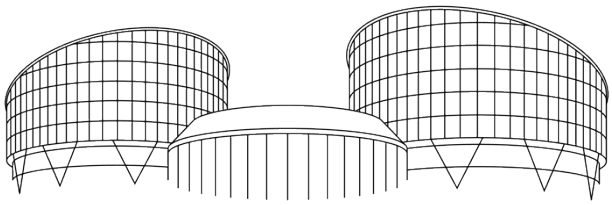

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF VESELOV AND OTHERS v. RUSSIA

(Applications nos. 23200/10, 24009/07 and 556/10)

JUDGMENT

STRASBOURG

2 October 2012

FINAL

02/01/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Veselov and Others v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 11 September 2012,

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

PROCEDURE

1. The case originated in three applications (nos. 23200/10, 24009/07 and 556/10) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Russian nationals, Mr Viktor Sergeyevich Veselov, Mr Maksim Borisovich Zolotukhin and Mr Igor Vyacheslavovich Druzhinin ("the applicants"), on 8 April 2010, 3 May 2007 and 12 November 2009 respectively.

2. The applicants were represented respectively by Ms O.O. Mikhaylova, a lawyer practising in Moscow, Mr G.B. Gabdrakhmanov, a lawyer practising in Yekaterinburg, and Mr V.G. Tuchin, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants each alleged that they had been convicted of drug offences incited by the police in violation of Article 6 of the Convention.

4. On 25 November 2010 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were each targeted in undercover operations conducted by the police in the form of a test purchase of drugs under sections 7 and 8 of the Operational-Search Activities Act of 12 August 1995 (no. 144-FZ). These operations led to their criminal conviction for drug dealing.

6. The facts of each individual criminal case, as submitted by the parties, are summarised below. The applicants disagreed with the Government on the underlying causes and the circumstances leading to the test purchases, and where this is so both versions are given. As regards the factual details of the covert operations, they are not in dispute. In particular, it is common ground that the applicants knowingly procured drugs in the course of the test purchases.

A. The application of Mr Veselov

7. The applicant was born in 1989 and lives in Moscow. At the time of his arrest he was a third-year student at a management college. He is currently serving a prison sentence in a correctional colony.

8. According to the Government, on 19 May 2009 a Mr X voluntarily went to the police and reported that two persons, "Viktor" (the applicant) and "Ruslan", were selling hashish at 600 Russian roubles (RUB) per gram.

9. According to the applicant, X was a drug addict, with a previous criminal conviction for illegal possession of drugs, and he was a police informant who had previously taken part in test purchases of drugs. To support these allegations the applicant provided a copy of the judgment against X and copies of four judgments in unrelated criminal proceedings against four different persons where X featured as the buyer in test purchases of cannabis, heroin and hashish from the accused.

10. It is common ground, supported by the official records, that the police ordered a test purchase and proceeded with it immediately after having received the information from X. The order indicated the applicant's name and stated that he was suspected of selling hashish at RUB 600 per gram. X phoned "Ruslan" and told him that he wished to buy hashish. The police officers were present when X was speaking to "Ruslan", but the conversations were not recorded. X was given RUB 3,000 that had been photocopied. He met "Ruslan" later on the same night and together they met the applicant who took RUB 1,200 from them and went away to purchase the drugs. The applicant was later arrested and was found in possession of banknotes that matched the photocopied ones. Throughout the test purchase X had his mobile phone turned on with the police officer's number dialled,

which enabled the police to overhear their conversations. These communications were not recorded. Neither "Ruslan" nor the applicant's dealer were arrested or prosecuted, allegedly on the grounds that their identities could not be established.

11. X testified at trial that he had met the applicant and "Ruslan" at a local supermarket about two weeks before the test purchase. In the course of their conversation the applicant had told him that he could get some hashish for him. "Ruslan" had given him his phone number. X had then volunteered that information to the police and agreed to take part in the test purchase. He testified that he had not previously bought drugs from the applicant. When the defence counsel cross-examined X the court disallowed questions about his criminal record and whether he was a drug user. It also dismissed the motion to have the judgments proving that X had previously acted as a buyer in test purchases of drugs accepted as evidence.

12. The policemen who had initiated and carried out the test purchase testified at the trial that prior to X's information they had not known the applicant as drug dealer. They reiterated the details of the test purchase.

13. At the trial the applicant pleaded guilty of assisting "Ruslan" in buying drugs, but claimed that it had been the result of police incitement. He claimed that he and "Ruslan" were occasional smokers of hashish but that he was not selling or otherwise supplying it to anyone. The test purchase was the first time he had agreed to help "Ruslan", or anyone, in obtaining drugs, and he had only done so because of his insistent prompting.

14. The person named "Ruslan" was not called to be cross-examined at the trial, allegedly because the investigating authorities had failed to establish his identity.

15. On 15 September 2009 the Nikulinskiy District Court of Moscow found the applicant guilty of attempted illegal sale of narcotic drugs and sentenced him to four and a half years' imprisonment. The court did not make an express assessment of the applicant's plea of entrapment.

16. The applicant appealed. He reiterated his plea of provocation, claiming, *inter alia*, that X had been a police informant and challenging the refusal of the first-instance court to admit the relevant documents as evidence. He also pointed out that the police had no other information suggesting that he had previously sold drugs. He also complained that the authorities had not made any attempts to find and question "Ruslan", who had played a key role in the test purchase and could have cast light on the extent of the provocation.

17. On 11 November 2009 the Moscow City Court upheld the first-instance judgment. It reiterated the finding that the applicant had attempted to sell the narcotic drug during the test purchase and implicitly dismissed the plea of entrapment without answering the applicant's arguments.

B. The application of Mr Zolotukhin

18. The applicant was born in 1982 and lives in Yekaterinburg. He is currently serving a prison sentence in Nijniy Tagil.

19. According to the Government, on 13 June 2006 Ms Y voluntarily went to the police and reported that she was a heroin addict and that she wished to inform on her drug dealer. She said that she had been buying heroin from the applicant for a long time, but did not specify for how long. The police asked her to participate in a test purchase of drugs from the applicant, and she agreed to do so.

20. According to the applicant, he knew Y from primary school and through his girlfriend. He knew that she was a drug user; she would occasionally offer to sell him second-hand mobile phones of unclear provenance. A few months before the test purchase she had sold him a DVD player which had later been seized by the police as a stolen item. Because of that, Y owed the applicant RUB 6,000 which she was unable to repay. On 13 June 2006 she contacted him with an offer to redeem the debt, but told him that she would only do so if he got her some heroin, of which she was badly in need. The applicant contacted an acquaintance, a drug dealer, and arranged for the quantity Y had requested. He claimed that it was the first time he had agreed to purchase drugs for Y or for anyone.

21. It is common ground between the parties that prior to Y's submissions the police had not been in possession of any information suggesting the applicant's possible involvement in drug dealing.

22. On the same day the police ordered a test purchase. The order indicated the applicant's name and address and stated that he was suspected of selling heroin at RUB 500 per gram. Y was given RUB 3,000 in banknotes that had been photocopied. She phoned the applicant and arranged to purchase five grams of heroin. The content of the phone call, which was made from police premises and in the presence of police officers, was not recorded. The applicant met Y at the agreed place in town and she passed him the money. The police arrested the applicant on the spot. He was in possession of RUB 3,000 in banknotes that matched the ones the police had photocopied. Y handed in a packet of heroin allegedly purchased from the applicant. The applicant claimed that he had not supplied the drugs handed in by Y because he was supposed to give them to her later.

