



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

FIRST SECTION

Application no. 48809/07
Nikolay Borisovich MAKAROV
against Russia
lodged on 8 October 2007

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Nikolay Borisovich Makarov, is a Russian national, who was born in 1965 and lives in Chelyabinsk.

The applicant has been convicted in criminal proceedings of a drug offence. The principal evidence against him derived from a test purchase conducted in accordance with Section 6 of the Operational-Search Activities Act.

At his trial the applicant claimed that the offence in question was committed as a result of entrapment by the authorities. He alleged the involvement of an *agent provocateur*.

The first-instance judgment was held by the Leninskiy District Court of Chelyabinsk on 27 December 2006. It was upheld by the Chelyabinsk Regional Court on 15 May 2007.

COMPLAINTS

The applicant complains that he had been unfairly convicted of a drug offence incited by the police and that his plea of entrapment had not been properly examined in the domestic proceedings, in violation of Article 6 of the Convention. These complaints fall to be examined under Article 6 § 1 of the Convention.

QUESTIONS

1. Did the undercover technique used to investigate the drug offence in the present case amount to an entrapment (see *Ramanauskas v. Lithuania* ([GC], no. 74420/01, § 51, ECHR 2008-...)?

2. Before the applicant was approached by the undercover agent (the police agent, collaborator, informant or other person acting on the authorities' instructions in the test purchase concerned), did the investigative authorities possess preliminary information concerning the applicant's pre-existing criminal intent? Did this information come from a verifiable source unconnected with the individuals involved in the undercover operation (see *Vanyan v. Russia*, no. 53203/99, § 49, 15 December 2005, and *Khudobin v. Russia*, no. 59696/00, § 134, ECHR 2006-XII (extracts))?

3. Did the undercover agent exert such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed? Was the applicant subjected to any pressure, either through prompting, persuasion, pleading compassion or otherwise, on the part of the undercover agent to commit the offence (see *Malininas v. Lithuania*, no. 10071/04, § 37, 1 July 2008, *Vanyan*, cited above, §§ 11 and 49 and *Ramanauskas*, cited above, § 67)?

4. Did the authorities have good reasons for mounting the covert operation (see *Ramanauskas*, cited above, §§ 63 and 64, and *Malininas*, cited above, § 36)? Was the test purchase a part of an anti-drug trafficking operation targeting the supply chain? What other investigative activities were carried out as regards the applicant prior to the test purchase?

5. Was the procedure authorising the test purchase clear and foreseeable (*Vanyan*, cited above, §§ 46 and 47, and *Khudobin*, cited above, § 135)? Did the decision authorising it refer to the information as to the reasons for and purposes of the planned test purchase?

6. Was the test purchase carried out in the present case subject to any judicial control or other independent supervision (see *Miliniene v. Lithuania*, no. 74355/01, § 39, 24 June 2008)?

7. Was the applicant afforded adequate procedural safeguards enabling him to raise a complaint about entrapment before the national courts (see *Ramanauskas*, cited above, §§ 69-70)?

8. Was the issue of entrapment examined in an adversarial, thorough and comprehensive manner? Was all relevant information, particularly regarding the purported suspicions about the applicant's previous conduct, put openly before the trial court or tested in an adversarial manner (see *V. v. Finland*,

§§ 76 et seq., and *Malininas*, § 36, both cited above; and *Bulfinsky v. Romania*, no. 28823/04, 1 June 2010)?

9. Did the courts have access to the full file relating to the operational-search activities against the applicant prior to the test purchase? What other material did the courts examine to answer the plea of entrapment?

10. Did the courts assess 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? Was the applicant given an opportunity to state his case on each of these points (see *Ramanauskas*, cited above, § 71)?

11. Were the undercover agents and other witnesses who could testify on the issue of incitement heard in court and cross-examined by the defence (see *Lüdi v. Switzerland*, 15 June 1992, § 49, Series A no. 238; *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI; *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV, *Bulfinsky*, § 45, cited above; and *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008)?

12. Having regard to the above, did the applicant have a fair hearing in the determination of the criminal charge against him, in accordance with Article 6 § 1 of the Convention?

13. The Government are requested to provide a full copy of the court records of the first-instance hearing.