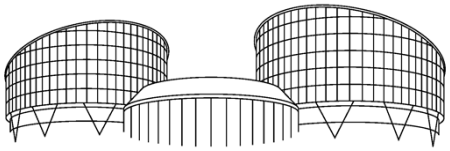

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AKBAY AND OTHERS v. GERMANY

(Application no. 40495/15 and 2 others)

JUDGMENT

Art 34 • Victim • Transferability of an Art 6 complaint of entrapment of applicant's husband who had died before application was lodged before the Court • Potential violation of Article 6, based on unlawful police incitement, providing applicant with sufficient moral interest in bringing an application on her own behalf • Potential compensation claim under Article 41 not constituting sufficient material interest • Case raising issues of general interest concerning the legal system and practice of the defendant State
Art 6 § 1 (criminal) • Fair hearing • Non-exclusion of evidence linked to direct and indirect police incitement to commit drug offences • Criteria for establishing indirect incitement • Domestic courts' failure to draw necessary inferences from their finding that first and second applicants had been incited to commit an offence • No issue regarding third applicant whose activity was not determined by the police conduct

STRASBOURG

15 October 2020

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 Akbay and Others v. Germany,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
Mārtiņš Mits,
Latif Hüseynov,
Lado Chanturia,
Anja Seibert-Fohr,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 40495/15, 40913/15 and 37273/15) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Turkish nationals, Ms Yıldız Akbay ("the first applicant"), Mr Hakki Soytürk ("the second applicant") and Mr Dervıs Usul ("the third applicant"), on 11 August 2015 (applications nos. 40495/15 and 40913/15) and on 24 July 2015 respectively;

the decision to give notice to the German Government ("the Government") of Ms Yıldız Akbay's complaints under Article 6 of the Convention and to declare the remainder of application no. 40495/15 inadmissible;

the decision to give notice of applications nos. 40913/15 and 37273/15 to the Government;

the letters of 19 May 2017 and 4 July 2017 to the Government of Turkey informing them of their right to intervene in the proceedings concerning the applications under Article 36 § 1 of the Convention; the Turkish Government did not indicate within the time allowed that they wished to exercise that right;

the observations submitted by the respondent Government and by the second applicant while the first and third applicants' observations were submitted outside the time-limit set and therefore not included in the case file;

Having deliberated in private on 22 September 2020,

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

INTRODUCTION

1. The present case concerns the conviction of the first applicant's husband (N.A.) and of the second and third applicants for drug offences committed in the context of a drugs importation on which the State had exerted influence. The domestic courts found that N.A. and the second, but not the third applicant had been incited by State authorities to commit the

offences. They therefore considerably reduced N.A.'s and the second applicant's sentences and also generally mitigated the sentence imposed on the third applicant. The applicants claimed, in particular, that the right to a fair trial under Article 6 § 1 of the Convention had been violated as N.A. and the second and third applicants had been convicted of offences incited by the police.

THE FACTS

2. The first applicant, Ms Yıldız Akbay, was born in 1977 and lives in Berlin. She was represented before the Court by Mr S. Conen, a lawyer practising in Berlin. The second applicant, Mr Soytürk, was born in 1965. At the time of lodging his application, he was detained in Großbeeren. He was represented by Mr C. Noll, a lawyer practising in Berlin. The third applicant, Mr Usul, was born in 1969 and lives in Berlin. He was represented by Mr D. Lammer, a lawyer practising in Berlin.

3. The Government were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

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

I. THE INVESTIGATION PROCEEDINGS

5. In September 2009, an informant from criminal circles informed the Bremen customs authorities that N.A. was alleged to be dealing heroin (several kilograms) from a café in Berlin. Subsequent telephone surveillance, which revealed discussions in coded language about larger sums of money, had neither confirmed nor fully dissipated the suspicions against N.A., who did not have a criminal record. The Berlin police, having obtained the authorisation of the Berlin Public Prosecutor's Office, therefore asked a different informant from criminal circles, M., to make investigations. The informant was to be reimbursed for his expenses and to be paid a fee for each day of work, as well as a bonus dependent on the quantity of drugs seized.

6. Following regular visits to the café run by N.A. from November 2009, during which the informant came to know N.A., the informant asked N.A. in February 2010 about his interest in trafficking heroin. The informant explained, in accordance with the instructions of the investigation authorities, that he could import drugs via Bremerhaven's port in containers and remove them from the port area, bypassing customs inspection, with the help of a dock worker, K. N.A. replied that he did not want to have anything to do with heroin, but that he considered that hashish and cocaine were a different matter.

7. In May 2010 the informant offered to introduce N.A. to the dock worker, who was ready to work with N.A. Although N.A. had agreed to meet the dock worker and alleged that he had contact persons and the financial means to import cocaine, he did not in fact have either. Furthermore, no such contacts of N.A. for trafficking in heroin or cocaine had come to light when in August 2010 N.A., following the informant's repeated offers, finally agreed to meet the dock worker, who was in fact a police agent working undercover, to discuss the modalities of importing drugs via the port. The informant and the dock worker were to be paid EUR 50,000 each for their services. N.A. was impressed by K.'s alleged influence in the port, and the seemingly easy way in which drugs could be imported without risk of discovery, and alleged that he would send a person to South America in order to prepare a cocaine shipment, without in fact having any such contact person.

8. Following that meeting, on 24 September 2010 the Berlin District Court authorised K. to work as an undercover police agent in accordance with Article 110b § 2 of the Code of Criminal Procedure (see paragraph 41 below).

9. Subsequent attempts by N.A., who felt under pressure and obliged by his honour by repeated statements made by the informant, to build up contacts with persons capable of furnishing drugs abroad failed, until spring 2011. N.A. had, *inter alia*, asked the third applicant, a friend, to build up contacts with cocaine dealers via a person detained in Turkey, but the third applicant's attempts to do so had failed. The investigation authorities were aware of N.A.'s failure to establish the necessary contacts in order to have cocaine delivered to the port of Bremerhaven. The informant, however, had repeatedly told his supervising police officers that N.A. was eager to pursue drug trafficking via the port.

10. In May 2011, N.A. and the second applicant, another friend of his, met an acquaintance of the latter in the Netherlands whom N.A. had come to know shortly before, by coincidence, and to whom he had spoken about possible drug deals. N.A. and the second applicant's acquaintance, together with the latter's contact persons, met and agreed to organise the importation of 100 kg of cocaine from South America, to be furnished by contact persons in the Netherlands. The drugs were to be imported via Bremerhaven port with the help of the dock worker, K., which appeared to be a safe importation channel. The second applicant served as a contact person between N.A. and the group of persons in the Netherlands. K. subsequently dissipated N.A.'s doubts concerning the shipment.

11. On 17 August 2011 almost 100 kg of cocaine was delivered in a container to the port of Bremerhaven. On 18 August 2011 N.A. and K. fetched the drugs from the container in the port and took them to a flat which N.A. had rented for that purpose with K.'s help. As agreed with N.A., the third applicant, whom N.A. had previously recruited to transport the

drugs from Bremerhaven to Berlin, went to the flat to pick up the drugs. N.A. and the second and third applicants were arrested on that day.

II. THE PROCEEDINGS BEFORE THE REGIONAL COURT

12. On 7 November 2012 the Berlin Regional Court convicted N.A. of illicit importation of and trafficking in drugs and sentenced him to four years and five months' imprisonment. The second applicant was convicted of aiding and abetting N.A.'s drug offence and sentenced to three years and seven months' imprisonment. The third applicant was found guilty of illicit possession of drugs entrusted to him by N.A., and of aiding and abetting drug trafficking and was sentenced to four years' imprisonment. Two further co-defendants were equally given prison sentences for their participation in the drug offence in question.

13. The Regional Court, having established the facts as described above (see paragraphs 5-11), based the convictions of N.A. and of the applicants essentially on their confessions at the hearing.

14. The Regional Court observed that it had not been possible to question the police informant, M., as a witness at the hearing, but only his supervising police officers. In so far as the informant had described the course of events, and in particular the extent of his influence on N.A., in a substantially different manner than N.A. in his reports to the supervising police officers, the court noted that the testimony at the hearing of the supervising police officers regarding these reports was of little probative value. Furthermore, it could not be ruled out that the informant, who moved in criminal circles, had induced N.A. to traffic cocaine owing to the considerable bonus he would receive if N.A. were found guilty. In its assessment of the evidence, the court had therefore only taken into account the informant's statements as an additional source of information, in particular with regard to the chronology of the events, insofar as they had not contradicted N.A.'s statements. This had not caused any disadvantage to the defendants.

15. Likewise, other evidence, such as the statement of the undercover police agent, K., via videoconference, had only been considered as information complementing the defendants' confession. The Regional Court clarified that there was no bar to using evidence obtained by K. at his first meeting with N.A. in August 2010, when the District Court had not yet authorised him to work as an undercover police agent under Article 110b § 2 of the Code of Criminal Procedure (see paragraph 41 below). In accordance with established practice, a police officer working undercover could have up to three contacts with a suspect prior to a court order becoming necessary under that provision.

16. The Regional Court found that N.A. had been incited to commit the offence of which he had been found guilty, in breach of the rule of law.

