CASE OF RAMANAUSKAS v. LITHUANIA

(Application no. 74420/01)

JUDGMENT

STRASBOURG

5 February 2008

This judgment is final but may be subject to editorial revision.

In the case of Ramanauskas **v.** Lithuania**,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa, *appointed to sit in respect of* ***Lithuania***,
Christos Rozakis,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Ireneu Cabral Barreto,
Rıza Türmen,
Corneliu Bîrsan,
András Baka,
Mindia Ugrekhelidze,
Antonella Mularoni,
Stanislav Pavlovschi,
Elisabet Fura-Sandström,
Khanlar Hajiyev,
Dean Spielmann,
Renate Jaeger, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 28 March and 12 December 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 74420/01) against the Republic of **Lithuania** lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Kęstas **Ramanauskas** ("the applicant"), on 17 August 2001.

2. The applicant, who was granted legal aid, was represented by Mr R. Girdziušas, a lawyer practising in Kaunas. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged, in particular, that he had been the victim of entrapment and that he had been denied the opportunity to examine a key witness in criminal proceedings against him.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Danutė Jočienė, the judge elected in respect of **Lithuania**, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Jean-Paul Costa, the judge elected in respect of France, to sit in her place (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 26 April 2005 the application was declared partly admissible by a Chamber of the Second Section composed of the following judges: András Baka, Jean-Paul Costa, Rıza Türmen, Karel Jungwiert, Mindia Ugrekhelidze, Antonella Mularoni, Elisabet Fura-Sandström, and also Stanley Naismith, Deputy Section Registrar. On 19 September 2006 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed written observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 March 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms E. Baltutytė, *Agent*,
Ms S. Balčiūnienė, *Adviser*;

(b) *for the applicant*
Ms A. Vosyliūtė, *Counsel*,
Mr K. **Ramanauskas**, *Applicant*.

The Court heard addresses by Ms Baltutytė and Ms Vosyliūtė.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, Mr Kęstas **Ramanauskas**, is a Lithuanian national who was born in 1966 and lives in Kaišiadorys.

10. He formerly worked as a prosecutor in the Kaišiadorys region.

11. The applicant submitted that in late 1998 and early 1999 he had been approached by AZ, a person previously unknown to him, through VS, a private acquaintance. AZ had asked him to secure the acquittal of a third person and had offered him a bribe of 3,000 United States dollars (USD) in return. The applicant had initially refused but had later agreed after AZ had reiterated the offer a number of times.

12. The Government submitted that VS and AZ had approached the applicant and negotiated the bribe with him on their own private initiative, without having first informed the authorities. They alleged that AZ had suspected the applicant of having accepted bribes in the past.

13. On an unspecified date AZ, who was in fact an officer of a special anti-corruption police unit of the Ministry of the Interior (*Specialiųjų tyrimų tarnyba* – "the STT"), informed his employers that the applicant had agreed to accept a bribe.

14. On 26 January 1999 the STT applied to the Deputy Prosecutor General, requesting authorisation to use a criminal conduct simulation model ("the model" – see paragraph 32 below). The request stated:

> "Senior Commissar [GM], Head of the Operational Activities Division of the [STT], having had access to information concerning [the applicant's] criminal conduct, has established that [the applicant] takes bribes since he has agreed to assist a defendant, [MN], in return for payment.
>
> In implementing the criminal conduct simulation model, which is intended to establish, record and put an end to [the applicant's] unlawful acts, an STT official [AZ] would hand over 12,000 litai, in foreign currency if required.
>
> Implementation of [the model] would require [AZ] to simulate criminal acts punishable under Articles 284 and 329 of the [Criminal Code].
>
> With reference to section 11 of the Operational Activities Act ..., the undersigned requests the Deputy Prosecutor General to authorise the criminal conduct simulation model for a period of one year.
>
> This request is based on the information obtained during the preliminary inquiry."

15. On 26 January 1999 the STT sent a letter to the Deputy Prosecutor General outlining the model as follows:

"[STT] officials have collected operational information attesting that [the applicant] takes bribes.

In implementing the criminal conduct simulation model, which is intended to establish, record and put an end to [the applicant's] unlawful acts, an STT official [AZ] would simulate the offences of offering a bribe and breaching currency and securities regulations.

In view of the above, and in accordance with section 11 of the Operational Activities Act, I hereby request you to authorise the criminal conduct simulation model and thus to exempt [AZ] from criminal responsibility for the offences under Articles 284 and 329 of the [Criminal Code] which are intended to be simulated.

[The model] would be implemented by STT officials on the basis of a separate operational action plan.

Implementation of [the model] would be financed by STT resources."

16. On 27 January 1999 the Deputy Prosecutor General gave the required authorisation by countersigning and placing his official seal on the letter in question. This document constituted the final version of the model.

