



Use of undercover agents to dismantle a drug-trafficking network: no violation of the rights of the defence

In today's **Chamber** judgment¹ in the case of **Guerni v. Belgium** (application no. 19291/07) the European Court of Human Rights held, by a majority (six votes to one), that there had been:

no violation of Article 6 § 1 of the European Convention on Human Rights as regards the use of the undercover investigative method;

no violation of Article 6 §§ 1 and 3 (d) (right to question witnesses) owing to the applicant's inability to examine the informer or the undercover agent or to have them examined.

The case concerned criminal proceedings under which Mr Guerni had been convicted of drug trafficking. In the framework of their investigations, the police had been authorised to call on the services of an informer and an undercover agent posing as a purchaser.

The Court found in particular that despite the absence of a legal framework, the trial courts' review of the lawfulness of the uncover operation had provided a proper safeguard and that there was nothing to suggest that Mr Guerni's rights of the defence had been violated. The courts had concluded, on the basis of reliable evidence on file – including Mr Guerni's statements and concurring statements from other defendants – that the intention of importing a consignment of drugs had pre-dated the involvement of the informer and the undercover agent and that the latter had not exerted any pressure. The Court also held that the domestic courts' refusal to examine the informer and the undercover agent on the grounds that such questioning was unnecessary for establishing the truth had been properly grounded. It therefore detected no arbitrariness and considered that the defence had benefited from sufficient procedural safeguards to ensure the overall fairness of the proceedings.

Principal facts

The applicant, Abdalwahab Guerni, is a Belgian national who was born in 1967. He was living in Meise (Belgium) at the time the application was lodged.

In 1998 Mr Guerni organised the transport of a large volume of drugs from Morocco to Belgium. The transport was to have involved a lorry fetching a consignment of lawful goods, to which the drugs would be added. For the transport, Mr Guerni called on the services of Ron and Dominique. The latter individuals, who were in fact a police informer and an undercover agent, had claimed that they ran a transport firm which could supply Mr Guerni with a lorry and a driver. The transport took place in February 1998, monitored by the Moroccan and Belgian authorities; the lorry, which was driven by another undercover agent, picked up the goods and the drugs in Morocco and took them to Belgium. In March 1998, when Dominique was paid for his assistance and the drugs were delivered to Mr Guerni, he and two other persons involved were arrested.

In 2003 a court convicted each of the defendants to four years' imprisonment. In 2006 a court of appeal upheld the convictions, although it reduced the sentences on the grounds that the length of

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.

the proceedings had become unreasonable. The two accomplices were sentenced to three years' imprisonment each. Mr Guerni was sentenced to four years' imprisonment, although the court of appeal had held that his sentence should have been longer.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (d) (rights of the defence / right to question witnesses) of the European Convention of Human Rights, Mr Guerni complained about the special investigative methods used by the domestic authorities and the trial courts' refusal to question the informer and the undercover agent involved in implementing those methods. Mr Guerni also alleged a violation of Article 8 (right to respect for private and family life) on the grounds that the undercover operation had had no lawful basis.

The application was lodged with the European Court of Human Rights on 2 May 2007.

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

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Paul **Lemmens** (Belgium),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),

and also Hasan **Bakırcı**, *Deputy Section Registrar*.

Decision of the Court

Article 6 §§ 1 and 3 (d)

1. The undercover operation

At the material time the undercover operation concerning Mr Guerni had not been governed by any law, but had been authorised, under a ministerial circular, by the public prosecutor's office, and its implementation had been placed under the supervision of an investigating judge. Subsequently, before the court of appeal, Mr Guerni had contested the lawfulness of the use of those special investigative methods, particularly the undercover operation, pleading police incitement in his defence. Following a meticulous and detailed assessment of the impact of the informer's and the undercover agent's involvement on the lawfulness and admissibility of the evidence gathered, the domestic courts had found that the lack of police incitement could be inferred from evidence on file whose reliability was beyond doubt, that is to say the statements given by Mr Guerni himself, concurring statements by the other defendants and the witness statements from persons extraneous to the police service. That evidence had also enabled the two courts to conclude that it had been established with certainty that the intention of importing drugs had pre-dated the involvement of the informer and the undercover agent. The courts also established that the latter had not exerted any undue pressure beyond providing the material possibility of transporting the drugs, which, moreover, could have happened without the police involvement. Finally, it transpired from the judgment of the court of appeal that the establishment of the truth and Mr Guerni's conviction had been based on other evidence. The informer's statements and the reports drawn up by the undercover agent had therefore been of lesser importance in evidentiary terms. Consequently, the Court considered that the trial courts' review of the lawfulness of the undercover operation had provided an effective safeguard and that there was nothing to suggest that it had infringed Mr Guerni's defence rights in a manner incompatible with the right to a fair trial. There had

therefore been no violation of Article 6 § 1 of the Convention owing to the execution of an undercover operation without a legal framework.

2. Mr Guerni's inability to examine the informer and the undercover agent or to have them examined

Before the domestic courts, Mr Guerni requested the questioning of the informer and the undercover agent in order to verify whether or not there had been any police incitement. After a detailed examination, which constitutes an important procedural safeguard for the fairness of the trial, the domestic courts rejected the request on the grounds that no statements were required from the two persons in question in order to establish the truth, since a body of evidence whose reliability was beyond doubt had shown that there had been no police incitement. The court of appeal had also held, in connection with the establishment of the facts, that in view of the clarity of the evidence, the informer's testimony and the undercover agent's reports had taken on a completely ancillary importance in terms of cogent evidence. The Court also noted that in order to reach its findings concerning the facts, particularly the role played by each person involved, the court of appeal relied essentially on the statements by Mr Guerni and those, deemed concurring, of the other defendants and the witnesses who were directly involved in the facts and were unlinked to the police authorities, rather than on the informer's statements and the agent's reports. The trial courts had also mentioned the need to avoid jeopardising the anonymity of those concerned in order to guarantee their security. The Court considered that the trial courts' refusal to examine the informer and the undercover agent had been properly justified, being based on objective and concrete facts. In particular, it detected nothing arbitrary or manifestly unreasonable in the conclusion that hearing the informer or the undercover agent would have been completely pointless in terms of establishing the truth. Consequently, the Court concluded that despite the trial courts' refusal to examine the informer and the undercover agent, the defence had enjoyed sufficient procedural safeguards to ensure the fairness of the proceedings against Mr Guerni. There had therefore been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Separate opinion

Judge Karakaş expressed a separate which is annexed to the judgment.

The judgment is available only in French.

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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.