23. After the arrest the applicant offered to inform the police on the dealer from whom he had obtained the heroin for Y and to conduct a test purchase from him, but the offer was not followed up.

24. The case was examined at first instance by the Ordzhonikidzevskiy District Court of Yekaterinburg. At the trial the applicant pleaded partly guilty but claimed that the crime he had committed was the result of police entrapment. He pointed out, in particular, that there was no evidence of his prior involvement in drug dealing. He maintained that Y had previously

asked him to buy heroin for her, knowing that he had an acquaintance who was a dealer, but he had always refused. 13 June 2006 was the first time he had agreed to help her, and this was only because she had promised to pay back her debt if he did. He claimed that her participation in the test purchase was not "voluntary", but prompted by the police, who had manipulated her by playing on her drug addiction.

25. Y testified at the trial that on 13 June 2006 she had voluntarily gone to the police to inform them about the applicant's involvement in drug trafficking. She also stated that she had previously bought heroin from the applicant at least three times.

26. The police officer who carried out the test purchase testified at the trial that on 13 June 2006 Y had voluntarily gone to the police station and reported that she was a heroin addict and that she wished to inform them that the applicant was her drug dealer. He also stated that she had collaborated with him for six months prior to the test purchase, and that she had taken part in unrelated test purchases of drugs from other persons. He further stated that prior to 13 June 2006 the police had had no information on the applicant and that the test purchase was ordered as soon as Y had reported him. She had been asked to make a phone call to the applicant immediately from the police station; when she did so she had only asked the applicant to sell her heroin, without entering into any other subjects.

27. The court also cross-examined another policeman who had taken part in the test purchase, and read out statements given by the attesting witnesses in the investigation, in which they set out the details of the test purchase. On 28 September 2006 it found the applicant guilty of attempted illegal sale of narcotic drugs in particularly large quantities. It did not expressly refer to the applicant's plea of entrapment, having found the fact of the sale sufficiently established and having noted the compliance of the test purchase with the procedural requirements. It considered that the applicant's version of events, whereby he met Y because of the debt, had been refuted by other evidence. The applicant was sentenced to ten years' imprisonment in a high-security correctional colony.

28. The applicant appealed, pleading police incitement of the offence he was convicted of and alleging that the first-instance court had incorrectly assessed the evidence.

29. On 6 December 2006 the Sverdlovskiy Regional Court upheld the first-instance judgment. It did not address the plea of entrapment, but limited itself to finding the applicant's conviction lawful and well-founded.

C. The application of Mr Druzhinin

30. The applicant was born in 1977 and lives in Moscow. Trained in the past as a policeman, in 2002 he was convicted of a murder and, after his release, worked as a welder. He is currently serving a prison sentence in a

correctional colony in the Republic of Mordovia following his conviction of the drug offence described below.

31. According to the Government, on 4 September 2008 Ms Z voluntarily presented herself at the local office of the Federal Service for Drug Control (*ФКСН*, the police) and reported that she was a heroin addict and that she wished to inform the authorities that the applicant was a drug dealer. The police asked her to participate in a test purchase of drugs from the applicant, and she agreed to do so.

32. It is common ground between the parties that prior to Z's submissions the police had not been in possession of any information suggesting the applicant's possible involvement in drug dealing. However, the Government also claimed that this information was corroborated by a report of an officer of the Federal Service for Drug Control drawn on the same day, 4 September 2008.

33. According to the applicant, he had known Z for about ten years through his personal contacts; he was also acquainted with a certain Ms P, also through personal contacts. From his police training with the Federal Service for Drug Control he knew that the two women were drug addicts, with criminal records related to drug dealing, and that they were police informants. On 4 September 2008 Z called him and asked for the phone number of P because she wanted to buy drugs from her; she said that she was suffering severe withdrawal symptoms and was on the verge of committing suicide. Later the same day she called him again and asked him to accompany her to the meeting with P because she feared that P would not sell to her if she was on her own. Out of compassion he agreed to go along. When the three of them met, P sold Z two grams of methamphetamine, a home-made narcotic drug produced with ephedrine and referred to throughout the proceedings by its slang name "speed" (*«винт»*). The applicant was arrested on the spot. He alleged that he did not have either money or drugs on him during the arrest, claiming that the money was planted on him during the search. He acknowledged, however, that he assisted Z in buying the "speed" but maintained that it was the first time he had done so for Z or for anyone, having succumbed to her persistent begging.

34. The official records presented the following account of the test purchase. Having received the information from Z, the police ordered a test purchase and proceeded with it immediately. The order indicated the applicant's name and stated that he was suspected of selling "speed" for RUB 500 per gram. Z was given RUB 1,000 in banknotes that had been photocopied. She phoned the applicant from police premises and asked him to get the drugs for her. He called her back later and they arranged to purchase two grams of "speed". The police officers were listening when Z spoke to the applicant on the phone, but the conversations were not recorded. The applicant met Z later on the same night and together they met

another person, P. When Z gave a signal to the police they arrested the applicant and took him to the police station. At the station the police examined a wallet allegedly found on him which contained RUB 1,000 in banknotes that matched the photocopied ones. Z handed in a syringe with "speed" in it, allegedly purchased from the applicant. P was also arrested, but she was released shortly afterwards and was not prosecuted.

35. At the trial the applicant pleaded guilty of helping Z to buy drugs, but claimed that he had been induced by the police to do so and requested that the evidence relating to the test purchase be excluded.

36. Z testified that she had volunteered information about the applicant to the police because she thought it would make it easier for her to overcome her addiction. She stated that before the test purchase she had never bought drugs from the applicant; however, since they used to buy and consume them together she told the police that she would be able to convince him to obtain the drugs for her. She further stated that she did not know if the applicant had previously sold drugs to anyone else, and she was almost certain he did not produce them himself. She also admitted that she used to buy drugs from another source. Finally, concerning the circumstances of the test purchase, she testified that she gave the money to the applicant and took the syringe from him and that she did not see P handle either the money or the syringe.

37. The applicant requested that P be called and cross-examined, but the court noted that she had been summoned and had absconded, and that her whereabouts were unknown. The court considered this to constitute exceptional circumstances allowing it to take her written depositions into account. Despite the applicant's objections, it read out her pre-trial statement saying that she had delivered the drugs to the agreed place at the applicant's request, but that the sale had been arranged by him.

38. Four police officers were cross-examined about the covert operation. They reiterated the details of the test purchase. One of them testified, when asked, that Z was not remunerated for her collaboration with the police.

39. On 17 February 2009 the Zyuzinskiy District Court of Moscow found the applicant guilty of attempted illegal sale of narcotic drugs and sentenced him to four and a half years' imprisonment. The sentence was increased to five years for breach of parole relating to his previous conviction.

40. The applicant appealed, pleading police incitement of the offence he was convicted of and complaining that the first-instance court had incorrectly assessed the evidence.

41. On 13 May 2009 the Moscow City Court examined the appeal. It dismissed the plea of entrapment, stating that the test purchase was based on the information given by Z to the police, notably that she "had previously bought drugs from the applicant on multiple occasions", and concluded that

the test purchase was therefore lawful. It upheld the first-instance judgment as well-founded.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal liability for drug trafficking

42. Article 228.1 of the Criminal Code (as in force at the material time) provided that the unlawful sale of narcotic drugs or psychotropic substances carried a sentence of four to eight years' imprisonment; the same offence involving a large quantity of drugs or committed by a group of persons acting in conspiracy carried a sentence of up to twelve years' imprisonment; the same offence involving a particularly large quantity of drugs carried a sentence of up to twenty years' imprisonment (Article 228.1 § 3 (d)).

