



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

FIRST SECTION

DECISION

Application no. 3343/06
Sarkis Arshakovich BAGARYAN against Russia
and 4 other applications
(see list appended)

The European Court of Human Rights (First Section), sitting on 12 November 2013 as a Committee composed of:

Elisabeth Steiner, *President*,

Mirjana Lazarova Trajkovska,

Linos-Alexandre Sicilianos, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having regard to the above applications lodged on 28 December 2005, 18 May 2009, 25 August 2009, 17 March 2010, 14 April 2010 and 18 June 2010,

Having regard to the comments submitted by the Russian Government,

Having deliberated, decides as follows:

THE FACTS

The full names of the applicants, their dates of birth and their places of residence are set out in the appendix. They are Russian nationals, except for Mr Bagaryan who claims to be “a citizen of Abkhazia”.

The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

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.

The facts of each individual criminal case, as submitted by the parties, are summarised below.

1. Application by Mr Bagaryan (3343/06)

On 22 November 2004 the police carried out a test purchase during which the applicant procured 1.245 g of cannabis to a private individual primed by the police.

On 5 March 2005 the Adlerskiy District Court of Sochi examined the case. The applicant pleaded guilty to having helped the undercover buyer to find cannabis. The court found the applicant guilty of drug sale. The applicant appealed on the grounds that his offence should have been qualified as assistance in acquisition, and not sale, of drugs.

On 4 May 2005 the Krasnodar Regional Court dismissed the applicant's appeal. The applicant brought a request for supervisory review.

On 5 October 2006 the Presidium of the Krasnodar Regional Court examined the case in supervisory review proceedings and amended the legal qualification of the offence from "sale" with "attempted sale" of drugs. The applicant's sentence remained unchanged.

2. Mr Travin (no. 28655/09)

On 17 November 2007 and on 3 December 2007 the police carried out test purchases during which the applicant procured substances containing 0.73 g of heroin and 0.72 g of ephedrine hydrochloride to an undercover police agent introduced to him by his friend as a fellow drug addict.

On 3 September 2007 the Sverdlovskiy District Court of Kostroma examined the case. The applicant pleaded not guilty to having procured drugs. He alleged that he had no knowledge of the content of the parcel he had passed on his friend's request. The court found the applicant guilty and convicted him of drug dealing.

The applicant appealed, claiming that he was not a drug dealer, that he had been "provoked", tricked into passing the heroine without him realizing it. He complained about the allegedly wrongful conviction of drug dealing and claimed that he had "acted for the buyer".

On 18 November 2008 the Kostroma Regional Court dismissed the applicant's appeal.

3. Mr Tukhatullin (no. 21665/10)

On 28 April 2008 the police carried out a test purchase during which the applicant procured 195.6 g of amphetamine to an undercover police agent.

On 30 June 2009 the Uvinskiy District Court of the Republic of Udmurtiya examined the case. The applicant pleaded guilty to having

helped the undercover buyer to find amphetamine. The court found the applicant guilty of drug sale. The applicant appealed on the grounds that his offence should have been qualified as assistance in acquisition, and not sale, of drugs.

On 24 September 2009 the Supreme Court of the Republic of Udmurtiya dismissed the applicant's appeal.

4. Mr Ostanin (no. 25350/10)

On 26 June 2009 the police carried out a test purchase during which the applicant procured 6.15 g of cannabis to a private individual primed by the police.

On 7 October 2009 the Oktyabrskiy District Court of Novorossiysk examined the case. The applicant pleaded guilty to having helped the undercover buyer to find cannabis. The court found the applicant guilty of drug sale. The applicant appealed on the grounds that his offence should have been qualified as assistance in acquisition, and not sale, of drugs.

On 18 November 2009 the Krasnodar Regional Court dismissed the applicant's appeal.

5. Mr Grebenets (45639/10)

On 22 September 2008 and on 7 January 2009 the police carried out test purchases during which the applicant procured of substance containing 7.54 g and 3.737 g of cannabis oil to a private individual primed by the police.

On 19 October 2009 the Kirovskiy District Court of the Primorskiy Region examined the case. The applicant pleaded not guilty but admitted to having passed the drugs to the buyer. He alleged that he has been incited by the police to do so. The court found the applicant guilty of drug sale and of illegal drug possession. The applicant appealed on the grounds that his offence had been committed as a result of the police incitement.

On 17 December 2009 the Primorskiy Regional Court dismissed the applicant's appeal.

On 28 January 2011 the Presidium of the Primorskiy Regional Court quashed in supervisory review the previous judicial decisions and remitted the case for a fresh examination by the first-instance court.

