



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

THIRD SECTION

CASE OF ALI v. ROMANIA

(Application no. 20307/02)

JUDGMENT

STRASBOURG

9 November 2010

FINAL

09/02/2011

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

In the case of Ali v. Romania,

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

Josep Casadevall, *President*,

Elisabet Fura,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 20 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 20307/02) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Syrian national, Mr Ali Ahmad (“the applicant”), on 15 April 2002. The applicant also holds Romanian nationality.

2. The applicant, who had been granted legal aid, was represented by Ms Carmen Boghina, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu, of the Ministry of Foreign Affairs.

3. On 29 November 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning Article 3 (alleged ill-treatment, conditions of detention and medical care in detention), Article 6 § 1 (right to a fair trial) and Article 9 of the Convention to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1962 and lives in Bucharest. He has had Romanian nationality since 1999, has been in business and is married to a Romanian national.

A. The events leading to the applicant's arrest and prosecution

5. On 29 May 2001 the police division responsible for combating organised crime and drug trafficking (“the drug traffic division”), of their own motion, began an investigation into allegations of drug trafficking offences being committed by three persons – the applicant, together with K.M. and D.H. – with the intention of selling 1.5 kg of heroin for 10,000 United States dollars (USD).

The same day, the Prosecutor's Office attached to the Supreme Court of Justice authorised the use of two undercover police agents with a view to determining the facts of the case, identifying the offenders and obtaining evidence. It also authorised them, together with one collaborator, to procure 2 kg of heroin. The Prosecutor's Office justified the issuing of the authorisation on the ground that it had good reason to believe that a drug trafficking offence was about to be committed.

6. On the same day, 29 May 2001, the applicant and D.H. met the undercover agents. According to the indictment issued in the case, D.H. asked for USD 10,000 for 1 kg of heroin. On 31 May 2001, the undercover agents met the three persons again, to discuss the details of the transaction.

7. On 1 June 2001, the undercover police agents met the suspects again in the applicant's apartment, where K.M. came with a bag. The agents reported later that they had been offered 1 kg of heroin for USD 10,000. When they left the building together, police surrounded them and took away the three suspects, while the undercover police agents left by car. The bag brought by K.M. was opened and a packet containing powder was found in it, along with shoes and food samples.

At the police headquarters the applicant was informed that there were drugs in the bag.

8. The undercover agents prepared a report on the flagrant offence. The suspects denied drug trafficking; in particular the applicant declared that he thought the money was for other merchandise and not for drugs (see paragraph 13 below).

9. The police searched the suspects' apartments and found a pack of 36.56 g of heroin in K.M.'s home. No drugs were found in the applicant's home. The search reports were attached to the file.

10. During the investigation, K.M. confessed to the crime and explained that he had received the drugs (one pack of 1 kg and another of 36.56 g) from a certain “Ahmed” and that the other two suspects were also aware of the drug sale.

On 4 July 2001 the police separated the investigation in respect of Ahmed and three other persons from that in respect of the applicant, D.H. and K.M.

B. Criminal proceedings against the applicant

11. On 2 June 2001 the applicant was remanded in the custody of the General Inspectorate of Police by order of the public prosecutor F.C. from the Prosecutor's Office attached to the Supreme Court of Justice.

12. On 9 July 2001 the Prosecutor's Office committed the applicant for trial for drug trafficking, an offence prohibited under Article 2 § 2 of Law no. 143/2000. F.C. drafted the indictment.

13. On 18 October 2001 the applicant gave a statement before the court. He averred that he had a company in Romania selling clothes and shoes and the two co-defendants had been his business partners. In May 2001 when K.M. asked the applicant to buy some merchandise from him, the applicant told him that he was no longer doing business but could put him in contact with D.H. The applicant, D.H. and the buyer (in fact an undercover police officer) were in the applicant's apartment when K.M. arrived with a bag containing samples of the merchandise (shoes and food). The applicant noticed that K.M. kept the bag closed in his hands throughout the visit.

The applicant also described the alleged police brutality during the arrest and claimed that he was not allowed to see a doctor.

14. The co-defendants also denied any drug-related offence. They claimed not to have been aware that the bag contained drugs.

15. On 13 December 2001 and 7 February 2002 the court heard six witnesses who were present at the arrest or during the searches of the defendants' homes.

On the latter date the applicant made a written statement reiterating his position, adding details to his version of the facts and claiming that he had been forced by the police into making statements.

16. The Bucharest County Court gave judgment on 21 February 2002. It convicted the applicant of drug trafficking and sentenced him to thirteen years' imprisonment. It also sentenced K.M. to fifteen years' imprisonment and D.H. to thirteen years' imprisonment.

