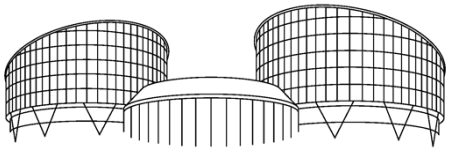

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FURCHT v. GERMANY

(Application no. 54648/09)

JUDGMENT

STRASBOURG

23 October 2014

FINAL

23/01/2015

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

In the case of Furcht v. Germany,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 30 September 2014,

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

PROCEDURE

1. The case originated in an application (no. 54648/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Andreas Furcht ("the applicant"), on 9 October 2009.

2. The applicant was represented by Mr R. Birkenstock, a lawyer practising in Cologne. The German Government ("the Government") were represented by two of their Agents, Mr H.-J. Behrens and Mrs K. Behr, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the criminal proceedings against him had been unfair and in breach of Article 6 § 1 of the Convention because he had been convicted of offences incited by the police.

4. On 14 October 2013 the complaint concerning the alleged unfairness of the criminal proceedings against the applicant was communicated to the Government and the remainder of the application was declared inadmissible by the President of the Section, sitting in a single-judge formation.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961. When lodging his application, he was detained in Hagen Prison. He was released on 12 July 2011.

A. The investigation proceedings

6. On 18 October 2007 the Aachen District Court authorised criminal investigations against S. and five other persons (not including the applicant) to be conducted by up to five undercover police officers, in accordance with Article 110a § 1 no. 1 and Article 110b § 2 no. 1 of the Code of Criminal Procedure (see paragraphs 24-25 below). Criminal investigation proceedings on suspicion of drug trafficking had previously been instituted against the six suspects. Prior to the District Court's order, the police's suspicion against the suspects had been confirmed, in particular, by information obtained via telephone tapping and police surveillance of the suspects.

7. The police decided to attempt to establish contacts between S. and the undercover agents via the applicant, a good friend of S. and business partner for real estate transactions. The applicant, who had no criminal record, was not, at that time, suspected of any involvement in drug trafficking.

8. From 16 November 2007 onwards, two undercover police officers, P. and D., established contacts with the applicant. They visited him in the restaurant he ran and pretended to be interested in purchasing real property for running a club. In the following weeks the applicant made a number of offers of real property to the undercover agents and visited the estates with them.

9. The applicant subsequently established contacts between the two undercover agents and S. for organising an international contraband trade in cigarettes after one of the undercover agents had pretended to have a suitable lorry at hand for transporting the cigarettes abroad. S. refused, however, to communicate directly with undercover agent P. by telephone and proposed to further communicate via the applicant. When undercover agent D. disclosed to the applicant on 23 January 2008 that he considered that the risk of being caught with smuggling cigarettes was too high compared to the possible profits, the applicant disclosed that they (that is, S. and others and himself) would also traffic in cocaine and amphetamine. He stated that he did not want to be involved in the drug trafficking itself, but would only draw commissions. The undercover agents showed interest in transporting and purchasing drugs.

10. However, on 1 February 2008 the applicant, having been telephoned by undercover agent P., explained to P. that he was no longer interested in any business other than the restaurant he ran.

11. On 7 February 2008 the Aachen District Court, having regard to the applicant's submissions to undercover agent D. on 23 January 2008, extended the court order of 18 October 2007 authorising investigations so as to cover also the applicant.

12. On 8 February 2008 undercover agent P. visited the applicant in his restaurant and dispersed the applicant's suspicions against the undercover

agents as well as his fear of having to serve a prison sentence in case the drug deal was discovered. The applicant thereupon continued arranging two purchases of drugs (cocaine and amphetamine) by the undercover agents from S. on 16 February 2008 (10 kilograms of amphetamine paste and 40 grams of cocaine) and on 12 March 2008 (some 250 kilograms of amphetamine paste). On the latter day, the applicant and S. were arrested after the delivery of the drugs to the undercover agents. The applicant would have received a commission of more than EUR 50,000 from S. for having arranged the second contract between S. and the undercover agents.

B. The proceedings before the Aachen Regional Court

13. On 22 October 2008 the Aachen Regional Court convicted the applicant of two counts of drug trafficking and sentenced him to five years' imprisonment.

