



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

FIFTH SECTION

CASE OF YAKHYMOVYCH v. UKRAINE

(Application no. 23476/15)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Domestic courts' failure to address adequately the applicant's plea of police incitement • Overall fairness of proceedings undermined

STRASBOURG

16 December 2021

FINAL

09/05/2022

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

In the case of Yakhymovych v. Ukraine,

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

Síofra O’Leary, *President*,
Ganna Yudkivska,
Stéphanie Mourou-Vikström,
Lətif Hüseyinov,
Jovan Ilievski,
Arnfinn Bårdsen,
Mattias Guyomar, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 23476/15) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Oleg Ignatiovych Yakhymovych (“the applicant”), on 29 April 2015;

the decision to give notice of the application to the Ukrainian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 5 October and 9 November 2021,

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

INTRODUCTION

1. The case concerns allegations of police entrapment raised under Article 6 of the Convention.

THE FACTS

2. The applicant was born in 1954 and is being detained in Lozivskyy. He was represented before the Court by Mr O.V. Levytskyy, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, Mr I. Lishchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant had a conflict with a certain Mr S., who, the applicant alleged, had fraudulently misappropriated a residential property from him. The applicant brought complaints in that connection with various authorities.

6. According to the domestic courts’ decisions, the applicant, who had no previous criminal record, ordered the contract killing of S. under the following circumstances.

Ch. was a long-term acquaintance and family friend of the applicant’s.

According to Ch.'s statements to the police, which eventually led to the applicant's conviction, the applicant had first spoken to Ch. about S. in 2007 or 2008, after Ch. had been released from prison. On that occasion the applicant had explained to Ch. that he was unable to recover his property from S. by legal means and had repeatedly asked for Ch.'s help in finding people who would beat S. up. Ch. had refused. After Ch. had again been imprisoned in 2008, the applicant visited him and brought him clothing. The applicant had then repeatedly called Ch. in prison: because by that time the applicant had lost all his court cases against S., his plans progressed to murder and he had asked for Ch.'s help in finding people to kill S.

When Ch. was released at the end of February 2012, he asked to borrow some clothes from the applicant. In reply the latter repeated his request for Ch.'s help in finding contract killers.

Ch. informed the police. The Donetsk regional police unit for the fight against organised crime arranged an undercover operation to collect proof against the applicant. An undercover agent I.¹ was engaged for this purpose on 3 April 2012. Although the case file does not contain any definitive information about I.'s background and identity, it appears that he was not an undercover police officer, but rather a police informant recruited from among individuals with a criminal background. All relevant documentation was drawn up by police officers of the organised crime unit. Acting according to the plan, Ch. introduced the applicant to I.

On 3 April 2012 the applicant met I. and hired him to kill S. in exchange for 2,000 Ukrainian hryvnias (UAH, the equivalent of about 180 euros (EUR) at the time). He paid a portion of the sum the same day and promised to pay the rest after the murder. The applicant indicated to I. where S. lived and what kind of car he drove. On 5 April 2012 the applicant met I., who told him that the murder would be committed the same day. The applicant said that he would remain near his home so that he could be seen by his neighbours, thereby ensuring his alibi. On the same day the police staged S.'s kidnapping and prepared a staged photograph of his "dead" body. Ch., settling a prior debt, gave the applicant the money which he understood would be paid to I. On 6 April 2012 I. met the applicant, showed him the staged photograph on his phone and received the remaining money from him for the murder. The applicant was then arrested.

7. During the pre-trial investigation, a confrontation was conducted between the applicant and I. in the presence of the applicant's lawyer. The applicant was given an opportunity to put questions to I. but he did not do so.

8. The applicant stood trial before the Horlivka Nikitovsky District Court.

¹ The agent's first name was Sergey. In the relevant recordings he is sometimes referred to by the diminutive form of that name, Serezha (see paragraph 11 (ii) below).

9. The applicant pleaded not guilty and explained that he had not wished to have S. killed, had not ordered his killing and had paid money to I. at Ch.'s request to help I. pay for a trip. It had been Ch. who had hated S. and had told the applicant that he had wished to take revenge on him. The applicant considered that he had been framed by Ch. and I., and that it had been I. who had offered to kill S. I. had acted aggressively and in an assertive manner. When I. had persistently pressured the applicant to organise S.'s murder, the applicant had avoided agreeing to it and had given evasive answers because he was afraid of I., who had been introduced to him as a person with a record of serious crime.

10. The trial court repeatedly summoned I. as a witness and ordered the police to bring him to court, but to no avail. On 4 July 2013 the court found that there was a valid reason not to examine I. at the trial, as he was in detention and his identity was not to be disclosed. The applicant objected to that decision, stating that he had seen the witness, including at the pre-trial confrontation, and therefore there was no reason to protect his identity and that it was possible to deliver the witness to court.

11. On 3 October 2013 the trial court convicted the applicant of organising an attempted murder and sentenced him to eleven years' imprisonment. The trial court referred to Article 15 § 2 (completed attempt to commit an offence), Article 27 § 3 (organiser of an offence) and Article 115 § 2(11) (contract murder) of the Criminal Code (see paragraphs 19 to 21 below). The trial court relied on the following evidence:

(i) a pre-trial statement by I. and the in-court testimony of Ch. presenting the events largely as set out in paragraph 6 above. I. stated in particular that on 3 April 2012 he had been invited to the police station and told that the applicant was looking for a killer to murder S. and that he was to meet the applicant, clarify his intentions and, if the applicant asked him to kill S., to accept and act as a potential killer;

(ii) video recordings of the conversations between the applicant, I. and Ch. on 3, 5 and 6 April 2012 and a transcript of them prepared by a forensic expert, according to which the relevant part of the conversation unfolded as follows in sub-paragraphs (a) to (d) below:

(a) first conversation on 3 April 2012:

"Applicant [A.]: That is his [S.'s] car... He is going to his dacha...

I.: Oleg, I understand... Will we do it or not? Here is the situation... I am telling you, I need money to go to Russia... Let's say five hundred...

A.: Uh.

I.: Five hundred.

A: Dollars?