The court upheld the prosecutor's description of the facts and noted that the prosecutor's act was based on the reports from the undercover agents, the report from the arrest and from the searches of the defendants' homes as well as on witness statements. It also noted that the defendants had alleged that they had been forced by police into confessing and had denied in their statements before the court having committed the offences. However, the court considered that they had failed to adduce evidence in support for their statements and thus discarded their declarations as being in contradiction with the other evidence in the file.

Furthermore, the court based its decision on the indictment, which in its view was supported by K.M.'s initial statement to the police, the arrest report, the confrontations between the co-defendants and the reports on the

searches. It also noted that the defendants had not adduced evidence in their favour.

17. The applicant appealed against the judgment. He alleged that he had not been allowed by the first-instance court to adduce evidence, and asked the court to hear evidence in his defence, in particular to see the videotape recorded at the arrest and to question the undercover police officers.

On 20 June 2002 the Bucharest Court of Appeal rejected the appeal without giving any specific answer to the applicant's complaints about evidence.

18. The applicant appealed again, on points of law, claiming that the entire operation was a frame-up by the police and asking again that the undercover agents and all those who participated in the operation be brought before the court as witnesses.

In a final decision of 15 May 2003 the Supreme Court of Justice dismissed the appeal.

19. The applicant requested the revision of the final decision, arguing again that the courts should hear the undercover police agents and allow the confrontation between the applicant and those agents. He also argued that in fact one of the undercover agents had brought the heroin to K.M. while the other agent was the alleged buyer of the drugs.

On 23 June 2006 the Bucharest County Court dismissed the application, on the ground that the extraordinary court could not re-examine the evidence in the file. It noted:

“The decision under review was based on substantial evidence; the undercover agents did not have a decisive role, they merely contributed evidence that corroborated the suspects' statements, the report on the flagrant offence, and the home search reports.”

The appeals lodged by the applicant were dismissed, first by the Bucharest Court of Appeal on 30 May 2007 and then by the High Court of Cassation and Justice, in a final decision of 11 January 2008.

20. According to the applicant, he remained handcuffed during the public hearings before the judges in the ordinary proceedings on the merits. In its letter to the Government dated 14 February 2008 describing the conditions of detention in the police detention facilities, the General Inspectorate of Police mentioned that:

“...the detainees were handcuffed when they left the arrest centre... When presented to the courts, the detainees remained handcuffed, unless the president of the court expressly asked that the handcuffs be removed ([Ministry of Interior's] Regulation no. 901/1999).”

C. Complaints of ill-treatment

21. According to the applicant, while in pre-trial detention in the General Inspectorate of Police (from 2 June to July 2001 at the latest) he was the victim of ill-treatment by the police. He claimed to have been dragged daily from his cell over a period of fifteen to twenty days, and put in a toilet for fifteen to thirty minutes until the investigator eventually found the time to question him. He claimed to have then been stripped naked for thirty to forty minutes, searched and verbally abused by the police officers. He alleged that this had lasted for six hours daily.

22. On 21 June 2001, the applicant was allegedly hit on the head by a police officer in the prosecutor F.C.'s presence, because he had refused to sign the record of the police actions during the undercover operation which had led to his arrest.

23. On 5 April 2002 the applicant lodged a criminal complaint with the Military Prosecutor's Office concerning the alleged ill-treatment suffered at the hands of police and prosecutor F.C. He also alleged that he gave USD 5,000 to a prosecutor, through an intermediary, to help in the proceedings; he requested that the sum be reimbursed by F.C. and the middle man. On 28 June 2002 he gave a statement before the prosecutor, indicating the identity of the alleged culprits and asking that they be pursued for abuse of position, abusive behaviour and abusive investigation.

24. On 6 February 2003 the military prosecutor transferred the file to the Prosecutor's Office at the Bacău Court of Appeal, following the demilitarisation of the police.

25. Several referrals between the prosecutors' offices took place, and on 27 August 2003 the Prosecutor's Office attached to the Supreme Court of Justice dismissed the accusations on the ground that there was no evidence to support the allegations of abuse during the investigation.

26. According to the information from the domestic authorities, the applicant did not challenge the prosecutor's decision of 27 August 2003.

27. The complaint concerning the alleged acts of corruption by F.C. and the middle man was referred to the Prosecutor's Anti-Corruption Office, which on 14 January 2004 decided not to prosecute. On 6 May 2004 the applicant was informed of the decision.