17. On 28 January 1999 the applicant accepted USD 1,500 from AZ.

18. On 11 February 1999 AZ gave the applicant a further USD 1,000.

19. On the same date the Prosecutor General instituted a criminal investigation in respect of the applicant for accepting a bribe, an offence punishable under Article 282 of the Criminal Code in force at that time.

20. On 17 March 1999 the Prosecutor General dismissed the applicant from his post as a prosecutor on grounds relating to corruption. Referring to the relevant provisions of the Prosecuting Authorities Act, the Prosecutor General stated that the applicant had been dismissed for a disciplinary offence and activities discrediting the prosecuting authorities.

21. On an unspecified date the pre-trial investigation was concluded and the case was referred to the Kaunas Regional Court. During the trial the applicant pleaded guilty but alleged that he had succumbed to undue pressure from AZ in committing the offence.

22. On 18 July 2000 the Deputy Prosecutor General authorised a judge of the Kaunas Regional Court to disclose the details of how the model had been implemented "provided that this [did] not harm the interests" of the individuals and authorities involved in the operation.

23. On 29 August 2000 the Kaunas Regional Court convicted the applicant of accepting a bribe of USD 2,500 from AZ, in breach of Article 282 of the Criminal Code then in force, and sentenced him to 19 months and six days' imprisonment. The court also ordered the confiscation of his property in the amount of 625 Lithuanian litai (LTL). It found it established, firstly, that AZ had given the applicant the bribe during their meetings on 28 January and 11 February 1999, in return for a promise that the applicant would intervene favourably in a criminal case against a third person and, secondly, that AZ had entered into contact and negotiated with the applicant through VS.

24. The court's conclusions were mainly based on the evidence given by AZ and on secret recordings of his conversations with the applicant. The court had also examined AP, a prosecutor working in the same regional office as the applicant, whose evidence had not gone beyond confirmation that the applicant had dealt with the criminal case against the third person (MN) indicated by AZ. VS was not summoned to give evidence at the trial as his place of residence was unknown, but a statement by him, which had been recorded by the pre-trial investigators, was read out in court. However, the Kaunas Regional Court did not take it into account in determining the applicant's guilt. The court's judgment did not contain any discussion of the authorisation and implementation of the model.

25. On 26 October 2000 the Court of Appeal upheld the judgment on an appeal by the applicant, finding that there had been no incitement and that the authorities had not put any active pressure on the applicant to commit the offence.

26. On 23 November 2000 the applicant lodged a cassation appeal. Relying in particular on the Constitutional Court's decision of 8 May 2000 (see paragraph 34 below), he argued that there were no statutory provisions allowing the authorities to incite or provoke a person to commit an offence. In that connection, he submitted that on several occasions he had unsuccessfully requested the first-

instance and appeal courts to consider the influence exerted by AZ and VS on his predisposition to commit the offence. He further complained that the lower courts had not taken into account the fact that AZ was a police officer and not a private individual. He argued that AZ had incited him to accept the bribe. Furthermore, he stated that the authorities had had no valid reason to initiate an undercover operation in his case and that they had overstepped the limits of their ordinary investigative powers by inducing him to commit an offence. He also submitted that VS had not been examined during the trial.

27. On 27 February 2001 the Supreme Court dismissed the applicant's cassation appeal in a decision which included the following passages:

> "There is no evidence in the case file that [the applicant's] free will was denied or otherwise constrained in such a way that he could not avoid acting illegally. [AZ] neither ordered [the applicant] to intervene in favour of the person offering the bribe, nor did he threaten him. He asked him orally for help in securing the discontinuation of proceedings [against the third person] ... K. **Ramanauskas** understood that the request was unlawful ... [and] the Regional Court was therefore correct in finding him guilty ...
>
> [The applicant] contests the lawfulness of [the model] ..., stating that the case discloses a manifest example of incitement (*kurstymas*) by the officers of the special services to accept the bribe ... [He submits that, by law], authorisation to simulate a criminal act cannot be given in the absence of evidence of the preparation or commission of an offence. Therefore, in his view, such a procedure cannot pursue the aim of inciting a person or persons to commit a crime. If the model were used for that purpose, it would be unlawful [and] the information thereby obtained could not be admitted in evidence ... [The] model cannot be authorised and implemented unless a person has planned or started to commit an offence, evidence of which should be submitted to a prosecutor ... It appears from the case file that [the authorities] were contacted by [VS] and [AZ] after [their initial] meetings with K. **Ramanauskas**, during which he had agreed in principle that he would perform the requested actions for USD 3,000 ... Accordingly, in authorising the use of the model, [the authorities] merely joined a criminal act which was already in progress.
>
> ...
>
> The case file contains no evidence that [VS] is an employee of the special services ... [AZ] works at the STT as a police driver ... but this does not mean that he is prohibited from acting in a private capacity. There is no evidence that [VS] and [AZ] negotiated with K. **Ramanauskas** on police instructions. It has, however, been established that [VS] and [AZ] handed money to him on the police's orders.
>
> The court considers that provocation (*provokacija*) to commit a crime is similar but not equivalent to incitement (*kurstymas*) ... Provocation is a form of incitement consisting in encouraging a person to commit an offence ... entailing his criminal responsibility so that he can then be prosecuted on that account. While such conduct is morally reprehensible, the term 'provocation' is not used either in criminal or procedural law or in the Operational Activities Act of 22 May 1997 ... From a legal standpoint, provocation does not constitute a factor exempting from criminal responsibility a person who has thereby been induced to commit an offence ...
>
> Since the case file contains contradictory evidence as to the conduct of [VS] and [AZ] before the criminal conduct simulation model was authorised, it is difficult to establish who was the instigator (*iniciatorius*) of giving and accepting the bribe, or, in other words, who incited whom to give or accept the bribe. [VS] ... stated that, after he had contacted K. **Ramanauskas** to ask him to intervene in securing the discontinuation of the criminal case [against the third person], K. **Ramanauskas** had been the first to say that he could settle the matter for USD 3,000. For his part, [AZ] ... stated that K. **Ramanauskas** had said that the discontinuation of the case would cost USD 3,000. In his testimony K. **Ramanauskas** alleged that [VS] had asked him if USD 3,000 would be enough to ensure that the case was discontinued. In these circumstances, it cannot be said with any certainty who was the instigator of the bribery, nor can it be inferred that [VS] and [AZ] incited K. **Ramanauskas** to accept the bribe. Furthermore, there is no reason to conclude that [VS] and [AZ] provoked the offence committed by K. **Ramanauskas** in accepting the bribe. It can only be said unequivocally that the initiative (*iniciatyva*) to apply to K. **Ramanauskas** in order to have the case [against the third person] discontinued came from [AZ].
>
> However, the court considers that the answer to the question whether a person has actually induced (*palenkė*) or otherwise incited (*sukurstė*) another to offer or accept a bribe is of no consequence as far as the legal classification of [the applicant's] conduct is concerned. Incitement (*kurstymas*) to commit an offence is one of the various forms of complicity. Under the branch of criminal law dealing with complicity, incitement is a form of conspiracy. A person who commits an offence after having being incited to do so incurs the same criminal responsibility as a person who acts of his own volition ... Even assuming that K. **Ramanauskas** was incited by [VS] and [AZ] to accept a bribe, it must be emphasised that the incitement took the form of an offer, and not of threats or blackmail.

He was therefore able to decline (and ought to have declined) the illegal offer ... It follows from the testimony of K. **Ramanauskas** that he understood the nature of the acts he was being asked to carry out, and accepted [the bribe] of his own free will ...

At the same time it must be noted that it is a specific feature of bribery as an offence that one side is necessarily the instigator (*kurstytojas*) of the offence. A State official soliciting a bribe is an instigator within the meaning of Article 284 [of the Criminal Code then in force – 'the CC'] in that he incites (*kursto*) another to pay him a bribe, in breach of that Article. [A person] offering a bribe to a State official is necessarily an instigator within the meaning of Article 282 of the CC since, by making the offer, he incites the official to accept a bribe, that is, to commit the offence provided for in that Article ... Both the person giving and the person accepting a bribe exercise their free will ... and may therefore choose between possible forms of conduct. A person who intentionally chooses the criminal option while having the possibility of resisting the incitement rightly incurs criminal responsibility, regardless of the outside factors that may have influenced his choice ..."

28. On 27 March 2001 the applicant began serving his prison sentence. He remained in prison until 29 January 2002, when he was released on licence.

29. Furthermore, the prohibition on his working in the legal service was lifted in July 2002. In January 2003 his conviction was expunged.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. The Criminal Code applicable at the material time punished the acts of accepting a bribe (Article 282), offering a bribe (Article 284) and breaching currency and securities regulations (Article 329).

31. Article 18 of the Criminal Code in force at the time and Article 24 of the present Criminal Code (in force since 1 May 2003) provide that incitement is one of the possible forms of complicity in an offence and is punishable alongside other forms of assistance (aiding and abetting, organising, executing) in the commission of an offence. These provisions define an instigator (*kurstytojas*) as a person who induces (*palenkė*) another to commit an offence. The term *kurstymas* (which can also be translated as "incitement" or "instigation") is normally used in domestic legal doctrine to define the notion of complicity.

