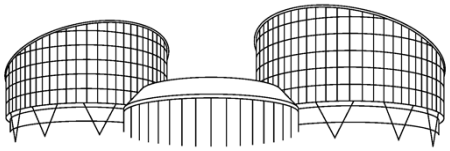

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PAPYAN v. ARMENIA

(Application no. 53166/10)

JUDGMENT

STRASBOURG

21 December 2021

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

In the case of Papyan v. Armenia,

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

Jolien Schukking, *President,*
Armen Harutyunyan,
Ana Maria Guerra Martins, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 53166/10) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Viktor Papyan ("the applicant"), on 22 November 2010;

the decision to give notice to the Armenian Government ("the Government") of the complaints under Articles 6 and 8 of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 30 November 2021,

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

INTRODUCTION

1. The present case concerns the applicant's conviction for bribe-taking. The applicant alleged, in particular, that the criminal proceedings against him had been conducted in breach of Article 6 §§ 1 and 3 (d) of the Convention since he had been the victim of entrapment by the National Security Service and that the trial court had refused to hear a certain witness. The applicant further alleged that his right to respect for his private life under Article 8 of the Convention had been breached on account of the unlawful recording of his conversation with an undercover agent.

THE FACTS

2. The applicant was born in 1958 and lives in Yerevan. He was represented by Mr V. Gevorgyan, Ms L. Sahakyan and Mr Y. Varosyan, lawyers practising in Yerevan.

3. The Government were represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia before the European Court of Human Rights.

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

5. At the relevant time the applicant was head of the Kotayk investigative division of the Principal investigative department of the Police ("the division").

6. On an unspecified date in January 2008 criminal proceedings were instituted against A.P. on account of aggravated assault, upon the applicant's instruction. From 24 January 2008 S.K., one of the division investigators, was in charge of the investigation in that case.

7. In March 2008 A.P.'s defence lawyer A.S. requested a forensic expert examination to determine whether A.P. had acted under an irresistible impulse.

8. On 5 May 2008 S.K. granted the request and ordered a forensic psychological assessment.

9. According to the applicant, starting from May 2008 A.P's mother, Z.P., repeatedly contacted S.K., proposing that the charges against her son be mitigated in exchange for payment of a certain sum of money but S.K. rejected the offer.

10. The Government, relying on Z.P.'s statement before the Regional Court (see paragraph 37 below), stated that Z.P. and her husband had started negotiations with regard to the sum of the bribe already in February. Referring to Z.P.'s witness statement of 8 July 2008, they claimed that in response to Z.P.'s requests S.K. had demanded 5,500 United States dollars (USD) for settling the matter in her favour and modifying the charges against her son. In particular, S.K. had stated that he would share the required sum with M.P., the forensic psychologist.

11. On 2 July 2008 A.K., an officer of the National Security Service ("the NSS") who was apparently from the same village as S.K., telephoned the latter and suggested helping Z.P. in exchange for payment of a certain sum of money since she was close to him.

12. According to a detailed telephone bill produced in the domestic proceedings and before the Court, on the same day at 20.40 p.m., A.K. called Z.P. and had a conversation with her lasting around seven minutes. Thereafter, Z.P. called S.K. twice – at 11.23 p.m. and 11.33 p.m. following which A.K. called Z.P. once again at 11.54 p.m., and they had a conversation lasting 42 minutes.

13. On 3 July 2008 at around 9.30 a.m. Z.P. called S.K. once again.

14. According to the applicant, thereafter Z.P. visited S.K. and again suggested mitigating the charges against her son in exchange for payment of a certain sum of money. S.K. tentatively agreed, hoping that Z.P. would not be able to raise the requested amount (see also S.K.'s statement in paragraph 35 below).

15. On 4 July 2008 Z.P. visited S.K. in his office. According to the relevant telephone bill, on that day ten telephone calls were made from A.K's mobile phone to Z.P's phone between 9.25 a.m. and 1 p.m.

16. On the same date Z.P. filed a crime report with the NSS, which was registered by A.K. She stated that S.K. had solicited a bribe from her in order to mitigate the charges brought against her son, threatening otherwise to bring more serious charges. She also noted in the report that she had met S.K on

the same date at about 11.25 a.m. when the latter demanded that she provide the required sum by 4.30 p.m.

17. On the same date the NSS applied to the Kentron and Nork-Marash District Court of Yerevan ("the District Court") requesting authorisation to carry out a covert operation in respect of S.K., namely external and internal surveillance envisaged by the "Law on operational intelligence activity". The relevant application referred to the crime report filed by Z.P. to the effect that S.K. had demanded a bribe from her.

