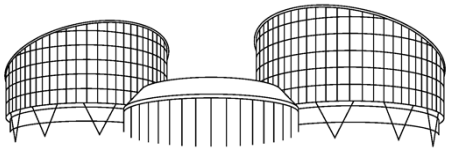

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF VOINEA v. ROMANIA

(Application no. 64020/09)

JUDGMENT

STRASBOURG

18 December 2018

This judgment is final but it may be subject to editorial revision.

In the case of Voinea v. Romania,

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

Paulo Pinto de Albuquerque, *President,*
Egidijus Kūris,
Iulia Antoanella Motoc, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 27 November 2018,

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

PROCEDURE

1. The case originated in an application (no. 64020/09) 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 Romanian national, Mr Lucian Cătălin Voinea ("the applicant"), on 19 November 2009.

2. The applicant was represented by Mr H. Petria-Mitran, a lawyer practising in Craiova. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar from the Ministry of Foreign Affairs.

3. The applicant alleged that the criminal proceedings against him had been unfair because he had been convicted of an offence committed under police incitement. He relied on Article 6 § 1 of the Convention.

4. On 19 May 2014 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and is detained in Poarta Albă Prison.

6. On 19 July 2007 the authorities initiated an investigation of their own motion in connection with a network of drug dealers coordinated by C.B.S.

7. On the same day the prosecutor's office attached to the High Court of Cassation and Justice authorised the police division responsible for combatting organised crime and drug trafficking to use an undercover agent in order to identify members of the network. The justification given for such an operation was that, on the basis of information gathered during a preliminary criminal investigation, there was a strong indication that the

applicant belonged to a drug-dealing network which provided drugs such as cannabis, ecstasy and hashish to drug users known to him in Craiova.

8. The authorisation for the operation was extended three times, on 18 August, 17 September and 16 October 2007 respectively.

9. The interception and recording of the applicant's phone conversations was also authorised. The meetings between the applicant and the undercover agent were recorded.

10. On 19 July 2007 the undercover agent approached the applicant, asking to buy cannabis or any other drug from him. According to the report drafted by the agent on the same day, the applicant confirmed that he had a small amount of cannabis and hashish in his possession and offered to sell it to the agent. He sold to the undercover agent on that occasion 1.59 grams of cannabis, 0.23 grams of hashish and a cigarette containing cannabis.

11. At the undercover agent's request they met again on 25 July 2007. The undercover agent asked for more drugs. The applicant informed him that he had none, but promised to find a supplier. He subsequently bought two ecstasy pills from C.B.S. and on 27 July 2007 he met the undercover agent and sold him the pills.

12. After the undercover agent telephoned him again requesting more drugs, the applicant bought three pills of ecstasy from N.F. and handed them over to the undercover agent on 2 August 2007.

13. On 9 August 2007 the applicant supplied the undercover agent with 0.43 grams of cannabis.

14. On 17 August 2007 the police officers, acting in league with the undercover agent, caught the applicant red-handed while he was selling 7.54 grams of cannabis to the undercover agent.

15. The applicant also had in his possession five small packages of cannabis and a small envelope containing hashish.

16. The applicant was immediately remanded in police custody. His home was searched on the same day and the police officers found 350 grams of cannabis.

17. The applicant gave a statement in the presence of a lawyer appointed on his behalf. He pleaded guilty to the accusation of drug trafficking. The next day the applicant was questioned again in the presence of a lawyer of his own choosing. He stated that initially he had only been a user (but not a seller) of drugs. In 2003 he had decided to stop using drugs. In 2007 he had encountered some financial difficulties and had accordingly decided to sell cannabis that he had found growing wild on public spaces in Craiova and a village in the city's neighbourhood. On several occasions he had gathered the cannabis and sold it to different buyers. He also acknowledged selling hashish that he had procured from C.B.S., one of his friends. He had also sold ecstasy pills that he had obtained from N.F., a girl he had met in May 2007 in a holiday resort. She had told him that she had bought ecstasy pills while living in Spain and that before returning home she had sent a

parcel containing ecstasy pills to her home address. They had met again several times after the holiday and she had informed him that she could obtain more ecstasy pills from her brother, who was living abroad.

