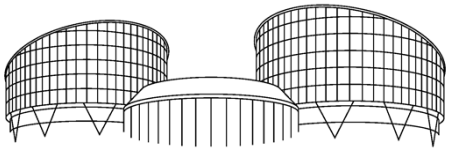

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ZININ v. RUSSIA

(Application no. 54339/09)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Fairness of the proceedings irreversibly undermined on account of applicant's conviction as a result of police entrapment
Art 6 §§ 1 (criminal) and 3 (c) • Fair hearing • Court not persuaded by the evidence submitted by the respondent Government in support of their contention that the applicant had been duly summoned to the cassation hearing • Failure to inform the applicant and his lawyer of the cassation hearing • Breach of the principles of adversarial proceedings and equality of arms

STRASBOURG

9 March 2021

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 Zinin v. Russia,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Georges Ravarani,
María Elósegui,
Darian Pavli,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 54339/09) 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, Mr Stanislav Nikolayevich Zinin ("the applicant"), on 10 September 2009;

the decision to give notice to the Russian Government ("the Government") of the complaints concerning police entrapment and absence of the applicant and his lawyer from hearing in the cassation court;

the parties' observations;

Having deliberated in private on 26 January 2021,

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

INTRODUCTION

1. The main issue in the present application is whether the applicant's right to a fair trial was breached when he was convicted of copyright infringement and distributing counterfeit software as a result of alleged police entrapment, and when neither the applicant nor his lawyer was present during the hearing of the applicant's case in the cassation court.

THE FACTS

2. The applicant was born in 1987 and lives in Ulyanovsk. He was represented by Ms L.V. Emelyanenkova, a lawyer practising in Ulyanovsk.

3. The Government were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

4. The facts of the case may be summarised as follows.

I. EVENTS IN ISSUE

5. In July 2008 the applicant advertised his telephone number in the computer-services section of a newspaper. On 21 July 2008 an undercover police officer, Mr Ig., called the applicant and asked him to install a full eighth version of the computer programme "K". The applicant searched for counterfeit copy of that programme on the Internet and downloaded it on to a portable hard magnetic disk. He then called Mr Ig. and they agreed to meet several hours later in Mr Ig.'s undercover office in a shopping centre. The applicant attempted to install the unlicensed copy on Mr Ig.'s computer on the same day for 300 roubles ((RUB) about 8 euros (EUR) at that time). The print-out of the recording of the applicant's conversation with Mr Ig. during the installation, in so far as relevant, reads as follows:

"...

Mr Zinin: [the programme] won't install ...

Mr Ig.: what shall we do?

Mr Zinin: I will leave "K." to you.

Mr Ig.: [installation pack]?

Mr Zinin: (nodding). So that my visit is not useless. It is possible to install it, it is working, I had tried it before coming here. It works on my computer, maybe it's because of the server ... Windows server ...

Mr Ig.: so you did not install it, did you? You just transferred [the installation pack]?

Mr Zinin: well, yes ...

Mr Ig.: Will I be able to install it if I try? ... or should I change...

Mr Zinin: try it on another computer: here is a crack [tool] and here is a folder.

Mr Ig.: "Read me" - that I understood.

Mr Zinin: Read it, it describes how to install it, I tried it at home [with this], it was installed and started. ... If anything, I will leave a demo version for you.

Mr Ig.: what's that?

Mr Zinin: "K" [version 7 is ok]. And here is "K" [version 8]

Mr Ig.: what if I re-install the system? ... this is disc D – you copied it there. ...

Mr Zinin: Error... I will install in [on your computer] and you re-install it on another one, version 8, it is ...

Mr Ig.: Newer.

Mr Zinin: yes, it is newer. Package service... there are additional features ...

...

Mr Ig.: So, I owe you, don't I? How much ... two hundred, isn't it?

Mr Zinin: Three hundred. And let's ... Would you like to have Windows installed? Because here there is a server and I think it will be hard for you later.

...

Mr Ig.: Well, let's get in touch by phone then.

Mr Zinin: And I will install such a version [of Windows] that no one will harass [you], if they come to you.

...

Mr Zinin: And for this you can be penalised.

Mr Ig.: Ok, we will see. Well, that is all. Take care!

Mr Zinin: By the way, just in case, there is a Windows Server that expires after 64 days, but it can be [modified] so as to last for half a year, as if for information purposes ...

Mr Ig.: I do not really need this.

Mr Zinin: You will have to, it is necessary ..."

