CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

**CASE OF IORDACHI AND OTHERS v. MOLDOVA**

*(Application no. 25198/02)*

JUDGMENT

This version was rectified on 24 September 2009
under Rule 81 of the Rules of the Court

STRASBOURG

10 February 2009

**FINAL**

*14/09/2009*

*This judgment may be subject to editorial revision.*

**In the case of Iordachi and Others v. Moldova,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 20 January 2009,

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

# PROCEDURE

1. The case originated in an application (no. 25198/02) 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 Mr Vitalie Iordachi, Mr Vitalie Nagacevschi, Ms Snejana Chitic, Mr Victor Constantinov and Mr Vlad Gribincea ("the applicants"), on 23 May 2002.

2. The Moldovan Government ("the Government") were represented by their Agent at the time, Mr V. Pârlog and subsequently by his successor Mr V. Grosu.

3. The applicants alleged, in particular, under Article 8 of the Convention that their right to freedom of correspondence had not been respected since the domestic law governing telephone tapping did not contain sufficient guarantees against abuse by the national authorities.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 5 April 2005, the Court declared the application admissible and joined the question of victim status to the merits of the case.

6. The applicants and the Government each filed further written observations (Rule 59 § 1), the Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1972, 1965, 1980, 1961 and 1980 respectively and live in Chişinău. They are members of "Lawyers for Human Rights", a Chişinău-based non-governmental organisation specialised in the representation of applicants before the Court.

8. According to the applicants, after the coming to power of the Communist Party the number of violations of human rights increased considerably. In that context their organisation was created, whose sole purpose was the protection of human rights by assisting persons who sought to introduce applications with the European Court of Human Rights.

9. As a result, the applicants considered that they had caused the Government serious harm in terms of damage to their image and financial loss as a result of the findings of violation in cases they had helped to bring before this Court.

10. The applicants maintained that they ran a serious risk of having their telephones tapped as a result of their activity, due to the state of the legislation in force. They did not claim to have been victims of any specific interception of their communications, whether by telephone or post, and they had not instituted any domestic proceedings in that respect.

11. The Government disputed the allegation concerning the increase of the number of violations of human rights after the Communist Party had won the elections.

12. On 17 January 2008 one of the applicants wrote to the President of the Supreme Court of Justice and asked for statistical information concerning, *inter alia*, the number of applications lodged by the investigating bodies with courts for interception of telephone conversations and the number of successful and unsuccessful applications.

13. In a letter of 6 February 2008 the Head of the President's Office of the Supreme Court of Justice replied that in 2005 of a total of 2,609 applications for interception lodged, 98.81% had been successful; in 2006 of the 1,931 applications lodged, 97.93% had been successful; and in 2007 of the 2,372 applications lodged, 99.24% had been successful.

## II. RELEVANT DOMESTIC LAW

14. The Operational Investigative Activities Act of 12 April 1994 reads as follows:

**“Section 2. The aims of operational investigative activities**

a) revealing attempts to commit crime; preventing, suppressing or discovering criminal offences and the persons who organise, commit or have already committed offences; and ensuring compensation for damage caused by a criminal offence;

b) searching for persons who are evading the preliminary investigative authorities, the preliminary investigation or the court, or who are fleeing from a criminal sanction, or for persons who have disappeared;

c) collecting information on events or actions which endanger the State or the military, economic or environmental security of the Republic of Moldova.

...

**Section 4. The legal basis for operational investigative activities**

(1) The Constitution, the present Law and other regulations enacted in accordance with them constitute the legal basis for operational investigative activities.

(2) The authorities which are entitled to conduct operational investigative activities may issue, within the limits of their competence, in accordance with the law and with the consent of the Supreme Court of Justice and the General Prosecutor's Office, regulations governing the organisation, methods and tactics of carrying out operational investigative measures.

**Section 5. Respect for human rights and liberties in conducting operational investigative activities**

...

(2) Anyone who considers that the actions of the authority which has carried out investigative measures have infringed his or her rights and liberties may lodge a complaint with the hierarchically superior authority, the General Prosecutor's Office or the courts.

(3) In order to ensure a full and thorough examination of the complaint lodged by a person against whom operational investigative measures have been applied without due grounds, the authorities which have applied such measures shall, at the request of the prosecutor, present the latter with a record of every operational action taken on duty. Data concerning persons who have confidentially contributed to the conduct of operational investigative measures shall be presented only at the request of the General Prosecutor.

(4) Should the authority (the official) exercising the operational investigative activity have infringed the legitimate rights and interests of natural and legal persons, the hierarchically superior authority or prosecutor shall take measures restoring such legitimate rights and interests, and afford compensation for the damage caused, in accordance with the law.