18. Five co-defendants (who were allegedly members of the same network of drug dealers) were taken into police custody on the same day. Arrest warrants were issued in their names and their pre-trial detention for thirty days was ordered on 18 October 2007 by the Dolj County Court.

19. On 12 September 2007 the prosecutor's office attached to the High Court of Cassation and Justice issued an indictment naming the applicant and five co-accused, and the case was registered with the Dolj County Court.

20. On 17 October 2007 the prosecutor in charge decided to join the applicant's file to another criminal file concerning other offences involving drug-trafficking allegedly committed by one of the applicant's co-defendants. In that file another undercover agent and his collaborator were authorised to operate.

21. The applicant gave evidence again on 5 March 2008 before the Dolj County Court. He partly maintained the statement that he had given earlier, during the criminal investigation. He contended that the cannabis he had gathered from the public space located near Craiova's stadium had been for his own use and not for selling. He also stated that he had not sold drugs to anyone other than the undercover agent.

22. On 14 May 2008 the county court heard evidence from the undercover agent, in the presence of the applicant who was assisted by his lawyer. The undercover agent stated that he had been introduced to the applicant by a drug user, who had informed him that the applicant had been trying to find buyers for hashish and cannabis. He also stated that it had been the applicant who had proposed that he obtain a large quantity of ecstasy pills for him.

23. In his last oral and written submissions the applicant's lawyer contended that the use of an undercover agent had been illegal.

24. By a judgment of 5 September 2008 the Dolj County Court convicted the applicant of drug trafficking under Article 2 of Law no. 143/2000 and sentenced him to five years' imprisonment. When determining his sentence, the court – referring to Articles 74 (a) and (c) and 76 of the Romanian Criminal Code – took into account as mitigating circumstances the applicant's good behavior before and after committing the crime.

25. The court based its findings on (i) the statements given by the co-defendants, the undercover agent and witnesses, (ii) the transcripts of the recorded phone conversations, and (iii) technical and search reports. It held that the applicant's defence argument – according to which he had acted at the undercover agent's instigation – was not viable as the undercover agent

had not forced the applicant to sell him drugs. He had merely called the applicant several times and asked him to sell him different drugs.

Moreover, the defence argument was contradicted by the statements given by the applicant during the criminal investigation and by C.B.S., one of the co-accused. Accordingly, the court concluded that the use of the undercover agent in the case had been lawful.

26. The court furthermore noted the extensive criminal activity engaged in by the applicant's co-defendants, including C.B.S. (who provided most of the drugs that the applicant sold to the undercover agent) and imposed on them prison sentences. It also noted that the investigating authorities had found out that the cannabis sold by the co-accused had been gathered from a park located in Craiova and that it had been cultivated by C.B.S. Moreover, C.B.S. had been caught red-handed with 102 ecstasy pills when taking delivery of a parcel received by post.

27. The applicant appealed, complaining, *inter alia*, that the undercover agent had overstepped the legitimate limits of investigation by influencing him and inciting him to sell drugs. He also contended that he had merely been a drug user and not a drug dealer.

28. On 19 November 2008 the Craiova Court of Appeal allowed the applicant's appeal and partly set aside the judgment of the first-instance court. It reduced the applicant's sentence to four years' imprisonment, suspended, and placed him on probation. The appeal court upheld the lower court's reasoning in dismissing the entrapment plea.

29. The prosecutor's office and all the accused, including the applicant, lodged appeals on points of law.

30. The applicant submitted that – as was clear from the transcripts of the recorded phone conversations – all the drug transactions had taken place at the initiative of the undercover agent. He argued that prior to 19 July 2007, when he had been approached by the latter (see paragraph 10 above), he had not been known as a drug dealer. He also claimed that even though he had been under police surveillance between July and November 2007, no buyer other than the undercover agent had been identified.

