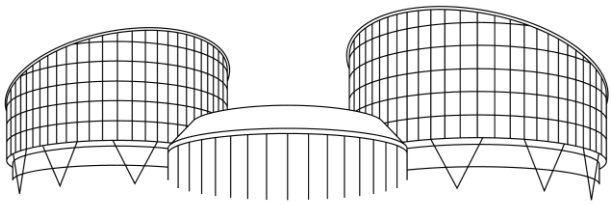

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BALTIŅŠ v. LATVIA

(Application no. 25282/07)

JUDGMENT

STRASBOURG

8 January 2013

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 Baltiņš v. Latvia,

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

David Thór Björgvinsson, *President,*
Ineta Ziemele,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 4 December 2012,

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

PROCEDURE

1. The case originated in an application (no. 25282/07) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mr G. Baltiņš ("the applicant"), on 12 June 2007.

2. The applicant, who had been granted legal aid, was represented by Mrs D. Rone, a lawyer practising in Rīga. The Latvian Government ("the Government") were represented by their Agent, Mrs I. Reine, who was succeeded by Mrs K. Līce.

3. The applicant alleged that he had not had a fair trial as required under Article 6 of the Convention. In particular, he alleged that as a result of unlawful operational investigative measures he had been incited by an undercover police agent to commit an offence, namely the acquisition and sale of narcotic substances, of which he was subsequently convicted.

4. On 16 June 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Rīga.

A. The events leading to the applicant's arrest

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

7. In July 2003 the applicant was convicted of unauthorised acquisition and storage of narcotic substances. According to the criminal case file he had acquired and stored for personal use nine packages of a narcotic substance which contained 0.5108 grams of methamphetamine. The applicant pleaded guilty. He was given a suspended prison sentence. Before 2003 he had been convicted four times of theft.

B. The operational investigative measures in respect of the applicant

8. At the Government Agent's request the State police furnished the following information on 5 October 2011:

> "...since 2002 the Anti-Drugs Office [*Narkotiku apkarošanas birojs – ONAP*] had information to the effect that [the applicant] had been involved in the trafficking of narcotic substances. [The applicant] has six previous convictions; before [the arrest] he was convicted on 18 July 2003 of unauthorised acquisition, storage and transfer of narcotic substances with intent to sell...
>
> In February 2004 the Anti-Drugs Office received new unofficial information in connection with the applicant's drug-trafficking activities. [The Office] therefore commenced undercover investigation by carrying out a preliminary inquiry (*izziņa*), as a result of which on 24 February 2004 the [investigators] opened Case No. 7004204 in order to verify the operational information (*operatīvās pārbaudes lieta*). Information concerning the applicant was entered in the operational records (*operatīvā uzskaite*). Within the framework of the above proceedings [the investigators] collected information from various sources and carried out several operational investigative measures, including operational inquiry (*izzināšana)* phone tapping, which was authorised by the Supreme Court.
>
> The information acquired during the verification process confirmed that the applicant was involved in drug trafficking. Accordingly, operational case (*operatīvās izstrādes lieta*) No. 7019304 was opened on 27 October 2004. Various operational measures were carried out within the [above case], including operational surveillance (*operatīvā novērošana),* operational interception of telephone conversations (*operatīva sarunu noklausīšanās*) and others.
>
> Three undercover operations conducted in the context of the operational case were used as evidence of [the applicant's] guilt, in the criminal proceedings ...which were instituted on 1 December 2004. [Their] aim was to create a situation in which the applicant would have an opportunity to either procure narcotics or refuse to do so, in order to determine how he would behave.
>
> As a result it was proved that [the applicant] procures narcotic substances in large quantities.
>
> ..."

9. According to the information provided by the Government, on 2, 11 and 30 November 2004, at the request of the Anti-Drugs Office, a specially

authorised prosecutor from the Office of the Prosecutor General (*Ģenerālprokuratūras īpaši pilnvarots prokurors*) authorised the carrying-out of investigative tests (*operatīvais eksperiments*) in which an undercover police agent, I., was supposed to make a "test" purchase of amphetamine from the applicant. The authorisation was granted in accordance with section 15(3) of the Law on Operational Activities (*Operatīvās darbības likums,* hereafter "the LOA") (see the relevant domestic law part below).

