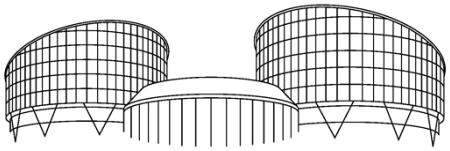

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF CIPRIAN VLĂDUȚ AND IOAN FLORIN POP v. ROMANIA

(Application nos. 43490/07 and 44304/07)

JUDGMENT

STRASBOURG

16 July 2015

FINAL

14/12/2015

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

In the case of Ciprian Vlăduț and Ioan Florin Pop v. Romania,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 23 June 2015,

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

PROCEDURE

1. The cases originated in two applications (nos. 43490/07 and 44304/07) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Romanian nationals, Mr Ciprian Vlăduț Pop and Mr Ioan Florin Pop ("the applicants") on 28 September 2007.

2. The applicants were represented by Mr F. Andreicuţ, a lawyer practising in Baia Mare. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. On 12 July 2013 the complaints concerning the conditions of the second applicant's detention and fairness of the proceedings were communicated to the Government under Articles 3 and 6 §§ 1 and 3 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants, two brothers, were born in 1982 and 1974 respectively and live in Tautii Magheraus.

A. The drug transactions between the applicants and the undercover agent

5. According to the first applicant, in the summer of 2004 he was contacted on several occasions by an undercover police agent who wanted to buy ecstasy from him, brought into the country from the Netherlands.

According to the prosecutor's report, the police gained knowledge of the first applicant's alleged involvement in drug trafficking at the beginning of September 2004.

6. It was established by the prosecutor and domestic courts that some time in September the first applicant brought a batch of drugs into the country and sold ten tablets to the undercover agent on 26 October 2004 and 115 tablets on 29 October 2004. According to the transcripts of the conversations intercepted between the first applicant and the police agent, on 28 October the latter called the first applicant, asked him if he had "any left" and at the applicant's confirmation that some 150 remained, the undercover agent calculated their price at 1,000 euros, and advised the applicant on where and how to meet the next day for him to buy them all.

7. On 29 October 2004 the police intercepted a conversation between the undercover agent and the first applicant when they met for the drug transaction. The police agent told the applicant that the day before he had been offered a batch of "1,000 pieces" (*1,000 de bucăţi*) which would be available the next week, and that he would not want to miss such an opportunity. The applicant offered to bring the same amount for him. The police agent agreed, and asked how much more he could bring. They settled for 5,000 pieces. The undercover agent warned the first applicant repeatedly during their conversation that if he did not receive his supply from the applicant he would go to the other provider. During the conversation it appeared that the applicant had meanwhile sold some twenty more tablets. The first applicant called someone on his mobile phone and discussed in English getting 5,000 or 10,000 tablets. He then reported to the agent that he could get him some stronger tablets, and described the sensations he had had when he had used them himself. The agent proposed the place and arrangements for their next transaction.

8. The new transaction was postponed for various reasons and was finally planned to take place on 23 December 2004 in Baia Mare. That day the first applicant informed his brother for the first time that he had brought drugs into the country and about the deal. After having initially refused and argued extensively about it with his brother, the second applicant agreed to help, in order to save the family from potential retaliation by the Dutch seller. That evening he took the drugs to an agreed location while the first applicant negotiated the terms of the transaction with the undercover agent.

9. The first applicant and the undercover agent then joined the second applicant; the agent was offered an ecstasy tablet for testing and then left

with the first applicant in order to set out the details of the transaction. The second applicant was to wait at the same location for the buyer to return with the money to pay for the drugs. Meanwhile, the second applicant saw police agents approaching in a taxi. He threw the bag containing the drugs into a nearby bush and phoned his brother to warn him. The first applicant told the undercover agent that the transaction was cancelled.

10. Police agents apprehended the two applicants and later recovered a bag containing 4,409 ecstasy tablets from the bushes.

11. The applicants were taken to the police station for further questioning. After consultation with their counsel they refused to make any statements. They were arrested.

B. The criminal prosecution

12. On 25 October 2004 the organised crime and terrorism division of the prosecutor's office attached to the Cluj Court of Appeal ("the prosecutor") identified the first applicant as being apparently involved with trafficking in drugs and drug consumption, the merchandise being brought from the Netherlands.

13. On 26 October 2004 the prosecutor authorised the use of an undercover police agent to infiltrate the applicants' circle in order to obtain information and evidence about the drug trafficking. It also authorised the undercover agent to purchase 150 ecstasy tablets. After each transaction the undercover agent wrote a report on the meeting with the first applicant. The prosecutor noted as follows:

> "there are strong indications that the crime of drug trafficking has occurred/is about to occur ... as Ciprian Vlăduț Pop bought in 2004 high-risk drugs from the Netherlands, namely ecstasy tablets (MDMA), which he is selling in Baia Mare and Cluj-Napoca."

