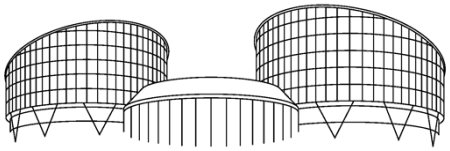

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF CAVCA v. THE REPUBLIC OF MOLDOVA

(Application no. 21766/22)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Disciplinary proceedings against a public official resulting in his dismissal after being allegedly incited by an undercover State agent to accept a bribe as part of a professional integrity test • Art 6 not applicable under its criminal limb but under its civil limb • Fair trial guarantees developed in the Court's case-law in respect of entrapment in the context of criminal proceedings relevant to impugned civil proceedings • Subjecting a person to a professional integrity test not in itself entrapment nor incompatible with Art 6 § 1 requirements • Need for strong procedural guarantees for the planning, execution and evaluation of such a test • Flagrant procedural deficiencies • Domestic courts' failure to examine applicant's arguable claim of entrapment effectively and to observe the principles of equality of arms and adversarial proceedings

Prepared by the Registry. Does not bind the Court.

STRASBOURG

9 January 2025

FINAL

09/04/2025

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

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

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

Mattias Guyomar*, President*,
María Elósegui,
Stéphanie Mourou-Vikström,
Gilberto Felici,
Andreas Zünd,
Diana Sârcu,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 21766/22) 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 Ivan Cavca ("the applicant"), on 18 April 2022;

the decision to give notice to the Moldovan Government ("the Government") of the complaints under Article 6 § 1 of the Convention concerning the alleged incitement to commit acts of misconduct and the failure to observe the principle of adversarial proceedings, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 3 December 2024,

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

INTRODUCTION

1. The case concerns the applicant's alleged incitement to commit a disciplinary offence and insufficient procedural guarantees in that regard (Article 6 § 1 of the Convention).

THE FACTS

2. The applicant was born in 1988 and lives in Cozești. He was represented by Mr I. Cobîșenco, a lawyer practising in Chișinău.

3. The Government were represented by their Agent, Mr D. Obadă.

4. The facts of the case may be summarised as follows.

5. The applicant was the head of a territorial subdivision of the Environmental Protection Inspectorate (EPI). Before the relevant events, he had never been sanctioned for any disciplinary offence. On 29 February 2019 the National Anticorruption Centre (NAC) initiated a procedure to test the professional integrity of EPI employees, in accordance with Law no. 325 on the assessment of institutional integrity (see paragraph 18 below). It identified corruption risks within the EPI on the basis of the information available, such

as previous reports, a decision by the Court of Auditors, reports by non-governmental organisations, statistics and specific confirmed cases of corruption amongst EPI employees. It also described a plan to randomly test public officials employed by the EPI, evaluate the results and formulate proposals to reduce such risks following the testing. As part of the procedure in the present case, a judge from the Chișinău Court (Centru Office) reviewed whether it was necessary to carry out such testing and the manner in which it would be carried out, and then authorised it by a decision of 5 March 2019.

6. On 22 May 2019 someone called the applicant's office, complaining about the illegal felling of trees. At the location indicated by the caller, the applicant discovered that S. had cut down a tree with a chainsaw. In fact, S. was acting undercover to test the applicant's professional integrity. He suggested to the applicant that the issue could be resolved without there being an official procedure, and offered the applicant various items as a bribe. The applicant rejected that suggestion and drew up a record of the administrative offence committed by S., imposing a fine on him. S. then returned to the applicant's office to show proof that he had paid the fine. The applicant informed S. that he also had to confiscate the chainsaw used to commit the administrative offence. S. replied that this was not a problem since he had another tool like it. According to the Government, the applicant gestured to S. not to speak so that they would not be overheard, then they went outside and the applicant told him that he had had to draw up the record because there had been a complaint and a local forester had been present. He promised to help S. in the future if S. warned him ahead of time. S. asked whether the applicant needed the chainsaw (apparently offering it as a bribe), and the applicant replied that he did and showed S. a car where he could leave it. S. secretly recorded the above events.

7. In a decision dated 28 January 2020 the judge who had authorised the testing examined all the material relating to a number of public officials who had been tested during the relevant period, including audiovisual recordings. He confirmed the facts mentioned above in respect of the applicant. The judge established that several public officials, including the applicant, had failed the professional integrity test. He also stated "... the NAC has proved the existence of indications that the acts described above [the breaches of rules of professional conduct] would have been committed by the public officials even in the absence of any involvement by the State authorities". He did not give any details. The applicant and the other officials tested had not been summoned to that hearing and were not given the opportunity to make any submissions in those proceedings. Only the institution concerned by the professional integrity testing (in this case, the EPI) could appeal against the decision.

8. In the light of the decision of 28 January 2020, the NAC asked the EPI to examine the material in the case and inform it of any measures taken. On 8 May 2020, having heard the applicant, the EPI disciplinary commission

proposed that he be dismissed for failing the integrity test. It noted, *inter alia*, that the applicant had breached "legislative instruments for internal use", namely several provisions of the Law on public officials. On 19 May 2020 the EPI decided to dismiss the applicant on that basis. The dismissal decision also noted that the applicant had taken steps "to satisfy requests outside the legal framework – actions which affect[ed] the prestige of the public authority for which he work[ed] – [and that there had been a] breach of the rules of conduct of a public official [and a] breach of provisions concerning the rights and duties established by law ..."

