GRAND CHAMBER

CASE OF BYKOV v. RUSSIA

(Application no. 4378/02)

JUDGMENT

STRASBOURG

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

In the case of Bykov v. Russia,

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

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Ljiljana Mijović,
Dean Spielmann,
David Thór Björgvinsson,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria, *judges,*
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 18 June 2008 and on 21 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 4378/02) against the Russian Federation lodged with the

1. The case originated in an application (no. 4378/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Anatoliy Petrovich Bykov ("the applicant"), on 21 December 2001.

2. The applicant was represented by Mr D. Krauss, Professor of Law at Humboldt University, Berlin, and by Mr J.-C. Pastille and Mr G. Padva, lawyers practising in Riga and Moscow respectively. The Russian Government ("the Government") were initially represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant complained under Article 6 § 1 and Article 8 of the Convention about the covert recording made at his home and its use as evidence in the ensuing criminal proceedings against him. He also alleged that his pre-trial detention was excessively long and not justified for the purposes of Article 5 § 3 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 7 September 2006 it was declared partly admissible by a Chamber of that Section composed of the following judges: Christos Rozakis, Loukis Loucaides, Françoise Tulkens, Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, and also of Søren Nielsen, Section Registrar. On 22 November 2007 a Chamber of that Section, composed of the following judges: Christos Rozakis, Loukis Loucaides, Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Dean Spielmann, and also of Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

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

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 June 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms V. MILINCHUK, *Agent*,
Ms I. MAYKE,
Ms Y. TSIMBALOVA,
Mr A. ZAZULSKIY, *Advisers*;

(b) *for the applicant*
Mr D. KRAUSS,
Mr J.-C. PASTILLE, *Counsel*,
Mr G. PADVA,
Ms J. KVJATKOVSKA, *Advisers.*

The applicant was also present.

The Court heard addresses by Mr Krauss and Ms Milinchuk, as well as the answers by Mr Pastille and Ms Milinchuk to questions put to the parties.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1960 and lives in Krasnoyarsk.

9. From 1997 to 1999 the applicant was chairman of the board of the Krasnoyarsk Aluminium Plant. At the time of his arrest in October 2000 he was a major shareholder and an executive of a corporation called OAO Krasenergomash-Holding and a founder of a number of affiliated firms. He was also a deputy of the Krasnoyarsk Regional Parliamentary Assembly.

A. Covert operation

10. In September 2000 the applicant allegedly ordered V., a member of his entourage, to kill S., the applicant's former business associate. V. did not comply with the order, but on 18 September 2000 he reported the applicant to the Federal Security Service of the Russian Federation ("the FSB"). On the following day V. handed in the gun which he had allegedly received from the applicant.

11. On 21 September 2000 the Prosecutor of the Severo-Zapadnyy District of Moscow opened a criminal investigation in respect of the applicant on suspicion of conspiracy to murder.

12. On 26 and 27 September 2000 the FSB and the police decided to conduct a covert operation to obtain evidence of the applicant's intention to murder S.

13. On 29 September 2000 the police staged the discovery of two dead men at S.'s home. They officially announced in the media that one of those killed had been identified as S. The other man was his business partner, I.

14. On 3 October 2000 V., acting on the police's instructions, came to see the applicant at his estate. He carried a hidden radio-transmitting device while a police officer outside received and recorded the transmission. He was received by the applicant in a "guest house", a part of the estate connected to his personal residence. In accordance with the instructions, V. engaged the applicant in conversation by telling him that he had carried out the assassination. As proof of his accomplishment he handed the applicant several objects taken from S. and I.: a certified copy of a mining project feasibility study marked with a special chemical agent, two watches belonging to S. and I. and 20,000 United States dollars (USD) in cash. At the end of the conversation V. took the cash, as suggested by the applicant. The police obtained a sixteen-minute recording of the dialogue between V. and the applicant.

15. On 4 October 2000 the applicant's estate was searched. Several watches were seized, including those belonging to S. and I. A chemical analysis was conducted and revealed the presence on the applicant's hands of the chemical agent which had been used to mark the feasibility study. The applicant was arrested.

16. On 27 February 2001 the applicant complained to the Prosecutor of the Severo-Zapadnyy District of Moscow that his prosecution had been unlawful because it involved numerous procedural violations of his rights, including the unauthorised intrusion into his home and the use of the radio-transmitting device. On 2 March 2001 the prosecutor dismissed his complaint, having found, in particular, that the applicant had let V. into his house voluntarily and that therefore there had been no intrusion. It was also found that no judicial authorisation had been required for the use of the radio-transmitting device because in accordance with the Operational-Search Activities Act, it was only required for the interception of communications transmitted by means of wire channels or mail services, none of which had been employed in the covert operation at issue.