43. On 15 June 2006 the Plenary Supreme Court of the Russian Federation adopted guidelines (Ruling No. 14) on jurisprudence in criminal cases involving narcotic drugs or psychotropic, or strong, or toxic substances. The Plenary ruled, in particular, that any sale of such substances, if carried out in connection with a test purchase under the Operational-Search Activities Act, should carry charges of attempted sale (Article 30 § 3 in conjunction with Article 228.1 of the Criminal Code). It also set out the following conditions on which the results of the test purchase could be admitted as evidence in criminal proceedings: (i) they must have been obtained in accordance with the law; (ii) they must demonstrate that the defendant's intention to engage in trafficking of illegal substances had developed independently of the undercover agents' acts; and (iii) they must demonstrate that the defendant had carried out all the preparatory steps necessary for the commission of the offence.

B. Investigative techniques

44. The Operational-Search Activities Act of 12 August 1995 (no. 144-FZ) provided as follows at the material time:

Section 1: Operational-search activities

> "An operational-search activity is a form of overt or covert activity carried out by operational divisions of State agencies authorised by this Act (hereinafter 'agencies conducting operational-search activities') within the scope of their powers, with a view to protecting the life, health, rights and freedoms of individuals and citizens, or property, and protecting the public and the State against criminal offences."

Section 2: Aims of operational-search activities

"The aims of operational-search activities are:

– to detect, prevent, intercept and investigate criminal offences as well as searching for and identifying those responsible for planning or committing them;

..."

Section 5: Protection of human rights and citizens' freedoms during operational-search activities

"...

A person who considers that an agency conducting operational-search activities has acted in breach of his or her rights and freedoms may challenge the acts of that agency before a higher-ranking agency conducting operational-search activities, a prosecutor's office or a court.

..."

Section 6: Operational-search measures

"In carrying out investigations the following measures may be taken:

...

4. test purchase;

...

9. supervision of postal, telegraphic and other communications;

10. telephone interception;

11. collection of data from technical channels of communication;

12. operational infiltration;

13. controlled supply;

14. operational experiments.

...

Operational-search activities involving supervision of postal, telegraphic and other communications, telephone interception through [telecommunications companies], and the collection of data from technical channels of communication are to be carried out by technical means by the Federal Security Service, the agencies of the Interior Ministry and the regulatory agencies for drugs and psychotropic substances in accordance with decisions and agreements signed between the agencies involved.

...”

Section 7: Grounds for the performance of operational-search activities

“[Operational-search activities may be performed on the following grounds;] ...

1. pending criminal proceedings;

2. information obtained by the agencies conducting operational-search activities which:

(1) indicates that an offence is being planned or has already been committed, or points to persons who are planning or committing or have committed an offence, if there is insufficient evidence for a decision to institute criminal proceedings;

...”

Section 8: Conditions governing the performance of operational-search activities

“Operational-search activities involving interference with the constitutional right to privacy of postal, telegraphic and other communications transmitted by means of wire or mail services, or with the privacy of the home, may be conducted, subject to a judicial decision, following the receipt of information concerning:

1. the appearance that an offence has been committed or is ongoing, or a conspiracy to commit an offence whose investigation is mandatory;

2. persons who are conspiring to commit, or are committing or have committed an offence whose investigation is mandatory;

...

Test purchases ..., operational experiments, or infiltration by agents of the agencies conducting operational-search activities or individuals assisting them, shall be carried out pursuant to an order issued by the head of the agency conducting operational-search activities.

Operational experiments may be conducted only for the detection, prevention, interruption and investigation of a serious crime, or for the identification of persons who are planning or committing or have committed a serious crime.

...”

Section 9: Grounds and procedure for judicial authorisation of operational-search activities involving interference with the constitutional rights of individuals

“The examination of requests for the taking of measures involving interference with the constitutional right to privacy of correspondence and telephone, postal, telegraphic and other communications transmitted by means of wire or mail services, or with the right to privacy of the home, shall fall within the competence of a court at the place where the requested measure is to be carried out or at the place where the requesting

body is located. The request must be examined immediately by a single judge; the examination of the request may not be refused.

...

The judge examining the request shall decide whether to authorise measures involving interference with the above-mentioned constitutional right, or to refuse authorisation, indicating reasons.

..."

Section 10: Information and documentation in support of operational-search activities

"To pursue their aims as defined by this Act, agencies conducting operational-search activities may create and use databases and open operational registration files.

Operational registration files may be opened on the grounds set out in points 1 to 6 of section 7(1) of this Act ..."

Section 11: Use of information obtained through operational-search activities

"Information gathered as a result of operational-search activities may be used for the preparation and conduct of the investigation and court proceedings ... and used as evidence in criminal proceedings in accordance with legal provisions regulating the collection, evaluation and assessment of evidence. ..."

45. On 24 July 2007 section 5 of the Act was amended to prohibit agencies conducting operational-search activities from directly or indirectly inducing or inciting the commission of offences.

46. Article 125 of the Code of Criminal Procedure of the Russian Federation, in force from 1 July 2002, provided at the material time that orders of a preliminary interview officer, investigator or prosecutor that were capable of encroaching on the constitutional rights and freedoms of participants in criminal proceedings or obstructing their access to justice could be challenged before a court whose jurisdiction covered the place of the investigation. Subsequent changes in the Code added the head of the investigating authority to the list of officials whose acts could be challenged.

47. On 10 February 2009 the Plenary Supreme Court of the Russian Federation adopted guidelines (Ruling No. 1) on the practice of judicial examination of complaints under Article 125 of the Code of Criminal Procedure of the Russian Federation. The Plenary ruled, *inter alia*, that decisions of officials of agencies conducting operational-search activities must also be subject to judicial review under the provisions of Article 125 if the officials were acting pursuant to an order by an investigator or the head of the investigating or preliminary inquiry authority.

C. Evidence in criminal proceedings

48. The Code of Criminal Procedure provides, in so far as relevant:

Article 75: Inadmissible evidence

"1. Evidence obtained in breach of this Code shall be inadmissible. Inadmissible evidence shall have no legal force and cannot be relied on as grounds for criminal charges or for proving any of the [circumstances for which evidence is required in criminal proceedings].

..."

Article 235: Request to exclude evidence

"...

5. If a court decides to exclude evidence, that evidence shall have no legal force and cannot be relied on in a judgment or other judicial decision, or be examined or used during the trial.

49. Article 392 of the CCP contains a list of situations which may justify the reopening of a finalised case on account of newly discovered circumstances. A judgment of the European Court of Human Rights finding a violation of the European Convention on Human Rights in a case in respect of which an applicant lodged a complaint with the Court is considered to be a new circumstance warranting a reopening (Article 392 § 4 (4)).

III. COMPARATIVE LAW

50. The Court conducted a comparative study of the legislation of twenty-two member States of the Council of Europe (Austria, Belgium, Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Lithuania, "the former Yugoslav Republic of Macedonia", Poland, Portugal, Romania, Slovenia, Spain, Turkey and the United Kingdom) concerning the use of undercover agents in test purchases and similar covert operations.