9. On 18 June 2020 the applicant challenged that decision in court. He argued, *inter alia*, that he had been incited to commit the disciplinary offence and that the sanction imposed had been disproportionate.

10. On 3 November 2020 the Chișinău Court (Râșcani Office) dismissed the court action as ill-founded. It found that the applicant's propensity to commit such offences was evident from the video-recordings of the events of 22 May 2019 which had been examined at the hearing, and from the fact that he had voluntarily reimbursed the State for the cost of the chainsaw in the meantime. Moreover, the results of the professional integrity testing had been confirmed by a court in its decision of 28 January 2020. The court noted, *inter alia*, a statement made by the NCA's representative. According to that statement, the applicant had said several times that he had had to draw up the record of the administrative offence because a complaint had already been made and he had not been alone; he had also stated several times that the chainsaw had to be confiscated, and S. had responded by saying that this was not a problem since he had another tool like it; and "on the basis of this previous discussion [about the chainsaw], when they [had gone] outside, [S. had] asked once more if the applicant needed such a tool and [had] not even [been] able to finish his sentence because the applicant [had] told him that he needed it". The court did not comment on the applicant's argument about entrapment.

11. The applicant appealed and stated, *inter alia*, that the video-recording of the relevant events showed S. offering him brandy, fish, money, and finally the chainsaw. This had not been passive recording of an ongoing offence, but active incitement to accept a bribe. Moreover, under section 28 of the Law on the assessment of institutional integrity (see paragraph 18 below), the EPI had had an obligation to inform him that his professional integrity might be tested, and he had had to countersign such a notification. This had not happened in his case. He added that under domestic law, the employer had to pay him the salary he had not received for the entire period after his wrongful dismissal and compensate him for the non-pecuniary damage caused, which he assessed as equating to two average monthly salaries.

12. On 12 May 2021 the Chișinău Court of Appeal upheld the lower court's decision, essentially for the same reasons. It did not comment on the

applicant's argument about entrapment or the failure to inform him that his professional integrity might be tested.

13. The applicant appealed, repeating his arguments, including those about entrapment and the failure to inform him that his professional integrity could be tested, as required by law. In relation to this latter argument, he relied on the case of F., which had previously been decided by the Supreme Court of Justice (see paragraph 21 below).

14. On 27 October 2021 the Supreme Court of Justice declared the appeal inadmissible. It did not comment on the applicant's argument about entrapment or the failure to inform him that his professional integrity might be tested.

15. On 15 February 2022 the applicant asked for the proceedings in his case to be reopened, referring to a decision by the Constitutional Court to annul parts of section 17 of Law no. 325 (see paragraph 20 below). However, by decisions of 30 May and 5 October 2022, the Chișinău Court of Appeal and the Supreme Court of Justice rejected that request.

RELEVANT MATERIAL

I. RELEVANT DOMESTIC LAW AND PRACTICE

16. Under Article 343^8 of the Code of Civil Procedure, as it was in force at the relevant time, the decision confirming the result of the professional integrity testing could be appealed by the agency concerned by the evaluation.

17. Under section 22 of the Law on public functions and the status of public officials (no. 158-XVI of 23 December 2008), a public official must, *inter alia*, observe rules of professional conduct established by law and comply with the provisions of section 7(2) of the Law on the assessment of institutional integrity (no. 325 of 23 December 2013).

Under section 58 of the Law on public functions and the status of public officials, the list of applicable disciplinary sanctions is limited to warnings, reprimands, severe reprimands, temporary suspension of the right to be promoted, demotion and dismissal.

18. Under section 4 of the Law on the assessment of institutional integrity (no. 325 of 23 December 2013 – "Law no. 325"), a test of a person's professional integrity is the creation and application by the tester of virtual, simulated situations similar to those in the work environment, carried out in the context of covert operations and influenced by the behaviour of the public official being tested, with a view to passively monitoring and recording the official's reactions and conduct, thus determining the degree to which the climate of professional integrity is affected and the risk of corruption within the public entity where professional integrity is being evaluated.

Under section 7 of the same Law, public officials have the right, *inter alia*, to be informed of the specific requirements of professional integrity within

their public entity, as well as the applicable disciplinary sanctions for breaching those requirements. They also have a duty not to allow corrupt behaviour and to immediately report such behaviour and any attempt to involve them in such activity, to know and observe the duties resulting from sectorial and national anti-corruption policies, and to comply with the specific requirements of professional integrity of public officials in the relevant public agency of which they have been informed.

Under section 8 of the same Law, when hiring new public officials or within ten days of the entry into force of the Law for existing public officials, public authorities and local administrations have an obligation to inform those officials that their professional integrity could be tested.

