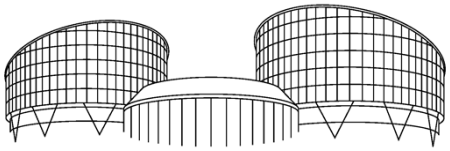

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF E.G. v. THE REPUBLIC OF MOLDOVA

(Application no. 37882/13)

JUDGMENT

Arts 3 and 8 • Authorities breaching procedural positive obligations as to enforcement of sentence for sexual assault after offender's amnesty granted then revoked • Amnesty and pardon lying within province of domestic law; not contrary to international law unless relating to acts amounting to grave breaches of fundamental human rights • Amnesty enabling offender to leave country • Lack of coordination between State authorities • Unjustified delay in issuing wanted notices for offender
Art 35 § 1 • Period of non-enforcement of criminal sanction taken as a whole for purposes of six-month rule • Authorities' failures inextricably interlinked and amounting to a continuing situation

STRASBOURG

13 April 2021

FINAL

13 July 2021

This judgment has become final pursuant to Article 44 § 2 of the Convention. It is subject to editorial revision.

In the case of E.G. v. the Republic of Moldova,

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

Jon Fridrik Kjølbro*, President*,
Marko Bošnjak,
Aleš Pejchal,
Valeriu Griţco,
Carlo Ranzoni,
Pauliine Koskelo,
Saadet Yüksel*, judges*,
and Hasan Bakırcı, *Deputy Section Registrar*,

Having regard to:

the application (no. 37882/13) 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 dual Moldovan and Romanian national, Ms E.G. ("the applicant"), on 9 May 2013;

the decision to notify the Moldovan Government ("the Government") of the complaints under Articles 3 and 8 of the Convention relating to non-enforcement of a sentence of imprisonment and to declare the remainder of the application inadmissible;

the decision not to disclose the identity of the applicant;

the submissions of the parties; and

the decision of the Romanian Government not to exercise their right to intervene in the proceedings (Article 36 § 1 of the Convention),

Having deliberated in private on 16 March 2021,

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

INTRODUCTION

1. This case concerns the non-enforcement of a sentence imposed on one of the perpetrators of a sexual assault against the applicant. It raises issues under Articles 3 and 8 of the Convention.

THE FACTS

2. The applicant was born in 1977 and lives in Chișinău. She was represented by counsel, Mr S. Burlaca.

3. The Government were represented by their agents, in order of time Mr L. Apostol, Mr M. Gurin and Mr O. Rotari.

4. On the night of 9-10 February 2008 the applicant was sexually assaulted by three individuals.

5. On the basis of a complaint lodged by the victim, the public prosecution service instituted criminal proceedings against P.G., R.G. and V.B. They were initially placed in pre-trial detention but were released pending the

outcome of their case. V.B. specifically was released on 12 March 2008 against a deposit of security.

6. On 17 June 2009 the Centru District Court in Chișinău convicted the three defendants of gang sexual assault contrary to Article 172 § 2 (c) of the Criminal Code and sentenced them to suspended terms of imprisonment. The applicant appealed.

7. By a judgment of 2 December 2009 the Chișinău Court of Appeal affirmed the lower court's findings; it further convicted P.G. and R.G. of the offence of gang rape contrary to Article 171 § 2 (c) of the Criminal Code and sentenced them to terms of imprisonment of six and five and a half years, respectively. It also imposed on V.B. a sentence of five years' imprisonment. The judgment was immediately enforceable.

8. The State authorities took P.G. and R.G into custody that day from the courtroom of the Chișinău Court of Appeal. As he was not present at the trial V.B. was not taken into custody.

9. By a decision having final effect of 7 December 2010, the Supreme Court of Justice affirmed the judgment of the Court of Appeal.

10. In the meantime, on 14 May 2010, the authorities had issued a wanted notice for V.B.

11. On 18 April 2011 V.B. made an application through his lawyer to be discharged from his sentence pursuant to the Amnesty Act 2008.

12. A similar amnesty claim lodged by R.G. was rejected by the Chișinău Court of Appeal in a decision having final effect of 5 October 2011. The court noted *inter alia* that R.G.'s conviction post-dated the commencement of the Amnesty Act and that section 5 of the Act was not applicable to him.