6. On the same day the applicant was arrested and charged with copyright infringement and large-scale distribution of counterfeit software.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

7. On 18 December 2008 the Justice of the Peace of District Court No. 3 of the Leninskiy District of Ulyanovsk ("the Justice of the Peace") examined the applicant's case. The applicant testified that when Mr Ig. had called him for the first time, he had asked the applicant to install the computer programme "G". The applicant had offered him a free trial version of that programme but Mr Ig. had refused. Several days later Mr Ig. had asked the applicant to install programme "K". The applicant offered a free trial seventh version of programme "K" to Mr Ig. The latter insisted on the installation of a full eighth version. The applicant found a counterfeit copy of it online and came to Mr Ig.'s undercover office in a shopping centre to install it. He was unable to install it and offered to copy it to Mr. Ig.'s hard drive so he could himself install it later. The applicant further testified that he had known that the programme was unlicensed and would not have copied it on to Mr Ig.'s computer if Mr Ig. had not insisted. He also explained that when the seventh version was started on the computer it indicated that it was "for study purposes only".

8. Mr Ig. was also questioned in the hearing by the applicant's lawyer. He testified that he had called the applicant twice. The first time the applicant had offered him the seventh version of "K." but he had wanted the eighth one. During the second call the applicant told him that he had found the eighth version of that programme. When the applicant's lawyer asked Mr Ig. about the source of the information concerning the applicant's illegal activity, he stated that he had received "information incriminating the applicant for the distribution of counterfeit software", having made no reference to any physical or legal persons that might have provided that

information to him. The prosecution did not question Mr Ig., confining itself to asking the Justice of the Peace to read out his pre-trial statement.

9. The court admitted in evidence, *inter alia*, the crime report submitted by Mr Ig. (who worked in the police cybersecurity unit) to the deputy head of that unit (Mr D.). The report contained written authorisation by Mr D. to carry out operational search activities.

10. The applicant pleaded guilty to copyright infringement and distribution of counterfeit software, and claimed that the police had incited him to commit the crime. His lawyer pointed out in his closing arguments that the incriminating information had not been verified, that the testimony of the police officers as to the existence of such information should not be taken into account, and that they had called the applicant on their own initiative and incited him to install the counterfeit programme in order to improve their performance indicators. The prosecutor argued that the applicant's plea of entrapment had been unsubstantiated, and that the court had considered the testimony of the witnesses questioned in the hearing to be reliable evidence. The Justice of the Peace found the applicant guilty of gross copyright infringement and fined him RUB 8,000 (ca. EUR 206 at that time). The Justice of the Peace made no assessment of the applicant's plea of police entrapment in the judgment.

11. The applicant and his lawyer lodged a statement of appeal claiming, *inter alia*, that the applicant had not intended to commit copyright infringement and that Mr Ig. had lured him into committing that offence.

12. On 2 February 2009 the Leninskiy District Court of Ulyanovsk dismissed the defence arguments on appeal and upheld the applicant's conviction. The appeal court held that the undercover operation had been launched on the basis of the operational information in respect of the applicant, and that the applicant's pre-existing criminal intent had only been confirmed in the course of the undercover operation.

13. The applicant and his lawyer lodged a cassation complaint with the District Court presenting arguments similar to those that had been raised in the course of the appeal proceedings.

14. On 12 February 2009 the first-instance court sent the applicant's cassation complaint to the Ulyanovsk Regional Court. The dispatch note was also addressed to the prosecutor, the applicant and the representative of the software company, stating that the cassation hearing was scheduled for 11 March 2009 at 10 a.m.

15. On 11 March 2009 the Ulyanovsk Regional Court upheld the lower courts' decisions in cassation proceedings in the presence of the public prosecutor, who made oral submissions concerning the applicant's case. The applicant and his lawyer were absent from the hearing. The text of the judgment of the Ulyanovsk Regional Court contains no information on whether the applicant had been notified of the hearing or not and whether it

was possible to continue the examination of his case in his or his lawyer's absence.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CRIMINAL LIABILITY FOR COPYRIGHT INFRINGEMENT AND DISTRIBUTION OF COUNTERFEIT SOFTWARE

16. Article 146 § 2 ("Copyright infringement and distribution of counterfeit software") of the Criminal Code of the Russian Federation ("CCP") as in force at the material time provided that the unlawful use of copyright and derivative works or the wilful purchase, storage or transfer of counterfeit copies or phono records thereof for large-scale commercial distribution committed carried a fine of up to RUB 200,000 (ca. EUR 2,700), eighteen months' salary or other income of the convicted person, compulsory community service of between 180 and 240 hours, or a term of imprisonment of up to two years.

II. OPERATIONAL SEARCH ACTIVITIES AND EVIDENCE

17. For a summary of the relevant provisions on operational search activities and, specifically, on undercover operations and evidence in criminal proceedings in Russia see *Lagutin and Others v. Russia* (nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, §§ 62‑6, 24 April 2014).

III. CASSATION REVIEW

18. Article 371 of the Code of Criminal Procedure of the Russian Federation (CCP), as in force at the material time, provided that the judgments and rulings of the appeal court may be appealed with the cassation court.

