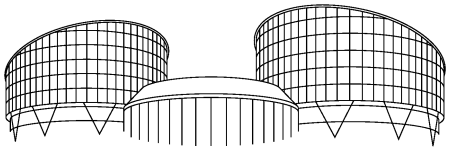

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LAGUTIN AND OTHERS v. RUSSIA

(Applications nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09)

JUDGMENT

STRASBOURG

24 April 2014

FINAL

24/07/2014

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

In the case of Lagutin and Others v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 1 April 2014,

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

PROCEDURE

1. The case originated in five applications 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 Russian nationals ("the applicants"). The dates of lodging the applications, the application numbers, the applicants' names, their personal details and the names of their legal representatives are set out in Annex I.

2. 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 following entrapment by the police in violation of Article 6 of the Convention.

4. On 25 November 2010 the applications were communicated to the Government.

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). Those 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, it is common ground that the applicants knowingly procured drugs in the course of the test purchases.

A. The applications of Mr Ivan Lagutin and Mr Viktor Lagutin (nos. 6228/09 and 19123/09)

7. The applicants are brothers. At the time of arrest they were vendors working in a video- and audio-rental kiosk. At the time of lodging their applications they were serving prison sentences in correctional colonies following their criminal conviction in respect of which they lodged these applications.

8. On an unspecified date the Federal Service for Drug Control (*ФСКН*, the drugs police) received information from an undisclosed source that the applicants were involved in drug dealing. On that basis the police decided that an undercover policeman, X, would infiltrate the group and carry out test purchases of cannabis from the applicants.

9. It is undisputed by the parties that X approached Ivan Lagutin through an acquaintance and asked him whether he could supply him with cannabis. The parties differ as to whether Ivan Lagutin agreed to do so. According to the Government, which relied on X's testimony, Ivan Lagutin had readily agreed to supply him with cannabis. According to the applicants, he had replied that he did not have any but could ask his dealer who occasionally passed by his kiosk.

10. The applicants contended that after that conversation X had called Ivan Lagutin repeatedly to ask if he had cannabis. Ivan Lagutin thought that X was a drug user, and being a cannabis smoker himself he decided to help him. When the dealer eventually came to the kiosk Ivan Lagutin asked him to supply cannabis for X as well, and when the dealer agreed the applicant called X back to tell him. He bought the cannabis for X with money borrowed from the kiosk cash till which he refunded after X had paid him back. On that occasion it was Viktor Lagutin who had passed the parcel to X at his brother's request. After that, X had continued to call Ivan Lagutin regularly. In total Ivan Lagutin had bought cannabis for X on three occasions, all of which had been test purchases.

11. The official records of the three test purchases contain the following account. On 16 October 2007 undercover policeman X was assigned to carry out the first test purchase of cannabis from the applicants. He was given 350 Russian roubles (RUB) in banknotes that had been photocopied. He met the applicants at the kiosk, they went inside and he purchased 7.5 grams of cannabis. Ivan Lagutin took the money and Viktor Lagutin

handed him a paper bag with the drug inside. He asked the applicants if he could come back for more in future, and they confirmed that he could. Afterwards, he handed the cannabis to the police. The second test purchase took place on 1 November 2007, allegedly following a phone call from Ivan Lagutin telling X that he had obtained the cannabis. After being given RUB 500 that had been photocopied X called Ivan Lagutin to arrange a meeting, picked him up in town and drove to the kiosk where he purchased 7.8 grams of cannabis wrapped in paper. Afterwards, he handed the packet of cannabis to the police. The third test purchase took place on 23 November 2007, this time for RUB 1,000. X pre-arranged it by telephone, then left the money at the kiosk with another vendor and came back later to get the drugs from Ivan Lagutin, who gave him 10 grams of cannabis which X then handed over to the police.

12. The telephone communications between X and the applicants were not recorded or intercepted.

13. On 14 December 2007 the police searched the kiosk and seized 7.6 grams of cannabis wrapped in newspaper and a cut-off plastic bottle with paper foil inside, which was allegedly a device for smoking cannabis. The applicants were arrested and charged with procuring large quantities of narcotic drugs, acting in conspiracy, and illegally possessing drugs.

14. The case was examined at first instance by the Promyshlennyy District Court of Stavropol. The applicants pleaded guilty in part, but claimed that they had committed the crime as a result of police entrapment. They pointed out that there had been no evidence of their prior involvement in drug dealing. They maintained that Ivan Lagutin had only exceptionally agreed to assist X in acquiring the drugs because he believed that he was a cannabis smoker like himself. As regards Viktor Lagutin, he had not been directly involved in the transactions with X, although he knew that his brother had occasionally smoked cannabis.

15. The court cross-examined X, whose identity had been disclosed, and the witnesses, who gave a detailed account of the test purchases. The court also examined the video recordings of the first two test purchases.

16. X testified that he had infiltrated the group in order to verify operational information received by the drugs police concerning the supplying of cannabis. He had approached the applicant at a party asking if it was possible to obtain any, and the applicant had agreed to help. Defence counsel asked whether X had been aware that the law prohibited incitement to commit criminal offences, but the judge rejected the question as irrelevant.

17. The court also cross-examined S, an operations officer who had been in charge of the undercover operation. He testified that the police had received information from an undisclosed source that the applicants were selling drugs. He testified that the information had not come from X, but refused to provide any details on the grounds that it was classified

information. He testified that X had been instructed to infiltrate the group but had not been obliged to disclose his methods of undercover work and had not reported back to his superior about the manner of his communications with the applicants prior to, and between, the test purchases. In particular, he did not know and was not interested in how X had come to an agreement with the applicants about supplying the drugs. He did not know whether the transaction had been initiated by X or one of the applicants.

18. On 1 October 2008 the Promyshlennyy District Court of Stavropol convicted the applicants as charged and sentenced Ivan Lagutin to six years' and Viktor Lagutin to five years' imprisonment. The applicants appealed, pleading, in particular, police entrapment and alleging that the results of the test purchases had to be excluded from the body of evidence as unlawfully obtained. They contested the allegation that the police had had information indicating that they had previously sold drugs.

19. On 26 November 2008 the Stavropol Regional Court dismissed the appeal, without expressly addressing the allegation of entrapment, and upheld the first-instance judgment.

20. On 28 January 2011 the Deputy Prosecutor of the Stavropol Region lodged a request for supervisory review of the case on the grounds that the operational-search activity against the applicants had ceased to be lawful after the first test purchase, which had yielded sufficient proof of their criminal activity. The Deputy Prosecutor considered that the police should have instituted criminal proceedings immediately after the episode of 16 October 2007 and that therefore the second and third episodes constituted entrapment contrary to the Operational-Search Activities Act. Those episodes should therefore be excluded from the grounds of their conviction.

21. On 16 February 2011 a judge of the Stavropol Regional Court dismissed the prosecutor's request and refused to reopen the criminal proceedings in the applicants' case, having dismissed the arguments concerning entrapment.

22. On an unidentified date the Deputy Prosecutor General of the Russian Federation lodged a request for supervisory review of the case on essentially the same grounds.

23. On 26 January 2012 the Presidium of the Stavropol Regional Court granted the request. It found that the first test purchase had been carried out on the basis of operational information that two persons, Ivan and Viktor Lagutin, had been selling cannabis. During the test purchase that information had been confirmed and at the same time the criminal offence had been committed, which was sufficient to bring charges. There had been no need for any further test purchases as these had not been aimed at investigating the chain of supply of drugs. The second and third episodes were therefore to be considered as intentional incitement to commit the drug

offences. The evidence relating to those two episodes was declared inadmissible and excluded from the grounds of the applicants' conviction. Ivan Lagutin's sentence was commuted to five years and two months' imprisonment, and Viktor Lagutin's sentence remained unchanged.

B. The application of Mr Semenov (no. 19678/07)

24. The applicant is a drug user. He claims to have become a heroin addict in prison where he was serving his first sentence. At the time of his arrest he was unemployed. At the time of lodging his application he was serving his third prison sentence in a correctional colony following his criminal conviction in respect of which he lodged this application.

25. According to the official version, the drugs police received operational information that the applicant was selling drugs. The Government claimed that the drugs police had been keeping a file on the applicant's involvement in drug dealing for a year and a half prior to the test purchase. On 18 November 2005 the interception of his mobile phone was authorised by a court. On the basis of that preliminary information, on 25 November 2005 the police decided to carry out a test purchase of heroin from the applicant. It was carried out by a police informant, "Ivanov", whose identity remained undisclosed in the ensuing proceedings. During the test purchase the applicant sold four packets of heroin and a syringe with heroin to "Ivanov", who paid him RUB 5,000.

