



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

FIFTH SECTION

CASE OF TCHOKHONELIDZE v. GEORGIA

(Application no. 31536/07)

JUDGMENT

STRASBOURG

28 June 2018

FINAL

28/09/2018

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

In the case of Tchkhonelidze v. Georgia,

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

Angelika Nußberger, *President*,

Erik Møse,

Yonko Grozev,

Síofra O'Leary,

Mārtiņš Mits,

Gabriele Kucsko-Stadlmayer,

Lado Chanturia, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 5 June 2018,

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

PROCEDURE

1. The case originated in an application (no. 31536/07) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Mr Eldar Tchkhonelidze (“the applicant”), on 5 June 2007.

2. The applicant was represented by Ms L. Mukhashavria, a lawyer practising in Tbilisi. The Georgian Government (“the Government”) were represented by their Agent, Mr L. Meskhoradze, of the Ministry of Justice.

3. The applicant alleged, in particular, that the criminal proceedings against him had been conducted in breach of Article 6 §§ 1 and 3 (d) of the Convention, since he had been the victim of police entrapment and that the trial court had refused to hear a certain witness.

4. On 8 December 2014 the above-mentioned complaints under Article 6 §§ 1 and 3 (d) of the Convention were 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 1956 and lives in the village of Tsereteli, Marneuli Region, Georgia.

A. Pre-trial investigation

6. On 1 December 2005 a certain individual, Ms K., applied to the Governor of the Marneuli Region for the permit necessary for the construction of a petrol station on a plot of land situated in the region. The Governor assigned the examination of the application to the applicant, his deputy, who was responsible for the development of the region's infrastructure and the management of State lands.

7. A meeting between the applicant and Ms K. took place on the same day, 1 December 2005, in the former's office. According to the official version of events, during the meeting, when Ms K. enquired about the necessary documents and applicable procedure for the issuance of the construction permit, the applicant replied that, apart from the necessary formalities, she would also need to make a pay-off (*გროსბო*) to the amount of 30,000 United States dollars (USD); of this amount, USD 20,000 would be the share of the Governor himself, whilst the rest would be divided between the applicant and representatives from the various agencies involved.

8. On 6 December 2005 Ms K. informed the Department of Constitutional Security of the Ministry of Internal Affairs ("the DCS") that the applicant had requested a bribe from her in return for a promise to assist her in obtaining the requisite construction permit. She expressed her readiness to cooperate with the DCS. The authority immediately opened a criminal case into Ms K.'s allegations ("the bribery case").

9. Still on 6 December 2005, the General Public Prosecutor's Office ("the Prosecutor's Office") issued the DCS with a general authorisation to remain in charge of the bribery case and to conduct all types of investigative measures necessary.

10. By rulings dated 7 December 2005, the Tbilisi City Court authorised secret video surveillance of the applicant's meetings with Ms K., as well as the tapping of their telephone conversations.

11. On 8 December 2005 Ms K. bought a plot of land from another private individual, Ms N. (hereinafter "the sales agreement"), for the purpose of constructing a petrol station on it. On the same day, the applicant contacted a notary and the head of the Land Registry of the Marneuli Region, requesting them, respectively, to certify the sales agreement and to register, in an expedited manner, the plot in Ms K.'s name.

12. On 12 December 2005 Ms K. brought to the applicant's office the sales agreement and a record from the Land Registry of the Marneuli Region confirming her title to the newly acquired plot of land. During that second meeting, which was secretly filmed by Ms K., the applicant reiterated his request for a bribe. He asked her to bring USD 10,000 as a down payment, emphasising that this sum was not supposed to cover any

official fees or charges prescribed by law for the issuance of a construction permit. Ms K. promised to bring the sum the following day.

13. On 13 December 2005 Ms K. brought USD 10,000 to the applicant in cash. The banknotes had been pre-marked with a special substance by the DCS. The meeting took place in the applicant's office, and it was secretly filmed by Ms K. and closely supervised by the DCS. As soon as Ms K. handed over the money to the applicant, DCS officers entered the room and arrested the applicant.