14. The Regional Court, having established the facts as described above (see paragraphs 6-12), noted that the applicant had confessed to the offences in the hearing. It had further read out in the hearing the written reports of undercover agents D. and P., drawn up throughout the undercover measure, with the consent of the parties. It noted that the applicant had accepted that these reports were essentially correct. It considered that the applicant's allegation that it had been undercover agent D. and not himself who had first come up with the possibility of drug trafficking on 23 January 2008, and that he had only responded to that proposal, had not been proven. It noted in that context that the undercover agents had been careful throughout the investigations not to propose illegal business transactions or specific types or amounts of drugs first, but had waited for their respective counterparts to make the first step before becoming more concrete themselves.

15. In fixing the sentence, the Regional Court considered the considerable quantities of drugs trafficked as an aggravating factor. However, there were considerable elements leading to a mitigation of the sentence, which had to be considered as relatively mild in view of the amount of drugs trafficked. The applicant had in essence confessed to the offences and did not have any prior convictions. He had further trafficked mainly amphetamine, which was not a hard drug. In view of the undercover agents' involvement, there had also not been a risk that the drugs would freely circulate on the market.

16. The Aachen Regional Court further stated that it was a particularly weighty factor mitigating the sentence that the applicant had been incited (*verleitet*) by a State authority to commit offences. Prior to the undercover measure concerning him, there had not been any suspicion of involvement in drug trafficking against the applicant, who did not have a criminal record. The police had only known that the applicant was a friend of S., against

whom there had been strong suspicions of involvement in drug trafficking, and that the applicant had already arranged the sale of real estate together with S. The Regional Court considered that, nevertheless, the applicant had not been instigated (*angestiftet*) to commit the offences at issue. The undercover agents had waited for the applicant to raise the possibility of arranging an international contraband trade in cigarettes when the arrangement of a real estate transaction had not been successful. The agents had again waited for the applicant to raise the possibility of drug trafficking after the undercover agents had made him understand that they considered that the risk of being caught with smuggling cigarettes was too high compared to the possible profits.

17. Moreover, the Regional Court stressed that the applicant had then renounced any drug business on 1 February 2008 for fear of punishment. However, the undercover agents nevertheless contacted the applicant again on 8 February 2008, when the court order authorising recourse to undercover agents had been extended so as to cover also the applicant, and dispersed his doubts. The Regional Court considered that the way in which the undercover measure had been organised, that is, by contacting the applicant, a person not suspected of an offence, in order to establish contacts with suspect S., had entailed a risk, from the outset, that the applicant became implicated in drug trafficking.

18. The Regional Court further found that the applicant's involvement in the offences had been less important than that of S., as he had only arranged contacts between S. and the undercover agents and had shielded off S. against them. The applicant obviously did not have any contacts with the drug scene apart from his contacts with S.

C. The proceedings before the Federal Court of Justice

19. The applicant subsequently lodged an appeal on points of law against the Regional Court's judgment. He complained, in particular, that he had been incited by the police to commit the offences he had later been found guilty of. This had breached the rule of law. There was, therefore, a bar to the criminal proceedings against him, which should have been discontinued.

20. On 8 April 2009 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. The decision was served on the applicant's counsel on 20 April 2009.

D. The proceedings before the Federal Constitutional Court

21. On 12 May 2009 the applicant lodged a constitutional complaint with the Federal Constitutional Court. Relying, *inter alia*, on Article 6 § 1 of the Convention and on the corresponding provisions of the Basic Law,

the applicant complained that he had not had a fair trial. He argued that the undercover agents had incited him to commit drug offences which he would not have committed otherwise. The use of the evidence obtained thereby in the criminal proceedings against him had rendered these proceedings unfair.

22. On 28 May 2009 the Federal Constitutional Court declined to consider the applicant's constitutional complaint against the judgment of the Aachen Regional Court and the decision of the Federal Court of Justice without giving reasons (file no. 2 BvR 1029/09). The decision was served on the applicant's counsel on 3 June 2009.

E. Subsequent developments

23. On 16 June 2011 the Aachen Regional Court ordered the applicant's conditional release on 12 July 2011 after the applicant had served two thirds of his sentence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions on undercover agents

24. Under Article 110a § 1 no. 1 of the Code of Criminal Procedure, undercover investigators may be used to investigate criminal offences if there are sufficient factual indications showing that a criminal offence of considerable significance has been committed in the field of illegal trade in drugs. Their intervention is only admissible if the investigation would offer no prospects of success or be considerably more difficult otherwise. Undercover investigators are police officers who investigate using a longer-lasting changed identity conferred on them (so-called legend; see Article 110a § 2 of the Code of Criminal Procedure).