26. According to the applicant, he knew "Ivanov" as a fellow drug addict. On 25 November 2005 "Ivanov" called him to tell that he had RUB 1,000 and was looking to buy heroin with that amount. The applicant told him that his dealer was selling only 5-gram doses for RUB 5,000, that he had only RUB 700 and was suffering from withdrawal symptoms, and suggested sharing a dose between them. "Ivanov" called him back later and told him that he had found RUB 5,000, and they agreed to share the purchase. "Ivanov" brought the money to the applicant's flat and the applicant asked him to wait outside to avoid crossing with the dealer. When the dealer brought the drug the applicant paid him with "Ivanov's" cash. He then reimbursed "Ivanov" RUB 700 and they consumed part of the heroin together. "Ivanov" took the remaining heroin away with him.

27. After the test purchase a search was carried out at the applicant's flat. No money was found, but the police seized an empty sachet with traces of heroin, a piece of cotton wool soaked in heroin and an empty syringe, also with traces of heroin. The applicant was charged with drug trafficking.

28. The Moskovskiy District Court of Cheboksary examined the case at first instance. The applicant denied having been involved in drug dealing. He pleaded guilty to having acquired heroin on behalf of "Ivanov" but explained that he had only done so because of the arrangement to consume

it together, as he was suffering from withdrawal symptoms. He alleged that he had committed the offence as a result of entrapment.

29. "Ivanov" was called as a witness and examined during the trial, although his identity was kept secret. He testified that he had called the applicant asking him to supply him with heroin and that he had purchased four sachets of the drug at the applicant's flat. When cross-examined, "Ivanov" refused to answer the following questions: whether he knew the applicant; whether he knew the applicant's heroin dealer; whether he knew that the dealer was coming after he had left the money with the applicant; whether it was his initiative to conduct a test purchase from the applicant; whether he had previously bought drugs from the applicant; and whether he had previously been arrested by the drugs police.

30. On 5 May 2006 the first-instance court found the applicant guilty of selling drugs and sentenced him to six years' imprisonment, having found him to be a serial offender. In its judgment the court relied, among other evidence, on the transcripts of the applicant's intercepted telephone calls which had taken place between him and "Ivanov" during the transaction on 25 November 2005. It noted that the audio recording had confirmed receipt of the money and that the applicant had given drugs to the informant.

31. The applicant appealed on the grounds, *inter alia*, that he had been convicted of an offence committed as a result of police entrapment.

32. On 6 July 2006 the Supreme Court of the Republic of Chuvashiya dismissed the applicant's appeal, upholding, in substance, the first-instance judgment. At the same time it reclassified the offence as attempted sale, having reduced the sentence to five years and eleven months' imprisonment.

33. On 18 August 2006 the Presidium of the Supreme Court of the Republic of Chuvashiya examined a request by the applicant for supervisory review and decided that the applicant was not a serial offender. It reduced the applicant's sentence to five years and nine months' imprisonment and upheld the remainder of the earlier judicial decisions.

C. The application of Ms Shlyakhova (no. 52340/08)

34. The applicant is a drug user. At the time of her arrest she was unemployed. At the time of lodging her application she was serving a prison sentence in a correctional colony following her criminal conviction in respect of which she lodged this application.

35. On the night of 6 to 7 October 2007 the drugs police conducted two test purchases whereby the applicant first procured 5 grams of cannabis for police informant "Smirnov" and about one and a half hours later procured 5.8 grams of cannabis for an undercover police officer, "Zhirkov". The parties differ as to the reasons for ordering the test purchases and as to the circumstances in which the applicant had agreed to procure the drugs. According to the Government, the drugs police had been in possession of

operational information from an undisclosed but reliable source that the applicant was trafficking in cannabis. According to the applicant, the police had had no preliminary information about her alleged criminal activity and had ordered the test purchase without a valid reason. She claimed that she had procured drugs for the undercover agents as a result of entrapment.

36. On the basis of the test purchases the applicant was charged with selling drugs.

37. The Sovetskiy District Court of Krasnodar examined the case at first instance. At the trial the policemen and the witnesses testified regarding the test purchases. They all pointed out that during the test purchase the applicant had been in a state of narcotic intoxication. A forensic report also confirmed that at the time of arrest the applicant had been under the influence of opiates.

38. The court asked the prosecutor if the investigating authorities had had any classified information incriminating the applicant. The prosecutor replied that all confidential material relating to the conduct of the test purchase had been disclosed. However, when the court subsequently examined the police officers they testified that, prior to the test purchase, the police had received operational information that the applicant was selling cannabis at RUB 350 per box, but they could not name the source or expand on that information at the hearing because the information remained confidential.

39. "Smirnov" and "Zhirkov" were called as witnesses and were examined during the trial, although their identity was kept secret.

40. "Zhirkov" testified that he had met the applicant in September 2007 and that she had immediately offered to purchase cannabis for him. He had called her back in October 2007 and asked her to supply him with cannabis. She had sold him two sachets for RUB 800 during the test purchase, and he had paid her with banknotes marked with a UV marker pen. He denied having been acquainted with "Smirnov" and also denied the involvement of any intermediary between himself and the applicant.

41. "Smirnov" testified that he was an occasional cannabis smoker and that he had collaborated with the drugs police. He had met the applicant in autumn 2007 and she had asked him if he was taking drugs. He stated that the applicant had offered to buy him drugs but could not remember in what circumstances. He had then reported on her to the drugs police, who had decided to carry out a test purchase in which he would act as a buyer. The transaction had taken place inside the entrance to a block of flats, and the applicant had handed him two sachets of cannabis. When cross-examined, he denied having consumed drugs with the applicant during the test purchase.

42. The applicant alleged that she was a cannabis smoker but had never been involved in drug dealing. She pleaded guilty to having acquired cannabis on behalf of "Smirnov" but explained that she had only done so

exceptionally and as result of entrapment. She testified that she had met "Smirnov" when she was renting a room in his flat. She knew that he was a drug user and they had once smoked cannabis together. On one occasion he had told her that he wanted to overcome his addiction to strong drugs and needed some "weed" to ease the withdrawal pains. The applicant could see that he was suffering and out of compassion had agreed to buy cannabis for him from her dealer. On 6 October 2007 she had met "Smirnov" to take the money before going to the dealer, and he had then introduced her to "Zhirkov", who had also asked for cannabis and complained of withdrawal symptoms. The applicant replied that she could find cannabis for "Smirnov", but not for "Zhirkov". Later on the same day she had met "Smirnov" to give him the cannabis that she had purchased for him. They had entered a block of flats so that she could pass it over to him and then "Smirnov" had produced a syringe of heroin and offered it to the applicant. She had accepted, although she was not a heroin user, and "Smirnov" had injected her with it. He had then told her to wait for "Zhirkov" and to pass part of the cannabis to him. Feeling disorientated from the effects of the drug, she had done as she was told and when "Zhirkov" came she had passed him the cannabis and then been arrested.

43. On 5 March 2008 the first-instance court found the applicant guilty of selling drugs and sentenced her to five years and six months' imprisonment. The applicant appealed, *inter alia*, on the grounds that she had committed the offence as a result of police entrapment.

44. On 9 April 2008 the Krasnodar Regional Court dismissed the applicant's appeal, having found, in particular, that there had been sufficient evidence that the applicant had procured drugs on the night of 6 to 7 October 2007. It noted that the police officers had testified that they had received preliminary information that the applicant had been selling drugs. It also found that the police had acted in accordance with the law and therefore rejected the defence of entrapment. It upheld the first-instance judgment.

D. The application of Mr Zveryan (no. 7451/09)

45. The applicant is a drug user. At the time of his arrest he was working for his father's company. At the time of lodging his application he was serving a prison sentence in a correctional colony following his criminal conviction in respect of which he lodged this application.

46. On an unspecified date the Kaluga regional office of the drugs police received information from an undisclosed source that the applicant was involved in drug dealing. On that basis the police carried out a test purchase of MDMA pills, commonly known as "ecstasy", from the applicant. The test purchase was carried out by an undercover police officer acting under the pseudonym of "Azamatov".

47. According to the Government, "Azamatov" had infiltrated a group of people close to the applicant, all of whom were dealing in and/or using drugs, pretending that he was a drug user himself. The first time he met the applicant and his acquaintance, Ms S., they had told him that they were MDMA users and that they could help if he wanted to buy some, the price of one MDMA pill being RUB 600. They gave him their cell phone numbers.

48. According to the applicant, he was approached by an acquaintance, "Timagin", with a request to buy some "ecstasy" for him. He knew that Ms S had a contact, a drug dealer, and he asked her to help him purchase four MDMA pills for his friend. "Timagin" picked him up in a car, with another person, "Azamatov", who was supposedly in need of the drug. They then met Ms S. and she took them to a night club where she met the dealer and purchased four pills for "Azamatov" with the latter's money (RUB 2,400).

