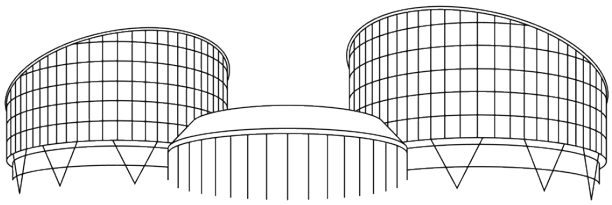

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 12025/02
Yevgeniy Yevgenyevich TRIFONTSOV
against Russia

The European Court of Human Rights (First Section), sitting on 9 October 2012 as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 25 June 2001,

Having regard to the partial decision on admissibility of 8 June 2006,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Yevgeniy Yevgenyevich Trifontsov, is a Russian national who was born in 1963 and lives in Kaliningrad. He was represented before the Court by Mr V. Filatyev and Mr S. Baranov, lawyers practising in Kaliningrad.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, the former Representative of the Russian Federation at the

European Court of Human Rights, and then by Mr G. Matyushkin, their Representative at the European Court of Human Rights. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The parties' description of the events of December 1999-15 January 2000

3. At the relevant time the applicant was working as a police investigator. He was in charge of a criminal case against N.K., a student suspected of illegal possession of drugs. The case against N.K. was opened on 23 November 1999.

4. According to the official account of events, in December 1999-January 2000 the applicant repeatedly contacted N.K.'s parents offering to close the case against their son in exchange for payment of a certain sum of money. The applicant's father, V.K., tentatively agreed. However, some time later V.K., having discussed the matter with his wife, decided to report the applicant and secretly recorded their conversations on several audiotapes. On 28 December 1999 V.K. informed the Internal Security Service (hereinafter the "ISS") of the offer he had received from the applicant. He gave them the audiotapes at a later date. It is unclear when those recordings were made and what they contained.

5. The applicant claimed that he had been incited by V.K. to take the money. He also maintained that V.K. had been acting on ISS orders, and that the ISS had instructed V.K. to make him accept the deal and to secretly record their conversations.

6. The ISS's first official record of V.K.'s statement reporting the applicant was dated 15 January 2000. To the extent that V.K.'s statement is legible (the record of his questioning is hand-written), it can be summarised as follows. According to V.K., in December 1999 the applicant solicited a bribe from N.K.'s mother. In January 2000 the applicant made a similar approach to V.K. The applicant allegedly asked for 5,000 US dollars (US$), which were supposed to go to a supervising prosecutor. V.K. claimed that he had taped some of his conversations with the applicant on his own initiative.

7. On the same date, the ISS conducted a covert operation targeting the applicant. They equipped V.K. with a radio-transmitting device connected to a tape-recorder and instructed him to record his conversation with the applicant. They also gave V.K. money to be handed over to the applicant, and recorded the serial numbers of the banknotes in a document, signed by two attesting witnesses – soldiers from a nearby military base.

8. Again on 15 January 2000 V.K. called the applicant, who told V.K. that they should meet at the regional Prosecutor's Office. They met there at about noon and discussed the deal. Their conversation was recorded by the ISS through the radio transmitter. In the course of the conversation, the

applicant reproached V.K. for having brought only US$ 2,500, namely half the amount agreed earlier. V.K. replied that he would bring the remaining half later. The applicant also asked V.K. whether he had told anybody about their deal. V.K. replied in the negative. The applicant then asked V.K. to leave the money on a table, in a plastic bag. When V.K. had done so, the applicant gave him an official note signed by the applicant and confirming that the case against N.K. had been closed.

