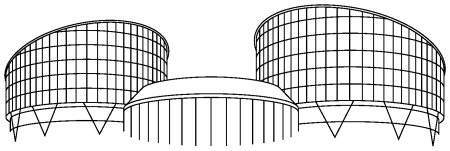

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF NOSKO AND NEFEDOV v. RUSSIA

(Applications nos. 5753/09 and 11789/10)

JUDGMENT

STRASBOURG

30 October 2014

FINAL

30/01/2015

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

In the case of Nosko and Nefedov v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 7 October 2014,

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

PROCEDURE

1. The case originated in two applications (nos. 5753/09 and 11789/10) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Ms Alla Vladimirovna Nosko and Mr Nikolay Polikarpovich Nefedov ("the applicants"), on 30 December 2008 and 25 January 2010 respectively.

2. Ms Nosko was represented by Mr Ivan Grigoryevich Nosko, a lawyer practising in the town of Zarechnyy in the Penza Region. 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, who had been convicted of bribery and abetting bribery, respectively, alleged that their conviction had been a result of entrapment by the police in breach of Article 6 of the Convention.

4. On 17 November 2010 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were both targeted in undercover operations designed to investigate bribe-taking launched by the police under sections 6 and 8 of the Operational-Search Activities Act of 12 August 1995 (no. 144-FZ).

6. The facts of each individual criminal case, as submitted by the parties, are summarised below. The factual details of the undercover operations are not in dispute and the applicants admitted that they had received the money in return for promises to render certain services. However, the applicants contested the Government's position as to the reasons for the undercover operations and the circumstances leading to them. In particular, they contended that they had accepted the money only because the police had incited them to do so, and they would not have done it under any other circumstances.

A. The application of Ms Nosko (application no. 5753/09)

7. The applicant was born in 1960 and lives in Zarechnyy, in the Penza Region. At the time of her arrest, she was working as a dermatologist-venerologist in the outpatient unit of the municipal hospital in Zarechnyy.

8. According to the Government, the police in Zarechnyy received confidential operational information implicating the applicant in the illegal acceptance of money for issuing and extending false sick-leave certificates. On 19 November 2007 it was decided to conduct an undercover operation targeting the applicant, with the aim of documenting her illegal activity. The police proposed Ms A. to participate in the operation as their agent.

9. According to the applicant, she had not been implicated in any bribe-taking prior to the operation and the police had had no grounds to suspect her. On 20 November 2007 her colleague and former fellow classmate from medical school, X, had come to her office while she was seeing patients. He had been accompanied by a young woman, Ms A. He had asked the applicant to provide Ms A. with a sick-leave certificate as she had herpes on her leg. The applicant had examined the woman, confirmed the diagnosis, prescribed treatment and issued the sick-leave certificate. The applicant thought that she had recognised Ms A. as the mother of a girl she had treated on a previous occasion. On 23 November 2007 Ms A. had come to the applicant's office by herself and the applicant had agreed to extend her sick-leave as her condition had not yet been cured. Ms A. had been given the certificate and had handed 500 roubles (RUB – 11 euros (EUR)) to the applicant. The applicant had taken the money as she thought that Ms A. was offering it as a token of appreciation for having successfully treated her daughter previously. Immediately after Ms A. had left, the police had entered the applicant's office and asked her and the nurses who were present to show them all the money in their possession. The applicant had taken out her wallet and while the police were searching the office she had remembered about the money that Ms A. had given her. She had become frightened and had moved the money from the pocket of her uniform into her left boot, where the police eventually discovered it.

10. On 26 May 2008 the Zarechenskiy Town Court of the Penza Region examined the applicant's case. The applicant admitted that she had taken the money because she had thought of it as a gift from a grateful patient. She maintained that the police had incited her to accept the money. In particular, they had sent their agent to her office together with a colleague of hers whom she had known well since their student years in medical school and at whose request she had issued the sick-leave certificate to Ms A.

11. Ms A. testified at the trial that on 19 November 2007 she had agreed to help the police conduct an undercover operation investigating bribe-taking. She had telephoned her acquaintance X and told him that she needed a sick-leave certificate to justify her stay at home while she redecorated her flat. X had agreed to help her and she had come to the hospital outpatient unit with him the next day. She had had with her RUB 2,000 (EUR 42) in cash and a recording device given to her earlier by the police. She had given X RUB 500 (EUR 11) for his intermediary services and also RUB 500 (EUR 11) to pay the applicant, who did not examine her at the time but nevertheless issued the sick-leave certificate. On 23 November 2007 she had returned to the applicant's office. The applicant had not examined her but had extended her sick-leave certificate for RUB 500 (EUR 11) which the applicant had placed in the pocket of her uniform.