49. The official records of the three test purchases contain the following account. On 2 April 2007 the police officer "Azamatov" was assigned to carry out the first test purchase of the MDMA pills from the applicant. "Azamatov" was given RUB 2,400. The banknote numbers had been noted, but they were not otherwise marked or photocopied. He met the applicant and Ms S. at around midnight the same day, handed the applicant RUB 2,400 and they drove together to a night club where Ms S. left them for a few minutes and returned with a packet containing four pills. "Azamatov" came back to the police station and handed in the pills. It was later established by an expert that only one of the four pills contained an active MDMA ingredient, while the other three did not contain any narcotic substances.

50. The telephone communications between "Azamatov", the applicant and Ms S. prior to the test purchase were not recorded or intercepted, but an audio recording was made in the course of the transaction, starting at 11.30 p.m. on 2 April 2007.

51. On 12 April 2007 the President of the Kaluga Regional Court authorised the tapping of the applicant's and Ms S.'s telephones for up to three months. Several recordings were made, the transcripts of which were appended to the case file, but they were not used as evidence during the trial. Transcripts made available to the Court included four conversations during which the applicant spoke about drugs, in jargon. It transpires from those conversations that he and his correspondents lived in constant search of drugs, shared information about their sources and purchased them together from whatever dealer they could find.

52. On 6 June 2007 "Azamatov" called the applicant and asked him to purchase drugs for him. The applicant said that he could not help him, but they agreed to meet. When they met the applicant was arrested and charged

with procuring large quantities of narcotic drugs on 2 April 2007 in conspiracy with Ms S.

53. The case was examined at first instance by the Borovskiy District Court of Kaluga Region. The applicant and Ms S. pleaded guilty in part but claimed that the crime they had committed was the result of police entrapment. The applicant pointed out, in particular, that there was no evidence of his prior involvement in drug dealing. He maintained that he had only agreed to assist "Timagin" in acquiring drugs because he had believed that he was an occasional "ecstasy" user, like himself. He had not intended to purchase it for "Azamatov", but had ended up doing so because of "Timagin's" manipulation.

54. The court cross-examined "Azamatov" under a procedure whereby his identity was concealed from the participants in the proceedings, except the judge. He testified that his infiltration and the covert operation had been ordered because of the information about the applicant and Ms S. received by the police, but he refused to name the source of that information. He stated that the applicant and Ms S. had told him that they could sell him MDMA pills, but he had never bought any from them prior to the test purchase and had never seen either of them selling drugs to anyone. The court also cross-examined another police officer who had taken part in the test purchase and the witnesses in the investigation who had given details of the test purchase. The court also examined extracts of the recordings made during the test purchases, which were about five minutes long.

55. Ms S. testified at the trial that the applicant had called her at about 10 p.m. on 2 April 2007 and asked her to find some drugs for his friend, who was "unwell". She had refused to begin with, but in the end he had persuaded her to help. She had called her dealer and found out that he had MDMA pills available. She had called the applicant back and confirmed that they could go and get the pills, and they had driven together to the night club to meet up with the dealer. There had been four people in the car: the applicant, herself, "Azamatov" and "Timagin". Before she left the car the applicant had given her RUB 2,400 and she had purchased the packet of four pills with that money. She had then returned to the car and handed the packet to "Azamatov".

56. The applicant's defence counsel referred in oral pleadings to the guidelines adopted on 15 June 2006 by the Plenary Supreme Court of the Russian Federation on jurisprudence in criminal cases involving narcotic drugs or psychotropic, strong or toxic substances. He claimed, in particular, that it had not been established that the applicant had intended to engage in drug trafficking prior to being contacted by the undercover agent, or that he had carried out any preparatory steps to the commission of the offence.

57. On 7 February 2008 the Borovskiy District Court of Kaluga Region convicted the applicant as charged and sentenced him to five years and six months' imprisonment.

58. The applicant appealed. He reiterated his plea of entrapment and claimed, *inter alia*, that the police had no information suggesting that he had previously sold drugs. He also complained that the authorities had not made any attempts to find and question "Timagin", who had played a key role in the test purchase and could have cast light on the role of the police in the offence he had committed. He claimed that the first-instance court had failed to follow the guidelines adopted by the Plenary Supreme Court of the Russian Federation on 15 June 2006.

59. On 1 July 2008 the Kaluga Regional Court upheld the first-instance judgment. It did not address the plea of entrapment, having limited itself to the finding that the applicant's conviction had been lawful and well founded. It also noted that the undercover operation had been based on preliminary information indicating that the applicant was involved in drug dealing.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal liability for drug trafficking

60. 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; and the same offence involving a particularly large quantity of drugs carried a sentence of up to twenty years' imprisonment (Article 228.1 § 3 (d)).

61. 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, strong or toxic substances. The Plenary ruled, in particular, that charges of attempted sale should be brought against anyone selling such substances where this was carried out in connection with a test purchase under the Operational-Search Activities Act, (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 agent's 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

62. 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 and search for and identify those responsible for planning or committing them;

..."

Section 5: Protection of human rights and citizens' freedoms during operationalsearch 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. monitoring 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 the monitoring of postal, telegraphic and other communications, telephone interception through [telecommunications companies], or the collection of data from technical channels of communication shall

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 in the following circumstances] ...

1. pending criminal proceedings;

2. where information is 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. indications 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 from 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. ..."

63. 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.

64. 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."

65. 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 the 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

66. 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.”

D. Reopening of criminal proceedings

67. Article 413 of the Code of Criminal Proceedure 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 413 § 3 (2)).

III. RELEVANT INTERNATIONAL INSTRUMENTS AND COMPARATIVE LAW

68. 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-...).

69. A comparative analysis of the national systems of authorisation of undercover operations in the Council of Europe member States is summarised in *Veselov and Others v. Russia* (nos. 23200/10, 24009/07 and 556/10, §§ 50-63, 2 October 2012).

THE LAW

I. JOINDER OF THE APPLICATIONS

70. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their similar factual and legal background. It considers that joining these applications will highlight the recurring nature of the issues raised in the five cases at hand and underscore the general nature of the Court’s findings below.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

71. The applicants complained that they had been unfairly convicted of drug offences that they had been incited by the police to commit 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 ..."

A. Admissibility

72. The Government claimed that none of the applicants, except for Mr Semenov, had exhausted domestic remedies in respect of their complaints of entrapment by an *agent provocateur*. In particular, Mr Ivan Lagutin and Mr Viktor Lagutin had not complained of the alleged entrapment before the prosecutor's office and Mr Zveryan had not made an entrapment plea before the domestic court. In respect of Ms Shlyakhova they alleged, in general terms, that she had failed to exhaust domestic remedies but did not specify which ones.

73. The applicants disagreed, pointing out that they had made a plea of entrapment in the first-instance hearing and before the appeal court. Mr Ivan Lagutin and Mr Viktor Lagutin referred to extracts from the court records and copies of their grounds of appeal, which contained the relevant arguments.

74. Having examined the case files of all the applicants, the Court finds that in each case the court records and the grounds of appeal contain sufficiently clear and specific allegations that the offences at issue were the result of police entrapment. 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.

75. In so far as the Government may be understood to be suggesting that, before or in addition to having raised the issue of incitement in court, the applicants were required to lodge 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). Moreover, when the domestic courts examined the applicants' pleas of entrapment they did not suggest that the applicants had somehow undermined their entrapment arguments by not having previously raised them before the prosecutor's office. The Court therefore 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 (see *Veselov and Others*, cited above, § 73).

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

77. 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

78. The Government maintained that the test purchases conducted in all these cases were lawful and involved no entrapment by the police. They contended that in each case the police had had grounds to suspect the applicants of involvement in drug trafficking

79. They maintained in each case that the police had ordered the test purchases on the basis of incriminating information from undisclosed confidential sources. That classified information could be disclosed to the trial court by a decision of the head of the body carrying out the operational-search activity. However, in the present cases disclosure was unnecessary because the fact of the sale of drugs by each applicant had been sufficiently and clearly established and there were no reasons to believe that it had been the result of entrapment.

80. 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.

81. In the case of Mr Semenov, the Government alleged that the suspicion of his involvement in drug trafficking had been particularly strong. They claimed that the drugs police had opened a file on this applicant eighteen months prior to the test purchase and that before ordering the test purchase they had been intercepting the applicant's telephone calls for a week, under a court order. The Government alleged that the content of the telephone calls between 22 and 25 November 2005 revealed that the applicant was a drug addict and that he had been systematically selling small quantities of heroin received from his dealer. They contended that this

preliminary information had been sufficient to carry out a test purchase in his case. They also stressed that in this case, "unlike in other cases against the Russian Federation concerning [the test purchases of drugs]", the police informant, "Ivanov", had put no pressure on the applicant to sell him drugs, but only joined an ongoing trade.

82. 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 had been required because the covert operations in question had not encroached 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 had been 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 normal rules of admissibility of evidence; it had been open to the applicants to challenge this before the court, *inter alia* on the grounds of entrapment. They also pointed out that although the investigating authorities had relied on the existence of confidential information justifying the undercover operations, the disclosure of that information had not been necessary because there had been ample material on the basis of which alleged entrapment could be ruled out. In the case of Ms Shlyakhova, they also noted that the operations file had been destroyed on account of the expiry of the retention period. They did not specify whether the destruction had taken place before or after the applicant's trial.

