crime punishable by imprisonment for a term of over 1 year. This includes situations in which the person was caught *in flagrante delicto*; an eye witness or a victim directly indicates to the offender; obvious proofs of committing the crime were found on the person's body, clothes or in his/her private premises or if the person concerned left such proofs at the crime scene; the person tried to abscond or does not reveal his/her identity.

An important amendment was introduced in Article 313 (2) d) of the CCP which provides for the possibility to challenge the legality of the arrest in court. Previously, the 72-hour arrest could be only contested before the prosecutor.

Another important novelty introduced by the amendments is the exclusion of the possibility of a suspect being detained on remand. According to Article 175 (4), detention on remand is only applicable to an accused and defendant against whom official charges were brought and an indictment act delivered.

Moreover, Article 176 of the CCP – which provides the basis for the application of preventive measures – was substantially modified. It now imposes a proportionality test to be performed by the prosecuting authority and the court when requesting and deciding on the application of the detention on remand. It requires the prosecutor and the court to consider whether the detention on remand is a proportional measure, considering the specific circumstances of the case at issue. In particular, they must check the existence of a reasonable suspicion and take into consideration such aspects as the severity of the charges, the character of the accused/defendant, his/her age and state of health, his/her family situation, the existence of any dependants etc. Such assessment should be made on case-by-case basis.

Furthermore, Articles 177 (11) and 308 of the CCP now clearly require the judges to reflect, in the detention order, the basis for the application of detention on remand, with reference to the specific facts and circumstances of the case which gave rise to this measure; explain the necessity to detain the person concerned according to the conditions and criteria established in Article 176 (risk of interference with the investigation, absconding, reoffending or public danger); cite the arguments of the parties, including those of the accused/defendant and of his/her representative and/or lawyer; and explain why these arguments have to be admitted or rejected by the court.

[3] Law no. 100 of 26/05/2016 (in Romanian).

Following those amendments, Article 185 of the CCP states that detention on remand is an exceptional preventive measure, which can only be applied when it is proven that other measures would not be sufficient to remove the risks justifying the application of detention on remand. According to Article 185 (3) of the CCP, when deciding to admit or dismiss the prosecutor's motion to detain an individual on remand, the investigating judge/the trial court is required to examine first of all the possibility to apply other non-custodial measures and is enabled to order any other preventive measure provided for by Article 175 CCP. Article 185 (4) of the CCP provides that the detention order should explain why other non-custodial preventive measures are insufficient in that specific case.

Similarly, Article 186 (4) and (9) of the CCP provides that the detention on remand can be only extended when other non-custodial measures are insufficient, and after a careful examination of the basis and conditions for detention as provided by Articles 175, 176 and 185 of the CCP. In other words, any detention extension must be ordered in strict compliance with the conditions as the ones established by the CCP for the initial detention order.

Article 308 (1) of the CCP concerns the procedure of the examination in court of requests by the prosecuting authority to apply detention on remand. It stipulates now that the request should be reasoned, explain the basis and the necessity for detention, and should be supported by evidence sustaining the reasonable suspicion that the individual concerned committed the crime. At the court hearing on the application of detention on remand the prosecutor has the obligation to explain the basis for the reasonable suspicion in that specific case (Article 308 (6)).

The new Code of Contraventions (the CC) (misdemeanour proceedings) was adopted on 24 October 2008 and entered into force on 31 May 2009. It follows the general rules of procedure established in the Code of Criminal Procedure and the same logic of ensuring the existence of a reasonable suspicion. Thus, a person can be arrested in misdemeanour proceedings in the following situations (provided for by Article 433 of the CC):

a) if caught *in flagrante delicto* committing an offence for which the Code provides the sanction of administrative detention[4];

b) if the identification of the misdemeanant failed after the exhaustion of all identification measures;

c) for the execution of a court decision on expulsion;

d) in case of a violation of the state border regime/border crossing points.