I.: Yes.

A.: I do not have the money right now. Ch. knows this.

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I.: How much can you give, realistically? Realistically?

A.: Well, you...

I.: Because I need to leave [profanity]... Because, you understand, I have come from far away...

A.: I understand all this. Well, this should be totally clean.

I.: It will all be clean, don't worry. I will do everything so that [profanity].

A.: You, understand, the time is now... I am really in trouble, you know...

I.: Ok, really, how much money is ok for you? Really, don't beat around the bush [profanity], tell me how much it is.

A.: So, you need the money for the trip?

I.: Yes, I need it for the trip.

Ch.: We need you to show where he spends his time....

I.: Well, not to show, just say where.

A.: But do you know him by sight?

I.: [profanity] Of course I know him. Who doesn't know that ape? Really, how much money can you give?

A.: Do you need to go to Moscow?

I.: Yes.

A.: To move up in the world?

I.: Well, they're waiting for me there. What difference does it make?

A.: I don't need this.

I.: I just need to get there, that is all. They will meet me there. This is not your problem. I don't ask you about details... He crossed you, crossed other people, that's all. That's why I'm telling you: let me quickly do him in, let us whack him and that's all. I just need money for the ticket and the food.

A.: Do you need it quickly?

I.: Yes, I will do him in today or tomorrow because I cannot stay here for long...

A.: Well, well. [to Ch.:] How much will you bring?

Ch.: Well, today five hundred.

A.: That is not enough for him. Give him another five hundred so that he can leave and settle in for the first few days and I will pay you back later. I will get money soon.

Ch.: How much do you need?

A.: That is for [I.]. How much do you need? One thousand is not enough?

I.: Of course it is not enough.

A.: Fifteen hundred?

I.: Just the ticket costs twelve hundred and there is also food for twenty-four hours.

Ch.: It's up to you to find it, I think.

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A.: Well, I borrowed for my wife's surgery...

I.: Those are your problems.

A.: You understand there is a lot going on and now you two come along. All this crap.

I.: Well, we spoke about this long ago...

A. to Ch.: I will pay you back; you know I pay my debts.

Ch. to I.: So, let us fix how much you need and I will bring [the applicant] as much dough as I can.

A.: Give it to him.

Ch.: No, I will give it to you and you will pay him...

A.: I told you, give it to him.

I.: Look, let us do it this way, I will explain to you...

A.: No need for all this.

I.: Look, let us do it the smart way. Let us go today... you will just show where he... I will be without my phone, you will leave your phone at home, do you understand? Because, you know, all kinds of stuff can happen. You know, the antennas will show where you went, where you passed by... And this way it's just like you were sitting at home...

A.: I will find an alibi...

I.: Let's cut this short. Let's agree like this: two thousand hryvnias. He gives me five hundred now...

A.: Get him one thousand five hundred... I will pay you back two thousand and the debt.

I.: Look, I'll stay with him, he will give me five hundred now, this is for our food, and then one thousand five hundred for the ticket... Well, I need to eat, right? Are you okay with this?

A.: What are you...

I.: And well let's... I am just talking to people. Well, you understand. I will just get down to business... Shall I bring you his ear, his head? A photo will be enough.

A.: There is no need, there is no need for anything. Serezha, don't...

I.: I'm just a person who...

A.: There is no need.

I.: Listen, let's... Listen, listen, let's, listen...

A.: He would call me the same day and say... you understand.

I.: Yes, we would meet, you will understand and that is all. We will sort it out.

A.: Calm down. There is no need for any of this. I will know about it for sure, I'd be the first [to know]. I did nothing, but they say that I tried to stab him... He lodged a complaint against me with the prosecutor...

I.: Well, Oleg, let's cut this short.

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A.: He complained that I set his door on fire.

I.: Look, let us now go and eat and then we can come back for you and you can show us where he lives and his route, do you understand?

A.: And if I just tell you briefly?

Ch.: It would be better if we go there so you can show him.

I.: And about the price. He has given me five hundred, and one thousand five hundred remains.

A.: I, well...

I.: Wait Oleg, I am just explaining it to you. If I do it today, let's say, I would come tomorrow and say 'Oleg, the work is done'.

A.: Don't do anything, don't say anything. We... That's all.

I.: So that you pay it right away, and don't say 'I don't have it, come back tomorrow'. Because I need it, you understand, to leave this place, that's all.

A. (to Ch.): Give him five hundred today and one thousand five hundred that day.

Ch.: You will give it to him yourself. I will leave the money with you because I might leave town by tomorrow. I have some business in Donetsk.

...

I.: That's all. We have agreed on the price.

A.: That's all.

I.: I do not say goodbye, we will see each other later today... You watch out.

A.: You give a sign, so that I can get out of town. I will go somewhere so that I have a 100% alibi.

I.: I understand. So long. Prepare the money."

(b) second meeting on 3 April 2012:

"I.: Oleg, sit in front so that you can show the way... Have you switched off your phone?

A.: I completely removed the battery.

I.: Good man. Show us where this S. lives.

...

I.: Oleg, look, one question for you: we will kill him tomorrow or the day after. What should we do with the body?

A.: Well, about this...

I.: We all know each other here.

A.: [unintelligible]

I.: Look, let us bury him or burn the body. That way he would disappear and nobody would know where. Do you agree?

A.: Serezha...

I.: Well, do you agree?

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A.: [unintelligible]

I.: Well the most important thing for you is that the job is done, correct? I am correct?

A.: [unintelligible]

I.: That's all, no more questions. Don't you worry. We all know each other here. If we undertake to do something, we do it... If he just disappears, there will be less trouble. But if his body is found...

A.: [unintelligible]

I.: We'll see. Do you know where you'll go when you leave town?

A.: Well, tomorrow I can spend time near my home. There are youngsters living there... A retired policeman lives across the street. I will be around my home, people will see me...

[There followed a discussion about where S. lived, where he drove with his car and the applicant's alibi.]

(c) conversation on 5 April 2012:

"A.: Hello Serezha.

I.: So, how is life going?

A.: All is normal.

I.: All normal? Let's cut it short, look, Oleg...