There had therefore been a breach of his right to a fair trial under Article 6 § 1 of the Convention. It found that, despite the fact that N.A. did not have a criminal record, there had been sufficient suspicions of drug trafficking against him at the outset of the undercover operation, following the information given by a police informant and the results of telephone surveillance. However, the police informant had subsequently both considerably tempted N.A. and exerted pressure on him over a very long period of time, partly in breach of the instructions given by the supervising police officers to remain passive.

17. Moreover, the investigation authorities had created a considerable incentive for the commission of the offence by presenting a seemingly safe importation channel for drugs via Bremerhaven's port. It may have been only this safe channel which had put N.A. in a position to set up contact with a cocaine supplier, as he did not have any such contacts before. Furthermore, that importation channel and the money to be paid to the informant and to the undercover agent for their help (EUR 50,000 each), induced N.A. to traffic a large amount of drugs, which went considerably beyond the offences of which N.A. was initially reasonably suspected following telephone surveillance.

18. With regard to the second applicant, who had not previously been involved in drug offences (he had two previous convictions for traffic offences), the Regional Court equally found that he had been unlawfully incited to commit his offence, and that his right to a fair trial under Article 6 § 1 of the Convention had therefore equally been violated. Even though the investigation authorities had only exerted indirect influence on him, he had contributed to the drug importation precisely because, as a result of the investigation authorities' influence on N.A., that importation appeared safe also to him. N.A. had described the importation channel in detail to the second applicant, arguing that the latter was safe and very valuable as his influential contact person, K., could bypass all controls in the port. The police had further confirmed that they had assumed that N.A. would not carry out the drug importation alone, but would have people helping him, who could equally be inclined to participate owing to the seemingly safe importation channel.

19. As for the third applicant, who did not have any previous convictions in Germany, but one conviction from 2007 in the Netherlands for drug trafficking, the Regional Court considered that he had not been incited to commit his offence and that Article 6 § 1 of the Convention had not been violated in his respect. The court found that the third applicant had initially hesitated to participate in the drug operation, but had felt obliged to his friend N.A., who had also told him about the seemingly safe importation of drugs via the port of Bremerhaven. He had hoped to earn several thousand euros for transporting the drugs from the flat in Bremerhaven to Berlin. However, the court considered that the third applicant's decision to

transport the drugs had not been influenced by the fact that their previous import, as described to him by N.A., had appeared safe. The investigation authorities had not been involved in that transport.

20. In view of the case-law of the Federal Court of Justice (see paragraphs 46-50 below), which had itself had regard to the case-law of the European Court of Human Rights, the Regional Court refused to discontinue the criminal proceedings against the defendants because of the unlawful incitement to commit the offences in question. It took the latter into account when fixing the sentence (so-called "fixing of penalty" approach (*Strafzumessungslösung*)).

21. The Regional Court therefore reduced N.A.'s sentence by at least five years and seven months; it stated that without the incitement it would have fixed a sentence of not less than ten years. When fixing the second applicant's sentence of three years and seven months' imprisonment, the Regional Court equally took into account as a mitigating factor, in particular, the indirect unlawful entrapment in his respect. It stated that without that entrapment, it would have fixed a term of imprisonment of not less than seven years. As for the third applicant, the Regional Court only took into account the State's influence on the commission of the drug operation as a whole as a general mitigating factor when fixing his sentence.

III. THE PROCEEDINGS BEFORE THE FEDERAL COURT OF JUSTICE

22. In their appeal on points of law against the Regional Court's judgment, N.A. and the second and third applicants submitted that in view of the nature of the entrapment, which constituted a particularly serious breach of the rule of law, the proceedings against them should have been discontinued. The second applicant claimed, alternatively, that in line with the case-law of the European Court of Human Rights, all evidence obtained as a result of the entrapment, including his confession, should have been excluded and, that as a consequence, he should have been acquitted. The second and third applicants further submitted that the participation of the undercover agent in the police operation had not complied with Articles 110a and 110b of the Code of Criminal Procedure (see paragraphs 40-41 below) as the District Court's authorisation had been obtained only after the agent's first meeting with N.A. N.A. and the second and third applicants also argued that the recourse to an informant had not had a sufficient legal basis.

23. On 11 December 2013 the Federal Court of Justice dismissed N.A.'s and the second and third applicants' appeals on points of law (file no. 5 StR 240/13). It confirmed the Regional Court's finding that N.A. and the second applicant had been incited, contrary to the rule of law, to commit the

offence in question, and that the proceedings against them had therefore not been fair as required by Article 6 § 1 of the Convention.

24. Referring to its well-established case-law (see in more detail paragraphs 46-50 below), it found, however, that this entrapment did not entail the discontinuation of the criminal proceedings, but only a mitigation of the sentence. It explained that in accordance with the principles of the German law of criminal procedure, even a serious breach of the law by the use of a prohibited method of investigation listed in Article 136a of the Code of Criminal Procedure (see paragraph 44 below) only entailed an exclusion of the evidence which had been obtained thereby. Discontinuing the proceedings could adversely affect the protection of third parties as well as the criminal law's function to provide satisfaction.

IV. THE PROCEEDINGS BEFORE THE FEDERAL CONSTITUTIONAL COURT AND SUBSEQUENT DEVELOPMENTS

25. In their constitutional complaints of 29, 30 and 23 January 2014 respectively, N.A. and the second and third applicants submitted, in particular, that their constitutional right to a fair trial had been breached. They argued that the criminal courts, even though they had established that the drug offences had been incited in a way which had grossly violated the rule of law, had only compensated this, insufficiently, by mitigating their sentences instead of discontinuing the proceedings. In the second applicant's view, he should, alternatively, have been acquitted following an exclusion of all evidence obtained by entrapment. N.A. and the second and third applicants submitted, in particular, that the Federal Court of Justice's approach of only mitigating the sentence in cases of unlawful incitement was not in line with the case-law of the European Court of Human Rights. N.A. further complained that he had been unable to cross-examine M. directly in the hearing before the Regional Court, in breach of Article 6 § 3 (d) of the Convention.

26. On 18 December 2014 the Federal Constitutional Court dismissed N.A.'s and the second and third applicants' constitutional complaints which it had joined (file nos. 2 BvR 209/14, 2 BvR 262/14 and 2 BvR 240/14). It found that the complainants' constitutional right to a fair trial had not been breached by the criminal courts' decisions.

27. The Federal Constitutional Court considered that, even assuming that the incitement of an offence in breach of the rule of law could lead to a bar to the criminal proceedings, such a prohibition to enforce the State's entitlement to impose a punishment could only be derived from the principle of the rule of law in very exceptional cases. In such cases, it had to be taken into account that the principle of the rule of law did not only protect the interests of the accused, but also the public interest in a criminal prosecution which serves material justice.

28. Even though, in the present situation, it would not have been unreasonable to conclude that there was such a very exceptional case, it was acceptable, for the standards of constitutional law, for the criminal courts to have concluded that this had not been the case.

29. The court considered that there had been sufficient grounds to institute investigation proceedings against N.A. at the outset. Moreover, N.A.'s criminal conduct had not exclusively remained within the framework set up by the investigation authorities. When the police informant started exerting influence on N.A., the latter had been under suspicion of drug trafficking. N.A. had further explained in his first conversation concerning drugs with the police informant that he was ready to traffic hashish and cocaine. Despite the constant influence the informant had exerted on N.A., N.A. had neither been threatened by the informant nor had the informant exploited a situation of distress in N.A. The fact that N.A. had taken an independent decision to commit the offence was illustrated by the fact that the actual offence developed from a random meeting between N.A. and an acquaintance of the second applicant in the Netherlands. When N.A. realised the opportunity to carry out the drug offence which derived from this meeting, he pursued his decision to commit the offence with considerable criminal energy. This held all the more true for the second and third applicants, who had been influenced only indirectly. The considerable degree of personal guilt incurred thereby had to be taken into account in accordance with the principle of material justice.

30. Furthermore, even when taking into account the case-law of the European Court of Human Rights on entrapment, there was no breach of the constitutional right to a fair trial. The violation of Article 6 § 1 of the Convention in the investigation proceedings had been sufficiently compensated for by the criminal courts.

31. The Federal Constitutional Court noted that the European Court of Human Rights had a different dogmatic approach to cases of entrapment in that it focused on the admissibility of conducting a trial at all and the admissibility of evidence (in cases including, *inter alia*, *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008; *Prado Bugallo v. Spain*, no. 58496/00, 18 February 2003; and *Furcht v. Germany*, no. 54648/09, 23 October 2014), unlike the Federal Court of Justice with its so-called "fixing of penalty" approach.

32. In particular, for the European Court of Human Rights, the public interest could not justify the use of evidence obtained as a result of police incitement (*ibid*.). The domestic legal system did not, however, necessarily need to follow the same dogmatic approach. It could implement the requirements under Article 6 § 1 of the Convention in a different manner in the national legal system as long as it ensured that the substantive requirements of a fair trial were met.

33. At least in the way in which the "fixing of penalty" approach was applied in the present case, it did not violate the constitutional right to a fair trial, also having regard to the requirements of Article 6 § 1 of the Convention.

34. The Regional Court had expressly acknowledged a breach of Article 6 § 1 of the Convention. It had further reduced N.A.'s and the second applicant's sentences in a considerable and quantifiable manner (see paragraph 20 above). Its findings had been upheld by the Federal Court of Justice. Both courts had adopted their decisions prior to the delivery of the judgment of the European Court of Human Rights in the case of *Furcht v. Germany* (cited above).