As a general rule, the arrest in misdemeanour proceedings cannot last longer than three hours. The court can decide upon longer arrest (up to 24 hours) in the following situations (provided for by Article 435 of the CC):

[4] As a rule, administrative detention is only provided for the commission of an offence that threatens or endangers an individual's health or bodily integrity. Administrative detention cannot be applied to individuals with severe and accentuated disabilities, individuals in mandatory military service, individuals employed on the basis of a contract, minors, pregnant women, women with children under the age of 8, single caretakers with children under the age of 16, or individuals having reached the general retirement age (Article 38 of the CC).

a) in a contravention case pending examination – if the person is suspected of committing an offence for which the Code provides the sanction of administrative detention;

b) in case an individual violated the rules of residence of foreign citizens and stateless individuals in the Republic of Moldova or the state border regime – for the purpose of identification of that person and clarification of the circumstances of the commission of the offence.

Article 436 of the CC provides that a person arrested in misdemeanour proceedings should be released immediately if the reasonable suspicion that he/she committed an offence was not confirmed.

The current practice of the application of the national legislation does not appear to reveal any systemic issue in this regard. As an example of the positive practice, the Government would like to refer to the case of *Ignatenco v. Moldova* (no. 36988/07) (events of 2007). In this case the European Court declared the applicant's application concerning his arrest without reasonable suspicion inadmissible as manifestly ill-founded. The Court considered that there was sufficiently specific information to raise a reasonable suspicion that the applicant committed an offence (see § 60 of the judgment). A similar solution was adopted by the Court in the case of *Juganaru v. Moldova* (no. 75448/11) (events of 2011). In its recent inadmissibility decision of 23 January 2018 in the case of *Anatol Cislaru and Others v. Moldova* (no. 40799/09), which concerned *inter alia* the applicants' allegation that their detention in custody had not been based on a reasonable suspicion that they had committed an offence, the Court ruled that since the applicants did not make use of the mechanism provided for by Law no. 1545, their application had to be rejected for non-exhaustion of domestic remedies.

It should be noted that the events in all the cases at issue took place before the adoption of the relevant legislative amendments. The Government are of the opinion that the legislative measures adopted are capable to exclude similar violations in the future.

In support of the above, the Government attach to this Action Report examples of rulings and decisions issued by the national courts after the relevant legislative amendments entered into force, in which they dismissed the application or extension of detention on remand due to the lack of reasonable suspicion.

In the rulings of 1 March 2018 the Chisinau District Court examined the existence of a reasonable suspicion taking into account the national legal provisions and the Court's case-law, including its findings in the *Musuc* and *Stepuleac* cases. Thus, it rejected the prosecutors' motion to the application of the detention on remand due to the lack of a reasonable suspicion.

In one of its decisions of 14 July 2016, the appellate court admitted the defendant's appeal and dismissed the prosecutor's motion for the application of detention on remand. The court considered that the prosecutor did not prove the existence of a reasonable suspicion that would make an objective observer believe that the defendant committed a crime. In doing so, it referred both to Article 5 of the Convention and to the relevant national legislation.

At the same time, the Government attach a few samples of rulings that show that the national courts started examining the prosecutor's motions on applying detention on remand by checking the existence of a reasonable suspicion. Once the reasonable suspicion that the defendant

committed a crime was proved, the courts proceeded with assessing the risks that would justify the application of the detention on remand. In these rulings, the national courts also refer to the Court's findings in such cases as *Becciev, Ignatenco* etc.

*Article 8 (breach of the inviolability of home) and Article 13 taken together with Article 8*

It is recalled that in the *Gutu* case the Court considered that it was not shown that effective remedies existed in respect of the applicant's complaints under Articles 8, and found a breach of Article 13 of the Convention. The Court noted in particular that, under Law no. 1545, the applicant could claim compensation for the allegedly unlawful actions of the police officers only if acquitted. However, she was found guilty of disobeying the lawful orders of police officers in a final judgment, which made the law inapplicable to her situation.