32. The Operational Activities Act (*Operatyvinės veiklos įstatymas*) was enacted in 1997 and remained in force until 27 June 2002. Section 2(12) of the Act defined a "criminal conduct simulation model" (*Nusikalstamos veikos imitacijos elgesio modelis*) as a set of actions entailing the elements of an offence, authorised with a view to protecting the best interests of the State, society or the individual.

Section 4(2) of the Act authorised the initiation of "operational activities" within the meaning of the Act where:

(a) the authorities did not know the identity of an individual who was preparing to commit or had committed a serious offence;

(b) the authorities had obtained "verified preliminary information" about a criminal act;

(c) the authorities had obtained "verified preliminary information" about a person's membership of a criminal organisation;

(d) the authorities suspected activities by foreign secret services; or

(e) an accused, defendant or convicted person had absconded.

Section 7(2)(3) of the Act provided that the authorities could have recourse to a model only in one of the above scenarios, and then only on condition that the requirements of sections 10 and 11 of the Act were satisfied.

Sections 10 and 11 of the Act empowered the Prosecutor General or his deputy to authorise the use of a criminal conduct simulation model on an application by the police or the investigative authorities. The application for authorisation had to include, among other things, a reference to the limits of the conduct intended to be simulated (that is, the legal characterisation under a specific

provision of the Criminal Code of the actions to be taken) and the purpose of the operation, including its interim and ultimate aims.

Section 8(1)(3) of the Act required the authorities to protect persons from active pressure to commit an offence against their own will.

Section 13(3) of the Act afforded the right to contest the lawfulness of evidence obtained by means of special techniques.

33. In the proceedings which gave rise to the case of *Pacevičius and Bagdonas v.* ***Lithuania*** (no. 57190/00, struck out of the Court's list of cases on 23 October 2003), the Court of Appeal gave judgment on 29 April 1999, holding, *inter alia*:

> "Section 2 of the Operational Activities Act defines [the criminal conduct simulation model] as a set of actions entailing the elements of an offence, authorised with a view to protecting the best interests of the State, society or the individual. ... The model may be authorised only for operations by [the police] and does not apply to individuals who commit offences.
>
> The request [by the police for authorisation of the model in this case] referred to the aim of the intended operation, namely identification of all persons involved in a [human] trafficking network.
>
> Of course, the [police] officers could not foresee who would take part in this crime ... One of the aims of the [prosecution in] authorising the model was to establish the identities of members of a criminal organisation."

In a judgment of 12 October 1999 in the same case the Supreme Court held as follows regarding the use of police undercover agents:

> "[The applicants] were not aware of the ongoing operation at the time they committed the offence. They were convinced that they were trafficking persons who had illegally crossed the Lithuanian border. As Article 82-1 of the Criminal Code provides that the offence in question is committed where direct intent has been established, [the applicants'] error as to the nature of the act they were committing is of no relevance to the legal classification of their conduct. Since they were convinced that they were trafficking [human beings], their acts fell objectively within the scope of the offence defined in Article 82-1 ... Their conduct was therefore rightly classified as a completed offence. The authorisation given to the authorities [to use the model] served the sole purpose of legitimising the actions of the police officers taking part in the trafficking."

34. On 8 May 2000 the Constitutional Court ruled that the Operational Activities Act was generally compatible with the Constitution. It held in particular that the model constituted a specific form of operational activity using intelligence and other secret measures in order to investigate organised and other serious crime. It emphasised that the use of clandestine measures, as such, was not contrary to the European Convention on Human Rights, or indeed the Constitution, as long as such measures were based on legislation that was clear and foreseeable in effect and were proportionate to the legitimate aims pursued. The Constitutional Court found that the Act provided a clear definition of the scope and procedure for the use of various forms of operational activities, including the model.

Referring in particular to the *Teixeira de Castro v. Portugal* case (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV), the Constitutional Court emphasised that a criminal conduct simulation model could not be used for the purpose of incitement (*kurstoma*) or provocation (*provokuojama*) to commit an offence that had not already been initiated. It further held that this investigative technique did not allow officials to incite the commission of an offence by a person who had abandoned plans to commit the offence. It added that, by authorising and implementing the model, the investigative authorities and their undercover agents were restricted to "joining criminal acts that [had] been initiated but not yet completed". The Constitutional Court emphasised that it was for the courts of ordinary jurisdiction dealing with allegations of incitement or of other forms of abuse of the model to establish in each particular case whether the investigating authorities had gone beyond the limits of the legal framework within which the model had been authorised.

The Constitutional Court also stated that authorisation of the model did not amount to a licence for a police officer or third person acting as an undercover agent to commit a crime but simply

legitimised – from the point of view of domestic law – the acts which the agent might be required to carry out in simulating an offence. The main aim of operational activities, including the model, was to facilitate criminal investigations, and on that account they came within the sphere of competence of both the prosecuting authorities and the courts. Accordingly, the model did not require judicial authorisation but simply authorisation by a prosecutor. The Constitutional Court further noted that secret audio and video recordings of conversations taking place in the context of operational activities under the Act were not subject to judicial authorisation and that this was compatible with the Constitution. Under section 10(1) of the Act, only wiretapping and surveillance techniques using stationary devices required a court order.

