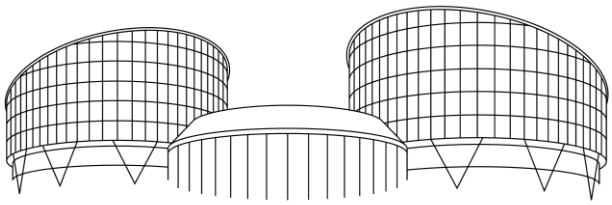

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BULFINSKY v. ROMANIA

(Application no. 28823/04)

JUDGMENT

STRASBOURG

1 June 2010

FINAL

01/09/2010

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

In the case of Bulfinsky v. Romania**,**

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

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 11 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 28823/04) 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 Cristian-Răzvan Bulfinsky ("the applicant"), on 2 July 2004.

2. The applicant was represented by Mr Vasile Topârceanu, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Mr Răzvan-Horaţiu Radu, of the Ministry of Foreign Affairs.

3. On 11 December 2008 the President of the Third Section decided to communicate to the respondent Government the applicant's complaint under Article 6 § 1 of the Convention that the criminal proceedings against him had been unfair because of police entrapment. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1979 and lives in Bucharest.

5. At the beginning of April 2002 the police division responsible for fighting organised crime and drug trafficking ("the police") received information that the applicant and his friends P.T. and D.C. were trafficking

in drugs. The three friends were ecstasy users. At the time of the events, the applicant and D.C. were students.

6. On 18 April 2002 the police sought authorisation from the prosecutor's office to use undercover agents and a collaborator to follow the lead regarding the suspects' alleged criminal activities. On the same day the organised crime and drug-trafficking section of the prosecutor's office at the Supreme Court of Justice ("the prosecutor's office") authorised two agents, referred to in the proceedings as "Toni" and "Sven" (the latter being introduced to the applicant and his friends as "Alex"), and a collaborator, "Gotti", to participate in the operation.

A. The uncontested events on 29 April 2002

7. On 29 April 2002 Sven met the applicant, D.C. and P.T. in a restaurant ("restaurant E") and agreed to meet with them again later the same day.

8. At 9.15 p.m. the applicant and P.T. were sitting with Alex on the terrace of restaurant M and D.C. was sitting at the adjacent table with some friends, when plain clothes police officers rose from the neighbouring tables and arrested the three suspects. A yellow plastic bag was taken from under the applicant's table and its contents checked; the police noted that it contained bread, under which were several packets fastened with brown tape which together contained 2,016 white tablets which later proved to be ecstasy.

9. The three suspects were arrested on suspicion of drug trafficking. The police took photographs and videotaped the events. Images from the operation were shown on the evening news.

B. The statements of the applicant, D.C. and P.T. during the proceedings

10. On her arrest D.C. confessed to the prosecutor that she and P.T. had taken part in drug trafficking. However, she withdrew her confessions before the first-instance court, claiming that she had been coerced into making them by the police with the promise that if she wrote down what she was told to write, she would be released after ten minutes.

11. The applicant and his friends claimed that they had been contacted by Gotti, whose real name was Bogdan, and who was a friend of D.C. They gave the authorities his full name and address for further investigation. Gotti had told them that Alex had various objects (clothes and watches) for sale at reasonable prices. They finally agreed to meet Alex and at 4.30 p.m. on 29 April they, together with Bogdan, went to restaurant E. They sat down with Alex, who did not have the merchandise with him. Later that day the three friends were at bar N. when Bogdan told them that Alex was at

restaurant M and could meet them again. The applicant and Bogdan left in Bogdan's car. After a while, they called D.C. and P.T., who had stayed behind, and told them that Bogdan had forgotten a yellow plastic bag under their table at the bar and asked them if they could bring it to restaurant M as it contained food for Bogdan's wife, who was ill.