**Section 6. Operational investigative measures**

(1) Operational investigative measures shall be carried out only in accordance with the law and only when it is otherwise impossible to achieve the aims provided for in section 2.

(2) For the purpose of accomplishing the stated aims, the authorities carrying out operational investigative measures are entitled, with due observance of the rules of secrecy, to: ...

(c) intercept telephone and other conversations; ...

The operational investigative measures provided for under ..., (l), ... may be carried out only by the Ministry of Internal Affairs and the Information and Security Service under the statutory conditions and only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of offences, and the protection of health, morals, and the rights and interests of others. ..."

In 2003 this section was amended as follows (amendment in bold):

**"Section 6. Operational investigative measures**

(1) Operational investigative measures shall be carried out only in accordance with the law **on criminal procedure** and only when it is otherwise impossible to achieve the aims provided for in section 2.

(2) For the purpose of accomplishing the stated aims, the authorities carrying out operational investigative measures are entitled, with due observance of the rules of secrecy, to: ...

(c) intercept telephone and other conversations; ...

The operational investigative measures provided for under ..., (l), ... may be carried out only by the Ministry of Internal Affairs and the Information and Security Service under the statutory conditions and only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of **very serious offences** and the protection of health, morals, and the rights and interests of others. ..."

The section was further amended in 2007 and currently reads as follows (amendment in bold):

**"Section 6. Operational investigative measures**

(1) Operational investigative measures shall be carried out only in accordance with the law **on criminal procedure** and only when it is otherwise impossible to achieve the aims provided for in section 2.

(2) For the purpose of accomplishing the stated aims, the authorities carrying out operational investigative measures are entitled, with due observance of the rules of secrecy, to: ...

(c) intercept telephone and other conversations; ...

The operational investigative measures provided for under ..., (l), ... may be carried out only by the Ministry of Internal Affairs and the Information and Security Service under the statutory conditions and only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of **serious, very serious and exceptionally serious offences**, and the protection of health, morals, and the rights and interests of others. ..."

Under Article 16 of the Criminal Code the serious offences are considered to be those offences which are punishable with imprisonment of up to fifteen years; very serious offences are intentional offences punishable with imprisonment of over fifteen years; and exceptionally serious offences

are those intentional offences punishable with life imprisonment. Approximately 59% of all offences provided for in the Moldovan Criminal Code fall into the category of serious, very serious and exceptionally serious offences.

**"Section 7. The grounds for carrying out operational investigative activities**

"(1) The grounds for carrying out operational investigative activities are:

(a) unclear circumstances concerning the institution of criminal proceedings;

(b) information of which the authority carrying out an operational investigative activity has become aware in connection with:

- an illegal act that is being prepared, committed or has already been committed, or persons who are preparing, committing or have already committed such an act, where the basis for instituting criminal proceedings is insufficient;

- persons who are fleeing from a criminal investigation or the courts, or who are avoiding a criminal sanction; ...

(c) instructions given by a criminal investigator, investigative body, prosecutor or court in pending criminal cases;

(d) requests from the bodies carrying out an operational investigative activity based on the grounds provided for in the present section. ..."

In 2003 this section was amended as follows (amendment in bold):

**"Section 7. The grounds for carrying out operational investigative activities**

(1) The grounds for carrying out operational investigative activities are:

(a) unclear circumstances concerning the institution of criminal proceedings;

(b) information of which the authority carrying out an operational investigative activity has become aware in connection with:

- an illegal act that is being prepared, committed or has already been committed, or persons who are preparing, committing or have already committed such an act, where the basis for instituting criminal proceedings is insufficient;

- persons who are fleeing from a criminal investigation or the courts, or who are avoiding a criminal sanction; ...

(c) instructions given by an **officer of criminal investigation**, investigative body, prosecutor or court in pending criminal cases;

(d) requests from the bodies carrying out an operational investigative activity based on the grounds provided for in the present section. ...

**Section 8. The conditions and manner of carrying out operational investigative activities**

(1) Operational investigative measures which infringe lawful rights - the secrecy of correspondence, telephone and other conversations, telegraphic communications, and the inviolability of the home - shall be permitted only for the purpose of collecting information about persons who are preparing or attempting to commit serious offences or are committing or have already committed serious offences, and only with

the authorisation of the prosecutor pursuant to a reasoned decision of one of the heads of the relevant authority. ...

(2) In urgent cases where otherwise there would be a risk of commission of serious criminal offences, it shall be permitted, on the basis of a reasoned conclusion of one of the heads of the authority carrying out the operational investigative activity, to carry out operational investigative measures. The prosecutor must be notified within 24 hours.

