

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

FOURTH SECTION

CASE OF JEVTIC v. AUSTRIA

(Application no. 54664/16)

JUDGMENT

STRASBOURG

24 January 2023

This judgment is final but it may be subject to editorial revision.



In the case of Jevtic v. Austria,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Armen Harutyunyan*, President*,
Anja Seibert-Fohr,
Ana Maria Guerra Martins*, judges*,
and Veronika Kotek, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 54664/16) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 13 September 2016 by a Serbian national, Mr Vladimir Jevtic ("the applicant"), who was born in 1980 and at the time of the application was detained in Vienna, and who was represented by Mr W. Haas, a lawyer practising in Vienna;

the decision to give notice of the application to the Austrian Government ("the Government"), represented by their Agent, Mr H. Tichy, Ambassador, Head of the International Law Department at the Federal Ministry for European and International Affairs;

the information given to the Serbian Government regarding their right to intervene in the proceedings pursuant to Article 36 § 1 of the Convention and the fact that the Serbian Government did not express a wish to exercise that right;

the parties' observations;

Having deliberated in private on 13 December 2022,

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

SUBJECT MATTER OF THE CASE

1. On 30 October 2015 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) convicted the applicant of drug offences. It found that he had been unlawfully incited to commit the offences by a police informant (*bei der Polizei registrierte Vertrauensperson*) whose actions could be attributed to the criminal police, and, as a consequence, reduced his prison sentence by six months.

2. In a plea of nullity to the Supreme Court based on Article 281 § 1.9b of the Code of Criminal Procedure (CCP) (see paragraph 7 below), the applicant relied on the Court's case-law and argued that mitigation of sentence was not sufficient under Article 6 of the Convention to remedy unlawful State incitement. On 14 July 2016 the Supreme Court rejected the applicant's plea of nullity on admissibility grounds. It confirmed that there had been unlawful State incitement but argued that the applicant should have based his plea of nullity on Article 281 § 1.4 (see paragraph 5 below) rather than on Article 281 § 1.9b of the CCP. According to the Supreme Court, there was no legal basis to support his argument that unlawful State incitement constituted a bar to

criminal prosecution (*Verfolgungshindernis*). Article 133 § 5 of the CCP, which provided for a bar to criminal prosecution in cases of unlawful incitement and had entered into force on 1 June 2016, was not applicable to the applicant's case since the regional court had rendered its judgment before that date. Therefore, there was no legal basis for a plea of nullity based on Article 281 § 1.9b of the CCP. The applicant had failed to raise his concern about the incitement during the oral hearing and he had not asked the regional court to refrain from using evidence obtained by means of the undercover police investigations which would have been necessary in order for him to rely on Article 281 § 1.4 of the CCP in his plea of nullity.

3. Following an appeal by the applicant against his sentence, the Court of Appeal reduced the sentence by further nine months, thus in total by fifteen months.

4. In his application to the Court the applicant complained that he had been incited to commit a criminal offence, in breach of his right to a fair trial, and that in the light of the Court's judgment in the case of *Furcht v. Germany* (no. 54648/09, 23 October 2014), the mitigation of his sentence did not constitute sufficient redress for the breach of Article 6 § 1 of the Convention.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. Admissibility

5. The Government argued, in line with the Supreme Court (see paragraph 2 above), that the applicant should have based his plea of nullity on Article 281 § 1.4 of the CCP, which states that a plea of nullity may be raised in the Supreme Court if during the main trial the court in question has failed to deal with a request from the accused or if a [procedural] decision disregarding his request or conflicting with his declared objection has been taken by the court and there has been a violation of either the law or fundamental procedural principles which seek to safeguard compliance with human rights – especially Article 6 of the Convention – or other fundamental rights of the prosecution or the defence. In order to be able to lodge a plea of nullity based on Article 281 § 1.4 of the CCP, the applicant would have had to ask the regional court during the main trial to refrain from using evidence obtained by means of the undercover police investigations. The Government concluded that because the applicant had failed to lodge such a request and to subsequently base his plea of nullity on Article § 1.4 of the CCP, he had not exhausted domestic remedies.