51. The comparative study showed that in all of these countries it is possible for the police to carry out undercover operations, in particular in drug-trafficking cases, according to the procedure set out in the relevant laws and regulations. Only in Ireland is there no formal legislative or regulatory basis for the use of undercover police. A number of countries provide also for the involvement of private individuals and authorise resort to undercover agents only when the collection of evidence by other means is too complicated or impossible.

52. Research reveals that in most of the countries covered there is exclusive or shared responsibility of the judicial bodies in the authorisation procedure, although in some the decision lies with the public prosecutor, the administrative authorities or high-level police officials.

53. A judicial authorisation is required in Bulgaria (court), Croatia (investigating judge), Estonia (investigating judge), Greece (indictments chamber), Liechtenstein, Poland (regional court with prior agreement of the Prosecutor General), Slovenia (investigating judge), and Turkey (judge).

54. In Austria and Belgium the authority to sanction undercover operations lies exclusively with the public prosecutor.

55. A number of countries provide for the involvement of the prosecutor or the court, or both, depending, for example, on the type of operation or, more commonly, the stage of the proceedings.

56. In the Czech Republic, "*fictitious transfers*", which include test purchases, require authorisation by the public prosecutor, whereas the use of an undercover agent (in connection with particularly serious offences) can be authorised only by a High Court judge. Under German law, the use of undercover agents must be authorised by the public prosecutor, and additionally by a court if the operation targets a particular person or involves entry into private premises. In Romania also the authorisation is given by the public prosecutor, but video and audio recording during the operation requires prior authorisation by a judge.

57. In France, the authorisation is delivered by the public prosecutor at the preliminary inquiry stage, and by the investigating judge (*juge d'instruction*) during the pre-trial investigation. Lithuanian law, in a similar vein, requires the authorisation of a pre-trial judge during a pre-trial investigation, while at an earlier stage the authorisation of the prosecutor suffices. In "the former Yugoslav Republic of Macedonia" special investigative measures in the pre-investigation phase can be ordered either by the public prosecutor or by an investigating judge, but once an investigation has been opened the authorisation can be given only by the latter.

58. In Portugal, covert operations within the framework of the inquiry are subject to the prior authorisation of the competent member of the Public Prosecution, with mandatory communication to the investigating judge, and are deemed to be ratified if no order refusing permission is issued within 72 hours. If the operation is carried out in the framework of crime prevention, it falls within the competence of the investigation judge to give the required authorisation at the proposal of the prosecution authorities.

59. Spanish law also provides for notification of the investigating judge when authorisation for an undercover operation has been given by the public prosecutor. Such authorisation can also be issued directly by the judge.

60. In Italy there is no requirement for formal authorisation from the prosecutor or a court, but the appropriate authority must give prior notification of the start of the operation to the competent prosecutor. In drug cases, before undertaking an undercover operation, the Central Directorate for Drug Services or its regional or provincial offices need to inform the prosecutor in charge of the investigations, but they do not need their formal approval.

61. In a few countries, there is no involvement of a court or a prosecutor in the authorisation procedure. In Finland, the decision on undercover activities is taken by the Head of the National Bureau of Investigation or the Head of the Security Police, at the request of a regular police department. The decision-making bodies are separate from the services which carry out the operation.

62. In the United Kingdom undercover operations are subject to administrative rather than judicial authorisation. In the House of Lords decision in *R v. Loosely* [2001] Lord Mackay underlined that although the technique in the United Kingdom for authorising and supervising such practice was very different from the judicial supervision in continental countries, the purpose was the same, namely to remove the risk of extortion, corruption or abuse of power by policemen operating without proper supervision.

The public authorities entitled to authorise the use or conduct of a Covert Human Intelligence Source (CHIS) are laid out in law. Each public authority has its own separate authorising officer.

Authorising officers should not be responsible for authorising their own activities, that is, those in which they themselves are to act as the CHIS or as the handler of the CHIS. Furthermore, authorising officers should, where possible, be independent of the investigation. However, it is recognised that this is not always possible, especially in the case of small organisations, or where it is necessary to act urgently or for security reasons. Where an authorising officer authorises his own activity the central record of authorisations should highlight this and the attention of a Commissioner or Inspector should be drawn to it during his next inspection.

63. In Ireland similarly there is no judicial authorisation procedure. The police or other enforcement agencies both take and carry out all operational decisions concerning undercover operations.

IV. RELEVANT INTERNATIONAL LAW

A. The Council of Europe's instruments

64. The Council of Europe's instruments on the use of special investigative techniques are outlined in *Ramanauskas v. Lithuania* ([GC], no. 74420/01, §§ 35-37, ECHR 2008-...).

B. Resolutions of the Committee of Ministers

65. On 26 February 2001 the Committee of Ministers of the Council of Europe concluded the examination of the application no. 25829/94 in the case of *Teixeira de Castro v. Portugal* (9 June 1998, Reports of Judgments and Decisions 1998-IV) by adopting Resolution CM/ResDH(2001)12, which described the measures taken by the Government of Portugal to prevent future violations of Article 6 § 1 on account of the use by the police of undercover agents:

> "... in order to ensure that the use of undercover agents does not unduly interfere with the right to fair trial guaranteed by the European Convention on Human Rights, Article 59 of Legislative Decree No. 15/93 on the prevention of drug-trafficking has been amended by Act No. 45/1996 of 3 September 1996. According to the added paragraph 3 to Article 59, the use of such persons is subject to a court's approval, which has to be given within 5 days and for a specific period.
>
> The Government is of the opinion that, in view of the supra-legal status of the Convention, as interpreted by the European Court of Human Rights, in Portuguese law (Constitutional Court judgments Nos. 345/99 of 15 June 1999 and 533/99 of 12 October 1999), the Portuguese courts will exercise this supervision and adapt their interpretation of the Code of Criminal Procedure (in particular of Article 126) in such a way as to avoid new violations similar to that found in the Teixeira de Castro case.
>
> In order to facilitate this adaptation, the judgment of the European Court of Human Rights has been published in the Revista Portuguesa de Ciência Criminal (RPCC 10/2000) and also disseminated to the authorities concerned, including the police."

66. On 10 March 2011 the Committee of Ministers concluded the execution of the judgment in the case of *Pyrgiotakis v. Greece* (no. 15100/06, 21 February 2008), having adopted Resolution ResDH(2011)11 which read in so far as relevant:

> "The Court's findings have been endorsed in national case-law: it is held that, in conformity with Article 6 of the Convention, the conviction of an accused should not arise solely from the conduct of a police officer involved in the case (acting as agent provocateur), otherwise the requirements of a fair trial are not met (Court of Cassation 193/2009). Furthermore, this conviction should be based on additional, strong evidence, and not only on the testimony of the police officers involved. (Court of Cassation 100/2007, Corfu Court of Appeal 29/2007)."