III. RELEVANT INTERNATIONAL LAW

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

The explanatory report on the Convention further specifies that "special investigative techniques" may include the use of undercover agents, wiretapping, interception of telecommunications and access to computer systems.

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

36. The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS no. 141, 8 November 1990) provides, in Article 4, that each party should consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto.

37. The use of special investigative techniques, such as controlled deliveries in the context of illicit trafficking in narcotic drugs, is also provided for in Article 73 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, signed in Schengen on 19 June 1990.

THE LAW

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

38. The applicant submitted that he had been incited to commit a criminal offence, in breach of his right to a fair trial under Article 6 § 1 of the Convention, the relevant parts of which provide:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. The parties' submissions

1. The applicant

39. The applicant submitted that his right to a fair trial had been infringed in that he had been incited to commit an offence that he would never have committed without the intervention of "agents provocateurs".

40. He argued that the authorities bore responsibility for the conduct of AZ and VS. In its judgment in the instant case the Supreme Court had acknowledged that AZ was in fact an officer of the special anti-corruption police unit of the Ministry of the Interior (STT) and had instigated the offence. The applicant contended that the authorities could not legitimately claim that they had simply "joined" a criminal act instigated by one of their own employees, and asserted that they should accept full responsibility for the acts carried out by AZ before the criminal conduct simulation model had been authorised. In any event, all his meetings with AZ – both before and after the model had been authorised – had taken place on the latter's initiative, as was attested by the record of AZ's telephone calls to the applicant. The applicant accordingly submitted that the crime would not have been committed without the authorities' intervention.

41. The applicant further complained that the domestic courts had failed to give an adequate answer to the question of the authorities' responsibility for the use of entrapment in inducing him to commit a crime. He submitted that by putting him in contact with AZ, VS had played a crucial role in the model that had led him to accept the bribe. He asserted that VS was a long-standing informer of the police, as was attested by the fact that the police had authorised him to act as an undercover agent in the case. The applicant inferred from this that the examination of VS would have been crucial in establishing whether he had been incited to commit an offence and that the authorities' failure to summon VS to appear as a witness had breached the relevant provisions of Article 6. The court had not sought to establish whether VS had collaborated with the judicial authorities. The applicant therefore submitted that he had been denied a fair hearing, in breach of Article 6 § 1 of the Convention.

2. The Government

42. The Government submitted that, since the Court was not a "fourth-instance judicial body", it did not have jurisdiction to deal with the applicant's complaints, which related mostly to questions of fact and of application of domestic law.

43. They submitted that in any event the authorities had not incited the applicant to commit an offence and that the model forming the subject of his complaints had not infringed his rights under Article 6.

44. In this connection, the Government pointed out that VS and AZ had approached the applicant and negotiated the bribe on their own private initiative, without first having informed the authorities. The use of the model in issue had been authorised subsequently in order to protect the fundamental interests of society, on the basis of the preliminary information submitted by AZ attesting to the applicant's predisposition to accept a bribe. They asserted that, in authorising and implementing the model complained of by the applicant, the authorities had pursued the sole aim of "joining" an offence which the applicant had planned to commit with VS and AZ, who had acted on their own initiative and "in a private capacity". The authorities could not be held responsible for any acts that VS and AZ had carried out before the procedure in question had been authorised.

45. The Government added that only AZ had acted as an undercover agent of the authorities, as the model had been authorised on his behalf. They pointed out that, before requesting authorisation, the STT had carefully verified the information submitted by AZ about the applicant's criminal inclinations and had found it to be corroborated by other data already in its possession. The investigating authorities had drawn up a precise action plan for the implementation of the model, clearly defining the nature and scope of the actions they intended to carry out. The Government stated that they were unable to provide the Court with a copy of the action plan or any other data from the STT's file on the applicant since it had been destroyed on the expiry of the five-year period laid down in the Ministry of the Interior's regulations for keeping secret files. However, they assured the Court that in all cases of this kind, the Prosecutor General or his deputy would carefully scrutinise the entire STT file on the suspect before authorising a criminal conduct simulation model.

46. The Government asserted that the offence would in any event have been committed without the intervention of the State authorities, since even before the model had been authorised, the applicant had clearly been predisposed to commit the offence. In support of that argument they observed that after the model had been authorised, the applicant had instantly accepted AZ's oral offer of a bribe and that the authorities had not subjected him to any threats or other forms of undue pressure. The applicant's guilt was aggravated by the fact that, as a law-enforcement official, he was perfectly aware that his actions were illegal. In conclusion, contrary to the position in the *Teixeira de Castro* case (cited above), there had been no incitement to break the law in the instant case.