19. Article 373 provided that the cassation court examined appeals with a view to verifying the lawfulness, validity and fairness of judgments and other judicial acts.

20. Article 376 § 2 provided that the parties must be apprised of the date and time of the cassation hearing no later than fourteen days before the hearing.

21. Article 376 § 4 provided that a failure on the part of persons who had been duly informed of the cassation hearing to appear was not considered an impediment to the examination of a criminal case in the court dealing with cassation complaints.

22. Article 377 § 3 (The order of examination of cases by the cassation court) provided *inter alia* that the cassation court heard the oral arguments

of the party that lodged a cassation complaint in support of their position and then the objections of the other party.

23. Under Article 377 §§ 4 and 5 of the CCP the cassation court could directly examine evidence, including additional material submitted by the parties.

24. Article 379 read as follows:

> "1. A judgment may be quashed on appeal on the following grounds:
>
> (1) a discrepancy between the findings made in the judgment and the factual circumstances of the case established by the first-instance ... court;
>
> (2) a breach of criminal procedural law;
>
> (3) incorrect application of the criminal law;
>
> (4) injustice of the judgment."

IV. REOPENING OF CRIMINAL CASES ON ACCOUNT OF NEW OR NEWLY DISCOVERED CIRCUMSTANCES

25. Article 413 of the CCP provides for the possibility of reopening criminal proceedings as the result of a finding by the European Court of Human Rights of a violation of the Convention.

V. MANUALS ON UNIFORM CASE PROCESSING

26. Paragraphs 2.13 and 4.3, respectively, of the Manuals on uniform case-processing in (i) district and (ii) regional courts adopted by the Judicial Department of the Supreme Court of the Russian Federation, as in force at the material time, provided that judicial summonses should be sent by courts by registered letter with acknowledgement of receipt.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (*AGENT PROVOCATEUR*)

27. The applicant complained that the police had incited him to commit the crime of copyright infringement and distribution of counterfeit software, and that as a result his conviction had been in breach of his right to a fair trial as provided for in Article 6 § 1 of the Convention, which provides:

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

A. Admissibility

28. The Government claimed that the applicant had not exhausted domestic remedies in respect of his complaint of entrapment by an *agent provocateur*. In particular, he had neither complained of the alleged entrapment nor filed a motion with the prosecutor's office or the domestic court to declare the results of the covert operation inadmissible before the commencement of the judicial proceedings in his criminal case.

29. Having examined the applicant's case file, the Court finds that the court records and the grounds of appeal and cassation complaint contain sufficiently clear and specific allegations that the offence at issue was the result of police entrapment. It transpires from those documents and from the respective judgments that this complaint was understood by the domestic courts as such, but was dismissed (see paragraphs 7 and 11-13 above). The Court thus concludes that the applicant's complaints were brought to the attention of the domestic courts competent to deal with them.

30. Insofar as the Government may be understood to be suggesting that, before having raised the issue of incitement in the court proceedings in his case, the applicant should have raised the same complaint with the prosecutor's office or another court, the Court considers that this was not necessary in order to comply with the rule of exhaustion of domestic remedies. It reiterates that an applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III and *Lagutin and Others*, cited above, §§ 72-6, 24 April 2014). When a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef v. Malta* [GC], no. 17056/06, § 58, 15 October 2009). Moreover, when the domestic courts examined the applicant's pleas of entrapment, they did not suggest that the applicant had somehow undermined his entrapment arguments by failing to have previously raised them before the domestic authorities. The Court therefore considers that the applicant has complied with the exhaustion requirement and that it has not been shown that a complaint to the prosecutor or to the domestic court prior to the commencement of the judicial proceedings in the case would have offered better prospects of success (see *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, § 73, 2 October 2012).

31. The foregoing considerations are sufficient to enable the Court to dismiss the Government's objection.

32. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

33. The applicant claimed that the police had had no good reason to suspect him of planning to distribute the counterfeit software, and therefore that the undercover operation conducted in his case had not pursued the purpose of investigating a criminal offence. He noted that the police had not carried out any investigative activities prior to mounting the covert operation. He further indicated that the police had not proved that they had indeed been in possession of information pointing to his involvement in the distribution of counterfeit software or indicating any predisposition to commit such offence. The allegedly incriminating information received by the police from the undisclosed confidential source had not been disclosed to the domestic courts. Accordingly, the latter had not had any opportunity to examine this information in adversarial proceedings.

34. The applicant also alleged that in the absence of any preliminary operational information, the police had randomly contacted persons advertising their computer-related services in newspapers and incited them to distribute counterfeit software, as happened in his case.