67. On 2 December 2011 the Committee of Ministers concluded the execution of the judgments in the cases of in *Ramanauskas*, cited above, and *Malininas v. Lithuania* (no. 10071/04, 1 July 2008), having adopted Resolution CM/ResDH(2011)231, which described the measures taken by the Government of Lithuania to prevent future violations of Article 6 § 1 on account of the use by the police of undercover agents:

> "In order to prevent similar violations, the Supreme Court set out, in its decision of 16 December 2008, the general principles with regard to cases where the criminal conduct simulation model is employed.
>
> First, the Supreme Court stressed that the criminal conduct simulation model as an investigative technique may not be employed to incite the commission of an offence but may be applied only if credible and objective information had already been obtained to the effect that the criminal activity had been initiated.
>
> Secondly, state officials may not act as private persons to incite third parties to commit an offence, while the acts of private persons acting to incite third parties to commit an offence under the control and instructions of state officials shall constitute such incitement.
>
> Thirdly, it may be inferred that there is an act of incitement even if state officials do not act in a very intensive and pressing manner, including in situations when contact with third parties is made indirectly through mediators.
>
> Fourthly, the burden of proof in judicial proceedings lies with the state authorities, which have an obligation to refute any argument raised by a defendant in criminal proceedings in respect of the incitement by state agents to commit an offence.
>
> Fifthly, once the act of incitement is established, no evidence obtained through incitement shall be admissible. The confession of an offence as a result of incitement does not eradicate either incitement or its effects.
>
> Sixthly, it is preferred that undercover techniques are supervised by a court although supervision by a prosecutor does not in itself violate the Convention.
>
> This decision of the Supreme Court is binding upon all domestic courts. Thus, it provides a clear and foreseeable procedure in similar cases."

THE LAW

I. JOINDER OF APPLICATIONS

68. Given that the applications at hand concern similar complaints and raise identical issues under the Convention, the Court decides to join them pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

69. The applicants complained that they had been unfairly convicted of drug offences incited by the police and that their 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, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

70. The Government contested that argument. They claimed that the applicants had not exhausted domestic remedies because they had not challenged the alleged entrapment before the prosecutor's office or the courts.

71. The applicants disagreed, pointing out that they made a plea of entrapment in the first-instance hearing and before the court of appeal. They referred to extracts from the court records and copies of their points of appeal which contained the relevant arguments.

A. Admissibility

72. Having examined the documents referred to by the applicants, the Court finds that the court records and the points of appeal contain sufficiently clear and specific allegations that the offences at issue were the result of police incitement. Moreover, it is clear from these documents as well as from the respective judgments that these complaints were understood by the domestic courts as such, but were dismissed. Consequently, the Court concludes that the applicants' complaints were brought to the attention of the domestic courts competent to deal with them.

73. In so far as the Government may be understood as suggesting that, before or in addition to having raised the issue of incitement in court, the applicants were required to file the same complaints with the prosecutor's office, the Court considers that this was not necessary in order to comply with the rule of exhaustion of domestic remedies. It reiterates that an applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III). When a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef v. Malta* [GC], no. 17056/06, § 58, 15 October 2009). In the circumstances of the present case, the Court considers that the applicants have complied with the exhaustion requirement and that it has not been shown that a complaint to the prosecutor would have offered better prospects of success.

74. Accordingly, it dismisses the Government's objection as to non-exhaustion of domestic remedies

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

B. Merits

1. The parties' submissions

(a) The Government

76. The Government maintained that the test purchases conducted in all three cases were lawful and involved no entrapment by the police. They contended that in each case the police ordered the test purchases based on information from independent sources, namely the private individuals X, Y and Z, who had volunteered to expose the applicants' criminal activity. They considered that on this basis the present case should be distinguished from the cases of *Vanyan v. Russia* (no. 53203/99, 15 December 2005) and *Ramanauskas* (cited above).

77. In respect of Mr Druzhinin, the Government also contended that in addition to the above information from the private individual concerned, there had also been a report by an officer of the Federal Service for Drug Control referring to previous information that the applicant was selling drugs.

78. In any event, they claimed that one source of information was sufficient under domestic law for the conduct of a test purchase.

79. They further alleged that neither the police nor the buyers acting in the covert operations had put any pressure on the applicants to sell drugs during the test purchases.

80. The Government also stated that the formal requirements for a test purchase had been complied with in each case. They submitted that no judicial authorisation was required because the covert operations in question did not encroach on the applicants' constitutional right to privacy of their correspondence, telephone or other communications or their homes. It was therefore sufficient that the test purchases were ordered by a senior police officer. They further stated that the use of the results of the test purchase as evidence was lawful, subject to the regular rules of admissibility of evidence; it had been open to the applicants to challenge it before the court, *inter alia* on the grounds of entrapment.

81. Finally, the Government stated that the applicants had had their plea of entrapment examined by the domestic courts. All the materials relating to

the test purchase had been open to review by the parties to the proceedings and all the relevant witnesses had been cross-examined. The applicants' conviction for drug dealing was therefore fair and lawful.

(b) The applicants

82. The applicants claimed that the test purchases conducted in their cases did not pursue the purpose of investigating criminal offences because the police had had no good reason to suspect them of wishing to sell drugs. They pointed out that the authorities had not been in possession of any information suggesting their involvement in drug dealing or indicating any predisposition to commit drug offences.

83. For their part, the applicants maintained that before the test purchases they had never procured drugs and would not have done so had they not been lured by the police and their informants into doing so. Moreover, in the cases of Mr Veselov and Mr Druzhinin the persons who had informed on the applicants had later testified that they had not bought drugs from them before they exposed them as drug dealers, and were not aware if they had sold drugs to anyone else. Referring to the Government's argument specifically concerning his case, Mr Druzhinin argued that the police report they referred to did not contain any previous information that could have led them to suspect him of being a drug dealer.

84. In any event, all three applicants contested the Government's allegations that the police sources were private individuals unconnected with operational-search activities. They maintained that X, Y and Z were long-term police informants who would regularly act as buyers in test purchases of drugs. Mr Veselov supported his allegation with copies of judgments given in unrelated criminal cases where the same source had acted as a buyer in other test purchases. Mr Zolotukhin also claimed that the source in his case had collaborated with the police in other cases for at least six months before informing on him, and this had been confirmed in the first-instance hearing. Mr Druzhinin likewise contended that the source in his case was no ordinary private individual, but a police informant, a fact allegedly known to him from his previous training with the Federal Service for Drug Control.

85. The applicants further claimed that the investigating authorities had not acted in an essentially passive manner. They had taken no steps to verify the collaborators' information, but had limited the investigation to only one measure: the test purchase. They claimed that the authorities had taken the initiative to contact them and persuade them, through the informants, to find drugs. They alleged that the buyers had pestered them incessantly, and they had succumbed to their insistence on the understanding that they would only do it once, exceptionally.

86. Furthermore, they claimed that the lack of formal requirements for the authorisation of test purchases and the fact that they were poorly

documented had made it impossible for them to demonstrate, or for the domestic courts to review, the reasons for the test purchase, or the manner in which the police and their informants had acted.

87. Finally, the applicants pointed out that the courts had not properly examined their allegations that the offences they were charged with had been instigated by the police. In sum, they considered that the whole criminal proceedings in their cases were based on entrapment and concerned offences that would never have been committed were it not for the police incitement.

2. The Court's assessment

(a) General principles

88. General principles relating to the guarantees of a fair trial in the context of undercover investigative techniques used to combat drug trafficking and corruption are set out in the Court's extensive case-law summarised in the case of *Bannikova v. Russia* (no. 18757/06, §§ 33-65, 4 November 2010). Those directly applicable in the instant cases are reiterated below.

89. While the Court accepts the use of undercover agents as a legitimate investigative technique for combating serious crimes, it requires that adequate safeguards against abuse be provided for, as the public interest cannot justify the use of evidence obtained as a result of police incitement (see *Teixeira de Castro*, cited above, §§ 34-36). More particularly, the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (see *Khudobin v. Russia*, no. 59696/00, § 135, 26 October 2006, and *Ramanauskas*, cited above, § 53).

