THE LIMITS TO THE WORK OF UNDERCOVER INVESTIGATORS, AS SET OUT IN THE ECtHR CASE-LAW

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Abstract

According to art. (4) and (5) CPP, undercover investigators are operational workers of the criminal investigation police, whose role is to collect data and information and make it available in full to the prosecutor conducting or supervising the criminal prosecution, by drawing up a report.

The work of the undercover investigator must be carried out under the observance of the fair trial guarantees. However, as this study will demonstrate, the ECtHR judgments reveal a practice that is at least surprising: not infrequently, criminal activity has been provoked by prosecuting authorities in order to gather the evidence necessary to bring a case to trial. Art. 148 para. (7) CPP provides that judicial bodies may use or make available to the undercover investigator any documentary evidence or objects necessary for the conduct of the authorized activity. The activity of the person making available or using the documentary evidence or objects does not constitute an offense.

Notwithstanding, in practice, the judicial bodies have assigned to the wording of art. 148 para. (7) CPP the interpretation according to which, in the exercise of their legal powers, they may draw up/enact/issue any documentary evidence or objects necessary for the performance of the authorized activity, giving them an appearance of legality, with the purpose of provoking the commission of a crime.

In this background, by examining the ECtHR case-law on the use of special investigative techniques, we note that the Court of Strasbourg has repeatedly held that the Romanian State violated the general principles of fair trial guarantees, on the grounds that the criminal activity was provoked by the criminal prosecution authorities.

Keywords: *undercover investigators, fair trial guarantees, evidence, causing a crime to be committed, limits, ECtHR case-law.*

1. Introduction

According to art. 148 para. (1) CPP, authorization to use undercover investigators may be ordered by the prosecutor supervising or conducting the criminal prosecution, for a maximum period of 60 days, if certain cumulative conditions are met.

Therefore, there must be reasonable suspicion regarding the preparation or commission of a crime against national security under the Criminal Code and other special laws, as well as in case of crimes provided by art. 148: drug trafficking offenses, offenses related to doping substances, unlawful operations with precursors or other products likely to have psychoactive effects, offenses related to non-compliance with the regime of restricted arms, ammunition, nuclear materials, explosives and explosives precursors, trafficking and exploitation of vulnerable persons, acts of terrorism or acts assimilated to terrorism, terrorist financing, money laundering, counterfeiting of coins, stamps or other valuables, counterfeiting of electronic payment instruments, in the case of offences committed by means of computer systems or electronic means of communication, extortion, unlawful deprivation of liberty, tax evasion, in the case of corruption offences, offences treated as corruption offences, offences against the EU financial interests or other offences for which the law provides for imprisonment of 7 years or more or where there is a reasonable suspicion that a person is involved in criminal activities related to the offences listed above.

A second condition is that the measure must be necessary and proportionate to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the crime.

Furthermore, criminal law establishes that the evidence or the location and identification of the offender, suspect or defendant could not be obtained in any other way or obtaining it would involve particular difficulties which would prejudice the investigation or there is a danger to the safety of persons or valuable property.

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2. Content

By examining the case-law of the European Court of Human Rights[1] on the use of special investigation techniques (judgment from 01.06.2010, final on 01.09.2010, in Case *Bulfinsky v. Romania*; judgment from 23.06.2015, final on 23.09.2015, in Case *Opriş v. Romania*; judgment from 29.09.2009, final on 29.12.2009, in Cause *Constantin and Stoian v. Romania*; judgment from 14.02.2017, final on 14.05.2017, in Cause *Pătrașcu v. Romania*; judgment from 16.07.2015, final on 14.12.2015 in Case *Ciprian Vlăduț and Ioan Florin Pop v. Romania*), we can note that, *the Court of Strasbourg has repeatedly held that the Romanian State infringed the general principles relating to fair trial guarantees on the ground that the criminal activity was instigated by the criminal prosecution authorities.*

These general principles on fair trial guarantees in the context of the use of special investigative techniques to combat drug trafficking or corruption are detailed in Case *Bannikova v. Russia* (4 November 2010). The European Court of Human Rights has emphasized that it is aware of the difficulties involved in combating serious crime and of the need for the authorities to sometimes resort to more elaborate methods of investigation. In principle, its case-law does not preclude, at the investigation stage and in cases where the nature of the crime justifies it, the production in the case-file of evidence obtained by means of an undercover police operation (*Ludi v. Switzerland*, 15 June 1992, series A, no. 238). Notwithstanding**, the intervention of undercover agents must be restricted: although the police can act secretly, they cannot provoke a crime** (*Teixeira de Castro v. Portugal*, 9 June 1998; *Vaniane v. Russia*, 15 December 2005).