35. Furthermore, the way in which the Regional Court had assessed the evidence had to be taken into account. It had based its findings of fact primarily on the – essentially identical – credible confessions made at the trial by N.A., the second and third applicants and two other defendants. It did not rely on further evidence to make findings to the detriment of the defendants to which the latter had not themselves confessed. In particular, despite the fact that the Regional Court had not excluded the evidence given by the police informant, that court did not rely on the statements made by the informant or the investigating police officers to the defendants' disadvantage, but only to supplement existing evidence and to clarify the extent of the influence exerted by the informant on N.A. Therefore, the way in which the Regional Court assessed the evidence came close, in substance, to an exclusion of the incriminating evidence provided by the police informant and the undercover agent.

36. In the Federal Constitutional Court's view, the case before it differed in this respect from the case of *Furcht v. Germany* (cited above), where the statements made by the undercover agents had served to disprove the defendant's statements in important respects.

37. The Federal Constitutional Court further noted that, having regard to the case-law of the European Court of Human Rights, the criminal courts will nevertheless have to consider whether, in comparable cases, the use of evidence directly obtained by entrapment in breach of the rule of law (in particular evidence given by the witnesses directly involved in the entrapment) should be excluded.

38. The Federal Constitutional Court's decision was served on the second applicant's counsel on 11 February 2015 and on N.A.'s and the third applicant's counsel on 12 February 2015.

39. N.A. died on 3 June 2015.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF CRIMINAL PROCEDURE

A. Provisions regarding covert police investigations

40. Under Article 110a § 1 no. 1 of the Code of Criminal Procedure, undercover investigators may be used to investigate criminal offences if there are sufficient factual indications showing that a criminal offence of considerable significance has been committed in the field of illegal trade in drugs. Their intervention is only permitted if the investigation would offer no prospects of success or be considerably more difficult otherwise. Undercover investigators are police officers who investigate using a longer-lasting changed identity conferred on them (so-called legend; see Article 110a § 2 of the Code of Criminal Procedure).

41. Article 110 b § 2 no. 1 of the Code of Criminal Procedure provides that interventions of undercover investigators which are directed against a specific suspect have to be authorised by the court.

42. The use of police informants is not specifically addressed in the Code of Criminal Procedure, but falls under the general provisions of Articles 161 and 163 of the Code of Criminal Procedure authorising the police and the Public Prosecutor's Office to investigate criminal offences.

43. Annex D of the Guidelines on criminal and summary proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren*), which are addressed to the prosecution authorities, contains rules regarding informants, in particular rules on assurances of confidentiality.

B. Provisions regarding the exclusion of evidence and bars to criminal proceedings

44. Article 136a of the Code of Criminal Procedure lays down rules on, and consequences of, prohibited methods of interrogation. It provides, in particular, that the freedom of the accused to make decisions and to manifest his will shall not be impaired by methods such as, *inter alia*, ill-treatment, induced fatigue, physical interference or the administration of drugs (Article 136a § 1). Statements obtained in breach of this prohibition shall not be used in evidence, even if the accused has agreed to their use (Article 136a § 3).

45. Under 260 § 3 of the Code of Criminal Procedure, following a trial hearing criminal proceedings are to be discontinued by a judgment if there is a bar to the criminal proceedings.

II. CASE-LAW OF THE FEDERAL COURT OF JUSTICE

A. Case-law as developed before the judgment in *Furcht v. Germany*

46. Under the Federal Court of Justice's well-established case-law, the right to a fair trial under Article 6 § 1 of the Convention was breached if the accused had been induced to commit the offences of which he was indicted by an incitement contrary to the rule of law and imputable to the State (see Federal Court of Justice, file no. 1 StR 221/99, judgment of 18 November 1999, BGHSt 45, pp. 321 ss., § 8 (of the internet version); confirmed by Federal Court of Justice, file no. 5 StR 240/13, judgment of 11 December 2013, §§ 33 et seq., referring to the Court's judgment in *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008).

47. In order to determine whether or not there had been an unlawful incitement to commit an offence, the Federal Court of Justice, in its well-established case-law, considered it necessary to take the following aspects into account: the reason and extent of suspicion of involvement in the offences investigated, the manner and intensity of and the reasons for the influence exercised, the readiness of the person concerned to commit an offence and the extent of contributions to the offence of his or her own of the person concerned. Having regard to these criteria as a whole, the criminal court has to determine whether the incitement by the *agent provocateur* was so serious as to outweigh the contribution of the person concerned (see Federal Court of Justice, file no. 1 StR 148/84, judgment of 23 May 1984, BGHSt 32, pp. 345 ss., § 7).

48. As to the consequences to be drawn from a finding of police incitement, under the Federal Court of Justice's established case-law an incitement to commit an offence, even if it was contrary to the rule of law, did not constitute a bar to criminal proceedings. It only had to be taken into consideration – as a considerable mitigating factor – in the fixing of the penalty (so-called "fixing of penalty" approach (*Strafzumessungslösung*); see Federal Court of Justice, file no. 1 StR 148/84, cited above, §§ 10-35; file no. 1 StR 453/89, decision of 29 August 1989, § 4; file no. 1 StR 221/99, cited above, §§ 13, 18; confirmed in file no. 5 StR 240/13, cited above, § 37).

49. In the Federal Court of Justice's view, under the law on criminal procedure, even a massive breach of the rules on prohibited measures of investigation only led to the exclusion of evidence obtained by the prohibited measure of investigation (see Article 136a of the Code of Criminal Procedure, at paragraph 44 above). Moreover, applying a bar to the criminal proceedings would disregard the rights of victims of the offence (see Federal Court of Justice, file no. 1 StR 221/99, cited above, §§ 43-44; and file no. 5 StR 240/13, cited above, § 37). Taking into account the incitement by an *agent provocateur* as a considerable mitigating factor

in the determination of the penalty further allowed the sentencing court to have regard to all the circumstances which have led to the offence in a reasonable manner (see Federal Court of Justice, file no. 1 StR 148/84, cited above, § 31; and file no. 1 StR 221/99, cited above, §§ 41-42). If a breach of Article 6 of the Convention had occurred, the criminal courts should establish this in the reasoning of the judgment and had to mitigate the sentence in a measureable manner (see Federal Court of Justice, file no. 1 StR 221/99, cited above, §§ 47 and 56).

50. The Federal Court of Justice considered that by applying the "fixing of penalty" approach, it was possible to afford the necessary redress for the breach of Article 6 of the Convention (see Federal Court of Justice, file no. 1 StR 221/99, cited above, §§ 18 et seq.). Referring to the case of *Teixeira de Castro v. Portugal*, it took the view that, despite some indications to the contrary in the wording of the judgment, the Court's case-law did not require discontinuing the criminal proceedings against a person who had been incited by *agents provocateurs* working for the police to commit the offence at issue or excluding the evidence obtained by the agents' intervention (*ibid.*, §§ 36-46 and 57-61).

B. Case-law as developed after the judgment in *Furcht*

51. By a judgment of 10 June 2015 the Federal Court of Justice (Second Senate), reversing its previous case-law, held that the incitement to an offence in breach of the rule of law by members of the investigation authorities or third persons directed by them, as a rule, led to a bar to the criminal proceedings, which therefore had to be discontinued (file no. 2 StR 97/14).

52. The Federal Court of Justice argued that a reversal of its case-law was necessary in order to implement the *Furcht* judgment according to which the "fixing of penalty" approach was not sufficient to redress a breach of Article 6 § 1 of the Convention resulting from incitement.

53. The Federal Court of Justice noted that, according to *Furcht*, it was necessary either to exclude all evidence obtained as a result of police incitement or to apply a procedure with similar consequences. This case-law could best be integrated into the German law of criminal procedure by a finding that an unlawful incitement led to a bar to the criminal proceedings instead of an exclusion of evidence. It noted that the impugned measure, incitement, did not concern only the acquisition of evidence, but resulted in the offence as a whole. Recognising a bar to the criminal proceedings drew a direct consequence from the fact that an offence was incited and thus from the unlawful conduct of the investigation authorities. It led to discontinuing the proceedings in respect of that offence (see, in particular, Article 260 of the Code of Criminal Procedure, at paragraph 45 above).

54. In contrast, the exclusion only of the statements made by the *agents provocateurs* would often not lead to eliminating the results of incitement as required by the Court's case-law because the sale of drugs was usually also observed by other police officers whose testimony would be sufficient to prove drug trafficking at the trial.

THE LAW

I. JOINDER OF THE APPLICATIONS

55. Having regard to the similar subject matter of the applications, which all concern the same criminal proceedings before the domestic courts, the Court finds it appropriate to examine them jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

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

56. The applicants complained that the criminal proceedings at issue had been unfair as N.A. and the second and third applicants had been convicted of drug offences which they had been incited to commit by the police. They relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

1. Standing of the first applicant to lodge the application

57. In the Government's submission, the first applicant did not have standing to lodge her application. She could not claim to be the victim of a violation of the Convention for the purposes of Article 34 of the Convention, which, in so far as relevant, provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."

(a) The parties' submissions

(i) The Government

58. In the Government's submission, the first applicant was not the direct victim of a breach of her own Convention rights as the criminal proceedings at issue, in which Article 6 of the Convention had allegedly

been breached, had not been brought against herself, but only against her husband.