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

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

85. For their part, the applicants maintained that prior to 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.

86. The applicants further claimed that the investigating authorities had not acted in an essentially passive manner. They claimed that the authorities had taken the initiative of contacting them and persuading them, through the informants, to find drugs. They alleged that the buyers had pestered them

incessantly and that they had succumbed to their insistence on the understanding that they would only do it once, exceptionally.

87. 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.

88. Lastly, 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 particular, the judiciary had accepted the police statements that they had been in possession of incriminating information against the applicants without verification and merely referring to the confidential nature of that information. In sum, they considered that the whole criminal proceedings in their cases had been based on entrapment.

2. The Court's assessment

(a) General principles

89. The 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) and *Veselov and Others* (cited above, §§ 88-94). Those directly applicable in the instant cases are reiterated below.

90. 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 v. Portugal*, 9 June 1998, §§ 34-36, *Reports of Judgments and Decisions* 1998-IV). 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 v. Lithuania* [GC], cited above, § 53).

91. 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 v. Lithuania*, no. 10071/04, § 36, 1 July 2008). The Court has specified that any information relied on by the authorities must be verifiable (see *Vanyan v. Russia*, no. 53203/99, § 49, 15 December 2005, and *Khudobin*, cited above, § 134).

92. Furthermore, any covert operation must comply with the requirement that the investigation be conducted in an essentially passive manner. It is therefore crucial in each case to establish if the criminal act was already under way at the time when the police intervened (see *Sequeira* and *Eurofinacom*, both cited above).

93. In cases against Russia the Court has previously found that in the police-controlled test purchases the police were virtually unaccountable for the manner of conduct of their undercover agents and informants because of a systemic failure, namely the absence of a clear and foreseeable procedure for authorising test purchases (see *Vanyan*, cited above, §§ 46 and 47; *Khudobin*, cited above, § 135; *Bannikova*, cited above, §§ 49-50, and *Veselov and Others*, cited above, §§ 106, 126-27).

94. The Court has emphasised the role of the 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, §§ 133-35).

95. Moreover, in cases where the lack of file disclosure or the conflicting nature of the parties' interpretation of events precludes the Court from establishing with a sufficient degree of certainty whether the applicant was subjected to police incitement, the procedural aspect becomes decisive (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X; *V. v. Finland*, no. 40412/98, § 72, 24 April 2007; and *Constantin and Stoian v. Romania*, nos. 23782/06 and 46629/06, §§ 56-57, 29 September 2009).

96. Furthermore, the Court has found that a guilty plea as regards criminal charges does not dispense the trial court from the duty to examine allegations of incitement (see *Ramanauskas*, cited above, § 72).

97. Lastly, the Court reiterates that it is a common feature of many *agent provocateur* cases that the applicant is precluded from raising a plea of incitement because the relevant evidence has been withheld from the defence, often by a formal decision on grounds of public-interest immunity granted to particular categories of evidence.

98. The Court, while recognising that the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused, has nevertheless accepted that there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v. the Netherlands*, 26 March 1996, § 70, Reports 1996-II; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, Reports 1997-III; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-53, ECHR 2000-II; *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V; *Botmeh and Alami v. the United Kingdom*, no. 15187/03, § 37, 7 June 2007; *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 205 et seq., ECHR 2009-...; and *Leas v. Estonia*, no. 59577/08, §§ 76 et seq., 6 March 2012).

99. Accordingly, in public-interest immunity cases the Court has considered it essential to examine the procedure whereby the plea of incitement was determined in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings and to equality of arms (see *Edwards and Lewis*, cited above, §§ 46-48, and, *mutatis mutandis*, *Jasper*, cited above, §§ 50 and 58). The procedure in the cases in question was as follows: the public-interest immunity material was made available to the trial judge in the *ex parte* procedure, and the judge would decide whether any of the confidential material would assist the defence, in particular to argue the point of entrapment, in which case it would be obliged to order its disclosure. The Court found, in particular, that the issue of entrapment, if determined by the trial judge who also decided upon the guilt or innocence of the accused, was too closely related to the essence of criminal charges to exclude the defence from full knowledge of all material to which the prosecution had access (ibid.). Subsequently, the Court examined (in the context primarily of Article 5 § 4, but also of Article 6) the possibility of using special advocates to counterbalance the procedural unfairness caused by lack of full disclosure in national-security

cases but also found such an approach to be capable of upsetting equality of arms, depending on the importance of the undisclosed material to the outcome of the trial (see *A. and Others*, cited above, §§ 205 et seq.).

100. Although the above cases concerned the specific situation of non-disclosure of information admitted as evidence, the Court has adopted a broader application of the principles set out therein, extending them to the entire procedure by which the plea of incitement was determined (see *Ramanauskas*, §§ 60-61; *Malininas*, § 34; *V. v. Finland*, §§ 76 et seq.; and *Khudobin*, § 133, all cited above). Even if the information in question was not part of the prosecution file and had not been admitted as evidence, the court's duty to examine the incitement plea and ensure the overall fairness of the trial requires that all relevant information, particularly regarding the purported suspicions about the applicant's previous conduct, be put openly before the trial court or tested in an adversarial manner (see *V. v. Finland*, §§ 76 et seq., and *Malininas*, § 36, both cited above; and, *mutatis mutandis*, *Bulfinsky v. Romania*, no. 28823/04, 1 June 2010).

101. For the same reasons the Court will generally require that the undercover agents and other witnesses who could testify on the issue of incitement should be heard in court and be cross-examined by the defence, or at least that detailed reasons should be given for a failure to do so (see *Lüdi*, § 49; *Sequeira*; *Shannon*; and *Bulfinsky*, § 45, all cited above; and *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008).

(b) Application of these principles in the present case

102. The Court 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 criminal activity on their part, and that the authorities had carried out the investigation in a manner that was not "essentially passive". They also complained that the domestic courts had failed to properly examine their pleas of entrapment. They all alleged that the preliminary operational information on which the police had relied had not been disclosed to the defence and had not been verified.

(i) Assessment of facts and substantive test of incitement

103. Turning to the facts of the individual applications at hand, the Court first notes that Mr Ivan Lagutin and Mr Viktor Lagutin accepted that one of them was a cannabis smoker, but alleged that X, the undercover agent, had induced them to sell the drug. The drugs police, on the other hand, maintained that they had merely joined an ongoing criminal activity. The police referred to the "existence of operational information implicating the applicants in drug dealing", although X did not allege at the hearing that he had previously bought drugs from the applicants or knew of people who had. No further details concerning the "operational information" were

provided or, seemingly, requested by the trial court (see paragraphs 7-23 above).

104. The applicant in the next case, Mr Semenov, also accepted in his submissions that he was a drug addict. He claimed, however, that he would not have procured heroin had he not been approached by the police informant "Ivanov", who had given him an opportunity to secure a fix at a time when he could not otherwise have afforded one. The drugs police contended, on the contrary, that the applicant had been a known drug dealer, and that they had ordered the test purchase by "Ivanov" because they had received preliminary "operational information" to that effect. It is not clear whether that "operational information" came from "Ivanov" or from another source because at the trial he had refused to answer the question whether he had previously bought drugs from the applicant and had declined to answer a number of related questions. In the Government's observations, they specified that the drugs police had been keeping an operational file for a year and a half prior to the test purchase and that they had taken other investigative steps before ordering it, in particular interception of the applicant's mobile phone. However, they provided no documents or further details as regards the intercepted telephone calls. In any event, it can be seen from the court records submitted by the parties that the applicant's conviction was not based on the content of the phone calls intercepted between 18 and 25 November 2005 except for those made in the course of the test purchase itself. Moreover, the court records contain no submissions relating to the content of the allegedly incriminating operational files. It has not been suggested that the trial court had examined the operational materials in an *ex parte* procedure. Consequently, the Court will assume that it did not examine them at all (see paragraphs 24-33 above).

105. In Ms Shlyakhova's case, likewise, the applicant accepted that she was a drug user, but insisted that she had only procured drugs for the undercover agents because of an accumulation of exceptional circumstances. First, she had felt compassion for the undercover agent's withdrawal symptoms and then he had subsequently influenced her behaviour by giving her an injection of heroin. The drugs police contended, on the contrary, that they had had good reason to suspect the applicant of drug dealing. At the trial they claimed that they had received "operational information" that she was selling cannabis, although they did not allege that they had previously bought drugs from her. When cross-examined, they refused to name the source or to disclose the content of the "operational information" on grounds of confidentiality. The applicant, for her part, claimed that they had not had such information. The trial court did not seek to clarify the circumstances in which the covert operation had been ordered. In particular, it took no steps to obtain further details about the content of the operational files allegedly implicating the applicant in drug trafficking (see paragraphs 34-44 above).