A.: I am not showing up anywhere.

I.: I understand.

A.: The only thing is that I will be at the car market on Saturday [7 April 2012].

I. - Well, most likely we will kill him, this Elgar [S.], today, do you understand? In short, do this – call a taxi. You have a wife or someone else in the hospital, right?

A.: Well, yes.

I.: - Well, go to the hospital and stay there until evening, you understand, well, so that you have an alibi, so...

Ch.: Yes. not here.

I.: Well, in short, yes, so that you are somewhere in sight, you know [profanity], you know, well, so that people [can see you]

A.: You got him good?

I.: Well, we will, we are going to get him today.

Ch.: Right now everything will be alright. Already..

A.: At home there?

I.: Yes.

[There followed a discussion of how exactly Ch. was supposed to give money to the applicant.]

Ch.: In short, I will call you as soon as I leave it [the money in the agreed place].

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A.: Everything is alright, do not worry about that. I am already...

I.: I will tell him you said hello.

A.: There is no need for anything.

I.: But he will not exist anymore, what are you worrying about? A am telling you, he won't be there anymore.

A.: Don't.

I.: So that the [profanity] knows who he got it from.

A.: Nothing about that, nothing.

Ch.: No need to tell him anything.

A.: Nothing, keep quiet Serezha, you know what they say: silence is golden.

I.: Well, ok. It is time, take care.

A.: Silence is golden.

I.: Now you better call a taxi.

Ch.: You change your clothes and you go.

I.: You have taxis here, right?

A.: Yes, it's all good. Here, I have called a taxi, it has been registered there.

Ch.: Well, he has his own car, he will take it and go.

I.: [profanity] Better call the taxi [profanity] so that there is [a trace of] a telephone call so that, in case, you know, I'm just saying it in case.

A.: Well, I...

I.: Because you yourself are worried.

A.: Look, I am not at all worried.

I.: I hope you did not take your phone with you.

A.: I turned it off.

I.: There you go. Well, I am without a phone, it doesn't matter. Well, look, tomorrow...

A.: He has more enemies than a dog has lice.

I.: Well, that's all. Then tomorrow at ten or nine, I think.

A.: Do not call, nothing. I will learn about everything myself. I...

I.: That's all.

A.: There will be rumours right away [Then the applicant discussed his family].

I.: Well, that is all, don't worry.

A.: Well, I...

I.: So tomorrow...

A.: It's alright, Serezha.

I.: That's all. Do as I tell you. Now the taxi...

A.: Everything will be...

I.: And you went somewhere in town.

A.: Don't worry, don't you worry about me.

I.: I'm not worrying about you. I...

A.: That's all.

I.: See, you said it yourself: tell me when to arrange for an alibi.

A.: Ok, that's all.

I.: Because, how to say it... I have some debt to [Ch.].

A.: I have an alibi. You see, I am walking around at home.

I.: Pasha [Ch.] asked me.

A.: [I am walking] in the street... I can be seen at the shop, at the kiosk, and the neighbours see me – like that old woman. I'm here and I'm there, you know.

I.: Well, that's all, until tomorrow then Oleg. So long.

A.: Everything is ok. Do not call me. Later one day...

I.: I'm not calling, everything is through Pasha. Until tomorrow. Pasha, let's go.

A.: I will learn everything myself. There, to put it short, if that happens there, when he is... no need to say anything.

Ch.: Ok, Oleg, so long, goodbye.”

(d) during the conversation on 6 April 2012 I. attempted to show the applicant the staged photograph of S.'s body on his mobile phone, but the applicant told him that he could not see the screen clearly;

(iii) police reports documenting the handover of cash that I. had received from the applicant to the police and the preparation of the staged “dead body” photograph;

(iv) the testimony of police witnesses who described how they had staged S.'s kidnapping and death. There is no indication in the case file that any authority outside of the organised crime unit in which the officers worked had authorised or been informed of the operation targeting the applicant; and

(v) various other less central pieces of evidence, notably:

- testimony of S. to the effect that Ch. had told him that the applicant wished to have him killed and that S. himself had subsequently participated in the staging of his own killing;

- testimony of K. (S.'s relative) to the effect that at the time S. had told him the same things.

12. The applicant appealed. He argued that he had been a victim of police entrapment: the police, knowing about his animosity towards S., had employed an *agent provocateur* to incite the applicant to order S.'s killing. He submitted that the evidence showed that he had never actually sought to have S. killed, but rather he had passively accepted the undercover agent's

initiative and pressure to kill S. He had not sought I.'s services and had not even known him, but rather had been introduced to him by Ch. at the police's initiative. The recordings of the conversations revealed I. persistently badgering the applicant about killing S., whereas the applicant had never initiated or even voiced such an order.

13. On 24 December 2013 the Donetsk Regional Court of Appeal upheld the applicant's conviction, finding that the evidence cited in the trial court's judgment sufficiently established his guilt. However, the court of appeal found, contrary to the trial court, that the applicant could not be considered to be an "organiser" of the crime, but rather an "instigator" under the relevant provisions of the Criminal Code. It therefore reduced his sentence to ten years. The relevant part of the court's ruling reads as follows:

"Pursuant to Article 27 § 3 of the Criminal Code of Ukraine, an organiser is a person who has organised a criminal offence or supervised its preparation or commission.

It follows that a person who has organised an offence is an accomplice who initiates the commission of the offence, unites other accomplices, directs their actions, distributes roles between them, defines and develops the criminal plan, coordinates the actions of the participants, divides roles and functions between them and designates the future victim.

The panel considers that, on the basis of the charges as found proven and as set out in the trial court's judgment, there is no indication of the aforementioned characteristics of an organiser, the status attributed to [the applicant].

Pursuant to Article 27 § 4 of the Criminal Code of Ukraine, an instigator is a person who has induced any other accomplice, by way of persuasion, bribery, threat, coercion or other means, to commit a criminal offence.