13. On 20 December 2011 the Centru District Court in Chișinău rejected V.B.'s amnesty application for the same reason. He appealed. On the appeal the public prosecution service supported his claim for amnesty.

14. By a decision having final effect of 22 May 2012, the Chișinău Court of Appeal reversed the judgment of the lower court and granted V.B.'s amnesty claim. It expressed the view that section 5 of the Amnesty Act 2008 (see paragraph 28 below) was applicable because, among other reasons, the offence had pre-dated the commencement of the Act.

15. On 29 June 2012 the Chișinău Court of Appeal granted an application from the public prosecution service to have V.B.'s amnesty case reconsidered on fresh evidence. The court reopened the proceedings, set aside the decision it had given on 22 May 2012 and affirmed the judgment of 20 December 2011 (see paragraph 13 above). The public prosecution service and V.B.'s lawyer made applications to have that decision set aside on review.

16. By a decision of 4 December 2012 the Supreme Court of Justice granted their applications. It set aside the Court of Appeal decision of 29 June 2012 for lack of subject-matter jurisdiction and remitted the case.

17. On 7 March 2013 the Chișinău Court of Appeal ruled that the public prosecution service's application for reconsideration on fresh evidence could not be entertained.

18. Meanwhile, on 22 October 2012, the authorities had arrested V.B. They had released him that same day on the basis of the decision of the Chișinău Court of Appeal of 22 May 2012.

19. By a judgment of 4 September 2013 the Centru District Court in Chișinău granted a further application by the public prosecution service for reconsideration on fresh evidence, reopened V.B.'s amnesty proceedings and set aside the decision of the Chișinău Court of Appeal of 22 May 2012. The Chișinău Court of Appeal affirmed that judgment on 18 November 2013. It noted *inter alia* that the court that had given the decision of 22 May 2012 had been unaware of V.B.'s breach of the conditions on which he had been released against security.

20. The applicant subsequently enquired whether V.B. had been found and was serving his sentence. The police inspectorate informed her lawyer by a letter of 10 January 2014 that no wanted notice had been issued for V.B. and no steps taken to find him as neither the competent prosecuting authority nor the Chișinău Court of Appeal had directed that a search should be made for him.

21. On 28 January 2014 the public prosecution service asked the police to enforce the decision setting aside the grant of amnesty to V.B.

22. On 31 January 2014 the police resumed their investigation into the whereabouts of V.B. They determined that he had left Moldova on 16 November 2013 for Ukraine.

23. In a letter to the applicant of 4 February 2014, the public prosecution service opined that the courts had failed to discharge their duty to forward the Court of Appeal decision having final effect of 18 November 2013 to the competent police authority for enforcement purposes within ten days.

24. The police issued a Commonwealth of Independent States (CIS) wanted notice for V.B. on 20 February 2014 and an international notice on 29 April 2015.

25. According to the Government's most recent submissions, received by the Court on 2 March 2020, V.B. has yet to be found.

RELEVANT DOMESTIC LEGAL FRAMEWORK

26. The relevant provisions of the Criminal Code which were in force at the material time read as follows:

Article 171 – Rape

" ...

2. Rape:

...

(c) committed by two or more persons;

...

shall be punished by a term of imprisonment of between 5 and 15 years.

..."

Article 172 – Violent acts of a sexual character

"1. ... the satisfaction of sexual desire in perverse forms [obtained] through physical or mental coercion or by taking advantage of a person's inability to defend himself or herself or to express his or her will

[shall be] punished by a term of imprisonment of between 3 and 7 years.

2. The same acts:

...

(c) committed by two or more persons;

...

shall be punished by a term of imprisonment of between 5 and 15 years."

27. Article 468 § 1 of the Code of Criminal Procedure requires the court to forward any immediately enforceable decision, within ten days, to the authority competent to enforce the sentence.

28. The relevant parts of section 5 of the Amnesty Act (Law no. 188), which came into force on 18 July 2008, read as follows:

Section 5

"Any person who has been sentenced to a term of imprisonment of seven years or less and who at the commencement of this Act has not reached the age of twenty-one years ... shall be discharged from serving his or her sentence."