14. On 29 October 2004 the prosecutor started criminal prosecutions against the first applicant on suspicion that he had both consumed and sold drugs. On 23 December 2004 the prosecution was extended to the second applicant.

15. On 27 October and 11 and 18 November 2004 the Cluj County Court authorised for a period of thirty days, at the prosecutor's request, the tapping of the first applicant's telephone and that of the undercover police agent. On 24 November and 22 December the authorisation was extended by thirty days on each occasion. Some 100 CDs were recorded in the process.

16. The prosecutor asked for the tablets purchased by the undercover agent to be tested by the police laboratory for physical and chemical analysis ("the police laboratory"). On 28 October, 2 November, and 27 December 2004 the police laboratory submitted its reports on the three batches of tablets, concluding that they contained

methylenedioxymethamphetamine (MDMA). The tablets remaining after the laboratory test were sealed and stored in a special police depository.

The applicants and two taxi drivers who transported the police agents to the crime scene were interviewed by the prosecutor.

17. On 11 January and 10 March 2005 the first applicant stated that he had visited the Netherlands in the summer of 2004 and met P., who had afterwards visited Romania and spent a few weeks at the applicant's home. P. found out that ecstasy sold very well in Romania, and offered to obtain some for the first applicant. The applicant brought a first batch of 250 tablets and sold some of them to the undercover police agent; the remaining tablets he either consumed himself or gave away to others. During the night of 22/23 December 2004 the applicant returned from the Netherlands with a batch of 5,000 ecstasy tablets from P. He contacted several individuals to offer to sell them tablets, but the undercover police agent offered to buy them all.

18. The second applicant gave statements on 11 January 2005. He declared that before 23 December 2004 he had not known of any dealings in drugs that his brother might have had, that during the night of 22/23 December he had returned with his brother from the Netherlands but had not been aware until later that day that his brother, who had crossed the border on his own on foot, had brought drugs into the country. He further explained that he had agreed to help his brother because he feared his brother was in danger of being attacked and killed by the drug dealers, given the large amount of money involved in the transaction. He further explained that it was morally impossible for him, at the time of the crime, to denounce his brother to the authorities. He also explained that he had never taken drugs himself.

19. On 2 March 2005 the prosecutor presented the transcripts of some of the recorded conversations, along with forty CDs, to the Maramureș County Court. He sought confirmation from the court that the evidence produced before it was relevant to the case (procedure under Articles 91^3 and 91^5 of the CCP). The hearing took place on 9 March 2005. Defence counsel asked for an adjournment to allow her to study the evidence and form an opinion on the relevance of the CDs. She also expressed the wish to examine the remaining recordings which had not been produced before the court by the prosecutor. The court dismissed the requests and accepted the evidence in the file, as proposed by the prosecutor. It agreed with the prosecutor's opinion and ruled that the remaining CDs were not relevant to the case.

20. On 10 March 2005 the applicants, in the presence of their counsel, acquainted themselves with the prosecution file.

21. On 15 March 2005 the prosecutor committed the applicants to trial for trafficking in drugs, under Law no. 143/2000 on the fight against drug trafficking and illegal drug use ("Law no. 143/2000"). The prosecutor noted that the first applicant was also a drug user, whereas his brother, the second

applicant, was not and had had no knowledge of his brother's dealing before 23 December 2004. The prosecutor also noted that the first applicant had a prior conviction for theft and breach of firearms regulations (*nerespectarea regimului armelor*).

C. The first-instance court proceedings

22. The case was heard by the Maramureș County Court. The applicants' detention pending trial was extended at regular intervals by the court.

23. On 5 April 2005 the applicants gave statements before the court, reiterating their declarations from the prosecution phase. It appears that at that time the first applicant was suffering from withdrawal symptoms and was under sedatives prescribed by the prison doctors to alleviate his symptoms.

24. The applicants' counsel asked for an expert evaluation of the tablets to establish whether they contained MDMA or a lighter drug. Relying on the principle of equality of arms, defence counsel requested that the expert examination be performed by experts from the Ministry of Justice and not by experts from the Forensic Institute, as the latter institution was attached to the police. The prosecutor advised that the Police Forensic Institute was normally responsible for such analyses. On 11 July 2005 the Ministry of Justice informed the court that it would not be possible for their experts to perform the requested tests.

25. The second applicant also asked the court to hear evidence from the undercover police agent. His request remained unanswered.