106. Lastly, in Mr Zveryan's case, the applicant also confirmed having taken drugs. He regarded himself as a recreational drug user but strongly denied any involvement in drug trafficking. The drugs police, on the other hand, claimed that there had existed "preliminary operational" information from an undisclosed source suggesting that he was also selling drugs. At the trial, the undercover agent "Azamatov" testified that he had never bought drugs from the applicant prior to the test purchase and had never seen him selling drugs to anyone. As in the other cases under examination, the drugs police alleged that they had merely joined an ongoing criminal activity, but that allegation was not detailed beyond the statement that there was "operational information implicating the applicants in dealing in MDMA pills". It appears that the trial court took no steps to access the operational files allegedly implicating the applicant in drug trafficking (see paragraphs 45-59 above).

107. According to the general principles set out in the Court's case-law, the Court must first examine the question whether the State agents carrying out the undercover activity remained within the limits of "essentially passive" behaviour or went beyond them, acting as *agents provocateurs*. In addressing this question, the Court will apply the substantive test of incitement (see *Bannikova*, cited above, §§ 37-50); its ability to make a substantive finding on this point will depend on whether or not the case file contains sufficient information on the undercover activities preceding the offence, in particular details of encounters between the undercover agents and the applicants leading to the test purchase.

108. The Court considers that the above-mentioned test purchases raise questions of fact that are essentially different from those examined in *Veselov and Others*, cited above. In the latter case, it found that the reasons for carrying out the test purchases were sufficiently clear. It was established that they had been ordered on the basis of information provided by private sources who subsequently acted as buyers in the police-controlled test purchases. In each case, the source had been identified and had testified at the trial. No other, undisclosed, information had played any role in the conduct of the undercover operations or in the determination of criminal charges. Accordingly, the Court had a sufficient factual basis that enabled it to examine the undercover operations applying the substantive test of incitement (ibid., §§ 95-97, and *Bannikova*, cited above, §§ 37-50).

109. In the present case, however, the Government claimed that the test purchases had been ordered on the basis of "operational information" received from undisclosed sources. Neither the Government's observations nor the materials of the criminal case files at the Court's disposal contain any further details that could assist the Court in ascertaining the existence of such information, its content and its relevance to the test purchases. The applicants, for their part, had contested the existence of such information throughout the domestic proceedings and before the Court.

110. It was only in Mr Semenov's case that the Government had attempted to expand on the reasons for targeting the applicant in the covert operation. They suggested in their observations that the test purchase had been ordered on the basis of information obtained through the interception of the applicant's telephone calls. However, the Court cannot accept that explanation because of the lack of any details as to the content of the allegedly incriminating information and the lack of any corroborating documents (see paragraph 104 above). It will therefore proceed on the premise that the reasons for the covert operation in Mr Semenov's case remain unclear, as in the cases of the four other applicants.

111. The Court considers that on the basis of the materials in its possession, which lack verifiable accounts of the initial phase of the test purchases, it is unable to determine whether the authorities had had good reasons for mounting the covert operations and whether the undercover agents had exerted pressure on the applicants to commit the offences at issue. It is accordingly impossible for the Court to establish whether or not the applicants were victims of entrapment, as they claim.

(ii) Procedural test of incitement

112. Having found that the substantive test is inconclusive, owing to the lack of factual information, the Court will have to rely on the procedural test whereby it will assess the procedure by which the plea of incitement was determined by the domestic courts (see *Bannikova*, cited above, §§ 51-65). It will therefore proceed to examine whether the applicants were able to raise the issue of incitement effectively in the domestic proceedings and assess the manner in which the domestic courts dealt with their pleas.

113. The Government contended, *inter alia*, that all the applicants had been able to raise the incitement plea effectively at their trial and that the courts had thoroughly examined it before dismissing it. The applicants, for their part, maintained that the courts had rejected the entrapment plea without examining the substance of their allegations. In particular, they did not question the drugs police about the reasons for mounting the covert operations, did not check the operational files and did not verify whether the undercover agents had acted in a passive manner.

114. The Court will begin its assessment of the domestic procedure by noting that the applicants' criminal conviction was based in each case entirely or predominantly on the evidence obtained through the police-controlled test purchases of drugs. It also observes that the offences of which the applicants were convicted had involved the direct participation of the undercover police officers or informers.

115. The Court reiterates that test purchases and similar investigative techniques are generally associated with the risk that a criminal offence will be instigated by the police, unless firm procedural safeguards are in place. In respect of Russia it has previously found that test purchases and operative

experiments fall entirely within the competence of the operational-search bodies and held that this system revealed a structural failure to provide for safeguards against police provocation (see paragraph 93 above).

116. Taking into account the importance of the covert operations for the outcome of the criminal proceedings and the high risk of provocation, it was incumbent on the domestic courts to verify that the manner in which the test purchases had been ordered and conducted excluded the possibility of abuse of power, in particular of entrapment.

117. The Court has previously noted that it is illegal under Russian law to incite individuals to commit criminal offences. Under the rules of criminal procedure, all evidence obtained in breach of that prohibition must in principle be excluded (see *Khudobin*, cited above, §§ 133-35). This requirement is in line with the Court's approach to evidence obtained though undercover operations; for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see *Teixeira de Castro*, cited above, §§ 34-36; *Khudobin*, cited above, § 135; *Vanyan*, cited above, §§ 46-47; *Ramanauskas*, cited above, § 54; and *Edwards and Lewis*, cited above, § 46).

118. In the present case the trial courts, when confronted with a plausible – and even arguable – allegation that the undercover police officers and informants were not acting in a passive manner, should have had regard to whether the results of the test purchases were admissible as evidence, in particular verifying that they were not tainted by incitement. Interpreted in the light of the Court's case law, this requirement entailed an obligation to establish in adversarial proceedings 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, and *Bannikova*, cited above, § 73).

119. The Court stresses the importance of the courts' supervisory role and their increased responsibility in a system where the police operation takes place without a sufficient legal framework or adequate safeguards, as is generally the case in Russia (see *Khudobin*, cited above, §§ 133-35, *Bannikova*, cited above, § 56; and *Veselov and Others*, cited above, § 94). In such a system the judicial examination of an entrapment plea provides the only effective means of verifying the validity of the reasons for the undercover operations and ascertaining whether the agents remained "essentially passive" during those operations.

120. The Court reiterates that in order to examine an entrapment plea effectively it is incumbent on the trial court to take the necessary steps to uncover the truth, while bearing in mind that the burden of proof falls on the prosecution to demonstrate that there has been no incitement (see *Ramanauskas*, cited above, § 70). This includes the task of determining

what material must be made a part of the case file in order to examine the plea of entrapment (see *Edwards and Lewis*, cited above, § 54).

121. In all those criminal cases, when the drugs police relied on classified information from undisclosed sources implicating the applicants in drug trafficking, it fell to the domestic courts to verify the existence of such information prior to the first contact between the undercover agent and the suspect, to assess the content of that information and to decide whether or not it could be disclosed to the defence. In the circumstances of the present cases, the entrapment plea could not be examined without requesting all relevant materials concerning the allegedly pre-existing "operational information" incriminating the applicants prior to the undercover operations and questioning the undercover agents about the early stages of their infiltration. However, the courts made no attempts to check the allegations of the drugs police and accepted their uncorroborated statements that they had had good reasons for suspecting the applicants. They dismissed the entrapment plea in breach of their procedural obligations set out in the Court's case-law (see, in particular, paragraph 118 above). That failure was particularly consequential given the importance of a judicial examination of the entrapment plea, which is the only safeguard against provocation provided for in the Russian system.

122. In cases such as the present ones the determination of an entrapment plea is inseparable from the question of the defendant's guilt, and the failure to address it compromised the outcome of the applicants' trials beyond repair. It was also at odds with the fundamental guarantees of a fair hearing, in particular the principles of adversarial proceedings and the equality of arms. The courts did not ensure that the prosecution had discharged the burden of proof by establishing that there had been no incitement and thus unduly placed the burden of adducing evidence of entrapment on the applicants. However, since the "operational information" was not disclosed, it was impossible for the applicants to challenge its content and relevance, and that burden was impossible to discharge. Consequently, the applicants were put at a disadvantage *vis-à-vis* the prosecution with nothing to counterbalance that, restore the equality of arms and achieve the overall fairness of the criminal proceedings.

123. In view of the above factors, the Court considers that in all five cases the trial courts failed to comply with their obligation to examine the plea of entrapment effectively.