47. Having regard to all these factors, the Government concluded that the applicant had had a fair trial.

B. The Court's assessment

48. The applicant complained of the use of evidence resulting from police incitement in the proceedings against him, in breach of his right to a fair trial.

1. General principles

49. The Court observes at the outset that it is aware of the difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences. To perform this task, they are increasingly required to make use of undercover agents, informers and covert practices, particularly in tackling organised crime and corruption.

50. Furthermore, corruption – including in the judicial sphere – has become a major problem in many countries, as is attested by the Council of Europe's Criminal Law Convention on the subject (see paragraph 35 above). This instrument authorises the use of special investigative techniques, such as undercover agents, that may be necessary for gathering evidence in this area, provided that the rights and undertakings deriving from international multilateral conventions concerning "special matters", for example human rights, are not affected.

51. That being so, the use of special investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits (see paragraph 55 below).

52. In this connection, it should be reiterated that it is the Court's task, in accordance with Article 19, to ensure the observance of the engagements undertaken by the States Parties to the Convention. 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, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judments and Decisions* 1997-III, p. 711, § 50; *Teixeira de Castro*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34; *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI; and *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV). In this context, the Court's task is not to determine whether certain items of evidence were obtained unlawfully, but rather to examine whether such "unlawfulness" resulted in the infringement of another right protected by the Convention.

53. More particularly, the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (see *Khudobin v. Russia*, no. 59696/00, § 135, 26 October 2006, and, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September

1978, Series A no. 28, pp. 24-26, §§ 52-56). While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (see *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 13-15, § 25).

54. Furthermore, while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest 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, among other authorities, *Teixeira de Castro*, cited above, pp. 1462-64, §§ 35-36 and 39; *Khudobin*, cited above, § 128; and *Vanyan v. Russia*, no. 53203/99, §§ 46-47, 15 December 2005).

55. 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 *Teixeira de Castro*, cited above, p. 1463, § 38, and, by way of contrast, *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII).

56. In the case of *Teixeira de Castro* (cited above, p. 1463, § 38) the Court found that the two police officers concerned had not confined themselves "to investigating Mr Teixeira de Castro's criminal activity in an essentially passive manner, but [had] exercised an influence such as to incite the commission of the offence". It held that their actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention it would have been committed (ibid., p. 1464, § 39).

In reaching that conclusion the Court laid stress on a number of factors, in particular the fact that the intervention of the two officers had not taken place as part of an anti-drug-trafficking operation ordered and supervised by a judge and that the national authorities did not appear to have had any good reason to suspect the applicant of being a drug dealer: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug trafficking until he was approached by the police (ibid., p. 1463, §§ 37-38).

More specifically, the Court found that there were no objective suspicions that the applicant had been involved in any criminal activity. Nor was there any evidence to support the Government's argument that the applicant was predisposed to commit offences. On the contrary, he was unknown to the police and had not been in possession of any drugs when the police officers had sought them from him; accordingly, he had only been able to supply them through an acquaintance who had obtained them from a dealer whose identity remained unknown. Although Mr Teixeira de Castro had potentially been predisposed to commit an offence, there was no objective evidence to suggest that he had initiated a criminal act before the police officers' intervention. The Court therefore rejected the distinction made by the Portuguese Government between the creation of a criminal intent that had previously been absent and the exposure of a latent pre-existing criminal intent.

57. Using the same criteria, in the *Vanyan* judgment (cited above) the Court found a violation of Article 6 § 1 in connection with a test purchase of drugs which it found had constituted incitement. Although the operation in question was carried out by a private individual acting as an undercover agent, it had actually been organised and supervised by the police.

58. In the *Eurofinacom* decision (cited above) the Court, while reaffirming the principles set out above, held that the instigation by police officers of offers of prostitution-related services made to them personally had not in the true sense incited the commission by the applicant company of the offence of living on immoral earnings, since at the time such offers were made the police were

already in possession of information suggesting that the applicant company's data-communications service was being used by prostitutes to contact potential clients.

59. In the case of *Sequeira* (cited above) the Court found that there had been no police incitement, basing its finding on the following considerations:

> "In the present case, it has been established by the domestic courts that A. and C. began to collaborate with the criminal-investigation department at a point when the applicant had already contacted A. with a view to organising the shipment of cocaine to Portugal. Furthermore, from that point on, the activities of A. and C. were supervised by the criminal-investigation department, the prosecution service having been informed of the operation. Finally, the authorities had good reasons for suspecting the applicant of wishing to mount a drug-trafficking operation. These factors establish a clear distinction between the present case and *Teixeira de Castro*, and show that A. and C. cannot be described as *agents provocateurs*. As the domestic courts pointed out, as in *Lüdi* [*Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238], their activities did not exceed those of undercover agents."