28. A similar complaint lodged by C.D., the applicant's fellow inmate, on behalf of the applicant, alleging criminal offences committed by the prosecutor F.C. during the investigations, was also dismissed by the Prosecutor to the High Court of Cassation and Justice (the new Supreme Court) on 12 December 2005. The applicant's objection to the prosecutor's decision was dismissed by the High Court on 30 March 2006 for failure to exhaust the administrative complaint procedure set out in Article 278¹ of the Code of Criminal Procedure, before lodging the complaint with the court (the decision became final on 16 October 2006 when the applicant's appeal

on points of law was dismissed by the High Court, sitting as a panel of nine judges).

29. In 2005 the applicant also lodged a criminal complaint with the Prosecutor's Office attached to the Bucharest Regional Court against four police officers from the drug traffic division and three certified translators, alleging mainly that the police officers had used violence, threats and inducements in order to obtain evidence for the police report for the offence of 1 June 2001. On 14 November 2006, the Prosecutor attached to the Bucharest County Court dismissed the complaint concerning abusive investigation against the police officers on the grounds that the allegations had already been examined by the courts in the criminal proceedings against the applicant (which had been terminated by a final decision) and that there was nothing in the file to substantiate the idea that the investigation had been abusive. The prosecutor sent the case to the Prosecutor's Office to the Bucharest District Court for the remaining offences, regarding both the police officers and the certified translators.

The Court has received no recent information from the parties on the development of these proceedings.

30. According to the information provided by the Government from the domestic authorities, the applicant did not challenge the 14 November 2006 decision.

D. Conditions of detention

31. On 2 June 2001, the applicant was remanded in the custody of the General Inspectorate of Police. He remained there until 18 July 2001, except for the period from 22 June to 4 July when he was hospitalised in Jilava Prison Hospital. On 18 July, he was transferred again to Jilava where he remained until 13 August 2001, when he was transferred to Rahova Prison where he remained until 2008. According to the information available to the Court, the applicant is currently being held in Jilava Prison.

1. The detention in the General Inspectorate of Police

32. According to the applicant, in the same place of detention he was also underfed and kept in a damp cell. He claimed that he did not receive a suitable Muslim diet, but had to get marmalade, butter and tea from his two fellow inmates or biscuits and tea from the prison.

He claimed that he had tuberculosis. A medical report certifies that on 6 August 2001 the applicant had tuberculosis and piles.

33. According to the information from the Bucharest Police, the cells in the police detention facilities measured 20 sq. m and had four to five beds and three 2.5 sq. m windows each. The toilets and showers were situated in the cells and hot water was constantly available. The inmates had access to the windows to ensure ventilation of the cell. No concrete information about

the applicant's stay was furnished, as, according to the applicable regulations, the relevant documents are kept by the prison authorities only for five years, which has already expired in the applicant's case.

2. The detention in Rahova Prison

34. According to the applicant, the conditions of detention in Rahova Prison are equally inappropriate: it was extremely cold in winter, when the heating system functioned for a short time only, there was hot water for only half an hour per week, there were ten to twelve inmates in a cell with ten beds, the food was not clean and there was almost no meat.

Since his transfer to Rahova, the applicant has had some health problems: scabies, articular rheumatism and renal and abdominal pain. The existing medical reports certify left renal microlithiasis, bladder lithiasis and right basal pachypleuritis. Moreover, the applicant allegedly did not receive the medical treatment he needed.

35. Based on the information from the National Prison Administration, the Government indicated that the applicant had been placed in cells measuring 18.8 sq. m with four to five bunk beds, or 24.6 sq. m with five to six bunk beds. The toilet room was attached to the cells and both had windows, to allow in air and natural light.

The Government did not provide concrete information on the occupancy rate of the applicant's respective cells, except for the last part of his stay, when he allegedly shared a 30.5 sq. m cell with ten bunk beds with nine co-detainees. A separate room with toilet, sinks and showers was attached to the cell. They both had windows.

36. Hot water in the prison was available once a week before 6 June 2007 and twice a week after that date, between 12 noon and 1 p.m. and 5 p.m. to 6.30 p.m. Detainees received cleaning equipment from the prison administration. No information on the actual heating schedules was provided.

37. Lastly, the Government contended that the applicant had received food prepared in accordance with Muslim dietary norms.

E. Medical care in detention

38. From 21 to 22 June 2001 the applicant was an in-patient in Bucharest Emergency Hospital, which recorded in a medical report that he had craniocerebral trauma with moderate post-concussion and an "atrocious cephalalgia" with consciousness disorder.

39. From 22 June to 4 July 2001 the applicant was in Bucharest Jilava Prison Hospital. He alleged that he did not receive proper medication because of lack of funds for medicine. The official documents issued by the National Prison Administration at the Government's request as well as the

medical register from the prison indicate that the applicant received treatment and food adequate to his medical conditions.

40. From 26 June to 31 July 2003 the applicant went on hunger strike; his condition was monitored and his health did not suffer significant deterioration.