B. Pre-trial detention

17. Following the applicant's arrest on 4 October 2000, on 6 October 2000 the Deputy Prosecutor of the Severo-Zapadnyy District of Moscow ordered his detention during the investigation, having found that it was "in accordance with the law" and necessary in view of the gravity of the charge and the risk that the applicant might influence witnesses. Further extensions were ordered by the competent prosecutor on 17 November 2000 (until 21 December 2000) and on 15 December 2000 (until 21 March 2001). The reasons for the applicant's continued detention were the gravity of the charge and the risk of his influencing the witnesses and obstructing the investigation. The applicant appealed against each of these decisions to a court.

18. On 26 January 2001 the Lefortovskiy District Court of Moscow examined the applicant's appeal against his continued detention on remand and confirmed the lawfulness of his detention. The court referred to the gravity of the charge and noted that this measure had been applied in accordance with the law. The applicant lodged a further appeal, which was also dismissed by the Moscow City Court.

19. In view of the forthcoming expiry of the term of the applicant's detention, its further extension was ordered by the competent prosecutor, first on 15 March 2001, until 4 April 2001, and then on 21 March 2001, until 4 June 2001, still on the grounds of the gravity of the charge and the risk of his influencing the witnesses and obstructing the investigation. The applicant challenged the extensions before the court.

20. On 11 April 2001 the Lefortovskiy District Court of Moscow declared that the applicant's detention until 4 June 2001 was lawful and necessary on account of the gravity of the charge. The

applicant lodged an appeal with the Moscow City Court, which was dismissed on 15 May 2001. The appeal court considered the applicant's detention lawful and necessary "until the bill of indictment had been submitted or until the applicant's immunity had been confirmed".

21. On 22 May 2001 the Deputy Prosecutor General extended the applicant's detention on remand until 4 September 2001, still on the grounds of the gravity of the charge and the risk of his influencing the witnesses and obstructing the investigation.

22. On 27 August 2001 the case was referred to the Tushinskiy District Court of Moscow. On 7 September 2001 the court scheduled the hearing for 26 September 2001 and authorised the applicant's further detention without indicating any reasons or the length of the extension. On 3 October 2001 the Moscow City Court examined and dismissed an appeal by the applicant, upholding his continued detention without elaborating on the reasons.

23. On 21 December 2001 the Meshchanskiy District Court of Moscow scheduled the hearing for 4 January 2002 and authorised the applicant's further detention, citing no reasons. The court did not indicate the length of the prospective detention. It again reviewed the lawfulness of the applicant's detention on 4 January 2002 but found that it was still necessary owing to the gravity of the charges and the "circumstances of the case". An appeal by the applicant to the Moscow City Court was dismissed on 15 January 2002.

24. Further applications by the applicant for release were examined on 23 January, 6 March, 11 March and 23 April 2002. As before, the Meshchanskiy District Court of Moscow refused his release, citing the gravity of the charge and the risk of his evading trial and influencing the witnesses. The applicant was released on 19 June 2002 following his conviction (see paragraph 45 below).

C. Criminal investigation and trial

25. On 3 October 2000, immediately after visiting the applicant in the "guest house", V. was questioned by the investigators. He reported on the contents of his conversation with the applicant and submitted that he had handed him the gun, the watches and the feasibility study. He was subsequently questioned on 12 October, 9 November, 8 December and 18 December 2000.

26. The applicant was questioned as a suspect for the first time on 4 October 2000. From October to December 2000 he was questioned at least seven times.

27. On 10 October 2000 the applicant and V. were questioned in a confrontation with each other. The applicant's legal counsel were present at the confrontation. The statements made by the applicant on that occasion were subsequently summarised in the indictment, of which the relevant part reads as follows:

> "At the confrontation between A.P. Bykov and [V.] on 10 October 2000 Bykov altered, in part, certain substantive details of his previous statements, as follows. [He] claims that he has been acquainted with [V.] for a long time, about 7 years; they have normal relations; the last time he saw him was on 3 October 2000, and before that they had been in contact about two years previously. He has never given any orders or instructions to [V.], including any concerning [S.]. When [V.] came to see him on 3 October 2000 he began to tell him off for coming to him. When he asked [V.] who had told him to kill [S.] he replied that nobody had, he had just wanted to prove to himself that he could do it. He began to comfort [V.], saying that he could help with his father; [he] did not suggest that [V.] flee the town [or] the country, and did not promise to help him financially. He did not instruct [V.] on what to do if [V.] was arrested; he asked him what was going to happen if he was arrested; [V.] said that he would tell how it all happened and would confess to having committed the crime, [and the applicant] approved of that. Concerning K., Bykov stated that this was his partner who lived and worked in Switzerland; he admitted *de facto* that he had spoken to him on the phone at the beginning of August ... but had given him no directions about [V.]"