12. X testified that Ms A. had repeatedly called him requesting the false sick-leave certificate. He had agreed to help her and had received RUB 500 (EUR 11) from her. He had called several doctors but they had refused to help and he had decided to ask the applicant to issue the certificate. On 20 November 2007 he had come to the applicant's office and she had handed him the certificate for Ms A. for RUB 500 (EUR 11) without actually examining Ms A.

13. The police officer in charge of the undercover operation also testified at the trial. In particular, he stated that following the receipt of confidential information implicating the applicant in bribe-taking, an undercover operation had been launched to verify and to document the applicant's unlawful activity.

14. On 26 May 2008 the Zarechenskiy Town Court of the Penza Region granted the prosecutor's request to drop the charges against the applicant in relation to the episode of 20 November 2007 for lack of evidence. It found the applicant guilty of bribery committed on 23 November 2007 and imposed a suspended sentence of three years in prison with three years' probation.

15. On 6 August 2008 the Penza Regional Court examined the applicant's case on appeal and upheld the conviction. The court dismissed the plea of entrapment and held that the police had had good reason to conduct the undercover operation as they were in possession of

incriminating information against the applicant which revealed a pre-existing intent to commit bribery.

B. The application of Mr Nefedov (application no. 11789/10)

16. The applicant was born in 1951 and lives in Cheboksary, in the Chuvash Republic. At the time of his arrest, he worked as a narcology psychiatrist at a regional narcology centre.

17. The Government submitted that in early 2008 the police had received information which had implicated the applicant and other staff members at the regional narcology centre in the issuance of false forensic medical examination reports in return for monetary consideration. On 17 July 2008 the police decided to conduct an undercover operation in order to expose and document the applicant's unlawful acts. One of the police officers, Mr Y., was chosen to participate in the undercover operation and to bribe the applicant into altering the results of Mr Y.'s blood test and issuing a false forensic medical report.

18. The applicant contested the Government's allegations. In particular, he claimed that the incriminating information had been ambiguous and had referred to medical personnel at the local narcology centre in general. It did not specifically identify him as an individual who was taking bribes. Moreover, the police were not in possession of any complaints from persons allegedly aggrieved by his unlawful acts.

19. The applicant further maintained that on 18 July 2008, when he started his shift at the regional narcology centre, traffic police officers had brought Mr Y. to his office for a blood alcohol test. The applicant had conducted preliminary tests that had shown that Mr Y. was under the influence of alcohol. Mr Y. acknowledged that he had drunk some alcohol the day before. Meanwhile, the officer who had accompanied Mr Y. had stepped out of the room and Mr Y. had repeatedly asked the applicant to help him obtain a favourable blood test result as he feared that the alcohol level in his blood would exceed the legal limit and he would have his driving licence revoked. The applicant had categorically refused at first and had sent the applicant to a laboratory for a blood test in the presence of police officers. Mr Y. had then returned to the applicant's office and resumed his requests for help. He had offered to pay the applicant and had stated that his earnings and ability to support his family depended on his having a driving licence. On 19 July 2008 the applicant had again seen Mr Y. in his office, where he had repeated his requests. The applicant had then agreed to try talking to the laboratory staff and speculated that Mr Y. would need to pay RUB 6,000 (EUR 126) or 7,000 (EUR 147) to the laboratory technician. However, the nurse working in the applicant's office had commented that at least RUB 10,000 (EUR 210) would be needed, as the laboratory technician would not accept less. Mr Y. had then paid the

applicant RUB 10,000. The applicant had used RUB 5,000 (EUR 105) to pay the laboratory technician to alter the results of Mr Y.'s blood test and had paid RUB 1,500 (EUR 32) to the nurse to ensure her confidentiality. On 25 July 2008 the applicant had received a further RUB 4,000 (EUR 84) from Mr Y. and they had agreed on an additional RUB 2,000 (EUR 42) to be paid at a later date. Immediately afterwards, the police had entered the applicant's office, charged him with abetting bribery and arrested him on the spot.

20. On 29 May 2009 the Moscovskiy District Court of Cheboksary examined the applicant's case. The applicant testified that he had at first refused to help Mr Y. with his request. He conceded that he had taken the money from Mr Y. but only because Mr Y. had described his difficult personal situation and had strongly urged and incited the applicant to help him.