41. In his statement of 18 October 2001 given before the Bucharest County Court, the applicant expressly complained that he had not been taken to a doctor.

42. During his detention the applicant did not request early release from prison on medical grounds, nor did he request specialised medical examination, nor to be taken to a civilian hospital for investigations. According to the applicant's medical record from prison, his treatment for his various conditions is continuing.

II. RELEVANT DOMESTIC LAW

43. The relevant provisions of the Code of Criminal Procedure and of the police and military prosecutor statutes are set out in *Dumitru Popescu v. Romania* ((no. 1), no. 49234/99, §§ 43-46, 26 April 2007), and *Barbu Anghelescu v. Romania* (no. 46430/99, § 40, 5 October 2004). In paragraphs 43-45 of the judgment in *Dumitru Popescu* (no. 1), cited above there is a description of the development of the law concerning complaints against decisions of the prosecutor (Article 278 of the Code of Criminal Procedure and Article 278¹ introduced by Law no. 281/24 June 2003 applicable from 1 January 2004, “Law no. 281/2003”).

44. The Government Emergency Ordinance no. 56 of 27 June 2003 (“Ordinance no. 56/2003”) regarding certain rights of convicted persons states, in Article 3, that convicted persons have the right to bring legal proceedings before the court of first instance concerning the implementing measures taken by the prison authorities in connection with their rights. Ordinance no. 56/2003 has been repealed and replaced by Law no. 275 of 20 July 2006, which has restated the content of Article 3 mentioned above in Article 38, which provides that a judge shall have jurisdiction over complaints by convicted persons against the measures taken by the prison authorities (see also *Petrea v. Romania*, no. 4792/03, §§ 21-23, 29 April 2008).

45. The provisions of Law no. 143/2000 on the fight against drug trafficking and illegal drug use (“Law no. 143/2000”) are described in *Constantin and Stoian v. Romania*, nos. 23782/06 and 46629/06, §§ 33-34, 29 September 2009).

46. The Ministry of the Interior's Instruction no. 901/1999 on the organisation and functioning of preventive detention facilities under the control of the Ministry of the Interior was not published in the Official Bulletin.

On 13 November 2003 the Ministry of Justice issued Instruction no. 3352 on the rights and obligations of persons in preventive arrest which made no mention on the policy concerning the use of handcuffs and only repealed previous legislation that contradicted the new regulations. Ordinance no. 56/2003 makes no mention of it either. It is only in Law no. 275/2006, referred to above, that the use of handcuffs is expressly forbidden save for exceptional circumstances (Article 37) and cannot be used as sanction (Article 71).

It appears that in 2006 the Instruction no. 901/1999 was still in force, in so far as it concerned transport to the courts of persons in preventive detention (see Decision no. 980/2007 by the High Court of Cassation and Justice).

47. Article 68 § 2 of the Code of Criminal Procedure prohibits incitement to commit or continue committing a criminal offence with the purpose of obtaining evidence.

III. COUNCIL OF EUROPE DOCUMENTS

48. The relevant findings and recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") are described in *Artimenco v. Romania* (no. 12535/04, §§ 22-23, 30 June 2009). In particular, the Court notes that in the report on the 2002-2003 visits, the CPT expressed concerns over the limited living space available to prisoners and the insufficient space provided by the regulations in place at that date. It also noted that prisoners were sometimes obliged to share a bed and that the toilets were not sufficiently separate from the living space.

49. As far as Rahova Prison is concerned, the Romanian NGO Human Rights Defence Association Helsinki Committee (Apador-CH) prepared four reports regarding conditions of detention following visits to the Minors' and Women's Sections and to Rahova Prison Hospital in 2002, 2003 and 2005. Besides case-related conclusions, the reports stated that the prison was overcrowded and that meat was almost completely absent from the meals.

50. The Council of Europe's texts on the use of special investigative techniques are detailed in *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 35-37, ECHR 2008-....

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

51. On 28 July 2003 the applicant complained under Article 3 of the Convention, of ill-treatment by the authorities. He also complained about the conditions of detention and of the fact that he had become ill while in both the General Inspectorate of Police and Rahova Prison, and of a lack of medical treatment.

He also complained that he had been handcuffed continuously, especially during the public hearings before the judge, and the Court considered, in the admissibility decision of 29 November 2007, that this complaint fell within the scope of Article 3.

Article 3 of the Convention reads as follows:

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

A. Admissibility

1. The parties' arguments

52. The Government argued non-exhaustion of domestic remedies. They submitted that for the 21 June 2001 incident the applicant should have used the appeal introduced by Article 278¹ of the Code of Criminal Procedure, effective since 1 January 2004. Furthermore, for the complaint concerning the alleged ill-treatment in detention, the conditions of detention and the alleged lack of adequate medical treatment the applicant could have lodged a criminal complaint for abusive behaviour, illegal arrest, abusive investigation and inhuman treatment and torture, crimes prohibited by the Criminal Code, or a complaint under the provisions of the Emergency Ordinance no. 56/2003.