25. Article 110 b § 2 no. 1 of the Code of Criminal Procedure provides that interventions of undercover investigators which are directed against a specific suspect have to be authorised by the court.

B. Relevant case-law of the Federal Court of Justice

26. Under the Federal Court of Justice's well-established case-law, the right to a fair trial under Article 6 § 1 of the Convention was breached if the accused had been induced to commit the offences he was indicted of by an incitement contrary to the rule of law and imputable to the State (see Federal Court of Justice, file no. 1 StR 221/99, judgment of 18 November 1999, BGHSt 45, pp. 321 ss., § 8 (of the internet version); confirmed by Federal Court of Justice, file no. 5 StR 240/13, judgment of

11 December 2013, §§ 33 et seq., referring to the Court's judgment in *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008).

27. In order to determine whether the limits of an admissible incitement to commit an offence were respected, the Federal Court of Justice, in its well-established case-law, considered it necessary that the following aspects be taken into account: the reason and extent of suspicion of involvement in the offences investigated, the manner and intensity of and the reasons for the influence exercised, the readiness of the person concerned to commit an offence and the extent of contributions to the offence of his or her own of the person concerned. Having regard to these criteria as a whole, the criminal court has to determine whether the incitement by the agent provocateur was so serious as to outweigh the contribution of the person concerned (see Federal Court of Justice, file no. 1 StR 148/84, judgment of 23 May 1984, BGHSt 32, pp. 345 ss., § 7).

28. In a number of decisions, interventions by agents provocateurs had been considered unlawful already if, at the time of the agent provocateur's intervention against the person concerned, there had not been a suspicion of involvement in serious offences such as drug trafficking against that person (see Federal Court of Justice, file no. 1 StR 453/89, decision of 29 August 1989, § 3; and file no. 1 StR 221/99, cited above, § 15 with further references and § 51).

29. As to the consequences to be drawn from a finding of police incitement, under the Federal Court of Justice's established case-law, an incitement to commit an offence, even if it was contrary to the rule of law, did not constitute a bar to criminal proceedings. It only had to be taken into consideration – as a considerable mitigating factor – in the fixing of the penalty (so-called fixing of penalty approach (*Strafzumessungslösung*); see Federal Court of Justice, file no. 1 StR 148/84, cited above, §§ 10-35; file no. 1 StR 453/89, cited above, § 4; file no. 1 StR 221/99, cited above, §§ 13, 18; confirmed in file no. 5 StR 240/13, cited above, § 37).

30. In the Federal Court of Justice's view, under the law on criminal procedure, even a massive breach of the rules on prohibited measures of investigation only led to the exclusion of evidence obtained by the prohibited measure of investigation (see Article 136a of the Code of Criminal Procedure). Moreover, applying a bar to the criminal proceedings would disregard the rights of victims of the offence (see Federal Court of Justice, file no. 1 StR 221/99, cited above, §§ 43-44; and file no. 5 StR 240/13, cited above, § 37). Taking into account the incitement by an agent provocateur as a considerable mitigating factor in the determination of the penalty further allowed the sentencing court to have regard to all the circumstances which have led to the offence in a reasonable manner (see Federal Court of Justice, file no. 1 StR 148/84, cited above, § 31; and file no. 1 StR 221/99, cited above, §§ 41-42). If a breach of Article 6 of the Convention had occurred, the criminal courts should establish this in the

reasoning of the judgment and had to mitigate the sentence in a measureable manner (see Federal Court of Justice, file no. 1 StR 221/99, cited above, §§ 47 and 56).

31. The Federal Court of Justice considered that by applying the "fixing of penalty approach", it was possible to afford the necessary redress for the breach of Article 6 of the Convention (see Federal Court of Justice, file no. 1 StR 221/99, cited above, §§ 18 et seq.). Referring to the case of *Teixeira de Castro v. Portugal*, it took the view that, despite some indications to the contrary in the wording of the judgment, the Court's case-law did not require discontinuing the criminal proceedings against a person who had been incited by agents provocateurs working for the police to commit the offence at issue or excluding the evidence obtained by the agents' intervention (*ibid.*, §§ 36-46 and 57-61).