21. Mr Y. testified that on 18 July 2008 he had consumed 200 grams of vodka in the presence of the police officers who were to participate in the undercover operation. He did not know the name of the applicant at the time. Following some documentary formalities, they all proceeded to the local narcology centre, where the applicant had first established that he tested positive for alcohol. When he and the applicant were alone, he had asked the applicant to tamper with the results of his blood test to prevent him losing his driving licence. The applicant had refused and had sent him off to the laboratory for a blood sample. He had then urged the applicant to help him out once again, had offered him money, and the applicant had at last agreed. On 19 July 2008 he had met the applicant in his office. The applicant had told him that he needed to pay RUB 6,000 (EUR 126) or 7,000 (EUR 147) to the laboratory technician. However, Mr Y. had given RUB 10,000 (EUR 210) to the applicant as the nurse in the applicant's office had commented that the technician would not take less than that. The applicant had later informed him that the technician would modify the test results accordingly. On 25 July 2008 he had paid RUB 4,000 (EUR 84) to the applicant in addition to the money given earlier and had agreed to pay a further RUB 2,000 (EUR 42) later, at the applicant's request.

22. The police officer responsible for the undercover operation testified that in early 2008 the police had received information implicating the applicant and other staff members at the regional narcology centre in bribe-taking. In July 2008 an undercover operation had been planned and launched with the participation of one of the police officers, Mr Y. In the course of the operation, the applicant had agreed to tamper with the results of a forensic medical test in return for financial remuneration from Mr Y. The undercover operation had been both audio-recorded and videotaped and a body search of the applicant at the end of the operation had revealed that he had marked banknotes on his person.

23. On 29 May 2009 the Moscovskiy District Court of Cheboksary convicted the applicant of abetting bribery and sentenced him to imprisonment for two years and six months and to a three-year ban on federal and municipal employment. The court dismissed the applicant's plea of entrapment in its entirety as it found that the police had conducted the undercover operation in a lawful manner. The applicant appealed, pleading police incitement to commit the offence of which he was convicted.

24. On 30 July 2009 the Chuvash Regional Court found the applicant's entrapment claim unsubstantiated and upheld his conviction on appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. Article 290 § 2 of the Criminal Code in force at the material time provided that any official found to have accepted a bribe for an illegal act (or omission) faced between three and seven years' imprisonment together with either revocation of the right to occupy certain posts or suspension of the right to engage in certain activities for up to three years.

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

Section 1: Operational-search activities

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

Section 2: Aims of operational-search activities

"The aims of operational-search activities are:

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

..."

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

"...

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

..."

Section 6: Operational-search measures

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

...

9. supervision of postal, telegraphic and other communications;

10. telephone interception;

11. collection of data from technical channels of communication;

12. operational infiltration;

...

14. operational experiments.

...

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

...”

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

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

1. pending criminal proceedings;

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

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

...”

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

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

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

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

...

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

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

...”

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

“The examination of requests for the taking of measures involving interference with the constitutional right to privacy of correspondence and telephone, postal, telegraphic and other communications transmitted by means of wire or mail services, or with the right to privacy of the home, shall fall within the competence of a court at the place where the requested measure is to be carried out or at the place where the requesting body is located. The request must be examined immediately by a single judge; the examination of the request may not be refused.

...

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

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

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

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

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

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

Section 21: Supervision over operational-search activities by a prosecutor

“The Prosecutor General of the Russian Federation and prosecutors duly aauthorised by him supervise the execution of the present Federal law.

At the request of any of these prosecutors, the heads of bodies in charge of operational-search activities shall provide them with operational documents which include records of ongoing surveillance, reports of recorded operational-search activities as well as the register of documents and agency regulations that govern the administration of operational-search activities.”

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

28. 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 issued by a preliminary interview officer, investigator or prosecutor that were liable to encroach 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.

29. 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 Court ruled, *inter alia*, that decisions issued by 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 issued by an investigator or the head of the investigating or preliminary inquiry authority.

30. 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."

31. Article 413 of the Code of Criminal Procedure contains a list of situations which may justify the reopening of a 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 such reopening (Article 413 §§ 1 and 4 (2)).

III. RELEVANT INTERNATIONAL LAW

32. The Council of Europe's Criminal Law Convention on Corruption (ETS no. 173, 27 January 1999) provides in Article 23 that each party is to adopt such legislative and other measures as may be necessary – including those permitting the use of special investigative techniques – to enable it to facilitate the gathering of evidence in this sphere.

33. The explanatory report on the Convention further specifies that "special investigative techniques" may include the use of undercover agents,

wiretapping, interception of telecommunications and access to computer systems.

