CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF VANYAN v. RUSSIA

(Application no. 53203/99)

JUDGMENT

STRASBOURG

15 December 2005

FINAL

15/03/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vanyan v. Russia,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 24 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 53203/99) 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 a Russian national, Grigoriy Arkadyevich Vanyan ("the applicant"), on 16 November 1999.

2. The applicant, who had been granted legal aid, was represented by Ms M. Voskobitova and Ms K. Moskalenko, lawyers with the International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P.A. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been convicted of an offence incited by the police through OZ, an individual acting on their instructions, and that his case had been reviewed by the Presidium of the Moscow City Court in his absence.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 13 May 2004, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1971 and lives in Moscow.

A. Initial criminal proceedings

9. On 3 June 1998 the applicant was arrested and taken to the Kapotnya district police station in Moscow, where he was searched and found to be in possession of a sachet of heroin. In a decision of 4 June 1998 the head of the Kapotnya district police department held that the applicant had committed an act of petty hooliganism and ordered him to pay an administrative fine. He was released on 5 June 1998, according to his submissions, and on 4 June 1998, according to the Government. On 5 June 1998 criminal proceedings were brought against the applicant on suspicion of procuring and storing drugs. The investigation resulted in the indictment of the applicant for procurement, storage and sale of drugs, punishable under Article 228 § 4 of the Criminal Code.

10. On 2 April 1999 the Lyublinskiy District Court of Moscow convicted the applicant and SZ under Article 228 § 4 of the Criminal Code of having unlawfully procured, stored with a view to their sale and sold drugs in "particularly large" quantities. The applicant was sentenced to seven years' imprisonment and a confiscation order was made. Further to a medical report, he was ordered to undergo compulsory psychiatric treatment for drug addiction.

11. At the hearing before the District Court the applicant stated that on 2 June 1998 he had telephoned SZ. He asked SZ to obtain drugs for him. SZ said that he would try to do so and they agreed that the applicant would go to SZ's flat. Shortly afterwards, OZ called the applicant and asked him to buy heroin for her. She complained that she badly needed drugs as she was suffering from withdrawal symptoms. Frightened that she might commit suicide, the applicant agreed and arranged to meet her near the block of flats where SZ lived. They met later in the evening. He received 200 roubles (RUR) from OZ and went to SZ's flat, where SZ sold him one sachet of heroin at a cost of RUR 300. Since the amount of heroin bought from SZ was insufficient even for his own needs, he decided not to share it with OZ. The applicant further submitted to the court that he had subsequently given OZ a soporific, telling her that the narcotic was of bad quality and that he would repay her money later. As he left, he saw people approaching who were, as he subsequently learned, police officers. He escaped from them, throwing the drugs away. Later that night he returned and found the drugs. The next day, with the drugs still in his possession, he went to work, where

he was arrested by the police. They found the drugs in his possession and seized them.

12. The applicant's co-defendant SZ also submitted at the hearing before the District Court that he had sold the applicant one sachet of heroin for RUR 300.

13. The District Court observed that the applicant's testimony in court differed from that which he had consistently given throughout the pre-trial investigation, when he had pleaded guilty to buying two sachets of heroin from SZ, one for OZ and the other for himself, for RUR 400, of which RUR 200 had been received from OZ. He also admitted that he had repeatedly bought drugs from SZ. Similarly, SZ stated throughout the pre-trial investigation that he had sold two sachets of heroin to the applicant for RUR 400.

14. The District Court heard EF and MB, police officers from the criminal investigation department of the Kapotnya district police of Moscow, who submitted that the police had information that the applicant was involved in selling drugs. OZ, who knew the applicant and could obtain drugs from him, was selected to verify that information. She agreed to take part in a "test purchase" of drugs, to be organised by the criminal investigation department. OZ was given RUR 200 in cash for that purpose. She was searched and no narcotics were found on her before her meeting with the applicant. She then made an appointment with the applicant. OZ was placed under permanent surveillance, in the course of which EF and MB saw the applicant and OZ meet, enter the block of flats in which SZ lived and leave the building some time later. OZ gave a previously-agreed sign indicating that she had purchased drugs from the applicant. The police officers tried to apprehend the applicant but he escaped. OZ was brought to a police station where, in the presence of witnesses, she handed over a sachet of heroin which she claimed had been sold to her by the applicant, who had procured it from SZ. On the following day, the applicant was brought to the Kapotnya district police station, where he was searched and found to be in possession of a sachet of heroin.

