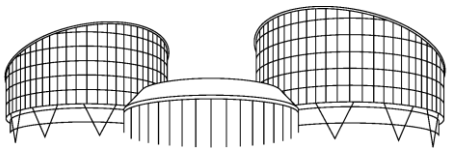

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF VĂDUVA v. ROMANIA

(Application no. 27781/06)

JUDGMENT

STRASBOURG

25 February 2014

FINAL

25/05/2014

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

In the case of Văduva v. Romania,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Dragoljub Popović,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 4 February 2014,

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

PROCEDURE

1. The case originated in an application (no. 27781/06) 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 Ion Irinel Văduva ("the applicant"), on 29 June 2006.

2. The applicant was represented by Ms M. Jicol, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Ms I. Cambrea, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the criminal proceedings against him had not been fair in so far as he had been convicted without evidence being heard directly from him or the witnesses and as he could not challenge the key evidence for the prosecution (notably records of the telephone tapping and the statement made by the undercover police agents and their collaborator).

4. On 6 October 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Bucharest.

6. On 8 April 2002 the Ministry of the Interior notified the division of the Prosecutor's Office attached to the Supreme Court of Justice responsible for handling organised crime and drug trafficking cases ("the Prosecutor's Office") that the applicant, T.T., S.M. and S.I. were believed to be selling ecstasy that had been brought into the country from Israel.

7. On the same day, a prosecutor authorised the tapping of the telephone of those involved and assigned undercover agents to the operation. The applicant's telephone was apparently not tapped.

8. A police informant facilitated contact between T.T. and L.G., on the one hand, and the undercover agents pretending to be potential buyers, on the other hand. On 10 April 2002 the police and prosecutor apprehended T.T. and L.G. while they were trying to sell 5,000 tablets of ecstasy to the undercover agents. Arrested and questioned on the same date, allegedly without the presence of a lawyer, they confessed that they had taken part in drug trafficking. In addition, T.T. made incriminating statements about the applicant.

9. Again on 10 April 2002, the police broke into the applicant's apartment, in his absence, and searched for drugs. When the applicant and his wife returned home, the police officers, who did not identify themselves, admitted that they did not have a warrant for the search. They then conducted searches of the applicant and his car, but no illegal substances were found.

10. In the same evening of 10 April 2002, at the end of the search, the applicant was taken into custody on suspicion of trafficking in dangerous drugs, a crime prohibited by Law no. 143/2000 on the fight against drug trafficking and illegal drug use ("Law no. 143").

11. On 11 April 2002 the Prosecutor's Office decided to keep the applicant in custody for five days.

12. On 15 April 2002 the police informant gave statements, detailed by the prosecutor in a report. The informant reported that in March 2002 the applicant had offered to sell him 12,000 tablets of ecstasy brought into the country from Israel. The drugs were allegedly intended to be held in the applicant's home, following the latter's receipt of the tablets from L.G. The three suspects were reported to have already sold 5,000 of the 12,000 tablets.

13. Based on that report, the prosecutor decided, on 15 April 2002, to start criminal proceedings against the applicant (*începerea urmăririi penale*) and ordered that he be placed in pre-trial detention for twenty-five days. The applicant was released pending trial on 5 July 2003 by the Bucharest County Court.

14. On 15 May 2002 the applicant, T.T. and L.G. were committed for trial on charges of drug trafficking. The prosecutor based the charges on the initial confessions made by T.T. and L.G., the reports by the undercover agents and the informant, witness statements, and transcripts of telephone

conversations between the suspects, one of them allegedly taking place on 10 April 2002 between the applicant and T.T. They both denied that the conversation had been about drugs.

15. The case was examined by the Bucharest County Court. T.T. and L.G. retracted their confessions and asked the court not to take them into account, as they had been without legal representation at that time. The applicant denied any participation in drug trafficking.

16. A witness, D.C., who had temporarily shared the same prison cell with the defendants, declared that L.G. had agreed to take the full blame. The accused contested the veracity of those statements.