34. Article 35 states that the Convention does not affect the rights and undertakings deriving from international multilateral conventions concerning special matters.

35. The Committee of Ministers of the Council of Europe has also adopted several resolutions describing the measures taken by the Governments of Portugal, Greece and Lithuania in line with the respective Court judgments on the use of undercover agents. The Committee noted, in particular, that the national laws of the countries in question were amended to include such requirements as prior judicial authorisation, the existence of credible and objective incriminating information, and strong evidence in addition to the testimony of the police officers involved (see Resolution CM/ResDH(2001)12 adopted by the Committee of Ministers of the Council of Europe on 26 February 2001; Resolution ResDH(2011)11 adopted by the Committee of Ministers of the Council of Europe on 10 March 2011; Resolution CM/ResDH(2011)231 adopted by the Committee of Ministers of the Council of Europe on 2 December 2011).

THE LAW

I. JOINDER OF APPLICATIONS

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

37. The applicants complained that their convictions for bribe-related offences incited by the police were unfair and in breach of Article 6 § 1 of the Convention, which reads:

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

38. The Government contested that argument. They claimed that the applicants had had a pre-existing intent to commit bribe-taking, that the police had conducted undercover operations in a lawful manner and that the criminal proceedings against the applicants had been fair.

39. The applicants disagreed and stated that they had committed the crimes only because the police had incited them to do so.

A. Admissibility

40. The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

41. The Government maintained that the undercover operations in both cases had not involved entrapment. They contended that the police had had statutory grounds for conducting the undercover operation in each case because they had received information implicating the applicants in the issuing of false medical documents in exchange for financial remuneration. They stated that the sources of that information were classified and there was no need to disclose them because the evidence available to the courts was sufficient to determine whether or not entrapment had taken place. Moreover, prior to the conduct of the operations, the police had in both cases carried out preliminary search activities to confirm the allegations against the applicants.

42. They further submitted that upon receiving the incriminating information, senior officials from the respective police departments in both cases had taken the decision to launch the undercover operations. No judicial authorisation had been required because the operations did not infringe the applicants' constitutional rights to privacy of their correspondence, telephone or other communications or their homes.

43. The Government also stated that no pressure had been exerted on the applicants in the course of the undercover operations and that the applicants had solicited and accepted the bribes on their own free will. Moreover, in each case the police had complied with all the formal requirements for the conduct of an undercover operation. The results had been disclosed and the courts had examined and admitted evidence obtained in the course of the operations.

44. Lastly, the Government asserted that the applicants had been able to raise their pleas of entrapment effectively before the domestic courts, which had duly examined them. In particular, the applicants had reviewed and commented on the evidence presented in the case, had submitted requests to exclude certain evidence and had cross-examined witnesses testifying against them. Therefore, the criminal proceedings against the applicants had been fair and in accordance with Article 6 § 1 of the Convention.

(b) The applicants

45. The applicants claimed that the police had unlawfully created an artificial situation to incite them to take bribes. They submitted that prior to the undercover operation the police had not possessed any information which implicated them personally in the criminal activity or which revealed a propensity to commit bribery. Moreover, the incriminating information was possibly not reliable since its sources were not made known.

46. Both applicants claimed that the procedure authorising the undercover operations had fallen short of being clear and foreseeable in so far as the police had not identified suspect individuals prior to the undercover operation but had randomly chosen the applicants for it. The undercover operation had not served the purpose of investigating criminal activity. In addition, Ms Nosko pointed out that the authorisation procedure had not been subject to independent judicial supervision.

47. The applicants further maintained that the police had pressurised them into committing the crimes. In particular, Ms Nosko had taken the money handed to her by the police agent who had been brought to the applicant's office by the applicant's long-time colleague. Mr Nefedov, for his part, asserted that the police agent had described his difficult personal situation and thus had actively invoked compassion in the applicant, prompting him to help and take the money in return.

48. Lastly, both applicants submitted that the courts had failed to properly examine their allegations of entrapment and the circumstances surrounding the two undercover operations.

2. The Court's assessment

(a) General principles

49. The Court has recognised in general that the rise in organised crime and difficulties encountered by law-enforcement bodies in detecting and investigating offences has warranted appropriate measures being taken. It has stressed that the police are increasingly required to make use of undercover agents, informants and covert practices, particularly in tackling organised crime and corruption (*Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 49 and 53, ECHR 2008).