59. The Government further argued that the first applicant could not claim to be an indirect victim of the alleged breaches of her husband's Convention rights. The potential direct victim, N.A., died prior to the first applicant lodging her application with the Court. However, the strict requirements under the Court's case-law for an applicant to have standing in these circumstances, namely an allegation of a serious breach of human rights (such as of the rights under Articles 2 or 3 of the Convention), were not met.

60. The Government took the view in that context that the admissibility requirement of victim status under Article 34 of the Convention had to be interpreted restrictively as the Convention system was based on the protection of individual rights. The purpose of Article 34 was to prevent the institution of an *actio popularis*.

61. Moreover, the first applicant could not base her victim status on her own pecuniary interest arising from the fact that her husband had no longer been able to run his café following his detention and from potential claims under Article 41 of the Convention. Such pecuniary interests were only relevant where the direct victim had died after having lodged the application. The first applicant had further not proven that there was a direct link between her husband's ruin and his detention or conviction. His café had been a registered association which had not been allowed to make profits and he had received unemployment benefits.

62. Finally, there was no general interest in the adoption of a judgment in the present case despite the death of the direct victim. In particular, the Court had already dealt with the legal questions under Article 6 raised by the present application in the cases of *Furcht v. Germany* and *Scholer v. Germany*. Moreover, the Federal Court of Justice, in a recent judgment of 10 June 2015 (file no. 2 StR 97/14, see paragraphs 51-54 above), had implemented this Court's findings in the case of *Furcht* by amending its case-law.

(ii) The first applicant

63. In her application, the first applicant took the view that she had standing to lodge the application on her behalf, for the purposes of Article 34 of the Convention. She claimed that she had a considerable moral and pecuniary interest in a finding that her deceased husband's Convention rights had been breached. The latter had wished that an application to defend his rights be lodged with the Court.

64. The first applicant submitted that she had a moral interest in obtaining justice for her deceased husband and to re-establish his reputation after his unjustified conviction as a drug dealer.

65. The first applicant further claimed that the breach of Article 6 of the Convention in the criminal proceedings against her husband had had a direct effect on her pecuniary rights as his heir. She argued that as a result of her husband's detention resulting from these proceedings, they had lost the café run by him and thus their main source of income. Moreover, the violation of Article 6 would have led to the possibility of a compensation claim under Article 41 of the Convention.

66. There was further a considerable public interest in obtaining a judgment of the Court on the subject-matter at issue. The Federal Constitutional Court had not implemented the Court's judgment in the case of *Furcht v. Germany* (no. 54648/09, 23 October 2014) in its decision on the constitutional complaint of the first applicant's husband.

(b) The Court's assessment

(i) Relevant principles

67. In order to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was "directly affected" by the measure complained of (see *İlhan v. Turkey* [GC], no. 22277/93, § 52, ECHR 2000-VII; *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014). Moreover, in accordance with the Court's practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 111, ECHR 2009, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 96).

68. In cases in which the direct victim of an alleged breach of the Convention died, the Court has differentiated between applications where that victim died after he or she had lodged an application with the Court and those where he or she had already died beforehand.

69. Where the direct victim died before the application was lodged with the Court the Court's approach has been generally restrictive. It has usually declined to grant standing to any other person unless that person could either demonstrate a direct effect on his or her own rights or where the complaint(s) raised an issue of general interest pertaining to "respect for human rights" and the applicant(s) as heir(s) had a legitimate interest in pursuing the application (see, in particular, *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, §§ 21-31, 5 July 2005; *Micallef v. Malta* [GC], no. 17056/06, § 48, ECHR 2009, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 98).

70. The Court has recognised the standing of the victim's next of kin to submit an application in their own right where the alleged violation of the Convention was closely linked to disappearances or deaths giving rise to

issues under Article 2, but has been more restrictive where other Convention rights were concerned (see *Direkçi v. Turkey* (dec.), no. 47826/99, 3 October 2006; *Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.), no. 57602/09, §§ 19-20, 4 October 2011, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 98 and 100 with further references).

71. In cases concerning, in particular, complaints under Articles 5, 6 or 8 the Court has acknowledged victim status of close relatives, allowing them to submit an application where they have shown a moral interest in having the late victim exonerated of any finding of guilt or in protecting their own reputation and that of their family, or where they have shown a material interest on the basis of the direct effect on their pecuniary rights. The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 100 with many references).

72. The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria (see *Nölkenbockhoff v. Germany*, 25 August 1987, § 33, Series A no. 123; *Grădinar v. Moldova,* no. 7170/02, §§ 95-103, 8 April 2008; *Micallef*, cited above, §§ 48-49; *Kaburov v. Bulgaria* (dec.), no. 9035/06, §§ 53 and 58, 19 June 2012, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 100).

73. In cases raising an issue under Article 6, a transferable right (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI, and *Marie-Louise Loyen and Bruneel*, cited above, § 28), the Court has thus found close relatives to have victim status for example where they have shown a material and moral interest in having the late victim exonerated because the innocence of the deceased was put in issue after his death (see *Nölkenbockhoff*, cited above, § 33 (regarding a complaint under Article 6 § 2), and *Grădinar*, cited above, §§ 95-98 (where criminal proceedings were continued against the applicant's husband after his death owing to the applicant's express request)).

74. The Court has further acknowledged victim status of close relatives in cases raising an issue under Article 6 where they have shown an interest on the basis of a direct effect of the impugned measures on their pecuniary rights. Such an interest has been recognised, for instance, in *Micallef* (cited above, §§ 48-49) where the applicant was authorised to intervene as heir in the domestic proceedings and was then made to bear the costs. In *Grădinar* (cited above, §§ 95-103) domestic law allowed the applicant to intervene in the criminal proceedings against her deceased husband and the outcome of these proceedings had a direct effect on the applicant's own right to claim compensation.

75. In contrast, in *Makri and Others v. Greece* ((dec.), no. 5977/03, 24 March 2005) the heirs failed to intervene in the procedure before the domestic courts started by the deceased and were found not to have a material or moral interest of their own in a finding of a breach of Article 6 on account of the length of these proceedings. Likewise, in *Biç and Others v. Turkey* (no. 55955/00, § 23, 2 February 2006) and *Direkçi* (cited above), the next-of-kin were not considered personally affected by the criminal proceedings which had been conducted against the deceased allegedly in breach of Article 6.

76. As to whether the complaint(s) raised an issue of general interest pertaining to "respect for human rights" and the applicant(s) therefore had a legitimate interest in bringing the application, the Court has assessed this issue in the light of all the circumstances of each individual case (see, *inter alia*, *Marie-Louise Loyen and Bruneel*, cited above, §§ 21-31; *Biç and Others*, cited above, § 23; *Direkçi*, cited above; *Micallef*, cited above, §§ 48 and 50; *Nassau Verzekering Maatschappij N.V.*, cited above, § 20; *Lacadena Calero v. Spain*, no. 23002/07, § 30, 22 November 2011, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 98). The Court found such a general interest to exist, in particular, in cases in which the main issue raised by it transcended the person and the interests of the applicant (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX; *Fairfield and Others v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI, and *Ressegatti v. Switzerland*, no. 17671/02, § 26, 13 July 2006). Such an issue of general interest arises notably where an application concerns the legislation or a legal system or practice of the defendant State (see *Micallef*, cited above, § 46).

77. The Court has usually considered the above criteria cumulatively and made its assessment of whether close relatives had standing to submit an application having regard to all the circumstances of the case (compare *Micallef*, cited above, § 51).

(ii) Application of these principles to the present case

78. In order to determine whether the first applicant has standing for the purposes of Article 34 of the Convention to lodge the present application, the Court observes that the direct victim of the breaches of Article 6 alleged by her was her husband, N.A. The latter died on 3 June 2015 and thus before the application was lodged by the first applicant on 11 August 2015.

79. The Court shall therefore examine, first, whether the first applicant exceptionally has standing as the actions of the authorities allegedly in breach of the Convention had a direct effect on her own rights because she can show a moral or material interest allowing her to lodge an application.

80. The Court notes that the first applicant claimed, in the first place, to have a moral interest in reestablishing her husband's reputation after his unjustified conviction. It observes that the substantive question at issue

before the Court is the fairness of the criminal proceedings against N.A. which led to his conviction. In case the Court shares the domestic courts' assessment that there had been incitement in breach of Article 6 § 1 of the Convention, the question will arise whether the domestic courts drew the relevant inferences in accordance with Article 6 by excluding all evidence which had been obtained as a result of the incitement or by applying a procedure with similar consequences (compare, *inter alia*, *Furcht v. Germany*, no. 54648/09, § 64, 23 October 2014).

81. The Court considers that a potential violation of Article 6 based on unlawful incitement to an offence that would otherwise not have been committed raises issues which go beyond purely procedural flaws resulting in a finding that the proceedings at issue were unfair. Given that a finding of incitement must result in an exclusion of all evidence obtained thereby or similar consequences, the Court's conclusion that there was a breach of Article 6 on that ground will enable the person concerned to substantively challenge, at the national level, the validity of the conviction itself which was based on such evidence.

82. In these circumstances, the Court can accept that the first applicant may have a legitimate interest to seek, by means of the present proceedings, to ultimately have N.A.'s conviction, pronounced on the basis of such evidence, set aside. It further notes that N.A. was a close relative of the first applicant who had been convicted of a serious drug offence and died soon afterwards, shortly before the present application was lodged. The first applicant therefore may be considered to have a certain moral interest for the purposes of Article 34.