60. The Court has also held that where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards (see *Khudobin*, cited above, §§ 133-135).

61. Lastly, where the information disclosed by the prosecution authorities does not enable the Court to conclude whether the applicant was subjected to police incitement, it is essential that the Court examine the procedure whereby the plea of incitement was determined in each case in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings and to equality of arms (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46-48, ECHR 2004-X, and, *mutatis mutandis*, *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 50 and 58, 16 February 2000).

2. Application of these principles in the present case

62. It appears from the evidence in the present case that a request for authorisation to use a criminal conduct simulation model, together with a request for exemption from criminal responsibility, was made by the STT on 26 January 1999, by which time AZ had already contacted the applicant through VS and the applicant had apparently agreed to seek to have a third person acquitted in return for a bribe of USD 3,000. In the Government's submission, that sequence of events showed that VS and AZ had acted on their own private initiative without having first informed the authorities. By authorising and implementing the model, they argued, the prosecuting authorities had merely put themselves in a position to establish an offence which the applicant had already planned to commit. They had therefore not been guilty of incitement.

63. The Court is unable to accept such reasoning. The national authorities cannot be exempted from their responsibility for the actions of police officers by simply arguing that, although carrying out police duties, the officers were acting "in a private capacity". It is particularly important that the authorities should assume responsibility as the initial phase of the operation, namely the acts carried out up to 27 January 1999, took place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the use of the model and exempting AZ from all criminal responsibility, the authorities legitimised the preliminary phase *ex post facto* and made use of its results.

64. Moreover, no satisfactory explanation has been provided as to what reasons or personal motives could have led AZ to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he was not prosecuted for his acts during this preliminary phase. On this point, the Government simply referred to the fact that all the relevant documents had been destroyed.

65. It follows that the Lithuanian authorities' responsibility was engaged under the Convention for the actions of AZ and VS prior to the authorisation of the model. To hold otherwise would open the way to abuses and arbitrariness by allowing the applicable principles to be circumvented through the "privatisation" of police incitement.

66. The Court must therefore examine whether the actions complained of by the applicant, which were attributable to the authorities, amounted to incitement prohibited by Article 6.

67. To ascertain whether or not AZ and VS confined themselves to "investigating criminal activity in an essentially passive manner", the Court must have regard to the following considerations. Firstly, there is no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences. Secondly, as is shown by the recordings of telephone calls, all the meetings between the applicant and AZ took place on the latter's initiative, a fact that appears to contradict the Government's argument that the authorities did not subject the applicant to any pressure or threats. On the contrary, through the contact established on the initiative of AZ and VS, the applicant seems to have been subjected to blatant prompting on their part to perform criminal acts, although there was no objective evidence – other than rumours – to suggest that he had been intending to engage in such activity.

68. These considerations are sufficient for the Court to conclude that the actions of the individuals in question went beyond the mere passive investigation of existing criminal activity.

69. Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. It is therefore not sufficient for these purposes, contrary to what the Government maintained, that general safeguards should have been observed, such as equality of arms or the rights of the defence.

70. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention (see the Court's case-law cited in paragraphs 49-61 above).

71. The Court observes that throughout the proceedings the applicant maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination – as, indeed, the Constitutional Court urged in its judgment of 8 May 2000 – of whether the prosecuting authorities had gone beyond the limits authorised by the criminal conduct simulation model (see paragraph 14 above), in other words whether or not they had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. This was especially important having regard to the fact that VS, who had originally introduced AZ to the applicant and who appears to have played a significant role in the events leading up to the giving of the bribe, was never called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of these points.

72. However, the domestic authorities denied that there had been any police incitement and took no steps at judicial level to carry out a serious examination of the applicant's allegations to that effect. More specifically, they did not make any attempt to clarify the role played by the protagonists in the present case, including the reasons for AZ's private initiative in the preliminary phase, despite the fact that the applicant's conviction was based on the evidence obtained as a result of the police incitement of which he complained.

Indeed, the Supreme Court found that there was no need to exclude such evidence since it corroborated the applicant's guilt, which he himself had acknowledged. Once his guilt had been established, the question whether there had been any outside influence on his intention to commit

the offence had become irrelevant. However, a confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects.

