

CASE OF MALININAS v. LITHUANIA - Application no. 10071/04 (2008)

In the Chamber's judgment in the case of **JOKŠAS v. LITHUANIA** (12.11.2013) the European Court of Human Rights held, unanimously, that there had been:

- **a violation of the article 6 § 1 of the Convention (Right to a fair trial);**

I. Principal facts

The Applicant, Mr Sergejus Malininas, is a Lithuanian national. At the time of lodging his application he was serving a nine-year custodial sentence at Pravieniskes Prison, in Lithuania, for drug-dealing.

In 2003 the Applicant, together with his accomplice, was convicted by the Kaišiadorys District Court of attempted drug dealing in large quantities. The court established that the offence had been disclosed using a "Criminal Conduct Simulation Model" ("the model"), which had been authorised by the Prosecutor General on 29 May 2002. The Court found that the Applicant was caught on selling psychotropic drugs to an undercover agent, V., under the model.

Defence counsel contended that the Applicant had been stirred up by the agent provocateur, who had acted unlawfully, and therefore committed the offence. According to the Applicant, adduced evidences could not be relied on.

The trial court concluded that the use of the model in the case had been lawful. The court acknowledged that Mr Malininas' conduct from the beginning had been influenced by Officer V and added that it had not been established the applicant had sold or tried to sell drugs to anyone other than this officer. The Applicant was convicted of the attempted offence and sentenced to three years and six months' imprisonment.

Mr Malininas appealed. On 10 June 2003 the Kaunas Regional Court upheld the conviction, considering that the applicant was guilty of a completed offence, not a mere attempt. The Applicant's sentence was increased to nine years' imprisonment. Afterwards, the Applicant lodged a cassation appeal, but it was dismissed by the Supreme Court. However, the Applicant's conviction was again re-classified as an attempt to sell drugs in large quantities, but the sentence of nine years' imprisonment was retained.

II. Complaints and procedure

Relying on the Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, the case concerned Mr Sergejus Malininas' complaint that his conviction was unfair, not only because had he been entrapped by the police into committing an offence, but also because certain essential evidence had not been disclosed at his trial relating to the authorisation and use of the Criminal Conduct Simulation Model. The Applicant had also invoked an infringement of Article

8 of the Convention. However, the Court had limited its examination to the key issue under Article 6 § 1 of the Convention.

III. Decision of the Court

In accordance with a concept of entrapment in a breach of Article 6 § 1 of the Convention, the Court recalled the *Ramanauskas* judgement. “In respect of the former, there must be adequate safeguards against abuse, as the public interest cannot justify the use of evidence obtained as a result of police incitement. The Court held that its function under Article 6 § 1 is to review the quality of the domestic courts’ assessment of the alleged entrapment and to ensure that they adequately secured the accused’s rights of defence”.

The Court had taken the following considerations into account: there was no evidence that the applicant had committed any drug offences beforehand. No objective, judicially verified materials have been presented to the Court to demonstrate that the authorities had had good reason to suspect the applicant of drug dealing or of being pre-disposed to commit such an offence until approached by Officer V. The Court noted that the Applicant had been incited to commit the offence by the undercover police officer. Furthermore, In the recent case the Court concluded that there was an apparent instigation to commit a criminal act by intensively offering a significant sum of money for the supply of a large amount of drugs. Finally, the first instance court recognised the decisive role played by the police. Above mentioned arguments, in the Court’s view, “extended the police’ role beyond that of undercover agents to that of *agents provocateurs*” and that the initiative came not from the Applicant but from the agents provocateur.

Consequently, the Court concluded that there has been a violation of Article 6 § 1 of the Convention.

IV. Just satisfaction

The Applicant was awarded EUR 1,710 for costs and expenses.

V. Dissenting opinion

The judgment contains the dissenting opinion of judge Cabral Barreto.