14. A search of the applicant's person was conducted on the spot, which led to the discovery of the banknotes in the right inner pocket of his suit. The law-enforcement officers immediately examined the banknotes using a special lamp and observed the marks made by a substance previously applied by the DCS. The same substance was also detected on both of the fingers of the applicant's hands and on the clothing of his suit. The accuracy of these findings was later confirmed by a forensic chemical examination.

15. On 14 December 2005 the applicant was charged, under Article 338 § 2 (b) of the Criminal Code of Georgia, with the crime of requesting a bribe in a large amount.

16. The results of an examination of the secret recordings of the various meetings between the applicant and Ms K. confirmed the authenticity of those recordings. On 8 February 2006 the investigator in charge of the case acquainted the applicant and his lawyer with the results of the above-mentioned forensic examinations. The accused party did not contest that evidence.

B. Trial

17. When questioned by the Bolnisi District Court, the applicant, who was represented by two lawyers of his choice, complained that he had been entrapped by the DCS. He stated that he had never had any intention of accepting a bribe but had been helping Ms K. out of good will, as he had considered her to be a distant relative. He confirmed that he had been assisting Ms K. in the various administrative formalities related to the purchase of the relevant land. The applicant furthermore admitted to having received money to the amount of USD 10,000, from the applicant, but added that the sum had been meant to be transmitted to a construction company as an advance payment for its upcoming construction of the petrol station. He stated that he could not explain why Ms K. would have wished to induce him to accept a bribe.

18. When questioned by the trial court for the first time on 20 April 2006, Ms K. stated that she had met the applicant in his office and informed him of her intention to construct a petrol station. She had falsely presented herself as his distant relative in order to obtain the applicant's favour more easily. Ms K. confirmed that the applicant had then assisted her with the

relevant administrative formalities with the notary and the Land Registry of the Marneuli Region. As to the sum of USD 10,000, Ms K. stated – reiterating the applicant’s version of events – that it had been intended that the money would be paid through the applicant’s offices to a private construction company in relation to the ongoing construction project of a petrol station. Ms K. emphasised that she had never been sure that the applicant had intended to retain any part of the above-mentioned sum for his personal benefit. Nevertheless, still suspecting that there might have been illegal intent involved in the applicant’s wish to be involved in the money transfer, Ms K. had decided to inform the DCS of her conversation with the applicant.

19. On 2 May 2006 the prosecutor in charge of the applicant’s criminal case instituted criminal proceedings against Ms K. for giving conflicting witness statements, on the grounds of the alleged inconsistency between the statements that Ms K. had originally given to the DCS during the investigation stage and those given before the trial court on 20 April 2009.

20. On 3 May 2006 Ms K. requested that the Bolnisi District Court hear her again in relation to the applicant’s case, stating that she had forgotten to testify in respect of a number of significant factual details when the court had previously heard her on 20 April 2006.

21. On 17 May 2006 Ms K. lodged a complaint with the Prosecutor’s Office in respect of the initiation of the criminal proceedings against her (see paragraph 19 above). She submitted that the statements she had given to the trial court on 20 April 2006 had been truthful and had fully reflected the content of her several meetings with the applicant, which could have been verified by examining the relevant secret video and audio recordings.

22. When questioned by the trial court on 23 June 2006, both the notary who had certified the sales agreement and the head of the Land Registry of the Marneuli Region confirmed that the applicant had been urging them to expedite the registration of Ms K.’s title to the plot of land on which a petrol station was scheduled to be constructed. The two witnesses furthermore stated that the plot still constituted Ms N.’s property, given that the sales agreement had been annulled shortly after having been concluded.

23. Allowing a request lodged by the applicant on 23 June 2006, the trial court admitted to the criminal case file as evidence a recording of a television programme and a newspaper article in which Ms K. had publicly acknowledged having been an DCS undercover agent in four other unrelated criminal cases.