73. In conclusion, while being mindful of the importance and the difficulties of the task of investigating offences, the Court considers, having regard to the foregoing, that the actions of AZ and VS had the effect of inciting the applicant to commit the offence of which he was convicted and that there is no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial was deprived of the fairness required by Article 6 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (d) OF THE CONVENTION

75. The applicant further submitted that the principle of equality of arms and the rights of the defence had been infringed in that during the trial neither the courts nor the parties had had the opportunity to examine VS, one of the two undercover agents involved in the case. He alleged a violation of Article 6 §§ 1 and 3 (d), the second of which provides:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. The parties' submissions

1. The applicant

76. The applicant submitted that his defence rights had been infringed in that during the trial neither the courts nor the parties had had the opportunity to examine VS, a key witness. He alleged that this amounted to a breach of Article 6 § 3 (d) of the Convention.

2. The Government

77. The Government submitted that this provision did not guarantee, as such, an absolute right to examine every witness a defendant wished to call. They contended that the arguments advanced by the applicant in support of his complaint that VS had not appeared in court were not persuasive, since the trial courts had not based his conviction on the statement by VS. They added that it had been impossible to secure the attendance of VS as his place of residence was unknown. They submitted that, in any event, the applicant had had the opportunity to contest in open court the other items of evidence against him – chiefly the statement by AZ and the recordings of his conversations with the applicant – on which the courts had based their guilty verdict. The proceedings in issue had therefore complied with the adversarial principle and had not breached the Convention provision relied on by the applicant.

B. The Court's assessment

78. The applicant complained that the proceedings against him had been unfair in that it had been impossible to obtain the examination of VS as a witness against him.

79. The Court considers that the applicant's complaint under this head is indissociable from his complaint under Article 6 § 1 of the Convention in so far as it merely concerns one particular aspect of the conduct of proceedings which the Court has found to have been unfair.

80. In conclusion, having regard to the findings set out in paragraphs 73-74 above, the Court does not consider it necessary to carry out a separate examination under Article 6 § 3 (d) of the Convention of the applicant's complaint that the proceedings were unfair.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

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

A. Damage

82. The applicant firstly claimed the sum of 123,283.69 Lithuanian litai (LTL – approximately 35,652 euros (EUR)) for loss of earnings during the period from 11 February 1999 to 29 January 2002, on the basis of a gross monthly salary of LTL 3,472.78 (approximately EUR 1,000). He claimed a further sum of LTL 3,524.60 (approximately EUR 1,021) for the costs incurred in the domestic proceedings, including LTL 3,500 for fees (approximately EUR 1,013.67). Lastly, he sought the reimbursement of LTL 625 (approximately EUR 181) in relation to the confiscation of his property and LTL 420 (approximately EUR 121) for translation costs.

83. The applicant also claimed LTL 300,000 (approximately EUR 86,755) in respect of non-pecuniary damage, on account of the media campaign against him, the harm to his reputation and the anxiety experienced during his ten months in detention.

84. While accepting that the applicant had been dismissed by an order of the Prosecutor General adopted on 17 March 1999, the Government asked the Court to take into account the fact that the applicant had himself tendered his resignation in a letter of 9 March 1999, thereby manifesting his intention to leave his post. Accordingly, the applicant's claim for loss of earnings was unfounded.

In any event, the applicant's claims were excessive, since they were based on gross monthly salary (LTL 3,472.78) whereas his net monthly salary had been LTL 2,400.47.

85. As to the costs incurred in the domestic proceedings, the Government submitted that they should not be refunded.

86. With regard to non-pecuniary damage, the Government observed that the applicant had failed to establish that there was a causal link between the damage alleged and the violation of the Convention. In any event, the sum claimed was excessive.

87. The Court considers that it would be equitable to make an award in respect of damage. The documents in the case file suggest that the applicant would not have been imprisoned or dismissed from his post in the legal service if the incitement in issue had not occurred. His loss of earnings was actual, and the Government did not dispute this.

In quantifying the damage sustained, the Court considers that it should also take into consideration part of the applicant's costs in the national courts to the extent that they were incurred in seeking redress for the violation it has found (see *Dactylidi v. Greece*, no. 52903/99, § 61, 27 March 2003, and *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 21, § 66).

Likewise, the Court considers that the applicant indisputably sustained non-pecuniary damage, which cannot be compensated for by the mere finding of a violation.

88. Having regard to the diversity of factors to be taken into consideration for the purposes of calculating the damage and to the nature of the case, the Court considers it appropriate to award, on an equitable basis, an aggregate sum which takes account of the various considerations referred to above (see *mutatis mutandis*, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 26, 28 May

2002). It therefore awards the applicant EUR 30,000 in compensation for the damage sustained, including the costs incurred at domestic level, plus any tax that may be chargeable on this amount.

B. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that it is not necessary to examine the complaint under Article 6 § 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 30,000 (thirty thousand euros) in respect of damage, plus any tax that may be chargeable, to be converted into Lithuanian litai at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 February 2008.

Michael O'Boyle Nicolas Bratza
Deputy Registrar President