50. The Court has thus consistently accepted the use of undercover investigative techniques in combatting crime. It has held on several occasions that undercover operations *per se* did not interfere with the right to a fair trial and that the presence of clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment (see *Ramanauskas*, cited above, §§ 51 and 53; *Bannikova v. Russia*, no. 18757/06, § 35, 4 November 2010; *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, §§ 89 and 93, 2 October 2012; and

Lagutin and Others v. Russia, nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, § 90, 24 April 2014).

51. In particular, the Court has emphasised that the Convention does not preclude reliance – at the preliminary 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 find a conviction is a different matter and is acceptable only if a clear and foreseeable procedure exists for authorising, implementing and supervising the investigative measures (see *Teixeira de Castro v. Portugal*, 9 June 1998, § 35, *Reports of Judgments and Decisions* 1998-IV, and *Ramanauskas*, cited above, § 53).

52. Furthermore, the Court has reiterated that while admissibility of evidence lies within the domain of the national courts, the Court will in its turn ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Ramanauskas*, cited above, § 52). Therefore, in cases where the main evidence originates from an undercover operation, the authorities must be able to demonstrate that they had good reasons for mounting that operation (see *Bannikova*, cited above, § 40, citing *Ramanauskas*, §§ 63 and 64, and *Malininas v. Lithuania*, no. 10071/04, § 36, 1 July 2008). 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 *Veselov*, cited above, § 90). The Court has emphasised that any information relied on by the authorities must be verifiable (see *Veselov*, cited above, § 90) and that the public interest cannot justify the use of evidence obtained as a result of incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see *Teixeira de Castro*, cited above, § 36, and *Bannikova*, cited above, § 34).

53. In this regard, the Court has repeatedly held that the line between legitimate infiltration by an undercover agent and incitement to commit a crime was likely to be crossed if no clear and foreseeable procedure was set up under the domestic law for authorising undercover operations, and especially if proper supervision was lacking. In cases brought against Russia concerning undercover drug operations the Court has found, in particular, that neither the Operational-Search Activities Act nor other instruments provide sufficient safeguards in this regard and has stated the need for the judicial or other independent authorisation and supervision of such operations (see *Veselov* § 93, cited above, and the cases cited therein).

54. The Court has further observed in its case-law that undercover operations must be carried out in an essentially passive manner without any pressure being put on the applicant to commit the offence through means such as taking the initiative in contacting the applicant, insistent prompting,

the promise of financial gain or appealing to the applicant's sense of compassion (see *Veselov*, cited above, § 92, and the cases cited therein).

55. Lastly, the Court has highlighted that where the accused puts forward an arguable claim of incitement, domestic courts have an obligation to examine it through an adversarial, thorough, comprehensive and conclusive procedure, with the burden of proof on the prosecution to demonstrate that there was no incitement. The scope of the judicial review must include the reasons why the undercover 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. As regards Russia, in particular, the Court has found that the domestic courts have the jurisdiction to examine such pleas, in particular under the procedure for the exclusion of evidence (see *Veselov*, cited above, § 94; *Ramanauskas*, cited above, §§ 70 and 71; and *Khudobin*, no. 59696/00, § 133, ECHR 2006-XII (extracts)).

(b) Application of these principles to the present case

56. The Court observes that both applicants claimed that the police had had no grounds to suspect them of bribe-taking and that they had mounted the undercover operations against them on the basis of unverified information from undisclosed sources. They further contended that the procedure authorising the operations had been deficient since it had not been subject to any independent judicial or administrative control or supervision. In addition, the applicants alleged that the police had not remained passive during the operation but had pressurised them into committing the crime. Both Ms Nosko and Mr Nefedov also alleged that the judicial review of their pleas of incitement had not been adversarial, thorough and comprehensive.

57. In the light of the applicants' allegations and the Court's relevant case-law, the Court will therefore focus first on the circumstances preceding and accompanying the undercover operations in the two cases in order to determine whether entrapment took place. It will then examine the manner in which the domestic courts assessed each of the applicants' claims of entrapment.

(i) Undercover operation in the case of Ms Nosko

58. It follows from the parties' submissions – and appears to be common ground between them – that the police learned about the applicant's allegedly illegal acts through receiving information from an undisclosed source. According to the excerpts from the trial transcript submitted by the applicant, neither Ms A. herself nor the police officer in charge of the operation demonstrated any prior knowledge of the applicant having accepted bribes on earlier occasions. The Government did not dispute this testimony. The information received from the anonymous source therefore

provided the only grounds for conducting an undercover operation and as such, it should have been verified accordingly.