THE LAW

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

32. The applicant complained that the criminal proceedings against him had been unfair as he had been convicted of drug offences which he had been incited to commit by undercover police officers and essentially on the basis of the evidence obtained by that entrapment. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

33. The Government contested that argument.

A. Admissibility

34. The Court observes that in its judgment convicting the applicant of drug trafficking, the Regional Court found that the applicant had been incited by a State authority to commit offences and mitigated the applicant's sentence because of that incitement. Therefore, the question arises whether the applicant lost his status as a victim of a breach of Article 6 § 1 of the Convention, for the purposes of Article 34 of the Convention. In the Court's view, the adequacy or otherwise of the authorities' response to the impugned police measure must be considered in the light of the extent of the possible unfairness of the applicant's trial as a result of that measure. The issue whether the applicant lost his victim status shall therefore be examined under the merits of the applicant's complaint under Article 6 § 1.

35. The Court notes that this 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. Whether the criminal proceedings of the applicant were contrary to Article 6

(a) The parties' submissions

(i) The applicant

36. The applicant submitted that the criminal proceedings against him had been unfair and in breach of Article 6 § 1 of the Convention.

37. The applicant considered that he had been instigated by undercover agents to commit the offences he had later been convicted of. He submitted that at the time when the undercover agents started their investigations and established contacts with him, the court order of 18 October 2007 concerning their intervention had not authorised their acts against him, but had only covered S. and five other suspects. He did not have a criminal record and there had not been any suspicion of his having been involved in drug trafficking. This had expressly been confirmed by the Aachen Regional Court in its judgment.

38. The applicant argued that he had not been predisposed to commit drug offences. When contacted by the undercover agents, he had owned and had been running a restaurant in Aachen. The undercover agents, meeting him regularly for a long period of time, had then persistently induced him to participate in the offences at issue. After he had made numerous fruitless offers for sale of real estate to them, they had made him understand that they were interested in business of all kinds, provided that it was worth taking a high risk, which had made him reflect on drug deals. Despite the fact that he had clearly declared on 1 February 2008 not to be interested in any such business any longer, the undercover agents had re-contacted and again induced him to participate in the drug deal. The undercover agents thus had even continued inciting him to commit the offences after and despite the fact that they had achieved the aim pursued by contacting him already since January 2008, namely to establish contacts with suspect S. His only contribution to the drug deals had been to report the undercover agents' interest in buying drugs to S. and to shield off the latter against the undercover agents.

39. The applicant further submitted that the undercover police officers had initially acted without a court order covering their actions against him. At the time of the court order of 7 February 2008 authorising the use of

undercover agents to investigate also against him, he had already retracted himself, on 1 February 2008, from further participation in offences. This had not been disclosed by the prosecution to the Aachen District Court. Therefore, it could not be said that the intervention of the undercover agents had been properly monitored by the domestic courts.

40. The applicant stressed that the Aachen Regional Court had expressly recognised in its judgment that he had been incited (*verleitet*) to commit the drug offences he had been found guilty of. In any event, the intervention of the undercover agents amounted to an undue incitement for the purposes of the Court's case-law as the agents provocateurs had raised his willingness to participate in offences.

(ii) The Government

41. In the Government's view, the criminal proceedings against the applicant had complied with Article 6 § 1 of the Convention. The use of the undercover investigators and of the evidence obtained as a result of their intervention had not rendered the trial against the applicant unfair.

42. The Government submitted, in particular, that the applicant had not been induced by the two undercover agents, within the meaning of the Court's case-law, to commit the drug offences in question. They argued that the applicant had been predisposed to commit these offences prior to the undercover agents' intervention. In particular, in a conversation with undercover agent D. on 23 January 2008, the applicant had not only mentioned his access to a group of cigarette smugglers, but had also raised himself the possibility of delivering cocaine and amphetamine and had himself proposed the quantities of drugs to be delivered. Moreover, the applicant had described himself as part of a group with S. and had been able to initiate drug deals quickly via his contacts with S. Given the amount of drugs involved, a speedy conclusion of the drug deals would not have been possible without an organised crime structure involving the applicant. Even though the applicant had not had a leading role in the negotiations of the deals, he was to receive an equal share of the profits as S. from the transactions.