15. Witness OZ explained to the District Court that she had voluntarily assisted the police in exposing drug trafficking by the applicant. Her evidence was similar to that of police officers EF and MB.

16. According to expert reports, the substance contained in the sachet handed to the police by OZ was heroin, weighing 0.008 grams, and the substance contained in the sachet found by the police in the applicant's possession, in the circumstances described above, was also heroin, weighing 0.31 grams.

17. The District Court examined written evidence and statements by other witnesses, including a witness who had seen the applicant with a girl near the block of flats where SZ lived at the time of events in question.

18. The District Court held that statements by the applicant and SZ during the pre-trial investigation were corroborated by witnesses' testimony, expert opinions and written evidence in the case. It found that all the evidence in the case had been obtained in accordance with the law and that the applicant's defence rights, including the right to legal assistance, had been properly secured by the investigating authority. It concluded that on 2 June 1998 the applicant had procured two sachets of heroin from SZ, had sold one of them to OZ and had kept the other with a view to its sale.

19. The applicant appealed against the District Court's judgment of 2 April 1999, complaining of violations of the criminal procedural law at the pre-trial investigation stage, including a violation of his defence rights. He also pointed out the lack of evidence of his guilt in the sale of drugs and asked that his actions be re-classified as the illicit procurement and storage of drugs without intent to sell, punishable under Article 228 § 1 of the Criminal Code. On 17 May 1999 the Moscow City Court upheld the findings of the District Court and dismissed the appeal. It found that the applicant's guilt had been fully proven by his own statements and the other evidence in the case and that there had been no substantial violations of the criminal procedural law during the pre-trial investigation or at the trial which would require the quashing of the judgment.

B. Supervisory review proceedings

20. On 10 November 2000 the Deputy President of the Supreme Court of the Russian Federation lodged an application with the Presidium of the Moscow City Court to review the case in supervisory proceedings (*протест*). The grounds for the request were that the applicant's actions should have been classified as the illicit procurement and storage of drugs without intent to sell, punishable under Article 228 § 1 of the Criminal Code. The application called for the judgment of 2 April 1999 and the appeal decision of 17 May 1999 to be amended so that the applicant would be convicted under Article 228 § 1 of the Criminal Code, sentenced to two years' imprisonment and released from that sentence pursuant to the relevant amnesty law.

21. On 16 November 2000, at the request of the Deputy President of the Supreme Court, the Presidium of the Moscow City Court, composed of seven judges, reviewed the case under the supervisory review procedure (*пересмотр в порядке надзора*). The applicant and his counsel were not informed of the application for supervisory review or the hearing before the Presidium of the Moscow City Court. They did not attend the hearing.

22. The court heard submissions from an acting public prosecutor of Moscow, who considered it necessary to reclassify the applicant's actions under Article 228 § 1 of the Criminal Code.

23. The court noted that the applicant had been found guilty under Article 228 § 4 of the Criminal Code, in that he had procured drugs from SZ for RUR 400, with a view to their sale, and had kept "particularly large" quantities in his possession, namely heroin weighing 0.318 grams in two sachets; that he had then sold one sachet containing "particularly large" quantities of heroin – 0.008 grams – to OZ for RUR 200 and had kept the remaining "particularly large" quantity of heroin – 0.31 grams – in his possession until his arrest by police on 3 June 1998.

24. The Presidium of the Moscow City Court held:

> "... having correctly established the facts of the case, the court gave an incorrect legal assessment thereof in the judgment. In procuring the narcotics for his personal consumption and also for [OZ], at her request and with her money, in storing the narcotics and in handing over part of the heroin to [OZ] and keeping part of it for himself, G.A. Vanyan did not act with a view to selling [drugs] and he did not sell [drugs] but was acting as an accomplice to [OZ], who purchased heroin for her personal consumption."