THE LAW

I. ALLEGED VIOLATION OF CONVENTION ARTICLES 3 AND 8

29. Relying on Articles 3 and 8 of the Convention, the applicant alleged that the State had not discharged what she saw as its positive obligations requiring it to give actual effect to the decision whereby V.B. had been convicted and sentenced for sexual assault. In particular, she complained of the decision to grant him amnesty and, in respect of the periods during which he had not had amnesty, of a failure by the authorities to conduct an effective search for him. So far as relevant, the Articles relied on read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence."

A. Admissibility

30. The Government objected that the application had not been lodged within the six-month time-limit. They pointed to the fact that the applicant's chief complaint concerned the grant of amnesty to V.B. by the Chișinău Court of Appeal in its decision having final effect of 22 May 2012. In their view, the six months had to run from that date, and, for the purposes of reckoning that period, no account was to be taken of the applications for review of that decision. Thus, they argued, the application had been lodged out of time.

31. The applicant was silent on this point.

32. The Court notes that the applicant's complaints comprise two limbs. The first limb concerns the grant of amnesty to V.B. and the second the fact that there were no actual steps taken, when V.B. did not have amnesty, to give effect to the decision whereby he had been convicted and sentenced. The Court must ascertain whether a distinction falls to be drawn between the two limbs for the purposes of reckoning the six-month time-limit under Article 35 § 1 of the Convention.

33. In this connection the Court would draw attention to the concept of a "continuing situation" – meaning a state of affairs which operates by continuous activities performed by or on the part of the State to render the applicant a victim – and would observe that the six-month period does not start to run so long as a continuing situation exists (see *Iordache v. Romania*, no. 6817/02, §§ 49-50, 14 October 2008, and *Călin and Others v. Romania*, nos. 25057/11 and 2 others, § 57, 19 July 2016). However, not all continuing situations are the same (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 262, ECHR 2014 (extracts)). The Court would reiterate that, while there are obvious distinctions between different continuing violations, the applicant's complaint must in any event be lodged "without undue delay" once it is apparent that there is no realistic prospect of a favourable outcome or progress of the complaint domestically (see *Sokolov and Others v. Serbia* (dec.), nos. 30859/10 and others, § 31 *in fine*, 14 January 2014).

34. In this case the Court notes that the nub of the applicant's complaints under Articles 3 and 8 of the Convention concerns V.B.'s *de facto* impunity for the sexual assault on her. In the Court's opinion, the specific failures pointed to by the applicant in relation to those complaints – that is to say the purportedly unlawful grant of amnesty and the authorities' alleged inaction in taking no steps to locate V.B. – are inextricably linked. For that reason the Court considers that in the circumstances of the present case the period of

non-enforcement of the criminal sanction imposed on V.B. must be taken as a whole for the purposes of the six-month rule.

35. In conclusion, the Court considers that the set of failures for which the applicant seeks to hold the Moldovan authorities responsible amounted to a continuing situation (compare, regarding a failure to give effect to administrative court judgments, *Hornsby v. Greece*, 19 March 1997, § 35, *Reports of Judgments and Decisions* 1997-II, and *Sabin Popescu v. Romania*, no. 48102/99, § 51, 2 March 2004). Moreover, the Court observes that it is not apparent from the material before it that there had ceased to be any realistic prospect of the Moldovan authorities' enforcing V.B.'s sentence. The Government's objection must therefore be dismissed.

36. The Court furthermore finds that the present complaints are neither manifestly ill-founded nor inadmissible on any other ground under Article 35 of the Convention and accordingly declares them admissible.

B. Merits

37. The applicant submitted that the failure to give effect to the decision convicting and sentencing V.B. had rendered illusory the protection that should have been afforded by punishment of the offence of sexual assault, resulting, in her view, in a violation of Articles 3 and 8 § 1 of the Convention. She alleged that the grant of amnesty to V.B. had been unlawful and that the national courts had applied the provisions of the Amnesty Act 2008 inconsistently. She further complained of failures by the authorities to give effect to the conviction and sentencing decision after the grant of amnesty had been set aside.