59. The Government pointed out that the police had carried out an "inquiry" (*наведение справок*) and "operational infiltration" (*оперативное внедрение*) prior to the undercover operation to verify the information. However, they did not elaborate on how and when exactly that inquiry and operational infiltration had been executed and what information they had yielded. Moreover, the procedural evidence submitted by the Government does not relate to any inquiry or operational infiltration. It reveals only that two strikingly similar operations were conducted consecutively on 20 and 23 November 2007. They were both designated as "operational experiments". There was no other documentation showing that the police had taken any additional preliminary investigative steps. Thus, it appears that the police proceeded to conduct the undercover operation on 20 November 2007 immediately upon receipt of the incriminating information, without due confirmation, and that the applicant was subsequently indicted in relation to it. The fact that the charges relating to that episode were eventually dropped is irrelevant because the court still admitted as evidence the banknotes and the recording from 20 November 2007 when convicting the applicant in relation to the episode on 23 November 2007. Hence, the operation that took place on 20 November 2007 was not a preliminary inquiry and did not serve the purpose of investigating possible criminal activity but appears to have been a deliberate and calculated move to build up a criminal case against the applicant.

60. The Court also takes into account the role of Ms A. It is not disputed that she participated in the undercover operation after the police had invited her to do so. According to excerpts from the trial transcript, the police officer in charge of the undercover operation testified that Ms A. had taken part in similar operations before and his testimony was not disputed. Thus, it can be assumed that Ms A. collaborated with the police on a regular basis and that her participation in the undercover operation with the applicant was not merely incidental, and the Government have not shown otherwise. The Court is therefore unable to accept that the police had made an inquiry into the matter for good reasons prior to conducting the undercover operation.

61. In addition, the Court notes that the authorisation procedure for the undercover operation in the present case lacked sufficient safeguards and was not subject to independent control and scrutiny. The Court has already noted in earlier Russian cases concerning the test purchase of drugs that the Russian domestic framework for authorising and supervising test purchases was deficient, even though the 2007 amendment to the Operational-Search Activities Act had unequivocally banned entrapment (see *Veselov*, cited above, § 103; *Vanyan v. Russia*, no. 53203/99, §§ 46 and 47, 15 December 2005; and *Khudobin*, cited above, § 135). In a manner similar

to the test purchase in *Veselov*, the undercover operation in the present case was ordered by a simple administrative decision of the body which was in charge of carrying out the operation, the decision contained very few details as to the reasons for the operation, and the operation was not subjected to judicial review or any other independent supervision (see *Veselov*, cited above, § 104).

62. The Court also notes that the police did not send Ms A. to the applicant directly but did so through the applicant's former fellow medical student and long-time colleague. By involving X in the undercover operation and by placing the applicant in an inappropriately informal setting, the police counted at least to some extent on the applicant's trust in this person and her willingness to help a colleague. It can therefore be concluded that the police did not remain fully passive, and that the undercover operation involved at least some element of pressure on the applicant.

63. The Court further observes that in the domestic proceedings the investigating authorities did not argue that their conduct had remained strictly passive. In this respect the Court reiterates that the burden of proof to show that there was no incitement lies with the authorities, but it also recognises that in practice they may be prevented from discharging this burden owing to the absence of any formal authorisation and supervision of the undercover operation (see *Veselov*, cited above §§ 109-10). The deficiencies in procedure are admittedly due to the lack of appropriate legislative regulation in place (see *Veselov*, cited above, § 111) but this does not release the police from the duty to carry out their investigation in good faith using the instruments that the legislator has made available to them, as was the case in *Bannikova* (cited above), for instance. Moreover, while the Court emphasises that the most appropriate safeguard for an undercover operation would be judicial supervision, it also refers to the possibility of supervision by a prosecutor (see *Bannikova*, cited above, § 50) and it notes that the Russian law at the time provided for the prosecutor's discretionary power to review criminal case files and operational materials (see paragraph 26 above).

64. In the present case, the lack of procedural safeguards led to the undercover operation being ordered arbitrarily, which tainted its legitimacy from the outset and exposed the applicant to the risk of police entrapment.

65. Lastly, the Court agrees with the applicant that the domestic courts did not properly address her plea of incitement. The first-instance court referred in general to the operational information and the right of the police to prevent and detect criminal activity. It did not investigate why the police had decided to launch the operation, what materials they had in their possession, or the manner in which the police and their informer had interacted with the applicant. It focused its inquiry mainly on the applicant's demeanour during the operation and held that she had a predisposition to

commit crime because she had consented to take the money. The appeal court merely reiterated the reasoning of the first-instance court and held that her plea was unsubstantiated.