It maintained that, in those circumstances, the applicant's actions should be classified under Article 228 § 1 of the Criminal Code as joint participation in the procurement and storage of "particularly large" quantities of drugs without intent to sell.

25. The Presidium of the Moscow City Court held that the judgment of 2 April 1999 and the decision of 17 May 1999 in the applicant's case should be varied, convicted him under Article 228 § 1 and sentenced him to two years' imprisonment. It upheld the judgment and decision in the remaining part. With reference to the Amnesty Act of 26 May 2000, the court ordered that the applicant be released from serving his sentence and, consequently, from custody.

II. RELEVANT DOMESTIC LAW

26. Section VI, Chapter 30 of the Code of Criminal Procedure of 1960, (*Уголовно-процессуальный кодекс РСФСР*), in force at the material time, allowed certain officials to challenge a judgment which had entered into force and to have the case reviewed.

27. Pursuant to Article 356 of the Code of Criminal Procedure of 1960, a judgment enters into force and is subject to execution as of the day when the appeal (cassation) instance pronounces its judgment or, if it has not been appealed against, when the time-limit for appeal has expired.

Article 379. Grounds for setting aside judgments which have entered into force

> "The grounds for quashing or changing a judgment [on supervisory review] are the same as [those for setting aside judgments which have not entered into force on cassation appeals]."

Article 342. Grounds for quashing or changing judgments [on cassation appeal]

"The grounds for quashing or changing a judgment on appeal are as follows:

(i) prejudicial or incomplete inquest, investigation or court examination;

(ii) inconsistency between the facts of the case and the conclusions reached by the court;

(iii) grave violation of procedural law;

(iv) misapplication of [substantive] law;

(v) inadequacy of the sentence to the gravity of offence and the convict's personality."

28. Article 371 of the Code of Criminal Procedure of 1960 provided that the power to lodge a request for a supervisory review could be exercised by the Prosecutor General, the President of the Supreme Court of the Russian Federation and their respective Deputies in relation to any judgment other than those of the Presidium of the Supreme Court, and by the Presidents of the regional courts in respect of any judgment of a regional or subordinate court. A party to criminal or civil proceedings could solicit the intervention of such officials for a review.

29. According to Articles 374, 378 and 380 of the Code of Criminal Procedure of 1960, the request for supervisory review was to be considered by the judicial board (the Presidium) of the competent court. The court could examine the case on the merits, and was not bound by the scope and grounds of the extraordinary appeal. The Presidium could dismiss or uphold the request. If the request was dismissed, the earlier judgment remained in force. If it upheld the request, the Presidium could decide whether to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, or for a fresh court examination at any instance, to uphold a first instance judgment reversed on appeal, or to amend and uphold any of the earlier judgments.

30. Article 380 §§ 2 and 3 of the Code of Criminal Procedure of 1960 provided that the Presidium could in the same proceedings reduce a sentence or amend the legal qualification of a conviction or sentence to the defendant's benefit. If it found a sentence or legal qualification too lenient, it had to remit the case for a new examination.

31. Under Article 377 § 3 of the Code of Criminal Procedure of 1960, a public prosecutor took part in a hearing before a supervisory review instance. A convicted person and his or her counsel could be summoned if a supervisory review court found it necessary. If summoned, they were to be given an opportunity to examine the application for supervisory review and to make oral submissions at the hearing. On 14 February 2000 the Constitutional Court of the Russian Federation ruled that the above

provision was incompatible with the federal Constitution where the grounds for supervisory review of a case were to the detriment of a convicted person.

32. Under Article 407 of the new Code of Criminal Procedure of 2001, which entered into force on 1 July 2002, a convicted person and his counsel are notified of the date, time and place of hearings before the supervisory review court. They may participate in the hearing provided that they have made a specific request to that effect.

33. Illicit procurement or storage of drugs without intent to sell is punishable under Article 228 § 1 of the Criminal Code of 1996, in force at the material time. Illicit procurement or storage of drugs with intent to sell and the sale of drugs in "particularly large" quantities are punishable under Article 228 § 4 of the Criminal Code.