12. At 9.15 p.m. the applicant and Bogdan arrived at restaurant M and sat at Alex's table. Ten minutes later P.T., who was carrying Bogdan's plastic bag, and D.C., joined them. P.T. sat at Alex's table while D.C. sat at the next table with some acquaintances.

13. When Alex went to the toilet, plainclothes police officers intervened, expecting to find exactly 2,000 tablets of ecstasy in the bag under the table.

14. In their statements, the applicant and his friends insisted that the drugs had in fact been given to the undercover agents by the police for the purpose of the covert operation. In support of their statements they pointed out that despite their constant surveillance over the previous few days the police could not explain where the friends had obtained the drugs.

C. The criminal proceedings against the applicant

1. The indictment

15. The applicant and his friends were arrested and taken into custody on the evening of 29 April 2002, on suspicion of trafficking in drugs. Their detention was maintained by the courts throughout the proceedings.

16. The prosecutor's office heard evidence from the applicant, D.C. and P.T., and from two eyewitnesses who had been present on the terrace at restaurant M, and examined the written records of statements by Toni and Sven. At the prosecutor's request, both the applicant's and D.C.'s flats were searched by the police. No drugs or other illegal substances were found.

The prosecutor concluded that on 29 April 2002 Gotti had informed Toni that the three persons were preparing a transaction involving MDMA tablets (methylenedioxymethamphetamine). Toni had then contacted Sven, who had met with the suspects to secure the transaction. According to Sven's statements, the suspects had offered to sell him 4,000 tablets of MDMA for 4 US dollars each.

17. On 21 June 2002 the prosecutor's office committed the applicant, P.T. and D.C. for trial on charges of drug-trafficking, in violation of Law no. 143/2000 on the fight against drug trafficking and illegal drug use (“Law no. 143”).

18. It also decided to sever the criminal investigations from those concerning another participant in the trafficking, Bogdan, who had not yet been identified by the police. On 13 February 2003, the prosecutor's office at the Supreme Court of Justice identified Bogdan as being the same person as Gotti and closed the investigation against him.

2. Proceedings before the first-instance court

19. Several hearings were held before the Bucharest County Court.

20. The three accused denied their involvement in drug trafficking and claimed that they had been entrapped by the police. They repeatedly stated that Bogdan had also been present at restaurant M.

21. The defence lawyers insisted on the importance for the court of hearing evidence from Bogdan in the presence of the defendants. They also requested the police to produce the bag and the packets in which the tablets had been found and to collect fingerprints from them. They considered that the court should see the video tapes of the events. Lastly, they asked for a confrontation between the applicants, which would allow them to prove that the police had put pressure on them and made them promises in order to obtain the initial declarations.

The court did not hear that evidence.

22. The County Court gave judgment on 15 April 2003. It found the three accused guilty of drug trafficking and sentenced them each to four years' imprisonment. It deducted from the sentence the time spent in pre-trial detention. The court also confiscated the 1,965 tablets of MDMA that were left after laboratory tests had been carried out.

23. The County Court dismissed the defence arguments on the ground that under Law no. 143 statements made by undercover agents and their collaborators can constitute evidence. The court was satisfied that those statements had not been obtained illegally and considered that the defence argument to the contrary could not taint the evidence. It also considered that the intention of the accused to sell drugs was evidenced by their entering into negotiations with Toni and Gotti, which in turn led to their authorising Sven to make the transaction with the defendants and obtain the drugs from them.

In reaching its conclusion, the County Court relied on the statements made by the suspects and the undercover agents Toni and Sven to the police, as well as the declarations made by the applicant before the court. It gave precedence to the statement given by D.C. during the investigations as it considered that her withdrawal of her initial statement to the police was unjustified, as she had not proved that she had been coerced into making it.

3. The appeal proceedings

24. All the parties appealed against the judgment of 15 April 2003. The defence counsel reiterated that the evidence gathered against the defendants was illegal, that the drugs had belonged to the police and that Bogdan should be heard by the court.