(iii) Conclusion

124. Regarding the entrapment plea, the Court has found that in all the applicants' cases the domestic courts took no steps to verify the content of the operational files allegedly implicating them in drug trafficking (see paragraphs 103-06 above). They did not establish the reasons why the covert operations had been mounted, the extent of the police's involvement

in the offence and the nature of any incitement or pressure to which the applicants had been subjected. In the light of the foregoing, the Court concludes that the domestic courts did not comply with their obligation to take cognisance of all possible materials supporting the entrapment plea. That omission prevented the courts from carrying out effective judicial supervision of the test purchases, thus failing to comply with the only safeguard against police provocation in a system where the authorisation of covert operations falls short of guarantees against abuse.

125. There has accordingly been a violation of Article 6 of the Convention as regards all five applicants.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

126. Two applicants 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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."

128. Mr Zveryan did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

129. The other applicants submitted the following claims.

A. Damage

130. In respect of non-pecuniary damage Mr Ivan Lagutin and Mr Viktor Lagutin claimed 25,000 euros (EUR) each, Mr Semenov claimed EUR 195,000 and Ms Shlyakhova claimed EUR 10,000.

131. The Government contested those claims as excessive and out of line with the awards made by the Court in similar cases. They considered that the acknowledgment of a violation, if found by the Court, would constitute sufficient just satisfaction for the applicants.

132. The Court considers that in the present case an award of just satisfaction must take account of the fact that the applicants did not have a fair trial because they were convicted of 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 appear to be excessive. Making its assessment on an equitable basis, the Court awards Mr Ivan Lagutin, Mr Viktor Lagutin, Mr Semenov and Ms Shlyakhova EUR 3,000 each in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

133. 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). This applies to all five applicants in the present case. The Court notes in this connection that Article 413 of the Russian Code of Criminal Procedure provides a basis for the reopening of the proceedings if the Court finds a violation of the Convention (see paragraph 67 above).

134. Lastly, the Court points out that the failure to conduct an effective judicial review of the entrapment plea which gave rise to the finding of a violation in this case was intrinsically linked to the structural failure of the Russian legal system to provide for safeguards against abuse in the conduct of test purchases. The Court has already highlighted the structural nature of the problem, indicating that in the absence of a clear and foreseeable procedure for authorising test purchases and operational experiments the system was in principle inadequate and prone to abuse (see paragraphs 93 and 115 above with further references). This situation in principle calls for the adoption of general measures by the respondent State, which remains, subject to monitoring by the Committee of Ministers, free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V).

B. Costs and expenses

135. The applicants made no claims under this head.

136. The Government made no comment.

137. 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 the applicants under this head.

C. Default interest

138. 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 complaint 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 five applicants;

4. *Holds*
   (a) that the respondent State is to pay Mr Ivan Lagutin, Mr Viktor Lagutin, Mr Semenov and Ms Shlyakhova within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) each in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (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 24 April 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Pinto de Albuquerque joined by Judge Dedov is annexed to this judgment.

I.B.L.
S.N.

ANNEX

List of applications

No.	Application No.	Lodged on	Applicant's name Date of birth Place of residence	Represented by
1.	19678/07	06/01/2007	**Andrey Nikolayevich SEMENOV** 30/10/1979 Novocheboksarsk, the Republic of Chuvashiya	Vadim Andreyevich LOSHCHILIN
2.	52340/08	03/06/2008	**Yekaterina Aleksandrovna SHLYAKHOVA** 25/04/1986 Zelenchukskaya, the Krasnodar Region	Ruslan Khamsudinovich KHUSHT The applicant was granted legal aid
3.	6228/09	17/12/2008	**Ivan Vasilyevich LAGUTIN** 13/11/1980 Kochubeyevskoye, the Stavropol Region	Aleksandr Sergeyevich DAVYDOV
4.	7451/09	10/10/2008	**Aleksey Leonidovich ZVERYAN** 14/04/1986 Obninsk, the Kaluga Region	Valentin Valentinovich BOGAYCHUK
5.	19123/09	14/03/2009	**Viktor Vasilyevich LAGUTIN** 29/01/1986 Stavropol	Georgiy Anzorovich UVAROV

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGE DEDOV

1. The *Lagutin and Others* case expands the jurisprudence of the European Court of Human Rights ("the Court") on special investigation techniques. The novelty of the case lies in the lack of judicial review of the existence of incriminating evidence forming the basis for the undercover operation order, and consequently the extent of the police's involvement in the offence[1]. Quite rightly, the Court found a breach of Article 6 of the European Convention on Human Rights ("the Convention") and strongly criticised the shortcomings of the applicable Russian law, namely the Operational-Search Activities Act of 12 August 1995, but it could and should have gone further, and given proper guidance to the Russian authorities on introducing appropriate legislation on special investigation techniques ("operational-search activities"). In view of the systemic failure of the Russian legal order previously noted by the Court, and repeated in the present case, the time was ripe for the Court to establish the requirements of Convention-compliant legislation on special investigation techniques, and to impose on the respondent State the obligation to review its legislation in accordance with those requirements[2]. In addition, the cases at hand contain some particularly serious features which should have merited the attention of the Court, such as the long duration of the police investigation of one of the suspected persons, the audio- and video-recording of the undercover operations and the performance of one undercover operation while the suspected person was in a state of intoxication. The purpose of this opinion is to address these particular issues along with the general problem raised by the Article 46 obligation.

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[1] The expressions "undercover operation" and "operative experiment" were used in this case in a broad sense, which includes infiltration, covert audio and video recording, test sales of drugs, and other "operational-search activities". This broad concept can be equated to the concept of "special investigation techniques" as defined in the Council of Europe Committee of Ministers' Recommendation Rec(2005)10 on "special investigation techniques". Although there is not a generally accepted legal definition, special investigation techniques are deceptive by nature, in so far as they are fashioned and implemented in such a way as to gather evidence from the subject of the technique without his or her knowledge thereof. The covert or secret nature of the technique is not sufficient for it to qualify as a "special investigation technique", since there must be an additional element of deception, disguise, cunning and subterfuge.

[2] See paragraphs 93 and 115 of the judgment and the previous cases of *Vanyan v. Russia*, no. 53203/99, §§ 46-47, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII; *Bannikova v. Russia*, no. 18757/06, §§ 49-50, 4 November 2010; and *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, §§ 106 and 126-127, 2 October 2012.

Special investigation techniques in international law

2. On the basis of the current international law standards in general and the Court's case-law in particular, as well as comparative-law research into the relevant legal framework in some European countries, it can be affirmed that an international consensus has emerged as to the minimum content of human rights-compatible legislation on special investigation techniques. This consensus has been reflected worldwide in Annex IV of the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (1977), Articles 1 (g) and 11 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 20 of the United Nations Convention against Transnational Organized Crime (2000), Article 50 of the United Nations Convention against Corruption (2003), Articles 11 and 12 of the International Convention on Mutual Administrative Assistance in Customs Matters (2003), Article 14 of the INTERPOL Model Police Co-operation Agreement, Recommendations 31 and 37 of the FATF Recommendations on International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2012)[3], the G8 Recommendations on Special Investigative Techniques and other Critical Measures for Combating Organized Crime and Terrorism (2004)[4] and Article 5 of the Inter-American Drug Abuse Control Commission (CICAD) Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses (1992, last amended in 2005).

3. In Europe, this consensus has been expressed in Articles 40 and 73 of the Convention implementing the Schengen Agreement (1990), Article 4 (2) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)[5], Articles 21 and 22 of the Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II Convention) (1997)[6], Article 23 of the Criminal Law Convention on Corruption (1999)[7], Articles 12 and 14 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000)[8], Articles 17 to 19 of the Second Additional Protocol to the

[3] See the previous Recommendation 36 of the FATF Recommendations (1996 version) and Recommendation 27 of the FATF Recommendations (2003 version).
[4] Approved at the meeting of G8 Justice and Home Affairs Ministers in Washington, 11 May 2004.
[5] ETS no. 141 and paragraphs 29 and 30 of the Explanatory Report. The Russian Federation has been bound by this treaty since 1 December 2001.
[6] Council Act 98/C 24/01 of 18 December 1997.
[7] ETS no. 173. The Russian Federation has been bound by this treaty since 1 February 2007.
[8] Council Act of 29 May 2000.

European Convention on Mutual Assistance in Criminal Matters (2001)[9], Article 7 (3) of the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)[10], Article 6, paragraph 1(a)(vi), of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, as amended by Council Decision 2009/426/JHA, the Council of Europe Committee of Ministers' Recommendation Rec(2001)11 concerning guiding principles on the fight against organised crime, Guideline VI of the Guidelines of the Committee of Ministers on human rights and the fight against terrorism (2002), and the Committee of Ministers' Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism.

Accordingly, human rights-compatible legislation on special investigation techniques must have the following features at least:

(1) The law must provide for a catalogue of serious offences that may be investigated by means of a special investigation technique; this refers either to a list of specific criminal offences or generally to offences punishable by four or more years' imprisonment[11].

(2) The law must provide for a catalogue of special investigation techniques, such as test purchases, test sales, controlled import, controlled export, controlled transit, other controlled operations, infiltration and undercover operations[12].