43. Moreover, the Government considered that the undercover agents had remained essentially passive in the course of their intervention and that the applicant would also have become involved in drug deals managed by S. without their intervention. It was true that in the telephone conversation between the applicant and P. on 1 February 2008 the applicant had declared that he no longer wished to prepare a drug purchase. By re-contacting the applicant on 8 February 2008, the undercover agents had only intended passively to establish the reasons for the applicant to refrain from the drug deal. However, it had become clear in the conversation that the applicant had not been willing to generally renounce drug trafficking, but had only intended to test the undercover agents' trustworthiness. The undercover

agents further left it to the applicant and S. to take the initiative in preparing the drug deals.

44. The Government conceded that the Regional Court had used the term *"verleiten"* in order to describe the activities of the undercover agents. However, it became clear from the context that it had used the term in the sense of "encourage". It had not meant that there had been undue incitement, inducement or instigation for the purposes of the Court's case-law. The undercover agents had not instigated the applicant to commit the drug offences because they had waited for the applicant to propose drug deals.

45. The Government further stressed that the involvement of the undercover agents had been ordered by a court and had been subject to permanent judicial supervision. The initial court order of 18 October 2007 authorising the intervention of undercover agents to investigate against S. and others on suspicion of drug trafficking had not covered the applicant, who had not been suspected of drug trafficking at that time. However, the court order of 7 February 2008 had extended the use of the undercover agents also against the applicant after the latter had shown interest and involvement in cigarette and drug trades.

(b) The Court's assessment

(i) Relevant principles

46. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV; and *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 52, ECHR 2008).

47. The use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards (see *Teixeira de Castro*, cited above, §§ 35-36; and *Ramanauskas*, cited above, § 54). While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience (see *Teixeira de Castro*, cited above, § 36). The public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see, *inter alia*, *Teixeira de Castro*, cited above, §§ 35-36; *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 48, ECHR 2004-X; *Vanyan v. Russia*, no. 53203/99, § 46, 15 December 2005; *Khudobin*

v. Russia, no. 59696/00, § 133, ECHR 2006-XII (extracts); *Ramanauskas*, cited above, § 54; and *Bannikova v. Russia*, no. 18757/06, § 34, 4 November 2010).

48. When faced with a plea of police incitement, or entrapment, the Court will attempt to establish whether there has been such incitement or entrapment (substantive test of incitement; see *Bannikova*, cited above, § 37). Police incitement occurs where the officers involved 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 with further references; and *Bannikova*, cited above, § 37; compare also *Pyrgiotakis v. Greece*, no. 15100/06, § 20, 21 February 2008). The rationale behind the prohibition on police incitement is that it is the police's task to prevent and investigate crime and not to incite it.

49. In order to distinguish police incitement, or entrapment, in breach of Article 6 § 1 from the use of legitimate undercover techniques in criminal investigations, the Court has developed the following criteria.

50. In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (see *Bannikova*, cited above, § 38).

51. The Court has found, in that context, in particular, that the national authorities had had no good reason to suspect a person of prior involvement in drug trafficking where he had no criminal record, no preliminary investigations had been opened against him and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (see *Teixeira de Castro*, cited above, § 38; confirmed in *Edwards and Lewis*, cited above, §§ 46 and 48; *Khudobin*, cited above, § 129; *Ramanauskas*, cited above, § 56; and *Bannikova*, cited above, § 39; see also *Pyrgiotakis*, cited above, § 21). In addition to the aforementioned, the following may, depending on the circumstances of a particular case, also be considered indicative of pre-existing criminal activity or intent: the applicant's demonstrated familiarity with the current prices for drugs and ability to obtain drugs at short notice (compare *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV) and the applicant's pecuniary gain from the transaction (see *Khudobin*, cited above, § 134; and *Bannikova*, cited above, § 42).

52. When drawing the line between legitimate infiltration by an undercover agent and incitement of a crime the Court will further examine the question whether the applicant was subjected to pressure to commit the

offence. In drug cases it has found the abandonment of a passive attitude by the investigating authorities to be associated with such conduct as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms (see, among other cases, *Bannikova*, cited above, § 47; and *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, § 92, 2 October 2012).