(3) Should danger to the life, health or property of certain persons become imminent, interception of their telephone conversations or other means of communication shall be permitted, following the request or written consent of such persons on the basis of a decision approved by the head of the authority carrying out the investigative activity, and the prosecutor shall be notified."

In 2003 this section was amended as follows (amendment in bold):

**"Section 8. The conditions and manner of carrying out operational investigative activities**

(1) Operational investigative measures which infringe lawful rights - the secrecy of correspondence, telephone and other conversations, telegraphic communications, and the inviolability of the home - shall be permitted only for the purpose of collecting information about persons who are preparing or attempting to commit **very serious** offences or are committing or have already committed **very serious** offences, and only with the authorisation of the **investigating judge** pursuant to a reasoned decision of one of the heads of the relevant authority. ...

(2) In urgent cases where otherwise there would be a risk of commission of serious criminal offences, it shall be permitted, on the basis of a reasoned conclusion of one of the heads of the authority carrying out the operational investigative activity, to carry out operational investigative measures. **The investigating judge shall be informed within 24 hours. He shall be presented with the reasons and shall verify the legality of the measures taken.**

(3) Should danger to the life, health or property of certain persons become imminent, interception of their telephone conversations or other means of communication shall be permitted, following the request or written consent of such persons on the basis of a decision approved by the head of the authority carrying out the investigative activity, and the **investigating judge shall give his authority**."

The section received further amendments in 2007 and currently reads as follows (amendment in bold):

**"Section 8. The conditions and manner of carrying out operational investigative activities**

(1) Operational investigative measures which infringe lawful rights - the secrecy of correspondence, telephone and other conversations, telegraphic communications, and the inviolability of the home - shall be permitted only for the purpose of collecting information about persons who are preparing or attempting to commit **serious, very serious and exceptionally serious offences** or are committing or have already committed such offences, and only with the authorisation of the **investigating judge** pursuant to a reasoned decision of one of the heads of the relevant authority. ...

**(2) Should danger to the life, health or property of certain persons become imminent, interception of their telephone conversations or other means of**

**communication shall be permitted, following the request or written consent of such persons on the basis of a decision approved by the head of the authority carrying out the investigative activity, and the investigating judge shall give his authority. ...**

**Section 9. The conduct of operational control**

(1) In cases envisaged under section 7, bodies exercising operational investigative activities are entitled to carry out operational control. A record must be kept of any measure of operational control.

(2) Operational control shall be carried out with the authorisation and under the supervision of the head of the body conducting it. The results of operational investigative measures applied shall be reflected in duly filed official operational documents. ...

(3) Official operational documents shall be submitted to the prosecutor in order to obtain approval for carrying out operational investigative measures.

(4) The operational control shall be suspended when the specific aims of the operational investigative activity set out in section 2 are accomplished or when circumstances are established proving that it is objectively impossible to accomplish the aim."

In 2003 paragraph 3 of this section was repealed.

**"Section 10. Use of the results of operational investigative activities**

(1) The results of operational investigative activity may be used for preparing and carrying out criminal investigative activities and for carrying out operational investigative measures in order to prevent, stop or discover criminal offences, and as evidence in criminal cases.

(2) Data obtained during operational control shall not constitute a reason for limiting the rights, liberties and legitimate interests of natural and legal persons.

(3) Information about the persons, means, sources (with the exception of the persons who may provide assistance to the authorities carrying out such measures), methods, plans and results of the operational investigative activity, and about the organisation and the tactics of carrying out the operational investigative measures which constitute State secrets, may be disclosed only in accordance with the conditions provided by law.

**Section 11. The authorities which may carry out operational investigative activities**

(1) Operational investigative activity shall be exercised by the Ministry of Internal Affairs, the Ministry of Defence, the Information and Security Service, the Protection and State Security Service, the Department of Customs Control attached to the Ministry of Finance and the Prison Department attached to the Ministry of Justice. ...

...

**Section 18. Parliamentary scrutiny**

Scrutiny, on behalf of Parliament, of operational investigative activity shall be exercised by the relevant permanent parliamentary commissions. The authorities which exercise operational investigative activities shall submit information to these commissions in accordance with the law.

**Section 19. Supervision by the prosecutor**

(1) Enforcement of the laws by the authorities carrying out operational investigative activities and the lawfulness of the decisions adopted by these authorities shall be supervised by the General Prosecutor, his or her deputy, and the municipal and county prosecutors...”