They also considered that the complaint concerning the ill-treatment and conditions of detention in the police facilities had been introduced out of time.

53. The applicant contested the Government's position.

2. The Court's assessment

54. At the outset, the Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. However, the only remedies which Article 35 of the Convention requires to be used are those that relate to the breaches alleged

and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, §§ 74-75, ECHR 1999-IV).

55. In order for the exhaustion rule to come into operation, the effective remedy must exist at the date when the application is lodged with the Court. However, this rule is subject to exceptions which might be justified by the specific circumstances of each case (see *Baumann v. France*, no 33592/96, § 47, 22 May 2001, and *Brusco v. Italy*, (dec.), no. 69789/01, ECHR 2001-IX).

The Court has accepted that this was the case when at the national level a new law, specifically designed to provide direct redress for violations of fundamental procedural rights, was introduced with retroactive effect and thus put an end to a structural problem that existed in the national legal system before its adoption (see *Petrea*, cited above, § 33).

56. Furthermore, the Court reiterates that the object of the six-month time-limit under Article 35 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with within a reasonable time and that past decisions are not continually open to challenge. The rule also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised (see, for example, *Worm v. Austria*, 29 August 1997, §§ 32-33, *Reports of Judgments and Decisions* 1997-V).

(a) The incident on 21 June 2001

57. The incident complained of took place two years and six months before the entry into force of Law no. 281/2003. The final decision in the case was taken by the prosecutor on 27 August 2003.

58. The Court has already held in *Stoica v. Romania* (no. 42722/02, §§ 106-109, 4 March 2008) that Law no. 281/2003, which allowed a prosecutor's decisions to be challenged before the domestic courts, made the appeal under Article 278¹ of the Code of Criminal procedure effective since 1 January 2004.

59. In particular, as Law no. 281/2003 set a one-year time-limit for interested parties to appeal against a prosecutor's decision taken before the entry into force of this Law; the applicant in the case at hand could thus have availed himself of the mechanism in order to challenge the decision of 27 August 2003.

Moreover, in *Stoica* the Court found that the remedy was effective as it considered that a three-year lag between the incidents complained of and the entry into force of the new appeal was not lengthy enough to seriously alter the recollection of facts by those involved and thus to reduce the

effectiveness of the courts' examination of facts (see *Stoica*, cited above, § 108 and, *mutatis mutandis*, *Dumitru Popescu (no. 1)*, cited above, § 56).

60. The Court sees no reason to depart, in the case at hand, from the conclusions reached in *Stoica*, cited above, on the effectiveness of the appeal mechanism introduced by Law no. 281/2003.

It follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(b) The complaints concerning alleged abuse during investigations

61. The applicant lodged several complaints against the prosecutor F.C. and police officers alleging several abuses during the investigations.

However, the Court notes that the applicant failed to challenge the prosecutor's decisions taken on 14 January 2004 (decision not to prosecute F.C.'s alleged acts of corruption) and 14 November 2006 (decision concerning the police officers from the drug trafficking division and the translators), although at that time he already had an effective remedy at his disposal, under Article 278¹ of the Code of Criminal Procedure.

62. Furthermore, on 30 March 2006 a similar complaint by the applicant was dismissed by the domestic courts for failure to observe the procedure instituted in Article 278¹ of the Code of Criminal Procedure.

63. Lastly, the Court notes that certain complaints against police officers and some certified translators have been sent to the Prosecutor's Office attached to the Bucharest District Court and no recent information is available on those proceedings.

64. It follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(c) The conditions of detention

(i) In the police detention facilities

65. The applicant complained that he had been held in poor conditions of hygiene and had received bad food.

66. The Court notes that the applicant was held in the Bucharest Police Detention Centre from 2 June to 18 July 2001 when he was transferred to Rahova Prison.

67. This complaint was lodged with the Court on 28 July 2003, more than six months after the end of the detention. Furthermore, the applicant made no allegations of overcrowding and nothing in the file indicates the existence of a structural problem in the applicant's case (in particular from the parties' descriptions of the prison conditions it appears that the applicant was sharing a 20 sq. m cell with two other inmates).

Therefore this part of the complaint is out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(ii) *In Rahova Prison*

68. The applicant complains about the conditions of detention in Rahova Prison, the overcrowding and the bad food.

69. The Court has already found that for the general conditions of detention, in particular the alleged overcrowding, the applicant could not be required to have recourse to any remedy (see *Petrea*, cited above, § 37). Furthermore, the applicant was held in this prison until 2008 and brought this complaint to the Court's attention for the first time in 2003.