24. On 7 July 2006 Ms K., who at that time had already been placed in pre-trial detention in relation to the criminal proceedings instituted against her for giving conflicting witness statements, was heard by the Bolnisi District Court for the second time. She confirmed the statements that she had given during the investigation stage. Namely, she testified that the applicant had clearly requested her to pay “unofficially” the sum of

USD 30,000 in return for promised assistance with the construction project, of which sum USD 20,000 was supposed to go, according to the applicant, to the Governor. She stated, however, that she did not know whether the applicant had any intention of retaining any part of the remaining USD 10,000 for his personal benefit. Ms K. also confirmed that the applicant had indeed conducted negotiations with a number of construction companies on her behalf at that time.

25. Ms K. did not deny that, prior to her involvement in the case against the applicant, she had acted as an undercover agent for the DCS in four other unrelated cases. She further stated before the trial court that she had already acted as an undercover agent of the DCS when she had approached the applicant for the first time on 1 December 2005. She stated that the initial objective of that undercover anti-criminal operation, led by the DCS, had been to expose the criminal activity of the Governor of the Marneuli Region. Notably, the DCS had been in possession of information that the Governor had been prone to requesting bribes in return for providing various public services. It was only after that initial plan had failed that the law-enforcement agency's attention had shifted towards the Governor's deputy, the applicant. Ms K. also stated that the sales agreement in respect of the plot of land had been annulled shortly after the applicant's arrest, as it had in fact been a fictitious transaction concluded under the DCS's close supervision. According to Ms K.'s statements, Ms N. had also been collaborating with the DCS at that time, and the first meeting between Ms K. and Ms N. had taken place on the DCS's premises.

26. On 7 July 2006 the applicant requested the trial court to summon Ms N. as an additional witness so that he could question her in relation to her purported collaboration with the DCS and role in the sequence of the events which had led to the initiation of the criminal proceedings against him (see the preceding paragraph). In reply, the Prosecutor's Office claimed that it had already attempted to summon Ms N. as a witness, but that the latter's whereabouts were unknown. Relying on that standpoint, the Bolnisi District Court ruled that it was objectively impossible to summon Ms N. as a witness.

27. By a judgment of 17 July 2006, the Bolnisi District Court found the applicant guilty as charged and sentenced him to seven years' imprisonment. The court stated that the collection of the evidence in the case file – the statements given during the trial by Ms K., the notary and the head of the Land Registry; the judicially authorised secret video and audio recording; and the results of the personal search of the applicant on 13 December 2005 and of the forensic chemical and phonoscope examinations – confirmed the applicant's guilt beyond reasonable doubt. As regards the applicant's statement that the money discovered on his person (USD 10,000) had not been a bribe but a valid advance payment for preparatory works associated with Ms K.'s construction project, the District

Court answered that this was not supported by the totality of the collected evidence; it did not provide any additional explanation in that respect. As to the applicant's argument that he had been induced to commit the offence in question by Ms K., who had been an *agent provocateur* of the DCS, the court did not address that argument at all.

28. On 15 August 2006 the applicant lodged an appeal with the Tbilisi Court of Appeal against his conviction, reiterating his complaint alleging entrapment and reasserting his version of events.

29. On 18 October 2006 the examination of the applicant's appeal by the Tbilisi Court of Appeal began. During a hearing held on 8 November 2006, the applicant – referring to statements given by members of his family that they had recently seen Ms N. at her house – the applicant requested the appellate court to summon the latter so that he could finally question her. The appellate court granted the applicant's request.

30. Ms N. was scheduled to appear before the appellate court on 1 December 2006, but failed to do so. The applicant noted that his family members, who were living in the same village (Orjonikidze) as Ms N., had approached her and asked her to testify before the court, but the latter had refused the request in a resolute manner. The Prosecutor's Office noted that it had been unable to secure Ms N.'s appearance but promised to do so for the next hearing, which was scheduled for 6 December 2006.

31. On 2 December 2006 Ms N. submitted a written statement to the Tbilisi Court of Appeal. Noting that she had recently learned of the ongoing examination of the applicant's criminal case, she stated that she was unable to appear as a witness before the appellate court because of her difficult family situation. Ms N. stated, in particular, that her aged mother had been seriously ill and remained under her constant supervision.