34. Under Article 84 § 2 of the Criminal Code, convicted persons can be released from punishment by an amnesty act. Under Article 86 § 2 of the Code, a person is considered not to have been convicted if he or she released from punishment.

35. Section 6 of the Operational-Search Activities Act of 1995 lists a number of techniques that may be used by law-enforcement or security authorities for the purposes of, *inter alia*, investigating and preventing offences. In particular, the police may carry out a "test purchase" (*проверочная закупка*) where, *inter alia*, a criminal case has been opened or information concerning the preparation or commission of an offence has become known to the police and the available data are insufficient for bringing criminal proceedings (section 7). The taking of operational-search measures which interfere with individuals' constitutional rights to respect for their correspondence, telephone communications and home is allowed if authorised, as a general rule, by a court (section 8). The "test purchase" of goods, the free sale of which is prohibited, and certain undercover operations by agents or persons assisting them, are carried out on the basis of a decision sanctioned by the head of an agency engaged in operational-search activities (section 8). Results of operational-search activities can serve as a basis for bringing criminal proceedings and can be used as evidence in accordance with the legislation on criminal procedure (section 11).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

36. The Government stated that the proceedings before the Presidium of the Moscow City Court were brought as a result of the Court's

communication of the present application. Those proceedings involved no fresh charge against the applicant. Instead, they changed the legal assessment of the applicant's actions by classifying them as a less serious drug offence. Referring to those proceedings and to the decision of 16 November 2000, the Government submitted that the applicant's amended conviction had not been based on the evidence obtained as a result of the police intervention. He was convicted solely of obtaining drugs for his personal use, which is something that he would have done irrespective of the police involvement. Furthermore, in application of an amnesty act, the same decision released the applicant from serving his sentence. The Government therefore claimed that the applicant could no longer be regarded as a victim of a conviction resulting from the alleged police entrapment.

37. The applicant maintained his complaint under Article 6 of the Convention with regard to his conviction on the charge involving OZ, which he alleged had been brought about by the police. He argued that the decision of 16 November 2000 contained neither an acknowledgment of nor a redress for that violation of the Convention. The applicant further complained under Article 6 of the Convention that the proceedings before the Presidium of the Moscow City Court were unfair in that, unlike the prosecution, he had not been given an opportunity to participate therein.

38. The Court reiterates that, in order to deprive an individual of his or her status as a "victim", the national authorities have to acknowledge, either expressly or in substance, and then afford redress for, the breach of the Convention (see *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions (Reports)* 1996-III, p. 846, § 36).

39. The Court observes that the applicant was initially convicted by the Lyublinskiy District Court of Moscow's judgment of 2 April 1999 of, *inter alia*, the procurement and sale of heroin to OZ, an offence which had allegedly been committed as a result of police incitement, and sentenced to seven years' imprisonment. The judgment was upheld by the Moscow City Court on 17 May 1999. A year and a half later the case was reopened under the supervisory review procedure. As a result of the review of the case, the Presidium of the Moscow City Court, in its decision of 16 November 2000, changed the applicant's conviction on a charge of procurement and selling heroin to OZ to that of acting as "an accomplice to OZ, who purchased heroin for her personal consumption". It classified the applicant's actions under Article 228 § 1 of the Criminal Code as joint participation in the procurement and storage of "particularly large" quantities of drugs, without intent to sell. It sentenced the applicant to two years' imprisonment and applied an amnesty act releasing him from serving that sentence.

40. On the facts of the case, the Court cannot agree with the Government's statement that the applicant's amended conviction was based solely on evidence which was not obtained as a result of police actions.

However, of even greater relevance is the fact that there is nothing in the Presidium of the Moscow City Court's decision to suggest that it examined the issue of police incitement in the applicant's case and considered whether and to what extent such incitement could have impaired the fairness of the proceedings.

