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La CEDU su indicazione di sieropositività in certificati e violazione della privacy
(CEDU, sez. II, sent. 26 maggio 2020, ric. n. 1122/12)

La Corte Edu si pronuncia sul caso di un cittadino moldavo, il quale lamentava la divulgazione del suo stato di sieropositività in un certificato che lo esonerava dal servizio militare. In particolare, il ricorrente si doleva di aver dovuto mostrare il certificato al momento del rinnovo dei suoi documenti di identità nel 2011 ed in alcune altre situazioni, come, ad esempio, in tutti i casi in cui aveva presentato domande per un nuovo lavoro.
I Giudici di Strasburgo hanno ritenuto, in particolare, che il governo moldavo non avesse specificato quale "legittimo scopo" dell'articolo 8 della Convenzione fosse stato perseguito rivelando la malattia del ricorrente, né avesse spiegato perché fosse stato necessario includere informazioni sensibili in un certificato che avrebbe potuto essere richiesto in una molteplicità di situazioni, per le quali la condizione medica del ricorrente non avrebbe avuto alcuna apparente rilevanza.
Pertanto, all'unanimità, la Corte ha dichiarato un'interferenza così grave con i diritti del ricorrente del tutto sproporzionata.

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

SECOND SECTION

CASE OF P.T. v. THE REPUBLIC OF MOLDOVA
(*Application no. 1122/12*)

JUDGMENT
STRASBOURG
26 May 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of P.T. v. the Republic of Moldova,
The European Court of Human Rights (Second Section), sitting as a Chamber composed of:
Robert Spano, *President*,

Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Arnfinn Bårdsen,
Darian Pavli,
Peeter Roosma, *judges*,
and Stanley Naismith, *Section Registrar*,
Having regard to:
the application 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 P.T. ("the applicant"), on 2 December 2011;
the decision to give notice to the Moldovan Government ("the Government") of the complaint concerning the disclosure of confidential medical information;
the decision not to have the applicant's name disclosed (Rules 33 and 47 § 4 of the Rules of Court);
the parties' observations;
Having deliberated in private on 28 April 2020,
Delivers the following judgment, which was adopted on that date:

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Art 8 • Respect for private life • Unnecessary disclosure of sensitive medical data in certificate to be produced in various situations • Disproportionate interference pursuing no legitimate aim

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INTRODUCTION

1. The present case concerns the disclosure of confidential medical information about the applicant through the inclusion of such information in a certificate which the applicant has to produce in a variety of situations.

THE FACTS

2. The applicant was born in 1978 and lives in Sângera. He was represented by Mr A. Lungu, a lawyer practising in Durleşti.
3. The Government were represented by their Agent, Mr O. Rotari.
4. The facts of the case, as submitted by the parties, may be summarised as follows.
5. The applicant is HIV positive. In 2011 he underwent a medical examination at the Chişinău Military Centre in order to obtain a military service record book. He informed the doctors of his illness and they confirmed it. On 11 July 2011 the Military Centre issued him with a certificate in place of the military service record book ("the exemption certificate"), according to which he was exempted from military service under Section 5 of the Medical Standards (Baremul Medical) provided for in Defence Ministry order no. 177 of 2003 (see paragraph 10 below). The certificate was

issued on the basis of the model for such certificates, adopted by Government decision no. 864 of 17 August 2005 (see paragraph 11 below).

6. When obtaining his national identity card, which under domestic law is mandatory for everyone (see paragraph 8 below), the applicant had to produce his military service record book or the exemption certificate. He complied with this obligation when he renewed his identity card in August 2011.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

7. Under section 4(c) of the Law on administrative proceedings (no. 793-XIV of 10 February 2000), in force at the relevant time, Government decisions of a normative character were exempt from judicial supervision.

8. Under section 7 of the Law on identity papers in the national passport system (no. 273-XIII of 9 November 1994), citizens of the Republic of Moldova residing in the country must have an identity card from the age of 16.

9. Under section 44(5) of the Law on preparing citizens for the defence of the Motherland (no. 1245-XV of 18 July 2002), as in force at the time of the events, the competent authority could issue passports and record a change of residence for recruits or reservists only after the latter had been registered with the military or officially exempted from such registration.

10. Section 5 of the Medical Standards (Baremul Medical) provided for in Defence Ministry order no. 177 of 2003, as published in the Official Gazette and as in force at the time of the events, read as follows:

"In the case of immunodeficiency disorders with a congenital or acquired character, accompanied by pathological changes in the haematopoietic system or other organs, the fitness for military service and military specialisation shall be determined depending on the degree to which the functioning of the organ or organ system is affected, in accordance with the relevant paragraphs of the Medical Standards".