The new Law on the police activity and the status of police officers of 27 December 2012 introduces the individuals' right to challenge the police actions before the Ministry of Internal Affairs, other bodies competent to control police activities or in a court of law.

The same law establishes the bodies competent to control police activities, also listing – besides the Ministry of Internal Affairs – the prosecution office, other public institutions, national and international organizations ensuring the protection of human rights and fundamental freedoms.

The individuals disagreeing with the decisions taken by the body examining their complaint are entitled to lodge court actions in the administrative court.

At the same time, the Government attach to this Action Report several samples of decisions in which the national courts decided to award compensations for the unlawful actions committed by police officers in accordance with the Law no. 1545, including for illegal phone interceptions and searching, relying on the provisions of Article 8 of the Convention and the Court's case-law.

In addition, the Government note that the national authorities are in the process of drafting several legislative proposals of modifying the Law no. 1545, which would enable each unlawfully detained individual to seek compensations in case of such violations.

**Professional education and training**

The national authorities continuously carry out training activities for professionals concerned, including on the matters concerning the right to liberty and security. Under the auspices of the National Institute of Justice (hereinafter "the NIJ"), the judges and prosecutors are continuously instructed in terms of the Court's case-law, including the present judgments. Between 2014 and 2017, the NIJ organized numerous training activities, including on the Article 5 standards, which involved 1288 professionals, and over 170 judges and prosecutors of which attended courses related to Article 5 of the Convention in 2017.

In April-June 2017, Moldovan judges and prosecutors attended the distance-learning course organized by the NIJ in cooperation with the European Program for Human Rights Education for Legal Professionals (HELP) concerning "Pre-trial investigation and the European Convention on

Human Rights". This course drew a special attention to the issues related to ensuring the respect for the right to liberty and security during pre-trial investigation.

A distance-learning course entitled "Introduction to the European Convention on Human Rights and the European Court of Human Rights" was carried out in partnership with the Council of Europe, also addressing the standards imposed by Article 5 of the Convention. Similar training has been provided to candidates for the positions of prosecutors and judges.

Within the framework of the Council of Europe Project "Supporting the Criminal Justice Reform in the Republic of Moldova", in June 2017 the Supreme Court of Justice and the NIJ elaborated a commentary on the judgments of the Court against the Republic of Moldova. It aims at facilitating the understanding of the Court's judgments and decisions, and at improving the implementation of the Convention standards at national level.

The police officers of the Criminal Prosecution General Directorate along with the experts of "Soros Foundation-Moldova" issued the handbook "Apprehension in criminal proceedings – practitioners' guide", which has been disseminated to all the criminal prosecution investigators. In 2015-2016 six training activities on topic "Respecting human rights at apprehension stage in the professional activity of the Police" were organized. Over 100 criminal prosecution investigators and police officers attended those training activities.

On 3 April 2018, the General Police Inspectorate in collaboration with "Soros Foundation-Moldova" launched the Standard Operating Procedure concerning apprehension, escort and detention of persons in the Police custody. It thoroughly describes the actions that shall be undertaken by the police officers when apprehending a person so that to ensure the respect for the fundamental human rights and namely for the right to liberty and security.

## VI. CONCLUSION

In light of the above, the Government invite the Committee of Ministers to take note of the measures undertaken in order to prevent the occurrence of similar violations in the future. Accordingly, the Government consider that they have fulfilled all their obligations arising under Article 46 § 1 of the Convention. At the same time, the Government will keep the Committee of Ministers informed about the measures taken on the outstanding questions.

Annexes:

- samples of rulings and decisions issued by national courts related to the dismissal of application of detention on remand due to the lack of a reasonable suspicion, and decisions that award compensations for illegal actions of police officers.

**Oleg ROTARI**
**Government Agent**