Furthermore, there is **incitement** on the part of the police when the officers involved – members of law enforcement agencies or persons intervening at their request – do not limit themselves to examining criminal activity in a purely passive manner, but exert on the person under surveillance[2] an influence such as to incite him or her to commit an offense which he or she would not otherwise have committed, in order to make it possible to establish the crime, i.e. to provide evidence of it and to bring about the prosecution of the person concerned (Case *Teixeira de Castro*, previously mentioned).

A comparative law study carried out by the Court on the legislation of 22 Member States of the Council of Europe (Austria, Belgium, Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Lithuania, „the former Yugoslav Republic of Macedonia", Poland, Portugal, Romania, Slovenia, Spain, Turkey and United Kingdom) on the use of undercover investigators in test purchases and similar undercover operations is summarized in Case *Veselov and others v. Russia* (no. 23200/10, 24009/07 and 556/10, items 50-63, 2 October 2012). In this case, it was held that it is essential to establish whether the criminal act was already in progress at the time when the source began to cooperate with the police[3].

Case *Pătrașcu v. Romania* has pointed out that, in order to distinguish entrapment from permissible conduct, ECtHR has developed the following criteria: *(i)* substantive test of incitement; *(ii)* procedure deciding on the plea of incitement.

Therefore, when the Court is referred to on the ground of instigation, the Court will first try to establish whether the crime would have been committed without the intervention of the authorities. The definition of incitement given by the Court in Case *Ramanauskas v. Lithuania* is as follows: „*There is incitement on the part of the police when the officers involved - members of law enforcement agencies or persons intervening at their request - do not limit themselves to examining criminal activity in a purely passive manner, but exert on the person under surveillance an influence such as to incite him or her to commit an offense which he or she would*

[1] Regarding the role of ECtHR case-law, see also C. Ene-Dinu, *National and European case-law – a remark for the High Court of Cassation and Justice in preliminary judgements*, in LEGAL AND ADMINISTRATIVE STUDIES Supplement 2024, p. 440-453; L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, 2nd ed., revised and added, Hamangiu Publishing House, Bucharest, 2024, p. 95.

[2] Regarding supervision methods, see C. Ene-Dinu, *The video surveillance matter in the case-law of the European Court of Justice*, in Lex ET Scientia International Journal nr. XXVII, vol. 2/2020, p. 32-40.

[3] See also E.E. Ștefan, *Delimitarea dintre infracțiune și contravenție în lumina noilor modificări legislative* [The demarcation between crime and contravention in light of the new legislative changes], in Dreptul no. 6/2015, pp. 143-159.

not otherwise have committed, in order to make it possible to establish the crime, i.e. to provide evidence of it and to bring about the prosecution of the person concerned [...]."

In deciding whether the investigation was „mainly passive", the Court will examine the grounds underlying the undercover operation and the conduct of the authorities who carried it out. It will also be based on whether there were objective suspicions that the applicant had been involved in the criminal activity or was likely to commit a crime (see *Bannikova v. Russia*, no. 18757/06, item 38, 4 November 2010). Therefore, the Court has formulated the requirement that any preliminary information as to the pre-existence of criminal intent must be verifiable, as follows from Cases *Vanyan v. Russia* (no. 53203/99, item 49, 15 December 2005) and *Khudobin v. Russia* (no. 59696/00, item 134, ECtHR 2006-XII)[4].

In what concerns the second criteria - Procedure deciding on the plea of incitement – the Court essentially held that **the prosecution must show that there was no instigation**, provided that the respondent's allegations are not entirely unproven. In the absence of any such evidence, it is for the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth by establishing whether there was instigation. If they find that it existed, they must draw conclusions in accordance with the Convention (see Ramanauskas, cited above, item 70).