83. The first applicant further argued that the criminal proceedings against her husband and his ensuing detention had affected her pecuniary rights as her husband's heir.

84. Insofar as the first applicant claimed that she had lost the café her husband had run until then and thus their main source of income the Court, having regard to the Government's submissions stating that the café in question was a non-profit association (see paragraph 61 above) and the material before it, considers that the first applicant failed to substantiate a pecuniary damage in this regard.

85. With respect to a potential compensation claim under Article 41 of the Convention in case of a finding of a breach of Article 6 in the proceedings against N.A., the Court finds that it can be deduced from its case-law cited above (see paragraph 74) that the necessary direct effect on an applicant's pecuniary rights by the impugned measure must concern pecuniary rights existing at the national level. For instance they could be affected by a duty of the applicant and heir to pay debts or costs as a result of a domestic court's judgment rendered against him or her (such as, for instance, in *Micallef*, cited above at paragraph 74) or if the applicant's own right to claim compensation is directly affected (*Grădinar*, cited above,

§§ 95-103). To the contrary, a potential compensation claim under Article 41 of the Convention, which requires the finding of a violation of the applicant's rights in the first place, is insufficient to render the applicant a potential victim of a violation of Article 6 § 1 of the Convention; it only arises once there has been a breach of Article 6 § 1. Therefore, a potential compensation claim under Article 41 of the Convention cannot be considered as constituting a material interest which would allow the first applicant to bring the application on her own behalf.

86. Second, as to whether, in the circumstances of the present case, the first applicant's complaints raised an issue of general interest pertaining to respect for human rights which necessitated recognising her standing to lodge the present application, the first applicant referred to the public interest in obtaining a judgment of the Court on the manner in which the domestic courts interpreted and applied the Court's judgment in the case of *Furcht* (cited above).

87. The Court considers that the case brought by the first applicant indeed raises the question, in particular, of an incitement recognised by the domestic courts and of the consequences to be drawn from a finding of incitement in order to comply with Article 6 of the Convention as interpreted, in particular, in the case of *Furcht v. Germany*. This question is at issue in respect of the first applicant's husband as the alleged principal perpetrator just as in the applications brought by the second and third applicants, who were involved in the same drug offence to different extents. The main issue raised by the case brought by the first applicant therefore transcends the interests of the first applicant in that it concerns the legal system and practice of the defendant State.

88. The Court does not overlook that the Federal Court of Justice, in a judgment of 10 June 2015 (file no. 2 StR 97/14), had amended its previous case-law with regard to this Court's judgment in *Furcht* and held that unlawful incitement, as a rule, led to a bar to the criminal proceedings. However, this change came only shortly after the termination of the proceedings before the Federal Constitutional Court in N.A.'s case and had not, therefore, been taken into account in the assessment of his case.

89. In view of the particularities of the case brought by the first applicant and the fact that she could not only show a certain moral interest in lodging the present application, but that there was also a general interest pertaining to "respect for human rights" in the examination of the application, the Court, making an overall assessment, considers that there were exceptional grounds in the circumstances of the present case which warrant recognising the first applicant's victim status.

90. Therefore, the Court concludes that, in the particular circumstances of this case, the first applicant has the requisite standing under Article 34 of the Convention and that the Government's objection in this respect must be rejected.

2. Loss of victim status regarding N.A. and the second and third applicants

91. The Court observes that in its judgment convicting N.A. and the second applicant of a drug offence, the Regional Court, whose judgment was upheld on appeal, found that N.A. and the second applicant had been incited by a State authority to commit the offence, in breach of Article 6 § 1 of the Convention. It mitigated their sentences because of that incitement. As for the third applicant, while the Regional Court found that he had not been incited to commit his drug offence in breach of Article 6, it nevertheless generally mitigated the third applicant's sentence because of the State authorities' influence on the drugs importation as a whole.

92. Therefore, the question arises as to whether, as was argued by the Government, N.A. and the second and third applicants at least lost their status as victims of a breach of Article 6 § 1, for the purposes of Article 34 of the Convention. In the Court's view, the adequacy or otherwise of the authorities' response to the impugned police measures must be considered in the light of the extent of the possible unfairness of the trial as a result of that measure. The issue of whether N.A. and the second and third applicants lost their victim status shall therefore be addressed under the merits of the complaint under Article 6 § 1 (compare also *Furcht v. Germany*, no. 54648/09, § 34, 23 October 2014). The Court therefore joins to the merits the Government's objection concerning the loss of N.A.'s and the second and third applicants' victim status.

93. The Court notes that the applications are not manifestly ill-founded. They must therefore be declared admissible.

B. Merits

1. Whether the criminal proceedings of N.A. and the second and third applicants were contrary to Article 6 of the Convention

(a) The parties' submissions

(i) The first applicant

94. In her application, the first applicant complained that the criminal proceedings against her husband had been unfair as he had been convicted of a drug offence incited by a police informant, in breach of Article 6 § 1 of the Convention. She argued that in accordance with this Court's judgment in the case of *Furcht v. Germany* (cited above), the domestic courts should have redressed the breach of Article 6 resulting from this incitement by discontinuing the criminal proceedings against N.A. There had further not been a sufficient legal basis for the investigation authorities to have recourse to an informant and the authorities had insufficiently monitored the investigations.

(ii) The second applicant

95. The second applicant also took the view that his right to a fair trial under Article 6 § 1 of the Convention had been violated in that he had been convicted of a drug offence which had been incited by the police. He had not been suspected of drug trafficking before the undercover operation and had no relevant previous convictions. He had only intervened once the police had started the entrapment and had only participated in the importation of the drugs as a result of the seemingly safe channel via the port of Bremerhaven set up by the police. The domestic courts had expressly acknowledged that he had been the victim of entrapment in breach of Article 6 § 1, despite the fact that he had only indirectly been affected by the measures taken by the police informant and the undercover agent in respect of N.A.

96. The second applicant further argued that he was still a victim of a violation of Article 6 § 1. The domestic courts had not provided him sufficient redress for the serious breach of Article 6 as a result of the entrapment by only mitigating his prison sentence. Such redress could only be provided by either discontinuing the criminal proceedings against him or by acquitting him.

97. The second applicant submitted that it was clear, since 1998, that a mere mitigation of the sentence did not remove victim status under this Court's case-law on entrapment. He referred, in particular, to the Court's judgments in the cases of *Teixeira de Castro v. Portugal*, of 1998, as well as *Ramanauskas v. Lithuania*, *Pyrgiotakis v. Greece*, *Bannikova v. Russia*, *Prado Bugallo v. Spain* and *Furcht v. Germany*. He stated that in accordance with that case-law, all evidence obtained as a result of police incitement had to be excluded or a procedure with similar consequences had to be applied. However, without the unlawful incitement, he would not have committed the offence. There would thus not have been any evidence against him and no confession to an offence at the trial, as all these were consequences of the entrapment.

98. The second applicant argued in this context that, in the circumstances of the case, he had not had any choice but to make a confession at the trial, despite his right as an accused to remain silent. The police informant had made partly untrue statements to his supervising police officers, which had concealed the manner and extent to which the informant had incited the commission of the drug offence. These statements were laid down in the incomplete case file and reported by the police officers at the hearing. Therefore, his confession, as well as that of N.A., had been indispensable to disclose the true extent of the incitement to the offence. This held particularly true for him, as he had not been in direct contact with the police and their informant, but had only indirectly been incited via N.A. N.A. had described to him the seemingly safe importation channel for drugs via the port of Bremerhaven, a fact of which the police had had no

knowledge and which was decisive to show that, just like N.A., he had been the victim of entrapment when participating in the drug offence.

99. The second applicant further noted that, after the termination of the proceedings before the domestic courts in the present case, a senate of the Federal Court of Justice, in a judgment of 10 June 2015, had abandoned the "fixing of penalty" approach in entrapment cases. Having regard to this Court's judgment in the case of *Furcht v. Germany*, the Federal Court of Justice now considered entrapment in breach of Article 6 § 1 of the Convention to lead to a bar to the criminal proceedings in question (see also paragraphs 51-54 above).

(iii) The third applicant

100. The third applicant equally argued that his right to a fair trial under Article 6 § 1 of the Convention had been violated by his having been convicted of a drug offence. Just like N.A. and the second applicant, he had been incited, in breach of the rule of law, to commit his offence. He had not been suspected of drug trafficking prior to the entrapment by the State authorities and would not have participated in the drug offence if the authorities had not set it up. Just like the second applicant, he had been indirectly incited to commit the offence as N.A. had informed him of the seemingly safe drug importation channel, which had convinced him to participate in the offence. The entrapment had led to a serious flaw in the criminal proceedings concerning the drug operation which would not have taken place without police intervention. Therefore, the proceedings had to be discontinued as a whole and not only in respect of some of the participants.

(iv) The Government

(1) Regarding N.A. and the second applicant

101. With regard to N.A. and the second applicant, the Government conceded that, as expressly confirmed by the Regional Court, the Federal Court of Justice and the Federal Constitutional Court, there had initially been a breach of their right to a fair trial under Article 6 § 1 of the Convention. The investigation authorities had unlawfully incited them to commit the drug offence of which they had subsequently been found guilty.

