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

FOURTH SECTION

DECISION

Application no. 28825/09
Lucian Tiberiu POPA
against Romania

The European Court of Human Rights (Fourth Section), sitting on 30 August 2016 as a Committee composed of:

Paulo Pinto de Albuquerque, *President,*
Iulia Motoc,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 6 May 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Lucian Tiberiu Popa, is a Romanian national who was born in 1986 and lives in Brad. He was represented before the Court by Mr V. Burugă, a lawyer practising in Timişoara.

2. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

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

A. Events leading to the applicant's arrest and prosecution

4. On 10 March 2005 the Timişoara County police division responsible for combating organised crime and drug trafficking started an investigation into allegations that the applicant was involved in drug dealing.

5. On 20 October 2006 the Timişoara County department for the investigation of organised crime ("the organised crime department") decided to indict the applicant for trafficking high-risk drugs.

6. According to the indictment, on 10 March 2005 the applicant had offered to sell drugs to V.S., a former high school classmate. V.S. had decided to collaborate with the authorities and had set up a meeting with the applicant the next day in order to complete the transaction. On 11 March 2005 a prosecutor from the organised crime department authorised the use of an undercover police officer together with V.S., as an informant (*colaborator*), to determine the facts of the case, identify the offenders and obtain evidence. The two men were also authorised to buy 200 ecstasy pills. The prosecutor justified the issuing of the authorisation on the grounds that there were reasons to believe that the applicant was about to commit a drug trafficking offence. Later that day V.S. had met the applicant who had sold him an ecstasy pill for 40 Romanian lei (RON). The police officer had not taken part in the transaction in order to avoid making the applicant suspicious and had only watched the operation from a distance. Subsequently, on 16 March 2005 the applicant had contacted V.S. for a new purchase, which had taken place under the same conditions as the first one, and the applicant had sold him two ecstasy pills. The prosecutor based the findings in the indictment decision on police reports, witness statements, photographs and other documents.

7. The applicant, who had previously been arrested for twenty-four hours on 4 April 2006, at first told the prosecutor that he did not remember selling drugs, while in a subsequent statement he stated that he had bought the pills for himself and had probably lost them, denying that he had ever met V.S. to sell him drugs.

B. The applicant's trial and conviction

8. On 5 February 2007 the applicant gave a statement to the Timiş County Court where his trial was being held. He again denied selling drugs to V.S., stating that he had bought two ecstasy pills for his own consumption and had probably lost them.

9. On the same date the applicant's lawyer asked the court to call as a witness for the defence the person from whom he had bought the drugs and to verify the accuracy of the laboratory tests done on the drugs. He further requested that the court send a letter to the municipality in order to check the exact locations where the alleged transactions had taken place. The prosecution asked the court to call V.S. and the undercover police officer as witnesses. The requests were allowed by the court.

10. On 2 May 2007 the undercover police officer gave his testimony. The applicant's lawyer was able to cross-examine the witness and asked for details about the decision to have an undercover officer on the case, whether

it had not been V.S. who had asked to buy drugs from the applicant and why there had been no photos of the alleged transactions. The officer stated that in the course of his work in the field as a policeman he had come across facts which had made him suspect that the applicant was involved in drug dealing. He further stated that he had overseen the covert operation without taking part personally in the meetings. However, V.S. had reported to him and had handed over the drugs after each transaction.

11. At a hearing on 5 October 2007 the Timiş County Court took note of the fact that V.S. could not be present to testify. The witness that the applicant wanted to call was being looked for by the police but had absconded. It therefore decided to hear closing arguments.

12. The applicant's representative contested the authenticity of V.S.'s signature on his statement to the prosecutor and asked the court to acquit the applicant because he had not committed the criminal act he was on trial for. In addition, the applicant's representative submitted written conclusions in which he contested the prosecution's case on where the alleged transactions had taken place and the applicant's presence there. He also complained about procedural irregularities in the authorisation of the covert operation, more specifically that the activity of the undercover police officer had been authorised only after the two transactions and that the police officer and V.S. had not been authorised jointly to buy drugs.

13. On 19 October 2007 the Timiş County Court convicted the applicant of trafficking high-risk drugs and gave him a three-year suspended prison sentence. The decision was based on the evidence in the file, which had been analysed at the hearings throughout the trial.