It follows from the way the charges are formulated that [the applicant] did not direct the actions of his co-accomplices, divide roles between them, develop the criminal plan or coordinate the actions of the participants, but rather, by way of persuasion and bribery, induced I. to commit the offence. Accordingly, the trial court found it established that [the applicant] was an instigator of the offence with which he was charged but [that court] incorrectly classified the actions of the defendant under Article 27 § 3, Article 15 § 2 and Article 115 § 2(11) of the Criminal Code of Ukraine.

In view of the above, the panel considers that ... the part of the judgment in respect of [the applicant] concerning the classification of his actions and the sentence imposed should be amended.

Therefore, [the applicant's] actions should be reclassified from Article 27 § 3, Article 15 § 2 and Article 115 § 2(11) to Article 27 § 4, Article 15 § 2 and Article 115 § 2(11) of the Criminal Code of Ukraine.

In view of the reduction of the gravity of the charges, the panel considers it possible to reduce the punishment ... to ten years' imprisonment."

14. The applicant appealed on points of law. He reiterated his arguments concerning entrapment. He added that, despite his numerous requests, the lower courts had failed to examine I. even though in his pre-trial statement,

used as evidence against the applicant, he had contradicted the content of the recordings.

15. On 27 November 2014 the Higher Specialised Civil and Criminal Court upheld his conviction and sentence. The court stated that the applicant's arguments concerning entrapment were unfounded since the evidence sufficiently showed his guilt. In particular, the court referred to the evidence of Ch., I., K. and police officers (see paragraph 11 (i) and (iv) above) to the effect that the applicant had first contacted Ch. seeking a contract killer and that the police had then mounted an operation to catch him in the act. This evidence was corroborated by the police reports documenting the relevant actions and by the report of the forensic expert analysis containing the detailed account of conversations between the applicant, Ch. and I. (see paragraph 11 (ii) above). The court rejected the applicant's argument that he, fearing I., had merely failed to actively object to I.'s persistent badgering. The court considered that the evidence showed that the applicant had initiated the crime, discussed the price of the murder, indicated S.'s address and asked to be informed of the time that S. would be killed in order to ensure his alibi. As to the applicant's argument that he had not been able to cross-examine I., the court noted that, at the close of the trial, the defence had not asked for that witness to be examined.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODES OF CRIMINAL PROCEDURE OF 1960 AND 2012

16. The 1960 Code of Criminal Procedure (which was in effect when the criminal proceedings against the applicant were initiated and the pre-trial investigation was conducted) did not contain any specific rules concerning the supervision of undercover operations, such as controlled purchases or the simulation of an offence. On 19 November 2012 the new Code of Criminal Procedure came into effect but the applicant's case was examined under the rules of the 1960 Code because his case had been sent to court prior to that date.

17. Article 271 § 3 of the 2012 Code prohibits incitement to commit an offence which would not otherwise be committed in the course of undercover police operations. Article 271 § 7 provides that undercover investigation activities such as a controlled purchase or simulation of an offence must be authorised by a prosecutor, who must state the reasons for the decision, in particular the circumstances indicating that there was no incitement.

II. CRIMINAL CODE OF 2001

18. The Criminal Code consists of the General Part and the Special Part. The General Part (Articles 1 to 108) contains general rules and principles of criminal liability. The Special Part (subsequent Articles) contains descriptions of specific offences and prescribes punishments for them.

19. Article 13 § 1 of the Criminal Code provides that a “completed offence” (*закінчений злочин*) is an offence which contains all the elements of the offence envisaged by the relevant provision of the Special Part of the Code. Article 13 § 2 provides that “an incomplete offence” (*незакінчений злочин*) can be in the form of either “preparation for an offence” (*готування до злочину*) or an “attempt to commit an offence” (*замах на злочин*). Articles 14 to 16 of the Code read as follows:

Article 14. Preparation for an offence

“1. Preparation for an offence shall mean searching for or adapting means and tools, looking for accomplices to, or conspiring to commit, an offence, removing obstacles to an offence, or otherwise wilfully creating the conditions for an offence.

...”

Article 15. Attempt to commit an offence

“1. An attempt to commit an offence shall mean a directly intentional act (action or omission) carried out by a person and aimed directly at the commission of a criminal offence provided for by the relevant Article of the Special Part of this Code, where the criminal offence in question has not been completed for reasons beyond that person’s control.

2. An attempt to commit an offence shall be deemed completed where a person has performed all the actions which he or she deemed necessary for carrying out the offence, but the offence was not completed for reasons beyond that person’s control.

3. An attempt to commit an offence shall be deemed incomplete where a person has not performed all the actions which he or she deemed necessary for carrying out the offence, for reasons beyond that person’s control.”

Article 16. Criminal liability for an incomplete criminal offence

“Criminal liability for preparation for an offence and an attempted offence shall be based on Articles 14 or 15 and the Article of the Special Part of this Code which prescribes liability for the completed offence.”

20. Article 26 of the Criminal Code defines criminal complicity as the wilful co-participation of several offenders in an intended criminal offence.

Article 27 § 1 of the Code defines four types of accomplices (principal offender, organiser, instigator and accessory). Paragraphs 2-5 define their roles as follows:

“2. A principal offender (or co-principal offender) is a person who, in association with other criminal offenders, has committed a criminal offence under this Code, directly or through other persons who cannot be held criminally liable.

3. An organiser is a person who has organised a criminal offence or offences or supervised its (their) preparation or commission. An organiser is also a person who has created, supervised or financed an organised group or criminal organisation, or who has organised the covering up of the criminal activity of an organised group or criminal organisation.

4. An instigator is a person who has induced any other accomplice to a criminal offence by way of persuasion, bribery, threat, coercion or other means.

5. An accessory is a person who has facilitated the commission of a criminal offence by other accomplices by way of advice or instructions, or by supplying the means or tools, or by removing obstacles. An accessory is also a person who has promised in advance to conceal a criminal offender, tools or means, traces of crime or criminally obtained items, or who has promised to buy or sell such items or to otherwise facilitate the covering up of a criminal offence.”

21. Article 115 § 2 of the Code provides for a maximum sentence of life imprisonment for murders aggravated by certain circumstances, in particular, contract murder (point (11) of that paragraph).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained that he had been a victim of police entrapment and that he had not been able to examine I., a witness against him, during the trial. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which reads, in so far as relevant, as follows:

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

...