Under section 11 of the same Law, if a person fails a professional integrity test, only disciplinary sanctions can be applied and the evidence obtained during such a test cannot be used in a criminal trial. The use of such evidence in civil proceedings is allowed if it is relevant, admissible and truthful, and if the public interest is preserved and human rights and freedoms are protected.

Under section 13 of the same Law, the process of testing professional integrity starts with the identification of a risk of corruption within specific public authorities, on the basis of information already made available by various persons, the media and analytical documents. The testing itself may follow (subject to authorisation by a judge under section 14 of the same Law), as may an analysis of the risk and any proposals to eliminate that risk.

Under section 17 of the same Law, as in force before the Constitutional Court's decision of 7 December 2021 (see paragraph 20 below), a judge who had previously authorised professional integrity testing would examine the result of the test and decide whether the person in question had passed or failed the test, or whether the result was inconclusive. In doing so, the judge would verify whether the testing had been authorised and review any evidence in the file relating to the test, including audiovisual recordings. At the request of the public agency concerned by the evaluation, the judge could issue a decision dealing with any outstanding issue.

Under section 21 of the same Law, disciplinary sanctions which are applicable as a result of a person failing a professional integrity test, including dismissal, shall be applied in accordance with the legislation regulating the activity of the relevant public agency. The NAC and the Security and Information Service (SIS) are both required to maintain professional integrity records of public officials. Employers may access those records up to five years after the events in question, in line with the conditions established in the relevant Government Regulation (see paragraph 19 below).

Under section 28 of Law no. 325, within ten days of its publication, the public authorities concerned by that Law had to inform the public officials they employed that their professional integrity might be tested, and the officials had to countersign that notification.

19. Under the Government Regulation concerning the maintaining and use of the professional integrity records of public officials (no. 767 of 19 September 2014), the aim of a record is to prevent public officials who have not shown professional integrity during a previous test from being hired to perform public functions. Future employers in the public sphere can request a certificate concerning the content of a candidate's personal professional integrity record. Information about a person failing a previous professional integrity test is stored in the record for five years if the person was found to be in breach of anticorruption rules, and one year if he or she failed to report corruption and related activities.

20. On 7 December 2021 the Constitutional Court issued decision no. 37, whereby it declared parts of section 17 of Law no. 325 (see paragraph 18 above) unconstitutional since it effectively prevented a public official from participating in the court proceedings to determine whether he or she had failed a professional integrity test and had thus committed a disciplinary offence, and from appealing against such a decision. It found that in any subsequent proceedings brought by a public official seeking to annul a sanction which had been applied, the courts would be bound by the previous determination made by another court concerning the results of the relevant professional integrity test, which had the power of *res judicata*. This irremediably affected the right to a fair trial. The court added that its decision affected only future cases; however, in order to make an immediate impact on the case which was the subject of the complaint before it, it decided that the complainant could appeal against the court decision confirming the results of his professional testing.

21. On 16 March 2016, in the case of F. (3ra-964/16), the Supreme Court of Justice annulled judgments by lower courts. It found that F., who had failed a professional integrity test, had not been informed that such tests could be carried out, as required by law. Accordingly, his dismissal had been unlawful; he was reinstated in his job.

II. RELEVANT INTERNATIONAL MATERIAL

22. The relevant provisions of the United Nations Convention against Corruption (2004), which the Republic of Moldova ratified on 1 October 2007, provide as follows:

Article 1. Statement of purpose

"The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property.

..."

Article 8. Codes of conduct for public officials

"...

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

...

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article."

The Technical Guide to the United Nations Convention against Corruption prepared by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Interregional Crime and Justice Research institute (UNICRI), in dealing with Article 50 of the United Nations Convention against Corruption, provides for the possibility to have recourse to undercover and sting operations, while warning about lawfulness issues in some countries, particularly in relation to concerns about entrapment.

23. Article 23 of the Council of Europe Criminal Law Convention on Corruption (European Treaty Series – No. 173, 27 January 1999), which the Republic of Moldova ratified on 14 January 2004, provides as follows:

Article 23 – Measures to facilitate the gathering of evidence and the confiscation of proceeds

"1 Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds, liable to measures set out in accordance with paragraph 3 of Article 19 of this Convention.

..."

The Explanatory Report to the above Convention provides, in respect of Article 23, as follows:

"114. This provision acknowledges the difficulties that exist to obtain evidence that may lead to the prosecution and punishment of persons having committed those corruption offences defined in accordance with the present Convention. Behind almost every corruption offence lies a pact of silence between the person who pays the bribe and the person who receives it. In normal circumstances none of them will have any interest in disclosing the existence or the modalities of the corrupt agreement concluded between them. In conformity with paragraph 1, States Parties are therefore required to adopt measures, which will facilitate the gathering of evidence in cases related to the

> commission of one of the offences defined in Articles 2-14. In view of the already mentioned difficulties to obtain evidence, this provision includes an obligation for the Parties to permit the use of 'special investigative techniques'. No list of these techniques is included but the drafters of the Convention were referring in particular to the use of under-cover agents, wire-tapping, bugging, interception of telecommunications, access to computer systems and so on. Reference to these special investigative techniques can also be found in previous instruments such as the United Nations Convention of 1988, the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, Article 4) or the Forty Recommendations adopted by the Financial Action Task Force (FATF). Most of these techniques are highly intrusive and may give rise to constitutional difficulties as regards their compatibility with fundamental rights and freedoms. Therefore, the Parties are free to decide that some of these techniques will not be admitted in their domestic legal system. Also the reference made by paragraph 1 to 'national law' should enable Parties to surround the use of these special investigative techniques with as many safeguards and guarantees as may be required by the imperative of protecting human rights and fundamental freedoms."