38. The Government noted that the State authorities could not have prohibited V.B. from lodging his amnesty claim. In any event, they argued, account should be taken of the subsequent quashing of the grant of amnesty in considering whether the State had discharged its positive obligations under Articles 3 and 8 of the Convention. The Government further contended that the positive obligations arising in cases of violence between private individuals were obligations of means and not of result and that, accordingly, the enforcement of V.B.'s sentence fell outside the scope of the State's positive obligations. Nonetheless they pointed out that the authorities' efforts to find and arrest V.B. remained ongoing.

39. The Court reiterates at the outset that rape and serious sexual assault amount to treatment that falls within the ambit of Article 3 of the Convention and also engages fundamental values and essential aspects of "private life" within the meaning of Article 8 (see *Y v. Bulgaria*, no. 41990/18, §§ 63-64, 20 February 2020, and cases therein cited). Applying that decided principle, the Court considers that the applicant's complaints may be examined jointly under Articles 3 and 8 of the Convention (ibid., § 65). The Court refers also to the applicable general principles stated in *M.C. v. Bulgaria* (no. 39272/98,

§§ 149-152, ECHR 2003-XII). It observes in particular that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal laws that effectively punish rape, and to apply them in practice through effective investigation and prosecution (see *M.C.*, cited above, § 153, and *B.V. v. Belgium*, no. 61030/08, § 55, 2 May 2017). That positive obligation further requires the criminalisation and effective prosecution of all non-consensual sexual acts (see *M.G.C. v. Romania*, no. 61495/11, § 59, 15 March 2016, and *Z v. Bulgaria*, no. 39257/17, § 67, 28 May 2020).

40. Implicit in this context is a requirement to act with reasonable promptness and expedition. A prompt response on the part of the authorities is essential to maintaining public confidence in their adherence to the rule of law and preventing any appearance of collusion in or tolerance of unlawful acts (see *B.V.*, cited above, § 58, and cases therein cited).

41. The Court would further point out that it has held, in respect of Article 2 of the Convention, that the requirement for the authorities to undertake an effective criminal investigation may also be interpreted as imposing on States a duty to enforce the final judgment without undue delay. It is so, since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under that Article (see *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, § 32, 13 October 2016; *Akelienė v. Lithuania*, no. 54917/13, § 85, 16 October 2018; and *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 50, 26 May 2020). The Court is of the view that the same approach falls to be applied in this case and that the enforcement of sentences for sexual offences is an integral part of the positive obligation cast on States by Articles 3 and 8 of the Convention.

42. Turning to the facts of the case, the Court notes that V.B. was sentenced to five years' imprisonment for sexually assaulting the applicant. The sentence became enforceable on 2 December 2009 but has not been enforced to date.

43. The Court observes that V.B. was granted amnesty by a decision having final effect of 22 May 2012, at a time when he was wanted by the authorities and had not served any of his sentence. On this subject the Court would point to its holding that amnesties and pardons should not be tolerated in cases of torture or ill-treatment by State agents (see, for example, *Mocanu and Others*, cited above, § 326), a principle it also applies to acts of violence perpetrated by private individuals (see *Pulfer v. Albania*, no. 31959/13, § 83, 20 November 2018; see also, for a case of impunity arising from the operation of a limitation period, *İbrahim Demirtaş v. Turkey*, no. 25018/10, § 35, 28 October 2014, and cases therein cited). That notwithstanding, the Court reiterates that pardons and amnesties are primarily matters of member States' domestic law and are not in principle contrary to international law unless they relate to acts amounting to grave breaches of fundamental human rights (see *Makuchyan and Minasyan*, cited above, § 160; see also *Marguš v. Croatia*

[GC], no. 4455/10, § 139, ECHR 2014 (extracts)). Here, it considers that the sexual assault on the applicant amounted to a serious breach of her right to physical and mental integrity and that, on the authorities cited above, the grant of amnesty to one of the perpetrators of the assault was, in the particular circumstances of the case, potentially inconsistent with the respondent State's obligations under Articles 3 and 8 of the Convention.