10. According to the statements of the undercover police agent I. and the reports of the official of the Anti-Drugs Office, the investigative tests were carried out in the following manner. On 3 November 2004 I. called the applicant and asked to meet him. The applicant replied that he was busy. Later the applicant called back and they arranged a meeting. When they met, I. gave the applicant 500 Latvian lati (LVL) (approximately 700 euros (EUR)) in marked banknotes. According to I.'s statement, they did not enter into a conversation. The applicant said that he would call back. Later the same day I. called the applicant, who told him that everything would be fine. I. again called the applicant, who told him that the deal had fallen through and that they had to meet at a petrol station. At the petrol station I. called the applicant, who gave him instructions where to find the "goods", which consisted of about 100 grams of amphetamine. Their conversations were recorded.

11. According to I.'s statements, he also arranged a meeting with the applicant on 8 November 2004 in a supermarket in order to establish contact and gain the applicant's trust. The applicant asked I. if everything had gone well and I. replied that everyone was satisfied, meaning that he had delivered the drugs to his partners. Then I. asked if there was any possibility of purchasing larger quantities of amphetamine. The applicant replied that this was not possible, but then added that he had 300 grams of amphetamine which he could sell. I. then asked about those 300 grams of amphetamine and the applicant replied that he could sell them the same day. I. told him that he could not make it that day, to which the applicant said "tomorrow then", and they agreed to call each other. Later on I. asked the applicant about his occupation, to which the latter replied that it was his "only bread", meaning drug trafficking. These statements could not be heard on the recordings because the applicant spoke in a low voice.

12. On 25 November 2004 I. called the applicant and asked him to procure the same type and amount of drugs as before. They met at a petrol station and I. gave him LVL 500 (approximately EUR 700). The applicant took the money. Later he asked I. to come to a restaurant where the applicant was waiting for a supplier. On the same day the applicant met I. in a restaurant and delivered a package of about 100 grams of amphetamine by putting them under a chair cover.

13. On 1 December 2004 I. called the applicant and asked to meet him. During the meeting I. offered to purchase 400 grams of the same type of

drugs for LVL 2,000 (approximately EUR 2,800). The applicant told him that he was not sure whether he could supply it. I. said he wanted to pay in two instalments, and gave the applicant half the agreed sum. I. asked about a discount and the applicant lowered the price by LVL 80. The next day the applicant complained to I. that the money was marked. Afterwards, all attempts to contact the applicant were unsuccessful.

C. Criminal proceedings against the applicant

14. On 1 December 2004 the Anti-Drugs Office initiated criminal proceedings against the applicant on charges of aggravated unauthorised acquisition and possession of narcotic substances with intent to sell.

15. On 6 December 2004 the applicant was arrested by the police. He refused to give any statements.

16. On 7 December 2004 the Rīga City Centre District Court authorised a search of the applicant's home, where the police officers seized a weighing scale, some money and a SIM card for a mobile phone. The results of a forensic chemical examination revealed traces of unauthorised psychotropic substances on the scale.

17. On 9 December 2004 a judge of the same court remanded the applicant in custody. The judge noted that the file did not contain, *inter alia*, the authorisation from a specialised prosecutor of the Office of the Prosecutor General to carry out the undercover operation. The court extended the applicant's detention on several occasions.

18. In response to a request by the Specialised Prosecutor's Office for Organised Crime and Other Offences, the Office of the Prosecutor General stated that the undercover operations in respect of the applicant had been authorised by the prosecutor on 2, 11 and 30 November 2004. The relevant decisions had not been added to the criminal case file since they were classified in accordance with the Law on State Secret.

19. On 29 December 2004 the criminal case was sent to the prosecutor's office and on 4 January 2005 the applicant was charged with unauthorised acquisition and possession of narcotic substances with intent to sell. On 6 May 2005 the applicant was presented with the bill of indictment, which referred to the undercover operations of 3 and 25 November 2004.