70. The Court also notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(d) The alleged deterioration of health and the alleged lack of medical treatment

71. In the case of *Petrea*, cited above, the Court has concluded that before the entry into force of Ordinance no. 56/2003, on 27 June 2003, there was no effective remedy for situations such as the one complained of by the applicant. However, after that date, persons in the applicant's situation had an effective remedy to complain about the alleged lack of medical treatment even if their applications had already been pending with the Court at the relevant date (see *Petrea*, cited above, §§ 35-36).

The Court sees no reason to depart in the present case from the conclusions it reached in *Petrea*.

72. It therefore considers that after the entry into force of Ordinance no. 56/2003, the applicant should have lodged a complaint with the domestic courts about the alleged lack of medical treatment.

It follows that the part of the complaint concerning the alleged lack of medical treatment after 27 June 2003 should be rejected for non-exhaustion of domestic remedies.

73. As for the period before the entry into force of Ordinance no. 56/2003, the Court notes that the applicant complained about having contracted tuberculosis in police custody, but that detention ended in July 2001. Furthermore, he complained with the domestic courts on 18 October 2001 that he had not been taken to a doctor.

However, as the applicant only lodged his complaint with the Court on 28 July 2003, he failed to observe the six-month rule.

It follows that this part of the complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention (see *Koval v. Ukraine* (dec.), no. 65550/01, 30 March 2004, and *Treptow v. Romania* (dec.), no. 30358/03, 20 May 2008).

74. Lastly, the Court finds no evidence in the file of any other potential breach of the applicant's right to receive treatment while in detention before the entry into force of Ordinance no. 56/2003. In particular, it notes that he formulated his complaint about the alleged lack of medical treatment in Rahova in very general terms, without allowing for specific determination of when the alleged interference with his right could have occurred. Furthermore, his statements are contradicted by the medical records and in his observations in reply to those formulated by the Government he did not make any additional submissions that would allow the Court to substantiate the complaint.

75. Therefore, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(e) The alleged wearing of handcuffs during public hearings

76. The Court notes that this part of the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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 conditions of detention in Rahova Prison

(a) The parties' submissions

77. The Government contended that the conditions of detention in Rahova Prison had been adequate and did not raise an issue under Article 3 of the Convention.

78. The applicant contested the Government's submissions and reiterated that he had been held in precarious conditions, that the cells had been overcrowded, the food of poor quality and there had been no conditions for maintaining a proper hygiene. He pointed out that the CPT reports of that time confirmed his allegations.

(b) The Court's assessment

79. The Court refers to the principles established in its case-law regarding the conditions of detention and the medical care of detainees (see, for reference, *Petrea*, cited above, § 43).

80. It also reiterates that Convention proceedings, such as the present application, do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in certain instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Kokoshkina v. Russia*, no. 2052/08, § 59, 28 May 2009).

81. The focal point in the case at hand is the assessment by the Court of the personal space afforded to the applicant in prison. The Government did not submit information that would allow the Court to establish the occupancy rate of the cells throughout the applicant's detention. However, the information that both applicant and Government submitted refers to the cell with ten beds where the applicant was placed in the latter part of his stay.

The applicant did not contradict the Government's submissions on the size of that cell. What is contested between the parties is its actual occupancy: while the Government submitted that the designed occupancy was always observed, the applicant claimed that prisoners had had to share beds.

The Court notes that the applicant's description of the overcrowding (see paragraph 34) corresponds to the findings made by the CPT during that period and supported by NGOs (see paragraphs 48 and 49 above). Furthermore, even at the occupancy rate indicated by the Government, the applicant's personal space seems to have been at the lower limit of what the Court has found acceptable in its case-law (see *Kokoshkina*, cited above, § 62; and *Orchowski v. Poland*, no. 17885/04, § 122, ECHR 2009-... (extracts)).

82. In addition, when corroborating the parties' allegations on the sanitary conditions with the CPT reports, the Court can but conclude that the applicant was deprived of the possibility to maintain an adequate corporal hygiene in prison: hot water was only available once a week for one hour. In this context, while availability of showers and cleaning equipment is a step forward towards ensuring decent conditions in prison, their utility remains rather futile given the lack of hot water.

In addition, according to the information submitted by the applicant and not contested by the Government, heating in winter was insufficient.

83. The Court has frequently found a violation of Article 3 of the Convention on account of the lack of personal space afforded to detainees and unsatisfactory sanitary conditions (see, in particular, *Ciorap v. Moldova*, no. 12066/02, § 70, 19 June 2007, and the judgments cited above: *Kalashnikov*, §§ 97 et seq.; *Kokoshkina*, § 64; and *Petrea*, §§ 49-50).