102. In the Government's view, there was nevertheless no more violation of Article 6 § 1 of the Convention as N.A. and the second applicant were no longer victims of a breach of that provision. The domestic courts had all not only expressly acknowledged that they had been the victims of entrapment in breach of Article 6 § 1, they had also sufficiently compensated this initial breach of Article 6 § 1. The Regional Court, whose judgment was upheld on appeal, had excluded all evidence which had been obtained as a result of the incitement or had applied a procedure with

similar consequences, as required by the Court's case-law (the Government referred, in particular, to the case of *Furcht v. Germany*, cited above).

103. The Government submitted that the Regional Court had in fact not used any evidence obtained by the entrapment. It had only used the confession which both N.A. and the second applicant had made at the hearing against them. Further evidence, in particular the testimony of the undercover agent K. and of the supervising police officers of the police informant and the minutes of the informant's reports to these officers, had only been used in addition and in so far as they did not contradict N.A.'s and the second applicant's statements. The Regional Court's assessment of the evidence therefore came close to excluding the evidence of the police informant and the undercover agent against N.A. and the second applicant, or was a procedure with similar consequences.

104. The Government argued that N.A.'s and the second applicant's confessions did not have to be excluded. As accused in the proceedings, they had had the right to remain silent. They had not been obliged to confess to the offence in order for the courts to conclude that they had been incited to commit the offence in question. It had been clear from the case file, which included the material collected by the investigation authorities, that there had been unlawful entrapment.

105. In the Government's view, the present case had to be distinguished from the case of *Furcht v. Germany*. Unlike the present case, the domestic courts in that case had used statements from the inciting undercover police agents against the applicant.

106. Furthermore, it was irrelevant that the Federal Court of Justice, in a subsequent case decided upon on 10 June 2015, after the judgment in the case of *Furcht v. Germany*, had found that the entrapment in breach of Article 6 § 1 of the Convention in the case before it should be compensated by a bar to the proceedings instead of a comprehensive exclusion of evidence. In the present case, that court had considered the proceedings as a whole against N.A. and the second applicant as fair.

(2) Regarding the third applicant

107. As for the third applicant, the Government argued that he had not been incited to commit the drug offence of which he was convicted and there had thus been no breach of Article 6 § 1. The third applicant, who had already been convicted of a drug offence in 2007 in the Netherlands, had been predisposed to commit a drug offence and had only seized the occasion offered by the authorities to do so, as in a situation of legal test purchases. The authorities had essentially remained passive in his regard. The fact that the investigation authorities had incited N.A. and, indirectly, the second applicant, to have cocaine imported in a seemingly safe manner via the port of Bremerhaven had not been decisive for the third applicant's decision to

participate in the operation at a later stage, namely by transporting the drugs from a flat in Bremerhaven to Berlin.

108. The domestic authorities had also complied with the procedural requirements under Article 6 § 1 regarding undercover investigations. There had been a clear and foreseeable procedure for the authorisation, implementation and supervision of the undercover operation (as required, for instance, in the case of *Ramanauskas v. Lithuania*). The undercover agent's involvement had been based on Articles 110a et seq. of the Code of Criminal Procedure (see paragraphs 40-41 above). The police informant's involvement had been based on Articles 161 § 1 and 163 § 1 of the Code of Criminal Procedure (see paragraph 42 above), read in conjunction with the applicable Guidelines on criminal and summary proceedings (see paragraph 43 above), which were binding for the prosecution authorities, including the police.

(b) The Court's assessment

(i) Relevant principles

(1) Evidence and fairness of criminal proceedings

109. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV; and *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 52, ECHR 2008).

110. As the Court has pointed out on numerous occasions, in view of the ravages drugs cause it can see why the authorities of the Contracting States are so firm towards those who contribute to the spread of this scourge (see *Medvedyev and Others v. France* [GC], no. 3394/03, § 81, ECHR 2010). However, the use of undercover agents and informants must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking (see *Teixeira de Castro*, cited above, §§ 35-36; *Vanyan v. Russia*, no. 53203/99, § 46, 15 December 2005, and *Pyrgiotakis v. Greece*, no. 15100/06, § 20, 21 February 2008). While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience (see *Teixeira de Castro*, cited above, § 36; and *Bannikova v. Russia*, no. 18757/06, § 33, 4 November 2010).

(2) Substantive test of incitement

111. When faced with a plea of police incitement, or entrapment, the Court will attempt to establish, as a first step, whether there has been such incitement or entrapment (substantive test of incitement; see *Bannikova*, cited above, § 37). If there has been such incitement or entrapment, the subsequent use of evidence obtained thereby in the criminal proceedings against the person concerned raises an issue under Article 6 § 1 (see, *inter alia*, *Teixeira de Castro*, cited above, §§ 35-36; and *Matanović v. Croatia*, no. 2742/12, § 145, 4 April 2017).

112. Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Ramanauskas*, cited above, § 55 with further references; and *Bannikova*, cited above, § 37; compare also *Pyrgiotakis*, cited above, § 20). The rationale behind the prohibition on police incitement is that it is the police's task to prevent and investigate crime and not to incite it (see *Furcht*, cited above, § 48).

113. In order to distinguish police incitement, or entrapment, from the use of legitimate undercover techniques in criminal investigations, the Court has developed the following criteria.

114. In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (see *Bannikova*, cited above, § 38).

115. The Court has found in that context, in particular, that the national authorities had no good reason to suspect a person of prior involvement in drug trafficking where he had no criminal record, no preliminary investigation had been opened against him and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (see *Teixeira de Castro*, cited above, § 38; confirmed in *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 48, ECHR 2004-X; *Khudobin v. Russia*, no. 59696/00, § 129, ECHR 2006-XII (extracts); *Ramanauskas*, cited above, § 56; and *Bannikova*, cited above, § 39; see also *Pyrgiotakis*, cited above, § 21). The following may, depending on the circumstances of a particular case, be considered indicative of pre-existing criminal activity or intent: the applicant's demonstrated familiarity with the current prices for drugs and ability to obtain drugs at short notice (compare *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV) and the applicant's

pecuniary gain from the transaction (see *Khudobin*, cited above, § 134; and *Bannikova*, cited above, § 42).

116. When drawing the line between legitimate infiltration by the police and incitement to commit an offence the Court will further examine the question of whether the applicant was subjected to pressure to commit the offence. In drug cases it has found the abandonment of a passive attitude by the investigating authorities to be associated with such conduct as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms (see, among other cases, *Bannikova*, cited above, § 47; and *Veselov and Others v. Russia*, nos. 23200/10 and 2 others, § 92, 2 October 2012).

117. The Court has further recognised that a person can be subjected to entrapment also if he was not directly in contact with the police officers working undercover, but had been involved in the offence by an accomplice who had been directly incited to commit an offence by the police (compare *Lalas v. Lithuania*, no. 13109/04, §§ 41 *et seq.*, 1 March 2011). There had been entrapment, as opposed to legitimate undercover techniques in criminal investigations, in these circumstances if the acts of the police represented an inducement to commit the offence also for this further person (compare *Lalas*, cited above, § 45; and *Grba v. Croatia*, no. 47074/12, § 95, 23 November 2017). The Court took into account in this respect whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence, whether that person's activities were also determined by the conduct of the police officers and whether the persons involved were considered as accomplices in the offence by the domestic courts (compare *Lalas*, *ibid.*; see also *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, §§ 84-94, 16 July 2015, in which the Court appears to have considered that both the applicant directly in contact with the undercover agent and his accomplice were incited to commit a drug offence).

118. When applying the above criteria, the Court places the burden of proof on the authorities. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. 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). The Court has emphasised in that context the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It considered judicial supervision as the most appropriate means in case of covert operations (see *Bannikova*, cited above, §§ 49-50; and *Matanović*, cited above, § 124; compare also *Edwards and Lewis*, cited above, §§ 46 and 48).

119. Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that would normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention (see, for instance, *Scholer v. Germany*, no. 14212/10, § 90, 18 December 2014, and *Matanović*, cited above, § 133).

(3) Procedural test of incitement

120. In order to determine whether the trial was fair the Court has further clarified in its more recent case-law that it will be necessary to proceed, as a second step, with a procedural test of incitement not only if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events, but also if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement (see *Matanović*, cited above, § 134; and *Ramanauskas v. Lithuania (no. 2)*, no. 55146/14, § 62, 20 February 2018).

121. The Court applies this procedural test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts and whether in the case of a finding that there has been incitement, or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention (see *Ramanauskas*, cited above, § 70; *Ciprian Vlăduț and Ioan Florin Pop*, cited above, §§ 87-88; and *Matanović*, cited above, § 135).

122. While the Court will generally leave it to the domestic authorities to decide what procedure must be followed when the courts are faced with a plea of incitement, it has indicated that the domestic courts deal with an entrapment complaint in a manner compatible with the right to a fair hearing where the complaint of incitement constitutes a substantive defence, places the court under a duty to either stay the proceedings as an abuse of process or to exclude any evidence obtained by entrapment or leads to similar consequences (compare *Bannikova*, cited above, §§ 54-56; *Matanović*, cited above, § 126; and *Ramanauskas (no. 2)*, cited above, § 59).