18. On the same date the District Court granted the application authorising S.K's external and internal surveillance for two months. According to the record of the relevant hearing, the District Court examined the application submitted by the NSS from 9.20 a.m. to 9.40 a.m.

19. At around 4 p.m. on the same date Z.P. went to the division. She did not have the money with her and was equipped with a recording device installed in her handbag by the NSS. Since S.K. was absent, she was received by the applicant in his own office. The relevant parts of the transcript of the recording of their conversation read as follows:

"[Z.P.]: I just needed to have a serious talk with [S.K.] so that he gives me time...

[Applicant]: well in any event the coming two days are a weekend, you have time anyway.

[Z.P.]: I also think that I still have time but [S.K.] disagrees... I need to meet him today at all costs...in fact this is about some psychologist...

...

[Applicant]: today is Friday, I do not know what arrangement [S.K.] has with [M.P.] maybe it is today...

[Applicant]: But it is interesting, what the reaction of the other [victim] side will be. I think they have complained to the [Prosecutor General]...

[Z.P.]: ... I am grateful that you [have not detained A.P.] and took the right direction...

[Applicant]: Well yes he is a minor child

[Z.P.]: It is a bit difficult for me [to find] that amount...

[Applicant]: Wait, when is the time-limit for the case (seems to be reading something)?

...

[Z.P.]: That is I still have time...?

[Applicant]: I think so. Let's just wait for [S.K.] to tell us about his arrangement [with M.P.] so that if there is a need we tell him to call [M.P.] and ask her to come on Monday.

[Z.P.] : ... it is not easy to raise USD 5,500...they just called me from the bank that I have a transfer from Russia...

[Applicant]: You can go if you want so that you are not late for the bank... I will tell [S.K.]

...

[Z.P.]: According to [S.K.] [M.P.] wouldn't wait...

[Applicant]: ... You see they [referring to M.P. and other experts] are already used to big sums."

20. After S.K. arrived, he and Z.P. went to his office. The relevant parts of the transcript of the recording of their conversation read as follows:

"[Z.P.]: just USD 5,500 is an extraordinary amount...

...

[S.K.]: Bring USD 5,000, consider that I gave you the [USD] 500 as a gift.

...

[S.K.]: ...no need for the [USD] 500. If anything is left ... [it will go] to our division, our head [the applicant] if he is suddenly against..."

21. On 7 July 2008 the NSS obtained an authorisation from the District Court to carry out an operational intelligence measure "imitation of giving a bribe" (see paragraph 58 below) in respect of S.K.

22. On the same date the NSS conducted a covert operation. They equipped Z.P. with a recording device and gave her banknotes treated with a special chemical substance and marked with a special marker visible only under ultraviolet light, to be handed over to S.K.

23. On the same date Z.P. went to the division. She met the applicant, who was getting into his car, outside the building. The applicant went back into the building with Z.P. and saw her to his office. In accordance with instructions, Z.P. recorded their conversation (see paragraph 37 below). Z.P. said that she had the required sum with her and suggested giving it to the applicant, but he preferred to wait for S.K. Later S.K entered the applicant's office and accompanied Z.P. to his office. According to the applicant, the meeting between Z.P. and S.K. ended with the latter refusing to take the money. The Government submitted that Z.P handed over money to S.K. in his office.

24. The relevant parts of the transcript of the recording of the conversation between S.K. and Z.P. in the former's office read as follows:

"[Z.P.]: Am I too late?

[S.K.]: ...you are already late because [she] called [presumably referring to M.P].

...

[Z.P.]: You should have called...

...

[S.K.]: Honestly I am so tired of this case...

[Z.P.]: You should have called to say what happened...

[S.K.]: What did you want me to say?

[Z.P.]: [M.P.] said it is not possible?

[S.K.]: No, I called her to say there is no need.

[Z.P.]: Why did you call?

...

[Z.P.]: Weren't you sure that I would come?

[S.K.]: No, I was not.

...

...

[S.K.]: [M.P.] called asking what to do... I told her to write as it is.

[Z.P.]: ... I have brought the money. Should I give it?

[S.K.]: ... go home now, I will call you in an hour.

[Z.P.]: So should I give the money now or take it back with me?

[S.K.]: No, take it back.

...

[S.K.]: .... Take [the money] back, I will now speak with [M.P.]. If it happens that she hasn't [finalised the report] I will come to your home and collect [the money]...

[Z.P.]: No need to come to my home...