35. The applicant maintained that before the undercover operation in question he had never distributed counterfeit software, and would not have committed the offence had he not been lured by the police into doing so.

36. The applicant further claimed that the investigating authorities had not acted in an essentially passive manner. He claimed that the authorities had taken the initiative of contacting and persuading him, through Ig., to find and distribute the counterfeit software. He alleged that Ig. had refused to install the trial version of the programme as offered to him by the applicant, and had insisted on receiving the full version, which appeared to be counterfeit.

37. The applicant also contended that the lack of formal requirements for the authorisation of the undercover operation and the fact that it was poorly documented had made it impossible for the investigation authorities to present any good reasons for the undercover operation and, accordingly, for the domestic courts to review such reasons.

38. Lastly, the applicant noted that the domestic courts had accepted the statements made by the police officers to the effect that they had been in possession of incriminating information against the applicant; the courts had not verified that information and had merely referred to its confidential nature. The applicant contended that the whole criminal proceedings in his case had been based on entrapment.

2. The Government's submissions

39. The Government submitted that the criminal proceedings against the applicant had been fair. They maintained that the covert operation conducted in the case had been lawful and had involved no entrapment by the police. They contended that the police had had reason to suspect the applicant of involvement in the distribution of counterfeit software, and that this preliminary information had been sufficient to conduct a covert operation in the case.

40. The Government maintained that the police had ordered the undercover operation on the basis of incriminating information from an undisclosed confidential source. That classified information could be disclosed to the trial court by a decision of the head of the body implementing the operational search activity. However, in the present case, disclosure had been unnecessary because there had been sufficient evidence at the courts' disposal to enable the allegation of entrapment to be ruled out.

41. They further alleged that the applicant had shown pre-existing criminal intent and that the police had not exerted any pressure on the applicant to distribute software during the covert operation.

42. The Government also stated that the formal requirements for a covert operation had been complied with. They submitted that no judicial authorisation had been required because the undercover operation in question had not encroached on the applicant's constitutional right to privacy of correspondence, telephone or other communications or his home. It was therefore sufficient that the operational experiment had been ordered by a senior police officer and confirmed by the senior officials of the regional Internal Affairs Directorate.

43. The Government further contended that the use of the results of the covert operation in evidence had been lawful, subject to the normal rules of admissibility of evidence; it had been open to the applicant to challenge such use before the court, *inter alia* on the grounds of entrapment.

44. Lastly, the Government stated that the domestic courts had examined the applicant's plea of entrapment. All the materials relating to the conduct of the covert operation had been open to review by the parties to the proceedings and all the relevant witnesses had been examined. The applicant's conviction for distribution of counterfeit software had therefore been fair and lawful.

3. The Court's assessment

(a) General principles

45. The Court is aware of the difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences. To perform this task, they are increasingly required to make use of undercover agents, informers and covert practices,

particularly in tackling organised crime and corruption (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 49, ECHR 2008). The Court reiterates that while it accepts the use of undercover agents as a legitimate investigative technique for combating serious crimes, it requires that adequate safeguards against abuse be provided for, as the public interest cannot justify the use of evidence obtained as a result of police incitement (see *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-6, *Reports of Judgments and Decisions* 1998-IV). The use of special investigative methods - in particular, undercover techniques - must be kept within clear limits, on account of the risk of police incitement entailed by such techniques (see *Ramanauskas*, cited above, § 51).

46. To distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations the Court has developed criteria in its extensive case-law on the subject. Since it is not possible to reduce the variety of situations which might occur in this context to a mere checklist of simplified criteria, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement (see *Matanović v. Croatia*, no. 2742/12, § 122, 4 April 2017, citing *Bannikova v. Russia*, no. 18757/06, § 37-65, 4 November 2010).

47. If the Court is satisfied during preliminary consideration of a complaint of incitement that the situation under examination falls *prima facie* within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement (see, *Matanović*, cited above, §§ 131-2, citing cases where this criterion was not met; see also *Volkov and Adamskiy v. Russia*, nos. 7614/09 and 30863/10, 26 March 2015).

48. Under the substantive test, when examining an applicant's arguable plea of entrapment, the Court will enquire into whether the authorities had good reasons for mounting a covert operation. In particular, they must show that they were in possession of concrete, objective and verifiable evidence showing that initial steps have been taken to commit the acts constituting the offence, and that the criminal act was already underway at the time when the police intervened. This principle rules out, in particular, any conduct that may be interpreted as inciting the applicant to commit an offence that would otherwise not have been committed, such as taking the initiative in contacting the applicant, repeating an offer despite having received an initial refusal, insistent prompting, the promise of financial gain, or appealing to the applicant's sense of compassion (see *Tchokhonelidze v. Georgia*, no. 31536/07, § 44, 28 June 2018). When applying the above criteria, the Court places the burden of proof on the authorities. To that end it has held that "it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable" (see *Ramanauskas*, cited above, § 70 and *Matanović,* cited

above, § 130). In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (see *Bannikova*, cited above, § 48). In cases against Russia the Court has also emphasised the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. As regards the authority exercising control over covert operations, the Court has held that judicial supervision would be the most appropriate means; however, with adequate procedures and safeguards other means may be used, such as supervision by a prosecutor (ibid., §§ 49-50).