26. On 26 July 2005 the first applicant, who was suffering from withdrawal symptoms, became ill in the court building and had to be taken to hospital. Defence counsel asked for a medical assessment of his client. Despite repeated requests by the court, the prison authorities later failed to take the first applicant to hospital so he could receive the expert examination ordered by the court.

27. On 10 August 2005, at the court's request, the Police Forensic Institute re-examined the drugs and in a comprehensive report confirmed that the tablets contained MDMA.

28. On 8 November 2005 the court heard pleadings from counsel for the prosecution and the defence. The applicants did not deny the substance of the charges. The first applicant admitted that the police operation respected the domestic legislation, but doubted its morality; in particular, he argued that if it had not been for the undercover police agent's insistence he would not have bought ecstasy in the first place. In his view the undercover police agent asked on purpose for a high-risk drug to attract a heavier penalty for the applicants, whereas if he had requested a milder drug the sentencing would have been consequently lighter. The prosecutor replied that as it was

known that the first applicant had brought ecstasy into the country in the summer of 2004, the undercover agent had done no more than follow that lead; it would have made no sense for him to ask for another drug so long as there was no indication that the applicant had dealt in any other type of drugs.

The second applicant pointed out that he had only been informed about the drug dealing on the very day when the last transaction had taken place, and that by telephoning his brother that day he had in fact prevented the crime from being committed.

29. The County Court rendered its judgment on 25 November 2005, based on the evidence in the file, namely the police reports from the undercover operation, witness statements (the two taxi drivers who had brought the police officers to the scene of the transaction and who had seen the applicants handcuffed and the police retrieving the bag containing the drugs from the bushes), the transcripts of the intercepted telephone calls and the expert reports concerning the content of the tablets. It reiterated the history as it had been established in the bill of indictment, and concluded that the applicants were guilty of the offences they had been accused of. The court gave no further answers to the arguments raised by the defence. It convicted both applicants and sentenced the first applicant to seven years and six months' imprisonment and the second applicant to three years and six months' imprisonment.

D. The appeal proceedings

30. The applicants reiterated their complaints concerning breach of the principle of equality of arms, in that the tablets had been analysed in police laboratories and not by an independent expert. Finally they renewed their request to have all the transcripts of the intercepted conversations produced before the court, and complained that they could not have access to them as the remaining recordings had been destroyed. Before the court, they also argued that the unlawfully obtained evidence should be removed from the file and reiterated that the police operation had started only from a suspicion that the first applicant was a drug user.

Throughout the proceedings, the second applicant made repeated requests to be allowed to study his file, but received no answer from the court.

31. On 5 October 2006 the Mina Minovici National Forensic Institute examined the first applicant and his medical record. On 19 January 2007 it rendered its medical report, which was examined at the court hearing held on 31 January 2007. The experts concluded that the applicant's drug addiction could be treated in the prison hospitals and that the medication he had received so far had been adequate; as he was not experiencing withdrawal symptoms, he did not need to be placed in a special drug

withdrawal programme; they also considered that his medical condition was compatible with detention.

32. The Cluj Napoca Court of Appeal delivered its decision on 7 February 2007. Concerning the defence's arguments about lack of access to the transcripts of the intercepted telephone calls the court reiterated that on 9 March 2005 it had decided which transcripts were useful to the case. The court dismissed their complaints concerning the secret police operation; in doing so, it relied on the report drafted by the undercover agent and by the prosecutor, and observed that the applicants' own statements to the police and before the courts corroborated those reports.

The court of appeal substantially maintained the conclusions of the first-instance court.

33. The applicants appealed on points of law and reiterated their main defence arguments. However, their appeal was dismissed in a final decision rendered on 29 March 2007 by the High Court of Cassation and Justice.

E. The conditions of the second applicant's detention

34. The second applicant described his detention as follows. He was arrested on 23 December 2004 and remained imprisoned until 1 May 2007. He spent the first three months of detention in police detention facilities, the following eight to nine months in Baia Mare Prison, then thirteen months in Gherla Prison; he spent the remaining time in Jilava Prison.

35. He had to share cells with smokers, although he was a non-smoker himself. He repeatedly asked the prison administration to place him in a cell with non-smokers. No such arrangements could be made for him, as the pre-trial detention facilities were already overcrowded and there were no places available in the non-smoking cells; according to the applicant, in Baia Mare Prison the ratio was of thirty-nine bunk beds, placed on three levels, for sixty inmates. When in Baia Mare Prison the applicant went on hunger strike from 13 to 16 April 2007 because he was placed in smoking cells despite being a non-smoker; he ended his protest when a non-smoking cell became available after refurbishment.