15. On 29 June 2007 the Ministry of Internal Affairs, the Secret Services and the Centre for Combating Organised Crime and Corruption enacted special instructions in accordance with section 4 (2) of the above Law. The instructions regulated the co-operation between the intercepting bodies and the telephone operators. In particular it obliged the operators to co-operate with the intercepting bodies in order to facilitate the interception of telephone conversations and to provide them with all the necessary information and with unlimited access to their networks.

16. The Code of Criminal Procedure in force until 12 June 2003 read as follows:

**“Article 156 § 1. Grounds for intercepting telephone and other conversations**

The interception of telephone conversations or other means of communication used by a suspect, defendant or other person involved in a criminal offence may be carried out in connection with criminal proceedings instituted in accordance with a decision of the authority conducting the preliminary investigation or the criminal investigator with the authorisation of the prosecutor, or in accordance with a court decision, where such a measure is deemed necessary in a democratic society in the interests of national security, public order, the economic welfare of the country, the maintenance of order and the prevention of crimes, or the protection of the health, morals, rights and liberties of others. The interception of telephone or other conversations may not last more than six months. ... Conversations held over the telephone or other means of communication may be recorded.

**Article 156 § 2. Manner of interception and recording**

The interception and recording of telephone conversations or other means of communication shall be carried out by the criminal investigator unless the task is entrusted to the authority in charge of the preliminary investigation. In this case, the criminal investigator shall draw up a warrant and a decision concerning the interception, which shall be sent to the authority in charge of the preliminary investigation. At the same time the criminal investigator shall liaise with the authority in charge of the preliminary investigation or specify in the warrant the circumstances and manner of interception of the conversations and recording, modification and disposal of the information obtained. ...

**Article 156 § 3. Record of the interception and recording**

Following the interception and recording, a record shall be drawn up giving a summary of the content of the taped conversations relevant to the case. The tape shall be attached to the record and the part which does not relate to the case shall be destroyed once the judgment becomes final.”

17. The Code of Criminal Procedure, in force after 12 June 2003, in so far as relevant, reads as follows:

**"Article 41. Competence of the investigating judge**

The investigating judge ensures judicial supervision during the criminal prosecution by:

...

5. authorising the interception of communications, seizure of correspondence, video recordings;..."

...

**Article 135. Interception of communications**

(1) The interception of communications (telephone conversations, or communications by radio or using other technical means) is carried out by the prosecution body on the basis of an authorisation issued by the investigating judge issued on the basis of a reasoned warrant of a prosecutor charged with the examination of very serious and exceptionally serious crimes.

(2) In case of urgency, when a delay in obtaining an authorisation as stipulated in paragraph (1) could cause serious harm to the evidence-gathering procedure, the prosecutor may issue a reasoned warrant for the interception and recording of communications. She or he is obliged to inform the investigating judge about this immediately and no later than 24 hours after issuing the warrant. The latter is required to take a decision within 24 hours regarding the warrant issued by the prosecutor. When she or he confirms it, she or he authorises the further interception if necessary. When he or she does not confirm it, she or he orders its immediate suspension and the destruction of records already made.

(3) The interception of communications may be carried out at the request of the victim of a crime, a witness and members of his/her family, in case of threats of violence, extortion or commission of other crimes affecting such parties, based on a reasoned warrant of the prosecutor.

(4) The interception of communications during a criminal investigation is authorised for a maximum of 30 days. The interception may be extended on the same conditions if justified. Each extension cannot however exceed 30 days. The total duration cannot exceed 6 months. In any case, it cannot last longer than the criminal prosecution.

(5) The interception of communications may be stopped before the end of the period for which it has been authorised, if the grounds initially justifying it no longer exist.

(6) During a criminal prosecution, after the end of an authorised interception, and after having asked the opinion of the prosecutor who supervises and carries out the criminal prosecution, the investigating judge shall inform in writing the persons whose conversations were intercepted and recorded. This shall be done within a reasonable time, and must be done before the termination of the criminal prosecution.

**Article 136. Interception and recording and their authorisation**

(1) The interception of communications is carried out by the criminal prosecution body. Persons whose responsibility is technically to facilitate the interception and recording of communications are obliged to preserve the secrecy of the procedure and the confidentiality of correspondence. They are liable in the event of a violation of

their obligations under the provisions of articles 178 and 315 of the Criminal Code. A note must be made to the effect that they have been informed of these obligations.

(2) A record of the interceptions and recording carried out by the prosecution body must be drawn up in conformity with the provisions of articles 260 and 261. It must record information about the authorisation given by the investigating judge, the intercepted telephone number or numbers and their addresses, together with details of the radio or other technical equipment used for conversations. The record must also indicate the name (where known) of the parties and the date and time of each separate conversation and the number assigned to the tape used for the recording.