In **case Opriș v. Romania**, the European Court of Human Rights ruled that, where the information disclosed by the prosecuting authorities does not enable the Court to determine whether or not the applicant was the victim of police incitement, it is essential to examine the procedure in the course of which the accusation of police incitement was decided, in order to ascertain, in the case in point, whether the rights of the defense and, in particular, the principles of adversarial proceedings and equality of arms were adequately protected [*Edwards and Lewis v. United Kingdom (MC), Constantin and Stoian v. Romania*]. It was pointed out that the national courts must examine, in particular, the reasons why the special investigative operation was organized, the extent of police involvement in the commission of the crime and the nature of the incitement or pressure brought to bear on the applicant (*Ramanauskas*, cited above, item 71).

In such cases, the Court of Strasbourg has carried out a two-stage examination. The first step was to establish whether the state agents involved in the investigation activities adopted *a purely passive attitude or, on the contrary, whether they overstepped the boundaries, acting as „agents provocateurs"* (the Court's examination depends to a large extent on the availability of information relating to investigative activities prior to the sting operation and, in particular, the nature of the contacts which the State agents had with the applicant prior to the sting operation procedure). In the absence of this information, the Court proceeded to the second stage of its analysis and examined the procedure in which the national courts addressed the arguments based on police incitement.

In Case *Ciprian Vlăduț v. Romania*, ECtHR held that police insistence[5], coupled with the lack of prior information on the alleged implication in drug trafficking of the first applicant are sufficient to conclude that there was entrapment in the case. On the other hand, the Court notes that besides arguing that the undercover police had played a too significant role in the drug deal, the applicants also asked expressly for the undercover agent to be heard by the court. The courts, however, either gave no answers to their pleas or dismissed them without further consideration (see para. 29 and 32 above).

In Case *Bulfinski v. Romania*, to ascertain **whether or not the undercover police confined themselves to „investigating criminal activity in an essentially passive manner in the present case"**, 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 and the authorities did not give details or refer to any objective evidence concerning unlawful behavior by the suspects prior to the incidents. 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 defense were adequately protected, in particular the right to adversarial proceedings and to equality of arms** [see *Ramanauskas*, §§ 60-61, and *Malininas*, § 34, and

[4] Given the exclusion of the Russian Federation from the Council of Europe, see C. Bîrsan, L.-C. Spătaru-Negură, *Russia's Exclusion From The Regional Human Rights Mechanism Or How Human Rights Are Endangered In A Sensitive International Context?!*, in CKS Journal 2023, Challenges of the Knowledge Society, „Nicolae Titulescu" University Publishing House, Bucharest, 2023, p. 224-230.

[5] The Court cannot but note the significant role played by the undercover agent in arranging the next transaction, which runs counter to the requirement of passivity on the State agent's part. The undercover agent was the main buyer of the first batch of drugs and, although the crime had already been committed, he insisted that the first applicant bring in more drugs to sell exclusively to him. He renewed his offer, was insistent, and threatened the first applicant that he would take his business elsewhere if drugs were not produced rapidly.

Khudobin v. Russia, no. 59.696/00, § 133, ECtHR 2006-XII (extracts)]. The Court found a violation of the right to a fair trial under art. 6 para. 1 ECHR, on grounds that 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. Furthermore, the courts did not hear the undercover agents. Therefore, the defense 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.

By analyzing the ECtHR case-law, it is easy to see that such violations of art. 6 of the Convention have been the basis for the judgments finding that the investigating bodies were not merely passive but, on the contrary, overstepped the limits, acting as „agents provocateurs".

Guide on art. 6 ECHR, Right to a fair trial (criminal limb), published in 2014[6], provides the following: the Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules established by the Convention, thereby **contributing to the observance by the States of the engagements undertaken by them as Contracting Parties** (*Irland v. United Kingdom*, item 154). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights case-law throughout the community of the Convention States [*Konstantin Markin v. Russia (MC)*, item 89].

In the section devoted to the use of evidence obtained unlawfully or in violation of Convention rights, the above cited Guide states that in cases where a challenge is at issue, art. 6 ECHR is not observed if, during the trial, the plaintiff could successfully invoke the existence of the challenge, by way of an exception or otherwise. It is therefore not sufficient for these purposes, contrary to what the Government maintained, that general safeguards should have been observed, such as equality of arms or the rights of defense [*Ramanauskas v. Lithuania (MC)*, item 69]. In this case, the Court held that the burden of proving lack of provocation is on the prosecution, to the extent that the defendant's allegations are not devoid of any credibility.