36. When he was detained in Gherla Prison, he complained about being placed with smokers and about overcrowding in prison, notably that he did not have 4 sq. m of personal living space in the cell. On 5 February 2007 his complaint was dismissed by the judge delegated by the court to supervise the observance of the prisoners' rights, under Law no. 275/2006 on the execution of sentences ("the post-sentencing judge"). The post-sentencing judge noted that there was no obligation in Romanian law to place a detainee in a non-smoking cell or to provide him with a certain amount of living space. According to the applicant, the cells were all dirty and infested with bugs.

37. According to information provided by the prison service, during his detention the applicant occupied altogether eleven cells in three prisons (Baia Mare, Gherla, and Jilava), sharing with between five and forty-three others; his personal living space was on average 1.91 sq. m at all times. In addition he spent three days in a cell alone in Baia Mare when he was on hunger strike, and two days alone in Gherla Prison infirmary; on those two occasions his living space was 16 sq. m.

38. The second applicant also described an episode where he was hit by a prison guard; he explained that he had got scared and become agitated because he had seen his brother suffering from withdrawal and was sure that his brother was about to die without anybody willing to come to his rescue. He pressed charges against the guard, and on 31 March 2006 the prosecutor decided not to prosecute.

39. He tried on two occasions to commit suicide by hanging himself (13 September 2005 and 2 December 2005). As a consequence of his attempted suicide of 2 December 2005, the second applicant was handcuffed to his bed for a month, according to his statements. The prison service explained that on 2 December 2005 he had been handcuffed to his bed as a means of preventing him from repeating his suicide attempt; he had been kept thus handcuffed while he remained "agitated and psychologically vulnerable". On 2 December 2005 he was seen by the prison doctor, who noted his agitation, lack of cooperation and headache, and concluded that he could be treated in the medical infirmary. He was not known to have a mental disorder, and no recurrence of the suicidal behaviour was recorded while he was in detention.

40. On 9 March 2006 the second applicant complained before the Cluj Court of Appeal, within the appeal proceedings on the merits of the accusations against him, about the conditions of his detention, in particular the fact that he shared a large dormitory with smokers. He requested to be medically examined in order to demonstrate the negative consequences of the passive smoking on his health. He also complained of lingering pain in his right leg on which he had fallen from a three-metre height on 2 December 2005, when he had tried to hang himself from a suspended bar; he had sought medical examination, which he alleged had been refused by the prison doctors until 23 December 2005. The applicant made full statements about his attempted suicide on 2 December 2005, and described how he had been handcuffed to his bed and left without medical care.

He received no answer to these complaints.

II. RELEVANT DOMESTIC LAW

41. Excerpts from the relevant domestic legislation and international reports, namely Law no. 275/2006 on the execution of sentences; reports of the European Committee for the Prevention of Torture and Inhuman or

Degrading Treatment or Punishment ("the CPT"); and Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member States on prison conditions, are set out in the cases of *Bragadireanu v. Romania* (no. 22088/04, §§ 73-75, 6 December 2007); *Artimenco v. Romania* (no. 12535/04, §§ 22-23, 30 June 2009); and *Iacov Stanciu v. Romania* (no. 35972/05, §§ 116-29, 24 July 2012).

42. In its report (CPT/Inf (2011) 31) published on 24 November 2011 following a visit from 5 to 16 September 2010 to a number of detention facilities in Romania, the CPT expressed concerns over the limited living space available to the prisoners and the inadequate amount of space specified by the regulations in place at that time.

43. The relevant provisions of the Code of Criminal Procedure and of Law no. 143 are set out in *Constantin and Stoian v. Romania* (nos. 23782/06 and 46629/06, §§ 33-34, 29 September 2009). A comparative-law study conducted by the Court on the use of undercover agents is presented in *Veselov and Others v. Russia* (nos. 23200/10, 24009/07 and 556/10, §§ 50-63, 2 October 2012).

44. 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. JOINDER OF THE APPLICATIONS

45. Having regard to the similarity of the applicants' grievances, the Court is of the view that, in the interest of the proper administration of justice, the applications should be joined in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

46. The second applicant complained about the conditions of his detention. In addition to the description of the material conditions of his detention, the applicant claimed that he was handcuffed to his cell bed for a month. He also attempted suicide on several occasions and went on hunger strike. He relied on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

47. The Government raised an objection of failure to exhaust the domestic remedies. They considered that the second applicant should have complained before the post-sentencing judge about the alleged lack of proper medical care after the suicide attempt or while on hunger strike. They also noted that the second applicant had failed to complain about being allegedly kept handcuffed to a bed for an extended period of time.