32. On 6 December 2006 the Prosecutor's Office presented a handwritten letter from Ms N.'s neighbours dated 4 December 2006, according to which the witness had long abandoned her house in the village and her current whereabouts were unknown. The Tbilisi Court of Appeal ruled that it was objectively impossible to summon Ms N., as her whereabouts could not be identified.

33. By a decision of 6 December 2006, the Tbilisi Court of Appeal rejected the applicant's appeal and upheld his conviction of 17 July 2006 in full. As with the first-instance court, the applicant's argument about his alleged entrapment by the victim, the DCS's *agent provocateur*, was left unanswered by the appellate court. The appellate court rejected as unfounded the applicant's argument that the USD 10,000 had been meant to be used as an advance payment for construction works. The court noted in this connection that by the time the applicant had received the sum from Ms K. the construction permit had not been issued, and neither had an architectural plan and expenditure estimate been drawn up.

34. On 16 April 2007 the Supreme Court of Georgia, rejecting an appeal by the applicant on points of law as inadmissible, finally terminated the proceedings.

35. On 24 November 2008 the applicant was granted early release from prison under a presidential pardon.

II. RELEVANT DOMESTIC LAW

36. Article 7 of the Code of Criminal Procedure (hereinafter “the CCP”), which was in force between 20 February 1998 and 1 October 2010, stated that evidence obtained in a manner that was in breach of a law was invalid.

37. Article 111 § 1 (c) of the Code of Criminal Procedure furthermore specified that evidence obtained as a result of “illegal activity, a threat or the use of force, degrading treatment, deceit, blackmail or through the use of any other unlawful method” could not be admitted to a criminal case file. Paragraph 2 of the same provision added that the relevant prosecutor’s office bore the burden of proving before a trial court that the incriminating evidence in question had been obtained legally.

38. The relevant provisions of the Act on Special Investigative Activity of 30 April 1999 (*კანონი ოპერატიულ-სამძებრო საქმიანობის შესახებ*), as in force at the material time, provided as follows:

Section 1 – “The notion of a special investigative activity”

“1. A special investigative activity is a form of overt or covert activity carried out by special divisions of State agencies authorised by this Act (hereinafter “special investigative agencies”) within the scope of their powers, with a view to protecting the rights and freedoms of individuals and legal entities [and] public security against criminal offences and other types of wrongdoing.”

Section 3 – “Guiding principles for conducting a special investigative activity”

“2. It is forbidden to conduct a special investigative activity that is associated with ... deceit, blackmail, inducement ...”

Section 6 – “Protection of human rights and freedoms during operational investigative activities”

“2. A person who considers that a special investigative agency has acted in breach of his or her rights and freedoms may challenge the acts of that agency before a higher-ranking special investigative agency, a public prosecutor’s office or a court.”

Section 7 – Special investigative techniques

“2. A special investigative agency may resort, either overtly or covertly, to the following techniques: ...

(h) interception of postal, telegraphic and telephone communications mounted on the basis of a valid court order;

- (i) surveillance by audio, video or photo equipment, as well as interception of electronic communication, mounted on the basis of a valid court order;
- (j) infiltration by a police informant;
- (k) the mounting of [action] by a clandestine group.”

39. Paragraphs 3-6 of section 7 of the Act on Special Investigative Activity furthermore emphasised that among the types of special investigative techniques exhaustively listed in the first paragraph of the same provision, the measures mentioned in sub-paragraphs (h) and (i) – surveillance and interception of various types of communications – ought to be mounted and conducted only under court supervision, on the basis of a valid court order.

THE LAW

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

40. The applicant complained that his conviction for a bribe-related offence had been unfair because, on the one hand, it had been confirmed by evidence obtained through police entrapment and, on the other, the domestic courts had failed to properly address his plea of entrapment. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