[S.K.]: I will tell you in an hour, ok? (a sound of opening or closing a handbag is heard)...

[S.K.]: ... I will call you in about an hour.

[Z.P.]: I hope everything will be fine.

[S.K.]: You know my disposition towards you.

[Z.P.]: I know.

[S.K.]: I am doing the impossible to [help].

[Z.P.]: Ok I'll get going then..."

25. As soon as Z.P. left the building NSS officers entered S.K's office where they found the applicant and S.K. The NSS officers searched the office and found the marked money under the sofa. Following the search, a record on "finding an amount given as a bribe" was drawn up, according to which the marked banknotes had been found in a copy of the Criminal Code inside the sofa in S.K.'s office. The special chemical substance with which the banknotes had been treated was found on S.K.'s fingers and the relevant pages of the Code with the use of specialist equipment. The record contained the signatures of two attesting witnesses, A.V. and G.M. According to the applicant, no attesting witnesses had been present during the search and their signatures had been added later on.

26. On the same date the Special Investigative Service instituted criminal proceedings against the applicant and S.K. for bribe-taking.

27. On 10 July 2008 the applicant was charged with bribe-taking in a particularly large amount. The relevant decision stated that the applicant and S.K. had received a bribe from Z.P. According to the decision, the applicant had taken a bribe from Z.P. through S.K. at around 5 p.m. on 7 July 2008 based on a prior agreement with the latter.

28. By a judgment of the Northern Criminal Court of 29 October 2008 A.P. was sentenced to one year's imprisonment.

29. In the course of the investigation S.K. refused to make any statements until 27 November 2008 when he submitted, *inter alia*, that Z.P. had repeatedly offered him money but he had refused constantly. On 7 July 2008 Z.P. had offered money to him in his office but he had refused to take it, saying that he would give an answer in an hour. However, despite his refusals, Z.P. had put the money on his desk and left.

30. When questioned by the investigator the applicant stated, *inter alia*, that he was with S.K. in the latter's office when the money was discovered but his presence there had to do with a different criminal case.

31. On 22 December 2008 the bill of indictment was finalised and the case was sent to the Northern Criminal Court for examination on the merits.

32. On 27 February 2009, following legislative changes, the case was transmitted to Kotayk Regional Court ("the Regional Court") for examination.

33. During the trial both S.K. and the applicant denied the charges against them.

34. In his statement before the Regional Court the applicant submitted that the criminal case against A.P. had been pending since January 2008. However, it was not until months later that the issue of whether or not A.P. had committed the offence under an irresistible impulse came about following his lawyer's application in that respect. The decision to order a forensic expert examination was discussed and agreed with the police superiors and the prosecutors. He further submitted that it was obvious from the content of his conversation with Z.P. on 4 July 2008 that he was not the initiator and was merely asking questions or repeating what she had already said.

35. In his statement before the Regional Court S.K. submitted, *inter alia*, that from the very first months of the investigation Z.P. stood out because of her eagerness to justify her son in any way possible and help him at any cost. He mentioned that he had not been acquainted with M.P. prior to that case. After the decision to seek an expert opinion Z.P. had become more active in her requests to requalify the offence and started to bother him often. By 10 June 2008 her persistence became unbearable to the point that he was obliged to put her off as he was disturbed at work because of her calls and visits. Thereafter her visits and calls stopped. He didn't hear from her until 2 July 2008, on which day he was surprised to receive a call from A.K., an officer of the NSS whom he knew as they came from the same village. A.K. was the officer who had later registered the crime report filed by Z.P. and

gathered materials. S.K. further stated that he did not want to reproduce the content of their conversation but he thought that it should be clear to everyone. Immediately after that conversation Z.P. had called and visited him, this time offering money to modify the charges against her son. Prior to that, no conversation about money had taken place. He decided to get rid of Z.P. and told her that he would help her son, feeling sure that she would not be able to raise the amount he proposed. That was the only way to deal with her persistence but at the same time a means not to refuse her request and that of her intermediaries. During their conversation in his office on 7 July 2008 he had tried to explain to Z.P. that it was too late to requalify the offence but she had continued to insist on leaving the money. Finally he had not agreed.

