



## German courts should not have used evidence obtained by police incitement in proceedings against drug-trafficking suspect

In today's **Chamber** judgment<sup>1</sup> in the case of **Furcht v. Germany** (application no. 54648/09) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights.

The case concerned the complaint by a man convicted of drug trafficking that the criminal proceedings against him had been unfair, as he had been incited by undercover police officers to commit the offences of which he was convicted.

The Court found that the undercover measure in Mr Furcht's case – going beyond a passive investigation of criminal activity – had indeed amounted to police incitement. The German courts should not have used the evidence obtained in this way to convict him.

### Principal facts

The applicant, Andreas Furcht, is a German national who was born in 1961.

In 2007, Mr Furcht, who had no criminal record, was approached by undercover police officers in the context of criminal investigations against six other people suspected of drug trafficking. One of the suspects was a friend and business partner of Mr Furcht and the officers intended to establish contacts with the suspect via him. They initially pretended to be interested in purchasing real estate and later in smuggling cigarettes.

During one of the meetings with the undercover officers, Mr Furcht offered to establish contacts with a group of people trafficking in cocaine and amphetamine (including his friend suspected of drug trafficking), while stating that he did not wish to be directly involved in the drug trafficking, but that he would draw commissions. The undercover officers expressed an interest in transporting and purchasing drugs. In a subsequent telephone conversation, on 1 February 2008, Mr Furcht explained to one of the officers that he was no longer interested in participating in a drug deal, but a few days later, on 8 February, the officer dispersed his fears and Mr Furcht eventually arranged two purchases of drugs for them in February and March 2008. In the meantime, a district court had authorised criminal investigations in his respect.

Following the second transaction, Mr Furcht was arrested and, in October 2008, he was convicted of two counts of drug trafficking and sentenced to five years' imprisonment. His appeals against the conviction were unsuccessful. In fixing the sentence, the first-instance court noted that Mr Furcht had been incited by a State authority to commit the offences and found that this was a weighty mitigating factor, leading to a relatively mild sentence.

In July 2011, Mr Furcht was released from prison.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

## Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), Mr Furcht complained that the criminal proceedings against him had been unfair as he had been incited by the police officers to commit the offences and that he had been convicted essentially on the basis of evidence obtained by entrapment.

The application was lodged with the European Court of Human Rights on 9 October 2009.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,  
Angelika **Nußberger** (Germany),  
Boštjan M. **Zupančič** (Slovenia),  
Ann **Power-Forde** (Ireland),  
Ganna **Yudkivska** (Ukraine),  
Helena **Jäderblom** (Sweden),  
Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, *Section Registrar*.

## Decision of the Court

### Article 6 § 1

The Court had to examine two questions: whether the criminal proceedings against Mr Furcht had been unfair; and whether he could still claim to be the victim of the alleged violation of the Convention for the purpose of Article 34 (individual applications), having regard to the fact that the German courts had already acknowledged his incitement by a State authority to commit the offences, and had mitigated his sentence.

As regards the first question, the Court came to the conclusion that the undercover measure in Mr Furcht's case had gone beyond the mere passive investigation of criminal activity. The measure had indeed amounted to police incitement as defined in the Court's case law under Article 6. Moreover, the evidence obtained by the police incitement had been used in the criminal proceedings against him.

In coming to the conclusion that he had been incited to commit the offences, the Court noted that Mr Furcht had had no criminal record; there were no objective suspicions that he was involved in drug trafficking; and the police had only seen him as a means to establish contacts with another suspect. It was true that he had himself later raised the possibility to deliver drugs and had been able to quickly initiate drug deals. However, the relevant time for determining whether there were objective suspicions that a person was predisposed to commit a criminal offence was when that person was first approached by the police. Moreover, it was significant that Mr Furcht had explained to one of the undercover police officers that he was no longer interested in participating in a drug deal. Despite this, the officer had contacted him again and had persuaded him to arrange the drug sale. By that conduct, the investigating authorities had clearly abandoned a passive attitude and had caused him to commit the offences.

As regards the second question, the Court noted that it could leave open whether, by finding that Mr Furcht had been incited by a State authority to commit the offences, the German courts had acknowledged in substance a violation of Article 6. What was at issue was the question of whether the German courts had provided him with sufficient redress. Under the Court's case-law, Article 6 § 1 did not permit the use of evidence obtained as a result of police incitement. For the trial to be fair all evidence obtained in such a way therefore had to be excluded, or a procedure with similar consequences had to be applied. In Mr Furcht's case, the evidence obtained by police incitement

had been used and his conviction had been based on that material. The Court was therefore not convinced that even a considerable mitigation of his sentence could be considered as a procedure with similar consequences as an exclusion of the evidence in question. Accordingly, Mr Furcht had not been provided with sufficient redress and could still claim to be a victim of the alleged breach of the Convention.

In conclusion, there had been a violation of Article 6 § 1.

#### **Just satisfaction (Article 41)**

The Court held that Germany was to pay Mr Furcht 8,000 euros (EUR) in respect of non-pecuniary damage and EUR 8,500 in respect of costs and expenses.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.