49. As a general rule the Court will also examine the way the domestic courts dealt with the applicant's plea of incitement. In fact, as the case-law currently stands, the Court considers the procedural aspect a necessary part of the examination of the *agent provocateur* complaint (see *Bannikova*, cited above, § 51). Similarly, in cases where the lack of file disclosure or the controversy of the parties' interpretation of events precludes the Court from excluding with a sufficient degree of certainty that there has been police incitement, the procedural aspect becomes decisive (ibid, § 52, with further references ; *Matanović*, cited above, § 134, and *Tchokhonelidze*, cited above, § 46).

50. In this respect, the Court has emphasised the role of domestic courts dealing with criminal cases where the accused alleges that he was incited to commit an offence. Any arguable plea of incitement places the courts under an obligation to examine it in a manner compatible with the right to a fair hearing. The procedure to be followed must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement. The scope of the judicial review must include the reasons why the covert operation was mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant was subjected (see *Veselov and Others*, cited above, § 94, 2 October 2012). The Court has also held that where an accused asserts that he was incited to commit an offence, the national courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded (see *Ramanauskas*, cited above, § 60 and *Bannikova*, cited above, § 56). The Court will generally leave it to the domestic authorities to decide what procedure must be followed by the judiciary when faced with a plea of incitement (see *Bannikova*, cited above, § 55). As regards Russia, in particular, the Court has found that the domestic courts had capacity to examine such pleas, in particular under the procedure for the exclusion of evidence (see *Veselov*, cited above, § 94).

(b) Application of these principles to the present case

51. With respect, first, to the substantive test, the Court will determine whether the offence would have been committed without the authorities' intervention, that is, whether there were objective suspicions that the applicant had been involved in a criminal activity or was predisposed to commit a criminal offence (see *Bannikova*, cited above, §§ 37-8).

52. In this regard, the Court notes that, on the one hand, Mr Ig. testified that he had rung the applicant's number after receiving information implicating the applicant in the perpetration of illicit activities. The applicant then agreed, without much hesitation, to install the unlicensed software, having found the programme in question on the Internet and having shown his expertise with what appears to be the illegal disabling of software protections, as it follows from the record of the undercover operations ("here is a crack [tool]", "I will install such version [of Windows] that no one will harass [you]", "and for that you may be penalised", "the programme may be modified in such a way"; see paragraph 5 above). It cannot be ruled out that the applicant's conduct during the undercover operation could be interpreted as an indication of his being involved in earlier criminal activity or being predisposed to commit a criminal offence (see *Volkov and Adamskiy*, cited above, § 43).

53. On the other hand, as in virtually all cases against Russia concerning police entrapment, authorisation for the undercover operation in the present case was issued in the absence of a clear and foreseeable procedure, by a simple administrative decision of the same body as the one which conducted the operation (see paragraphs 9 and 42 above), without any independent supervision, which is, in principle, inadequate, as the Court has pointed out (see *Vanyan v. Russia*, no. 53203/99, §§ 46‑9, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII (extracts); *Bannikova*, cited above, §§ 48-50; *Veselov and Others*, cited above, §§ 126‑8; *Lagutin and Others*, cited above, § 134, 24 April 2014 and *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, 30 October 2014). Neither the source of that incriminating information nor its exact contents were disclosed during the hearing of the applicant's case, whether at the prosecution's initiative or at the trial court's request. Mr Ig. evasively answered the question put by the applicant's lawyer concerning the source of the incrimination information (see paragraph 8 above). At the same time, unlike the applicants in the case of *Volkov and Adamskiy* (cited above, § 41), the applicant in the present case made out a plausible claim of entrapment, having consistently stated throughout the domestic proceedings that he would not have agreed to install the counterfeit software had Mr Ig. not requested him to do so, that there were no cogent reasons to suspect him of ongoing criminal activity, and that the police had phoned him in order to lure him into committing an illegal act.

54. In connection with the above circumstances and owing to the lack of information regarding the undercover operation which could shed light on the existence of prior incriminating information regarding the activity of the applicant, the Court cannot conclude that the Government met the requirement of the burden of proof to demonstrate that the applicant had not been subjected to police entrapment. The Court will accordingly move on to the procedural test, and examine whether the applicant was able to raise effectively the issue of entrapment before the domestic courts and if so, how the domestic courts dealt with the applicant's plea in that regard (see *Bannikova*, cited above, § 52, with further references; *Matanović*, cited above, § 134; and *Tchokhonelidze*, cited above, §§ 46, 48-9).