11. Under Annex 8 to the Government decision no. 864 of 17 August 2005 as in force at the relevant time, exemption certificates were to be issued in accordance with the model provided. In particular, they had to indicate the reason for the exemption from military service as follows:
"Ground: Section ___ of the Medical Standards (order of the Defence Ministry no. ____ of ____)", where the issuing authority would fill in the blank spaces with the relevant information.

12. The applicant referred to the case of B., who was also HIV positive and who had asked the courts to order the competent authorities to issue him with an exemption certificate without indicating the specific section of the Medical Standards (Section 5), so as to avoid disclosing his illness to third parties. By a final judgment of 15 April 2010 the Supreme Court of Justice rejected that request. The court found that the Military Centre had acted lawfully, having followed the model for exemption certificates as set out in Government decision no. 864 of 17 August 2005. B.'s certificate did not expressly indicate the exact type of illness from which he was suffering and Section 5 of the Medical Standards covered several types of illnesses; hence, the certificate did not identify the exact type of

illness in B.'s case. Moreover, the certificate was to be submitted only to a limited number of State authorities. Accordingly, no disclosure of confidential information had taken place.
In subsequent proceedings B. lodged a complaint against a public medical institution which provided information to the Chișinău Military Centre about young men registered with that institution as having certain types of illnesses. His complaints were rejected by the Chișinău Court of Appeal on 7 February 2012 and by the Supreme Court of Justice on 21 June 2012. The courts noted, inter alia, that the Supreme Court of Justice had already established in its decision of 15 April 2010 that indicating the specific section of the Medical Standards in the exemption certificate did not amount to disclosing confidential medical information.
13. Article 38 of the Code of Constitutional Jurisdiction (law no. 502-XIII, in force since 28 September 1995), exhaustively lists the circle of persons and institutions which may bring a case before the Constitutional Court. Individual litigants do not have that power.
In its judgment no. 13 of 6 November 2012 the Moldovan Constitutional Court, at the request of the Ombudsman, declared unconstitutional the part of the Government decision no. 864 of 17 August 2005 requiring the specific section of the Medical Standards to be indicated in the exemption certificate. The court noted, in particular, that the medical information concerning the illness which had served as the ground for the exemption from military service was given in coded form in the exemption certificate by means of reference to sections of the Medical Standards, so as to avoid divulging such information to third parties. However, since the Medical Standards as well as the relevant Defence Ministry order had been published in the Official Gazette and were identified by date and number in the exemption certificate, the public could have access to this information and thus the coding did not ensure its confidentiality. At the same time, the legislation made it a requirement to produce military registration documents when applying for identity documents or signing a work contract and in other cases provided for by law, including to private companies which so requested. The court found that this constituted a disproportionate interference with the right to protection of private life.
Following this judgment of the Constitutional Court, the Government amended its decision no. 864 mentioned above and excluded the requirement of indicating the ground for the exemption from military service (Government decision no. 135 of 22 February 2013).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

14. The applicant complained about the disclosure of his personal medical data in an official document which he had to present to various authorities. He relied on Article 8 of the Convention, which 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. Submissions by the parties

15. The Government argued that the applicant had failed to exhaust available domestic remedies since he had not initiated any kind of proceedings in the domestic courts. They referred to the case of Saghinadze and Others v. Georgia (no. 18768/05, §§ 80-84, 27 May 2010), in which only the first of the six applicants, members of the same family, had exhausted domestic remedies and in which the Court had declared the complaints lodged by the five other applicants inadmissible for that reason.
16. The Government argued that, as in Saghinadze, the applicant's situation was not identical to that in the case of B. (see paragraph 12 above) such as to exempt him from exhausting domestic remedies. In particular, unlike in the case of B., there had been no disclosure of confidential information in the present case. The outcome of a single case referred to by the applicant was insufficient to establish that a remedy was ineffective, given that no one could know what the outcome of the case would have been had the applicant raised his complaints before the domestic courts.
17. The applicant submitted that while his reference to B.'s case had been dismissed by the Government as being a lone example, the Government had failed to adduce any example of a case in which the courts had decided differently from that case in a similar situation. There was no material difference between his situation and that of B.; in particular, there had been a disclosure of confidential information to third parties in the present case when his exemption certificate had had to be submitted to the authorities in order to renew his national identity card. More importantly, any differences between the two cases were not important given the type of reasoning of the Supreme Court of Justice in its judgment in B.'s case. Lastly, he argued that since B.'s full name had been mentioned in the judgment of the Supreme Court of Justice despite a request to grant him anonymity, the applicant was at risk of the same further disclosure of very sensitive medical information. He was therefore dissuaded from lodging a court action as this could result in the very type of publicity which he sought to avoid when asking for a change in his exemption certificate.

