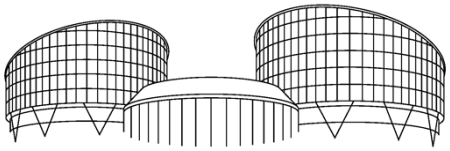

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF COVALENCO v. THE REPUBLIC OF MOLDOVA

(Application no. 72164/14)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Fresh judgment on the merits by the Supreme Court • No oral hearing despite factual and credibility disputes • Decisive counter-argument left unanswered • Supreme Court's reliance *proprio motu* on a new reason not argued by the parties and not a matter of dispute • Unfair trial

STRASBOURG

16 June 2020

FINAL

16/09/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Covalenco v. the Republic of Moldova,

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

Jon Fridrik Kjølbro, *President,*
Valeriu Griţco,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 72164/14) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Moldovan national, Mr Dumitru Covalenco ("the applicant"), on 28 October 2014;

the decision to give notice of the application to the Moldovan Government ("the Government");

the parties' observations;

Having deliberated in private on 19 May 2020,

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

INTRODUCTION

The case concerns the reversal by the Supreme Court of two judgments in favour of the applicant which were adopted in civil proceedings by two inferior courts. The examination of the appeal on points of law by the Supreme Court of Justice took place without the participation of the parties and completely new arguments which were not a matter of debate between the parties before the lower courts served as a basis for the reversal.

THE FACTS

1. The applicant was born in 1983 and lives in Chişinău. He was represented by Mr G. Ionaş, a lawyer practising in Chişinău.

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

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

4. On 13 July 2009 the applicant's wife was driving his car and was involved in a car accident. As a result of the accident the car was severely damaged.

5. On the same date the applicant contacted his insurance company and informed it about the accident. It appears from the materials of the case file

that the applicant had declared his wife as an authorised driver of the car for the purposes of insurance.

6. The applicant wrote many letters to the insurance company requesting to be paid the insurance indemnity, but to no avail. He also lodged numerous complaints with State regulatory bodies in the field of insurance but without any results because the insurance company did not reply to any of the letters. Instead, the insurance company lodged criminal complaints against the applicant, alleging that he intended to defraud it. As a result of such complaints a criminal investigation was conducted, in the course of which, in 2012, the representative of the insurance company admitted *inter alia* that the applicant's damaged car was being kept by the insurance company and that the applicant's wife was an authorised driver of the car. That information was not made available to the applicant until after the civil proceedings between him and the insurance company were over. It appears from the materials of the case file that the criminal investigation did not lead to the applicant's indictment and the outcome is not known to the Court.

7. On 12 July 2012 the applicant lodged a civil action against the insurance company and claimed the payment of the insurance indemnity and default interest.

8. In a judgment of 2 April 2013 the Botanica District Court found that a proportion of more than 75% of the applicant's car had been destroyed as a result of the accident and that it could not be repaired. Therefore, it ordered the insurance company to pay 20,858 euros (EUR) to the applicant, a sum consisting of the value of the car, less the 10% excess plus the default interest.

9. The insurance company appealed against the above judgment and argued that while the applicant's wife was an authorised driver of the insured car, it was not her but the applicant who had been driving the car at the moment of the accident. Since the applicant had not passed his breath test immediately after the accident, the insurance company was entitled not to pay the insurance indemnity. Moreover, the insurance company argued that in ordering the payment of the full value of the car, the first instance court had failed to rule on who was to keep the damaged vehicle.

10. On 26 November 2013 the Chișinău Court of Appeal partly upheld the appeal lodged by the insurance company and ordered that the damaged vehicle be kept by the insurance company. The Court of Appeal dismissed the insurance company's argument that the applicant had been driving the car. In so doing, the court made reference to a final judicial decision in parallel proceedings in which the police officer's finding to the effect that the applicant's wife had been driving the car at the moment of the accident was unsuccessfully contested.