The Court has also held that where an accused asserts that he was 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 art. 6 § 1 ECHR, all evidence obtained as a result of police incitement must be excluded. This is especially true where **the police operation took place without a sufficient legal framework or adequate safeguards** [*Ramanauskas v. Lithuania (MC)*, item 60].

Paradoxically, despite the existing case-law and the repeated condemnation of the Romanian state, the provocation of criminal activity by criminal prosecution bodies, in the context of the use of special investigative techniques, does not seem to stop. This practice is allowed by the interpretation that judicial bodies have assigned to art. 148 para. (7) CPP, according to which, in the exercise of their legal powers, they may draw up/enact/issue any documents or objects necessary for the performance of the authorized activity, giving them an appearance of legality, with the purpose of provoking the commission of a crime. In this way, by distorting the content of a legal norm, the prosecution authorities have drawn up (and not „used" or „made available" to the undercover investigator) a false document in order to incite a person to commit a crime and to gather evidence against him, in violation of the spirit of the criminal law.

3. Conclusions

In order to conclude, we recall the considerations of dec. no. 489/2016, in which the Constitutional Court emphasized that the law, as a work of the legislator, cannot be exhaustive, and if it is incomplete, unclear, the legal system recognizes the judge's competence to decide what has escaped the attention of the legislator, through a judicial, causal interpretation of the rule. The meaning of the law is not given forever at the moment of its creation, but it must be accepted that the content of the law is adapted by way of interpretation – as a stage in the application of the legal norm to the concrete case – in criminal matters, in compliance with the principle that criminal law is of strict interpretation. The Court thus holds that an authentic, legal interpretation may constitute a prerequisite for the proper application of the legal rule, in that it gives a correct explanation of

[6] The translation is published with the agreement of the Council of Europe and the ECtHR and is the sole responsibility of the European Institute of Romania. The guide can be downloaded at: *www.echr.coe.int* (Jurisprudence – Analyse jurisprudentielle – Guides sur la jurisprudence).

its meaning, purpose and finality, but the legislator cannot and must not prescribe everything. In concrete terms, any legal rule to be applied to resolve a specific case is to be interpreted by the courts (judicial interpretation, case-by-case interpretation) in order to issue a legal enforcement act.

On the other hand, in accordance with the settled CCR case-law[7], we hold that „the diversion of statutory provisions from their legitimate purpose, through systematic misinterpretation and misapplication by the courts or other persons called upon to apply the provisions of law, may render that provision unconstitutional". In this case, CCR has the power to eliminate the unconstitutionality flaw thus created, essential in such situations being to ensure respect for the rights and freedoms of individuals and the supremacy of the Constitution.

Under art. 20 of the Constitution, ECtHR is more than a mere dialog partner, its case-law constituting a binding frame of reference for the CCR. Therefore, the Romanian constitutional judge has assumed the role and the authority to ensure the transposition of the ECHR and the practice of the ECtHR, with effects both in terms of the regulation of the issue of fundamental rights and freedoms and the application of these regulations by national courts[8].

Essentially, it is the dialogue of the constitutional judge with the European judge that makes possible the drawing up of common standards for the protection of fundamental rights and the improvement of the existing ones. Notwithstanding, it is not enough that they exist, they must be observed and embraced in national lawmaking and law enforcement by all addressees of legal rules. Or, as our doctrine states, „the need for normative regulation of behavior is undoubtedly a social imperative and is not the prerogative of the times we are going through now, but has existed since the dawn of time, regardless of the form of state organization".[9] The efficiency and fairness of justice depend on the loyal conduct of public authorities and call for a joint effort by all those involved in defending these values.

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[7] Dec. no. 607/2020, dec. no. 250/2019, dec. no. 448/2013 and dec. no. 224/2012.

[8] T. Toader, M. Safta, *Dialogul judecătorilor constituționali* (The dialogue of constitutional judges), Universul Juridic Publishing House, Bucharest, 2015, p. 69.

[9] E.E. Ștefan, *Comparative law aspects regarding the oath of the head of state*, in Revista de Drept Public no. 3-4/2020, Universul Juridic Publishing House, Bucharest, p. 91.