25. In a decision of 29 October 2003 the Bucharest Court of Appeal upheld the County Court's findings on the facts of the case and its examination of the participants' guilt. It considered, however, that the

County Court had erred in determining the sentence, in that it had not taken into account the seriousness of the crimes committed and the fact that, as students, the participants had a higher level of education which should have allowed them to comprehend the gravity of their deeds. It therefore increased the sentence to twelve years' imprisonment for each defendant.

26. In a final decision of 20 April 2004 the High Court of Cassation and Justice dismissed the defendants' appeals in cassation and upheld the Court of Appeal's decision.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

27. 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.

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant complained that he had not received a fair trial in the criminal proceedings against him, alleging a violation of Article 6 §§ 1 and 3 of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing... Judgment shall be pronounced publicly...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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;"

30. In particular, he claimed that he and his friends had been entrapped by the undercover agents and their collaborator and that the drugs found at the scene had belonged to the police. He also complained that there was no lawful evidence of their involvement in drug trafficking and that the courts had failed to examine essential evidence; in particular, they had failed to ask for fingerprints to be taken from the bag containing the drugs, to take a statement from the key witness Bogdan, and to hear the transcription of the telephone conversations that had taken place between the co-defendants and the undercover agents. In addition, he considered that the prosecutor

and the courts had not correctly established the legal classification of the crime allegedly committed.

Under the same Article, the applicant complained that the decisions had not been pronounced publicly.

A. Admissibility

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

B. Merits

1. The parties' submissions

a) The Government

32. The Government supported the prosecutor's version of the facts, as confirmed by the domestic courts.

33. They submitted a detailed description of the procedure on covert police operations in Romania and pointed out that a system permitting such operations was common to many European countries and was recommended by the Council of Europe and the European Union in certain instances.

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

35. They also rejected the allegations of unfairness in the proceedings. In their view, the courts had given a detailed interpretation of the evidence and had explained their conclusions thoroughly.

36. Moreover, unlike in the case of *Teixeira de Castro v. Portugal* (9 June 1998, *Reports of Judgments and Decisions* 1998-IV), the courts in the case at hand had not based their decision solely on the undercover agents' testimonies, but also on the defendants' statements given at various stages of the proceedings.

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

b) The applicant

38. The applicant submitted that there was no convincing evidence in the file that he had taken part in drug trafficking, and he reiterated that no drugs had been found on him at the time of his arrest.

39. He argued that he had not participated in an operation involving the sale of drugs, in so far as the drugs had passed from one police agent's hands to the other without any intention of them being sold. In his opinion, it was merely a police operation aimed at gathering evidence. He reiterated that the courts had not heard the video or audio recordings of the operation; that no fingerprints had been taken from the bag containing the drugs; and that there had been no confrontation between the defendants and the undercover agents and their collaborator, who had never even been heard by the prosecutor or the courts.

2. The Court's assessment

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

41. To ascertain whether or not the undercover police confined themselves to "investigating criminal activity in an essentially passive manner" in the present case (see *Ramanauskas*, cited above, § 55), the Court has regard to a number of considerations. There are no indications that the applicant or the co-defendants have been previously involved in drug-related crimes. The Court notes that the authorities did not give details or refer to any objective evidence concerning unlawful behaviour by the suspects prior to the incidents of 29 April 2002. Moreover, no drugs were found either in the applicant's possession or in his home (see paragraph 16 above).

42. The Court also notes that the parties gave different interpretations of the events that occurred on 29 April 2002. According to the authorities, the applicant and his co-defendants had agreed to broker the deal. However, the

applicant, claiming police entrapment, stated that he had not been aware of the content of the bag, which, in fact, belonged to the police collaborator Bogdan; he also maintained that the drugs in the bag had belonged to the police.

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

44. In convicting the applicant and his co-defendants, the courts relied exclusively on the evidence obtained during the investigations, namely written reports by the undercover agents and the statements made by the suspects, as well as the defendants' testimonies before the first-instance court.