14. The applicant appealed against his conviction, reiterating his previous arguments.

15. On 8 May 2008 V.S. appeared before the Timişoara Court of Appeal. He stated that the applicant had offered to sell him drugs. The first time they had met had been in the yard of the high school and he had bought one pill from the applicant. The applicant had then called him and arranged to sell him two more pills. He had been searched by the police before each meeting with the applicant. The applicant's lawyer asked the witness whether he had known the applicant before the start of the covert operation, whether the applicant had his head covered during the two meetings and whether he could point to the person who had sold him the drugs in the courtroom.

16. The witness requested by the applicant failed to appear despite a summons and a fine being issued by the court.

17. On 4 September 2008 the Timişoara Court of Appeal dismissed the applicant's appeal as ill-founded. Based on the evidence in the file the court considered that the covert operation had been duly authorised because the prosecutor had strongly suspected that the applicant had been preparing to commit a criminal act. The court was also convinced, on the basis of the

same evidence, that it had been the applicant who had initiated the transactions.

18. The applicant lodged an appeal on points of law (*recurs*), arguing that the evidence in the file had not been enough for a conviction and that the judgments of the lower courts had not been properly reasoned. He asked for a retrial.

19. On 7 November 2008 the High Court of Cassation and Justice dismissed the applicant's appeal on points of law, holding that the evidence in the file had been sufficient to prove the applicant's guilt and that a retrial was not necessary.

C. Relevant domestic law

20. The relevant provisions of the Code of Criminal Procedure concerning the prohibition of constraint in order to obtain evidence as well as the relevant provisions of Law no. 143/2000 on the fight against drug trafficking are described in *Constantin and Stoian v. Romania* (nos. 23782/06 et 46629/06, §§ 33 and 34, 29 September 2009).

COMPLAINT

21. The applicant complained under Article 6 § 1 of the Convention of a breach of his right to a fair trial.

22. Relying on Article 5 of the Convention the applicant also complained that his detention for twenty-four hours on 4 April 2006 had been unlawful.

THE LAW

A. Complaint under Article 6 § 1 of the Convention

23. The applicant submitted that the criminal proceedings against him had been unfair as he had been convicted on the basis of insufficient evidence of a crime which he had been incited to commit by a police informant. He further alleged that the judgments issued in his case had lacked adequate reasoning.

He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

24. The Government denied that there had been police incitement and argued that the evidence in the file supported their submission. They rejected the allegations of unfairness in the proceedings. In conclusion, the Government stated that the proceedings as a whole, including the way in which the evidence had been obtained, had been fair and that the applicant's dissatisfaction with their outcome should not lead the Court to re-examine the case by taking on the attributes of a fourth-instance body.

25. The admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was gathered, were fair. In this context, the Court's task 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 (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 52, ECHR 2008).

26. The Court has also held that where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the 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. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards. Lastly, where the information disclosed by the prosecution authorities does not enable the Court to conclude whether the applicant was subjected to police incitement, it is essential that the Court examine the procedure whereby the plea of incitement was determined in each case 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 (ibid., §§ 60 and 61).

27. Turning to the facts of the current case the Court observes that the applicant did not raise the issue of police incitement before the domestic courts. His arguments before the national authorities were focused on the handling and assessment of the evidence against him.

28. In this context, the Court notes that the applicant's allegations were analysed by the domestic courts in adversarial proceedings in which his rights to equality of arms and a defence were adequately protected. The applicant was afforded ample opportunity to adduce arguments in support of his position and challenge the evidence against him. The Court observes that the applicant, represented by a lawyer of his own choice, had and used the opportunity to call witnesses, bring evidence in his defence and to cross-examine both the informant working undercover for the police and the police officer who participated in the covert operation (contrast *Ali v. Romania*, no. 20307/02, § 102, 9 November 2010). Moreover, the domestic courts analysed the reasons for which the covert operation had

been conducted in the applicant's case and, based on various evidence in the file, they established that the operation had been lawfully authorised. Therefore, the Court considers that the short reasoning given by the domestic courts complied with Article 6 of the Convention, given also the fact that the applicant had not raised before them the issue of police incitement.

29. In the light of those considerations, the Court concludes that there is no appearance of a violation of Article 6 in the criminal proceedings against the applicant. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under Article 5 of the Convention

30. The applicant also complained that he had been unlawfully deprived of his liberty for twenty-four hours on 4 April 2006, in breach of Article 5 of the Convention. Bearing in mind that the current application was lodged on 6 May 2009 and that the applicant was released on 5 April 2006, the Court notes that this complaint is outside the six-month time-limit provided by Article 35 § 1 of the Convention.

31. It follows that this part of the application has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 22 September 2016.

Andrea Tamietti
Deputy Registrar

Paulo Pinto de Albuquerque
President