(3) The law must provide for a catalogue of the persons who may perform special investigation techniques, such as police officers, customs officers and other law-enforcement agents or private persons working under the instructions of the law-enforcement agencies.

(4) The law must set out the maximum time duration of the special investigation techniques, which can potentially be extended one or more times after an assessment by the competent authorities of the results of the initial stages of the operation, but in any event with a maximum time-limit imposed for the whole operation[13].

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[9] ETS no. 182 and paragraphs 132-158 of the Explanatory Report.

[10] CETS no. 198 and paragraphs 79-90 of the Explanatory Report. The Russian Federation has signed but has not yet ratified this treaty.

[11] Article 2 (b) of the UN Convention against Transnational Organized Crime defines "serious crime" as conduct punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. The Explanatory Report on Recommendation Rec(2005)10 of the Committee of Ministers follows that reference.

[12] See paragraph 27 of the Explanatory Report on Recommendation Rec(2005)10 of the Committee of Ministers, and Guideline VI of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.

[13] See paragraph 156 of the Explanatory Report on the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

(5) The law must indicate the "good reasons" that may justify the adoption of a special investigation technique, such as law enforcement and crime prevention and prosecution[14].

(6) The law must require observance of the test of proportionality[15], according to the following rules:

(6.1) The special investigation technique must be proportionate to the "good reasons" indicated, which requires a fair balance to be struck between the competing rights of the suspected person and the "good reasons" cited as justification for the special investigation technique;

(6.2) The balancing exercise also has to take into account the rights and interests of the alleged victims, and therefore, for example, a controlled delivery is not appropriate in cases of trafficking in persons;

(6.3) The graver the suspected offences and their past or future consequences, the more intrusive and extensive the special investigation technique may be;

(6.4) The special investigation technique must ensure that the essence (or minimum core) of the rights of the suspected person is respected, such as his or her right to life and limb.

(7) The law must require compliance with the principle of necessity[16], according to the following rules:

(7.1) The special investigation technique must be necessary, which requires that the interference with the rights of the suspected persons must adequately serve the aims of the "good reasons" cited and go no further than is necessary to achieve those aims;

(7.2) The special investigation technique must be justified only as a measure of last resort, that is, when no other means of obtaining evidence are available;

(7.3) The special investigation technique must be tailored to avoid, as far as possible, targeting persons or institutions that are not responsible for the suspected offences; and

(7.4)The operation must be immediately stopped when it no longer serves the aims of the "good reasons" cited.

(8) The law must set out the list of authorities competent to issue a special investigation technique order, such as a judge, a prosecutor, a senior

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[14] See Chapter II, paragraph 2, of Recommendation Rec(2005)10 of the Committee of Ministers, and *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 63, ECHR 2008, and *Malininas v. Lithuania*, no. 10071/04, § 36, 1 July 2008.

[15] See Chapter II, paragraph 5, of Recommendation Rec(2005)10 of the Committee of Ministers and paragraph 46 of its Explanatory Report.

[16] See Chapter II, paragraph 6, of Recommendation Rec(2005)10 of the Committee of Ministers and paragraph 155 of the Explanatory Report on the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

police officer or other senior law-enforcement agent[17], according to the following rules:

(8.1) There must be a judicial authorisation and regular reviews of the special investigation technique whenever it involves interferences with the right to the protection of one's image, voice or private life[18], such as in the following cases:

(8.1.1) entry and bugging inside homes or private dwellings;

(8.1.2) entry and bugging inside office premises of clergy, medical doctors and lawyers;

(8.1.3) bugging outside private dwellings;

(8.1.4) tracing and tapping of phone conversations;

(8.1.5) tracing and interception of telecommunications and electronic communications;

(8.1.6) interception of post;

(8.1.7) acoustic and optical surveillance, by means of covert photography, and covert audio- or video-recording;

(8.1.8) use of Global Positioning System (GPS) satellite-guided positioning systems;

(8.1.9) automatic personal data comparison, defined as screening of specific personal characteristics of the suspected person in data stored for purposes other than criminal prevention and prosecution; and

(8.1.10) long-term observation, defined as observation for an uninterrupted period of more than twenty-four hours or on more than two days which provides an "image in movement" (*Bewegungsbild*) of the suspected person's life.

(8.2) In cases of urgency, a special investigation technique which involves interferences referred to in (8.1) may be authorised by a public prosecutor, but must be confirmed by a judge within a short period of time.

(8.3) A special investigation technique which does not involve interferences referred to in (8.1) may also be authorised by a public prosecutor, a senior police officer or other senior law-enforcement agent.

(8.4) The authorising agent must not be involved in any way in the execution of the operation, that is to say, he or she must not be the executing agent, belong to the same service as the executing agent or have hierarchical or supervisory power over the executing agent[19].

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[17] See Chapter II, paragraphs 1 and 3, of Recommendation Rec(2005)10 of the Committee of Ministers.

[18] One should not confuse the use of certain technologies and special investigation techniques. The use of such technologies alone is not, in itself, a special investigation technique.

[19] See *Khudobin*, cited above, § 135.

(9) The law must set out the procedure to be followed for the issuance and execution of a special investigation technique order[20], which includes the following:

(9.1) The request for a special investigation technique must be supported by incriminating evidence which provides at least sufficient cause to suspect (*hinreichende Tatverdacht*) that an offence has been, is being or will be committed; this standard is lower than that of clear, strong evidence (*dringende Tatverdacht*), but is higher than that of a mere *bona fide*, initial suspicion (*Anfangsverdacht*)[21];

(9.2) The competent authority must deliver a reasoned decision on the justification, purpose and limits of the operation and, if need be, on the authorisation for the State agent (or a private person under the instruction of a State agent) to use a false identity, forged documents, counterfeit money or unlawful arms, to act on behalf of bogus legal persons, to perform fake transactions or to commit other criminal offences that are instrumental to the purposes of the operation, with the exception of crimes against life or limb[22];

(9.3) The State agent (or a private person under the instruction of a State agent) must document, by means of written reports, all the activities performed and incidents that occurred during the operation, and must submit these documents regularly to the authorising authority.

(10) The law must set out the judicial procedure for the evaluation and potential exclusion of the evidence collected during the operation[23], even in the case of a guilty plea[24], which must take into consideration the following four evidentiary rules:

(10.1) Only evidence referring to criminal acts and omissions within the catalogue mentioned above in (1) can be considered for the purposes of criminal prosecution and conviction, and evidence of offences outside this catalogue cannot be considered for any law-enforcement purposes;

(10.2) Only evidence that refers to criminal acts and omissions that were not instigated by the agent can be considered for the purposes of criminal prosecution and conviction, and evidence of offences instigated,

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[20] See *Khudobin*, cited above, § 135, and *Ramanauskas*, cited above, § 53.

[21] See Chapter II, paragraph 4, of Recommendation Rec(2005)10 of the Committee of Ministers and paragraph 44 of its Explanatory Report.

[22] *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI; *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII; *Vanyan*, cited above, § 49; and *Khudobin*, cited above, § 134.

[23] The scope of the judicial review must include the reasons why the covert operation was mounted, the extent of the police involvement in the offence and the nature of the incitement or pressure to which the defendant was subjected (see *Ramanauskas*, cited above, § 71), and the court must have the power to exclude evidence that did not comply with the legal framework of covert operations (see *Khudobin*, cited above, §§ 133-135).

[24] See Chapter II, paragraph 7, of Recommendation Rec(2005)10 of the Committee of Ministers, and *Ramanauskas*, cited above, § 72.

incited or provoked by the State agent (or a private person under the instruction of a State agent) cannot be considered for any law-enforcement purposes;

(10.3) The burden of proof to demonstrate that there was no instigation, incitement or provocation lies with the prosecution[25];

(10.4) The evidence gathered by means of the special investigation technique must be corroborated by other convincing lawfully obtained evidence, and thus a criminal conviction may not be based solely or to a decisive extent on the evidence collected by means of the operation[26].

(11) The law must set out the judicial procedure for cross-examination by the parties of the evidence gathered by means of the special investigation technique[27], with specific rules enabling the defendant to raise a complaint of entrapment[28], and ensuring the protection of the confidentiality of the State agent's identity (or the identity of the private person under the instruction of a State agent), certain police methods of investigation or other relevant information on the grounds of public-interest immunity, but in any case providing sufficient safeguards for the defendant to contest the evidence adduced by the prosecution[29].

(12) The law must provide for the possibility of an appeal in order to contest the lawfulness of the gathering of the evidence and its reliability.

(13) The law must provide for exclusion from criminal responsibility for the State agent (or the private person under the instruction of a State agent), only to the extent that criminal offences committed by him or her during the operation are instrumental to the purposes of the operation and were duly authorised in accordance with (9.2) and the agent complied with the

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[25] Incitement or instigation exists when the suspected person would not have committed the offence but for the action of the State agent (see *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-36, *Reports of Judgments and Decisions* 1998-IV, and *Ramanauskas*, cited above, § 70). The Russian Act of 1995, as amended by a Federal Law of 2007, expressly forbids operational-search measures "to incite, induce, encourage, directly or indirectly, to commit unlawful acts (provocation)".