17. On 9 March 2004 the defence requested that the audio tapes of the telephone conversations be certified by expert examination. In order to perform that task, the Bucharest National Institute for Forensic Investigation (*Institutul Naţional de Expertise Criminalistice* – "the Institute") asked that the technical device used for making the recordings be put at their disposal for examination. The Ministry of Administration and the Interior, which had carried out the recording, informed the court that it was not possible to remove the equipment from its premises and that only experts with the required security clearance could be allowed in its vicinity. As the experts from the Institute did not have such clearance, it was not possible to carry out the expert examination. The defence did not insist on this evidence being produced.

The Prosecutor's Office also informed the court that the manner in which the authorised telephone tapping was carried out was classified information.

18. The defence requested that the undercover agents and the informant be heard by the County Court. The Prosecutor's Office refused and informed the court that, under Law no. 143, their identities could not be revealed and that, in any event, that Law recognised as evidence the reports drafted by them.

19. The court gave judgment on 14 July 2004, based on the evidence in the file and the testimony given by the accused and by witnesses before it during the proceedings. It acquitted the applicant on the grounds that there was no solid evidence in the file to support the charges against him. In particular, it noted that the conversation adduced as evidence did not explicitly refer to drugs and that the explanations offered by the applicant and T.T. for its content were plausible; it also noted that the only incriminating evidence was T.T.'s initial confession to the police which he had retracted and which, in any case, did not corroborate the remaining evidence in so far as the applicant's situation was concerned.

20. The court dismissed T.T. and L.G.'s allegations of a breach of their defence rights, as it found that they had been assisted by a legal-aid lawyer during the investigation. The court convicted T.T. and L.G. of drug trafficking.

21. On 18 November 2004 the Bucharest Court of Appeal reversed the judgment and convicted the applicant of drug trafficking, but that decision was quashed on 31 May 2005 by the High Court of Cassation and Justice (formerly known as the Supreme Court of Justice) because defence counsel had not appeared in the appeal proceedings. The case was sent back to the Court of Appeal for re-examination of the appeal.

22. The applicant again requested that the audio tape containing the telephone conversations be examined by an expert to confirm whether it was authentic and complete. In his view, not all relevant conversations had been presented publicly in court and that had prevented the court from getting an overall picture of what had happened that day and had allowed his conversation with T.T. to be taken out of context. In that connection, he also requested that the Prosecutor's Office produce a copy of the authorisations for interception of the telephone communications. Lastly, the applicant requested that witnesses, including D.C. and the informant, be heard and proposed that the informant be heard at a secret hearing, as allowed by Law no. 143, if his protection needed to be ensured.

23. In his address to the court, defence counsel pointed out that no drugs had been found in the applicant's home during the search that took place on 10 April 2002. He also contended that T.T.'s first handwritten statement to the prosecutor was not signed by counsel. He further challenged D.C.'s statements before the prosecutor, arguing that the witness was a notorious police informant. Lastly, he reiterated the request for expert examination of the tapes.

24. It appears that the Court of Appeal did not hear evidence directly from the applicant.

25. In a decision of 13 October 2005 the Court of Appeal quashed the County Court judgment, convicted the applicant of drug trafficking and sentenced him to ten years' imprisonment. The court took into account T.T.'s handwritten statement and the telephone conversation recorded between the applicant and T.T., and considered that the applicant's statements during the investigation and before the court did not corroborate the evidence in the file, which proved that the applicant had conducted himself dishonestly.

26. The applicant appealed on points of law before the High Court of Cassation and Justice. He argued that the Court of Appeal had made an erroneous application of the law and that essential factual errors had occurred in the lower court's decision. He contested the way the Court of Appeal had used the handwritten statement given by T.T. and the audio tapes. He argued that in presenting only a part of the transcripts of conversations the prosecutor had removed those discussions from their context and allowed for ambiguity which was wrongly interpreted by the court to his disadvantage. He reiterated his complaint that the prosecutor had refused to allow the records to be verified by an expert. He argued that

the court had ignored the evidence given in court and had based its decision solely on the evidence led by the prosecutor, thus failing to examine the abundant evidence in his favour. The applicant challenged the validity of the conclusion reached by the Court of Appeal that he was dishonest.