In the case at hand, the Government failed to put forward any argument that would allow the Court to reach a different conclusion.

84. In the light of the above, the Court considers that the conditions of the applicant's detention caused him suffering that exceeded the unavoidable level of suffering inherent in detention and that attained the threshold of degrading treatment proscribed by Article 3.

There has accordingly been a violation of Article 3 of the Convention.

2. The wearing of handcuffs in court

85. The parties presented observations on this point.

86. However, having regard to the provisions of the Law no. 275/2006 (see paragraph 46 above) and considering that it has examined the main legal questions raised under Article 3, the Court considers that it is not necessary to examine whether, in this particular case, there has been a violation of Article 3 in so far as it concerns the alleged wearing of handcuffs in court.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

87. The applicant complained that he had been entrapped by police, that the undercover agents had acted as *agents provocateurs*, in violation of Article 68 § 2 of the Code of Criminal Procedure, which prohibits incitement to commit or continue committing a criminal offence with the purpose of obtaining evidence.

He also argued that he had not been allowed to confront the two undercover agents or to call two additional witnesses who had also been present when the applicant had been arrested. Furthermore, he complained that he had not had the time and facilities to prepare his defence as he had only been given five to ten minutes' preparation time whenever he had been brought before the judge and that the officially appointed defence counsel had not defended him properly.

88. He relied on Article 6 §§ 1 and 3 (b) to (d) of the Convention which reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

A. Admissibility

89. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 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' positions

(a) The Government

90. The Government contested the applicant's allegations.

91. They pointed out that a system permitting covert police operations was common to many European countries and was recommended by the Council of Europe and the European Union in certain instances.

92. Regarding the facts of the present case, they denied that there had been police entrapment, and considered that the evidence in the file supported their submission.

93. Quoting *Klaas v. Germany* (22 September 1993, § 29, Series A no. 269), the Government contended that it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them.

94. Therefore they rejected the allegations of unfairness in the proceedings. In their view, the courts had given a detailed interpretation of the evidence and had explained their conclusions thoroughly and had not based their decision solely on the undercover agents' report, but also on witness testimony and on the interpretation of the defendants' statements given at various stages of the proceedings. On this point they considered that the case differed from *Teixeira de Castro v. Portugal* (9 June 1998, Reports 1998-IV) where the courts mainly relied on the undercover agents' statements.

They also argued that the applicant had not requested that other witnesses or the undercover agents be brought before the court.

95. The Government further considered that the applicant, who had been assisted by counsel, had had the opportunity to prepare his defence and to

present his arguments in court. They also pointed out that the applicant had not complained before the domestic courts about the quality of legal assistance offered by his lawyers.

(b) The applicant

96. The applicant contested the Government's position. In particular, he argued that the domestic courts had, in fact, based their decisions solely on the undercover agents' report, discarding the statements given before them by the defendants and that the witnesses heard by the courts were not in a position to offer relevant information on the actual commission of the offences, being only present during the arrest. However, the courts had not heard the undercover agents directly.

97. Lastly, he contended that during the search performed in his apartment, the police had not found any drugs or other material evidence that could prove his involvement in drug trafficking.

2. The Court's assessment

98. The Court reiterates its recent case-law on Article 6, in which it drew a detailed distinction between the concept of entrapment and the use of legitimate undercover techniques and reaffirmed the domestic courts' obligation to carry out a careful examination of the material in the file where an accused invokes police entrapment. In this context, the Court has also established that its function under Article 6 § 1 is not to determine whether certain items of evidence were obtained unlawfully, but rather to examine whether such "unlawfulness" resulted in the infringement of another right protected by the Convention; it thus has to review the quality of the domestic courts' assessment of the alleged entrapment and to ensure that they adequately secured the accused's rights of defence, in particular the right to adversarial proceedings and to equality of arms (see *Ramanauskas*, cited above, §§ 49-61; *Malininas v. Lithuania*, no. 10071/04, §§ 34-35, 1 July 2008; *Bykov v. Russia* [GC], no. 4378/02, §§ 88-93, 10 March 2009; and *Constantin and Stoian*, cited above, § 54).

99. In its extensive case-law on the subject the Court has developed the concept of entrapment breaching Article 6 § 1 of the Convention, as distinguished from the use of legitimate undercover techniques in criminal investigations. It has held that while the use of special investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial, the risk of police incitement entailed by such techniques means that their use must be kept within clear limits (see *Ramanauskas*, cited above, § 51). The Court has further established that 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 *Teixeira de Castro*, cited above, § 38)

To ascertain whether or not the undercover police confined themselves to “investigating criminal activity in an essentially passive manner” in the present case (see *Ramanauskas*, cited above, § 55), the Court has regard to a number of considerations. As the applicant pointed out, the search in his apartment had not revealed any evidence of his involvement in drug-related crimes.