20. On 23 May 2005 the Rīga Regional Court decided to commit the applicant for trial.

D. Trial

21. On 21 October 2005 the Rīga Regional Court convicted the applicant of aggravated unauthorised acquisition and possession of narcotic substances with intent to sell and sentenced him to ten years' imprisonment. Police officer I. did not attend the hearing and his statements given during

the pre-trial proceedings were read out. The court heard evidence from a police officer, T., who in the course of the undercover operation had carried out surveillance and tracking of the applicant. When questioned at the hearing, officer T. stated that during the period in question the applicant had tried to avoid being tracked and had met with suspicious individuals who might have been involved in drug trafficking. The Court also questioned V., who stated that the applicant had brought the marked banknotes to the currency exchange office at which she worked, to have them checked to see if they were forged.

22. The court relied on: the written statements provided by the police officers on the conduct of the investigative tests carried out on 3 and 25 November and from 1 to 6 December 2004; information about the telephone conversations between police officer I. and the applicant; an inspection report on the marked banknotes; an inspection report on the recording of the conversations between the applicant and officer I.; a forensic chemical report according to which the items seized at the applicant's apartment bore traces of amphetamine and cocaine; a medical examination report according to which no presence of psychotropic substances had been found in his body but traces of marihuana had been found on his hands; and a forensic chemical report on the narcotic substances acquired during the undercover operation. Items seized at the applicant's apartment (see paragraph 16 above), together with various data storage devices (a SIM card, a CD and an audio tape), were admitted as physical evidence in the criminal proceedings.

23. On appeal, the applicant requested witness I.'s attendance at the hearing but during the appeal hearing withdrew his request. On 15 September 2006 the Rīga Regional Court dismissed the appeal. It dismissed the incitement plea, finding that it was merely a defence strategy used in an attempt to mitigate the charges.

24. In an appeal on points of law the applicant alleged that police officer I. had incited him to commit the offence.

25. Following a request from the Senate of the Supreme Court to furnish observations, the Office of the Prosecutor General on 1 March 2007 submitted the following arguments in support of the dismissal of the applicant's incitement plea:

> "...Section 15(3) of the LOA authorises ... the carrying-out of undercover operations the aim of which is to determine the behaviour of a person ... in a situation which is liable to result in *(izraisa)* criminal or otherwise unlawful activities. Section 22 of the LOA provides that the precondition for instigating operational proceedings (*izstrāde*) is ... information ... which provides sufficient basis to suspect [specific] individuals of committing or preparing to commit an offence. Based on the above provisions [and] after having received authorisation from the prosecutor, the investigators are authorised to create a situation which is conducive to (*veicina*) the disclosure of [an individual's] criminal intent, but in which [the individual] remains free to choose whether or not to carry out the criminal activities. ... The applicant did not become

involved in the trafficking of narcotic substances as a result of the undercover operation; on the contrary, the criminal activities commenced by the applicant [had been] interrupted."

26. The Senate of the Supreme Court dismissed the appeal. It noted that the pre-trial investigation in the criminal case had been conducted before the Law of Criminal Procedure entered into force and that the former Code of Criminal Procedure did not regulate special investigative activities. With regard to the incitement plea, the Senate found as follows:

"... It is clear from the materials of the case that on 2, 11 and 30 November 2004 a prosecutor from the Office of the Prosecutor General approved the decision of the Anti-Drugs Office to conduct undercover operations in relation to [the applicant] in order to record [the latter's] behaviour when [the investigator] asked [him] to supply him with narcotic substances against payment.

... there is no evidence in support of the allegations that the police officer incited the applicant to commit a criminal offence; neither did [the officer] apply methods aimed at overcoming the applicant's doubts or his resistance to committing a crime.

The Court of Cassation concludes that, in accordance with the Law on Operational Activities, the aim of an investigative test is to record a person's behaviour in a situation in which he or she is liable to commit criminal or other unlawful acts.

It was established that the police officers had sufficient information to suspect [the applicant] of unlawful activities involving narcotic substances..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant parts of the Law on Operational Activities, as in force at the material time until 30 September 2005

27. Section 2 defines the aims of undercover operations. These are, *inter alia*, to prevent, deter and detect criminal offences and to identify criminal offenders and sources of evidence.

28. Section 4 sets out the principles governing undercover operations, such as the prohibition on inciting persons to [commit] a criminal offence (paragraph 2) and the right to commence undercover operations only as a last resort if it is not possible to attain the aims by deploying other measures (paragraph 4). Section 19 refers to section 4 and provides that undercover activities are to be instigated only in accordance with the provisions of the latter.