27. On 3 February 2006 the High Court held a hearing in the case. The applicant was not present, but his counsel represented him and argued the case for the defence.

28. On the same date the High Court rendered its final decision, dismissing the appeal as ill-founded. The court re-examined the file and, based on the reports of the undercover operations, T.T.'s initial statements to the police and the transcripts of the conversations as presented by the prosecutor, upheld the conviction. The court considered that the evidence cited by the applicant in his defence was not credible and that despite T.T.'s change of position, there was no reason to set aside his previous statements.

II. RELEVANT DOMESTIC LAW

29. The relevant provisions of the Code of Criminal Procedure ("the CCP") and of Law no. 143 are set out in *Constantinescu v. Romania* (no. 28871/95, § 37, ECHR 2000-VIII) and in *Constantin and Stoian v. Romania* (nos. 23782/06 and 46629/06, §§ 33-34, 29 September 2009).

30. Articles 86^1 § 7 and 86^2 of the CCP as amended by Law no. 281/2003, applicable since 1 January 2004, provide that undercover agents may give evidence before the court without revealing their identity and, if the technical means in the courtroom allow, through audio-video transmission with distorted image and sound to protect their identity.

31. The legislation in force at the relevant time concerning telephone tapping and changes to the law brought into force on 1 January 2004 are described in *Dumitru Popescu v. Romania (no. 2)* (no. 71525/01, §§ 39-46, 26 April 2007).

THE LAW

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

32. The applicant complained that the criminal proceedings instituted against him had been unfair. He relied on 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 ... within a reasonable time by [a] ... tribunal ..."

A. Admissibility

33. The Court notes that the 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

34. The applicant submitted that the Court of Appeal and the High Court had convicted him without hearing evidence directly either from him or from witnesses and without examining the arguments he raised before them. He further reiterated that the prosecutor had failed to present all the transcripts of the recorded conversations in court, thus concealing the fact that the police had incited the accused to sell drugs. Moreover, the courts had been unable to obtain expert examination of those tapes, because the prosecutor had refused to allow it.

35. Furthermore, the courts had not secured adversarial proceedings as they had failed to allow him to question the undercover police agents and the collaborator. He averred that, although unlawfully obtained, T.T.'s initial statements and the telephone tapping had had a decisive role in his final conviction.

36. The Government argued that there had been no police entrapment in the applicant's case. Furthermore, although he had denied any involvement in the drug trafficking, the evidence in the file corroborated a finding of guilt. They argued that the most incriminating evidence was a statement made by T.T. and witness D.C., and therefore the undercover agent and the informant could not have changed the outcome.

2. The Court's assessment

(a) General principles

37. The Court reiterates that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by an accused who claims that he has not committed the act alleged to constitute a criminal offence (see, among many others, *Ekbatani v. Sweden*, 26 May 1988, § 32, Series A no. 134; *Constantinescu*, cited above, § 55; *Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 22, 29 September 2009; *Sinichkin v. Russia*, no. 20508/03, § 32, 8 April 2010; *Lacadena Calero v. Spain*, no. 23002/07, §§ 36 and 38, 22 November 2011; and *Hanu v. Romania*, no. 10890/04, § 32, 4 June

2013). Moreover, in the determination of criminal charges, hearing the defendant in person should nevertheless be the general rule. Any derogation from this principle should be exceptional and subject to restrictive interpretation (see, notably, *Popa and Tănăsescu v. Romania*, no. 19946/04, § 46, 10 April 2012).