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

A. Admissibility

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

B. Merits

1. The parties' arguments

42. The Government submitted that there had been no entrapment of the applicant, with the law-enforcement authority (the DCS) having operated in an essentially passive manner when investigating the case. They argued in this regard that Ms K., who had taken the initiative to contact the applicant, was an ordinary private individual who had informed the DCS of her suspicions concerning the applicant only after the latter had requested a

bribe from her. In other words, the DCS had not induced the applicant to commit a crime but had rather “joined” the activity by authorising and equipping Ms K. to conduct the secret surveillance. The DCS had never abandoned that “essentially passive” attitude throughout the investigation stage. The Government furthermore submitted that the applicant had been able to effectively raise the issue of entrapment in the domestic proceedings. Indeed, he had extensively argued before the domestic courts that his indictment had been the direct outcome of that entrapment. The Bolnisi District Court had not, according to the Government, left that plea of entrapment unconsidered. Accordingly, it had allowed the applicant’s request for the inclusion in the criminal case file of the newspaper article and the recording of the television broadcast containing Ms K.’s confession to being a police collaborator. Furthermore, the applicant had had an opportunity to question Ms K. during the trial (see paragraphs 23 and 25 above).

43. In reply, the applicant firstly criticised the procedure whereby the DCS had arranged for an undercover operation against him. He had had no criminal record and had never been involved in any corrupt dealings; therefore, it was difficult to comprehend why the law-enforcement authorities had chosen him as a target. According to the official version of the events, the need for that operation had emerged merely from a written complaint lodged with the authority by Ms K. The applicant submitted that, as a matter of fact, Ms K. had not been an ordinary private individual but a paid undercover agent of the DCS who had collaborated with the latter authority in respect of a number of other unrelated criminal cases. He emphasised the fact that Ms K. had already been a police agent by the time she had first approached him. Ms N., another protagonist in the criminal case against the applicant, had apparently been another undercover agent of the DCS, whom he had had no possibility to question in court. The applicant stated that the domestic courts had not even mentioned the fact that she had been an undercover agent, let alone giving any meaningful answer to his plea of entrapment. The applicant also suggested that Ms K. had herself become the target of pressure from the authorities – in the form of the criminal proceedings instituted against her – after she had partly testified in his favour during the trial (see paragraph 19 above).

2. The Court’s assessment

(a) General principles

44. While the Court has consistently accepted the use of undercover agents as a legitimate investigative technique for combating serious crimes, this technique still requires that clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment, as the public interest cannot justify the use of evidence obtained as a result of

police entrapment (see *Teixeira de Castro v. Portugal*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-IV, and *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, § 50, 30 October 2014). In this respect, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive test and the procedural test of incitement (see, for instance, *Bannikova v. Russia* no. 18757/06, §§ 37 and 51, 4 November 2010). Under the substantive test, when examining an applicant's arguable plea of entrapment, the Court will enquire, as a first step, into whether the authorities had good reasons for mounting a covert operation. In particular, they must show that they were in possession of concrete, objective and verifiable evidence showing that initial steps have been taken to commit the acts constituting the offence, and that the criminal act was already underway at the time when the police intervened (see, generally, *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV; *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII; and *Furcht v. Germany*, no. 54648/09, § 51, 23 October 2014). This principle rules out, in particular, any conduct that may be interpreted as inciting the applicant to commit an offence that would otherwise not have been committed, such as taking the initiative in contacting the applicant, repeating an offer despite having received an initial refusal, insistent prompting, the promise of financial gain, or appealing to the applicant's sense of compassion (compare, among other cases, *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 67, ECHR 2008; *Malininas v. Lithuania*, no. 10071/04, § 37, 1 July 2008; and *Vanyan v. Russia*, no. 53203/99, §§ 11 and 49, 15 December 2005).

45. Where the authorities claim that they acted upon information received from a private individual, the Court draws a distinction between an individual complaint and information coming from a police collaborator or informant (see, among many others, *Shannon*, cited above; *Gorgievski v. "the former Yugoslav Republic of Macedonia"*, no. 18002/02, §§ 52 and 53, 16 July 2009; and *Miliniene v. Lithuania*, no. 74355/01, §§ 37-38, 24 June 2008). A collaborator or informant would run a significant risk of extending their role to that of *agents provocateurs*, in possible breach of Article 6 § 1 of the Convention, if they were to take part in a police-supervised operation. It is therefore crucial in each case to establish if the criminal act was already under way at the time when the source began collaboration with the police (compare *Eurofinacom* and *Vanyan*, both cited above, §§ 47-49). In assessing a plea of entrapment, it is also important to analyse whether the private individual who informed the authorities of the applicant's allegedly unlawful conduct might have had any ulterior motives (see *Miliniene*, cited above, § 39). The Court has found that the line between legitimate infiltration by an undercover agent and the instigation of a crime is more likely to be crossed if no clear and foreseeable procedure was set up under the domestic law for authorising and implementing undercover