36. Three witnesses were heard by the Regional Court: Z.P., M.P., the forensic expert, and A.S., A.P.'s defence lawyer.

37. When questioned by the Regional Court Z.P. stated, *inter alia*, that the conversation with S.K. about a bribe had started late in January or early in February 2008. According to what her husband had told her, S.K. had demanded USD 7,000 at first, to which her husband had not agreed. Prior to her husband's departure for Russia on 20 April 2008 she and her husband had visited the applicant with a request to accept USD 4,000 but the applicant had insisted that it was not enough. On 4 June 2008 S.K. told her that M.P. had demanded USD 3,000. During their subsequent conversations S.K. had decreased the amount, eventually requesting USD 5,000 from her. At that point she reported the matter to the NSS on 4 July 2008. The NSS officers had suggested that she take USD 5,000 to be handed over to the investigator and record the conversations between her and the investigators when giving the money by the device provided to her. She also stated that on 7 July 2008 the applicant had refused to take the money from her and referred her to S.K. with the matter. When she had taken the money out of her bag, S.K. would not take it from her directly "as if he were afraid". She had put the money on the table and S.K. had put the copy of the Code on top of it, pushing it to the side. When leaving thereafter she had seen the applicant in the hallway.

38. In her statement M.P. submitted, in particular, that she had met S.K. and Z.P. after receipt of the decision of 5 May 2008 ordering a forensic psychological examination in respect of A.P. At one point Z.P. had tried to enquire about the content of the report to be issued, in response to which M.P. had asked her to wait for the investigator to receive the conclusion. Z.P. had never offered her any money, nor had she told M.P. about any such agreement with S.K.

39. When questioned A.S. stated, *inter alia*, that Z.P. had asked him to meet with S.K. and M.P. but he had not agreed. Based on Z.P.'s demand he had filed an application seeking the appointment of a forensic psychological examination. After S.K.'s arrest, Z.P. had stated the following: "Would it have harmed him had he taken the money?". During the investigation Z.P. and her husband were ready to do anything to prevent their son being

convicted. However, in his presence there was never any conversation about anyone demanding money from them in the course of the investigation.

40. On 8 September 2009 the applicant requested the Regional Court to examine the original versions of the recordings of the covert operations carried out on 4 and 7 July 2008 in order to clarify whether they had been modified. He submitted, in particular, that the recordings were shorter in duration than was indicated. This application was dismissed.

41. On 21 September 2009 the applicant's lawyer interviewed A.V., one of the attesting witnesses on 7 July 2008 (see paragraph 25 above) who had been present by chance at the police station on that date for passport business. He submitted, *inter alia*, that during the search there were too many people in S.K.'s office and it was hard to follow the actions of those conducting the search. At that point he went out, since he was having difficulties breathing due to heart problems. After an hour, when A.V. was in the hallway, the young man (apparently the policeman who had asked him to participate in the operation) told him that they had found the money and accompanied him inside. He did not sign anything on that day. Later on NSS officers had looked for him. He was eventually taken to an investigator in the General Prosecutor's Office whom he had met twice. He had then signed some papers.

42. On 22 September 2009 the applicant requested A.V. to be summoned, to be examined in court. He argued that in reality A.V. had not been present and had signed the record at a later date.

43. On 23 September 2009 the applicant requested that the second attesting witness, G.M., be summoned as well.

44. Those applications were dismissed by the Regional Court.

45. During the hearing of 23 September 2009 the applicant submitted the record of A.V.'s private interview (see paragraph 41 above), requesting that it be included in the evidence. The Regional Court refused to admit the record at issue into the evidence.

46. On 30 October 2009 the applicant submitted a request, asking, *inter alia*, that the record on "finding an amount given as a bribe" be excluded from the evidence. He argued, in particular, that S.K.'s office had in fact been searched without any court authorisation.

47. On 25 February 2010 the Regional Court convicted the applicant and S.K. of bribe-taking under Article 311 § 4 (2) and imposed an eight-year sentence on the applicant. It relied on the following evidence: Z.P.'s statement, the crime report filed by Z.P., the transcripts of recordings made by Z.P. of her conversations with S.K. and the applicant, the record on "finding an amount given as a bribe", M.P.'s and A.S.'s statements, the video recording of the operation of 7 July 2008 as well as other circumstantial evidence such as, for example, the judgment convicting A.P., the decisions not to prosecute Z.P. and M.P. and records of various other investigative activities. At the same time, the Regional Court refused to grant the

applicant's request in respect of the record on "finding an amount given as a bribe" (see paragraph 46 above).

48. The applicant lodged an appeal arguing, *inter alia*, that there had been entrapment by the NSS.

49. On 17 June 2010 the applicant requested that A.V. be summoned. On the same date the Criminal Court of Appeal ("the Court of Appeal") granted the application.

50. On 24 June 2010 the Court of Appeal stated that it had received an official letter from the municipal authorities of Garni, the village where A.V. resided, stating that they did not know A.V.'s whereabouts.