38. Moreover, although it is for the national court to decide on the appropriateness of hearing evidence from witnesses, in particular circumstances, a violation of Article 6 may arise from the refusal to hear witnesses (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports of Judgments and Decisions* 1997‑VIII and, *mutatis mutandis*, *Destrehem v. France*, no. 56651/00, § 41, 18 May 2004; *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999‑I; *Igual Coll v. Spain*, no. 37496/04, § 36, 10 March 2009; and *Lacadena Calero v. Spain*, no. 23002/07, § 47, 22 November 2011). It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence (see *Fitt v. the United Kingdom* [GC], no. 29777/96, § 44, ECHR 2000-II). Before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

39. However, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports* 1996-II and *Fitt*, cited above, § 46).

40. In order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Fitt*, cited above 46, and *Niculescu v. Romania*, no. 25333/03, § 115).

(b) Application of those principles to the present case

41. The Court notes that the applicant was acquitted by the County Court on the ground that the evidence against him was not conclusive (see paragraph 19 above). However, based on the same evidence in the file, he was subsequently convicted by the Court of Appeal and by the High Court of Cassation and Justice (see paragraphs 25 and 28 above). Neither the

Court of Appeal not the High Court heard evidence directly from the applicant or witnesses.

42. An examination must be made of the role of the High Court of Cassation and Justice and the nature of the issues which it was called upon to try (see *Popa and Tănăsescu*, cited above, § 47, and *Hanu v. Romania*, no. 10890/04, § 34, 4 June 2013).

43. In the cases of *Popa and Tănăsescu* (cited above, § 48) and *Găitănaru v. Romania* (no. 26082/05, § 30, 26 June 2012), the Court had the opportunity to examine the scope of the High Court's powers when examining appeals in cassation similar to the one lodged in the present case, namely after a first appeal had already been decided by a lower court. It found that proceedings before the High Court were full proceedings governed by the same rules as a trial on the merits, with the court being required to examine both the facts of the case and questions of law. The High Court could decide either to uphold the applicant's acquittal or convict him, after making a thorough assessment of the question of guilt or innocence. If the necessity to hear evidence directly arose from the circumstances of the case, the High Court could refer the case to a lower court in accordance with the provisions of the Code of Criminal Procedure in force at the material time (see paragraph 29 above).

44. In the present case, the applicant lodged his appeal on points of law on the ground that essential factual errors had occurred in the lower court's decisions (see paragraph 26 above). The High Court examined the appeal within that framework. It had to decide what weight to give to T.T.'s first statements and his subsequent change of position, as well as to the remaining evidence that was contested by the applicant. The court was thus called upon to make a full assessment of the applicant's guilt or innocence regarding the charges against him since the same evidence had been used both to acquit and to convict him (see paragraphs 19 and 25 above). Moreover, both the Court of Appeal and the High Court made assessments concerning the applicant's alleged lack of sincerity in the proceedings. Although he challenged the manner in which the Court of Appeal determined his alleged dishonesty, his complaint went unanswered by the High Court (see paragraph 26 above).

45. The issues raised can reasonably be considered to have presented a certain complexity and they could not be properly assessed without evidence from the applicant and witnesses being heard directly by the court (see *Lacadena*, cited above, § 47).

46. Furthermore, when convicting the applicant, the Court of Appeal and the High Court relied on T.T.'s initial statement and on the transcripts of conversations. However, the applicant consistently challenged the lawfulness of those pieces of evidence.

47. Whereas the lawfulness of T.T.'s first statements was at least verified and confirmed by the County Court (see paragraph 19 above), the

courts could not examine the lawfulness of the transcripts. The Court notes that although the relevance and importance of that evidence was not contested throughout the proceedings, the courts could not obtain an expert examination of its content, as the prosecutor refused to allow court-appointed experts to examine the material (see paragraph 17 above). Moreover, the applicant's requests that the prosecutor produce a copy of the authorisation for interception and that all the transcripts be made available went unanswered, although he submitted arguments to prove why they could be relevant for the defence (see paragraphs 22 and 28 above).

48. While it is not for it to assess the relevance of this evidence, the Court notes that the domestic courts failed to allow the applicant to use the safeguards provided for by law for challenging the authenticity and accuracy of the transcripts (see paragraph 31 above).