11. The insurance company lodged an appeal on points of law in which it raised arguments which had not been raised previously. Firstly, it argued that the applicant had refused to present the damaged car and that it had not

even seen pictures of the vehicle. Secondly, the insurance company questioned the manner in which the courts had determined the fact that the proportion of the car that had been damaged was more than 75% in the absence of any expert report.

12. In his written submissions in reply to the above application the applicant argued that immediately after the accident it had been the representatives of the insurance company that had taken the damaged car from the police station and kept it. The applicant argued that the insurance company was being dishonest when stating that it had not seen the damaged car and that that could be proved by the fact that it had never raised that argument either during the proceedings before the first instance court or in its appeal against the judgment of the first instance court. Moreover, the applicant argued that the insurance company had attached an expert's report which it had requested concerning the technical state of the damaged car to its appeal application. That fact proved that the insurance company had access to the car and knew its whereabouts.

13. On 30 April 2014 the Supreme Court of Justice examined the case without the participation of the parties. It upheld the appeal on points of law, quashed the judgments of the lower courts and adopted a new judgment on the merits of the case, dismissing the applicant's action against the insurance company. The Supreme Court found in the first place that the insurance policy issued by the insurance company did not contain the name of the applicant's wife. Secondly, there was no evidence in the case file that the applicant had presented the insurance company with the damaged car or any documents confirming the damage.

RELEVANT LEGAL FRAMEWORK

14. The relevant provisions of the Code of Civil Procedure as in force at the material time read as follows:

> "**Article 26. Adversarial character and procedural equality of participants**
>
> (1) Civil legal proceedings shall be conducted in accordance with the principles of adversarial procedure and procedural equality of participants...
>
> ...
>
> (3) The court which examines a case shall maintain its impartiality and objectivity and shall create conditions for the parties to the proceedings to be able exercise their rights and for the objective examination of the circumstances of the case...
>
> **Article 444. The examination of the appeal on points of law**
>
> An appeal on points of law should be examined without the participation of the parties. The panel of five judges may decide to invite some of the parties or their representatives in order to decide on problems of lawfulness invoked in the appeal on points of law application."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

15. The applicant complained that the proceedings before the Supreme Court had not been fair. He relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

A. Admissibility

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

B. Merits

1. The parties' submissions

17. The applicant argued *inter alia* that the proceedings before the Supreme Court had been unfair because that court had not examined the arguments from his written submissions and had not invited the parties to participate in the proceedings. In the applicant's view, the decision of the Supreme Court was unreasoned and arbitrary because it relied solely on the false declarations made by the insurance company.

18. The Government submitted that during the examination of the appeal on points of law, the Supreme Court of Law had found that both the first and the second instance courts had incorrectly examined the case. Thus, after administering the evidence gathered by the lower courts, the Supreme Court had come to the conclusion that the applicant had not provided the insurance company with access to the damaged vehicle or with any documents concerning the damages caused to it as a result of the accident. Moreover, the Supreme Court had found that the insurance policy did not contain the name of the applicant's wife.

2. The Court's assessment

(a) General principles

19. The Court reiterates that the right to an oral hearing is not only linked to the question whether the proceedings involve the examination of witnesses who will give their evidence orally. It is also important for litigants to have the opportunity to state their case orally before the domestic courts (see *Göç v. Turkey* [GC], no. 36590/97, § 48, ECHR 2002-V, and

Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, § 187, 6 November 2018). Thus, the right to an oral hearing is one element underpinning the overall equality of arms between the parties to the proceedings (see, *mutatis mutandis*, *Margaretić v. Croatia*, no. 16115/13, §§ 127-28, 5 June 2014).

20. The Court also reiterates that, according to its established case-law, in proceedings before a court of first and only instance the right to a "public hearing" within the meaning of Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see *Göç*, cited above, § 47).