29. Section 5 provides that if a person considers that in the course of undercover operations his or her rights or freedoms have been infringed, he or she has a right to complain to the competent prosecutor or to lodge a claim with a court.

30. Section 6 sets out an exhaustive list of operational measures, including an investigative test (paragraph 1, subparagraph 7).

31. Section 8 provides that the organisation and methodology of operational measures are considered to be a State secret.

32. Under section 15, the purpose of an investigative test is to create specific circumstances (situations) in order to identify persons or items of interest, or to determine the reaction of persons under investigation and to determine the motivation (subjective aspect) for their actions.

An investigative test can also be carried out in order to verify the feasibility and objectives of a person's actions; to track a person's possible actions and verify the existence or movement of objects; or to create a favourable situation for the investigating authority to carry out its investigative tasks.

An investigative test, the purpose of which is to record the behaviour of a person ... in a situation liable to result in a criminal or other illegal act (*noziedzīgu vai citādu prettiesisku rīcību izraisošā situācijā*) shall be performed only with the approval of a prosecutor.

33. Section 22 provides:

"Paragraph I

If the authority carrying out investigative operations has at its disposal information in respect of specific persons (including information obtained as a result of an operational verification exercise) which provides sufficient basis to suspect such persons of planning or committing a criminal offence or threatening interests of importance to the State, or such persons are being sought in connection with a criminal offence already committed, operational proceedings shall be initiated in respect of the persons concerned.

Paragraph II

The operational proceedings shall be initiated by a decision which shall be approved by the head or deputy head of the body performing the investigative operations. A prosecutor shall be informed thereof.

Paragraph III

An operational case shall be opened in respect of the operational proceedings, and persons with respect to whom the investigation is being conducted shall be registered in the operational records.

Paragraph IV

Any of the operational measures set out in section 6, and the methods of conducting such measures referred to in section 7 of this Law, may be used in the investigative procedure.

Paragraph V

The period of the operational proceedings shall be six months, which may be extended for a further six months with the approval of the head or deputy head of the body performing the investigative operations. A further extension of the term may be obtained only with the approval of the Prosecutor General or a prosecutor specially

authorised by the Prosecutor General, but shall not last longer than the limitation period for the crime under investigation."

34. Section 35 provides:

"(1) The Prosecutor General and prosecutors specially authorised by the Prosecutor General shall be responsible for monitoring the conformity of undercover operations with the law. For the purpose of monitoring they shall be entitled to consult such documents, materials and information, at any stage of the investigative operations, as are available to the investigating body. Covert information and its sources shall be revealed only to the Prosecutor General, or to the prosecutors specially authorised by the Prosecutor General with the permission of the head of the investigating body.

(2) In order to take a decision with respect to undercover operations provided for by [the LOA], the carrying-out of which requires approval by a judge, the judge shall be entitled to consult those documents, materials and information available to the investigating body on which the necessity for the specific undercover measure is based. The covert information and the sources thereof shall be revealed to the judge only with the permission of the head of the investigating body."

B. Relevant parts of the Law of Criminal Procedure, in force as from 1 October 2005

35. With respect to the admissibility of evidence, section 130 provides that it is admissible to use factual information acquired during criminal proceedings if such information was obtained and authorised in accordance with the procedures specified in the Law of Criminal Procedure. Factual information that has been acquired in the following manner shall be deemed inadmissible and non-probative:

(i) through violence, threats, blackmail, fraud, or duress;

(ii) through a procedural action performed by a person who lacked authorisation, under this Law, to perform that action;

(iii) by violating the provisions of this Law prohibiting the use of evidence;

(iv) by violating the fundamental principles of criminal proceedings.

36. Part 11 of the Law of Criminal Procedure provides an exhaustive list of special investigative activities (*speciālās izmeklēšanas darbības*), which include phone tapping, a special investigative test and others, and governs the manner in which they are carried out.

37. Under section 225, investigative tests are designed to create a situation or circumstances characteristic of the daily activities of a person which are conducive to the disclosure of criminal intent, and to record the person's actions in such circumstances.

38. The investigative tests are carried out on the basis of a decision by an investigating judge if there are grounds for believing that: a person has previously committed a criminal offence and is preparing to engage in, or has commenced, the same criminal activities; an actual criminal offence may be interrupted within the framework of criminal proceedings under

way; information regarding the facts to be proved may be obtained as a result of the operation, or the acquisition of the necessary information is impossible or will be hindered without the operation.