55. There is no indication in the material of the case including the trial record that the prosecution attempted to refute the applicant's assertion that he had been incited to commit a criminal offence. They did not try to prove that there had been no provocation by the police during the examination of evidence or witnesses in the hearing, nor did they question their main witness, Mr Ig., who was in charge of the undercover operation, concerning the circumstances in which the operation had been carried out. They only argued in their closing arguments that the applicant's claim of entrapment was unsubstantiated, having thus failed to discharge the requisite burden of proof.

56. Furthermore, the Justice of the Peace did not seek to establish whether a private person or a police collaborator had alerted the police to the applicant's criminal activity, why the police had decided to launch the undercover operation, exactly what material they had in their possession, or whether Mr Ig. had exerted any pressure on the applicant during their interaction - factors which are crucially relevant for the examination of the plea of entrapment in a manner compatible with the letter and spirit of Article 6 of the Convention. Even though the applicant had contested the existence of incriminating information throughout the domestic proceedings, the first-instance court focused its inquiry mainly on the applicant's demeanour during the operation, holding that he had a predisposition to commit a crime because he had knowingly agreed to install counterfeit software. The Justice of the Peace did not in fact address the applicant's arguments concerning entrapment. The appeal and cassation courts referred, repeatedly, to the existing operational information in respect of the applicant, without trying to establish how concrete and objective it was and whether it was verifiable, having held, without any satisfactory explanation, that the applicant's plea of entrapment was unsubstantiated. The domestic courts thus failed to absolve themselves of the obligation to review the applicant's claim in accordance with the principles of adversarial proceedings and equality of arms, because they only carried out a limited assessment of the applicant's plea and disregarded his allegations of insistence from the police during the undercover operation.

57. In respect of judicial review, the Court has recognised that, in practice, in order to exercise effective judicial supervision, the courts in Russia need to have access to sufficient factual material clarifying the circumstances leading to the implementation of an undercover operation. The Court is mindful of the burden placed on Russian courts to examine pleas of entrapment based on the limited evidence provided to them at the discretion of the bodies which carry out undercover operations, as in the present case. However, it continues to stress that in the fight against 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 *Nosko and Nefedov*, cited above, § 73).

58. Accordingly, given the deficiencies in the procedure for authorising an undercover operation in respect of the applicant, the failure of the prosecution to discharge its burden of proof in showing that no entrapment had taken place, and the inadequate judicial review of the applicant's arguable claim of entrapment, the Court finds that the fairness of the proceedings against the applicant was irreversibly undermined, and there has accordingly been a violation of Article 6 § 1 of the Convention on account of applicant's conviction as a result of entrapment by police.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION (CASSATION PROCEEDINGS)

59. The applicant complained that the trial in his case had not been fair because neither he nor his lawyer had been informed about the date of the cassation hearing and had therefore not attended it. He relied on Article 6 §§ 1 and 3 (c) of the Convention. Article 6 § 3 (c) reads as follows:

> "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. Admissibility

60. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The applicant's submissions*

61. The applicant submitted that the case material included a dispatch note concerning the notice of the hearing. However, there was no proof that it had actually been sent or that it had been received by the applicant or his lawyer. The applicant further submitted that if a letter was not delivered, the post office usually drafted a "refused to accept" or "addressee absent" notice and returned it to the sender. The case material contained no such document. Lastly, the applicant submitted that he and his lawyer had initiated the cassation procedure, such that it had been in their best interests to attend the hearing.

2. *The Government's submissions*

62. The Government submitted that the notice of the cassation hearing had been sent to the applicant and his lawyer on 19 February 2009, but that they had failed to attend the hearing on 11 March 2009. The Government referred to Article 376 § 4 of the Code of Criminal Procedure, according to which a failure on the part of persons who had been duly informed of the hearing to appear was not considered an impediment to the examination of a criminal case in the cassation court (see paragraph 21 above). In support of their claim they submitted what appears to be a dispatch note (without a postmark) sent by the Leninskiy District Court of Ulyanovsk and addressed to the Ulyanovsk Regional Court that stated, *inter alia*, the following:

> "....19.02.2009 No. U-1088 ...
>
> The Leninskiy District Court of Ulyanovsk sends [the applicant's criminal appeal case] for examination on the merits.
>
> The hearing of the case is scheduled for 11 March 2009 at 10 a.m. in the Ulyanovsk Regional Court ...
>
> [to the applicant] – for information...".