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;

...”

A. Admissibility

23. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

24. The applicant reiterated the submissions he had made before the domestic courts (see paragraphs 9 and 12 above). In addition, he pointed out that there was no record of the initial statement from Ch. to the police which had supposedly served as the trigger for the police undercover operation. The entire operation had been conducted by police officers of the organised crime unit without any supervision. There had been no good reason not to examine I., and the defence had pointed this out during the trial. The applicant further submitted that he had not complained of a lack of opportunity to examine I. at the trial because he had not considered that he would succeed in bringing that witness to tell the truth.

25. The Government submitted that there had been no entrapment. Ch., a private individual, had, on his own initiative, informed the police about the applicant's offer to organise the murder. In the recorded conversations between the applicant and I., the applicant had spoken about arranging his alibi and discussed the amounts to be paid to I., indicating that he understood that he was engaging in a conspiracy to commit murder for hire. The police had merely joined the criminal activity as opposed to initiating it. The applicant had only raised the plea of entrapment on appeal, having not raised it during the investigation and trial.

26. Concerning the examination of I., the Government submitted that there had been a good reason for his absence from the trial, as he had been in prison during that time. His evidence had not been decisive for the outcome of the case. The applicant had had an opportunity to put questions to I. during the pre-trial investigation but had not taken up that opportunity. The defence had not asked for that witness to be summoned during the trial.

2. *The Court's assessment*

(a) **Relevant general principles**

(i) *Definition of entrapment and prohibition on the use of evidence obtained as a result of entrapment*

27. The Court is aware of the difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences. To perform this task, they are increasingly required to make use of undercover agents, informers and covert practices, particularly in tackling organised crime and corruption. Accordingly, the use of special investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 49-51, ECHR 2008).

28. In this connection, it should be reiterated that it is the Court's task, in accordance with Article 19, to ensure the observance of the engagements undertaken by the States Parties to the Convention. 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. In this context, the Court's task is not to determine whether certain items of evidence were obtained unlawfully, but rather to examine whether such "unlawfulness" resulted in the infringement of another right protected by the Convention (*ibid.*, § 52, with further references).

29. More particularly, the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (*ibid.*, § 53; see also *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII). While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11, and *Ramanauskas*, cited above, § 53).

30. Furthermore, while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest 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, among other authorities, *Ramanauskas*, cited above, § 54; see also *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 35-36, *Reports of Judgments and Decisions* 1998-IV; *Khudobin*, cited above, § 128; and *Vanyan v. Russia*, no. 53203/99, §§ 46-47, 15 December 2005).

31. Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Ramanauskas*, cited above, § 55, and *Teixeira de Castro*, cited above, § 38).

32. In its extensive case-law on the subject the Court has developed criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations. The Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement. The relevant criteria determining the Court's examination in this context are set out in the case of *Bannikova v. Russia* (no. 18757/06, §§ 37-65, 4 November 2010). These criteria are summarised below (see *Matanović v. Croatia*, no. 2742/12, §§ 122-35, 4 April 2017).

(ii) *Substantive test of entrapment*

33. When examining the applicant's arguable plea of entrapment, the Court will attempt, as a first step, to establish on the basis of the available material whether the offence would have been committed without the authorities' intervention, that is to say whether the investigation was "essentially passive". In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation, in particular, whether there were objective suspicions that the applicant had been involved in criminal activity or had been predisposed to commit a criminal offence (see *Furcht v. Germany*, no. 54648/09, § 51, 23 October 2014) and the conduct of the authorities carrying it out (*ibid.*, § 52).

34. In this connection, the Court has also emphasised the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It has considered judicial supervision to be the most appropriate means in cases involving covert operations, although with adequate procedures and safeguards, other means may be used, such as supervision by a prosecutor (*ibid.*, § 53; see also *Bannikova*, cited above, §§ 48-50, with further references).

35. Indeed, a lack of procedural safeguards in the ordering of an undercover operation generates a risk of arbitrariness and police entrapment (see *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, § 64, 30 October 2014).

(iii) *Procedural test of entrapment*

36. As a second step, the Court will examine the way the domestic courts dealt with the applicant's plea of incitement, which is the procedural part of its examination of the *agent provocateur* complaint (see *Bannikova*, cited above, §§ 51-65, with further references).

37. As the starting point, the Court must be satisfied with the domestic courts' capacity to deal with such a complaint in a manner compatible with the right to a fair hearing. It should 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. 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.

38. In particular, the questions to be addressed by the judicial authority when deciding on an entrapment plea were set out in *Ramanauskas* (cited above, § 71):

“The Court observes that throughout the proceedings the applicant maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination ... of whether or not [the prosecuting authorities] had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police’s involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. ... The applicant should have had the opportunity to state his case on each of these points.”

39. In this connection, the Court has also found that a guilty plea as regards criminal charges does not dispense the trial court from the duty to examine allegations of incitement (*ibid.*, § 72).

40. Moreover, the principles of adversarial proceedings and equality of arms are indispensable in the determination of an *agent provocateur* claim, as well as the procedural guarantees relating to the disclosure of evidence and questioning of the undercover agents and other witnesses who could testify on the issue of incitement (see *Bannikova*, cited above, §§ 58-65).

(iv) *Methodology of the Court’s assessment*

41. It follows from the Court’s case-law that a preliminary consideration in its assessment of a complaint of incitement relates to the existence of an arguable complaint that an applicant was subjected to incitement by the State authorities. In this connection, in order to proceed with further assessment, the Court must satisfy itself that the situation under examination falls *prima facie* within the category of “entrapment cases” (see, for cases where this criterion was not met, *Trifontsov v. Russia* (dec.), no. 12025/02, §§ 32-35, 9 October 2012; and *Lyubchenko v. Ukraine* (dec.), no. 34640/05, §§ 33-34, 31 May 2016).

42. If the Court is satisfied that the applicant’s complaint falls to be examined within the category of “entrapment cases”, it will proceed, as a first step, with the assessment under the substantive test of incitement (see *Matanović*, cited above, § 132).

43. Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant’s activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the

subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention (see, for instance, *Scholer v. Germany*, no. 14212/10, § 90, 18 December 2014, and *Rymanov v. Russia* (dec.), no. 18471/03, 13 December 2016).

44. However, if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events (see *Bannikova*, cited above, §§ 52 and 67) or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement contrary to Article 6 § 1, it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement (see *Matanović*, cited above, § 134).

45. The Court applies this test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts and whether in the case of a finding that there has been incitement or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention (see *Ramanauskas*, cited above, § 70; *Furcht*, cited above, § 53; and *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, § 88, 16 July 2015; see also *Bannikova*, cited above, §§ 53-57, concerning the relevant inferences to be drawn from a successful plea of incitement). The proceedings against an applicant would be deprived of the fairness required by Article 6 of the Convention if the actions of the State authorities had the effect of inciting the applicant to commit the offence of which he or she was convicted and the domestic courts did not address appropriately the allegations of incitement (see *Ramanauskas*, cited above, § 73; *Constantin and Stoian v. Romania*, nos. 23782/06 and 46629/06, § 64, 29 September 2009; and *Sepil v. Turkey*, no. 17711/07, § 36, 12 November 2013).

(b) Application of the above principles to the present case

46. The Court observes that the applicant consistently raised a claim of entrapment, implicitly or explicitly, throughout the proceedings. While the applicant did not admit to having committed the offence he was charged with, the nature of the defence he mounted (see paragraph 9 above) did not exclude the applicant's case from the category of "entrapment cases" (contrast *Berlizev v. Ukraine*, no. 43571/12, § 46, 8 July 2021). In view of the content of conversations between the applicant, I. and Ch. on 3 April 2012 (see paragraph 11 (ii) (a) and (b) above), his complaint is arguable and falls to be examined within the category of "entrapment cases".

47. Turning first to the substantive test of entrapment, the Court notes that the domestic courts found that it had been the applicant who had first solicited Ch.'s help in killing S. This finding was based, first and foremost, on the evidence of Ch., whom the applicant had an opportunity to

cross-examine and whose evidence he had an opportunity to challenge throughout the proceedings. The evidence before the courts also contained multiple indications that the applicant had repeatedly discussed murder plans with Ch. and I., had indicated to them the potential victim's address and had taken active steps to avoid detection and secure his alibi in that connection.

48. At the same time, the undercover police operation targeting the applicant had been launched on the strength of Ch.'s statements in the absence of authorisation or supervision from any authority external to the police unit which implemented it. This was apparently in line with the legal framework in place at the relevant time (prior to the enactment of the 2012 Code of Criminal Procedure – see paragraph 16 above), even though the Court, in its case-law, has consistently stressed the importance of a judicial or other independent supervision mechanism in this sphere. Moreover, neither Ch.'s statement to the police, which reportedly led to the launch of the operation, nor any formal reasoned decision to launch the operation have been provided to the Court. There is also no indication that the domestic courts had those documents before them.

49. The recordings of the conversations between the police agents I. and Ch. and the applicant indicate that the applicant gave seemingly non-committal and vague answers to the prompting about the organisation of the killing and even made remarks which could be interpreted as him expressing hesitation about either the entire criminal scheme or some of its aspects ("I don't need this", "No need for all this", "There is no need", "Calm down", "There is no need for any of this", "Don't do anything, don't say anything" – see paragraph 11 (iii) (a) above).

50. It is also true, however, that the applicant's words could be interpreted as hesitation concerning certain modalities of the planned crime and its coverup rather than about his wish to have the murder committed.

51. The recordings also contained exchanges which could indicate that I. and Ch. did not remain totally passive and that they could be seen as taking charge of the situation in the face of the applicant's passive attitude. In particular, I. framed the payment as financial help for a trip rather than the price of the killing and stressed his own dislike of S., the urgency of the situation and his need for money. Ch. advanced the funds to be paid to I.

52. However, another relevant element is, in the Court's view, the fact that the applicant was convicted only as the "instigator", not the "organiser" of the crime (see paragraphs 13 and 20 above). Consequently, the fact that I. and Ch. appeared to have displayed a more active attitude than the applicant himself as the matters advanced may be seen as less significant.

53. In the light of the above inconclusive elements, the Court cannot establish definitively, on the basis of the substantive test alone, whether the applicant was subjected to incitement contrary to Article 6 of the Convention and will proceed, therefore, with the procedural test of

incitement (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X).

54. For the applicant's plea of entrapment to be addressed effectively, the domestic courts would have had to establish in adversarial proceedings the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected (see *Ramanauskas*, cited above, § 71). The Court reiterates in this respect that the police operation had been launched without any authorisation or supervision from any authority external to the police unit that implemented it (see paragraph 48 above).

55. The domestic courts did, to an extent, address those elements. They concluded, notably on the basis of Ch.'s statements, that it had been the applicant who had initiated the search for a contract killer. They also pointed to the applicant's subsequent conduct, in particular the fact that he had indicated the potential victim's address and his efforts to secure an alibi, as evidence that he had indeed intended to have S. killed (see paragraph 15 above).

56. However, as to the domestic courts' reliance on the argument that the applicant had first contacted Ch. to organise the murder, the Court cannot find, given the above-mentioned flaws in the procedure which led to the undercover operation and the lack of relevant records (see paragraph 48 above), that the procedure by which the courts arrived at that conclusion was surrounded by sufficient safeguards.

57. Moreover, as the Court has indicated above, the question of the extent of the police's involvement and the nature of any incitement to which the applicant might have been subjected raised complex questions which merited close examination by the domestic courts. In this context, the effective exercise of the courts' obligation to scrutinise the applicant's entrapment plea required them to show diligence in seeking to question those who had a key role in the undercover operation, notably I., regardless of the applicant's rather passive attitude towards the examination of that witness (see paragraphs 7 and 24 above).

58. However, despite the central role that I. had played in the events, no good reasons were given for his absence from the trial: the fact that he was detained, far from meaning that he was unavailable, meant instead that he was under the authorities' control and could therefore in principle have been brought to court.