51. The applicant asked for witness A.V. to be compelled to appear before the court. The Court of Appeal dismissed this request and read out A.V.'s pre-trial statements.

52. In the proceedings before the Court of Appeal S.K. submitted that he wished to supplement his statement before the Regional Court as the defence had finally succeeded in having the transcripts of Z.P.'s calls included in the evidence so that he could properly support his entrapment plea. He stated that on 2 July 2008 NSS officer A.K. had called him and said that Z.P. was someone close to him, asking him not to turn her down if she were to offer money and to do everything possible to help her son by taking a certain sum of money in return. A.K. also stated that Z.P. had not been happy because S.K. would not engage in any such conversation with her. S.K. further stated that A.K.'s request was problematic since, on the one hand, the latter was from the same village as him and, on the other hand, A.P.'s charges could not be modified, so he could not and did not want to enter into any conversation with Z.P. about money. Realising that directly refusing the request of an NSS officer could bring about undesirable consequences, he decided not to take money from Z.P. and to pretend at the same time that he was trying to help her. S.K. stated, with reference to the transcript of the recording of his conversation with Z.P. of 7 July 2008 (see paragraph 24 above), that he had refused to take the money and had seen her off from his office, promising to continue his efforts to help her son and that, if successful, he would ask her to bring the money then. He had done so in order to be able to justify later to A.K. that he had done everything possible to meet his request but that it had not worked out.

53. On 30 July 2010 the Court of Appeal rejected the appeal. It found that it had been established by the materials of the case, in particular the fact that the use of specialist equipment had shown traces of the relevant chemical substance on S.K.'s fingers (see paragraph 25 above), that S.K. had taken the money from Z.P. There was no evidence suggesting that the applicant or S.K. had been forced or otherwise incited to take a bribe. The Court of Appeal found it established that Z.P. and her husband had started conversations with S.K. and the applicant about a bribe in January-February 2008. Moreover, Z.P. had regular access to the division to speak about the modalities of

payment and so on while S.K. had never reported to the competent authorities that any pressure was being exerted on him. The Court of Appeal found that it was Z.P., her husband and their minor son who had been under psychological pressure and not the investigators since, as attested by Z.P.'s statements, S.K. had threatened to aggravate the charges if they refused to pay. The Court of Appeal considered that there was no evidence that there had been entrapment by the NSS, since S.K. had failed to disclose the content of his conversation with A.K before the Regional Court whereas his statement before it was inconsistent. That is, on the one hand S.K. argued that A.K. had asked him to take money from Z.P. and, on the other hand, he claimed that he had not taken money from Z.P. The Court of Appeal concluded that Z.P. had not incited bribe-taking but had given an actual bribe, an offence punishable by criminal law, but since she had reported voluntarily to the authorities, she could not be prosecuted.

54. On 30 August 2010 the applicant lodged an appeal on points of law raising similar arguments to those made before the Court of Appeal.

55. On 6 October 2010 the Court of Cassation declared the applicant's appeal inadmissible for lack of merit.

RELEVANT LEGAL FRAMEWORK

RELEVANT DOMESTIC LAW

A. The Operative and Intelligence Measures Act

56. Section 21 prescribes that external surveillance is the tracing of persons or monitoring the course of various events and developments in open air or public places, without infringing the inviolability of residence, and with or without the use of special and other technical means, as well as the recording of surveillance results with or without the use of video recording, photographic, electronic and other data-carrying devices.

57. According to Section 22 (2), internal surveillance is the tracing of a person (persons) or monitoring the course of various events and developments inside the residence, and with or without the use of special and other technical means, as well as the recording of surveillance results with or without the use of video recording, photographic, electronic and other data-carrying devices.

58. According to Section 30 (1), imitation of taking or giving bribes as an operative intelligence measure may be carried out only for the disclosure of the crime of taking and giving bribes based exclusively on the written statement of the person to whom giving or taking a bribe was proposed.

59. According to Section 34 (1), internal surveillance, imitation of taking and giving bribes, may be conducted only with the court's authorisation.

60. According to Section 40, during an operational intelligence measure information, materials and documents that do not refer to the person to whom the measure is being applied, are acquired and if acquisition thereof has not been foreseen by the decision on carrying out such measures, they shall not be deemed to be evidence and shall be destroyed except for the following cases:

1) operational intelligence bodies have acted in good faith; and

2) information acquired contains materials referring to grave and particularly grave crime or planning of such crime; and

3) this Act authorises implementation of operational intelligence measures carried out to acquire such information. A separate record on acquiring information, materials and documents laid down in this part shall be drawn up.