The courts did not reply to the defence's requests for evidence, in particular in relation to Bogdan's involvement and role, or to their requests for fingerprints to be collected from the bags containing the drugs or for the recording of the events to be heard by the courts. Furthermore, the courts did not hear the undercover agents. The defence thus had no opportunity to cross-examine witnesses. The courts also decided to give precedence to the statements obtained by the investigators and considered that those given before the first-instance court had been false.

45. In the light of the defendants allegations as to the police involvement, the domestic courts could not have ensured the respect of the principle of fairness, and in particular the equality of arms, without hearing evidence from Bogdan and the undercover police officers and without allowing the defendants to question, even in writing, those persons. Furthermore, the court should have examined or at least given more thorough explanations to why it rejected the other requests for evidence.

46. The Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, even when the two are in conflict (see *Doorson v. the Netherlands*, 26 March 1996, § 78, *Reports of Judgments and Decisions* 1996-II). However, the Court considers that the reasoning given by the County Court to justify the precedence given to D.C.'s statements to the investigators might raise an issue as to the respect of the rights of the defence.

47. Lastly, the Court notes the summary manner in which the domestic courts rejected the allegations of police entrapment. It notes that the common ground of the divergent interpretations given by the parties of the facts of the case is that the applicant and his friends negotiated with Gotti/Bogdan and then met with Sven.

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

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

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

50. The applicant considered that, in the circumstances of the case, the sentence imposed on him constituted a violation of Article 3 of the Convention.

51. He also raised several complaints, under Article 5, about his arrest and pre-trial detention, in particular concerning the imposition of that preventive measure and its repeated extension by the courts.

52. The applicant complained that his sentence had been increased by the Court of Appeal solely because he was a student, which in his view constituted discrimination under Article 6 § 1 of the Convention taken together with Article 14.

53. Under Article 7 of the Convention, the applicant complained that he had been convicted of a crime that had never existed, in so far as he had been entrapped.

54. The Court considers that the issues raised by the applicant under Articles 3, 7 and 14 are simply a reiteration of those already raised and examined under Article 6.

In addition, the Court notes that while a person may be humiliated by the mere fact of being criminally convicted, what is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment (see *Tyrer v. the United Kingdom*, 25 April 1978, § 30, Series A no. 26). Nothing in the case indicates such humiliation, and the applicant has failed to substantiate his claims to the contrary. Lastly, the Court notes that the crime of which the applicant was convicted is prohibited by Law no. 143. The Article 7 complaint is thus unsubstantiated.

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

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

56. As to the complaints raised under Article 5, the Court notes that the applicant's pre-trial detention ended with the adoption of the judgment of 15 April 2003, that is, more than six months before the lodging of this application on 2 July 2004 (see *Mujea v. Romania* (dec.), no. 44696/98, 10 September 2002, and *Negoescu v. Romania* (dec.), no. 55450/00, 17 March 2005).

57. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 109,000 euros (EUR) in respect of pecuniary damage, broken down as follows:

– EUR 4,000 represents the salary he would have earned from 2002 to 2004 if he had continued in the employment he had at the date of his arrest;

– EUR 105,000 represents the salary he would have earned from 2004, when he was due to graduate from University, to date.

He also claimed EUR 105,000 in respect of non-pecuniary damage.

60. The Government argued that the applicant had not justified his claims and that there was no causal link with his conviction.

They also considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage alleged by the applicant.

Lastly, the Government pointed out that, if the Court found that the criminal proceedings had not been fair, the Code of Criminal Procedure provided for the reopening of the proceedings before the domestic courts.

61. The Court acknowledges that the applicant has the option of seeking the reopening of the proceedings under domestic law.

As to the damages sought by the applicant, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

62. The applicant made no claim under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of the principle of fair trial enshrined in Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine the remainder of the complaint under Article 6 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the respondent State's national currency at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 1 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada Registrar	Josep Casadevall President