On 19 July 2011 the Kirovskiy District Court of the Primorskiy Region examined the case. The applicant pleaded not guilty. He alleged that before the test purchases he had helped the buyer to find drugs but had not sold them. As regards the test purchases, he was not involved in the transaction, the evidence of his participation were false. The court found the applicant guilty of drug sale.

The applicant appealed on the grounds that there had been insufficient evidence of his participation in the drug sale.

On 4 October 2011 the Primorskiy Regional Court dismissed the applicant's appeal.

COMPLAINTS

The applicants complained under Article 6 of the Convention that they had been convicted of criminal offences incited by the police.

Mr Travin also complained under Article 6 of the Convention that the first-instance court had rejected his motion to conduct an expert examination of one video-record.

Mr Grebenets also alleged that the criminal proceedings had been conducted in violation of Articles 6 §§ 2 and 3 (a) and (b), Article 7 § 1 and Article 13 of the Convention.

THE LAW

1. Given that the applications at hand concern similar facts and complaints and raise identical issues under the Convention, the Court decides to join them and consider them in a single decision.

2. The applicants complained that they had been unfairly convicted of drug offences incited by the police, 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 ...”

3. The Government contested these allegations. They claimed that the applicants had not exhausted domestic remedies because they had not challenged the alleged entrapment before the trial courts.

4. The applicants maintained their complaints.

5. 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), *Bannikova v. Russia*, no. 18757/06, §§ 48-50, 4 November 2010; and *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, § 126-128, 2 October 2012). 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 v. Lithuania* [GC], no. 74420/01, §§ 70-71, ECHR 2008).

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.

The Court observes that throughout the domestic proceedings Mr Bagaryan, Mr Tukhatullin and Mr Ostanin did not allege that they had committed the offences of drug procurement as a result of the police incitement. Instead they contested the legal classification of the acts set out in the charges. In particular, they had pleaded guilty to having assisted in the acquisition of drugs but had denied the procurement of which they were eventually convicted. Moreover, it follows from the court records of their trials that aiding drug acquisition had not been an extraordinary fact attributable to the police intervention. On the contrary, they followed a pattern of established behaviour. Accordingly, the applicants had not made out the complaint of the alleged involvement of the *agents provocateurs* in the domestic proceedings, even in essence.

As regards Mr Travin, before the domestic courts he had denied the very fact of having knowingly passed the drugs during the test purchases. Although he had used the word “provocation” in his appeal, essentially he meant that he had not agreed to take part in the transaction. This argument related to the establishment of facts of the test purchase, and not to the alleged lack of justification for carrying it out, which is the necessary part of the *agent provocateur* defence. Accordingly, the applicant has not made out the complaint of the alleged involvement of the *agents provocateurs* in the domestic proceedings.

As for Mr Grebenets, in the first set of proceedings he made complaints of involvement of an *agent provocateur* in the test purchases. However, he had later abandoned this version of events and claimed that he had not been involved in the transactions imputed to him, although he had been habitually aiding drug acquisition in the past. Moreover, he did not allege at any stage that his acts had been extraordinary and that he would never have committed them if not for the police involvement. Accordingly, this applicant, too, has failed to make out the complaint of the alleged involvement of the *agents provocateurs* in the domestic proceedings.

It follows that the applicants’ incitement defence was not formulated clearly and in good time in the domestic proceedings (see *Association Les Témoins de Jéhovah v. France* (dec), no 8916/05, 17 June 2008; and *Trifontsov v. Russia* (dec.), no. 12025/02, 9 October 2012). Accordingly, these complaints brought before the Court must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

6. Two applicants also raised additional complaints with reference to various Articles of the Convention and its Protocols. Having regard to all the material in its possession, and in so far as it has jurisdiction to examine the allegations, the Court has not found any appearance of a breach of the rights and freedoms guaranteed by the Convention or its Protocols in that part of their applications. It follows that the applications in this part must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

André Wampach
Deputy Registrar

Elisabeth Steiner
President

APPENDIX

No	Application No	Lodged on	Applicant Date of birth Place of residence	Represented by
1.	3343/06	28/12/2005	BAGARYAN Sarkis Arshakovich 19/01/1971 Sochi, Russia	
2.	28655/09	18/05/2009	TRAVIN Oleg Vadimovich 03/03/1986 Kostroma, Russia	MASHKOVA Alla Alekseyevna
3.	21665/10	17/03/2010	TUKHVATULLIN Rifkat Rafailovich 23/09/1980 Izhevsk, Russia	
4.	25350/10	14/04/2010	OSTANIN Konstantin Aleksandrovich 22/11/1982 Novorossiysk, Russia	
5.	45639/10	18/06/2010	GREBENETS Zakhar Ivanovich 30/01/1978 Kirovskiy, Russia	ZHARKENOV Sergey Anatolyevich