21. The Court has identified the following situations in which the above-mentioned exceptional circumstances may justify dispensing with a hearing:

(a) where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the case file (see *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002, and *Saccoccia v. Austria*, no. 69917/01, § 73, 18 December 2008);

(b) in cases raising purely legal issues of limited scope (see *Allan Jacobsson v. Sweden (no. 2)*, 19 February 1998, § 49, *Reports* 1998-I, and *Mehmet Emin Şimşek v. Turkey*, no. 5488/05, §§ 29-31, 28 February 2012), or points of law of no particular complexity (see *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002, and *Speil v. Austria* (dec.), no. 42057/98, 5 September 2002);

(c) where the case concerns highly technical issues. For instance, the Court has taken into consideration the technical nature of disputes concerning social-security benefits, which may be better dealt with in writing than in oral argument. It has held on several occasions that in this sphere the national authorities are entitled, having regard to the demands of efficiency and economy, to dispense with a hearing, as systematically holding hearings may be an obstacle to the particular diligence required in social-security cases (see *Schuler-Zgraggen*, § 58, and *Döry*, § 41, both cited above).

22. By contrast, the Court has found the holding of a hearing to be necessary, for example:

(a) where there is a need to assess whether the facts were correctly established by the authorities (see *Malhous v. the Czech Republic* [GC], no. 33071/96, § 60, 12 July 2001);

(b) where the circumstances require the court to form its own impression of litigants by affording them a right to explain their personal situation, on their own behalf or through a representative (see *Göç*, cited above, § 51; *Miller*, cited above, § 34 *in fine*; and *Andersson v. Sweden*, no. 17202/04, § 57, 7 December 2010);

(c) where the court needs to obtain clarification on certain points, *inter alia* by means of a hearing (see *Fredin v. Sweden (no. 2)*, 23 February 1994, § 22, Series A no. 283-A, and *Lundevall v. Sweden*, no. 38629/97, § 39, 12 November 2002).

23. The Court also reiterates that it stems from well-established case law from the Court that even though Article 6 does not prescribe any right of appeal, it requires that if domestic law provides for an appeal, Article 6 comes into play even in these appeal proceedings to the extent that these proceedings can reasonably be said to involve a "determination" of a criminal charge against the applicant or of his "civil rights or obligations" (see *Reichman v. France*, no. 50147/11, § 29, 12 July 2016; *Maresti v. Croatia*, no. 55759/07, § 33, 25 June 2009; *Delcourt v. Belgium*, no. 2689/65, § 25, 17 January 1970). Moreover, the Court also emphasises that the manner of application of Article 6 § 1 to proceedings after appeal, including to supreme courts, depends on the special features of the proceedings involved; account must be taken of the entirety of the procedural system in the domestic legal order and of the role of the particular court therein (see *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, 16 July 2019, § 32; *Styrmir Þór Bragason v. Iceland*, no. 36292/14, § 63, 16 July 2019; *Lazu v. the Republic of Moldova*, no. 46182/08, § 33, 5 July 2016; *Hermi v. Italy* [GC], no. 18114/02, § 60, 18 October 2006; *Sigurþórsson Arnarsson v. Iceland*, no. 44671/98, § 30, 15 July 2003; *Botten v. Norway*, no. 16206/90, § 39, 19 February 1996)".

24. The Court further recalls that Article 6 requires the domestic courts to adequately state the reasons on which their decisions are based. Without requiring a detailed answer to every argument put forward by a complainant, this obligation nevertheless presupposes that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see, among many other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A).

(b) Application of the above principles to the present case

25. Turning to the facts of the present case, the Court notes in the first place that the Supreme Court of Justice quashed the judgments of the lower courts and made no reference to those courts' findings in its own judgment. It examined the case from the very beginning and replaced the assessment of facts and law made by the lower courts with its own, acting as if the case had never been examined by those courts. In such circumstances, it is safe to conclude that, despite being a court of last instance and examining an appeal on points of law, in reality the Supreme Court acted as a court of first instance. The fact that hearings were held before the lower courts is of no relevance and the applicant cannot be blamed for not requesting an oral

hearing before the Supreme Court since he was not in a position to know the scope of the examination to be carried out by it.