48. The second applicant contended that it would have been useless for him to complain, for instance, about being placed with smokers, in so far as there were at the time no means for the authorities to remedy the situation as there were no places available in the non-smoking cells. He further pointed out that the prison had kept no record of his being handcuffed for a month, thus making it impossible for him to prove his allegations.

49. The Court notes that the second applicant brought to the authorities' attention his complaints, but they were either dismissed (see paragraph 36 above) or ignored (see paragraph 40 above). As for the general complaint about overcrowding, the Court reiterates having found, in numerous similar cases regarding complaints about material conditions of detention relating to structural issues such as overcrowding or dilapidated institutions, that given the specific nature of this type of complaint the legal actions suggested by the Romanian Government do not constitute effective remedies (see, among other authorities, *Petrea v. Romania*, no. 4792/03, § 37, 29 April 2008; *Cucu v. Romania*, no. 22362/06, § 73, 13 November 2012; and *Niculescu v. Romania*, no. 25333/03, § 75, 25 June 2013).

50. The Government's objection should therefore be dismissed.

51. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' observations

52. The second applicant argued that if the conditions of detention had been good he would have had no reason to attempt suicide on two occasions.

53. The Government averred that the authorities had taken all the necessary steps to offer the second applicant adequate conditions in prison as regards space, hygiene, food, drinking water, and hot water. They considered that the conditions of detention had not gone beyond the inevitable element of suffering or humiliation connected with the given form of legitimate punishment.

54. As for the incidents mentioned by the second applicant, they pointed out that the allegations of ill-treatment by a prison officer had been investigated but dismissed as unfounded; the allegation that he was handcuffed to his bed remained unproven. Moreover, when he had gone on hunger strike to protest about being detained with smokers, the authorities moved him to a single cell until a place became available in the non-smoking cell.

55. Lastly, they pointed out that the second applicant had received medical care and psychological assessment after the attempted suicide of 2 December 2005.

56. They also contended that the mere fact that he had gone on hunger strike and had attempted suicide should not in itself lead the Court to conclude that the conditions of detention had been unbearable.

2. The Court's assessment

57. The Court refers to the principles established in its case-law regarding conditions of detention (see, for instance, *Kudła v. Poland [GC]*, no. 30210/96, §§ 90-94, ECHR 2000-XI; *Kalashnikov v. Russia*, no. 47095/99, §§ 97 et seq., ECHR 2002-VI; and *Iacov Stanciu*, cited above, §§ 165-170). It reiterates, in particular, that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3; the assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Kudła*, cited above, § 91).

58. The Court has considered extreme lack of space as a central factor in its analysis of whether an applicant's detention conditions complied with Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, § 39, 7 April 2005). In a series of cases the Court has considered that a clear case of overcrowding is sufficient for the conclusion that Article 3 of the Convention has been violated (see *Colesnicov v. Romania*, no. 36479/03, §§ 78-82, 21 December 2010, and *Budaca v. Romania*, no. 57260/10, §§ 40-45, 17 July 2012). Moreover, it has already found violations of Article 3 of the Convention on account of the physical conditions of detention in Romanian detention facilities, including Baia Mare, Gherla and Jilava Prisons (see, for example, *Radu Pop v. Romania*, no. 14337/04, § 101, 17 July 2012).

59. In the case at hand, the Court observes, on the basis of all the material at its disposal (see paragraphs 36 and 37 above), that the personal space allowed to the second applicant in detention fell short of the requirements set out in the case-law. The Government have failed to put forward any argument that would allow the Court to reach a different conclusion.

60. Moreover, the second applicant's submissions in respect of the overcrowding correspond to the general findings by the CPT in respect of Romanian prisons (see *Iacov Stanciu*, cited above, §§ 125-126).

61. The Court concludes that the conditions of detention caused the second applicant harm that exceeded the unavoidable level of suffering inherent in detention, and have thus reached the minimum level of severity necessary to constitute degrading treatment within the meaning of Article 3 of the Convention.

62. There has accordingly been a violation of Article 3 of the Convention in respect of the material conditions of the second applicant's detention.

63. Taking this finding into account, the Court does not consider it necessary to examine the remaining parts of the complaints concerning the conditions of detention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

64. The applicants complained that if it had not been for the undercover police agent's insistence, the first applicant would not have procured and sold the drugs and the second applicant would not have been compelled to help his brother out with the deal. They further complained that they could not obtain an expert evaluation of the drugs by an independent body; they argued that so long as the laboratories were subordinate to the police, which was an interested party in the case, the principle of equality of arms was breached. They also considered that there had been an interference with their defence rights in so far as the courts had excluded from the file most of the CDs containing the recordings of their conversations, without hearing them first and without allowing their lawyer to assess their utility for the defence. The second applicant added that he had discovered a conversation between his brother and the undercover police agent which could have proved that he had not been involved in the drug trafficking. The second applicant lastly complained that the court of appeal had denied him the right to study the case file.