3. *The Court's assessment*

(a) General principles

63. The general principles relating to the personal attendance of the appeal hearing are summarised in the judgments in the cases of *Metelitsa v. Russia*, no. 33132/02, §§ 26-9, 22 June 2006, with further references, and *Nefedov v. Russia*, no. 40962/04, §§ 35-40, 13 March 2012).

(b) Application of those principles to the present case

64. The Court notes the Government's argument that the summonses were sent to the applicant and his lawyer before the hearing and takes note

of the document that they submitted. However, the Court also notes that according to regulations that existed at the relevant time, those summonses should have been sent by registered letter with acknowledgement of receipt (see paragraph 26 above). The document submitted by the Government is dated and contains an outgoing correspondence number (see paragraph 62 above); however it is not postmarked and the Government have submitted no other evidence that the summonses had indeed been sent and/or that the applicant or his lawyer ever actually received them. Neither does it follow from the judgment of the Ulyanovsk Regional Court that the court tried to establish whether the applicant and his lawyer were duly apprised of the hearing and whether it was possible to continue the examination of the applicant's case in his and his lawyer's absence. In those circumstances, the Court is not persuaded by the evidence submitted by the Government in support of their contention that the applicant had been duly summoned to the cassation hearing.

65. The Court further notes that the main thrust of the applicant's cassation complaint was that he had been incited by the police to commit a criminal offence and that the Justice of the Peace had failed to examine his claim of entrapment. The Court considers that the issues raised by the applicant in his statement to the cassation court appeared to have presented a certain degree of complexity and were of paramount importance to the applicant as potentially exonerating. They therefore should have been directly assessed by the cassation court during a questioning of the applicant or his lawyer, especially given its broad review powers, which extend to both facts and law (see paragraphs 19 and 22-24 above) and the fact that the Justice of the Peace made no reference whatsoever in the judgment to the applicant's plea of entrapment (see *Nefedov*, cited above, §§ 37-8).

66. Furthermore, the prosecutor made oral submissions to the cassation court, whereas the applicant had no opportunity to present his evidence or to reply to the prosecutor's submissions, which situation always places one party to the proceedings in a more advantageous position *vis-à-vis* another before the court and therefore contravenes the principles of adversarial proceedings and equality of arms, inherent in the concept of a fair trial.

67. The foregoing considerations are sufficient to enable the Court to conclude that the cassation proceedings before the Ulyanovsk Regional Court did not comply with the requirement of fairness. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

70. The Government submitted that the applicant's claim for just satisfaction should be rejected. In particular, they submitted that the amount claimed by the applicant was excessive and contradicted the Court's case-law on just satisfaction awards. They further submitted that the applicant had not been detained on remand, had not been sentenced to imprisonment and had only been ordered to pay fine.

71. The Court considers that the applicant sustained non-pecuniary damage as a result of the violation of his right to fair trial. However, the amount claimed by the applicant appears to be excessive. Making its assessment on an equitable basis, it awards him EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

72. The Court further reiterates that when an applicant has been convicted despite a potential 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 *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005‑IV, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010). The Court notes in that connection that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention (see paragraph 25 above).

B. Costs and expenses

73. The applicant made no submissions in respect of his costs and expenses.

C. Default interest

74. 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention concerning the complaint of entrapment;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention concerning the complaint about unfairness of the cassation proceedings;

4. *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, EUR 2,500 (two thousand five hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 9 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Paul Lemmens President

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

P.L.
M.B.

CONCURRING OPINION OF JUDGE PAVLI, JOINED BY JUDGE RAVARANI

1. I have voted in favour of the unanimous finding that there has been a violation of the applicant's rights under Article 6 § 1 of the Convention. I regret, however, that I cannot join the majority's reasoning in arriving at this conclusion. In my view, the Court should have found a violation under the substantive test of incitement. I therefore see no need to have continued on to the procedural test in this case.

2. I have three points that I would like to make in this connection. The first is to highlight a certain lack of clarity in the Court's case-law in respect of the application of the substantive and the procedural tests in entrapment cases. The second relates to the question of the burden of proof in the context of the substantive test. The third is to explain why, given these first two points, I consider that the Court should have concluded that an application of the substantive test alone was sufficient to find a violation of the applicant's rights under Article 6 § 1.

3. As the Court notes in paragraph 46 of its judgment in the case, its examination of entrapment complaints has developed on the basis of two tests: the substantive and the procedural test of incitement. The substantive test asks whether the authorities had good reasons for mounting a covert operation. In particular, the authorities must show that they were in possession of concrete, objective and verifiable evidence indicating that initial steps had been taken to commit the acts constituting the offence, and that the criminal act was already underway at the time when the police intervened (see paragraph 48 of the judgment). The procedural test asks whether the applicant was able to effectively raise the issue of incitement or entrapment during the domestic proceedings (see paragraph 54 of the judgment).