9. As soon as the applicant left the building, V.K. contacted the ISS officers, who were waiting nearby and informed them that the money had been handed over. The ISS officers immediately apprehended the applicant, but found that he was not in possession of the money. They then searched the premises where V.K. had met the applicant and found the money in a plastic bag, hidden in the corridor. The serial numbers on the banknotes found there corresponded to those on the banknotes received by V.K. from the ISS. The ISS officers drew up a report of the search of the place of the incident, which was attested by the same two witnesses. The applicant was questioned and arrested. The case was then transferred to the regional Prosecutor's Office, and on 18 January 2000 the applicant was formally charged with taking a bribe. Material obtained by the ISS during the covert operation was declassified and attached to the criminal case file. On 16 May 2000 the prosecution sent the case with a bill of indictment to the Kaliningrad Regional Court.

B. The applicant's trial and conviction

10. In the course of the trial the applicant pleaded not guilty and alleged that it was V.K. who had offered him money. The applicant did not deny that he had agreed to take the money but claimed that his real intention had been to report V.K. as a briber. He had arranged for the meeting to take place at the Prosecutor's Office in order to report him to his friends who worked there. The applicant also claimed that the tape recorded on 15 January 2000 and the search report should not have been admitted in evidence.

11. The prosecution insisted that the applicant had extorted money from V.K. In support, they produced the report of "the search of the place of the incident" (namely the corridor where the money had been discovered in a plastic bag). They also produced the report of an expert examination of the fingerprints on the plastic bag, according to which the fingerprints belonged to the applicant. A record of the conversation of 15 January 2000 between the applicant and V.K. was also presented to the court. Finally, the prosecution submitted the official note signed by the applicant certifying that the case against N.K. was closed..

12. The court heard several witnesses. V.K. testified that the applicant had offered to discontinue the proceedings against his son in exchange for a

sum of money. His testimony was corroborated by N.K., who testified that in 1999 his father had told him about the offer made by the applicant. Another witness, V.K.'s wife, stated that she had known about the deal and had persuaded her husband to inform the ISS about it. The court also examined the ISS officers involved in the operation. They confirmed that V.K. had informed them about the offer made by the applicant. The applicant's immediate superiors and colleagues were also examined. They claimed that the applicant had never told them that V.K. had offered him money to close the criminal case against N.K.

13. The court also examined the record of the applicant's first questioning and noted that the applicant had not referred to "incitement" when questioned. The court also heard the two attesting witnesses who had been present on 15 January 2000 during the preparation of the covert operation and during the search of the premises of the regional Prosecutor's Office. They confirmed the accuracy of the reports drawn up by the ISS.

14. Finally, the court listened to the tape recording made secretly during the meeting between V.K. and the applicant on 15 January 2000, examined the transcript of the tape and studied the official note concerning the closure of the criminal case against N.K.

15. On 13 July 2000 the Kaliningrad Regional Court found the applicant guilty of taking a bribe and sentenced him to four years' imprisonment.

16. The applicant appealed. He maintained that ISS officers had framed him. He submitted that the ISS should have first obtained V.K.'s written statement, then opened an inquiry or instituted criminal proceedings, but that none of that had been done. The applicant also contested the admissibility and authencity of the tape recording of his conversation with V.K.. He also contested the admissibility of the search report . He submitted that those pieces of evidence had been obtained in breach of the law. Furthermore, the applicant challenged the veracity and consistency of statements of the witnesses who had testified against him.

17. On 28 December 2000 the Supreme Court of the Russian Federation upheld the decision of the Kaliningrad Regional Court and confirmed the findings of the first-instance court as to the facts of the case. It also noted that the operation that had led to the applicant's arrest had been carried out in conformity with the applicable legislation. The material obtained by the ISS had been duly incorporated in the body of evidence. Furthermore, in accordance with criminal procedure rules, the ISS had the right to search premises without waiting for an investigator from the Prosecutor's Office.

C. Relevant domestic law

18. For relevant provisions of the Operational-Search Activities Act of 1995, as in force at the material time, see *Bykov v. Russia* [GC], no. 4378/02, § 56, 10 March 2009.