24. The Council of Europe Civil Law Convention on Corruption (European Treaty Series – No. 174), which the Republic of Moldova ratified on 14 January 2004, requires Contracting Parties to provide in their domestic law "for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage". Its implementation will be monitored by GRECO.

It provides in Article 11 (Acquisition of evidence) that:

> "Each Party shall provide in its internal law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption."

25. The Organisation for Economic Co-operation and Development manual on "Managing Conflict of Interest in the Public Sector" states that "the Integrity Test can be a powerful specialised corruption detection tool". The Organization for Security and Co-operation in Europe "Best practices in combating corruption" note that "Integrity testing has now emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean". Further, the World Bank "Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity" guidelines refer to integrity testing as "a powerful corruption detection tool".

26. In its *amicus curiae* brief for the Constitutional Court of the Republic of Moldova on certain provisions of the law on professional integrity testing (opinion no. 789 / 2014, CDL-AD(2014)039 of 15 December 2014), the Venice Commission noted, *inter alia*, that:

> "10. As corruption undermines the rule of law and good governance, poses significant risks to the protection of human rights, hinders economic development, endangers the stability of democratic institutions and the moral foundation of society, any efforts made by Moldova to fight this is to be encouraged and welcomed. However, it is also important that these efforts do not jeopardise the stability of democratic institutions nor weaken the independence and impartiality of the judiciary.

...

83. [The guiding principles which can be derived from the European Court of Human Rights' case law] seem to be violated by the professional integrity procedure set out in Law no. 325: Articles 4 and 10.2 are not sufficient for a reasonable grounds test or a comparable concept concerning the initiation of an individual integrity testing procedure. It is also highly questionable whether the (confidential) 'professional integrity testing plan' established by the NAC (or ISS) under Article 11.3 of Law no. 325 satisfies the minimum requirements for the formal authorisation of an undercover agent's activity.

84. Finally, Law no. 325's circular argumentation for a 'justified risk' (Article 4) leading towards the legal fiction of the professional integrity tester not committing a criminal offence (Article 9.5), cannot negate that – factually – the tester with a fake identity who approaches a judge for the first time with an apparent corruptive offer – and be it with a mental reservation as to the seriousness of the offer – commits a criminal offence and thus has to be qualified as an agent provocateur."

27. The relevant parts of the United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators (Vienna, 2004) read as follows:

CHAPTER 11. INTEGRITY TESTING

"...

So it is that integrity testing is now considered to be an effective instrument that embraces both the prevention and the prosecution of corruption. The objectives of integrity testing are to:

a) Determine whether or not a particular public civil servant or branch of government is likely to engage in corrupt practices.

b) Increase the actual and perceived risk to corrupt officials that they may be detected, thereby deterring corrupt behaviour and encouraging officials to report instances when they are offered bribes (many genuine offers of bribes will be taken for being integrity tests and be reported to protect the official's job); and to

c) Identify officials, such as police officers, who are working in areas exposed to corruption as being honest and trustworthy, and therefore likely to be suitable for promotion. (For this reason it is essential that any regime of integrity testing include random elements and not rest solely on suspicion; passing an integrity test should be recorded as a credit to an official's record, and not imply that there has been an allegation of corruption against the official that an integrity test has failed to confirm).

Integrity testing has been used effectively to 'test' whether public officials of all description resist offers of bribes and refrain from soliciting them. As such they are proving to be an extremely effective and cost-efficient deterrent to corruption.

...

C. FAIRNESS

In democratic societies, it is generally considered to be unacceptable for a government to engage in activities that encourage individuals to perpetrate crimes they might not otherwise commit. It is, however, usually quite acceptable for a government to observe whether or not someone is willing to commit a crime under ordinary, everyday circumstances. For that reason, integrity testing must be carried out with the strictest discipline. Integrity testing, like other forms of intrusive technique, is an 'aggressive'

> exercise of state power. To avoid the criticism of abuse of power, audio or video recordings of the actual event should be made to verify that the accused person was not acting other than of his or her own free will, and that government agents have not behaved unfairly or coercively. Such recordings also help to ensure that a government has sufficient evidence to pursue a successful prosecution.
>
> ...
>
> E. INTEGRITY TESTING AND CONSTITUTIONAL CONCERNS
>
> Although integrity tests can be extremely effective as an investigative tool as well as being an excellent deterrent, not all courts readily accept them as a valid method of collecting evidence. Notwithstanding, there are substantial reasons for its use. It is one of the most effective tools for identifying and eradicating corrupt practices in government services within a short period of time. Where corruption is rampant and levels of public trust are low, it is one of the few tools that can promise immediate results and help restore trust in public administration. It cannot be stressed enough that legal systems that provide for 'agent provocateur' scenarios should try to ensure that they are never designed to instigate conduct that makes criminals out of those who might otherwise have reacted honestly. It is therefore important to ensure that the degree of temptation is not extreme and unreasonable. ..."

