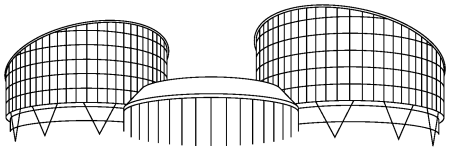

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MORARI v. THE REPUBLIC OF MOLDOVA

(Application no. 65311/09)

JUDGMENT

STRASBOURG

8 March 2016

FINAL

08/06/2016

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

In the case of Morari v. the Republic of Moldova,

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

Işıl Karakaş, *President,*
Nebojša Vučinić,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 9 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 65311/09) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Moldovan national, Mr Oleg Morari ("the applicant"), on 1 December 2009.

2. The applicant was represented by Mr V. Gribincea and Ms N. Hriptievschi, lawyers practising in Chisinau. The Moldovan Government ("the Government") were represented by their Agent, Mr L. Apostol.

3. The applicant alleged, in particular, that he had been the victim of entrapment, as a result of which he had committed a criminal offence.

4. On 23 October 2013 the complaint concerning Article 6 § 1 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Chisinau.

6. In January 2008 the Balti police organised an undercover operation with the purpose of apprehending a criminal group specialised in the production and circulation of forged documents. For that purpose an

advertisement was placed in a local newspaper specialised in advertising, stating as follows: "Need help with obtaining passport (Romanian-Bulgarian)" followed by a telephone number.

7. According to the applicant, at that time he was interested in leaving Moldova for Romania or another country in the European Union in order to find a job. He was therefore interested in obtaining a Romanian passport which would facilitate his plans. Since he understood the newspaper advertisement as proposing assistance with obtaining Romanian passports, he called the number from it and met a person who introduced himself as E. During their conversation he understood that E. was himself looking for a Romanian passport. Both men agreed to let each other know in the event that one of them found an easy way of obtaining a Romanian passport.

8. Some time later a friend of the applicant (D.) recommended to him a person called Z. who could help obtain a Romanian passport in a short time. Both D. and Z. confirmed during the subsequent court proceedings that it was D. who had recommended Z. to the applicant in March 2008. The applicant met Z. and found out that his services cost 1,500 euros (EUR), a sum of money which he did not possess at the time.

9. It appears from the materials of the case-file that approximately three weeks after the applicant's first meeting with E., the latter called him to find out whether he had progressed in his search for a way of obtaining a Romanian passport. This was submitted by the applicant in the proceedings and not contested by the prosecution. The applicant informed E. that he had found a person, Z., who could help in exchange for EUR 1,500 and proposed to put E. in contact with Z. However, E. refused to get into direct contact with Z. and informed the applicant that he did not have the money at the time. He also told the applicant that he had an acquaintance T. who was also interested in obtaining a Romanian passport and proposed a deal to the applicant. In particular, he proposed to him to act as an intermediary between Z. and T. and tell T. that the price was EUR 2,300. The difference of EUR 800 between the price asked by Z. and the sum paid by T. was to be split between the applicant and E. This information was not contested by the prosecution during the proceedings. The applicant accepted E.'s proposal and agreed to arrange a meeting with T.

10. The applicant then discussed the matter with Z., who gave him a list of documents necessary for T.'s new Romanian identity card. The applicant submitted during the proceedings that he had been convinced at the time that the identity card was not going to be forged and that Z. would only act as a representative of T. before the Romanian authorities. This information was contested by Z. during proceedings, who stated that he had informed the applicant from the very beginning that T.'s Romanian identity card was going to be false and that he was to avoid travelling to Romania with it.

11. On 3 April 2008 the applicant met with T. and obtained from him the necessary documents and an advance of EUR 750 for which he had written

and submitted to T. a receipt. He then transmitted the money and the documents to Z. The identity card was later produced in the United Kingdom and reached Z. and then the applicant by the middle of April 2008. On 16 April 2008 the applicant met with T. and gave him the identity card in exchange for the rest of the money. He was then arrested by the police.

12. On 17 April 2008 an official criminal investigation was initiated against the applicant on charges of manufacturing and trading with forged official documents.

13. In the meantime, Z. signed an agreement with the prosecutors acknowledging his guilt and was convicted on the basis of that agreement and given a suspended sentence of four years.

14. During the criminal proceedings the applicant argued *inter alia* that he had been entrapped by E. and T. and requested that they be heard in court. The court of first instance refused to hear E. and T. and referred to the fact that the law governing undercover operations made it possible to hear undercover officers in court only if they consented to that.