90. In cases where the main evidence originates from a covert operation, such as a test purchase of drugs, the authorities must be able to demonstrate that they had good reasons for mounting the covert operation. In particular, they should be in possession of concrete and objective evidence showing that initial steps have been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted (see *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI; *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII; *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV; *Ramanauskas*, cited above, §§ 63 and 64, and *Malininas*, cited above, § 36). The Court has specified that any

information relied on by the authorities must be verifiable (see *Vanyan*, cited above, § 49, and *Khudobin*, cited above, § 134).

91. Where the authorities claim that they acted upon information received from a private individual, the Court draws a distinction between an individual complaint and information coming from the police collaborator or informant (see *Sequeira* and *Shannon*, both cited above; *Milinienė v. Lithuania*, no. 74355/01, §§ 37-38, 24 June 2008; *Malininas*, cited above, § 37, and *Gorgievski v. "the former Yugoslav Republic of Macedonia"*, no. 18002/02, §§ 52 and 53, 16 July 2009). The latter would run a significant risk of extending their role to that of *agents provocateurs*, in possible breach of Article 6 § 1 of the Convention, if they were to take part in a police-controlled operation. It is therefore crucial in each case to establish if the criminal act was already under way at the time when the source began collaboration with the police (see *Sequeira* and *Eurofinacom*, both cited above).

92. Furthermore, any covert operation must comply with the requirement that the investigation be conducted in an essentially passive manner. This rules out, in particular, any conduct that may be interpreted as pressure being put on the applicant to commit the offence, such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms (see, among other cases, *Ramanauskas*, cited above, § 67; *Vanyan*, cited above, §§ 11 and 49, and *Malininas*, cited above, § 37).

93. The Court has found that the line between legitimate infiltration by an undercover agent and instigation of a crime was more likely to be crossed if no clear and foreseeable procedure was set up by the domestic law for authorising undercover operations; all the more so if their proper supervision was also missing. In cases against Russia the Court has found, in particular, that neither the Operational-Search Activities Act nor other instruments provided for sufficient safeguards in relation to test purchases, and stated the need for their judicial or other independent authorisation and supervision (see *Vanyan*, cited above, §§ 46 and 47; *Khudobin*, cited above, § 135; and *Bannikova*, cited above, §§ 49-50).

94. Finally, the Court has emphasised the role of domestic courts dealing with criminal cases where the accused alleges that he was incited to commit an offence. Any arguable plea of incitement places the courts under an obligation to examine it in a manner compatible with the right to a fair hearing. The procedure to be followed must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement (see *Ramanauskas*, cited above, § 70). The scope of the judicial review must include the reasons why the covert operation was mounted, the extent of the police's involvement in the offence and the nature of any incitement or

pressure to which the applicant was subjected (*ibid*, § 71). As regards Russia, in particular, the Court has found that the domestic courts had capacity to examine such pleas, in particular under the procedure for the exclusion of evidence (see *Khudobin*, cited above, §§ 133-135).

(b) Application of these principles to the present case

95. Before proceeding to examine the individual circumstances of the three applicants, the Court will outline the general considerations that apply to all of them. It observes that in contesting the fairness of the criminal proceedings the applicants alleged that the test purchases in their cases had been ordered arbitrarily, in the absence of prior information about any criminal activity on their part, and that the authorities had carried out the investigation in a manner that was not "essentially passive". They all alleged that the police sources in their cases were police informants, not independent individuals. They also complained of the lack of a regulatory framework providing for safeguards in the conduct of covert operations, and argued that the domestic courts had failed to properly examine their pleas of entrapment.

96. The central issue in this case is therefore the manner in which the authorities conducted the test purchases. The Court observes that although the background and the circumstances of the three covert operations varied, they shared a number of common features. In particular, they were ordered solely on the basis of an allegedly voluntary contribution of information by a private source who subsequently acted in the test purchase as a buyer. In each case, the source had an established identity and testified at the trial. No other, undisclosed, information had played any role in the domestic decision-making or judicial assessment. The circumstances of the ensuing transactions concluded between the applicants and the undercover agents were sufficiently established and largely undisputed between the parties. Accordingly, the Court will be able to examine the applicants' complaint of incitement having access to the same material as the domestic authorities. In view of the nature of the complaints and the underlying facts, the Court will examine whether the applicants were subjected to police entrapment, which is primarily the question under the substantive test of incitement (see *Bannikova*, cited above, §§ 37-50), although the subsequent judicial review will also be taken into account.

97. The Court will therefore proceed to assess the authorities' conduct in each of the three test purchases.

(i) Test purchase in the case of Mr Veselov

98. According to the domestic authorities this test purchase was ordered after a volunteer reported the applicant's criminal activity. The Government presented it as though the matter was brought to the attention of the police by an independent source, a private individual X. The applicant contested

that explanation and claimed that X had been working as an informant for the police, and that he had previously participated in other test purchases, at least four of which had resulted in criminal convictions.

99. The parties agreed, and it also appears from the domestic decisions that the police had possessed no information about the applicant before X reported him to them on 19 May 2009. Moreover, according to X's testimony, he had never bought drugs from the applicant, except during the test purchase. The Government nevertheless considered that the information supplied by X gave the police sufficient grounds for ordering a test purchase, and did not question the reasonableness of organising one immediately.

100. The Court observes the documentary evidence submitted by the applicant, which confirms X's involvement in unrelated test purchases carried out by the police, and finds that it convincingly demonstrates X's long-term collaboration with the investigating authorities.

101. It considers that X's status as a police informant sets this case apart from situations when the police are merely informed by a private individual - crucially, not a police collaborator or informant – about a criminal act that has already been initiated. Examples of such situations may be found in the cases of *Shannon* (cited above), where the police received a complete file documenting a drug sale made by the applicant, and *Milinienė* (cited above), where the authorities received an individual complaint that the applicant had requested a bribe. In both cases the police were acting under an obligation to verify criminal complaints about offences that had already been under way. The Court has considered that in such cases the use of the investigative techniques in question was not associated with the risk that a criminal offence would be instigated by the police, provided that firm procedural safeguards were in place.

102. When it comes to reports by police collaborators and informants, different considerations apply. The Court has required that clear distinction be made between their use as sources and their involvement in police-controlled covert operations. It has consistently stressed that their role must remain strictly passive so as not to incite the commission of an offence, which is hard to achieve if the test purchase is conducted by an informer acting as a buyer (as in the case of *Khudobin*, cited above, § 134). A test purchase performed by an undercover officer or informer must therefore call for a particularly strong justification, subject to a stringent authorisation procedure and a requirement that it should be documented in a way allowing for a subsequent independent scrutiny of the actors' conduct.

103. As regards the authorisation procedure, the Court notes that the Russian domestic framework for authorising and supervising test purchases was found deficient in the cases of *Vanyan* (cited above, §§ 46 and 47) and *Khudobin* (cited above, § 135), and observes that it has not evolved since. While entrapment was expressly outlawed by the 2007 amendments (see

paragraph 44 above), no legislative or regulatory instruments give a definition or interpretation of the term, or any practical guidance as to how to avoid it.

104. Like in the aforementioned cases, the test purchase in respect of the applicant was ordered by a simple administrative decision of the body which later carried out the operation; the decision contained very little information as to the reasons for and purposes of the planned test purchase, and the operation was not subjected to judicial review or any other independent supervision. There was no need to justify the decision and virtually no formalities to follow.