66. The foregoing considerations are sufficient to enable the Court to conclude that the substantive and procedural failures by authorities in the applicant's case, taken cumulatively, breached the applicant's right to a fair trial. There has accordingly been a violation of Article 6 § 1 of the Convention.

(ii) Undercover operation in the case of Mr Nefedov

67. According to the Government's account of events, in early 2008 the police started receiving information implicating some of the doctors at a local medical centre, including the applicant, in bribe-taking. In this connection, additional investigative measures were undertaken such as "examination of evidence from secret informants" (*изучение агентурных сведений*) that confirmed the allegations concerning the applicant.

68. The Court notes at the outset that the source of the information in the present case remained a State secret and the authorities were thus required to have solid reasons for launching the operation. In this connection the Court further observes that the police had at least five to six months to examine the preliminary information, to determine its veracity and to document the results. However, the Court has no evidence in its possession confirming that any additional examination took place or that its contents constituted a State secret and could not therefore be disclosed. Moreover, even though the police officer in charge of the operation testified that there had existed concrete evidence against the applicant and that – for security reasons – the applicant's identity had not been made known to the undercover police officer (Mr Y.) until the actual operation, the undercover police officer himself testified to the contrary. In particular, when questioned by the prosecutor in court, Mr Y. stated that the police had not had a specific person in mind and that they had approached the applicant merely because he happened to be working his shift on the day of the undercover operation. The prosecutor neither repudiated nor qualified Mr Y.'s testimony. Nor did the Government produce any reasonable explanation as to the conflicting testimony given by the police officers involved in the same undercover operation. In the light of the foregoing considerations, and given the burden of proof imposed on authorities in incitement cases, it therefore appears that the police did not verify the preliminary information to the requisite extent and that their suspicions in relation to the applicant were unfounded. In essence, they set up the undercover operation at the "suspicious venue" planning to expose bribe-takers at random and without specifically targeting the applicant.

69. Furthermore, as in the case examined above, owing to the absence of an effective regulatory framework, the procedure authorising the undercover

operation was not clear and foreseeable and it lacked independent supervision. There was no real accountability regarding the decision to conduct the operation and the manner of its administration because it was under the sole control of the same police officer who ultimately gave incriminating testimony in court.

70. The Court also disagrees with the Government's argument that the police had exerted no pressure on the applicant and that the applicant had himself indicated the amount of the bribe himself, thereby revealing his pre-existing intent to commit a crime. According to the transcript of the audio recording submitted to the Court, as soon as the preliminary tests revealed his blood alcohol level, the undercover police officer sought ways to convince the applicant to help him out even though the latter persistently resisted. He repeatedly assured the applicant that he had connections in the police force and that he would be able to settle the matter with them but he also needed the applicant's cooperation. He mentioned at least three times that his financial security and ability to support his family were contingent on his having a valid driving licence. In the course of the undercover operation, it was only the nurse who indicated RUB 10,000 (EUR 210) as an appropriate sum to pay the laboratory staff. Apart from his subsequent rough estimation of the sum to be paid to the laboratory technician, the applicant did not solicit a bribe for himself. It is therefore apparent that the police put the applicant under pressure to overcome his determination not to take the bribe.

71. Finally, the courts made only a limited assessment of the applicant's plea of entrapment, failing to examine the reasons for the undercover operation and the circumstances surrounding it and disregarding the applicant's allegations of pressure from the police during the undercover operation.

72. The Court thus finds that the manner in which the undercover operation was organised and conducted was deficient and improper, which irreversibly undermined the fairness of the criminal proceedings against the applicant. There has accordingly been a violation of Article 6 § 1 of the Convention.

(iii) Summary of the Court's findings

73. The Court reiterates that even though Russian law expressly prohibits entrapment, it nevertheless lacks adequate mechanisms of control and supervision and leaves undercover operations at the sole discretion of officers executing them, as happened in the two cases examined above. While the Court has recognised that judicial supervision would be an adequate safeguard for undercover operations, it notes that in order to exercise judicial control in practice the courts need access to sufficient factual material clarifying the circumstances leading to the conduct of an undercover operation. The Court is mindful of the burden placed on Russian

courts to examine pleas of entrapment on the basis of the limited evidence provided to them at the discretion of the bodies that carry out undercover operations. However, it continues to stress that in the fight against drug trafficking, corruption and other criminal offences, considerations of procedural economy and efficiency cannot be allowed to stand in the way of an individual's fundamental right to a fair trial, especially in the light of the successful efforts made by other European countries in this area (see paragraph 35 above and *Veselov*, cited above, §§ 50-63).