49. Lastly, the High Court relied on the reports from the undercover police operation (see paragraph 28 above). The applicant contested the use of these reports at all levels of jurisdiction and requested that the undercover agents and their collaborator be questioned (see paragraphs 18, 26 and 28 above). The domestic authorities failed to give any compelling reasons for the non-attendance of these witnesses (see paragraph 18 above and *Al-Khawaja and Tahery*, cited above, § 119). The applicant's conviction was based to a significant, if not decisive, extent on the depositions made by these witnesses at the prosecution stage. However, the defence was never allowed the opportunity to question them even at a secret hearing that could have ensured their confidentiality, a possibility provided for by domestic law (see paragraph 30 above).

The same conclusion applies in respect of the domestic court's failure to hear direct evidence from the witness D.C., presumably a police informant, whose statement before the prosecutor constituted, in the Government's view, one of the most incriminating pieces of evidence against the applicant (see paragraphs 23 and 36 above).

50. The foregoing considerations are sufficient to enable the Court to conclude that, in convicting the applicant without hearing evidence directly from him or from the witnesses and without giving proper consideration to his requests to allow expert examination of the telephone recordings and the undercover agents and collaborator to be questioned in an appropriate manner, the domestic authorities failed to ensure, in practice, adequate safeguards to counterbalance any difficulties caused to the defence by the limitation on its rights.

The proceedings against the applicant were not fair and there has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

51. Lastly, the applicant complained, under Article 6 §§ 1 and 2 of the Convention, that the proceedings against him had lasted too long and that the prosecutor had infringed the presumption of innocence in his favour when he had made statements to the press giving the impression that the applicant was a drug trafficker.

52. However, 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 these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant asked for the reopening of the criminal proceedings and claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

55. The Government argued that the claim was excessive.

56. The Court awards the applicant EUR 3,000 in respect of non-pecuniary damage.

57. Moreover, the Court reiterates that when a person, as in the instant case, has been convicted in domestic proceedings which failed to comply with the requirements of a fair trial, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the violation found. In this connection, it notes that Article 408^1 of the CCP provides for the possibility of a retrial or the reopening of domestic proceedings where the Court has found a violation of an applicant's fundamental rights and freedoms (see *Hanu*, cited above, § 50).

B. Costs and expenses

58. The applicant also claimed EUR 6,379.52 for the costs and expenses incurred before the domestic courts and the Court. He sent invoices justifying the amount sought.

59. The Government contested the amount sought and the relevance of some of the bills to the proceedings in the present case.

60. 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. 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 applicant the whole amount sought, that is EUR 6,379.52 covering costs under all heads.

C. Default interest

61. 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. *Declares* the complaint concerning the fairness of the criminal proceedings, raised under Article 6 § 1 of the Convention, admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, 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 currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,379.52 (six thousand three hundred and seventy-nine euros and fifty-two cents), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 25 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Motoc is annexed to this judgment.

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE MOTOC

I consider that several factors sufficed to find a violation of Article 6 § 1 of the Convention: the fact that the accused was convicted without a direct assessment by the appellate court of the evidence given by the accused in person; the refusal of the court to hear evidence from witnesses; and the lack of an adversarial procedure (see *Popa and Tanasescu v. Romania*, no. 19946/04, and *Gaitanaru v. Romania*, no. 26082/05).

Therefore it was not necessary for the Court to analyse the question of the undercover police operation or the expert examination of the telephone recording. Moreover, the most incriminating evidence before the Court of Appeal and High Court of Cassation did not involve the undercover agent or informant, but the other two witnesses. As the Court has held in several cases (see, for example, *Doorson v. the Netherlands*, 26 March 1996, *Reports of Judgments and Decisions* 1996-II), there are also competing interests such as national security – for instance the need to protect the secret methods of investigation used by the police – and the rights of the accused.

In so far as there was sufficient material before the Court to find a violation of Article 6 § 1 of the Convention, the arguments related to national-security grounds were not only unnecessary but also insufficiently proved and weighed against the rights of the accused. If the Court was willing to take into account that very delicate balance, which again was not necessary given the other strong legal arguments in favour of finding a violation of Article 6 § 1, it should have made a detailed and careful analysis of that balance.