39. Under section 225(3) it is prohibited to incite a person to commit a particular act, to influence a person by violence, threats, or blackmail or to take advantage of a person's helplessness.

C. Relevant parts of the judgment of 11 May 2011 adopted by the Constitutional Court in Case No. 2010-55-0106

40. When called upon to assess whether the supervisory mechanisms enshrined in section 35(1) of the LOA complied with Article 92 of the Constitution guaranteeing the right to a fair trial, the Constitutional Court, in Case No. 2010-55-0106, observed that the effectiveness of the above-mentioned supervisory mechanisms was to be assessed in conjunction with the right of the individuals concerned to protect their infringed rights. The court recognised that under section 5 of the LOA individuals could apply to the prosecutor's office or the courts if they considered that in the course of undercover operations the authorities had infringed their rights. The Constitutional Court concluded that the monitoring of the lawfulness of undercover operations by the prosecutor's office was supplemented by a review by the courts during or after the operations, thereby ensuring independent supervision of undercover operations. In the event of an infringement, the court or the prosecutor's office was obliged to restore the infringed rights and compensate for or remedy the damage caused.

41. The Constitutional Court also noted that the rights of individuals were effectively protected by means of the verification of the information obtained during undercover operations on the basis of the procedures enshrined in the Law of Criminal Procedure and the LOA. It noted in this regard:

> "20.3 ... Pursuant to section 24 paragraph 4 of the [LOA], in the course of undercover operations, the body responsible for the relevant stage of the proceedings (*procesa virzītājs*) must be informed of all the information obtained in the course of undercover operations. In verifying the admissibility of the evidence, the court assesses whether the information obtained as the result of undercover operations is in conformity with section 9 of the Criminal Procedure Act and the [LOA]. In verifying whether the particular activities comply with the norms regulating criminal procedure, [the information obtained as a result of undercover operations] may be used as fully-fledged evidence [in criminal proceedings] (see *Strada-Rozenberga K. Pierādīšanas teorija kriminālprocesā. Vispārīgā daļa. Rīga: Biznesa augstskola „Turība", 2002, pp. 187*). Consequently, the body responsible for that stage of the proceedings and the court assess the admissibility of the information obtained as the result of undercover operations. Effective protection of the rights of individuals is ensured by the Prosecutor General and by the specialised prosecutors who supervise the lawfulness of undercover operations, and by the court which reviews the operations *ex post facto*."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

42. The applicant complained that he had not had a fair trial. He complained in particular that as a result of unlawful operational investigative measures he had been incited by an undercover police agent to commit an offence, namely the acquisition and sale of narcotic substances, of which he was subsequently convicted.

The complaints are covered by Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

43. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint that the investigative test had been unlawful. They contended that the test had been duly authorised in a timely manner by a competent prosecutor of the Office of the Prosecutor General. In this regard the Government noted that the applicant had never complained about the legality of the operational measures to the prosecutor's office. They referred to the judgment of the Constitutional Court of 11 May 2011 in Case No. 2010-55-0106 which, according to the Government, confirmed that the public prosecutor's office was capable of exercising effective and independent supervision of special investigative activities and provided effective safeguards in cases of alleged violation of procedural and constitutional rights (see paragraph 40 above). The Government emphasised that the domestic courts could not examine the procedural and technical aspects of the investigative test since these issues fell outside their competence, but that nevertheless they had conducted a *prima facie* review of all the evidence in order to establish whether they had been technically admissible in terms of the legislation in force.

44. The applicant contended that the investigative test at issue had not been authorised in accordance with the domestic law and had been unlawful. He further argued that an appeal to the prosecutor's office would not constitute an effective remedy since the response would not lead to any real changes in the criminal proceedings. According to the applicant, he had exhausted remedies by raising an incitement plea before the domestic courts.

45. The Court reiterates that the Government have the burden of proving that the domestic legal system provided for a remedy that was effective and available not only in theory but also in practice, that is, that it was

accessible, capable of providing redress in respect of the applicant's complaints and offered a reasonable prospect of success (see, amongst many other authorities, *Ommer v. Germany (no. 2)*, no. 26073/03, § 55, 13 November 2008).