B. The Code of Criminal Procedure

61. According to Article 104 § 3, only factual information which has been obtained in compliance with the requirements of the Code of Criminal Procedure can be used as evidence in criminal proceedings.

62. According to Article 105 § 1 (1), materials obtained under violence, threat, trickery, humiliation of a person and through other unlawful actions cannot constitute the basis for charges and be used as evidence in criminal proceedings.

63. According to Article 106 § 1, the inadmissibility of factual data as evidence and the possibility of their limited use in proceedings is established by the authority examining the case of its own motion or upon the request of a party. The party who has obtained the relevant piece of evidence bears the burden of proving its admissibility (Article 106 § 2).

64. According to Article 126, evidence obtained in the case must be thoroughly and objectively examined: it must be analysed, compared with other evidence, new evidence must be collected and its sources must be verified.

THE LAW

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

65. The applicant complained that the criminal proceedings against him had been unfair as his conviction for a corruption-related offence had been confirmed by evidence obtained through entrapment. He 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. The parties' arguments

66. The Government argued that the applicant could not claim to be a victim of a breach of Article 6 § 1 of the Convention, for the purposes of Article 34 of the Convention. They submitted, in particular, that the applicant was never in direct contact with Z.P. or any other person, nor was he ever contacted by any State bodies or officials. Even assuming that there was any entrapment by the NSS through Z.P., the supposed victim of the alleged entrapment would have been S.K. and not the applicant.

67. The Government further argued that Z.P. had reported only S.K. It was only after Z.P. recorded her conversation with the applicant on 4 July 2008 that it was revealed that the latter was aware of S.K.'s unlawful actions and was involved in them as well.

68. The applicant argued that his conviction had resulted directly from an offence incited by the NSS through a private person who had acted under its supervision and instructions.

2. The Court's assessment

69. The Government argued that the applicant could not claim to be the victim of an alleged entrapment as he had never been in direct contact with the authorities or Z.P. In the Government's view, if anyone, it was S.K. and not the applicant who could claim to be a victim of entrapment (see paragraph 66 above).

70. The Court has 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 (see *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, § 117, 15 October 2020 for the relevant test). In any event, no issue of indirect entrapment arises in the present case for the following reasons.

71. Although it was indeed S.K. and not the applicant who was directly contacted by NSS officer A.K. (see paragraph 11 above), the applicant's complaint of entrapment related not only to the episode of A.K. calling S.K. and asking him to help Z.P. but also to the actions of the latter who, as the applicant argued, had been acting under the supervision and instructions of the NSS (see paragraph 68 above). In addition, while Z.P. was mainly in contact with S.K. as he was directly in charge of the investigation against her son, contrary to the Government's claim (see paragraph 66 above), she had also been in direct contact with the applicant on at least two occasions, including on 7 July 2008, the day of the covert operation, when she proposed to leave the money with the applicant (see paragraphs 19 and 23). It is clear from the evidence in the present case and the Government's submissions (see

paragraphs 19 and 67 above) that on the date of the covert operation the NSS already had information that the applicant was aware of the matter. It is also clear from Z.P.'s statement made before the Regional Court that she had been instructed to record her conversations with the investigators when giving the bribe, without any distinction being made between S.K. and the applicant (see paragraph 37 above). This finding is further reinforced by the fact that, although the operation had been authorised in respect of S.K., as noted earlier, Z.P. had first offered the money to the applicant (see paragraphs 21 and 23 above).

72. Furthermore, in its judgment of 25 February 2010 the Regional Court, whose judgment was upheld upon appeal, convicted the applicant and S.K. as accomplices in the same crime, finding that they had accepted a bribe from Z.P. based on a prior agreement between them. Notably, the domestic courts made no distinction between the actions of the applicant and S.K. (see paragraphs 47 and 53 above).

73. Against this background, the Court considers that the applicant can claim to be a victim of a breach of Article 6 § 1 of the Convention. It therefore dismisses the Government's objection concerning the applicant's victim status.

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

B. Merits

1. The parties' arguments

75. The applicant submitted that Z.P. had acted as an *agent provocateur* as she had initiated the offence and had been acting under the supervision and instructions of the NSS. She was interested in cooperating with the authorities as her son was facing charges for a grave crime punishable by three to seven years' imprisonment. Eventually, Z.P.'s son was given a one-year suspended sentence. The applicant maintained that he had no effective opportunity of raising his plea of entrapment before the domestic courts.