41. In so far as the Government may be understood to claim that the amnesty law had a decisive effect on the applicant's status as a "victim", the Court observes that the same decision of 16 November 2000 applied an amnesty law as a result of which the applicant was released from serving the sentence imposed by the Presidium of the Moscow City Court. However, the conviction and the sentence imposed by the Presidium of the City Court concerned the same facts or the same actions by the applicant as those on which the initial conviction was based in the judgment of 2 April 1999, as upheld by the decision of 17 May 1999. Following the latter decision, the applicant was imprisoned for at least a year and a half before being released under the amnesty. In those circumstances, the Court finds that the applicant cannot be said to have been relieved of any effects to his disadvantage as a result of the granting of an amnesty (see *Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII).

42. In view of the above considerations, the Court dismisses the Government's preliminary objection. Accordingly, the applicant can still claim to be a "victim", within the meaning of Article 34 of the Convention, of the alleged violation of Article 6 of the Convention in respect of police incitement.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

43. The applicant complained under Article 6 of the Convention that, in so far as it concerned the charge involving OZ, he had been convicted of an offence which had been incited by the police and that his conviction was based on evidence from the police officers involved and from OZ, an individual acting on their instructions. Article 6, in so far as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

44. The Government submitted no observations on the merits of the complaint.

45. The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair

hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and, for a more recent example in a different context, *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34). The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

46. The Convention does not preclude reliance, at the investigation stage of criminal proceedings and where the nature of the offence so warrants, on sources such as anonymous informants. However, the subsequent use of their statements by the court of trial to found a conviction is a different matter. The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. The requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against drug trafficking cannot justify the use of evidence obtained as a result of police incitement (see *Teixeira de Castro v. Portugal*, cited above, pp. 1462-1463, §§ 35-36).

47. Where the activity of undercover agents appears to have instigated the offence and there is nothing to suggest that it would have been committed without their intervention, it goes beyond that of an undercover agent and may be described as incitement. Such intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined (see *Teixeira de Castro*, cited above, pp. 1463-1464, §§ 38-39).

48. The Court observes that the proceedings in the present case ended with a decision of the Presidium of the Moscow City Court of 16 November 2000, by which the applicant was convicted under Article 228 § 1 of the Criminal Code of joint participation in procuring heroin from SZ and storing it without intent to sell. As regards the amount of heroin – 0.008 grams – which the applicant was found to have procured for OZ at her request, the Presidium of the Moscow City Court held that the applicant had acted as an accomplice to OZ, who had purchased heroin for her personal consumption. The Presidium of the Moscow City Court underlined that the Lyublinskiy District Court of Moscow in its judgment of 2 April 1999 had correctly established the facts of the case.

49. The Court notes that the applicant's complaint concerns only the conviction relating to the episode involving OZ. It observes that OZ acted on police instructions. She agreed to take part in the "test purchase" of drugs in order to expose drug trafficking by the applicant, and asked him to procure drugs for her. There is no evidence to suggest that before the intervention by OZ the police had reason to suspect that the applicant was a drug dealer. A mere claim at the trial by the police to the effect that they

possessed information concerning the applicant's involvement in drug-dealing, a statement which does not seem to have been scrutinised by the court, cannot be taken into account. The police had not confined themselves to investigating the applicant's criminal activity in an essentially passive manner. There is nothing to suggest that the offence would have been committed had it not been for the above intervention of OZ. The Court therefore concludes that the police incited the offence of procuring drugs at OZ's request. The applicant's conviction for joint participation in the procurement and storage of heroin, in so far as his procuring the narcotics for OZ is concerned, was based mainly on evidence obtained as a result of the police operation, including the statements by OZ and police officers EF and MB. Thus, the police's intervention and the use of the resultant evidence in the ensuing criminal proceedings against the applicant irremediably undermined the fairness of the trial.

50. There has therefore been a violation of Article 6 § 1 of the Convention.

III. FURTHER ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

51. The applicant complained under Article 6 §§ 1 and 3 (a) and (b) of the Convention that the decision of the Presidium of the Moscow City Court of 16 November 2000, taken in his absence and in the absence of his counsel since they had not been informed of the hearing, had prevented him from exercising his defence rights properly and thus rendered the criminal proceedings unfair. The Court considers that this complaint falls to be examined under Article 6 §§ 1 and 3 (c), which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ... .
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...".