46. The Court observes that the Government did not specify exactly which effective and sufficient remedies could be obtained in practice by means of an appeal to the prosecutor's office. It also observes that in the context of this particular type of investigation court supervision would be more appropriate, even though other supervisory mechanisms are not excluded (see *Milinienė v. Lithuania*, no. 74355/01, § 39, 24 June 2008).

The Government did not dispute on the other hand that under the Law of Criminal Procedure the domestic courts were empowered to rule on the admissibility of evidence obtained as a result of undercover activities. The Court also notes that the domestic courts' role in this particular type of criminal case was recognised by the judgment of the Constitutional Court invoked by the Government. Without commenting on the Constitutional Court's findings as to whether the domestic courts' *ex post facto* review (*pēckontrole*) of the authorisation to launch certain undercover activities provides effective safeguards against abuse of the rights protected under the Convention, in the instant case the Court would refer to the Constitutional Court's conclusion concerning the domestic courts' role in the advanced stages of criminal proceedings when, by assessing the admissibility of evidence, they review whether the evidence brought before them has been obtained in conformity with, *inter alia*, the provisions of the LOA (see paragraphs 40-41 above). Observing that, under section 4 of the LOA, incitement to commit a crime is prohibited the Court considers that it was reasonable to expect that the applicant would ask the domestic courts to address his concerns about the evidence allegedly obtained by means of unlawful undercover activities such as incitement.

47. It should be observed that the applicant's main complaint concerned the fairness of the proceedings as a whole, including his right to defend his case by, *inter alia*, raising an effective incitement plea and challenging the admissibility of evidence. The applicant raised complaints about the alleged police incitement before all three levels of court (see paragraph 26 above). None of the courts indicated that there were any statutory restrictions which prevented them from examining the complaint, or stated that the applicant should have applied to a prosecutor (see *Leas v. Estonia*, no. 59577/08, § 70, 6 March 2012).

48. In the light of the above considerations the Court finds that the applicant availed himself of a remedy that was apparently effective and sufficient, and therefore is not required to exhaust other alternative remedies which were no more likely to be successful (see, among other authorities, *Nada v. Switzerland* [GC], no. 10593/08, § 142, 12 September 2012).

49. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

50. The Government dismissed the applicant's argument that the police officers had overstepped the limits of undercover investigation. They noted that the applicant had a previous conviction for drug offences, a fact which distinguished the circumstances of the present case from those in *Ramanauskas v. Lithuania* ([GC], no. 74420/01, ECHR 2008) and *Malininas v. Lithuania* (no. 10071/04, 1 July 2008). The Government emphasised that only a few months after the applicant's previous conviction the law-enforcement authorities had received unofficial information indicating that he had resumed illegal drug-related activities, and the investigators had launched an operational verification exercise (*operatīvā pārbaude*) in the course of which, over a period of nine months and in accordance with the provisions of the LOA, they gathered information from various sources such as police informants and telephone tapping. Therefore, according to the Government, the investigators had verified the unofficial information and had had good reasons to suspect the applicant of committing or being prepared to commit a drug-related offence when they sought authorisation to carry out the investigative test. The Government further referred to the applicant's behaviour during the investigative test and contended that he himself had been eager to increase the quantity of drugs.

51. According to the Government, the domestic courts had duly examined the incitement plea. In this regard they referred to the reasoning of the Senate of the Supreme Court (see paragraph 26 above), adding that the evidence obtained by means of the special investigative techniques had not been the sole basis for the applicant's conviction. They noted that during the appellate proceedings the applicant had explicitly waived his right to question the undercover police agent I.

52. Accordingly, the Government invited the Court to dismiss the complaint as manifestly ill-founded or otherwise declare that there had been no violation of Article 6 of the Convention.

(b) The applicant

53. The applicant argued that prior to launching the investigative test the investigators had possessed only unofficial information obtained from police informants, and that by repeatedly requesting the applicant to sell narcotics, sending text messages and bringing about a supposedly accidental

meeting the undercover police agent had not acted in a passive manner but rather had incited the applicant to commit the offence.

54. He also argued that his conviction had been based solely on the evidence obtained as a result of the undercover operations and the pre-trial testimonies of the undercover police agent I., who had not been questioned during the trial.

