

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

FOURTH SECTION

CASE OF NIKOLOV v. AUSTRIA

(Application no. 48105/16)

JUDGMENT

STRASBOURG

24 January 2023

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



In the case of Nikolov 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. 48105/16) 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 12 August 2016 by a Bulgarian national, Mr Valentin Petrov Nikolov ("the applicant"), who was born in 1967 and at the time of the application was detained in Vienna, and who was represented by Mr R. Kier, 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 Bulgarian Government regarding their right to intervene in the proceedings pursuant to Article 36 § 1 of the Convention and the fact that the Bulgarian 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 27 August 2015 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) convicted the applicant, a Bulgarian national, of drug offences. It found that he had been incited to commit the offences by a person who was a police informant (*als Informant für die Polizei tätig*) and, as a consequence, reduced his prison sentence by three months. During the oral hearing, the regional court had dismissed the applicant's request for the whereabouts of the police informant (*Vertrauensperson der Kriminalpolizei*), T., to be ascertained and for T. to be called to give evidence, reasoning that the issue on which evidence should be taken (*Beweisthema*) was evident. In a plea of nullity to the Supreme Court the applicant relied on the Court's case-law and argued that mitigation of sentence was not sufficient to remedy unlawful State incitement. On 26 January 2016 the Supreme Court rejected the plea of nullity in its parts relevant to the application on admissibility grounds, arguing in substance that during the proceedings before the regional court there had been no indication of unlawful State incitement.

2. 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 under Article 6 § 1 of the Convention, and that the courts had not sufficiently examined whether T. had collaborated with the justice system.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. Admissibility

3. The Government submitted that the applicant had failed to exhaust domestic remedies because he had not asked the regional court to exclude evidence obtained by police incitement from the case file, nor had he relied on Article 281 § 1.4 of the Code of Criminal Procedure (CCP, see *Batista Laborde v. Austria* (dec.), no. 41767/09, § 20, 2 February 2016) in his plea of nullity. The Court cannot accept that objection. The record of the hearing shows that the applicant asked for T. to be called to give evidence (see also paragraph 1 above). According to his request, if T. were heard, State incitement could be proved. The regional court dismissed his request as, in its view, the issue on which evidence should be taken was in any event evident. The regional court later established that T. was indeed a police informant. Under those circumstances, the applicant could not be expected to challenge the dismissal of his request for evidence since the regional court seemed to accept his observations. The Court concludes that the applicant's concern about unlawful police incitement was brought to the attention of the regional court. The applicant also relied on it in his plea of nullity to the Supreme Court (contrast *Batista Laborde,* cited above, § 35, where the applicant in his plea of nullity did not complain of State incitement at all). While the Court agrees with the Government that the applicant never asked the regional court to exclude evidence because it had been obtained by police incitement, it notes that when lodging a plea of nullity under Article 281 § 1.9b of the CCP (see *Batista Laborde,* cited above, § 21) as he did, he was not required to have raised that point in the proceedings before the regional court. The Supreme Court did not base its decision to reject the plea of nullity on a failure of the applicant to rely on Article 281 § 1.4 of the CCP either. Accordingly, the Court dismisses the Government's objection as to non-exhaustion of domestic remedies.

4. The 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

5. 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).

6. The Supreme Court relied on the Court's case-law and, applying the criteria established in *Furcht v. Germany* (no. 54648/09, §§ 48-52, 23 October 2014), found that there had been no indication of unlawful police incitement. This conclusion contradicts the submissions of the applicant to the regional court when he clearly asked for T. to be heard as a witness should the court not accept that there had been incitement. He went on to submit that if T. were heard, State incitement could be proved (see paragraph 3 above). He thus raised a plea of incitement which the State was obliged to examine. The regional court established that T. was an informant acting for the police, thus implying a connection between T. and the authorities. It accordingly reduced the sentence in line with the Supreme Court's consistent case-law at the time.

7. The Court does not overlook the arguments relied on by the Supreme Court in line with the Court's case-law (*Furcht*, cited above, §§ 48-52) that the applicant had been convicted for drug offences before, was familiar with the circumstances in the drug scene and had apparently been contacted by T. whom he referred to as a friend before the undercover police agent had been involved. However, when applying the relevant criteria, the Court places the burden of proof on the authorities. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable (ibid., § 53; *Akbay and Others*, cited above, § 118). The applicant's allegation of State incitement cannot be found to have been wholly improbable given that the regional court itself accepted that T. was an informant acting for the police and dismissed the applicant's corresponding request for evidence, finding that the issue was evident. While it was the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 70, ECHR 2008), the regional court did not establish further whether T. had acted on behalf of the authorities in the instant case.

8. Concluding that the substantive test developed in the Court's case-law produces inconclusive results in this case because of a lack of information in the file and the contradictions in the parties' interpretations of events, the Court will turn to the procedural test of incitement (see *Akbay and Others*, cited above, § 120), assessing the procedure by which the plea of incitement was determined by the domestic courts. While the regional court found that there had been incitement by T. who was a police informant and consequently reduced the applicant's sentence, the Supreme Court appears to have

contradicted the findings of the regional court without giving sufficient reasons.

9. The Supreme Court rejected the plea of nullity without ensuring that the question of whether T. had worked for the State in this case was resolved. Similarly to the applicant in *Ramanauskas* (cited above, § 71), throughout the proceedings the applicant maintained that he had been incited to commit the offences. Accordingly, the domestic authorities should have undertaken a thorough examination and to that end should have established the role of T. as a police informant and the reasons for his actions. The regional court did not find a further investigation necessary as it found the incitement and T.'s role as a police informant to have been established (contrast *Bannikova v. Russia*, no. 18757/06, § 76, 4 November 2010). It remained unclear whether T. had acted as a private individual approaching the police with information indicating that the applicant had already initiated a criminal act or, as implied by the regional court's reasoning, as a police informant (ibid., § 44). In order for the Supreme Court to deviate from the regional court's conclusion that the applicant had been incited, it would have been necessary to question T.'s role and whether, as a police informant, he had had any arrangement with the police authorities even before he had contacted the undercover agent in the present case. The Supreme Court denied that there had been any police incitement but took no steps to have a further examination of the applicant's allegations to that effect carried out in line with the State's burden of proof (ibid., § 65; compare, *Tepra v. Austria* (dec.), no. 13573/14, § 43, 5 February 2019, where the police informant had been heard as a witness). The fact that the applicant had made a confession and had requested a mild verdict before the regional court does not lead to a different result (compare, *Akbay and Others*, cited above, § 124). In view of the intervention of T., a police informant, whose role in the present case remained unresolved, the applicant's trial was deprived of the procedural fairness required by Article 6 of the Convention.

10. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

11. The applicant did not claim an award in respect of pecuniary or non-pecuniary damage. He claimed 20,474.11 euros (EUR) in respect of costs and expenses incurred before the domestic courts and before the Court.

12. The Government submitted that the claim was excessive.

13. Having regard to the documents in its possession, the Court considers it reasonable to award EUR 3,000 covering costs and expenses under all heads, plus any tax that may be chargeable to 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 amounts:
   EUR 3,000 (three 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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