(3) Recorded communications must be fully transcribed and annexed to the record along with the authorisation of the criminal prosecution body, after its verification and signature by the prosecutor carrying out or supervising the criminal prosecution. Communications in languages other than the one in which the criminal prosecution is carried out shall be translated with the assistance of an interpreter. The tape containing the original recorded communications shall also be annexed to the record after having been sealed and after the stamp of the criminal investigation body has been applied.

(4) The tape of the recorded communications, the transcript and the records of the interception and recording of communications shall be handed over to the prosecutor within 24 hours. The prosecutor shall assess which parts of the collected information are important for the case in question and draw up a record in this regard.

(5) Original copies of the tapes along with the complete written transcript and copies of the records shall be handed over to the investigating judge who authorised interception of the communications for further storage in a special place in a sealed envelope.

(6) The court shall adopt a decision regarding the destruction of records which are not important for the criminal case. All the other records shall be kept up to the moment when the file is deposited in the archive.

**Article 138. Verification of interception recording**

Evidence collected under the provisions of articles 135 and 137 may be verified through technical expert examination by the court at the request of the parties or *ex officio*."

18. Under section 15(5) of the Advocacy Act of 13 May 1999, a lawyer's professional correspondence can be intercepted only under the conditions provided for by law. Section 15 (13) provides that the confidentiality of a lawyer's correspondence with his client is guaranteed and that such correspondence cannot be intercepted.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

19. The applicants complained under Article 8 of the Convention that their right to freedom of correspondence had not been respected since the

domestic law governing telephone tapping did not contain sufficient guarantees against abuse by the national authorities. They did not claim to have been victims of any specific interception of their telephone communications. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

## A. The parties' submissions

20. The applicants submitted that they had victim status and that there had therefore been interference with their rights guaranteed by Article 8 of the Convention. Even though they did not all possess licences to practise issued by the Ministry of Justice, they all represented applicants before the European Court of Human Rights. They were all members of the Lawyers for Human Rights organisation, which was considered by the Government as a subversive organisation acting against the interests of the State. The Lawyers for Human Rights organisation represented many persons who met the criteria for the application of the interception measures referred to by the Government both in domestic proceedings and in proceedings before the Court. The applicants gave the example of such persons as P. Popovici, who had been sentenced to life imprisonment, P. Stici and M. Ursu, who were accused of having killed the son of the Speaker of the Parliament, and C. Becciev and E. Duca, both accused of very serious crimes. They also referred to many persons who had disputes with the leaders of the ruling Communist Party as well as two persons who had brought proceedings against the Secret Services of Moldova. The applicants submitted that, even though not all the members of their organisation worked on serious cases, all members used the telephones of the organisation and therefore risked interception.

21. The applicants argued that the legislation in force both at the time of the introduction of their application and now violated their right to respect for their correspondence. They submitted that neither legislative regime satisfied the requirement of foreseeability as neither provided for sufficient safeguards against arbitrary interception and abuse.

22. According to the applicants, when examining a request for telephone interception, the investigating judge was not bound by legislation to balance the interests involved. The judge was only bound to check whether formalities had been observed. In making this submission, the applicants relied on official statistics concerning telephone interception which

indicated that in 2007 99.24% of a total of 2,372 requests for interception had been granted by investigating judges. In the applicants' opinion the statistics proved that the investigating judges did not examine the reasons advanced in support of the measure of interception and that manifestly ill-founded criminal charges could serve as a basis for interception. The applicants further argued that approximately 60% of the criminal offences provided for in the Criminal Code were eligible for interception warrants. The limitation in time of telephone interception warrants was only theoretical because in practice, after the expiry of a period of six months, a new authorisation could be issued by an investigating judge. According to the applicants, the provision in Article 135 of the Code of Criminal Procedure, concerning the obligation of the investigating judge to inform individuals whose telephone calls had been intercepted about the investigative measures taken, was not working in practice and no investigating judge had ever complied with that provision.

23. The Government submitted that the applicants could not claim to be victims of the state of the law. They considered the applicants' case to be distinguishable from the case of *Klass and Others v. Germany* (6 September 1978, Series A no. 28) where three of the applicants were lawyers and one was a judge. In the present case only two applicants were lawyers with licences to practise issued by the Ministry of Justice. Moreover, the applicants had not adduced any evidence that among their clients there were persons who belonged to the categories of persons to whom the relevant law applied and in respect of whom there was a reasonable likelihood that their conversations would be intercepted. In fact, at the time of introduction of the present application there had only been one judgment in respect of the Republic of Moldova, and the applicants had not been representatives in that case. All of the applicants' clients who could have been subjected to interception of telephone communications (see paragraph 20 above) had introduced their applications after 2003 and 2004. The only exception was E. Duca, but she had ultimately been acquitted. Therefore the applicants' complaint amounted to an *actio popularis* and must be declared inadmissible.