A. The parties' submissions

52. The Government disagreed. They submitted that no fresh charge had been brought against the applicant in the supervisory review procedure, in which the initial conviction for drug supplying had merely been reclassified as a less serious drug offence. They stressed that the applicant had never denied that he had purchased the drugs for his own consumption.

53. The Government further stated, with reference to Article 377 of the Code of Criminal Procedure as amended by a Decision of the Constitutional Court of 14 February 2000, that the summoning of parties to a supervisory review hearing remained at the discretion of the relevant court provided the review procedure was not triggered by an application that would be to the applicant's detriment. The Government noted that the application for supervisory review, as well as the prosecutor's pleadings at the hearing, were not to the applicant's detriment. Given that the supervisory review procedure had benefited the applicant, by sentencing him to a lesser term of imprisonment as a result of a new legal classification of his actions, and by releasing him from serving that sentence, the Government were of the view that the Presidium of the Moscow City Court's failure to secure the attendance of the applicant and his counsel did not breach Article 6 of the Convention.

54. The applicant contended that he did not have a fair trial in the proceedings before the supervisory review court. In his view, he faced a new charge. He was informed neither of the application by the Deputy President of the Supreme Court for supervisory review nor of the hearing before the Presidium of the Moscow City Court.

55. The applicant further submitted that the supervisory review court determined issues of both law and fact. In this connection, he claimed that, depending on the amount of drugs concerned, the unlawful procurement of drugs was punishable either as a criminal offence or as an administrative offence subject to a light penalty. The applicant stated that he had been deprived of an opportunity to be present and to submit arguments on this particular issue. In view of the above and having regard to the fact that the prosecution had participated in the hearing, the applicant considered that there had been a breach of Article 6 of the Convention in this respect.

B. The Court's assessment

1. Applicability of Article 6 of the Convention

56. The Court points out that Article 6 of the Convention applies to proceedings where a person is charged with a criminal offence until that charge is finally determined (see *Adolf v. Austria*, judgment of 26 March 1982, Series A no. 49, p. 15, § 30; *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 12-15, §§ 22-26). It further reiterates that Article 6 does not apply to proceedings concerning a failed request to reopen a case. Only the new proceedings, after the reopening has been granted, can be regarded as concerning the determination of a criminal charge (see *Löffler v. Austria*, no. 30546/96, §§ 18-19, 3 October 2000; *José Maria Ruiz Mateos and Others v. Spain*, no. 24469/94, Commission decision of 2 December 1994, Decisions and Reports 79, p. 141).

57. The Court observes that the Presidium of the Moscow City Court examined the application for supervisory review by the Deputy President of the Supreme Court of Russia, reviewed the case and amended the first-instance judgment and the appeal decision on the grounds put forward in that application. It reclassified the applicant's actions under Article 228 § 1 of the Criminal Code rather than Article 228 § 4, sentenced him to two years' imprisonment and, in application of an amnesty law, ordered his release. It upheld the first-instance judgment and the appeal decision in the remaining part.

58. On the above facts, the Court is of the view that, in so far as the Presidium of the Moscow City Court amended the first-instance judgment and the appeal decision, the proceedings before it concerned the determination of a criminal charge against the applicant. It finds, and this was not disputed between the parties, that Article 6 § 1 of the Convention under its criminal head applies to those proceedings.

2. Compliance with Article 6 of the Convention

(a) General principles

59. The Court reiterates that it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the first-instance hearing (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, pp. 14-15, §§ 27 and 29).

60. The personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing, even where an appellate court has full jurisdiction to review the case on questions both of fact and law. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant (see *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 570, § 37).

61. It is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first-instance and on appeal (see *Lala v. the Netherlands*, judgment of 22 September 1994, Series A no. 297-A, p. 13, § 33).

62. The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The latter means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 27, §§ 66–67).

(b) Application of the above principles to the instant case

63. The Court would note at the outset that it does not consider it necessary to decide whether the absence of the applicant and his counsel, taken separately, would render the proceedings before the supervisory review court unfair. Neither of them was present before the Presidium of the Moscow City Court, and it is against this background that the Court will determine the complaint in issue.