They relied on Article 6 §§ 1 and 3 (b) and (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 ...
>
> (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

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

B. Merits

1. The parties' arguments

(a) The applicants

66. The applicants reiterated at the outset that they had not been involved in drug trafficking prior to 2004, and that the only reason the first applicant had brought drugs into the country was because the undercover agent had insisted on it.

67. They further complained that they had had no opportunity to question the undercover agent, as he had not been brought before the domestic courts despite their specific requests.

68. They reiterated that they had been denied access to the criminal file and to the totality of the recorded conversations, and expressed lack of confidence in the impartiality of the experts from the Ministry of the Interior in the case.

(b) The Government

69. The Government denied that there had been police entrapment in the case. They explained that the prosecutor had identified an organised crime group, and that the role of the undercover agent was to confirm those findings. The infiltrated agent remained passive and did not exert any pressure on the applicants. As regards the applicants' conduct, they averred that they demonstrated familiarity with the current prices of drugs and were able to obtain drugs at short notice.

70. As regards the procedural safeguards in place in the domestic proceedings, they contended that the undercover agent had duly summarised his activity in reports which had become part of the prosecution file and thus was available to the parties and courts in the domestic proceedings. The Government further argued that the evidence thus obtained had not been the sole evidence leading to the conviction, or even decisive for it. They reiterated that it was for the domestic courts to decide whether it was appropriate for a witness to be called.

71. Concerning the expert examination of the drugs, the Government admitted that it was understandable that doubts could arise as to the neutrality of the experts from the Ministry of the Interior, but contended that the domestic courts took steps to obtain such an independent evaluation and

a new more comprehensive report had been presented to the court, albeit by experts from the Ministry of the Interior. They further argued that the applicants' apprehensions should not be decisive in the case and pointed out that there were no objective justifications for fearing lack of independence on the part of the experts. Lastly on this point they outlined that the applicant could have asked to cross-examine the experts in court, but had not done so.

72. The Government further averred that the applicants had not denied having the recorded conversations, and that they had had numerous opportunities to challenge the validity of that evidence. The fact that some of the recordings were destroyed because they had been deemed irrelevant to the case could not be construed as a denial of the rights of the defence; the Government maintained that the right of access to evidence should only concern the evidence on which the accusation relied. They pointed out that the applicant had had opportunities to challenge the evidence.

73. They further reiterated that the Court has a subsidiary role in the assessment of evidence, and that in the absence of any indication of arbitrariness in the present case it should find no reason to depart from the interpretation given to the facts by the domestic courts.

74. Lastly, the Government rejected the argument that the second applicant had been denied access to the criminal file. They noted that in his numerous submissions to the domestic courts he had relied extensively on the documents in the file, which proved in their view that he had sufficient knowledge of its content. Moreover, even if the applicant had not been able to study each document personally, that task could have been entrusted to counsel. In any case, the applicants' contacts with their lawyers were never restricted.

2. The Court's assessment

(a) General principles

75. At the outset the Court reiterates that paragraph 3 of Article 6 contains a non-exhaustive enumeration of specific applications of the general principle stated in paragraph 1 of that Article (see, for instance, *Andrejeva v. Latvia* [GC], no. 55707/00, § 98, ECHR 2009). The Court will therefore examine the case from the standpoint of Article 6 § 1 alone.

76. The Court has recognised in general that the rise in organised crime and difficulties encountered by law-enforcement bodies in detecting and investigating offences has warranted appropriate measures being taken. It has stressed that the police are increasingly required to make use of undercover agents, informants and covert practices, particularly in tackling organised crime and corruption (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 49 and 53, ECHR 2008).

77. The Court has thus consistently accepted the use of undercover investigative techniques in combatting crime. It has held on several occasions that undercover operations *per se* did not interfere with the right to a fair trial and that the presence of clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment (see *Ramanauskas*, cited above, §§ 51 and 53; *Bannikova v. Russia*, no. 18757/06, § 35, 4 November 2010; *Veselov*, cited above, §§ 89 and 93; and *Lagutin and Others v. Russia*, nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, § 90, 24 April 2014).