2. The Court's assessment

(a) General principles

55. The Court reiterates that it is for the national courts to assess the evidence brought before them, whereas the Court must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Ramanauskas* cited above, § 52). In this regard the Court's task is not to determine whether certain items of evidence were obtained unlawfully, but rather to examine whether such "unlawfulness" resulted in the infringement of another right protected by the Convention (*ibid*.). The requirement of the fairness of a trial embodied in Article 6 would be compromised by the use of evidence obtained as a result of police incitement (see *Teixeira de Castro v. Portugal*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-IV).

56. The Court has previously examined complaints raising issues of police incitement under the substantive and procedural limbs of Article 6 (see, for a detailed description of the applicable principles deriving from the Court's case-law, *Bannikova v. Russia*, no. 18757/06, §§ 33-65, 4 November 2010). Under the substantive limb, the Court has assessed whether the investigative activity of the police officers went beyond that of undercover agents (see *Teixeira de Castro* cited above, § 38, and *Ramanauskas* cited above, § 55), in other words, whether the offence would have been committed without the authorities' intervention. In this regard the Court has in previous cases examined, *inter alia*, whether the investigating authorities had good reasons to suspect the applicant of prior involvement in particular unlawful activities (see *Teixeira de Castro* cited above, § 38), at what stage of the offence the undercover agents carried out the undercover operation (see *Vlachos v. Greece*, no. 20643/06, § 26, 18 September 2008), and whether the conduct of the undercover agent was essentially passive (see *Malininas* cited above, § 37, and *Ramanauskas* cited above, § 67).

57. Under the procedural limb, the Court has assessed the procedure whereby a plea of incitement was determined in the particular case by the domestic courts, to ensure that the rights of the defence were adequately protected (see, among many other authorities, *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, § 51, 22 July 2003). The Court has also noted that where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence

takes on an even greater importance (see *Bykov v. Russia* [GC], no. 4378/02, § 95, 10 March 2009). In this regard the Court has emphasised that it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. If an arguable claim in this respect has been raised, the Court must ascertain whether the applicant was able to argue the incitement plea effectively and whether the domestic courts took the necessary steps to establish that no police incitement had taken place (see *Khudobin v. Russia*, no. 59696/00, § 135-137, ECHR 2006-XII (extracts)). For the national courts this entails establishing, *inter alia*, the reasons why the operation was mounted, the extent of the police's involvement in the offence and the nature of the activities to which the applicant was subjected (see *Ramanauskas* cited above, § 71).

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

58. In the light of the above principles the Court shall first assess the substance of the applicant's complaint that he had been the victim of police incitement. In this regard the Government emphasised the applicant's predisposition to commit drug offences (see paragraph 50 above). The Court notes at the outset that, although the applicant had previously been convicted of storing drugs, nothing in the case file suggests that he had been convicted of drug trafficking (see paragraph 7 above). The Court also notes that under section 4(4) of the LOA, undercover operations were to be carried out only after other means of attaining the aims laid down in the LOA had been exhausted. As is clear from the Government's observations, the investigators had unofficial information about the applicant's alleged illegal activities and they had taken steps to verify it (see paragraph 50 above). In contrast to, for instance *Milinienė* (cited above, §§ 37-38), where the police deployed the contested undercover activities in response to information which was later scrutinised by the domestic court (see also *Vanyan v. Russia*, no. 53203/99, § 49, 15 December 2005), in the present case no objective evidence showing the reasons for police officer I.'s attempts to establish contact with the applicant was ever subjected to the domestic courts' scrutiny (see paragraphs 10-13, above). Moreover, the information in the criminal file does not make it clear whether the investigators "joined in" an already ongoing offence (contrast, for instance, *Bannikova* cited above, § 69). Lastly, as in *Malininas* (cited above, § 37), with each offer the undercover agent asked the applicant to procure larger quantities of drugs and offered him a substantial monetary inducement; this raises doubts as to whether the conduct of the undercover agent remained purely passive.

59. In view of the nature of the police activities, the applicant's allegations of incitement brought before the domestic courts were not improbable. The courts should therefore have proceeded to determine whether the applicant had been the victim of incitement.