76. The Government argued that Z.P. had acted on her own initiative, without first having informed the authorities. The NSS officers dealt with the matter only after Z.P. reported S.K. to them on 4 July 2008 (see paragraph 16 above). Referring to Z.P.'s evidence (see paragraph 37 above), the Government further argued that the applicant and S.K. had agreed to take a bribe from Z.P. as early as in February 2008.

77. The Government submitted that it was only from the conversation between the applicant and Z.P. on 4 July 2008 that it became clear that the applicant was involved in the matter.

78. The Government further submitted that the applicant's allegations of entrapment raised before the domestic courts concerned solely S.K. The NSS

had carried out two kinds of operational intelligence measure in respect of the applicant and S.K.: "imitation of giving a bribe" and "internal surveillance", both of which had been authorised by the District Court.

2. The Court's assessment

(a) General principles

79. The general principles concerning the issue of entrapment and the Court's methodology for examining complaints of entrapment are summarised in *Ramanauskas v. Lithuania* ([GC], no. 74420/01, §§ 49-61, ECHR 2008) and have recently been extensively elaborated in the *Akbay and Others* case (cited above, §§ 109-24, with further references).

80. In particular, 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). 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. If there has been such incitement or entrapment, the subsequent use of evidence obtained thereby in criminal proceedings against the person concerned raises an issue under Article 6 § 1 (see *Akbay and Others*, cited above, § 111-12).

81. As a second step, the Court will examine the way the domestic courts dealt with an applicant's plea of incitement, which is the procedural part of its examination of the *agent provocateur* complaint (see *Bannikova v. Russia*, no. 18757/06, §§ 51-65, 4 November 2010).

82. 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 *Akbay and Others*, cited above, § 121, with further references).

(b) Application of these principles to the present case

83. The Court notes that the applicant was found guilty of accepting, together with S.K., a bribe in the amount of USD 5,500 from Z.P. in return for a promise to help mitigate the charges against her son (see paragraphs 27 and 47 above).

84. To ascertain whether the NSS confined themselves to "investigating criminal activity in an essentially passive manner" in the present case, the

Court has regard to the following considerations. There was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences (see *Milinienė v. Lithuania*, no. 74355/01, § 37, 24 June 2008). However, the initiative was taken by Z.P. who, as the developments in the criminal case against her son seem to suggest (see paragraphs 28 and 75 above), was interested in co-operating with the NSS.

85. Furthermore, the Court observes that it appears from the materials in the case-file that a request for authorisation to carry out the operational intelligence measure "imitation of giving a bribe" was made by the NSS on 7 July 2008 (see paragraph 21 above), by which time NSS officer A.K. had already contacted S.K. asking him not to refuse Z.P.'s request and Z.P. had visited S.K. offering him a bribe to which he had agreed (see paragraphs 11 and 13 above). It also appears from those materials that on 2 July 2008, when A.K. called S.K., the former was also in contact with Z.P. (see paragraph 12 above).

86. The Court further observes that the investigation into A.P. had been pending in the division since January 2008 (see paragraph 6 above). However, there is nothing, except Z.P.'s own statements (see paragraph 37 above), to suggest that prior to 2 July 2008 either the applicant or S.K. had agreed to take a bribe from her, let alone that they had requested one. While it is not clear at which stage Z.P. had contacted the NSS, it is clear that she was already co-operating with the NSS when she filed a report on 4 July 2008 (see paragraphs 12 and 16 above). The Court therefore does not consider that Z.P. was acting as a private individual who had been instructed by the authorities to act as an informant only after she had reported the applicant's corrupt offer (compare *Matanović v. Croatia*, no. 2742/12, § 139, 4 April 2017; and *Ramanauskas v. Lithuania (no. 2)*, no. 55146/14, § 66, 20 February 2018).

87. In addition, it can be seen from the materials before the Court that on 7 July 2008 the applicant refused to accept the money when Z.P. offered to give him the marked banknotes (see paragraph 23 above). It is also clear from the recording of the conversation between S.K. and Z.P. that S.K. refused to take the money - at least on that day - more than once. Nevertheless, Z.P. left the money which was then discovered by the NSS officers after she left (see paragraphs 24 and 25 above).

88. The foregoing considerations are sufficient for the Court to find that the NSS did not merely "join" an ongoing offence; they instigated it (compare, *Malininas v. Lithuania*, no. 10071/04, § 37, 1 July 2008). Furthermore, the role of Z.P., who was acting under their direct supervision and control at least starting from 2 July 2008, went beyond that of an undercover agent and extended to that of an *agent provocateur*.