4. It is in the inherent logic of these two tests that they are to be applied sequentially, with the Court turning to the procedural test only if the substantive test is inconclusive. This was the approach taken, for example, in *Teixeira de Castro v. Portugal* (9 June 1998, *Reports of Judgments and Decisions* 1998-IV), in which the Court determined that the application of the substantive test indicated a violation of Article 6 § 1 and did not find it necessary to continue on to a procedural analysis. This does not exclude that, in reaching its conclusion under the substantive test, the Court may refer to evidence produced and other findings made by the national courts in the course of the domestic proceedings.

5. The current judgment, relying on the 2010 judgment in *Bannikova v. Russia* (no. 18757/06, 4 November 2010), notes that "as the case-law currently stands, the Court considers the procedural aspect a *necessary* part of the examination of the *agent provocateur* complaint" (see paragraph 49 of the judgment, emphasis added). There is, however, no proper reasoning

offered in *Bannikova* for considering such a two-tier assessment necessary, other than a circular and general reference to the case-law (see *Bannikova*, cited above, § 51). At the same time, that judgment provides an alternative and genuine reason for shifting to the procedural test: pointing to "cases where the lack of file disclosure or the controversy of the parties' interpretation of events precludes the Court from establishing with a sufficient degree of certainty whether the applicant was subjected to police incitement"; the judgment emphasises that in such cases "the procedural aspect becomes decisive" (ibid., § 52). Under the same logic, the procedural test would not be "necessary" if the outcome of the substantive test is clear and conclusive. Any other conclusion begs the question as to what would be the point of having a substantive test in the first place. Furthermore, whatever the validity of the *Bannikova* position in 2010, it does not appear that such an approach has been invariably followed by the case-law in the intervening years. For example, in *Furcht v. Germany* (no. 54648/09, § 59, 23 October 2014), the Court simply concluded that "the undercover measure at issue ... amounted to police incitement" and that the evidence thus obtained "was further used in the ensuing criminal proceedings against the applicant", leading to a violation of Article 6 § 1.

6. Once the Court is satisfied that there was police incitement in the case at hand, the key remaining question is whether the domestic courts excluded any evidence obtained through such incitement from the resulting criminal proceedings in order to preserve the applicant's fair trial rights.

7. Shifting now to the question of the burden of proof, the Court has repeatedly held that the authorities bear the burden under the substantive test (see, for example, *Bannikova*, cited above, § 48), being required to demonstrate at any stage that they had good reasons for mounting the covert operation (ibid., § 40). At the domestic level, "it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable" (see, for example, *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 70, 5 February 2008). At the Strasbourg level, when applying the criteria of the substantive test, the Court has said that it places the burden of proof on the authorities (see *Furcht*, cited above, § 53).

8. It follows that, once the applicant puts forward an arguable claim of incitement, the respondent Government must provide sufficient evidence to rebut such a claim or at least to call into question a finding under the substantive test. In doing so, the Government cannot simply rely on the failure of national law enforcement to record and disclose the basics of the relevant operations, or follow any relevant procedures for its authorisation and monitoring. This would go against the very purpose of the ban on police incitement, especially in a context, such as the Russian one, where the Court has been consistently critical of the failure, at the legislative and practical levels, to subject undercover operations to prior authorisation with independent supervision (see paragraph 53 of the judgment). Such a failure

tends to undermine the legitimacy of such operations "from the outset" (see *Nosko and Nefedov v. Russia*, no. 11789/10, § 64, 30 October 2014) and even to encourage their arbitrary use as a routine law enforcement tool.

9. Turning to the current case, the Court concluded that the Government had not "met the requirement of the burden of proof to demonstrate that the applicant had not been subjected to police entrapment", but opted nevertheless to "move on to the procedural test" (see paragraph 54 of the judgment). While I agree with the first conclusion, I cannot follow the second.

10. In my view, the national authorities have failed, both at domestic level and before this Court, to put forward any concrete, objective and verifiable evidence showing that the alleged criminal act was already underway. In fact, there was *prima facie* evidence that the transaction in question was initiated by a police officer. Although the officer claimed that he had prior operational evidence of the applicant's propensity to commit the offence in question, no court has ever seen that evidence or any details about it; and no other evidence has been provided by the Government. Under these circumstances, the Court could and should have found, under the substantive test, that the applicant was subjected to police entrapment. An arguable claim put forward by the applicant requires at least some evidence to the contrary if it is to be considered inconclusive.

11. Finally, it is patently clear that the national courts did not exclude the evidence obtained through incitement and in fact relied on it in convicting the applicant – a conclusion that can certainly be reached without having to deploy the fully-fledged procedural test. That failure to exclude the tainted evidence is sufficient to find a violation of Article 6 § 1.