The Court further notes that the parties disputed before the Supreme Court for the first time factual issues such as the whereabouts of the damaged car and the insurance company's access to it. In view of the conflicting submissions about the factual situation, the parties' credibility was also an issue to be determined by the Supreme Court. Thus, the Supreme Court could not, as a matter of fair trial, dispense with a public hearing before adopting its judgment representing the final ruling on the matters of the dispute (see paragraphs 19-22 above).

26. The Court notes next that the Supreme Court of Justice accepted the insurance company's argument that it had no access to the damaged car. In so doing the Supreme Court did not pay attention to the applicant's counter-argument to the effect that the car was in the latter's possession and that an expert appointed by the insurance company had carried out an assessment of the car. In the Court's view the applicant's counter-argument was an important one and if accepted, it could have led to a different outcome of the case. In spite of that, the Supreme Court of Justice remained silent about it. In the absence of a specific and express reply, it is impossible to ascertain whether that court simply neglected to deal with the above applicant's submission or whether it intended to dismiss it and, if that was its intention, what the reasons were for so deciding (see *Ruiz Torija*, cited above, § 30; *Hiro Balani v. Spain*, 9 December 1994, § 28, Series A no. 303-B; and *Lebedinschi v. the Republic of Moldova*, no. 41971/11, § 35, 16 June 2015).

27. Finally, the Court cannot but observe that in dismissing the applicant's action against the insurance company the Supreme Court relied in its judgment *proprio motu* on a new reason which had not been argued by the parties and which was not a matter of dispute. Namely, it held that the insurance policy did not cover the applicant's wife's driving the insured car. Not only had the insurance company never relied on that argument, but it admitted earlier in the proceedings that the applicant's wife was covered by the insurance policy (see paragraph 9 above).

28. In the light of the foregoing considerations the Court comes to the conclusion that the proceedings were not fair and that, accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

29. The applicant further complained about a breach of his rights guaranteed by Article 13 taken in conjunction with Article 6 and Article 1 of Protocol No. 1 to the Convention. Having regard to the facts of the case, the submissions of the parties and its findings under Article 6 § 1 of the Convention, the Court considers that it is not necessary to examine either

the admissibility or the merits of the complaints under Article 13 and Article 1 of Protocol No. 1 (see *Eze v. Romania*, no. 80529/13, § 65, 21 June 2016, and *Michał Korgul v. Poland*, no. 36140/11, § 59, 21 March 2017).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 22,128 euros (EUR) in respect of pecuniary damage. He claimed that this amount represented the sum awarded to him by the first two instances plus the default interest. The applicant also claimed EUR 6,000 for non-pecuniary damage.

32. The Government objected and argued that the amounts claimed were excessive.

33. The Court cannot speculate as to whether the applicant would have suffered any pecuniary damage had the breach of Article 6 § 1 not taken place; it therefore rejects that claim. In this connection, the Court notes that Article 449 (h) of the Code of Civil Procedure provides for the possible revision of a judgment where the Court has found a violation of fundamental rights and liberties.

34. On the other hand, the Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of the breach of his right to a fair trial. Making its assessment on an equitable basis, it awards the applicant EUR 3,500 for non-pecuniary damage.

B. Costs and expenses

35. The applicant also claimed EUR 1,500 for the costs and expenses incurred before the Court.

36. The Government objected and argued that the amount claimed was excessive.

37. Regard being had to the circumstances of the case and to the documents submitted by the applicant, the Court considers it reasonable to award the applicant the entire amount claimed for costs and expenses.

C. Default interest

38. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine the admissibility or the merits of the complaints under Article 13 and under Article 1 of Protocol No. 1 to the Convention;

4. *Holds*,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts**,** to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President