89. The Court therefore concludes that the applicant's offence would not have been committed without the authorities' influence. He was thus incited, as defined in the Court's case-law under Article 6 § 1 of the Convention, by

the NSS to commit the corruption-related offence of which he was subsequently convicted.

90. 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 *Akbay and Others*, cited above, § 120).

91. The Court reiterates that 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 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 (see *Ramanauskas*, cited above, §§ 69-70).

92. The Court observes that throughout the proceedings the applicant maintained that there had been incitement (see paragraphs 34 and 48 above). Accordingly, the domestic courts should at the very least have undertaken a thorough examination of whether or not the prosecuting authorities had incited the commission of a criminal act (*Ramanauskas*, cited above, § 71).

93. However, the Regional Court did not at all address the applicant's allegations (see paragraph 47 above) while the Court of Appeal, having merely relied on Z.P.'s statements, considered that it was the latter and her son who had been pressurised by the applicant and S.K. and dismissed the applicant's arguments in a rather summary manner (see paragraphs 37 and 53 above).

94. The Court notes that neither the Regional Court nor the Court of Appeal made any attempt to clarify the role played by A.K. and Z.P., including the reasons for A.K.'s initiative of calling S.K. (see paragraph 11 above) and Z.P.'s actions during the covert operation of 7 July 2008 (see paragraph 23 and 24 above).

95. In addition, the courts essentially relied on Z.P.'s evidence (see paragraph 37 above) who, as noted earlier (see paragraph 84 above), was interested in co-operating with the authorities and was in fact acting under the supervision and in accordance with the instructions of the NSS, which facts did not receive any attention from the courts. Not only did the courts rely on Z.P.'s evidence but they also completely disregarded the statements of M.P. and A.S. (see paragraphs 38 and 39 above), which were in clear contradiction with Z.P.'s version of the events. In particular, the evidence from A.S., A.P.'s defence lawyer, suggested that Z.P. had expressed her dissatisfaction with the

fact that S.K. had been unwilling to accept a bribe from her (see paragraph 39 above).

96. Despite all those elements, the domestic courts in essence refused to enter into the merits of the applicant's plea of entrapment. Therefore, in the Court's view the issue of incitement was not adequately addressed during the proceedings.

97. Having regard to the foregoing, the Court considers that the criminal proceedings against the applicant were incompatible with the notion of a fair trial.

98. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

99. Lastly, the applicant complained under Article 6 § 3 (d) of the Convention that the trial court dismissed his request to summon the attesting witness A.V., who had allegedly been present during the search of S.K's office. He also complained under Article 8 of the Convention that the interception and recording of his conversation with Z.P. had been unlawful as it had been carried out without court authorisation. These provisions read as follows:

Article 6 § 3 (d)

"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; ..."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

100. Having regard to the facts of the case, the submissions of the parties and its findings under Article 6 § 1 of the Convention, the Court considers that it has examined the main legal question raised in the present application and that there is no need to give a separate ruling on the admissibility and the merits of the complaints raised under Articles 6 § 3 (d) and 8 of the Convention (see, amongst many authorities, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and the references cited therein).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. 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."

102. The applicant claimed the sum of 13,477 euros (EUR) in respect of pecuniary damage, including EUR 11,167 for the loss of earnings due to imprisonment and EUR 2,310 for the cost of food parcels delivered to him by relatives while in prison. He further claimed EUR 10,000 in respect of non-pecuniary damage.

103. The Government considered the applicant's claims excessive and unsubstantiated.

104. The Court notes that the sum claimed by the applicant for loss of earnings corresponded to the difference between the loss of earnings during his six-years' imprisonment as of the date of submitting his claims and the amount of pension received considering that he became eligible for retirement benefit while in prison. To support his claim the applicant submitted a certificate from the police department where he used to work prior to imprisonment according to which his average monthly salary had been AMD 253,458 (approximately EUR 560). However, the applicant failed to submit any documentary proof with regard to the amount of the received pension. Accordingly, regard being had to the insufficient documentary evidence in its possession, the Court rejects the claim for loss of earnings. Furthermore, the Court does not discern any causal link between the violation found and the claim for the costs of food parcels; it therefore also rejects this claim. On the other hand, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the acknowledgement of a violation as such. The Court therefore finds it appropriate to award EUR 3,600.

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's plea of entrapment;

3. *Holds* that there is no need to examine the admissibility and the merits of the complaints under Articles 6 § 3 (d) and 8 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months, EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 21 December 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Jolien Schukking President