59. While convicting the applicant as an "instigator" (that is one who induces another to commit a crime), the domestic courts provided little comment on how precisely that role squared with his apparent hesitations and I.'s and Ch.'s apparently proactive conduct: the courts did not clearly comment on whether they considered those hesitations as relating to certain modalities of the planned crime and its coverup or to the applicant's wish to have the murder committed as such (see paragraph 50 above).

60. Given the complexity of those matters in the present case (as described above in the context of the substantive test), they required more detailed comment from the domestic courts to satisfy an objective observer that they subjected the applicant's incitement plea to adequate scrutiny.

61. Although the above-mentioned procedural shortcomings, taken individually, may not have been sufficient to undermine the overall fairness of the criminal proceedings against the applicant, taken in combination they had such an effect.

62. The Court concludes that the domestic courts did not appropriately address the applicant's allegations of police incitement.

63. There has, accordingly, been a violation of Article 6 § 1 of the Convention on account of the domestic courts' failure to address adequately the applicant's plea of police incitement.

64. In view of the above considerations, there is no need to examine separately the applicant's complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the admission of evidence from I., whom the applicant had not been able to examine during the trial.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

67. The Government considered that claim unjustified and excessive.

68. The Court awards the applicant EUR 3,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

69. The applicant also claimed EUR 6,000 in respect of costs and expenses incurred before the domestic courts and EUR 9,800 in respect of those incurred before the Court. He submitted a copy of the agreement with his representative, under which he undertook to pay the representative's legal fees at EUR 100 per hour, and a detailed statement of time spent by the representative on the case, amounting in total to 158 hours.

70. The Government considered that claim unjustified and excessive.

71. 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 were 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 5,000 covering all costs under this head, plus any tax that may be chargeable to the applicant.

C. Default interest

72. 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

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 6 §1 of the Convention on account of the domestic courts' failure to address adequately the applicant's plea of police incitement;
3. *Holds*, by six votes to one, that there is no need to examine separately the applicant's complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the admission of evidence from I., whom the applicant had not been able to examine during the trial;
4. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand 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;
5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

YAKHYMOVYCH v. UKRAINE JUDGMENT

Done in English, and notified in writing on 16 December 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Victor Soloveytchik
Registrar

Síofra O’Leary
President

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

S.O.L.
V.S.

DISSENTING OPINION OF JUDGE YUDKIVSKA

The first known entrapment defence in history failed – the Lord God did not forgive Eve for eating the forbidden fruit from the tree of the knowledge of good and evil, and for giving Adam its forbidden fruit to eat, despite Eve claiming that she had been provoked by the serpent: “The serpent beguiled me, and I did eat”¹.

Millennia later, legal doctrine considered the manipulability of human nature and the authorities’ enormous resources to influence an individual and convince him or her to become a criminal, and came to the conclusion that investigative authorities should not test the ability of a person to resist the temptation to commit a crime if the opportunity was offered to him or her. A person’s free will can be undermined and manipulated, and thus he or she cannot be held responsible for acts committed when his or her will has been manipulated. This is called “entrapment”.

Investigative tactics, including provocative ones, might be used to clear a crime but not to create one. Legal doctrine and extensive jurisprudence, including the case-law of this Court, have made a clear distinction between “permissible conduct in the use of legitimate undercover techniques in criminal investigations” (since “the use of investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial”²) and entrapment, the latter constituting a breach of Article 6 § 1 of the Convention³.

I dissent in the present case since I fail to see it as falling within the category of “entrapment cases”.

In this case the applicant wanted to kill S., with whom he had had a long-lasting conflict. Initially, in 2007, he contacted Ch. to seek his assistance in beating S. However, several years later, after having lost all his court cases against S., his anger apparently turned into obsession and he explicitly requested Ch. – as was established in the domestic proceedings – to find contract killers to murder S. Thus, it is clear from the facts of the case that it was the applicant who had first solicited Ch.’s help in murdering S. The criminal design thus originated in the applicant’s mind, and not in the mind of the law-enforcement authorities. The police only intervened because they had a reasonable suspicion based on the applicant’s wish for S to be killed, and they merely “opened a door for him” – giving him the opportunity to go through with something he had originally intended to do – but did not push him out (compare *Rymanov v. Russia*⁴, where the Court held that “the

¹ Genesis 3:13.

² *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 51, ECHR 2008.

³ See the case-law referred to in the draft and “Guide on Article 6 - Right to a fair trial (criminal limb)”, pp 45-48,

https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

⁴ (Dec.), no. 18471/03, 13 December 2016.

applicant took a proactive stance in the criminal undertaking, without any intervention from the police, and thus revealed a pre-existing intent to commit crime”). In other words, they opened a door for him, and nobody entrapped him into *hiring* a killer.

Likewise, it cannot be said that the applicant was tempted or induced to commit a crime (inciting a murder) which he had not otherwise intended to commit. He was convicted for “instigating” the contract murder: the domestic courts found that the applicant had hired I., who turned out to be an undercover agent introduced to him by Ch., discussed the details, including his alibi, and paid I., in part before the “murder” and in full after the staged photograph of S.’s “dead body” was presented to him. The domestic authorities thus considered that the applicant, “by way of persuasion and bribery, induced I. to commit the offence” (see paragraph 13 of the judgment).

Although in the recorded conversations, I. and Ch. “appeared to have displayed a more active attitude” (see paragraph 52), entrapment does not exist if the law-enforcement officials merely afforded someone an opportunity to commit a crime. Offering *services* to carry out a murder, as well as discussing further practical details, cannot be said to be entrapment. An individual who did not intend to incite a murder would never be interested in these services.

The majority, however, did agree that I.’s and Ch.’s apparently “more active attitude” could not be a major factor given that the applicant was convicted only as the “instigator”. The sole point that made them unable to “establish definitively, on the basis of the substantive test alone, whether the applicant was subjected to incitement”, was the applicant’s “seemingly non-committal and vague answers” and “remarks which could be interpreted as him expressing hesitations about either the entire criminal scheme or some of its aspects” (see paragraph 49 of the judgment). In particular, reference is made to the conversation quoted in paragraph 11 (ii) (a) of the judgment.