15. On 17 December 2008 the Balti District Court found the applicant guilty of participating in the production of a false Romanian identity card and of selling it to T. The court sentenced him to a criminal fine of some EUR 200. The judgment did not make any mention of the applicant's assertion concerning incitement.

16. The applicant lodged an appeal in which he submitted *inter alia* that the first instance court had not paid attention to the fact that the offence had been committed as a result of police incitement and that the court had refused to hear the persons who had entrapped him.

17. During the appeal proceedings, the applicant asked again that E. and T. be heard in court. Initially the Court of Appeal agreed to hear them; however, later it decided otherwise.

18. On 4 March 2009 the Balti Court of Appeal dismissed the applicant's appeal and confirmed the judgment of the first instance court. The court examined the applicant's argument concerning entrapment and dismissed it on the sole ground that it was the applicant who had first telephoned the number indicated in the newspaper advertisement. In so far as the issue concerning the hearing of E. and T. was concerned, the court considered that that was not important as their statements had not been used against the applicant. Moreover, according to the law, they could not be heard unless they agreed to that. The applicant lodged an appeal on points of law and submitted the same arguments as in his appeal.

19. On 8 July 2009 the Supreme Court of Justice dismissed the applicant's appeal on points of law and upheld the previous judgments.

II. RELEVANT DOMESTIC LAW

20. Until 2012 the Moldovan Code of Criminal Procedure did not contain any formal ban on the use of evidence obtained by way of entrapment or incitement.

21. The offence of which the applicant was found guilty is provided for by Article 361 of the Criminal Code, is called "producing, detaining, selling and using of forged official documents" and is punished with fine of up to 12,000 Moldovan lei, community work of 180-240 hours or imprisonment of up to five years.

22. According to Article 16 (3) of the Law concerning operative investigation of 12 April 1994, the identity of undercover officers can be made public only if those officers agree to it.

THE LAW

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

23. The applicant complained that he had been incited to commit the offence of which he was subsequently found guilty and that the domestic courts had refused to hear the two persons who had incited him. He relied on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

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

A. Admissibility

24. 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

25. The applicant alleged that he had been a victim of entrapment by the police and that E. and T. had not confined themselves to observing his criminal activity in a passive manner but had exerted direct influence on him so as to incite him to commit an offence.

26. The applicant further submitted that he had pleaded before the domestic courts that he had been a victim of incitement, but that the courts had failed to examine his plea. Moreover, the courts had refused to hear the undercover agents and had not appeared interested in clarifying details of the undercover operation.

27. The Government submitted that it was the applicant who had placed an advertisement in a newspaper concerning services relating to forged documents. Building on that submission, the Government contended that the applicant had not been a victim of incitement and that he had in fact been the one who had taken the initiative of providing T. with a forged Romanian passport. In the Government's view, the undercover officers had had an essentially passive role and they had merely joined the criminal acts committed by the applicant.

28. The Government further argued that the fact that the applicant had committed the offence for the first time was irrelevant and they expressed doubt concerning the applicant's contention that he had not known that the identity card which he had obtained from Z. was false.

29. In so far as the procedural aspect was concerned, the Government submitted that the domestic courts' refusal to hear E. and T. in the criminal proceedings was compatible with the domestic law and that, more importantly, no statements made by E. and T. had been used to convict the applicant in the first place. Moreover, the Government expressed the view that the courts' refusal to hear the undercover agents had acted in favour of the applicant because the undercover agents would certainly have confirmed that the applicant had committed the offence imputed to him.

2. The Court's assessment

30. The Court reiterates that as a general rule the admissibility and assessment of evidence is a matter for regulation by national law and appreciation by the domestic courts (see, among other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III; *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 52, ECHR 2008; *Bykov v. Russia* [GC], no. 4378/02, § 88, 10 March 2009). Nevertheless, the admission of some evidence can render a trial unfair. Such has been found to be the case, for instance, of evidence obtained as a result of ill-treatment with the aim of extracting a confession (see *Jalloh v. Germany* [GC], no. 54810/00, § 99, ECHR 2006-IX) or of evidence obtained by way of police incitement or entrapment (see *Teixeira de Castro v. Portugal*, 9 June 1998, *Reports*, § 38, 1998-IV).

31. Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in

order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Ramanauskas*, cited above §55).

32. The above principle was further developed in *Bannikova v. Russia* (no. 18757/06, § 47, 4 November 2010) and in *Veselov and Others v. Russia* (nos. 23200/10, 24009/07 and 556/10, § 92, 2 October 2012) where the Court observed 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.