COMPLAINT

19. The applicant complained under Article 6 § 1 that he had been convicted on the basis of unlawfully obtained evidence and that the case against him had been fabricated.

THE LAW

20. The applicant's complaint is two-fold. First, he claimed that the court should not have used as evidence material obtained in the course of the covert operation of 15 January 2000. He relied on Article 6 § 1 in this respect, which, insofar as relevant, reads as follows:

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

21. The Government argued that material obtained by the ISS on 15 January 2000 had been admissible evidence and had therefore been validly used in the criminal proceedings against the applicant. The audiotapes and the search report had been obtained and processed in accordance with the law and duly attached to the criminal case file. They had not contained irregularities that had made them unreliable. In addition, if the applicant had considered that the covert operation had violated his rights, he could have lodged a separate complaint in that respect, which he had failed to do.

22. The applicant maintained his complaint. He claimed that material obtained in the course of the covert operation had been unreliable and should not have been used as evidence against him. The ISS had kept tape recordings of his conversations with V.K. for more than three weeks before sending them to the prosecutor. One of the ISS officers had entered the premises shortly before the start of the search. The attesting witnesses had been soldiers from a nearby military base belonging to the Federal Security Service. The applicant also claimed that he had complained of those discrepancies at his trial, so there had been no need for him to initiate separate court proceedings in that respect.

23. The Court points out that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence may be admissible or, indeed, whether the applicant was guilty or not (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V).

24. Turning to the present case, the Court notes that the material in question (the tape recordings made by the ISS on 15 January 2000 and the search report) was not the only evidence against the applicant. The domestic courts also relied on the testimony of V.K., who was a direct witness of the incident, several ISS officers involved in the operation, and, to a certain extent, on the testimony of the applicant himself, who admitted at least some of the facts on which the charge was based. In addition, the court relied on circumstantial evidence that supported the prosecution's account.

25. It should also be noted that the applicant had ample opportunity to contest the admissibility and reliability of that evidence before courts at two levels of jurisdiction, and that his arguments in this respect were properly addressed by the court of appeal. Even if the covert operation of 15 January 2000 that led to the applicant's arrest and conviction was affected by some procedural defects from the standpoint of domestic law, nothing suggests that they were of such an extent and character as to make the applicant's conviction "unfair" within the meaning of Article 6 § 1 of the Convention. The domestic courts are, in principle, better placed to judge the reliability of witnesses and the accuracy of investigation reports, as well as their formal compliance with domestic law. In these circumstances, the Court sees no reason to challenge the domestic courts' decision to admit in evidence material obtained as a result of the covert operation. Therefore, there is no need to address the Government's non-exhaustion plea. 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.

26. Secondly, the applicant may be understood to be claiming that he was convicted as a result of police incitement, in violation of Article 6 § 1, cited above.

27. The Government maintained that the applicant's conviction had not resulted from "incitement", as V.K. had not been an ISS informant. The Government admitted that V.K. had first approached the ISS on 28 December 1999, but had done so on his own initiative and after the applicant had solicited a bribe. Although some of the evidence against the applicant had been obtained from the covert operation, such a method of investigation had been necessary in order to verify the information received from V.K. The ISS's participation in the operation had not gone beyond mere surveillance; they had not interfered in the meeting between V.K. and the applicant in any manner. The Government also stressed that the applicant's conviction had been based on other evidence as well.

28. The applicant argued that V.K. had been an *agent provocateur* acting on the instructions of the ISS. He maintained that he had agreed to take the money because V.K. had virtually harassed him with demands to drop the criminal charges against N.K. Although V.K. had approached the ISS on 28 December 1999, his statement had not been officially recorded until 15 January 2000. Between 28 December 1999 and 15 January 2000 V.K.

had made several tape recordings that had not been examined by the court. V.K. had been interested in getting the applicant prosecuted, so his testimony should not have been trusted.