123. The Court has reiterated in its well-established case-law in this context, in particular, that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see, *inter alia*, *Teixeira de Castro*, cited above, §§ 35-36; *Edwards and Lewis*, cited above, §§ 46 and 48; *Vanyan*, cited above, § 46; *Ramanauskas*, cited above, § 54; *Bannikova*,

cited above, § 34; and *Furcht*, cited above, §§ 47 and 64). For the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see *Lagutin and Others v. Russia*, nos. 6228/09 and 4 others, § 117, 24 April 2014 with further references; and *Furcht*, cited above, § 64). A person shall not be punished for a criminal activity (or a part thereof) which was the result of incitement on the part of the State authorities (see *Grba*, cited above, § 103).

124. The Court has therefore considered that where an applicant's conviction for an offence had been based on evidence obtained by police incitement, even a considerable mitigation of the applicant's sentence cannot be considered as a procedure with similar consequences to an exclusion of the impugned evidence (see *Furcht*, cited above, §§ 68-69). Moreover, it has clarified that a confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects (see *Ramanauskas*, cited above, § 72; and *Bannikova*, cited above, § 60).

(ii) Application of these principles to the present case

(1) Regarding N.A. and the second applicant

– *Substantive test of incitement*

125. Having regard to the above principles the Court needs to examine, first, whether N.A. and the second applicant were incited by the police to commit the drug offence of which they were convicted, that is, whether the police exerted such an influence on them as to incite the commission of that offence which they would otherwise not have committed. The Court notes at the outset that the domestic courts recognised that both N.A. and the second applicant were incited by the police. While N.A. was in direct contact with the police undercover agent and the informant acting on the police's instructions, the second applicant did not have any direct contact with them. He was included in the drug importation by N.A. and was convicted of aiding and abetting N.A.'s drug offence. The Court needs to determine whether the acts of the police regarding N.A. constituted an incitement to commit the offence, within the autonomous meaning of the concept under the Court's case-law, for N.A. and for the second applicant.

126. As regards N.A. the Court observes that, according to the findings of the Regional Court, at the outset of the undercover operation there had been some initial suspicions that N.A., who did not, however, have a criminal record, might be trafficking heroin, following an indication by an informant and information obtained via telephone tapping (see paragraph 5 above). However, after informant M. entered into contact with N.A., the suspicions of ongoing drug trafficking were not confirmed over a period of many months and it became clear to the authorities that N.A. did not have any pre-existing contacts allowing him to acquire and traffic drugs.

127. The police nevertheless kept contacting N.A. through the informant M. and prompted him to organise drug importation via the seemingly safe channel controlled fully by the authorities for some one and a half years. The acting informant, M., had a considerable financial interest in N.A. – and possible accomplices – being caught in a serious drug offence owing to the fees and a bonus promised by the police for his activities. By the seemingly safe channel the police had not only created a considerable incentive for drug trafficking: the fact that drugs could be removed freely from large shipping containers and the money to be paid to the police informant, M., and the undercover agent, K., for their services in this respect (EUR 50,000 each) had foreseeably led to a large amount of drugs being imported. It may finally only have been this safe importation channel which had enabled N.A. and his co-perpetrators to organise drug importation with the persons he had come to know by coincidence in the Netherlands (see paragraphs 5-11 and 16-17 above).

128. As regards the second applicant, a friend of N.A.'s, the Court notes that according to the findings of the Regional Court, he had been involved in the drug importation as it had been an acquaintance of his in the Netherlands via whom, by coincidence, N.A. had managed to organise the importation. The second applicant had had no relevant previous convictions for drug-related offences, nor had there been preliminary investigations against him or indeed anything to suggest that he had a predisposition to traffic drugs.

129. As was confirmed by the police themselves, it had been foreseeable for them that N.A., who had been in direct contact with them, would contact other persons, and notably persons putting him in contact with drug suppliers, to participate in the offence (see paragraph 18 above).

130. In examining whether the second applicant's participation in the drug offence was determined by the conduct of the police, the Court notes that according to the findings of the Regional Court, the second applicant decided to contribute to N.A.'s drug importation through the port of Bremerhaven precisely because of the seemingly safe channel created by the police. N.A. had described to him in detail the importation, with the help of the dock worker, which appeared a safe and easy way to earn large sums of money (see paragraph 18 above). The second applicant was convicted of directly aiding and abetting N.A.'s drug offence. The second applicant's activities must therefore be considered as determined by the supply of the importation channel by the police.

131. The Court therefore concludes – agreeing with the findings of the domestic courts (see paragraphs 18, 23 and 34 above) and the Government (see paragraph 101 above) in this respect – that both N.A. and the second applicant's offence would not have been committed without the authorities' influence. They were thus incited, as defined in the Court's case-law under

Article 6 § 1, by the police to commit the drug offence of which they were subsequently convicted.

– *Procedural test of incitement*

132. Having found, on the basis of the substantive test, that both N.A. and the second applicant were subjected to incitement, the Court, in order to determine whether the trial was fair, needs to further examine whether the domestic courts drew the relevant inferences from this finding in accordance with the Convention, notably by either discontinuing the proceedings, excluding any evidence obtained by entrapment or drawing similar consequences from the finding of entrapment (see paragraphs 122-124 above).

133. The Court observes that in the present case, the Regional Court, in line with the Federal Court of Justice's established case-law at that time (see paragraphs 46-50 above) and prior to the delivery of this Court's judgment in the case of *Furcht v. Germany* (cited above), had neither discontinued the proceedings nor excluded any evidence following the entrapment. It had only reduced both N.A.'s and the second applicant's sentence in a considerable and measurable manner: N.A. was imposed a term of imprisonment of four years and five months; he would have been sentenced to at least ten years' imprisonment without the incitement (see paragraphs 12 and 21 above). The court further sentenced the second applicant to three years and seven months' imprisonment, but would have imposed a sentence of at least seven years' imprisonment without police incitement to the offence (see paragraphs 20-21 above).

134. The Court notes that the Government argued that the proceedings before the Regional Court had nevertheless met the requirements of Article 6 § 1 as the present case could be distinguished from the case of *Furcht*. This was equally the stance taken by the Federal Constitutional Court which had regard also to this Court's judgment in the case of *Furcht v. Germany* delivered in the meantime (see paragraphs 30-36 above).

135. The Court observes that, just as in the case of *Furcht* (cited above, §§ 59, 69), the Regional Court in the present case took into account and thus used evidence directly obtained as a result of incitement, namely the statements of the police informant and of the undercover agent, even though that evidence was given less weight in the present case. It further notes that, in both cases, the trial courts based their finding of guilt essentially on the confession made by the defendants before them (see *Furcht*, cited above, § 14 and paragraph 13 above).

136. The Court held in *Furcht* that all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply. This is the case if there is a link between the impugned evidence and the incitement that leads the Court to conclude that the accused was deprived of a fair trial. In *Furcht v. Germany* where the

applicant was convicted after he had confessed to the offences at the trial court's hearing and after the written reports of the undercover agents had been read out (see § 14 of that judgment), the Court found this to be the case.

137. In the present case, the Regional Court used the testimony of the undercover agent and of the supervising police officers of the police informant and the minutes of the informant's report. Although the Government submit that this evidence was ultimately used to convict N.A. and the second applicant only in so far as it did not contradict his confession, the Court notes, in particular, the second applicant's submission that he confessed because the police informant had made partly untrue statements to his supervising police officers which were reported by the police officers at the hearing. The Regional Court confirmed that the police informant had partly described the events leading to the drug importation in a substantially different manner from the defendants in their confessions at the trial. This held true, in particular, as regards the influence the informant had exerted on N.A., which was decisive for the finding that there had been incitement. It therefore appears that both N.A. and the second applicant did not have any option, in order to reveal the true extent of the incitement but to confess to the offence in the first place.

138. Since there was a close link between the confessions that the offence had been committed and the incitement which led to the committal of the offence, the Regional Court should have excluded not only the testimony of the undercover agent and of the supervising police officers and the minutes of the informant's report, but also N.A.'s and the second applicant's confession or it should have applied a procedure with similar consequences. On appeal, the failure of the lower court to draw the necessary inferences from the incitement was repeated by the Federal Court of Justice, which applied its well-established case-law on sentence reduction. The Court notes that both these courts handed down their decisions before the judgment in *Furcht*, cited above. That was not the case of the Federal Constitutional Court, whose judgment proceeded the latter judgment of the Court by several months. The Court notes that the Federal Constitutional Court engaged extensively with the Court's case-law, including *Furcht*, and that it sought to draw lessons for lower courts from the latter decision for the future. However, while recognising that the evidence against the second applicant which resulted from the incitement had not been totally excluded, the Federal Constitutional Court, in the case of N.A. and the second applicant , sought to distinguish the latter case. On the basis of the material available and outlined above, the Court sees no reason to distinguish the two cases.

139. As such, the domestic courts did not draw the relevant inferences in accordance with Article 6 § 1 of the Convention from their finding of entrapment and there is no room for the Government's argument that the

domestic courts had excluded all evidence obtained as a result of the incitement or had applied a procedure with similar consequences.

– *Conclusions*

140. The Court recalls that it has reserved its decision on the question whether N.A. and the second applicant lost their status as a victim of a breach of Article 6 § 1 as a result of the mitigation of their sentence because of the police incitement and had joined the Government's objection concerning the loss of victim status to the merits (see paragraph 92 above).