6. The Court cannot agree with that argument. For the ground of nullity the applicant relied on, namely Article 281 § 1.9b of the CCP, he was not required to raise his concern at the oral hearing since he did not seek to have

individual items of evidence excluded (*Beweisverwertungsverbot*) but wanted prosecution to be barred completely (*Verfolgungshindernis*) because of the unlawful police incitement. The Court would point out that the applicant did avail himself of the opportunity to lodge a plea of nullity complaining about unlawful State incitement under Article 6 of the Convention (contrast *Batista Laborde v. Austria* (dec.), no. 41767/09, §§ 11 and 35, 2 February 2016, where the applicant in his plea of nullity did not complain of State incitement at all). It is not convinced that he would have been expected to rely on a specific ground of nullity that could not have led to the result he was seeking.

7. At the time of the applicant's trial in October 2015 it was unclear how the Supreme Court or the legislature would implement the principles established by the Court in *Furcht v. Germany* (no. 54648/09, §§ 68-69, 23 October 2014). In 2016 the Criminal Procedure Reform Act (*Strafprozessrechtsänderungsgesetz,* published in the Federal Law Gazette I 26/2016) inserted a new paragraph 5 to Article 133 of the CCP, in force as of 1 June 2016, which prohibited the prosecution of persons who had been unlawfully incited by the police to commit the relevant offences. That provision was not applicable to the applicant's case as the regional court had rendered its judgment before 1 June 2016 (see paragraph 2 above). According to the Supreme Court's judgment of 14 July 2016 (ibid.), the applicant's plea of nullity under Article 281 § 1.9b of the CCP, which can be raised if there are circumstances in which the act concerned is no longer a punishable offence or can no longer be prosecuted, therefore lacked a legal basis. However, the Court notes that six months earlier in a different set of proceedings concerning similar facts the Supreme Court examined a plea of nullity based on Article 281 § 1.9b of the CCP without rejecting it for failure to rely on Article 281 § 1.4 of the CCP (see the Supreme Court's judgment of 26 January 2016 in case no. 14 Os 113/15 x).

8. Considering that it was not even clear within the Supreme Court which ground of nullity was appropriate for raising concerns about unlawful State incitement following the principles established in *Furcht* (cited above), the Court concludes that the applicant could not have foreseen that the Supreme Court would reject his plea of nullity based on Article 281 § 1.9b of the CCP for non-exhaustion. It must therefore be regarded as sufficient for the requirement of exhaustion of domestic remedies (compare, in the context of Article 13 of the Convention, *Martins Castro and Alves Correia de Castro v. Portugal*, no. 33729/06, §§ 51-56, 10 June 2008).

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

B. Merits

10. The general principles concerning cases of alleged police incitement or entrapment have been summarised in *Akbay and Others v. Germany* (nos. 40495/15 and 2 others, §§ 109-24, 15 October 2020, with further references).

11. The Court agrees with the domestic courts that the applicant was subjected to police incitement to commit the offences of which he was later convicted. The Government reiterated that the domestic courts had acknowledged a violation of Article 6 of the Convention and had considerably mitigated the applicant's sentence by fifteen months. According to the Government, the applicant had therefore been afforded sufficient redress. However, contrary to what the Government argued, the mere mitigation of sentences – without the exclusion of all evidence obtained as a result of entrapment or the use of a procedure with similar consequences – must be considered as insufficient to afford adequate redress for a breach of Article 6 § 1 of the Convention. The Court is not convinced that even a considerable mitigation of the sentence, fifteen months in the case of the applicant, satisfied those requirements (see *Furcht*, cited above, §§ 68-69 and, more recently, *Akbay and Others,* cited above, § 124).

12. It follows that the applicant has not been afforded sufficient redress for the breach of Article 6 § 1 of the Convention. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

13. The applicant did not claim an award in respect of pecuniary or non-pecuniary damage. He claimed 360 euros (EUR) for the costs of the translation of his observations. Other claims for costs and expenses were not submitted within the time allowed for that purpose (Rule 60 § 2 of the Rules of Court).

14. Having regard to the document in its possession, the Court considers it reasonable to award the full translation costs of EUR 360. This sum includes value-added tax (VAT) payable by the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amount:

EUR 360 (three hundred and sixty euros) in respect of costs and expenses, inclusive of VAT payable by the applicant;

(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.

Done in English, and notified in writing on 24 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Veronika Kotek Acting Deputy Registrar	Armen Harutyunyan President