31. The High Court of Cassation and Justice allowed the prosecutor's office's appeal and dismissed the applicant's appeal. It quashed the decision of 19 November 2008 (see paragraph 28 above) and upheld the judgment of 5 September 2008 (see paragraph 24 above). The court of last resort addressed all the arguments submitted by the applicant and his lawyer, including the matter of his having been incited by an *agent provocateur*. It considered the applicant's plea of entrapment to be unfounded.

II. RELEVANT DOMESTIC LAW

32. The relevant provisions of the Code of Criminal Procedure, as in force at the material time, 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).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

33. The applicant complained that his conviction for drug-trafficking had been in breach of Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

34. The Court notes that the application 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' submissions

35. The applicant submitted that he had had no criminal record and that if it had not been for the undercover police agent's insistence, he would not have procured and sold the drugs. He also claimed that even though he had been under police surveillance no buyer other than the undercover agent had been identified. Moreover, the domestic courts had failed to give an adequate answer to the question of the authorities' responsibility for the use of entrapment in inducing him to commit a crime.

36. The Government maintained that the actions of the undercover agent had not amounted to incitement and that the use by the national courts of the evidence obtained as a result of the operation had not been in breach of Article 6 § 1 of the Convention. They furthermore contended that the applicant had been afforded adequate procedural safeguards that had enabled him to lodge a complaint regarding the alleged incitement and that the domestic courts had thoroughly examined it in adversarial proceedings.

37. The applicant did not submit written submissions in response to the Government's observations. He maintained his initial submissions.

2. The Court's assessment

(a) General principles

(i) The test of entrapment

38. In the specific context of investigative techniques used to combat drug trafficking and corruption, the Court's long-standing view has been that, while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see, among other authorities, *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 35-36 and 39, *Reports of Judgments and Decisions* 1998-IV, and *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 54, ECHR 2008).

39. In its extensive case-law on the subject, the Court has developed the concept of entrapment in breach of 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).

40. The Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement. The relevant criteria determining the Court's examination in this context are set out in the cases of *Bannikova v. Russia* (no. 18757/06, §§ 37-65, 4 November 2010) and *Matanović v. Croatia* (no. 2742/12, §§ 123-135, 4 April 2017). They were recently summarised in the cases of *Ramanauskas v. Lithuania (No. 2)* (no. 55146/14, §§ 56-62, 20 February 2018) and *Virgil Dan Vasile v. Romania* (no. 35517/11, §§ 40-50, 15 May 2018).

41. The methodology of the Court's assessment is as follows (see, *inter alia*, *Ramanauskas (No. 2)*, cited above, § 62):

(a) A preliminary consideration in its assessment of a complaint of incitement relates to the existence of an arguable complaint that an applicant was subjected to incitement by the State authorities. In this connection, in order to proceed with further assessment, the Court must satisfy itself that the situation under examination falls prima facie within the category of "entrapment cases". If the Court is satisfied that the applicant's complaint falls to be examined within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement.

(b) Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention.

(c) However, if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement, contrary to Article 6 § 1 of the Convention, it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement (see also *Pătraşcu v. Romania*, no. 7600/09, §§ 36-41, 14 February 2017).

(ii) Cases concerning multiple illicit transactions

42. In the case of *Grba v. Croatia* (no. 47074/12, §§ 92-103, 23 November 2017) the Court set out its case-law concerning recourse to an operational technique involving the arrangement by the State authorities of multiple illicit transactions with a suspect.

43. In that case the Court concluded that recourse to an operational technique involving the arrangement by the State authorities of multiple illicit transactions with a suspect is a recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but rather a continuing illegal enterprise.

44. However, in keeping with the general prohibition on entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one that the individual was already planning to commit without such incitement (see *Matanović*, cited above, §§ 123-124, with further references). Accordingly, when the State authorities use an operational technique involving the arrangement of multiple illicit transactions with a suspect, the infiltration and participation of an undercover agent in each illicit transaction must not expand the police's role beyond that of undercover agents to that of *agents provocateurs*. In each transaction, the police's conduct must be consistent with the proper use of governmental power (see *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, §§ 86-87, 16 July 2015).