B. Admissibility

18. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after the exhaustion of those domestic remedies that relate to the breaches alleged and are also available and sufficient. The Court also reiterates that it is incumbent on the Government pleading non-exhaustion to satisfy it that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, in particular, Selmouni v. France [GC], no. 25803/94, § 76, ECHR 1999-V; Sejdovic v. Italy [GC], no. 56581/00, § 46, ECHR 2006-II; and Gherghina v. Romania [GC] (dec.), no. 42219/07, § 85, 9 July 2015). Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or

her from the requirement (see Akdivar and Others v. Turkey, 16 September 1996, § 68, Reports of Judgments and Decisions 1996-IV; Prencipe v. Monaco, no. 43376/06, § 93, 16 July 2009; and Molla Salli v. Greece [GC], no. 20452/14, § 89, 19 December 2018).

19. In the present case the Court notes that it was apparently open to the applicant to complain about the content of the exemption certificate. In the case of B., referred to by the applicant (see paragraph 12 above), the domestic courts had accepted for examination a complaint that was very similar to that of the applicant. It follows that there was a remedy in the domestic legal system which was available in theory and in practice.

20. The Court must next examine whether that remedy was also effective in the applicant's case. The applicant argued that the remedy was ineffective in that there was no reason to believe that the Supreme Court of Justice would have reached a different conclusion from that adopted in B.'s case. In this regard, the parties disagreed as to whether the present case differed sufficiently from that of B. so as to distinguish it, notably as to whether there had been a disclosure of confidential medical information in the applicant's case. The Court considers that there was no material difference in this regard between the present case and that of B.: a disclosure of confidential information also occurred in the applicant's case in August 2011, when he had to submit his exemption certificate to non-medical authorities in order to renew his identity card (see paragraph 6 above).

21. What is more important in the present case is that the content of exemption certificates was not left to the discretion of the Military Centres, but was expressly set out in Government decision no. 864 of 17 August 2005 (see paragraph 11 above). At the same time, under the Law on administrative proceedings, as in force at the time of the events, Government decisions of a normative character were exempt from judicial supervision (see paragraph 7 above). It follows that the courts could not verify whether Government decision no. 864 establishing the content of exemption certificates was itself in breach of the applicant's rights.

22. The Court notes that the applicant wanted a change in the content of his exemption certificate. However, that content was expressly dictated by Government decision no. 864 which remained in force throughout the relevant period and which the courts could not review, but had to apply. Accordingly, any court action aimed at changing the contents of an exemption certificate did not have any chances of success, given the mandatory nature of the relevant Government decision. B.'s two court actions mentioned above only confirm this. In such circumstances, the Court concludes that the remedy referred to by the Government was not effective in practice (see, mutatis mutandis, Ciubuc and Others v. Moldova (dec.), no. 32816/07, § 26, 10 January 2012, and Nikolyan v. Armenia, no. 74438/14, § 126, 3 October 2019). The Government's objection must therefore be rejected.

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

C. Merits

24. The Court notes that the Government did not make any submissions in respect of the merits of the case.

25. It notes that in 2012 the Moldovan Constitutional Court declared unconstitutional the part of the Government decision providing for reference to be made to the specific section of the Medical

Standards which had served as the ground for issuing an exemption certificate (see paragraph 13 above). In doing so that court found that the manner in which the exemption certificate was worded, in conjunction with the other publicly available information (the relevant Government decision and the Medical Standards), allowed third parties, including potential employers such as private companies, to establish specifically the type of a person's illness. The court also found that the resulting disclosure of confidential medical information amounted to a disproportionate interference with the right to protection of private life.

26. The Court recalls that systematic storage and other use of information relating to an individual's private life by public authorities entails important implications for the interests protected by Article 8 of the Convention and thus amounts to interference with the relevant rights (see, in particular, Rotaru v. Romania [GC], no. 28341/95, § 46, ECHR 2000-V; and S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, § 67, ECHR 2008). This is all the more true when the processing affects highly intimate and sensitive categories of information, notably the information relating to physical or mental health of an identifiable individual (see, in particular, Z. v. Finland, 25 February 1997, § 95, Reports of Judgments and Decisions 1997-I; Y.Y. v. Russia, no. 40378/06, § 38, 23 February 2016 and Surikov v. Ukraine, no. 42788/06, § 70, 26 January 2017).