28. The Venice Commission issued an interim opinion on the draft law on integrity checking in Ukraine (CDL-AD(2015)031), where it made an overview of available international texts dealing with the issue of integrity tests. It warned, *inter alia*, about the possibility that such testing could in certain circumstances amount to entrapment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (ALLEGED ENTRAPMENT AND ADVERSARIAL PROCEEDINGS)

29. The applicant complained that he had been entrapped by agents acting on behalf of the State, which had resulted in an unfair trial. Moreover, he could not address the court which had confirmed the results of his professional integrity testing in its decision of 28 January 2020. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

30. The Court must first determine whether Article 6 of the Convention is applicable to the present case under its criminal or civil limb.

1. Applicability of Article 6 § 1 of the Convention under its criminal limb

31. The Court reiterates that the assessment of the applicability of Article 6 under its criminal limb is based on three criteria, commonly known

as the "*Engel* criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring (see, for example, *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, § 75, 22 December 2020). In respect of the third criterion, the Court has also considered the nature of the penalty (see, for example, *Öztürk v. Germany*, 21 February 1984, § 50, Series A no. 3).

32. It is not disputed by the parties that the applicant was not convicted of any offence that is characterised under domestic law as "criminal"; rather, he was sanctioned for behaviour that belongs to the sphere of disciplinary law. However, the indications furnished by the domestic law of the respondent State have only a relative value (see, for instance, *Ziliberberg v. Moldova*, no. 61821/00, § 30, 1 February 2005).

33. It is therefore necessary to examine the sanctioned behaviour in the light of the second and third criteria mentioned above. In this regard, the Court reiterates that these criteria are alternative and not cumulative: for Article 6 to apply, it suffices that the offence in question should by its nature be criminal from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the criminal sphere (ibid., § 31).

34. As regards the nature of the applicant's sanctioned behaviour , the Court notes that he was accused of having breached several provisions of the Law on public office and public officials ("Law no. 158", 17 above) which the EPI disciplinary commission called legislative instruments for internal use (see paragraph 8 above). The Court notes that the relevant disciplinary regime aimed to ensure that public officials complied with the specific rules governing their professional conduct. Moreover, the above mentioned instruments were to be applied in accordance with the legislation regulating the activity of each specific public agency (see paragraph 18 above), thus limiting the reach of those rules even further and making it doubtful that they could be seen as rules of general application. While some aspects of the wrongdoing for which the applicant was disciplinarily sanctioned probably resembled constitutive elements of the criminal offence of corruption, if established outside the field of application of Law no. 325, it remains the fact that under the relevant legal regime what was sanctioned was the attitude shown by the person concerned during a test situation and not the commission of a specific act prohibited by law. Having regard to all these elements, the Court finds that the breach of the relevant rules in Law no. 158 was not criminal but disciplinary in nature (see *Müller-Hartburg v. Austria*, no. 47195/06, §§ 44-45, 19 February 2013).

35. Turning to the nature and degree of severity of the sanction which the applicant risked incurring, the Court reiterates that this criterion is to be

determined by reference to the maximum potential penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination, but cannot diminish the importance of what was initially at stake (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 120, ECHR 2003-X, with further references).

It is noted that under the domestic law 17 above), the sanctions applicable for a disciplinary offence ranged from warnings and reprimands to suspension of the right to be promoted and dismissal. These are typical disciplinary sanctions (see *Müller-Hartburg*, cited above, § 47). In particular, the applicant did not risk detention or a large fine, but was instead dismissed, which meant that for five years he had no right to be re-employed as a public official (see paragraph 19 above).

36. In view of the foregoing, the Court considers that the elements above cannot lead to a conclusion that the disciplinary proceedings against the applicant concerned the determination of a criminal charge within the meaning of Article 6 of the Convention (see *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, § 154, 28 January 2020, and *Xhoxhaj v. Albania*, no. 15227/19, §§ 240-246, 9 February 2021). Therefore, that provision is not applicable to the present case under its criminal limb.

2. Applicability of Article 6 § 1 of the Convention under its civil limb

37. The Court notes that the proceedings in the present case concerned a dispute in respect of the decision imposing a disciplinary sanction on the applicant. Regarding the existence of a "right", it observes that the proceedings in question were decisive for the applicant's rights in so far as they could have led to the setting aside of the disciplinary sanction imposed had his appeal been allowed. As to the "civil" nature of such a right, the Court notes that domestic law allows a public official against whom a disciplinary sanction has been applied to challenge it in court, and that the applicant availed himself of that right. Accordingly, Article 6 is applicable under its civil limb (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC] (nos. 55391/13 and 2 others, §§ 112 and 117-120, 6 November 2018).