operations – all the more so if they were also not properly supervised. It has considered judicial supervision as the most appropriate means in cases involving covert operations (see *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII (extracts); *Furcht*, cited above, § 53; and *Bannikova*, also cited above, §§ 49 and 50). A lack of procedural safeguards in the ordering of an undercover operation generates a risk of arbitrariness and police entrapment (see *Nosko and Nefedov*, cited above, § 64).

46. In cases where the lack of file disclosure or the controversy of the parties' interpretation of events precludes the Court from establishing with a sufficient degree of certainty whether the applicant was subjected to police incitement, the procedural aspect becomes decisive. In examining the procedure followed by the domestic courts the Court has had regard to the potential outcome of a successful plea of incitement (see *Bannikova*, cited above, §§ 52 and 53, with further references). As the starting point, the Court will therefore verify whether an arguable complaint of incitement constitutes a substantive defence under domestic law, or gives grounds for the exclusion of evidence, or leads to similar consequences (see *Khudobin*, cited above, §§ 133-135). Although the Court will generally leave it to the domestic authorities to decide what procedure must be followed by the judiciary when faced with a plea of incitement, it requires such a procedure to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the relevant prosecution authority to demonstrate that there was no incitement. The scope of the domestic judicial review must include the reasons why the undercover operation was mounted, the extent of the law enforcement authorities' involvement in the offence and the nature of any incitement or pressure to which the applicant was subjected (see, among other authorities, *Ramanauskas*, cited above, §§ 70 and 71, and *Bannikova*, cited above, § 48). The domestic courts' duty to ensure the overall fairness of the trial requires, *inter alia*, 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 (compare *Lüdi v. Switzerland*, 15 June 1992, § 49, Series A no. 238; *Bulfinisky v. Romania*, no. 28823/04, § 45, 1 June 2010; and *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008). The Court's findings under the procedural test will become of decisive significance for the finding of whether or not impugned criminal proceedings have been conducted in breach of Article 6 § 1 of the Convention (compare, for instance, *Sepil v. Turkey*, no. 17711/07, § 37-40, 12 November 2013, and *Constantin and Stoian v. Romania*, nos. 23782/06 and 46629/06, § 64, 29 September 2009).

(b) Application of these principles to the circumstances of the present case

47. Having regard to the limits of its international supervision, notably that it is not a court of fourth instance empowered to call into question the findings of the domestic courts as regards the commission of the offence in question, the Court notes that, in the examination of the present case, it must be guided by the relevant factual findings established at the domestic level. Thus, the Court will base its assessment on the fact – established by the domestic courts – that the applicant indeed accepted a bribe from Ms K. in exchange for a promise to assist her in the implementation of a business plan (compare, *mutatis mutandis*, *Matanović v. Croatia*, no. 2742/12, § 136). The only major procedural lacuna that was apparently left open at the domestic level – despite the fact of its being at the core of the question of whether or not the applicant was given a fair trial – is the latter’s claim that he was the victim of police entrapment and the domestic courts’ failure to address this allegation. The Court is therefore called on to address this particular procedural defence.