78. Furthermore, the Court has reiterated that while admissibility of evidence lies within the domain of the national courts, the Court will in its turn ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Ramanauskas*, cited above, § 52). Therefore, in cases where the main evidence originates from an undercover operation, the authorities must be able to demonstrate that they had good reasons for mounting that operation (see *Bannikova*, cited above, § 40, citing *Ramanauskas*, §§ 63 and 64, and *Malininas v. Lithuania*, no. 10071/04, § 36, 1 July 2008). They should be in possession of concrete and objective evidence showing that initial steps have been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted (see *Veselov*, cited above, § 90).

79. The Court has found in that context that the national authorities had no good reason to suspect a person of prior involvement in drug trafficking where he had no criminal record, no preliminary investigations had been opened against him, and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (see *Teixeira de Castro v. Portugal*, 9 June 1998, § 38, *Reports of Judgments and Decisions* 1998-IV; confirmed in *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 48, ECHR 2004-X; *Khudobin v. Russia*, no. 59696/00, § 129, ECHR 2006-XII (extracts); *Ramanauskas*, cited above, § 56; and *Bannikova*, cited above, § 39; see also *Pyrgiotakis v. Greece*, no. 15100/06, § 21, 21 February 2008). In addition to the aforementioned, the following may, depending on the circumstances of a particular case, also be considered indicative of pre-existing criminal activity or intent: the applicant's demonstrated familiarity with the current prices of drugs and ability to obtain drugs at short notice (see *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV), and the applicant's pecuniary gain from the transaction (see *Khudobin*, cited above, § 134, and *Bannikova*, cited above, § 42).

80. The Court has further emphasised that any information relied on by the authorities must be verifiable (see *Veselov*, cited above, § 90) and that the public interest cannot justify the use of evidence obtained as a result of incitement, as to do so would expose the accused to the risk of being

definitively deprived of a fair trial from the outset (see *Teixeira de Castro*, cited above, § 36, and *Bannikova*, cited above, § 34).

81. In this regard, the Court has repeatedly held that the line between legitimate infiltration by an undercover agent and incitement to commit a crime was likely to be crossed if no clear and foreseeable procedure was set up under the domestic law for authorising undercover operations, and especially if proper supervision was lacking (see *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, § 53, 30 October 2014).

82. The Court has further observed in its case-law that undercover operations must be carried out in an essentially passive manner, without any pressure being put on the applicant to commit the offence through means such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, the promise of financial gain such as raising the price beyond average, or appealing to the applicant's sense of compassion (see *Bannikova*, cited above, § 47, and *Veselov*, cited above, § 92, and the cases cited therein).

83. Lastly, the Court has highlighted that where the accused puts forward an arguable claim of incitement, domestic courts have an obligation to examine it through an adversarial, thorough, comprehensive and conclusive procedure. 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. The scope of the judicial review must include the reasons why the undercover operation was mounted, the extent of the police's involvement in the offence, and the nature of any incitement or pressure to which the applicant was subjected. For instance, a procedure for the exclusion of evidence was found to satisfy these criteria (see *Veselov*, § 94; *Ramanauskas*, §§ 70 and 71; and *Khudobin*, § 133, judgments cited above).

(b) Application of those principles to the case

84. Turning to the facts of the case under examination, the Court notes at the outset that the two applicants' situations differ significantly: it was only the first applicant who brought the drugs into the country and negotiated the transactions. The second applicant became involved only towards the end of the process, when everything had already been arranged in detail between his brother and the undercover police agent. As far as the second applicant was concerned, it can be accepted that he only got involved in order to help his brother whom he thought to be, along with the whole family, at great risk of retaliation from the Dutch drug dealer (see paragraph 18 above). Therefore the matter of whether there was police incitement in the case applies primarily to the first applicant. It nevertheless affects the outcome for the second applicant as well.

85. The authorities established that the first batch of drugs was brought into the country in September 2004, and it appears that most of the tablets

were eventually sold to the police agent (see paragraph 6 above). The authorisation for the use of an undercover agent does not offer more details in respect of the information the authorities had about the first applicant's involvement in drug trafficking (see paragraph 13 above). It is therefore hard to discern on what basis the operation was mounted and whether the authorities had a good reason to instigate the operation. On the basis of the information in the file the Court notes that the first applicant had no relevant prior criminal record, and the mere fact that he was a drug user could not justify the police intervention (see, *mutatis mutandis, Constantin and Stoian*, cited above, § 55). As regards the financial gain sought by the first applicant from the sale of drugs, it appears that from the first batch of drugs, besides the tablets sold to the infiltrated agent (160 of the 250 tablets) he either gave away most of the remaining tablets or consumed them himself (see paragraphs 6, 7 and 17 above). No other potential buyer was either identified or even mentioned by the police investigation.