3. Conclusion on admissibility

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

B. Merits

1. The parties' submissions

39. The applicant argued that he had been entrapped by State agents, which had rendered the subsequent court proceedings unfair.

40. The Government argued that the applicant had failed a professional integrity test by accepting a bribe in exchange for imposing a milder sanction on S. The legal requirements concerning the planning and carrying out of such tests had been observed. When viewing the material in the case in order to decide whether the applicant had passed the professional integrity test, the relevant court had also examined the actions of the undercover agent in question. In doing so, it had established that there were sufficient reasons to consider that the applicant would have committed the relevant disciplinary offence even without the tester's involvement.

The Government added that applicant had not opposed the bribery attempt, but had stalled the events by having long telephone conversations and stating that he would have been open to accepting the proposals by S., but had not been able to owing to the presence of a forester and the existence of a formal complaint. Moreover, he had initially announced that a larger fine would be imposed, but had then found a way to reduce it, thus coming to an illegal arrangement with the tester. When accepting the bribe in the form of the chainsaw, he had told S. that he could help him in the future if he was warned in advance. Moreover, by reimbursing the State for the cost of the chainsaw after the testing had been revealed, he had acknowledged having taken the bribe.

The relevant court had examined his complaint of entrapment and had concluded that there had been no incitement. The court had not found that argument decisive, as it had considered all the material in the case, including the video-recordings in the file. Moreover, the applicant had not raised the issue of entrapment before the EPI disciplinary commission.

2. The Court's assessment

(a) General considerations

41. The Court is aware of the difficulties inherent in the authorities' task of discovering and gathering evidence of corruption. Corruption most often goes unreported, since parties to such illicit deals profit from them. Accordingly, the authorities are increasingly required to make use of undercover agents, informers and covert practices. One such practice is professional integrity testing, which focuses not on gathering evidence for criminal investigations, but instead on determining the level of corruptibility in a specific group of persons. This has clear benefits for society: the authorities can form a better view of the risk of corruption and plan activities aimed at reducing that risk, while the possibility that any offer of a bribe could potentially be part of an integrity test clearly has a preventive effect.

42. Furthermore, corruption has become a major problem in many countries, as attested, for example, by the text of the Technical Guide to the United Nations Convention against Corruption (see paragraph 22 above), which provides for the possibility to have recourse to undercover and sting

operations, as does the OECD toolkit (see paragraph 25 above). The Council of Europe's Criminal Law Convention (see paragraph 23 above) authorises the use of special investigative techniques, such as undercover agents, that may be necessary for gathering evidence in this area, provided that such use is compatible with their international legal obligations, notably as regards protection of human rights and fundamental freedoms. In the civil context, albeit with the aim to secure the victim's right to be compensated rather than with a view to sanctioning the public official concerned, the Civil Law Convention on Corruption requires member States to provide in their internal law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption (see paragraph 24 above).

43. That being so, the use of special investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial. However, on account of the risk of incitement entailed by such techniques, their use must be kept within clear limits (see, *mutatis mutandis*, *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 51 and 55, ECHR 2008).

(b) Relevance of criminal fair trial guarantees to civil proceedings

44. The Court considers that, in order to define its approach to the present case, it must first deal with the question whether and, if so, to what extent, the guarantees of a fair trial concerning the use of *agents provocateurs*, which are applicable to criminal proceedings, may be relevant to civil proceedings resulting in a dismissal from office in the context of testing public officials' professional integrity, allegedly undertaken through a provocation to commit acts of corruption.

45. The Court has already had the opportunity to observe that "while the 'fair trial' guarantees are not necessarily the same in criminal-law and civil-law proceedings, the States having greater latitude when dealing with civil cases, it may nevertheless draw inspiration, when examining the fairness of civil-law proceedings, from the principles developed under the criminal limb of Article 6" (see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 152, 17 October 2019).

46. The Court observes that the proceedings against the applicant involved an assessment of his attitude and behaviour during an artificially created situation, albeit designed to reproduce events that might typically occur in his professional activities. It is evident that, in order to ensure the fairness of the proceedings, such an assessment had to include the question whether the observed behaviour betrayed an attitude incompatible with professional requirements or was unduly induced and therefore an unreliable basis for finding a disciplinary fault. In such circumstances, in which the applicant was charged with a disciplinary offence, while it appears clear that the elements to be proved and the standard of proof required in proceedings under Law no. 325 were not the same as in criminal proceedings, the Court considers that in the present case there are sufficient elements in favour of

drawing inspiration, with appropriate adjustments (see paragraph 57 below), from the guarantees of a fair trial developed in its case-law under Article 6 § 1 in respect of entrapment in the context of criminal proceedings.

(c) General principles concerning guarantees against entrapment in criminal proceedings

47. The Court has developed a set of principles applicable to entrapment in the context of criminal proceedings, which includes a substantive and procedural test of incitement.