105. The Court observes that similar investigative activities are subject to strict regulations in other Member States. The majority of justice systems require authorisation of test purchases and similar covert operations by a judge or a public prosecutor. In the few countries where there is no involvement of a court or a prosecutor in the authorisation procedure the decision-making bodies are still separate from the services which carry out the operation. The police are generally required to justify the need for such a measure before the decision-making body (see paragraph 50 et seq. above).

106. It follows that the Russian system, where test purchases and operative experiments fall entirely within the competence of the operational-search bodies, is out of line with the practice adopted by most Member States. The Court considers that this shortcoming reveals a structural failure to provide for safeguards against police provocation.

107. Turning back to the facts of the present case, the Court will examine whether, despite the lack of systemic safeguards, the police respected X's status as an informant and ensured that his conduct did not overstep the limits between legitimate infiltration and instigating an offence.

108. It observes that the police proceeded with the test purchase immediately after X's first report concerning the applicant and without any attempt to verify that information or to consider other means of investigating the applicant's alleged criminal activity. By contrast, in the case of *Bannikova* (cited above, § 69), the test purchase was preceded by a number of investigative steps, most notably telephone tapping authorised by a court, which secured tangible evidence of the applicant's pre-existing intent to sell cannabis. That evidence was then available for examination in open court, and it was given weight in the Court's assessment of the covert operation in question (ibid.). In the present case it considers that the police did not make up for the lack of procedural guarantees, but rather took unfair advantage of it.

109. The Court reiterates in this connection that the burden of proof is on the authorities to show that there was no incitement, but in practice they may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (see

Ramanauskas, cited above, § 70; *Teixeira de Castro*, cited above, § 38; and *Bannikova*, cited above, § 48).

110. In this case, this burden could not be discharged because the conduct of the police in the undercover operation was overlooked by the domestic authorities, and the file contains insufficient information for the Court to rule on it. It notes, in particular, the fact, established in the domestic proceedings, that the applicant had communicated with X through an intermediary, "Ruslan". Despite his role in the covert operation, this person was not questioned in the proceedings against the applicant, apparently because of the authorities' failure to establish his identity. Accordingly, an important element was missing from the domestic assessment of the alleged provocation. Moreover, the content of "Ruslan's" telephone conversations with X was not accounted for, as they were not recorded. Likewise, the conversations between the actors in the transaction that were intercepted by the police during the test purchase were not recorded or otherwise reported. The Court does not overlook the need for such recordings to be authorised by a court; yet it does not appear from the case file that the timing of the test purchase was too tight, or that there existed other obstacles to obtaining such authorisation, and the evidence thus obtained would have had high probative value for the assessment of any pre-existing intent on the part of the applicant to commit a criminal offence.

111. The Court considers that the informal and spontaneous way in which the test purchase was ordered and implemented in the present case was attributable, in particular, to the aforementioned absence of adequate regulation of such covert operations. On the one hand, the legislator's failure to impose conditions on the use of this type of operational-search measure left this technique open to abuse. And on the other hand, it prevented the authorities from subsequently discharging their burden of proof that their conduct remained strictly passive. In view of the fact that X had previously been a police informant, and the lack of any evidence as to the manner of his encounters with the applicant, the Court will presume that police incitement did indeed take place.

112. Lastly, the Court notes that the domestic courts expressly refused to enter into the merits of the applicant's plea of entrapment, in particular when the first-instance court rejected the evidence of X's previous involvement in test purchases and disallowed questions relating to his alleged drug addiction and his criminal record as a drug dealer. Nor did the appeal instance address the applicant's plea of provocation at all, despite his detailed and specific submissions in his points of appeal. It follows that the applicant's plea of incitement was not adequately addressed by the domestic courts.

113. In the light of the foregoing considerations, the Court concludes that the aggregate of these elements undermined the fairness of the applicant's trial.

(ii) Test purchase in the case of Mr Zolotukhin

114. The Court observes at the outset that this test purchase, like the one examined above, was ordered on the sole basis that Ms Y, allegedly a private individual, voluntarily informed the police about the applicant's criminal activity. As in the above case, the representation of Y as an independent source proved to be untrue. It transpired at the trial that she had been working as an informant for the police officer who conducted the test purchase in the applicant's case, and that she had previously participated in other test purchases.

115. The Court further notes that Y, unlike X, contended that she had previously bought heroin from the applicant, and therefore accepts that the police had grounds to suspect the applicant of drug dealing. However, it reiterates the distinction to be made between private sources and police informants (see paragraphs 101-102 above) and considers that the same principles apply here. Given Y's status as an informant, for her to be involved in the undercover activity the condition remained that her participation should be essentially passive.

116. The Court will therefore turn to the question whether the manner of her encounters with the applicant were capable of inciting him to commit a criminal offence. This question, as in Mr Veselov's case, cannot be answered, for the Court does not find sufficient material in the case file to assess her conduct. It observes that no trace was kept of the initial phase of the operation when Y called the applicant, under the instructions and in the presence of the police, and asked him to sell her drugs. Despite the fact that this telephone call was already a part of the test purchase, it was not recorded by any means, making it impossible to verify whether at this point the applicant volunteered his services freely or otherwise showed a pre-existing intent to commit a crime. It also notes that the police went ahead with the test purchase immediately after Y's first report concerning the applicant and without any attempt to verify the information or to consider other means of investigating the applicant's alleged criminal activity.

117. It considers that the above shortcomings were a result of the lack of a regulatory framework providing for safeguards in the conduct of covert operations, just as in Mr Veselov's case (see paragraphs 104-106 above), and that this prevented the authorities from discharging their burden of proof regarding the "essentially passive" manner of the investigation. Like in the above case, in view of Y's status as a police informant, combined with the lack of reported information on the manner of her encounters with

the applicant, it may not be ruled out that Mr Zolotukhin committed a criminal offence as a result of police incitement.

118. The Court observes, next, that throughout the judicial proceedings the applicant maintained that he had been incited to commit a criminal offence. Accordingly, the domestic courts were under an obligation to examine the plea of entrapment, including, in particular, 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 (see *Ramanauskas*, cited above, § 71). The Court notes, however, that these questions received only marginal attention from the first-instance court, and were not addressed at all on appeal, despite having been raised in the applicant's points of appeal. It follows that the applicant's plea of incitement was not adequately addressed by the domestic courts.

119. In the light of the foregoing considerations, the Court concludes that the aggregate of these elements undermined the fairness of the applicant's trial.

(iii) Test purchase in the case of Mr Druzhinin

120. The Court notes that this applicant, like the other two, alleged that the buyer in his test purchase, Ms Z, was also a police informant. However, unlike the applicants in the above two cases, he was unable to substantiate that allegation. The Court will therefore assume that that in his case the investigating authorities perceived Z as a private source.

121. The Court further notes that Z never claimed to have bought drugs from the applicant prior to the test purchase, and that she said so at the trial. Furthermore, she stated that as far as she knew he was not selling drugs to anyone else and that she was positive he was not producing them. What she did say to the police was that she could almost certainly make him obtain drugs for her. The Court also observes that the police admitted that they had had no other information about the applicant prior to that volunteered by Z.