33. In view of the importance of the above principles, the Court held in *Ramanauskas* (cited above, § 60) that where an accused asserted that he had been incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police entrapment must be excluded. This was especially true where the police operation had taken place without a sufficient legal framework or adequate safeguards.

34. Where the accused puts forward an arguable claim of incitement, 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 (see *Ramanauskas*, cited above §§ 70-71; *Bannikova v. Russia*, no. 18757/06, § 48, 4 November 2010; *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, § 83, 16 July 2015).

35. Lastly, where the information disclosed by the prosecution authorities does not enable the Court to conclude whether the applicant was subjected to police incitement, it is essential that the Court examine the procedure whereby the plea of incitement was determined in each case in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings and to equality of arms (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46-48, ECHR 2004-X; *Ramanauskas*, cited above, § 61). For more general principles concerning the issue of entrapment see *Bannikova v. Russia* (cited above, §§ 33-65).

36. Turning to the facts of the present case, the Court notes that the applicant was convicted on the strength of evidence obtained during an undercover operation. As established during the domestic proceedings, and contrary to the submissions made by the Government (see paragraph 26 above), the applicant first replied to a newspaper advertisement placed by

the police which concerned facilitation of obtaining Romanian passports. It does not appear from the materials of the case-file that the applicant contacted E. repeatedly after their first encounter. On the contrary, it was the undercover agent E. who contacted him several weeks later and enquired whether he had progressed in his endeavour to obtain a Romanian passport. When the applicant informed E. about Z. and proposed to him to contact Z. directly, E. insisted that the applicant act as an intermediary and promised him financial gain if he accepted.

37. The Court has not been able to find in the materials submitted to it any indication that the offence would have been committed by the applicant without such intervention. Indeed, it does not appear from those materials and from the Government's submissions that before the commencement of the undercover operation the authorities had knowledge of or any objective evidence that the applicant had previously been involved in producing and/or trading with forged documents. This, in the Court's opinion, clearly demonstrates that the applicant was subjected to prompting and incitement to engage in the criminal activity of which he was convicted.

38. The above findings alone might be sufficient basis for the Court to find a breach of Article 6 of the Convention. Nevertheless, the Court shall also examine the manner in which the domestic courts dealt with the applicant's defence concerning entrapment. It notes that the first instance court did not even take into consideration the applicant's entrapment plea. The two higher courts that examined his appeal and appeal on points of law limited the examination of the entrapment plea to finding that the applicant had been the first one to call the telephone number from the newspaper advertisement. Moreover, all the courts refused to hear the undercover agents, stating that according to the law, they could be heard only if they consented to have their identities disclosed.

The Court further notes that according to Section 16 (3) of the Law on operative investigation (see paragraph 22 above) the undercover agents' identity could not be disclosed without their consent. In the present case, however, the applicant has seen both of the agents in person. Had the agents' names known to the applicant been false, the courts had the opportunity to continue using those names for the purposes of the proceedings, without disclosing their real names. In the Court's view, it was fundamental, in the circumstances of the present case, to hear E. and T. in order to properly determine the issue of entrapment raised by the applicant. However, the domestic courts omitted to do that. In this latter respect, the Court recalls that it will generally require that the undercover agents and other witnesses who could testify on the issue of incitement should be heard in court and be cross-examined by the defence, or at least that detailed reasons should be given for a failure to do so (see *Lagutin and Others v. Russia*, nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, §§ 101, 24 April 2014)

39. In the light of the above, the Court considers that the applicant was convicted on the basis of evidence obtained by way of police incitement and the courts which examined the case did not carry out a careful examination of his assertion that he had been incited to commit the offence imputed to him. Accordingly, the criminal proceedings against the applicant were not fair and there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 4,000 euros (EUR) for non-pecuniary damage resulting from the anguish caused by the unfair criminal proceedings against himself.

42. The Government considered excessively high the amount claimed by the applicant.

43. The Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of the breach of his right to a fair trial. Making its assessment on an equitable basis, it awards the applicant EUR 3,500 for non-pecuniary damage.

B. Costs and expenses

44. The applicant also claimed EUR 1,820 for the costs and expenses incurred before the Court. He submitted a detailed time-sheet.

45. The Government contested this amount and argued that it was excessive and unsubstantiated.

46. The Court awards the entire amount claimed for costs and expenses.

C . Default interest

47. 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 application admissible;

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 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,820 (one thousand eight hundred and twenty euros), plus any tax that may be chargeable, 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 8 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Işıl Karakaş
Registrar	President