74. The Court has found above that the superficial preliminary investigation combined with the deficiencies in the procedure for authorising the undercover operations in both cases left the applicants unprotected against arbitrary police action and undermined the fairness of the criminal proceedings against them. The domestic courts, for their part, failed to adequately examine the applicants' plea of entrapment and in particular to review the reasons for the test purchase and the conduct of the police and their informants *vis-à-vis* the applicants.

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

76. Lastly, both applicants brought additional complaints under Article 6 §§ 1, 3 (c) and 3(d) in connection with the criminal proceedings against them. The Court has examined these complaints as submitted by the applicants. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that the complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

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

A. Damage

78. Ms Nosko claimed 50,000 euros (EUR) in respect of non-pecuniary damage. Mr Nefedov claimed EUR 100,000 in respect of non-pecuniary damage, plus EUR 5,000 in respect of pecuniary damage.

79. The Government considered that the acknowledgment of a violation, if found by the Court, would constitute sufficient just satisfaction in the present case in relation to both applicants. They contested the claim for compensation for non-pecuniary damage by Mr Nefedov as unsubstantiated, excessive and out of line with the awards made by the Court in similar cases. As for his claim concerning pecuniary damage, the Government contended that the applicant had failed to substantiate it with documentary evidence.

80. The Court considers that an award of just satisfaction must in the present case be based on the fact that, in violation of Article 6 of the Convention, the applicants did not have a fair trial because they were convicted for bribe-related crimes that had been instigated by the police. They undeniably sustained non-pecuniary damage as a result of the violation of their rights. However, the sums claimed by Ms Nosko and Mr Nefedov appear to be excessive. Making its assessment on an equitable basis, the Court awards the two applicants EUR 3,000 each in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

81. As regards the compensation for pecuniary damage claimed by Mr Nefedov, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

82. Furthermore, the Court refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Malininas*, cited above, § 43; and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). The Court notes in this connection that Article 413 of the Russian Code of Criminal Procedure provides the basis for a reopening of proceedings if the Court finds a violation of the Convention (see paragraph 31 above).

83. No conclusions about the applicants' guilt or innocence may be drawn from the finding of a violation. Such conclusions must await the consideration of matters that will have to be assessed in the reopened domestic proceedings. The Court notes that in the event of an acquittal in the reopened proceedings, they may claim compensation for pecuniary and

non-pecuniary damage suffered on account of their conviction, and the domestic courts would then be in the best position to deal with such claims.

B. Costs and expenses

1. Ms Nosko

84. The applicant claimed 55,500 roubles (RUB) (EUR 1,165) for costs and expenses incurred before the domestic courts, comprising legal representation in pre-trial proceedings and during the trial. She submitted receipts substantiating these payments. She also claimed RUB 294.72 (EUR 6.19) in related postage expenses in Russia and RUB 2,453.50 (EUR 51.55) for correspondence with the Court. However, only some of the submitted receipts are legible and only RUB 144.36 (EUR 3.03) in domestic postage expenses and RUB 1,657.18 (EUR 34.80) in expenses for correspondence with the Court are substantiated. Lastly, the applicant requested the reimbursement of translation expenses in the amount the Court sees fit. She submitted no receipts documenting payments for translation services.

85. The Government replied that the applicant had provided documents that substantiate only the payment of RUB 55,000 (EUR 1,155), the other receipts being illegible and not readily comprehensible. They further contended that the applicant had submitted no proof regarding translation expenses.

86. According to the Court's case-law, an applicant is entitled to 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. In the present case, taking into account the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of RUB 57,301.54 (EUR 1,202.83) covering costs under all heads for which the applicant submitted legible documentary proof.

2. Mr Nefedov

87. The applicant claimed RUB 2,000 (EUR 42) for legal representation in the domestic proceedings, RUB 3,000 (EUR 63) for legal representation before the Court and RUB 2,000 (EUR 42) in medication costs. The applicant submitted no documents in support of his claim for legal costs. As regards medication costs, he explained that he had not submitted any receipts because he had not been aware that he had to retain them.

88. The Government replied that the applicant had not submitted any proof of the costs and expenses he had incurred.

89. 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. In the present case, having regard to the documents in its possession and the above criteria, the Court will not make any award to Mr Nefedov under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

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

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

4. *Holds*
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) to each applicant EUR 3,000 (three thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) to Ms Nosko EUR 1,202.83 (one thousand two hundred and two euros and eighty-three cents), plus any tax that may be chargeable to this applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President