122. The Government suggested that the police had been in possession of other prior information incriminating the applicant, allegedly mentioned in a report by an officer of the Federal Service for Drug Control, dated 4 September 2008. The Court, however, agrees with the applicant that the report in question referred to the information supplied by Z, and this is how the domestic courts interpreted it. The Court therefore cannot accept that the test purchase was ordered on any grounds other than Z's affirmations. It follows that the investigating authorities had no good reason to suspect the applicant of drug dealing; the file reveals that they ordered the test purchase while fully aware that it might be the first time the applicant had sold drugs.

123. The Court considers that the above decision cannot be described as anything other than arbitrary, and sees it as a direct result of the lack of a regulatory framework providing for safeguards in the conduct of covert operations (see paragraphs 104-106 above). Just like the two test purchases

examined above, this one was ordered by a simple administrative decision of the same body that carried it out. Similarly, no track was kept of the initial phase of the operation, when Z called the applicant, under the instructions and in the presence of the police, and asked him to sell her the drugs, or of their ensuing telephone communications. The result of this omission was the same as in the other two cases, that is, the authorities were left unable to prove the applicant's pre-existing intent to commit a crime.

124. As regards the judicial review of the applicant's plea of incitement, the Court notes that the first-instance court implicitly rejected the plea without making any assessment or indicating its conclusions on the issue. The appeal court limited its review on this point to a statement that Z had previously bought drugs from the applicant, which demonstrated his pre-existing intent. That finding, however, contradicted Z's own testimony at first instance, and it did not follow from any other evidence examined by the first-instance or the appellate court. The Court therefore concludes that the domestic courts failed to take the necessary steps to determine whether there was any incitement, despite their obligation to do so under Article 6 of the Convention.

125. The Court finds that all these factors irreversibly undermined the fairness of the criminal proceedings against this applicant.

(iv) Summary of the Court's findings

126. The Court has found above that the applicants' criminal conviction for drug offences was based primarily on the results of the police-controlled test purchases. In none of these cases did the police consider other investigative steps to verify the suspicion that the applicants were drug dealers. With such a strong emphasis on the results of the covert operations and their importance for the outcome of the criminal proceedings, it was incumbent on the domestic authorities to ensure that the manner in which the test purchases were ordered and conducted excluded the possibility of abuse of power, in particular of entrapment. However, the Court found that the accountability of the police for their officers' and informants' conduct could not be established, largely because of a systemic failure, namely the absence of a clear and foreseeable procedure for authorising test purchases. It reiterated its case-law to the effect that the authorisation of a test purchase by a simple administrative decision of the same body as the one which conducts the operation, without any independent supervision, with no need to justify the operation and virtually no formalities to follow, is in principle inadequate (see paragraphs 103, 106, 117 and 123 above). Having compared this system with practices adopted in other Member States, the Court found that in most other countries the conduct of a test purchase and similar covert operations is subject to a number of procedural restrictions (see paragraphs 105-106 above). In Russia, by contrast, the operational-search bodies of the

State are entrusted with an intrusive investigative technique which apparently affords no structural safeguards against abuse.

127. In the circumstances of the present cases, it was precisely the deficient procedure for authorising the test purchase that exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them. The domestic courts, for their part, failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants vis-à-vis the applicants.

128. In the light of the foregoing the Court considers that the criminal proceedings against all three applicants were incompatible with the notion of a fair trial. There has accordingly been a violation of Article 6 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

129. Lastly, Mr Zolotukhin complained about the alleged lack of legal assistance and the alleged lack of an opportunity to examine certain witnesses. He relied on Articles 3, 4, 5 and 6 of the Convention. The Court has examined these complaints as submitted by the applicant. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

131. Mr Veselov claimed 50,000 euros (EUR) in respect of non-pecuniary damage. Mr Zolotukhin requested compensation for non-pecuniary damage in an amount to be determined by the Court. Mr Druzhinin claimed EUR 128,000 in respect of non-pecuniary damage, plus EUR 73,200 in respect of pecuniary damage for loss of wages over five years' imprisonment, calculated on the basis of the monthly salary of

EUR 1,000 that he would have earned had he not been convicted of a crime set up by the police.

132. The Government considered that the acknowledgment of a violation, if found by the Court, would constitute sufficient just satisfaction in the present case. They contested the claims by Mr Veselov and Mr Druzhinin as excessive and out of line with the awards made by the Court in similar cases.

133. The Court considers that an award of just satisfaction must be based in the present case on the fact that the applicants did not have a fair trial on account of their criminal conviction for drug offences instigated by the police in violation of Article 6 of the Convention. They undeniably sustained non-pecuniary damage as a result of the violation of their rights. However, the sums claimed by Mr Veselov and Mr Druzhinin appear to be excessive. Making its assessment on an equitable basis, the Court awards the three applicants EUR 3,000 each in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

134. Furthermore, the Court refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see*, mutatis mutandis, Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Malininas* cited above, § 43; and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). The Court notes in this connection that Article 413 of the Russian Code of Criminal Procedure and Article 392 of the Russian Code of Civil Procedure provide the basis for the reopening of the proceedings if the Court finds a violation of the Convention (see paragraph 49 above).

135. As regards the pecuniary damage claimed by Mr Druzhinin, the Court would like to stress that the award of damages in this case relates to the manner in which the proceedings were conducted, and there is no link between that manner and the pecuniary damage claimed.

136. No conclusions about the applicants' guilt or innocence may be drawn from the finding of a violation. These are matters to be assessed in the re-opened domestic proceedings. The Court notes that in case of an acquittal in the re-opened proceedings they may claim compensation for pecuniary and non-pecuniary damage suffered in account of their conviction, and the domestic courts would then be in the best position to deal with such claims.

B. Costs and expenses

1. Mr Veselov

137. The applicant claimed 35,000 Russian roubles (RUB) for costs and expenses incurred before the domestic courts and RUB 120,000 for those incurred before the Court, comprising RUB 60,000 in lawyer's fees relating to the submission of the application to the Court and RUB 60,000 for the filing of the reply to the Government's observations. He included receipts confirming these payments.

138. The Government replied that they saw no grounds to award the applicant compensation for fees incurred in the domestic proceedings, and contested the claim relating to the proceedings before the Court on the grounds that the applicant did not state the hourly rates of his counsel.

139. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court grants Mr Veselov's claims in full and awards the applicant EUR 4,000 covering costs under all heads.

2. Mr Zolotukhin

140. The applicant explained that he could not specify or substantiate his claims under this head, having lost the supporting documents.

141. The Government made no comment.

142. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court will not make any award to Mr Zolotukhin under this head.

3. Mr Druzhinin

143. The applicant claimed RUB 100,000 for costs and expenses incurred before the Court. He presented a copy of his service agreement with the lawyer, Mr. Tuchin, which contained a breakdown of the fees payable for the submission of the initial application (RUB 10,000), for the full statement of facts and complaints (RUB 26,000), for the reply to the Government's observations (RUB 60,000) and for correspondence with the Court (RUB 4,000).

144. The Government contested this claim on the grounds that the applicant did not state the hourly rates of his counsel.

145. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court grants Mr Druzhinin's claims in full and awards the applicant EUR 2,600 covering costs under all heads.

C. Default interest

146. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the complaints concerning the applicants' conviction for criminal offences that were incited by the police admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect to all three applicants;

4. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into Russian roubles at the rate applicable at the date of settlement:
      (i) to each applicant EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) to Mr Veselov EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
      (iii) to Mr Druzhinin EUR 2,600 (two thousand six hundred 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 amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President