(i) Substantive test of incitement

48. When faced with a plea of police incitement or entrapment, the Court will attempt to establish, as a first step, whether there has been such incitement or entrapment (substantive test of incitement; see *Bannikova v. Russia*, no. 18757/06, § 37, 4 November 2010, and *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, § 111, 15 October 2020). If there has been such incitement or entrapment, the subsequent use of evidence obtained thereby in the criminal proceedings against the person concerned raises an issue under Article 6 § 1 (see, among other authorities, *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 35-36, *Reports of Judgments and Decisions* 1998-IV, and *Matanović v. Croatia*, no. 2742/12, § 145, 4 April 2017).

49. Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Ramanauskas*, cited above, § 55).

50. In deciding whether the investigation was "essentially passive", in criminal cases the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were objective suspicions that the applicant in question had been involved in criminal activity or was predisposed to commit a criminal offence (see *Akbay and Others*, cited above, § 114). When drawing the line between legitimate infiltration by the police and incitement to commit an offence, the Court will further examine the question of whether the applicant was subjected to pressure to commit the offence (ibid., § 116).

51. When applying the above criteria, the Court places the burden of proof on the authorities. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (see *Bannikova*, cited above, § 48). In that context, the

Court has emphasised the need for a clear and foreseeable procedure for authorising investigative measures and properly supervising them. It has considered judicial supervision the most appropriate means in cases of covert operations (see *Bannikova*, cited above, §§ 49-50, and *Matanović*, cited above, § 124; compare *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 48, ECHR 2004-X).

(ii) Procedural test of incitement

52. In order to determine whether a trial was fair, the Court has further clarified that it will be necessary to proceed, as a second step, with a procedural test of incitement not only if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, a lack of disclosure or contradictions in the parties' interpretations of events, but also if it finds, on the basis of the substantive test, that an applicant was subjected to incitement (see *Matanović*, cited above, § 134; *Ramanauskas v. Lithuania (no. 2)*, no. 55146/14, § 62, 20 February 2018; and *Akbay and Others*, cited above, § 120).

53. The Court applies this procedural test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts and whether, in the case of a finding that there has been incitement, or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention (see *Ramanauskas*, cited above, § 70; *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, §§ 87-88, 16 July 2015; and *Matanović*, cited above, § 135).

54. The Court has reiterated in its well-established case-law that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see, *inter alia*, *Edwards and Lewis*, cited above, §§ 46 and 48; *Ramanauskas*, cited above, § 54; *Bannikova*, cited above, § 34; *Furcht v. Germany*, no. 54648/09, §§ 47 and 64, 23 October 2014; and *Akbay and Others*, cited above, § 123). For a trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see *Lagutin and Others v. Russia*, nos. 6228/09 and 4 others, § 117, 24 April 2014).

(d) The Court's approach in the present case

55. The Court considers that while, in certain circumstances, it can draw on the principles developed in its case-law concerning guarantees against entrapment in criminal proceedings when dealing with disciplinary proceedings following integrity testing, it must take into account the specificity of such testing. In particular, because of the difficulty in

discovering and proving specific acts of corruption (see paragraphs 41 and 42 above), the authorities can resort to testing whether particular groups of persons have a tendency to respect or breach rules of professional conduct. The nature of such testing involves the authorities artificially creating situations which are similar to those that might occur in the context of the professional activity of the persons being tested, in order to see how they react. Therefore, also in view of the lack of criminal liability for acts committed as a result, such testing cannot be considered incitement to commit an offence.

56. The Court considers that subjecting a person to a professional integrity test, and thus artificially creating a situation in which the person's resolve to uphold rules of professional conduct is verified, does not in itself amount to entrapment and is not incompatible with the requirements of Article 6 § 1 of the Convention.

57. At the same time, the Court finds that the evidence of misconduct resulting from professional integrity testing can often be decisive for the outcome of disciplinary proceedings against the person tested. Therefore, it must satisfy itself that strong procedural guarantees apply to the planning, execution and evaluation of such testing. This must include the right of the person concerned to challenge the results of such testing in court and the domestic courts' obligation to properly deal with the arguments raised, including any plea of entrapment.

(e) Application of the above approach to the facts of the case

(i) Initial planning and execution of the test

58. In the present case, the law provided for a detailed procedure whereby a judge was to authorise professional integrity testing within a specific public agency after reviewing both the need for such testing and the specific manner in which it would be carried out (see paragraph 18 above). The Court is satisfied that these constituted sufficient guarantees at this initial stage, including judicial authorisation and subsequent supervision.

59. Prior to the integrity test being carried out in the applicant's case, the authorities had no objective suspicions that he had been involved in any prohibited activities or was predisposed to take part in such activities, which is an important element in determining whether a person was subject to entrapment in criminal proceedings (see *Ramanauskas*, cited above, § 56).

60. However, the purpose of professional integrity testing is not necessarily to verify already existing suspicions concerning an identified individual. The Court finds that where there is random testing of an entire group of persons, it is important that the authorities clearly identify and prove the existence of a risk of corrupt behaviour within that group (in this case, EPI employees). In this sense, the absence of prior knowledge of reprehensible conduct by an identified individual is of lesser importance in

the context of professional integrity testing than in criminal proceedings. In the applicant's case, the authorities clearly identified a risk of corruption within the EPI, as also confirmed by a judge (see paragraph 5 above).