48. In this respect, the principal issue to be examined by the Court is whether the actions of the law-enforcement authority – the DCS – remained within the bounds of undercover work rather than inciting the applicant into taking a bribe. In other words, the Court must ascertain whether the DCS confined itself to “investigating criminal activity in an essentially passive manner” (see, for instance, *Ramanauskas*, cited above, §§ 66-67). Its ability to make a substantive finding on this point will depend, however, on whether or not the case file contains sufficient information on the undercover activities. If the substantive test is inconclusive owing to the lack of information in the file, the Court will proceed to the second step of its examination, whereby it will assess the procedure by which the plea of incitement was determined by the domestic courts in the light of the criteria set out in paragraph 46 above. Although there was no evidence that the applicant had committed any offences, in particular corruption-related ones, before the incident in question, the absence of a criminal record could not in itself, detached from the other circumstances of the case, be understood as an indication of bad faith in the law-enforcement authority’s decision to mount an undercover operation against him after Ms K. had reported his alleged request for a bribe. Nor can the subsequent technical and financial backing given by the DCS to the person who had purportedly received the request for a bribe – so that the latter could record the commission of the offence – be equated with the transgression by the police of the bounds of its undercover investigative work (compare, for instance, *Matanović*, cited above, § 138, and *Miliniene*, cited above, §§ 37 and 38).

49. What starts to taint the legality of the police operation mounted against the applicant is the fact that Ms K. was hardly an ordinary private individual. The criminal file against the applicant contained material which confirmed the fact that that person had been the DCS’s usual collaborator in

a number of unrelated criminal investigations. Ms K. conceded herself during the applicant's trial that when she had approached the applicant for the first time on 1 December 2005, she had already been acting under the DCS's instructions. On the other hand, however, the Court observes that, according to the official version of the events, it was not Ms K. who had proposed a bribe to the applicant. On the contrary, it was the latter who had been the first one to request a pay-off from her in the amount of USD 30,000. Although, the applicant claimed before the domestic courts that he had had no intention to retain any part of the received money for his personal benefit, this allegation is no valid excuse for his taking the initiative and raising financial aspects in the conversation with Ms K. (see paragraphs 7, 17, 18, 24 and 25 above). In such circumstances, the Court cannot determine with sufficient certainty, only on the basis of the materials available in the case file, that Ms K. took an active and decisive role in the creation of the stratagem that instigated the commission of the bribe offence in question. Thus, the Court's substantive test is inconclusive.

50. Consequently, the Court has to proceed to the procedural test and to examine whether the applicant was able to raise the issue of police entrapment effectively in the domestic proceedings (see the general principles cited in paragraph 46 as well as paragraph 48 above). In this regard, the Court is satisfied that the applicant basing his defence before the trial court on the grounds of alleged police entrapment was a valid course of action, as it could have resulted in the exclusion of the evidence obtained as a result of such an investigative technique (compare *Matanović*, cited above, § 140, and *Bannikova*, cited above, § 56). In particular, under sections 3, 6 and 7 of the Act on Special Investigative Activity it was outlawed for an investigative technique involving the infiltration of an undercover agent to be implemented with methods based on "deceit" and "inducement", and a person concerned by these illicit methods of investigation was entitled to complain before a court. Furthermore, Article 111 § 1 (c) of the Code of Criminal Procedure directly mandated a criminal court to exclude from the relevant case file evidence obtained as a result of any "illegal activity" or "unlawful method" (see paragraphs 36-38 above). Consequently, and given that the applicant had an arguable claim of entrapment, the Prosecutor's Office should have assumed the burden of proving that there had been no incitement contrary to Article 6 § 1 of the Convention (see, among many other authorities, *Bannikova*, cited above, § 48).

51. However, having regard to the relevant criminal materials, the Court observes that the Prosecutor's Office did not make any argument throughout the proceedings in an attempt to refute the applicant's allegations of entrapment. This total silence on the part the Prosecutor's Office could be explained by the objective impossibility of discharging the requisite burden of proof on account of the absence of any formal authorisation and supervision of the undercover operation in question (see *Vanyan*, cited

above, §§ 46 and 47, and *Khudobin*, cited above, § 135). Thus, the Court observes that the DCS sending Ms K., the infiltrated agent, to the applicant on an undercover mission was never ordered or supervised either by a court, which is considered by the Court's case-law as the most appropriate form of supervision in such matters, or any other independent public authority competent in criminal matters (contrast *Lüdi*, cited above; also compare, among many other authorities, *Teixeira de Castro*, cited above, § 38, and *Miliniene*, cited above, § 39). Indeed, under section 7 §§ 3-7 of the Act on Special Investigative Activity, it was not required that infiltration by an undercover agent – unlike certain other investigative techniques – be ordered and supervised by a court (see paragraph 39 above). In other words, the domestic law did not provide for the adequate regulation of the conduct of such a covert operation (compare, for instance, *Veselov and Others v. Russia*, nos. 23200/10 and 2 others, § 111, 2 October 2012).