27. In addition to being lawful, the interference with the right of protection of personal data must also pursue a legitimate aim and be "necessary in a democratic society". In determining whether the impugned measures were "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and the measures were proportionate to the legitimate aims pursued (see, for example, Peck v. the United Kingdom, no. 44647/98, § 76, ECHR 2003-I). In this latter respect the Court has noted that, regard being had to the fundamental importance of data protection for effective exercise of one's right to respect for private life, the margin of appreciation afforded to the member States in designing their respective legislative and administrative frameworks in this sphere is rather limited (see, in particular, Peck, cited above, §§ 77-78; and S. and Marper, cited above, §§ 102-103, ECHR 2008; and Surikov, cited above, § 73).

28. Like the Constitutional Court (see paragraph 13 above), the Court finds that the inclusion of medical data in a certificate which was to be presented to third parties constituted an interference with the applicant's rights protected under Article 8 of the Convention. The interference was in accordance with the domestic law at the time of lodging the present application, namely Government decision no. 864 (see paragraph 11 above).

29. However, neither the Government in their submissions nor the authorities in their decisions referred to any specific legitimate aim of the interference with the applicant's rights. Moreover, the parties did not make any submissions concerning the legislative history of the relevant Government decision so as to verify whether a legitimate aim could be discovered there. The Court will not identify such an aim in the authorities' place. In fact, it can hardly see what legitimate aim may have been pursued by revealing the applicant's illness to third persons in various proceedings which are unconnected to any health risks the applicant's illness may possibly entail. The policy does not appear to have a rational basis or connection to any of the legitimate aims foreseen in Article 8 § 2 of the Convention.

30. The above is sufficient for the Court to find a violation of Article 8 of the Convention. However, it considers that the interference in the present case raises such a serious issue of proportionality to any possible legitimate aim that it will also examine this aspect (see, for instance, Baka v. Hungary [GC], no. 20261/12, § 157, 23 June 2016, and Mozer v. the Republic of Moldova and Russia [GC], no. 11138/10, §§ 194-196, 23 February 2016).
31. The Court finds that the manner in which personal medical data in an exemption certificate was protected from unnecessary disclosure was deficient. In particular, it allowed third parties to find out the type of illness which had served as a basis for exempting the applicant from military service, even if they had no ostensible interest in having access to that information. In this regard, the finding of the Supreme Court of Justice in B.'s case (see paragraph 12 above) that section 5 of the Medical Standards provided for a number of various illnesses and not only HIV does not change the effect on the applicant. That section concerns various serious illnesses (see paragraph 10 above), which constitute sensitive medical data the disclosure of which seriously affects a person's rights under Article 8.
32. The Government did not submit any explanation of the need to include such a degree of sensitive medical details in a certificate which could be requested in a variety of situations where the applicant's medical conditions was of no apparent relevance, such as when applying for employment (see paragraph 13 above). Accordingly, the interference with the applicant's right was disproportionate.
33. There has therefore been a breach of Article 8 of the Convention in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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. Non-pecuniary damage

35. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage. He submitted that HIV-positive persons were amongst the most discriminated against categories of persons in Moldova. Disclosing to third parties his illness and giving up various rights and opportunities in order to avoid such disclosure had also adversely affected him. The applicant asked for any award made to be transferred directly to his lawyer's bank account since he had had to travel abroad and could not collect any award.
36. The Government submitted that since the application was inadmissible for failure to exhaust domestic remedies, no compensation was payable.
37. Having regard to the violation found above and its gravity, the Court considers that an award for non-pecuniary damage is justified in this case. Making its assessment on an equitable basis, the Court accepts in full the applicant's claim. It thus awards him EUR 4,000 plus any tax that may be chargeable, to be transferred directly to his lawyer's bank account.

B. Costs and expenses

38. The applicant also claimed EUR 1,960 for the costs and expenses incurred before the Court. He relied on an itemised list of the hours that his lawyer had spent working on the case.
39. The Government considered that in the absence of a violation of any Convention right no compensation for costs and expenses was payable.
40. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering costs under all heads, plus any tax that may be chargeable to the applicant, to be transferred directly to his lawyer's bank account.

C. Default interest

41. 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 application admissible;
2. Holds that there has been a violation of Article 8 of the Convention;
3. 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 Moldovan lei at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand 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;

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

Done in English, and notified in writing on 26 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President