86. Furthermore, the Court notes that it was the police agent who calculated the price of the first transaction (see paragraph 6 above). Not only did he indicate the price, but he also arranged for the next deal, set all the details, leaving the first applicant with nothing more to do than follow his lead. Certainly it was the first applicant who showed the ability to obtain more drugs on a short notice, but the Court cannot but note the significant role played by the undercover agent in arranging the next deal, which runs counter to the requirement of passivity on the State agent's part. The undercover agent was the main buyer of the first batch of drugs and, although the crime had already been committed, he insisted that the first applicant bring in more drugs to sell exclusively to him. He renewed his offer, was insistent, and threatened the first applicant that he would take his business elsewhere if drugs were not produced rapidly.

87. The police insistence, coupled with the lack of prior information on the alleged implication in drug trafficking of the first applicant are sufficient to conclude that there was entrapment in the case.

88. As the applicants raised a plea of incitement, albeit summarily, with the domestic courts (see paragraphs 28 and 30 above), the Court will further look into the manner in which the authorities responded to their arguments.

89. It notes that as well as arguing that the undercover police had played too significant a role in the drug deal, the applicants also asked expressly for the undercover agent to be heard by the court (see paragraph 25 above). The courts, however, either gave no answers to their pleas or dismissed them without further consideration (see paragraphs 29 and 32 above).

90. The courts did not hear direct evidence from the undercover agent. They did not question the legitimacy of the undercover operation, even in the absence of prior relevant information about the applicant's alleged involvement in drug trafficking. Furthermore, the Court notes that the domestic courts failed to offer the applicants the opportunity to study the

entirety of the recorded conversations, despite their potential relevance for the preparation of the defence (see paragraphs 19 and 30 above).

91. The Court lastly notes that, although the applicants' conviction was based on a whole body of evidence, the role played by the elements gathered through the covert operation undeniably played a significant role. It notes that, besides the undercover police reports, the county court relied mainly on the statements made by the two taxi drivers who did not witness the drug transaction (see paragraph 29 above); and on transcripts of conversations which were not complete and could not be examined by an independent expert.

92. In the light of the above considerations, the Court concludes that the undercover measure at issue went beyond the mere passive investigation of pre-existing criminal activity and amounted to police incitement as defined in the Court's case-law, and the evidence obtained by police incitement was further used in the ensuing criminal proceedings against the applicant.

93. Accordingly, there has been a violation of Article 6 § 1 of the Convention in respect of both applicants.

94. The Court does not consider it necessary to examine the remaining arguments raised by the applicants under Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. 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

96. The first applicant claimed 210,000 euros (EUR) in respect of non-pecuniary damage. The second applicant claimed EUR 2,100,000 in respect of non-pecuniary damage.

97. The Government argued that the applicants' requests were speculative, excessive and not proven. They considered that should the Court find a violation of Article 3, the acknowledgement as such could constitute sufficient just satisfaction. They further invited the Court, should it decide to make an award of damages in respect of the alleged violation of Article 6 of the Convention, not to depart from its previous rulings; they referred to *Constantin and Stoian*, cited above, and *Bulfinsky v. Romania*, no. 28823/04, 1 June 2010.

98. Making its assessment on an equitable basis, the Court awards, in respect of non-pecuniary damage, EUR 2,400 to the first applicant and EUR 9,750 to the second applicant.

99. It further acknowledges that the applicants have the possibility of seeking the reopening of the proceedings under the provisions of Article 465 of the Code of Criminal Procedure, should they choose to do so (see *Mischie v. Romania*, no. 50224/07, § 50, 16 September 2014).

B. Costs and expenses

100. The applicants also claimed EUR 2,000 for lawyers' fees for their representative before the domestic courts, and EUR 1,500 for lawyers' fees for their representative before the Court. They alluded to other costs, claiming that they could not produce evidence to support the additional claims. They adduced bills attesting payment of 75,000,000 old Romanian lei (ROL) to their representative in the domestic proceedings, of 6,750 new Romanian lei (RON) to their representative in the current proceedings, and of RON 380 for translations.

101. The Government contested the veracity of these claims.

102. 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 (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 142, ECHR 2014 (extracts)). 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 applicants jointly the sum of EUR 3,500 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 3 of the Convention with respect to the second applicant;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention with respect to both applicants;

5. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the respondent State's national currency at the rate applicable at the date of settlement:

(i) EUR 2,400 (two thousand four hundred euros) to the first applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 9,750 (nine thousand seven hundred and fifty euros) to the second applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 3,500 (three thousand five hundred euros) jointly to both applicants, plus any tax that may be chargeable to them, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 16 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President