52. Lastly, even if the Prosecutor's Office had failed to discharge the requisite burden of proof, that omission could not have excused the domestic courts from the need to address effectively the applicant's plea of entrapment. The effectiveness of the judicial review should be assessed by having due regard to the reasons contained in the domestic courts' decisions. The courts were expected to establish, after having conducted adversarial proceedings, the reasons why the undercover operation had been mounted against the applicant, the extent of the DCS's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected (see, for instance, *Ramanauskas*, cited above, § 71). However, the Court observes that the domestic courts, confronted with the applicant's well-substantiated allegations, did not provide any single reason in their decisions as to why those allegations ought to be dismissed (see paragraphs 27 and 33 above). The Court further notes the domestic courts' failure to secure the attendance and examination of another key witness, Ms N., who, according to the applicant and Ms K., was probably another undercover agent engaged by the DCS to entrap the applicant (see paragraphs 25-26 and 29-32). In such circumstances, it cannot be said that the judicial review of the allegations of entrapment was either conducted with sufficient respect for the principle of adversarial proceedings or that it established adequate reasons for dismissing the applicant's defence.

53. Having regard to all the above considerations – the absence of sufficient legislative framework of the mounting of the undercover operation against the applicant, the undercover agent's failure to remain strictly passive in her activity, the failure of the Prosecutor's Office to discharge its burden of proof, and the insufficiency of the judicial review of the applicant's well-substantiated allegations of entrapment – the Court concludes that the conduct of the criminal proceedings against the applicant was incompatible with the notion of a fair trial. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (d) THE CONVENTION

54. Lastly, the applicant complained, under Article 6 § 3 (d) of the Convention, that the principle of equality of arms and the rights of the defence had been infringed in that during the trial neither the courts nor the parties had had the opportunity to examine Ms N., one of the two undercover agents involved in the case. Article 6 § 3 (d) reads as follows:

“3. Everyone charged with a criminal offence has the following minimum rights: ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

55. The Court considers that the applicant’s complaint under this head is indivisible from that under Article 6 § 1 of the Convention and is likewise admissible. However, having regard to its findings set out in paragraphs 52 and 53 above, the Court does not consider it necessary to make a separate ruling on the merits of the complaint under Article 6 § 3 (d) of the Convention (see, amongst other authorities, *Sandu v. the Republic of Moldova*, no. 16463/08, § 40, 11 February 2014, § 40, and *Ramanauskas*, cited above § 79-80).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed 81,890 euros (EUR) in respect of pecuniary damage related to the loss of earnings due to his imprisonment, and EUR 50,000 in respect of non-pecuniary damage.

58. The Government considered the applicant’s claims excessive and unsubstantiated, and that the acknowledgment of a violation under Article 6 of the Convention, if found by the Court, would constitute sufficient just satisfaction for the applicant.

59. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the acknowledgement of a violation as such. The Court therefore finds it appropriate to award EUR 2,500.

B. Costs and expenses

60. The applicant also claimed EUR 1,831 for the legal assistance, postal, translation and other administrative costs and expenses incurred in the proceedings before the Court. He did not submit any legal or financial document in support of his claim

61. The Government submitted that the claim was unsubstantiated.

62. 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 insufficient documentary evidence in its possession and the above criteria (see *Ildani v. Georgia*, no. 65391/09, § 56, 23 April 2013, and *Saghinadze and Others v. Georgia*, no. 18768/05, § 164, 27 May 2010), the Court rejects the applicant's claim for costs and expenses.

C. Default interest

63. 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 complaints under Article 6 §§ 1 and 3 (d) of the Convention concerning the applicant's entrapment plea and his inability to have a witness examined by the trial court admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 6 § 3 (d) of the Convention;
4. *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, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 28 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President