53. When applying the above criteria, 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. In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (see *Bannikova*, cited above, § 48). The Court has emphasised in that context the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It considered judicial supervision as the most appropriate means in case of covert operations (see *Bannikova*, cited above, §§ 49-50; compare also *Edwards and Lewis*, cited above, §§ 46 and 48).

(ii) Application of these principles to the present case

54. The Court is called upon to determine whether the applicant committed the drug offences he was convicted of as a result of police incitement in breach of Article 6 § 1 (substantive test of incitement). This was the case if the undercover police officers must be considered not to have investigated the applicant's activities in an essentially passive manner, but to have exerted such an influence on him as to incite the commission of drug offences he would not have committed otherwise.

55. Having regard to the criteria established in the Court's case-law in order to distinguish police incitement from legitimate undercover techniques (see paragraphs 49-53 above), the Court notes that at the time the applicant was first approached by the undercover agents in November 2007, there were no objective suspicions that he was involved in drug trafficking. The Aachen District Court's order of 18 October 2007 authorised criminal investigations by undercover police officers only against S. and five other persons not including the applicant. No criminal investigations were instituted against the applicant at that time. The applicant, who had no criminal record, was approached by the undercover agents not on suspicion of any involvement in drug trafficking, but because he was a good friend of the suspect S. and was therefore seen as a means to establish contacts with S.

56. As to the Government's argument that the applicant was nevertheless predisposed to commit a criminal offence because he had himself raised the possibility to deliver drugs, had proposed the quantities of

drugs to be delivered, had described himself as part of a group with S. and had been able to initiate drug deals quickly via his contacts with S., the Court notes the following. The relevant time for determining whether there were objective suspicions that the person concerned was predisposed to commit a criminal offence is the time when the person was (first) approached by the police (see paragraph 51 above). As found above, when the undercover officers started contacting and meeting the applicant in November 2007, the investigation authorities, as clearly established by the Aachen Regional Court in its judgment, did not consider that the applicant was predisposed to traffic in drugs. It is therefore irrelevant that the Aachen District Court's authorisation extending the scope of the investigations so as to cover also the applicant (see paragraph 11 above) was based on the assumption of such a predisposition, all the more as the applicant had already explained at that moment not to be interested in any business other than the restaurant he ran (see paragraph 10 above). According to the applicant, this important information had not even been communicated to the Aachen District Court by the prosecution (see paragraph 39 above). In these circumstances, the elements mentioned by the Government cannot serve to prove that it was reasonable to conclude that the applicant was predisposed to trade in drugs.

57. The Court shall further examine the question whether the applicant was subjected to pressure by the undercover agents to commit the offences he was convicted of. It notes in that context that the Regional Court, having regard to the reports drawn up by the agents throughout the undercover measure and to the applicant's submissions, established that the agents had been careful not to propose concrete illegal business transactions or specific types or amounts of drugs before their respective counterparts, the applicant or S., took the first step. In that context, it is of relevance, as stressed by the Government, that the applicant was found to have raised the possibility to arrange for drugs to be sold by S., albeit in a context thoroughly prepared by the undercover agents and aimed at arriving at a sale of drugs by S. to them.

58. However, the Court cannot but note that on 1 February 2008 the applicant, having been called by undercover agent P., explained to the latter that he was no longer interested in participating in a drug deal. Despite this, undercover agent P. re-contacted the applicant on 8 February 2008 and persuaded him to continue arranging the sale of drugs by S. to the undercover agents. By that conduct against the applicant the investigating authorities clearly abandoned a passive attitude and caused the applicant to commit the offences. In view of the material before it, the authorities re-approached the applicant in order to make it possible to establish drug trafficking and to institute a prosecution both against the applicant, against whom a court order authorising the use of undercover agents had been obtained on 7 February 2008, and against S., with whom the authorities could only communicate via the applicant.

59. In the light of the above considerations, the Court concludes that the undercover measure at issue went beyond the mere passive investigation of pre-existing criminal activity and amounted to police incitement, as defined in the Court's case-law under Article 6 § 1 of the Convention. The evidence obtained by police incitement was further used in the ensuing criminal proceedings against the applicant.