45. It also follows from the above that in cases concerning recourse to an operational technique involving the arrangement by State authorities of multiple illicit transactions with a suspect, any extension of the investigation

must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime (compare *Malininas v. Lithuania*, no. 10071/04, § 37, 1 July 2008, and *Furcht v. Germany*, no. 54648/09, §§ 58-59, 23 October 2014).

(b) Application of these principles to the present case

(i) Substantive test of incitement

46. The first question to be examined by the Court when confronted with a plea of entrapment is whether the State agents carrying out the undercover activity remained within the limits of "essentially passive" behaviour or went beyond them, acting as *agents provocateurs*.

47. In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The authorities must be able to demonstrate that they had good reasons for mounting that operation (see *Bannikova*, cited above, § 40; *Ramanauskas*, §§ 63 and 64; and *Malininas*, cited above, § 36).

48. In the present case the Court notes that at the time the applicant was first approached by the undercover agent in July 2007, there were no objective suspicions that he was involved in drug trafficking. No criminal investigations were instituted against the applicant at that time.

49. Nevertheless, the Court has previously ruled that an applicant's behaviour might be indicative of pre-existing criminal activity. Thus, it has found that the following may, depending on the circumstances of a particular case, be considered indicative of pre-existing criminal activity or intent: the applicant's demonstrable 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 deriving pecuniary gain from the transaction in question (see, *a contrario*, *Khudobin v. Russia*, no. 59696/00, § 134, ECHR 2006-XII (extracts).

50. Several factual elements indicate that in the present case the applicant had been involved in drug trafficking before being contacted by the police undercover agent. The applicant himself confessed that, independently of his meeting with the undercover agent, he had gathered cannabis from public spaces (see paragraph 17 above). The police officers who carried out the search of his flat on 17 October 2007 found 350 grams of cannabis (see paragraph 16 above).

51. Moreover, following telephone discussions with the undercover agent, he had on several different occasions procured drugs at short notice (see paragraphs 10-14 above). His familiarity with the prices of drugs and

his ability to procure drugs within a short time also indicated his prior involvement in organised drug crime. He acknowledged that C.B.S., who had supplied most of the drugs he had sold to the undercover agent and appeared to be the main supplier and organiser of the drug-trafficking network, was his friend (see paragraph 17 above).

52. Although no other potential buyer was either identified or even mentioned by the police investigation, on 17 October 2007 – the day on which the applicant had been caught red-handed (see paragraph 14 above) – he had had in his possession five small packages of cannabis and a small envelope containing hashish (see paragraph 15 above), in addition to the 7.54 grams of cannabis that he had sold to the undercover agent.

53. The Court notes that the applicant confessed in the presence of a lawyer, in the first statement that he gave during the investigative stage, that he had taken the decision to sell drugs in order to surmount his financial difficulties before being contacted by the undercover agent and that he had previously sold drugs to other clients (see paragraph 17 above). The Court therefore considers that the intention to commit drug-related offences had already been developed freely by the applicant before the intervention of the undercover police officer.

54. Furthermore, the Court notes that at his first encounter with the undercover agent, the applicant had cannabis and hashish in his possession and readily offered to sell it to the latter (see paragraph 10 above). Accordingly, the Court does not consider that the first contact and meeting between the applicant and the undercover agent constituted an inducement to the applicant to sell drugs.

55. The Court observes, however, that the applicant was not arrested following the initial drug transaction with the undercover agent on 17 July 2007. This appears to be a result of the investigating authorities' decision to arrange further meetings with the applicant rather than arresting him immediately after the first illicit transaction (see paragraphs 11-14 above).