141. The Court observes that, in accordance with its more recent case-law (see paragraph 120 above), it has examined the question of whether the domestic courts drew the necessary inferences from their finding that N.A. and the second applicant had been incited to commit his offence already in the context of the procedural test of incitement under Article 6 § 1. As the Court has concluded that this had not been the case (see paragraph 139 above) N.A. and the second applicant may still claim to be the victim of a violation of Article 6 § 1. It follows that the Government's preliminary objection concerning the loss of their victim status must be rejected.

142. Accordingly, there has been a violation of Article 6 § 1 of the Convention in respect of both the first and the second applicants' complaints.

(2) Regarding the third applicant

143. In determining whether the third applicant was incited by the police to commit the drug offence of which he was convicted, the Court notes that he had equally not been in direct contact with the police or persons acting on their instructions. Although he had recently been convicted of drug trafficking in the Netherlands, the authorities had not had any suspicions that he was involved in drug trafficking together with N.A. when they mounted their operation against the latter. The third applicant had been recruited by N.A.

144. In examining whether the acts of the police regarding N.A. represented an incitement to commit the offence for the third applicant, the Court considers that, as found above, it was foreseeable for the police that N.A. was likely to contact other persons to participate in the drug trafficking, such as the third applicant, who was charged with transporting the drugs from Bremerhaven to Berlin.

145. As to whether the third applicant's activities were determined by the police's conduct, the Court takes note of his submission that, in any event, the entrapment of N.A. had led to a serious flaw in the criminal proceedings concerning the drug operation regarding all participants in the operation. The Court notes, however, that in its case-law (see, in particular,

paragraph 117 above), criminal proceedings following undercover operations were only found to raise an issue under Article 6 in so far as there was a direct or indirect incitement of the person subsequently charged in such proceedings. It cannot be deduced from that case-law that where an undercover operation entails incitement of one of the perpetrators, the proceedings automatically raise an issue under Article 6 in respect of other perpetrators who have neither directly nor indirectly been induced specifically by the police's conduct to participate in the offence.

146. The Court further observes that, according to the third applicant's submission, he had equally been aware of the seemingly safe drug importation channel following N.A.'s description to him of the planned offence, which had persuaded him to participate in that offence. However, the Court notes that the third applicant had been convicted for having agreed to pick up the drugs at a flat in Bremerhaven – after they had been imported via the port, taken out of the port with the help of the dock worker and taken to the flat – and transport the drugs to Berlin. Unlike the importation via the port, the police did not influence or was in any other way involved in these subsequent transport activities. Although it may have played a certain role for the third applicant that the previous drug importation was seemingly safe as it generally reduced the risk of discovery when picking up the drugs in Bremerhaven in the flat, the third applicant only seized the opportunity without the police exerting such an influence on him as to incite the transport of the drugs from the flat in Bremerhaven to Berlin. While the third applicant was found guilty of illicit possession of the drugs entrusted to him by N.A. and of having aided and abetted N.A.'s drug trafficking, his participation and activities cannot, therefore, be considered as having been determined by the conduct of the police who did not exert pressure on him either.

147. The Court, agreeing with the findings of the domestic courts (see paragraphs 19, 23 and 26 above) and the Government (see paragraph 107 above) in this respect, therefore concludes that the third applicant was not incited, as defined in the Court's case-law under Article 6 § 1, by the police to commit the drug offence of which he was subsequently convicted. It observes in this context that the work of the police informant, M., was supervised by the police following authorisation by the Public Prosecutor's Office and covered by the general provisions of Articles 161 § 1 and 163 § 1 of the Code of Criminal Procedure, read in conjunction with the applicable Guidelines on criminal and summary proceedings (see paragraphs 42-43 above). The work of the undercover agent, K., was authorised by the Berlin District Court in accordance with domestic law under Article 110b § 2 of the Code of Criminal Procedure (see paragraphs 15 and 41 above). This authorisation and – albeit perfectible – supervision of the undercover operation permitted the authorities to discharge the burden of proof of showing that there had been no incitement

in the third applicant's case. The subsequent use, in the criminal proceedings against the third applicant, of the evidence obtained by the undercover measure therefore does not raise an issue under Article 6 § 1 in his respect.

148. In view of its conclusion that the third applicant had not been the victim of incitement, it is not necessary to examine the Government's alternative preliminary objection regarding the loss of his victim status.

149. There has therefore been no violation of Article 6 § 1 of the Convention in respect of the third applicant.

2. Conclusion

150. It follows from the foregoing that there has been a violation of Article 6 § 1 of the Convention in respect of the first and the second applicants' complaints and no violation of Article 6 § 1 in respect of the third applicant.

III. REMAINING COMPLAINTS

151. The first applicant further complained that the criminal proceedings against N.A. had been unfair as he had been convicted of a drug offence without having been able to cross-examine, at the hearing, the police informant who had incited him to commit the offence. Furthermore, N.A.'s defence rights had been violated as the case-file initially had not contained all information regarding the police informant in order to guarantee him confidentiality, which had made it more difficult for N.A. to prove that there had been incitement. The first applicant relied on Article 6 §§ 1 and 3 (c) and (d) of the Convention.

152. The Government contested that argument.

153. The Court observes that it has found that N.A. had been incited to commit his drug offence and that the domestic courts did not draw the relevant inferences in accordance with Article 6 § 1 of the Convention from that finding, notably by excluding, *inter alia*, the informant's report of the events. The first applicant's further complaints under Article 6 §§ 1 and 3 (c) and (d) concern difficulties in proving that incitement and the cross-examination of a witness whose evidence was not to be used anyway because of the incitement. The Court therefore considers that, given the finding of a violation of Article 6 § 1, it is not necessary to examine the admissibility or merits of the first applicant's further complaints under Article 6 §§ 1 and 3 (c) and (d) of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

154. 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. The first applicant

155. The first applicant did not submit any claims for just satisfaction under Article 41 of the Convention. The Court therefore does not make an award in her respect.

B. The second applicant

1. Damage

156. The second applicant claimed a total of 40,700 euros (EUR) in respect of non-pecuniary damage. He claimed that he had suffered distress due to his criminal conviction, which had been the result of unlawful incitement and following which he had spent several years in prison.

157. The Government considered that the sum claimed by the second applicant in respect of non-pecuniary damage was excessive.

158. The Court considers that the second applicant must have suffered distress as a result of his conviction for an offence incited by the police and the imposition of a prison sentence, at a trial in breach of Article 6 § 1. Making its assessment on an equitable basis, it awards the second applicant EUR 18,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

2. Costs and expenses

159. The second applicant, submitting documentary evidence, also claimed EUR 3,000 for lawyers' costs and expenses incurred before the Federal Court of Justice and EUR 1,190 for those incurred before the Court. These amounts, which include value-added tax (VAT), had been lawfully agreed upon with the second applicant's lawyer and paid by the second applicant. He further claimed the reimbursement of costs for the translation into English of his observations before this Court, without quantifying this claim.

160. The second applicant also requested exemption from all court costs and from the expenses for his officially-appointed counsel in the proceedings before the Regional Court. These costs and expenses had been imposed by that court in its judgment as a result of his conviction, but he had not paid them.

161. The Government submitted that if the second applicant's counsel had calculated his fees for the proceedings before this Court in accordance with the Act on the Remuneration of Lawyers

(*Rechtsanwaltsvergütungsgesetz*), he would have claimed only EUR 600.71 including VAT. Furthermore, he could not claim any translation costs as he had not submitted any documentary proof therefor.

162. The Government further submitted that the exact amount of the court costs and expenses for the proceedings before the Regional Court which the second applicant was to pay as a result of his conviction had not been fixed. These costs were partly time-barred and the enforcement of payment had been stayed until delivery of this Court's judgment in the present application.

163. 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, the Court considers it reasonable to award the second applicant the sums claimed of EUR 3,000 for costs and expenses in the domestic proceedings and EUR 1,190 for those incurred before the Court, which include VAT, that is a total of EUR 4,190 including VAT, plus any tax that may be chargeable to the second applicant. It does not make an award in respect of translation costs incurred before this Court as this claim has neither been proved by documentary evidence nor quantified.

164. As for the second applicant's request to be exempted from all court costs and expenses for his officially-appointed counsel imposed by the Regional Court, the Court observes that the amount of these costs and expenses, which the second applicant was generally charged with paying as a result of his conviction, has not been fixed. The second applicant has not paid these costs and expenses, which are partly time-barred and the enforcement of their payment is currently stayed.

165. Having regard to these elements and its finding of a breach of Article 6 § 1 in the proceedings before the domestic courts, the Court finds that the second applicant is not currently liable to pay costs and expenses in this respect. It further assumes that he will not be requested to pay such costs and expenses following the delivery of this Court's judgment, a question which may be addressed at the stage of the execution of the Court's judgment when it becomes final.

3. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Dismisses* the Government's objection regarding the first applicant's victim status concerning the complaint under Article 6 § 1 about police incitement;

3. *Decides* to join to the merits the Government's remaining preliminary objection and, having examined the merits, dismisses it;

4. *Declares* the first applicant's complaint under Article 6 § 1 and the second and third applicants' applications admissible;

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the first and the second applicants' complaints;

6. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the third applicant;

7. *Holds* that it is not necessary to examine the admissibility or merits of the first applicant's remaining complaints;

8. *Holds*
   (a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 18,000 (eighteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,190 (four thousand one hundred and ninety euros), including VAT, plus any tax that may be chargeable to the second applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President