2. Whether the applicant lost his victim status

(a) The parties' submissions

(i) The applicant

60. The applicant took the view that his conviction had essentially been based on the evidence obtained by entrapment, which had rendered his trial unfair. In his view, it had not been sufficient that the Regional Court, in compliance with the Federal Court of Justice's well-established case-law (see paragraphs 26-31 above), had mitigated his sentence as a result of the police entrapment in breach of the Convention. Referring, *inter alia*, to the Court's case-law established in the cases of *Teixeira de Castro* (cited above) and *Vanyan* (cited above), he argued that the proceedings against him should have been discontinued.

(ii) The Government

61. The Government submitted that the use of the evidence obtained by the undercover agents at the trial against the applicant had not rendered the proceedings against him unfair. The Regional Court had considerably mitigated the applicant's sentence because, despite the fact that that court had not considered that there had been undue police incitement for the purposes of the Court's case-law, there had been an incentive for committing the offences by the State through its undercover agents. Moreover, the reports drawn up by the undercover agents had been disclosed in the criminal proceedings against the applicant. The Regional Court had examined allegations of an undue incitement made by the applicant, who had been able to exercise his defence rights in this respect.

(b) The Court's assessment

(i) Relevant principles

62. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention (see, *inter alia*, *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 179, ECHR 2006-V). A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the

national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Scordino (no. 1)*, cited above, § 180; and *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010).

63. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Gäfgen*, cited above, § 116; compare also *Scordino (no. 1)*, cited above, § 186).

64. In cases of police incitement in breach of Article 6 § 1 of the Convention, the Court, in its well-established case-law, reiterates that the public interest in the fight against serious crimes, such as drug trafficking, cannot justify the use of evidence obtained as a result of police incitement (see the case-law cited above at paragraph 47). For the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see *Lagutin and Others v. Russia*, nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, § 117, 24 April 2014 with further references).

(ii) Application of these principles to the present case

65. In determining whether the domestic courts have acknowledged, either expressly or in substance, a breach of Article 6 § 1, the Court observes that in its judgment convicting the applicant of drug trafficking, the Aachen Regional Court, having established in detail the facts underlying the undercover measure, found that the applicant had been incited (*verleitet*) – but not instigated (*angestiftet*) – by a State authority to commit offences. The Regional Court based this finding essentially on the same facts on which the Court based its finding that the undercover measure at issue amounted to police incitement as defined in the Court's case-law under Article 6 § 1 of the Convention. The Regional Court stressed, in particular, the lack of suspicion of involvement in drug trafficking against the applicant prior to the undercover measure concerning him and the fact that the authorities, despite their otherwise cautious approach, re-contacted the applicant and dispersed his suspicions and fear after the latter had renounced any participation in the drug transaction (see paragraphs 16-18 above).

66. The Court observes, however, that in the Government's submission, the Regional Court did not mean to acknowledge, by these statements, that there had been undue police incitement for the purposes of the Court's case-law. The Court notes that the Regional Court did not expressly refer either to Article 6 § 1 of the Convention, to corresponding rights under the

Basic Law or to the Federal Court of Justice's well-established case-law on undue police incitement (see paragraphs 26-31 above), which with the Regional Court's reasoning appears to be in line. Nonetheless, it considers that it can leave open the question whether the Regional Court, by its above findings, can be considered to have acknowledged in substance a breach of Article 6 § 1 in view of the following.

67. Even assuming an acknowledgement, by the Regional Court, of a breach of Article 6 § 1 of the Convention, the Court must further determine whether that court afforded sufficient redress for the breach of the Convention. It notes that the Regional Court expressly stated that it had been a particularly weighty factor mitigating the sentence that the applicant had been incited by a State authority to commit offences.

68. In determining whether a considerable mitigation of the sentence may be considered as having afforded the applicant sufficient redress for a breach of Article 6 § 1, the Court observes the following. Under the Court's well-established case-law, Article 6 § 1 of the Convention does not permit the use of evidence obtained as a result of police incitement. For the trial to be fair within that provision, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see paragraphs 47 and 64 above). In view of this case-law, it must be concluded that any measure short of excluding such evidence at trial or leading to similar consequences must also be considered as insufficient to afford adequate redress for a breach of Article 6 § 1.