24. The Government further submitted that no interception of the applicants' correspondence had taken place. They could not claim to be even potential victims since the legislation in force clearly established the category of persons susceptible of being subjected to interception measures and not every person within the jurisdiction of the Republic of Moldova was targeted by that legislation.

25. According to the Government, the pertinent legislation in force contained sufficient safeguards. The interception of telephone communications was regulated by the Operational Investigative Activities Act and by the Code of Criminal Procedure. Article 6 of the Operational Investigative Activities Act provided that interception could be carried out

only in accordance with the law. The interception measures were authorised in a public manner. However, the methods and techniques of surveillance were secret.

26. The category of persons liable to have their correspondence intercepted in accordance with the Moldovan legislation was limited. Only persons involved in serious offences were targeted by the legislation. As to interception of correspondence of other persons, it was necessary to have their written consent and there had to be plausible reasons for ordering interception.

27. In the Government's view, the interception of correspondence was not carried out arbitrarily but only on the basis of a warrant issued by the investigating judge pursuant to a reasoned decision of one of the heads of the bodies carrying out the interception. In urgent cases interception measures could be carried out on the basis of a decision of a prosecutor, who had to inform the investigating judge within not more than twenty-four hours. In such cases the investigating judge had the right to order the cessation of the interception measures and the destruction of the materials obtained by way of interception. Any person who considered that his or her rights had been infringed by interception measures had the right to complain to the hierarchically superior authority, the prosecutor or the investigating judge.

28. As to the regulations issued in accordance with section 4(2) of the Operational Investigative Activities Act, in their pre-admissibility observations the Government submitted that they constituted State secrets in accordance with the State Secrets Act.

### B. The Court's assessment

#### *1. Whether there was an interference*

29. The Court reiterates that telephone communications are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (see *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 77, 29 June 2006, and the cases cited therein).

30. It further reiterates that in *Klass v. Germany* (cited above, §§ 34 and 35) it was called upon to examine the question whether an individual could lodge an application with the Convention organs, concerning secret surveillance measures, without being able to point to any concrete measure specifically affecting him. The Court held that:

> "the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

> The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.
>
> ...
>
> The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.
>
> ...
>
> The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25, since otherwise Article 8 runs the risk of being nullified."

31. The Court notes that under the Operational Investigative Activities Act the authorities are authorised to intercept communications of certain categories of persons provided for in section 6 of that Act. In their capacity as human rights lawyers the applicants represent and thus have extensive contact with such persons.

32. The Court cannot disregard the fact that at the time when the present case was declared admissible Lawyers for Human Rights acted in a representative capacity in approximately fifty percent of the Moldovan cases communicated to the Government. Nor can it overlook its findings in *Colibaba v. Moldova* (no. 29089/06, §§ 67-69, 23 October 2007) where the Prosecutor General had threatened the Moldovan Bar Association with criminal proceedings against lawyers who damaged the image of the Republic of Moldova by complaining to international organisations specialising in the protection of human rights. It also recalls that the Government endorsed the actions of the Prosecutor General and further accused the applicant of slandering the Moldovan authorities by lodging a complaint under Article 34 of the Convention.

33. In such circumstances, and bearing in mind the Court's finding in paragraph 50 below, the Court considers that it cannot be excluded that secret surveillance measures were applied to the applicants or that they were at the material time potentially at risk of being subjected to such measures.

34. The mere existence of the legislation entails, for all those who might fall within its reach, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and

telecommunications services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for correspondence (see *Klass v. Germany*, cited above, § 41).

35. Accordingly, there has been an interference with the applicants' rights guaranteed by Article 8 of the Convention and the Government's objection concerning their lack of victim status must be dismissed.

*2. Whether the interference was justified*

36. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see *Weber and Saravia*, cited above, § 80).

*3. Whether the interference was "in accordance with the law"*

**a. General principles**

37. The expression "in accordance with the law" under Article 8 § 2 requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him (see, among other authorities, *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A; *Huvig v. France*, 24 April 1990, § 26, Series A no. 176-B; *Lambert v. France*, 24 August 1998, § 23, *Reports of Judgments and Decisions* 1998-V; *Perry v. the United Kingdom*, no. 63737/00, § 45, ECHR 2003-IX (extracts); *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, § 61, 26 April 2007; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, § 71, 28 June 2007; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008).