[26] See paragraph 114 of the judgment in the present case. This rule has been accepted, for example, in Germany (Joint Circular of the Ministry of Justice and the Ministry of Interior on Informants, Police Informers and Undercover Agents, 1994), France (Article 706-87 of the Code of Criminal Procedure), Croatia (Article 333 § 3 of the Code of Criminal Procedure), Bulgaria (Article 177 of the Code of Criminal Procedure), "the former Yugoslav Republic of Macedonia" (section 339(3) of the Criminal Proceedings Act) and Greece (Greek Court of Cassation's judgment no. 193/2009, and the Committee of Ministers' Resolution CM/ResDH(2011)11 on the execution of the *Pyrgiotakis* judgment).

[27] See *Sequeira*, cited above, and *Bannikova*, cited above, § 76.

[28] See Guideline VI of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, and *Ramanauskas*, cited above, § 69.

[29] See *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports* 1996-II; *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X; *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 205-224, ECHR 2009; and *Bannikova*, cited above, §§ 62-65.

conditions mentioned in (10.1) and (10.2). Any crimes committed against life or limb by the State agent (or a private person under the instruction of a State agent) during the operation can only be justified under the general terms of criminal law (for example, under self-defence, state of necessity or conflict of duties).

Application of the standard outlined above to the present cases

4. In the light of the above, the shortcomings of the police's conduct in the present cases are striking, and the domestic courts and prosecutors, moreover, provided only a limited remedy or no remedy at all. In the case against the Lagutin brothers, the second and third operations breached the principle of necessity, since the collection of evidence in the first operation had been sufficient to support the prosecution's case, as the Presidium of the Stavropol Regional Court rightly decided. The subsequent evidence was therefore tainted by the violation of the principle of necessity. Furthermore, the first and second undercover operations regarding the brothers were video-recorded[30]. Video-recording of the operation has a twofold consequence. On the one hand, it increases the degree of interference of the operation with the suspected person's rights, in so far as his or her voice and image are captured without consent. But on the other hand, it also ensures an enhanced review by the judge and the parties of the legality and reliability of the evidence gathered. Hence, the video-recording must be authorised by a judge, in accordance with the nature of the right to protection of one's own image and voice as a Convention right[31]. Since no judicial authorisation was obtained in the case of the Lagutin brothers, the evidence gathered against them based on the covert operation, or resulting from it in any way, should have been excluded by the domestic courts[32]. This conclusion is all the more forceful since no report was ever made by the undercover agent to his superiors about the manner of his communications with the suspected persons prior to, and between, the test purchases.

5. In the case against Mr Semenov, the undercover agent "Ivanov" was a police informant whose identity was kept secret. The judge could possibly have requested the details of his identity, but the national law is not clear as to whether the prosecutor could still have withheld this information had the

[30] See paragraph 15 of the judgment.

[31] See paragraph 5 of the remarkable ruling no. 21 of 27 June 2013 of the Plenum of the Supreme Court of the Russian Federation: "under the case-law of the European Court, using a person's image without this person's consent constitutes a violation of the relevant rights guaranteed by the Convention", and also Judge Pinto de Albuquerque's opinion in *Söderman v. Sweden* [GC], no 5786/08, ECHR 2013.

[32] See paragraph 11 of ruling no. 21 of the Plenum of the Supreme Court of the Russian Federation, cited above.

judge requested it. Although cross-examined in court, the agent "Ivanov" did not answer any of the relevant questions put to him. Moreover, the Government acknowledged that the police had kept a file on the suspected person for a year and a half prior to the test purchase, but this file was not provided to the court or submitted to the parties for examination. Even more extraordinary is the fact that such covert surveillance lasted for so long without the supervision of a judge[33]. Indeed, according to the current legal framework, the surveillance could have gone on and on for years, since there is nothing to prevent the police from closely following, monitoring and scrutinising the life of a person for an unlimited period of time, without ever disclosing such long-term observation to a judge or prosecutor. To conclude, there was no real cross-examination of the evidence adduced by the prosecution, and worse still, the bulk of the police's investigating activities, including the audio-recording of the undercover operation, were performed without any effective supervision by a judge. Here again, the evidence gathered by the police falls short of the international human rights standard.

6. In the case against Ms Shlyakhova, the suspected person was intoxicated by narcotics during the undercover operation, and her intoxication was evident to the undercover agent[34]. The principle of proportionality at least, if not the basic principle of human solidarity, requires that State agents should not start or continue an action detrimental to the rights and interests of citizens when the latter are gravely ill or intoxicated. The particular state of vulnerability of the suspected person should have led the undercover agent to suspend the operation. More gravely, the defendant alleged that her state of intoxication had been caused by the undercover agent himself[35]. Such an allegation should have been accorded the utmost care and attention by the domestic courts. Yet the domestic courts did not investigate this allegation seriously, having omitted to include any consideration of it in their judgments. In fact, the judgments did not take into consideration the defendant's state of intoxication at all. Furthermore, the domestic courts did not make the slightest attempt to clarify the flagrant contradiction between the public prosecutor and the police officers during the trial hearing[36]. In conclusion, even assuming that the undercover agent did not intoxicate the defendant, which is uncertain, the evidence resulting from the undercover operation was tainted and should have been excluded by the domestic courts, because the undercover agent in any event acted in breach of the principle of proportionality by continuing his operation when the suspected person was seriously intoxicated. This conclusion is reinforced by the fact that the decisions authorising the test

[33] See paragraph 25 of the judgment.
[34] See paragraph 37 of the judgment.
[35] See paragraph 42 of the judgment.
[36] See paragraph 38 of the judgment.

purchases were taken by the same operational officer who organised the test purchases and drew up the documents pertaining to them, which nullified *ab initio* the entire procedure of authorisation.

7. In the case of Mr Zveryan, the appellate court did not even address the entrapment plea, leaving the defendant without any sort of legal protection[37]. Here again, there was no supervision of the undercover operation by a judge or prosecutor and no authorisation for the audio-recording of the operation by a judge.

8. In all the cases before the Court, the Government argued that, in accordance with section 12 of the Operational-Search Activities Act of 12 August 1995, the data on the sources of information concerning the conduct of a test purchase were not to be disclosed in the present cases, since they constituted a State secret and, although they could be declassified by a ruling of the head of the agency carrying out the operation, there was no need to declassify them, because the evidence available to the domestic courts was sufficient to determine whether there had been any provocation. This line of argument is not convincing, for two reasons. First, there was no discussion during the domestic proceedings about whether the police investigations constituted a State secret, this allegation being submitted for the first time before the Court. Second, there is nothing in the files to support the conclusion that, at the time the decisions on the validity of the special investigation techniques were taken, the evidence available to the various domestic courts was sufficient to determine whether there had been any provocation. Contrary to the Government's statement, it appears from the files that the domestic courts assumed, without any hesitation, that there was sufficient incriminating evidence to form a basis for the undercover operation order, and consequently that there had been no police provocation. The lack of judicial review of the undercover operations involving audio- or video-recording was aggravated by the circumstance that no effective and regular supervision of the police investigation was carried out by the prosecution. Indeed, the existing practice reflects the shortcomings of the legal framework of "operational-search activities", which lacks basic human rights guarantees, and the possibility for the applicant to bring court proceedings seeking to declare an "operative experiment" unlawful and to request the exclusion of its results as unlawfully obtained evidence is evidently not sufficient[38].

Conclusion

9. The fight against drug trafficking is a priority of law enforcement in Europe, and special investigation techniques are a powerful means of

[37] See paragraph 59 of the judgment.
[38] *Bykov v. Russia* [GC], no. 4378/02, §§ 80-83, ECHR 2009.

pursuing this fight. But in Europe there are very precise limits to the means that can be used by courts and law-enforcement agents in this fight. And these limits were seriously overstepped in the cases before the Court, as in other similar ones. In order to tackle this systemic problem, the respondent State must not only reform its legislation on special investigation techniques in accordance with the above-mentioned international human rights standards, but must also take the additional administrative measures to achieve effective implementation of the new legislation in the practice of all law-enforcement agencies, and especially the police. In addition, in the specific cases before the Court, the domestic courts must necessarily quash the unfair convictions delivered on the basis of the impugned undercover operations, and consequently clear the defendants of the accusations against them, since the unfair convictions of the applicants are still severely affecting them[39]. Any other solution would be an affront to the rule of law.

[39] This conclusion is also applicable to persons who might be in a similar position to the applicants. See again paragraphs 17 and 21 of the far-reaching ruling no. 21 of the Plenum of the Supreme Court of the Russian Federation, cited above.