69. The Court notes that in the present case the evidence obtained by police incitement was used at the applicant's trial and his conviction was based on that material. Moreover, not least in view of the importance of that material to prove the applicant guilty, the Court is not convinced that even a considerable mitigation of the applicant's sentence can be considered as a procedure with similar consequences as an exclusion of the impugned evidence. It follows that the applicant has not been afforded sufficient redress for the breach of Article 6 § 1.

70. The Court would add that, even though it appears plausible that the sentence imposed on the applicant for drug trafficking was considerably mitigated as a result of the police incitement, the exact reduction of the sentence was not fixed in the judgment and was thus not clearly measureable.

71. In view of the foregoing, the applicant may still claim to be the victim of a breach of Article 6 § 1.

3. Conclusion

72. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. The applicant claimed a total of 85,525.67 euros (EUR) in respect of pecuniary damage. This sum comprised EUR 68,799.99 (EUR 2,000 per month) for loss of gains from the closure of his restaurant in September 2008 as a result of his detention until his release on 12 July 2011. He further claimed EUR 2,090.71 per month and person for expenses incurred for employing two replacement cooks in his restaurant between May and August 2008 in his restaurant. He refers to copies of documents attached to his application (a calculation by a tax consultant of the gains from his restaurant between January and July 2008 and several pay slips of two of his employees during the relevant period) to support his claim.

75. The applicant further claimed a total of at least EUR 11,749.99 in respect of non-pecuniary damage. This sum comprised EUR 8,249.99 in compensation for his pre-trial detention and detention for 3.3 years (he relied on unspecified case-law to explain his calculation) and at least EUR 3,500 in compensation for the length of the proceedings.

76. The Government considered that, even if there had been a breach of the Convention, the applicant did not sufficiently substantiate his claims for compensation for pecuniary damage. Even though there may have been an average operating result of his restaurant of some EUR 2,000 per month prior to his detention, it was unclear whether the applicant would have continued running his restaurant and earning that sum during the period in which he had been detained. Moreover, it was unclear from the pay slips submitted by the applicant whether the employment of the two persons mentioned therein had any link to the applicant's detention since May 2008.

77. As to the compensation the applicant apparently claimed for non-pecuniary damage, the Government argued that the applicant failed to demonstrate that he would not have been convicted without the intervention of the undercover agents.

78. The Court, examining the applicant's claim relating to pecuniary damage, would stress that the award of damages in this case relates to the manner in which the proceedings were conducted. The link between that manner and the specific amounts of pecuniary damage claimed are matters to be assessed in domestic proceedings. In case of an acquittal, the applicant could claim compensation for damage suffered on account of his conviction,

and the domestic courts would then be in the best position to deal with that claim (compare also, *mutatis mutandis*, *Veselov and Others*, cited above, §§ 135-136).

79. The Court further considers that the applicant must have suffered distress as a result of the fact that he did not have a fair trial on account of his conviction for drug offences the commission of which had been incited by the police. The Court considers that the finding of a violation of Article 6 § 1 does not constitute in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant. Making its assessment on an equitable basis, the Court awards the applicant EUR 8,000 in this respect, plus any tax that may be chargeable on that amount. The claim for compensation for length of proceedings must be dismissed as the applicant's complaint in this respect has been declared inadmissible (see paragraph 4 above).

B. Costs and expenses

80. The applicant also claimed a total of EUR 10,685.03 plus value-added tax for the costs and expenses incurred in the proceedings before the domestic courts. This sum included EUR 4,201.68 net for lawyer's costs in the proceedings before the Regional Court, EUR 5,000 net for lawyer's costs in the proceedings before the Federal Court of Justice and EUR 1,483.35 net for lawyer's costs in the proceedings before the Federal Constitutional Court. The applicant submitted copies of bills issued to him by his lawyer in respect of the latter two amounts.

81. Submitting documentary evidence, the applicant further claimed EUR 2,654.72 plus value-added tax for lawyer's costs incurred in the proceedings before the Court.

82. The Government considered that the applicant did not sufficiently substantiate his costs and expenses either. It was unclear from the invoices submitted, which referred to "the criminal case of" the applicant, whether they referred to the proceedings at issue and which services had been paid for and on what basis.

83. 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 sum of EUR 8,500 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

84. 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 application admissible in so far as it concerns the applicant's complaint about the alleged unfairness of the criminal proceedings against him;

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:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 8,500 (eight thousand five hundred euros), 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 23 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President