38. It is not in dispute that the interference in question had a legal basis under domestic law. The applicants, however, contended that this law, both pre-2003 and later, was not sufficiently detailed and precise to meet the "foreseeability" requirement of Article 8 § 2, as it did not provide for sufficient guarantees against abuse and arbitrariness.

39. The Court points out that recently, in its admissibility decision in *Weber and Saravia*, cited above, §§ 93-95, the Court summarised its case-law on the requirement of legal "foreseeability" in this field as follows:

> "93. .... foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see, *inter alia*, *Leander v. Sweden*, judgment of 26 August 1987, Series A no. 116, p. 23, § 51). However, especially where a power

vested in the executive is exercised in secret, the risks of arbitrariness are evident (see, *inter alia Huvig*, cited above, pp. 54-55, § 29; and *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V). It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated (see *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports* 1998-II, pp. 542-43, § 72, and *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, *Reports* 1998-V, pp. 1924-25, § 46). The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Kopp*, cited above, § 64; *Huvig*, cited above, § 29; and *Valenzuela Contreras*, ibid.).

94. Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Leander*, cited above, § 51; and *Huvig*, cited above, § 29).

95. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (see, *inter alia*, *Huvig*, cited above, § 34; *Valenzuela Contreras*, cited above, § 46; and *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003).”

40. Moreover, the Court recalls that in *Dumitru Popescu v. Romania* (cited above, paragraphs 70-73) the Court expressed the view that the body issuing authorisations for interception should be independent and that there must be either judicial control or control by an independent body over the issuing body's activity.

**b. Application of the general principles to the present case**

41. The Court finds that the legislation prior to 2003 lacked both clarity and detail and did not satisfy the minimum safeguards contained in the Court's case-law (see paragraph 39 above). Indeed, there was no judicial control over the grant and application of a measure of interception and, as regards the persons capable of being caught by its provisions, the legislation was very open-ended in its reach. The circumstances in which a warrant of interception could be issued lacked precision. The Court notes with satisfaction that some major improvements were carried out after 2003.

42. The Court recalls that in the *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (cited above, § 84) it distinguished between two stages of interception of telephone

communications: authorising the surveillance and the actual carrying out of the surveillance.

43. In so far as the initial stage of the procedure of interception is concerned, the Court notes that after 2003 the Moldovan legislation appears to be clearer in respect of the interception of communications of persons suspected of criminal offences. Indeed, it is made explicit that someone suspected of a serious, very serious or exceptionally serious offence risks in certain circumstances having the measure applied to him or her. Moreover, the amended legislation now provides that interception warrants are to be issued by a judge.

44. Still, the nature of the offences which may give rise to the issue of an interception warrant is not, in the Court's opinion, sufficiently clearly defined in the impugned legislation. In particular, the Court notes that more than one half of the offences provided for in the Criminal Code fall within the category of offences eligible for interception warrants (see paragraph 14 above). Moreover, the Court is concerned by the fact that the impugned legislation does not appear to define sufficiently clearly the categories of persons liable to have their telephones tapped. It notes that Article 156 § 1 of the Criminal Code uses very general language when referring to such persons and states that the measure of interception may be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation has been given as to who exactly falls within the category of "other person involved in a criminal offence".

45. The Court further notes that the legislation in question does not provide for a clear limitation in time of a measure authorising interception of telephone communications. While the Criminal Code imposes a limitation of six months (see paragraph 17 above), there are no provisions under the impugned legislation which would prevent the prosecution authorities from seeking and obtaining a new interception warrant after the expiry of the statutory six months' period.

46. Moreover, it is unclear under the impugned legislation who – and under what circumstances – risks having the measure applied to him or her in the interests of, for instance, protection of health or morals or in the interests of others. While enumerating in section 6 and in Article 156 § 1 the circumstances in which tapping is susceptible of being applied, the Law on Operational Investigative Activities and the Code of Criminal Procedure fails, nevertheless, to define "national security", "public order", "protection of health", "protection of morals", "protection of the rights and interests of others", "interests of ... the economic situation of the country" or "maintenance of legal order" for the purposes of interception of telephone communications. Nor does the legislation specify the circumstances in which an individual may be at risk of having his telephone communications intercepted on any of those grounds.

47. As to the second stage of the procedure of interception of telephone communications, it would appear that the investigating judge plays a very limited role. According to Article 41 of the Code of Criminal Procedure, his role is to issue interception warrants. According to Article 136 of the same Code, the investigating judge is also entitled to store "the original copies of the tapes along with the complete written transcript ... in a special place in a sealed envelope" and to adopt "a decision regarding the destruction of records which are not important for the criminal case". However, the law makes no provision for acquainting the investigating judge with the results of the surveillance and does not require him or her to review whether the requirements of the law have been complied with. On the contrary, section 19 of the Law on Operational Investigative Activities appears to place such supervision duties on the "Prosecutor General, his or her deputy, and the municipal and county prosecutors". Moreover, in respect of the actual carrying out of surveillance measures in the second stage, it would appear that the interception procedure and guarantees contained in the Code of Criminal Procedure and in the Law on Operational Investigative Activities are applicable only in the context of pending criminal proceedings and do not cover the circumstances enumerated above.