61. As regards the execution stage of the testing procedure, the applicant's argument that he had been entrapped was based on his allegation that the State agent played an excessively active role (offering a bribe several times, despite the applicant refusing it and reiterating that offer even after paying the fine). According to the Government, it was not unreasonable for S. (the tester) to consider that he needed to reiterate the offer as another person had been present during the previous testing offer. The Government also pointed to the reported words of the applicant, who, when reacting rather favourably to the renewed offer, has stated that he could not do so previously because of the presence of another person and the fact that a formal complaint had been filed (see paragraphs 6 and 40 above). The Court considers that, having regard to the specific nature of the testing and the ensuing civil proceedings, for the purposes of this aspect of the analysis, it is sufficient to note that the applicant raised an arguable claim about entrapment, which the domestic courts had to respond to and to draw the relevant conclusions from such a finding. For its part, the Court considers that in the present case there is no need to decide on whether the applicant was indeed subjected to entrapment, because there were flagrant procedural deficiencies, as examined below.

(ii) Evaluation of the testing and procedural guarantees in general

62. Before the domestic courts, the applicant expressly raised the argument that he had been entrapped (see paragraphs 9 and 11 above). The Government argued that the courts had examined this issue and had found no evidence of entrapment. The Court notes that the only court that examined the problem of entrapment was the Chișinău Court (Centru District) (see paragraph 7 above). That court found that the applicant would have breached the rules of professional conduct even without the involvement of the agent. However, it did not explain how it had arrived at that conclusion.

63. Moreover, that court decided on the basis of the file and without hearing the applicant or considering his evidence or submissions, including his submissions on the subject of entrapment. The Court is unconvinced that issues such as whether the applicant had been entrapped, and if so what consequences such a finding entailed, could be decided properly without hearing him and the tester in adversarial proceedings. In addition, the applicant could not appeal against that decision, while the other party could not only appeal, but also ask for any additional matter to be examined by the court (section 17 of Law no. 325, see paragraph 18 above). The Government argued that the applicant could submit any arguments and evidence to the disciplinary commission and the courts when he challenged the EPI decision to dismiss him. However, by that time, the crucial decision – whether or not he had failed the professional integrity test – had already been taken and the

courts in the dismissal proceedings were prevented by law from reopening or disregarding it (see the analysis of the Constitutional Court, paragraph 20 above). In such circumstances, the Court considers that the finding of the Chișinău Court (Centru District) that there had been no entrapment did not include a proper reasoning, with reference to facts, thus failing to properly deal with the applicant's argument. In addition, the proceedings were tainted by procedural flaws, notably the failure to observe the principle of equality of arms by not hearing the applicant or allowing him to appeal, a possibility available only to the other party (see paragraph 16 above). The impossibility for the other courts (the Chișinău Court (Râșcani District) and the Chișinău Court of Appeal) to deal with the issue of entrapment in any way – courts which had the benefit of hearing the parties and examining their arguments – does nothing to improve the situation.

64. In view of the above factors, the Court considers that the domestic courts failed to comply with their obligation to examine the plea of entrapment effectively (see, *mutatis mutandis*, *Lagutin and Others*, cited above, § 123) and ultimately to ensure the fairness of proceedings, notably with respect to the applicant's participation and his right to appeal.

(f) Conclusion

65. The Court finds that the domestic courts did not properly examine the applicant's argument in respect of entrapment, nor ensured that the proceedings were adversarial. It therefore concludes that the fair trial guarantees were not observed in the present case.

66. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 12,431 euros (EUR) in respect of pecuniary damage, an amount representing the salary that he would have received for the period after his dismissal. He also claimed EUR 10,000 in respect of non-pecuniary damage.

69. The Government argued that this claim was speculative.

70. The Court notes that it has found a breach of Article 6 of the Convention in the present case. Nonetheless, it cannot speculate as to the

outcome of the proceedings against the applicant had the courts properly dealt with the issue of entrapment and had he been allowed to make submissions before the court which issued the decision of 28 January 2020. It therefore discerns no causal link between the violations found and the pecuniary damage alleged, and accordingly it rejects this claim.

71. It also considers that, having regard to the circumstances of the case, the conclusion it has reached under Article 6 § 1 of the Convention constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. It therefore makes no award under this head. It is noted, however, that under the domestic law the Court's finding of a violation constitutes a ground for the reopening of the proceedings on which the applicant can rely.

B. Costs and expenses

72. The applicant also claimed EUR 1,375 for the costs and expenses incurred before the Court, on the basis of an excerpt from the contract which he had entered into with his lawyer and a receipt confirming that he had already paid that lawyer the equivalent of EUR 500.

73. The Government considered that the excerpt from the contract was an insufficient basis for the claim. In any event, the sum claimed was excessive in the light of the work done on the case.

74. 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 1,375 covering costs under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention about entrapment and adversarial proceedings admissible;

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

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

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, EUR 1,375 (one thousand three

hundred and seventy-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Moldovan lei at the rate applicable at the date of settlement;

(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;

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

Done in English, and notified in writing on 9 January 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Mattias Guyomar President