44. In this case the Court also observes that the Chișinău Court of Appeal was not consistent in its application of the Amnesty Act 2008. Specifically it sees that R.G., who was in a situation similar to that of V.B. and had already served some of his sentence, was denied amnesty (see paragraph 12 above). The Court therefore concludes that, in the case of V.B., the judges of the Court of Appeal used their discretion in order to minimise the consequences of an extremely serious unlawful act rather than to show that such acts could not in any way be tolerated (compare *Ateşoğlu v. Turkey*, no. 53645/10, § 28 *in fine*, 20 January 2015, and cases therein cited).

45. The Court bears in mind that the grant of amnesty to V.B. was ultimately set aside. However, it regards the fact that he had amnesty for a total of about a year as being in conflict with the procedural requirements of Articles 3 and 8 of the Convention, set out above, especially as it enabled him to leave Moldova just before the last decision to set aside the grant of amnesty was taken (see paragraph 22 above).

46. The remaining question for the Court is whether the steps taken by the authorities to enforce V.B.'s sentence outside of the periods during which the grant of amnesty had effect were sufficient.

47. On this point the Court would first observe that the State authorities appear to have disregarded the first decision to set aside the grant of amnesty to V.B., namely the decision having final effect of 29 June 2012. He had been arrested on 22 October 2012 (see paragraph 18 above) but was released that same day on the basis of the decision of 22 May 2012, which had already been set aside and no longer had legal effect at the time. In the Court's view this amounts at best to a failure of coordination between State authorities, which resulted in V.B.'s release without a valid legal basis.

48. The Court further observes that the last decision to set aside the grant of amnesty – the decision of 18 November 2013 – was forwarded to the authority responsible for the search for V.B. more than two months after being made (see paragraph 21 above). In that connection the Court takes note of the public prosecution service's opinion that that lapse of time had been contrary to domestic law (see paragraph 23 above). Although it was later established that V.B. had left the country before 18 November 2013, the Court believes that that delay necessarily postponed the date on which the authorities issued the CIS wanted notice (see paragraphs 20 and 24 above). Moreover, the Court sees that the international wanted notice was not issued until 2015 (see paragraph 24 above), but nothing in the case file explains why. In the Court's view, these instances of delay sit uneasily with the requirement

of reasonable promptness and expedition set out above (see paragraph 40 above and, conversely, *Akelienė*, cited above, §§ 91-93).

49. In view of the foregoing, the Court considers that the steps taken by the State to enforce V.B.'s sentence were not sufficient to meet its obligation to give effect to convictions and sentences handed down against perpetrators of sexual assault.

50. In conclusion, it is the Court's determination that the grant of amnesty to V.B. and the authorities' failure to enforce his sentence were not compatible with the respondent State's positive obligations under Articles 3 and 8 of the Convention.

51. There has accordingly been a violation of those Articles.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

54. The Government submitted that the amount claimed was excessive.

55. The Court concludes that the applicant suffered specific harm as a consequence of the violations found above and, ruling on an equitable basis, awards EUR 10,000 (plus any tax thereon chargeable to the applicant) in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicant claimed a further EUR 1,820 in respect of costs and expenses incurred in the proceedings before the Court, representing the fees charged by her representative for twenty-six hours' work at EUR 70 per hour. She provided an itemised statement of time spent.

57. The Government argued that this claim was unsubstantiated.

58. The Court has previously held that an applicant's costs and expenses are recoverable only in so far as it has been shown that they were actually and necessarily incurred and were reasonable as to quantum. In the present case, having regard to the documents before it and the criteria just stated, the Court considers it reasonable to award the applicant the full sum claimed in respect of the proceedings before it, plus any tax thereon chargeable to the applicant.

C. Default interest

59. The Court considers it appropriate to set the rate of default interest equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Articles 3 and 8 of the Convention admissible;

2. *Holds* that there has been a violation of Articles 3 and 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage;
      (ii) EUR 1,820 (one thousand eight hundred and twenty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from expiry of the above-mentioned period 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 that period plus three percentage points;

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

Done in French and notified in writing on 13 April 2021 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Deputy Registrar	Jon Fridrik Kjølbro President