100. The Court also notes that the parties gave different interpretations of the events that occurred on 1 June 2001. According to the authorities, the applicant and his co-defendants had agreed to broker the deal. However, the applicant, claiming entrapment, stated that he had not been aware that there were drugs in the bag and that he had thought the money received had been for other merchandise, samples of which had been found in the bag.

101. In the light of these divergent interpretations, it is essential that the Court examine the procedure whereby the plea of entrapment was determined in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings and to equality of arms (see *Ramanauskas*, §§ 60-61, and *Malininas*, § 34, both cited above, and *Khudobin v. Russia*, no. 59696/00, § 133, ECHR 2006-XII (extracts)).

102. In convicting the applicant and his co-defendants, the courts relied exclusively on the evidence obtained during the investigations, namely the written report by the undercover agents and the statement made by K.M. but withdrawn later in the proceedings and the witnesses' statements as well as the reports on the searches in the defendants' homes. As concerns the applicant, the Court notes that the witnesses could only attest to the actual arrest, but were in no way capable of providing information on the defendants' alleged criminal activities.

The courts did not adduce the recording of the events nor did they hear the undercover agents, even after the applicant's express request formulated in the appeal proceedings and to which he received no answer. The defence thus had no opportunity to cross-examine the police officers.

Furthermore, the courts decided to give precedence to the statements obtained from K.M. by the investigators and discarded those consistently given by the other defendants and by K.M. himself later in the proceedings, including before the courts.

103. The Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, even when the two are in conflict (see *Doorson v. the Netherlands*, 26 March 1996, § 78, *Reports* 1996-II). However, in the instant case, the Court considers that the reasoning given by the County Court appears to put the burden of proof on the applicant and gives no

explanation as to why the other statements were to be preferred to the subsequent consistent evidence before the courts.

104. Furthermore, in the light of the defendants' allegations as to the police involvement, the domestic courts could not have ensured the respect of the principle of fairness, and in particular the equality of arms, without hearing evidence from the undercover police officers and without allowing the defendants to question them, even in writing. Furthermore, the court should have examined or at least given more thorough explanation as to why it rejected the other requests for evidence (hearing of additional witnesses and the videotape).

105. In conclusion, while mindful of the importance and the difficulties of the task of the investigating agents, the Court considers, having regard to the foregoing, that the domestic courts did not sufficiently investigate the allegations of entrapment. For these reasons the applicant's trial was deprived of the fairness required by Article 6 of the Convention.

There has accordingly been a violation of Article 6 § 1 of the Convention on this account.

106. Furthermore, the Court considers that the foregoing conclusion makes examination of the remainder of the complaint redundant.

III. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

107. On 28 July 2003 the applicant complained that the prayer room in Rahova Prison had been closed. The Court considered that the complaint came within the ambit of Article 9 of the Convention.

108. The parties presented observations on this point.

109. The Court considers this complaint admissible. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Articles 3 and 6 above, the Court considers that it has examined the main legal questions raised in the present application. It concludes, therefore, that there is no need to examine whether in this case there has been a violation of Article 9 of the Convention (see, for example, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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

111. The applicant claimed reimbursement of medical expenses for the health conditions he contracted in detention in respect of pecuniary damage and 10,000 euros (EUR) for suffering caused by the ill-treatment in respect of non-pecuniary damage.

112. The Government put forward that the applicant did not quantify or justify the claims in respect of pecuniary damages. They also considered that the request for non-pecuniary compensation was excessive and that the conclusion of a violation of the Convention Articles would suffice to compensate for the non-pecuniary damage allegedly incurred.

113. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant suffered distress as a result of the conditions of his detention and the lack of a fair trial. It therefore awards him EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

114. The applicant also sought reimbursement of lawyers' fees, without submitting any concrete claims or justifications.

115. The Government asked the Court not to award any sum on this account.

116. 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 have been actually and necessarily incurred and are reasonable as to quantum.

117. In the present case, the applicant has already received EUR 850 in legal aid from the Council of Europe. No other sum being justified according to the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the conditions of detention in Rahova Prison, the alleged wearing of handcuffs in court, the alleged lack of fair trial and the alleged interference with the freedom of religion admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of detention in Rahova Prison;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there is no need to examine the complaints under Articles 3 (wearing of handcuffs in court) and 9 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the respondent State's national currency at the rate applicable on 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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Section Registrar

Josep Casadevall
President