48. Another point which deserves to be mentioned in this connection is the apparent lack of regulations specifying with an appropriate degree of precision the manner of screening the intelligence obtained through surveillance, or the procedures for preserving its integrity and confidentiality and the procedures for its destruction (see, as examples *a contrario, Weber and Saravia*, cited above, §§ 45-50).

49. The Court further notes that overall control of the system of secret surveillance is entrusted to the Parliament which exercises it through a specialised commission (see section 18 of the Law on Operational Investigative Activities). However, the manner in which the Parliament effects its control is not set out in the law and the Court has not been presented with any evidence indicating that there is a procedure in place which governs the Parliament's activity in this connection.

50. As regards the interception of communications of persons suspected of offences, the Court observes that in *Kopp* (cited above, § 74) it found a violation of Article 8 because the person empowered under Swiss secret surveillance law to draw a distinction between matters connected with a lawyer's work and other matters was an official of the Post Office's legal department. In the present case, while the Moldovan legislation, like the Swiss legislation, guarantees the secrecy of lawyer-client communications (see paragraph 18 above), it does not provide for any procedure which would give substance to the above provision. The Court is struck by the absence of clear rules defining what should happen when, for example, a phone call made by a client to his lawyer is intercepted.

51. The Court notes further that in 2007 the Moldovan courts authorised virtually all the requests for interception made by the prosecuting authorities (see paragraph 13 above). Since this is an uncommonly high number of authorisations, the Court considers it necessary to stress that telephone tapping is a very serious interference with a person's rights and that only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it. The Court notes that the Moldovan legislation does not elaborate on the degree of reasonableness of the suspicion against a person for the purpose of authorising an interception. Nor does it contain safeguards other than the one provided for in section 6(1), namely that interception should take place only when it is otherwise impossible to achieve the aims. This, in the Court's opinion, is a matter of concern when looked at against the very high percentage of authorisations issued by investigating judges. For the Court, this could reasonably be taken to indicate that the investigating judges do not address themselves to the existence of compelling justification for authorising measures of secret surveillance.

52. The Court is of the view that the shortcomings which it has identified have an impact on the actual operation of the system of secret surveillance which exists in Moldova. In this connection, the Court notes the statistical information contained in the letter of the Head of the President's Office of the Supreme Court of Justice (see paragraph 13 above). According to that information, in 2005 over 2,500 interception warrants were issued, in 2006 some 1,900 were issued and over 2,300 warrants were issued in 2007. These figures show that the system of secret surveillance in Moldova is, to say the least, overused, which may in part be due to the inadequacy of the safeguards contained in the law (see *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, cited above, § 92).

53. In conclusion, the Court considers that the Moldovan law does not provide adequate protection against abuse of power by the State in the field of interception of telephone communications. The interference with the applicants' rights under Article 8 was not, therefore, "in accordance with the law". Having regard to that conclusion, it is not necessary to consider whether the interference satisfied the other requirements of the second paragraph of Article 8.

54. It follows that there has been a violation of Article 8 in this case.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

55. The applicants argued that they did not have an effective remedy before a national authority in respect of the breach of Article 8 of the Convention and alleged a violation of Article 13, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority ...."

56. The Court reiterates that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention in their domestic legislation (see *Ostrovar v. Moldova*, no. 35207/03, § 113, 13 September 2005). In these circumstances, the Court finds no breach of Article 13 of the Convention taken together with Article 8.

## 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 did not make any claim for pecuniary or non-pecuniary damage.

### B. Costs and expenses

59. The applicants claimed EUR 5,475 for the costs and expenses incurred before the Court. They submitted a detailed time-sheet.

60. The Government argued that since the applicants represented themselves they should not be entitled to any payment under this head. Alternatively, the Government considered the amount claimed excessive and disputed the number of hours worked by the applicants.

61. The Court awards an overall sum of EUR 3,500 for costs and expenses.

### C. Default interest

62. The Court considers it appropriate that the default interest 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. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that there has been no violation of Article 13 of the Convention, taken together with Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, an overall sum of EUR 3,500 (three thousand five hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;[1]

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

Done in English, and notified in writing on 10 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

[1] Rectified on 24 September 2009: the point (b) was added.