29. While the Court accepts the use of undercover agents as a legitimate investigative technique for combating serious crimes, it requires the provision of adequate safeguards against abuse, as the public interest cannot justify the use of evidence obtained as a result of police incitement (see *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-36, *Reports of Judgments and Decisions* 1998-IV).

30. In cases where the main evidence originates from a covert operation, the authorities must be able to demonstrate that they had good reasons for mounting the covert operation and for targeting a particular person. In particular, they should be in possession of concrete and objective evidence showing that the applicant had taken initial steps to commit the acts constituting the offence for which he was 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 v. Lithuania* [GC], no. 74420/01, §§ 63 and 64, ECHR 2008; and *Malininas v. Lithuania*, no. 10071/04, § 36, 1 July 2008).

31. In several cases against Russia, the Court has found that applicable domestic law did not provide for sufficient safeguards in relation to test purchases of drugs, and has stated the need for their judicial or other independent authorisation and supervision (see *Vanyan v. Russia*, no. 53203/99, §§ 46-49, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII (extracts); and *Bannikova v. Russia*, no. 18757/06, §§ 48 - 50, 4 November 2010). Furthermore, the Court has emphasised the role of domestic courts in 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 and make conclusive findings on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement (see *Ramanauskas*, cited above, §§ 70-71).

32. That being said, the Court is not persuaded that the situation under examination falls within the category of "entrapment cases", even prima facie. Consequently, the defects in Russian law and practice identified by the Court in some previous cases are irrelevant in the case at hand.

33. First, the material at the Court's disposal does not show that V.K. took the initiative to contact the applicant with a view to bribing him, but rather that he reacted to the applicant's offer. V.K. was not originally a "police informant", and preparation for the criminal act had started before the ISS had become involved. Although V.K.'s role in the covert operation of 15 January 2000 can be compared to that of a "police agent", and even assuming that he had started to play that role some time before that date, it

is clear that he became an "agent" only after the applicant had solicited a bribe. In this respect the facts of the present case are closer to the situation in *K.L. v. UK* ((dec.), no. 32715/96, 22 October 1997), or *Sequeira,* cited above, where the Court noted that "it has been established by the domestic courts that A. and C. [police informers] began to collaborate with the criminal-investigation department at a point when the applicant had already contacted A. with a view to organising the shipment of cocaine to Portugal". Furthermore, the Court does not find that police role to have been abusive, given their obligation to verify criminal complaints and the importance of thwarting the corrosive effect of judicial corruption on the rule of law in a democratic society. Nor does it find that the police role was the determinative factor (see *Milinienė v. Lithuania*, no. 74355/01, § 38, 24 June 2008).

34. Secondly, the Court observes that the incitement defence was not formulated clearly and/or in good time in the domestic proceedings (see, *mutatis mutandis, Vayser v. Estonia* (dec.), no. 7157/05, 5 January 2010). At his first questioning after arrest, the applicant did not allege that he had been subjected to pressure to commit the offence, and nothing suggests that the applicant used that defence later, either during the investigation or at trial. In particular, there is no evidence that the applicant has ever sought the disclosure of the audiotapes allegedly made by V.K. prior to the covert operation of 15 January 2000, which could have shed light, according to the applicant, on V.K.'s role. As to the appeal proceedings, "incitement" was mentioned in the applicant's statement of appeal, but only in passing and in connection with other legal arguments, most of which concerned the formal lawfulness of the covert operation and the accuracy of reports drawn up by the ISS.

35. The Court observes that the applicant's conviction was based on numerous pieces of evidence, including oral statements of named witnesses and material evidence (see above), which were carefully studied by the domestic courts. Nothing in the domestic courts' findings of fact suggests that the crime imputed to the applicant was instigated by the ISS. In the circumstances the Court does not detect any serious flaw in the courts' decision-making process that would make the applicant's trial "unfair" (on the latter point see *Milinienė*, cited above, § 39). It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen Registrar	Nina Vajić President