64. The Court observes that the Presidium of the Moscow City Court was not bound by the scope of the application for supervisory review. It had to exercise a full review of the case and could dismiss the request, quash the judgment and/or the appeal decision and remit the case for a new investigation or for a fresh court examination at any instance, terminate the criminal proceedings, or amend any of the earlier decisions (see paragraphs 26-30 above).

65. The Presidium of the Moscow City Court exercised the above powers in the applicant's case by amending the conviction and the sentence, thereby determining a criminal charge against him (see paragraphs 56-58 above).

66. The prosecution was present before the Presidium of the Moscow City Court. It argued that the applicant's actions should be reclassified under Article 228 § 1 of the Criminal Code.

67. The Court notes the Government's argument that, given that the application for supervisory review was not to the applicant's detriment, the supervisory review court had acted in accordance with the domestic law, which left the question of whether to summon the applicant and his counsel to the court's discretion. However, in view of the powers of the Presidium of the Moscow City Court as set out above, the Court considers that the latter court could not, if the trial were to be fair, determine the applicant's case in the absence of the applicant and his counsel. Had they been present, they would have had an opportunity to plead the case and comment on the application by the Deputy President of the Supreme Court and on the submissions by the prosecutor.

68. In view of the above considerations the Court finds that the proceedings before the Presidium of the Moscow City Court did not comply with the requirements of fairness. There has therefore been a breach of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The applicant maintained that the police intervention infringed Article 8 of the Convention which, in so far as relevant, provides:

> "1. Everyone has the right to respect for his private ... life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

70. Having regard to the conclusion reached in paragraphs 49 and 50 above, the Court does not consider it necessary to examine this complaint separately under Article 8 (see *Teixeira de Castro v. Portugal*, cited above, § 43).

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

71. The applicant complained about a violation of Article 13 of the Convention as a result of the police incitement. Article 13 reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

72. In view of its finding under Article 6 § 1 of the Convention in paragraphs 49 and 50 above, the Court similarly does not find it necessary to examine the same complaint under Article 13 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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."

74. The applicant claimed compensation for the non-pecuniary damage sustained by him and for his legal costs and expenses. The Government contested these claims.

A. Non-pecuniary damage

75. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage.

76. The Government submitted that the finding of a violation would constitute sufficient satisfaction.

77. The Court observes that it has found above that the police incited the applicant to commit the offence for which he was convicted and that the Presidium of the Moscow City Court amended his conviction in his absence. The Court considers that the applicant indisputably sustained non-pecuniary damage, which cannot be compensated solely by a finding of

a violation. Deciding on an equitable basis, it awards him EUR 3,000 for non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

78. The applicant claimed 133,850 roubles in respect of his representation by Ms K.A. Moskalenko in the proceedings before this Court.

79. The Government argued that the applicant's claim had not been duly substantiated. They pointed out that, according to documents submitted by the applicant, he had made an agreement for representation before the Court with Ms K.A. Moskalenko, a lawyer practising in Moscow, but had actually been represented before the Court by Ms K.A. Moskalenko and Ms M.R. Voskobitova in their capacity as lawyers from the International Protection Centre.

80. The Court reiterates that, in order for costs and expenses to be awarded under Article 41, it must be established that that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII). In the present case the Court considers that the submitted documents represent an acceptable form of proof of the applicant's expenses for his representation in the Strasbourg proceedings by Ms K.A. Moskalenko. Taking into account that some of the applicant's complaints were dismissed at the admissibility stage and deciding on an equitable basis, the Court awards EUR 1,000 under this head, less EUR 630 paid by the Council of Europe by way of legal aid, plus any tax that may be chargeable on this amount.

C. Default interest

81. The Court considers it appropriate that the default interest 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. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in relation to the complaint concerning the conviction as a result of alleged entrapment by the police;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the absence of the applicant and defence counsel at the hearing in the supervisory review proceedings;

4. *Holds* that it is unnecessary to examine the applicant's complaint under Article 8 of the Convention;

5. *Holds* that it is unnecessary to examine the applicant's complaint under Article 13 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
      (ii) EUR 370 (three hundred and seventy euros) in respect of costs and expenses, to be converted into Russian roubles at the rate applicable at the date of settlement;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 15 December 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President