The relevant part of the conversation is the following (*emphasis added, and the applicant’s words that made the majority believe in his “non-committal” attitude are underlined*):

I.: And well let’s... I am just talking to people. Well, you understand. I will just get down to business... ***Shall I bring you his ear, his head? A photo will be enough.***

A.: There is no need, there is no need for anything. Serezha, don’t...

I.: I’m just a person who...

A.: There is no need.

I.: Listen, let’s... Listen, listen, let’s, listen...

A.: He would call me the same day and say... you understand.

I.: Yes, we would meet, you will understand and that is all. We will sort it out.

A.: Calm down. There is no need for any of this. I will know about it for sure, I'd be the first [to know]. I did nothing, but they say that I tried to stab him... He lodged a complaint against me with the prosecutor...”

It is clear here that the applicant’s “there is no need” remarks are a reply to I.’s “kind” proposal to bring him S.’s ear or head as proof that the murder has been completed. The applicant merely said that he did not need that kind of proof. The further conversation and the applicant’s plea to “calm down” in relation to providing any proof of the murder explain why he did not need any sort of proof that the murder had been carried out – if S. was dead, the applicant would be the first to find out.

In a further fragment, the applicant’s remark “don’t do anything, don’t say anything” is a reply to I.’s unwearying efforts to provide him with an account of the completed murder:

“I.: Wait Oleg, I am just explaining it to you. *If I do it today, let’s say, I would come tomorrow and say ‘Oleg, the work is done’.*”

A.: Don’t do anything, don’t say anything. We... That’s all.”

As explained above, the applicant did not need any proof of the murder coming from I., and his remarks did not indicate his “non-committal” attitude to the incitement. The majority indeed viewed the above remarks differently, as can be seen from paragraph 50 of the judgment. The remainder of the conversation concerned the organisation of the applicant’s alibi and the practical arrangements for I.’s remuneration, which further reinforces the applicant’s active involvement in the crime.

Police provocation presupposes a causal relation between the agents’ acts and the criminal actions of the defendant. A person who initiated a crime himself cannot be said to have been provoked to commit it. In a similar vein, in the case of *Trifontsov v. Russia*⁵, the applicant’s complaint that he had been incited to take a bribe was rejected by the Court, as it was established that the person who could be considered a “police agent” had become such an “agent” only after the applicant had solicited a bribe; and in the case of *Sequeira v. Portugal*⁶ the Court found that the police informers “began to collaborate with the criminal-investigation department at a point when the applicant had already contacted A. with a view to organising the shipment of cocaine to Portugal”. The applicants’ complaints in this regard were declared inadmissible.

This present complaint should equally be declared inadmissible if the Court is to remain consistent with its approach in cases concerning entrapment. As it has stated in many cases (see, for instance, *Bannikova v. Russia*⁷), “closely linked to the criterion of objective suspicions is the question of the point at which the authorities launched the undercover

⁵ (Dec.), no. 12025/02, § 32, 9 October 2012.

⁶ (Dec.), no. 73557/01, ECHR 2003-VI.

⁷ No. 18757/06, § 43, 4 November 2010.

operation, i.e. whether the undercover agents merely ‘joined’ the criminal acts or instigated them”. In the present case – as was proved in the domestic judicial proceedings – Ch. reported to the police the applicant’s request to find a killer, and that triggered the police operation. The police thus clearly “joined” the ongoing crime and “their actions thus remained within the bounds of undercover work rather than that of *agents provocateurs*”⁸.

For the above reasons, in my judgment, the domestic courts rightly did not consider the applicant’s entrapment defence plausible: the authorities investigated the reported crime in an essentially passive manner and did not persuade the applicant to commit a crime (that is, instigating a murder) that otherwise would not have been committed. The applicant’s allegations in this respect were “wholly improbable” (however restrictive this clause is⁹), and should have made it unnecessary for the majority to proceed with the “procedural test of entrapment” – the examination of the way the domestic courts dealt with the applicant’s entrapment plea.

Referring to the malleability of human nature, one might imagine that an allegedly corrupt official can be “provoked” or “induced” to take a bribe from a particular person for a particular action, or that a drug dealer can be “induced” to sell drugs to a police agent. The same concerns a contract killer – an *agent provocateur* can easily “create” a crime by proposing to pay someone who makes his living from that activity to commit a murder. Therefore, “the most objectionable feature” of entrapment is “that the government, by using encouragement, is no longer in a neutral position *vis-à-vis* its citizens and the choice that they make. Rather than giving an individual full freedom to comply with the law, and thereby respecting the individual’s autonomy and ability to avoid crime, by offering the encouragement the government tries ... to persuade the individual to violate the law”¹⁰.

On the other hand, it is hard to imagine that someone can be “induced” or “encouraged” or “persuaded” to incite and pay for a murder that he never envisaged. Deprivation of a human life is, to use Leo Tolstoy’s words, “the last most terrible crime, the most repugnant to any not completely depraved human heart”¹¹, so I am unable to believe that the authorities’ omnipotence in manipulating people’s minds goes so far as to be able to turn an innocent person into a murderer by way of simple persuasion.

Having disagreed that in the present case the applicant was subjected to incitement contrary to Article 6 of the Convention, I must admit, however, that every cloud has a silver lining – this is the first judgment against

⁸ See, for instance, *Miliniénė v. Lithuania*, no. 74355/01, § 38, 24 June 2008.

⁹ For a criticism of the “not wholly improbable” clause, see the concurring opinion of Judge Kūris in *Ramanauskas v. Lithuania* (no. 2), no. 55146/14, 20 February 2018.

¹⁰ Jonathon C. Carlson, “The Act Requirement and the Foundations of the Entrapment Defense”, 73 *VA. L. REV.* 1011, 1063 (1987), p. 1086.

¹¹ Leo Tolstoy, *I cannot be silent* (1908).

Ukraine concerning entrapment, and the detailed explanation of the principles relating to police incitement, the tests required and the necessary criteria to address any entrapment plea effectively will serve, I hope, as an important guide for the national courts.