60. At the time the investigative test was carried out, undercover activities were regulated exclusively by the LOA. (As from 1 October 2005 the existing framework was supplemented by the regulation on special investigation activities introduced by the Law of Criminal Procedure, – see Law part above).

61. The Court observes that, as characterised by the domestic law (see paragraph 32 above) and explained by the Supreme Court (see paragraph 26 above), the element of incitement was inherent in the very nature of investigative tests, and it appears that there was only a slight difference between incitement and legitimate undercover techniques. In such circumstances the role of the courts' scrutiny of whether the evidence was obtained without the use of incitement becomes even more important, in order to eradicate any reasonable doubts in that regard. Moreover, it becomes particularly important where no assessment has been made by the courts prior to the launching of an investigative test, as in the case of investigative tests regulated by the LOA which, in contrast to similar measures regulated by the Law of Criminal Procedure, are not subject to prior authorisation by the courts.

62. In the instant case the decision by which the Office of the Prosecutor General authorised the carrying-out of the investigative test in relation to the applicant was classified and was not added to the criminal file (see paragraph 18 above). The criminal file contained investigative reports which referred to the date of the above authorisation, but not to the substance of it. When called upon to examine the incitement plea, the court of first instance, without further assessment, concluded that all the evidence brought before it was admissible (see paragraphs 21-22 above), while the appellate court found that the applicant had raised the plea with the aim of evading criminal responsibility. Disregarding the lower courts' failure to address the incitement complaint on the merits, the Supreme Court concluded that it had already been established that prior to carrying out the undercover activities the investigators had had sufficient information to suspect the applicant of drug trafficking (see paragraph 26 above). The Court observes that there is no information whether the Senate reached the above conclusion by examining the authorisation and the reasons contained therein, or by relying on any other objective information which might have justified the launching of the investigative test.

63. As regards the domestic courts' access to the classified operational materials, the Court points out that the domestic law recognised the role of the domestic courts in the assessment of undercover operations (see paragraph 46, above regarding the exhaustion of domestic remedies). In addition, it can be understood from the wording of section 24 of the LOA (see paragraph 41 above) that if necessary the court, as the entity in charge of the criminal proceedings, may obtain access to the classified information. In any event, there is no indication that the domestic courts attempted to

obtain such access to the classified materials. Where it falls to the prosecution to prove that there was no incitement (see *Ramanauskas*, cited above, § 70), the domestic courts' powers to guarantee a fair trial would be undermined if, in assessing an incitement plea, they reached their conclusions by relying on unverified information which was in the exclusive possession of the prosecution.

64. The Court does not contest the Government's arguments that the applicant's conviction was based on various items of evidence. However, it observes that such evidence resulted from the impugned operation carried out by the investigating authority. Besides, the crux of the matter before the Court concerns fair-trial guarantees in circumstances where the applicant had raised an arguable claim of incitement.

65. The foregoing considerations are sufficient for the Court to conclude that the domestic courts did not properly address the incitement plea raised by the applicant.

There has accordingly been a violation of Article 6 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicant alleged violations under various other Articles of the Convention.

67. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that the remainder of the application does not disclose any appearance of a violation of any of the Articles of the Convention relied on. It follows that these complaints are inadmissible under Article 35 § 3 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 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 42,686 euros (EUR) in compensation for pecuniary damage and EUR 300,000 in respect of non-pecuniary damage.

70. The Government disagreed with the claims.

71. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

72. Having regard to the nature of the violation found in the present case and deciding on an equitable basis, the Court awards the applicant EUR 5,000 in compensation for non-pecuniary damage.

73. The Court also considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see, *Salduz v. Turkey* [GC], no. 36391/02, § 72, ECHR 2008).

B. Costs and expenses

74. The applicant also claimed EUR 1,364.53 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

75. The Government raised doubts as to the credibility of the claim, since the applicant had failed to submit any evidence that the aforementioned costs had actually been incurred.

76. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the fact that the applicant received legal aid from the Court, the latter rejects the claim for costs and expenses under all heads.

C. Default interest

77. 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 complaint under Article 6 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 of the Convention;

3. *Holds*:
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention EUR 5,000 (five thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage at

the rate applicable at the date of settlement, to be converted into the currency of the respondent State;

(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;

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

Done in English, and notified in writing on 8 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President