56. Therefore, the Court must also examine whether the investigating authorities' recourse to an operational technique involving the arrangement of multiple illicit transactions with the applicant ran counter to the requirements of Article 6 § 1 of the Convention. In making that assessment the Court must first examine whether in any of the multiple illicit transactions the State agent's role was expanded beyond that of an undercover agent to that of an *agent provocateur* and, secondly, whether by engaging in those multiple illicit transactions the State agent improperly extended the scope or scale of the applicant's actual criminal intent and capacity (see *Grba*, cited above, §§ 103-104 and 111).

57. The Court notes firstly that the undercover agent took the initiative in arranging the further meetings with the applicant. Moreover, there were certain aspects of the communications between the applicant and the undercover agent that suggested the prompting of the applicant to engage in

the illicit trafficking of stronger drugs, in larger quantities (see paragraphs 11 and 12 above).

58. The Court will further examine the reasons for the decision to engage in multiple illicit transactions with the applicant. Although not expressly mentioned, it can be seen that the main reason that prompted the authorities to engage in multiple transactions was their desire to identify the suppliers of the applicant's drugs and other members of the drug-trafficking network. Following these illicit multiple transactions the authorities managed to identify the way in which the network was organised and its main suppliers. In this connection they noted that the applicant's main supplier was C.B.S. but also that on one occasion he had bought ecstasy pills from N.F. The evidence secured during the multiple illicit transactions allowed the identification and prosecution of the members of the drug-trafficking network. Most of them have been convicted (see paragraphs 18, 19, 20 and 26 above).

59. Nevertheless, on the basis of the available material, it is impossible for the Court to establish with a sufficient degree of certainty whether or not the applicant was the victim of entrapment, contrary to Article 6, with regard to his participation in the multiple illicit transactions with the undercover agent. It is therefore essential that the Court examine the procedure whereby the plea of entrapment was assessed in this case, in order for it to ensure that the rights of the defence were adequately protected (see *Grba*, cited above, § 116, and *Matanović*, cited above, §§ 134-135).

(ii) Procedural test of incitement

60. The Court will further proceed to the second step of its assessment and examine whether the applicant was able to raise the issue of incitement effectively in the domestic proceedings, and assess the manner in which the domestic courts dealt with his plea.

61. The Court observes that the applicant made an arguable plea of incitement before the courts.

62. The domestic courts adequately addressed his plea and dismissed it on the basis of adequate reasoning. They took the necessary steps to uncover the truth and to resolve the doubts as to whether the applicant had committed the offence in question as a result of incitement on the part of an agent provocateur.

63. The courts' conclusion that there had been no entrapment was based on a reasonable assessment of relevant and sufficient evidence. In convicting the applicant, they referred not only to the evidence obtained as a result of the use of the undercover agent (such as the written reports by the undercover agent, the transcripts of the conversations between the applicant and the undercover agent, and the expert reports concerning the content of the drugs sold by the applicant to the undercover agent) but also on the

statements given by the applicant and his co-accused and the report on the search of the applicant's home (see paragraph 25 above).

64. The applicant, assisted by a lawyer of his own choosing, had the possibility to confront the undercover agent in open court (see paragraph 22 above).

65. The Court also notes that applicant's participation in the multiple illicit transactions did not aggravate the sentence applied to him. The domestic courts did not base his sentence on the continuing criminal activity related to his multiple illicit transactions with the police agent (contrast *Grba*, cited above, § 124). On the contrary, in the present case the domestic courts reduced his sentence, having taken into account as mitigating circumstances his behaviour before and after committing the offences (see paragraph 24 above).

66. In the light of the foregoing, the Court considers that the applicant's plea of incitement was adequately addressed by the domestic courts, which took the necessary steps to uncover the truth and to eradicate the doubts as to whether the applicant had committed the offence as a result of incitement by an *agent provocateur*. The Court finds therefore that the applicant's trial was compatible with the notion of fairness required by Article 6 § 1 of the Convention.

67. There has accordingly been no violation of this provision.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 18 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Paulo Pinto de Albuquerque
Deputy Registrar	President