28. On 13 October 2000 the applicant was charged with conspiracy to murder. Subsequently the charges were extended to include conspiracy to acquire, possess and handle firearms.

29. On 8 December 2000 two appointed linguistic experts examined the recording of the applicant's conversation with V. of 3 October 2000 and answered the following questions put to them:

> "1. Is it possible to establish, on the basis of the text of the conversation submitted for examination, the nature of relations between Bykov and [V.], the extent of their closeness, sympathy for each other, subordination; how is it expressed?
>
> 2. Was Bykov's verbal reaction to [V.]'s statement about the 'murder' of [S.] natural assuming he had ordered the murder of [S.]?
>
> 3. Are there any verbal signs indicating that Bykov expressed mistrust about [V.]'s information?
>
> 4. Is it possible to assess Bykov's verbal style as unequivocally aiming at closing the topic, ending the conversation?

5. Are there any identifiable stylistic, verbal signs of fear (caution) on Bykov's part in relation to [V.]?"

30. In respect of the above questions the experts found:

– on question 1, that the applicant and V. had known each other for a long time and had rather close and generally sympathetic relations; that V. had shown subordination to the applicant; that the applicant had played an instructive role in the conversation;

– on question 2, that the applicant's reaction to V.'s information about the accomplished murder was natural and that he had insistently questioned V. on the technical details of its execution;

– on question 3, that the applicant had shown no sign of mistrusting V.'s confession to the murder;

– on question 4, that the applicant had not shown any clear signs of wishing to end or to avoid the conversation;

– on question 5, that the applicant had not shown any fear of V.; on the contrary, V. appeared to be afraid of the applicant.

31. On 11 January 2001 the investigation was completed and the applicant was allowed access to the case file.

32. On 27 August 2001 the case was referred to the Tushinskiy District Court of Moscow.

33. On 22 October 2001 the Tushinskiy District Court declined jurisdiction in favour of the Meshchanskiy District Court of Moscow, having established that the venue of the attempted murder lay within that court's territorial jurisdiction.

34. On 16 December 2001 V. made a written statement certified by the Russian consulate in the Republic of Cyprus repudiating his statements against the applicant. He submitted that he had made those statements under pressure from S. Two deputies of the State Duma, D. and Y.S., were present at the consulate to witness the repudiation. On the same day they recorded an interview with V. in which he explained that S. had persuaded him to make false statements against the applicant.

35. On 4 February 2002 the Meshchanskiy District Court of Moscow began examining the charges against the applicant. The applicant pleaded not guilty. At the trial he challenged the admissibility of the recording of his conversation with V. and of all other evidence obtained through the covert operation. He alleged that the police interference had been unlawful and that he had been induced into self-incrimination. Furthermore, he claimed that the recording had involved unauthorised intrusion into his home. He contested the interpretation of the recording by the experts and alleged that nothing in his dialogue with V. disclosed prior knowledge of a murder conspiracy.

36. During the trial the court dismissed the applicant's objection to the covert operation and admitted as lawfully obtained evidence the recording with its transcript, the linguistic expert report, V.'s statements, and the evidence showing that the applicant had accepted the feasibility study and the watches from V. It dismissed the argument that there had been an unauthorised intrusion into the applicant's premises, having found, firstly, that the applicant had expressed no objection to V.'s visit and, secondly, that their meeting had taken place in the "guest house", which was intended for business meetings and therefore did not encroach on the applicant's privacy. The court refused to admit as evidence the official records of the search at the applicant's estate because the officers who had conducted the search on 4 October 2000 had not been covered by the authorisation.

37. The following persons were examined in the oral proceedings before the court:

S. explained his relations with the applicant and their conflict of interests in the aluminium industry. He confirmed that he had participated in the covert operation; he also confirmed that in 2001 V. had told him that he had been paid off to withdraw his statements against the applicant.

Twenty-five witnesses answered questions concerning the business links of the applicant, V. and S. with the aluminium plant and other businesses in Krasnoyarsk; the relations and connections between them; the existence of the conflict of interests between the applicant and S.; the events of 3 October 2000, namely the arrival of V. at the "guest house", his conversation with the applicant and the handing of the documents and the watches to the applicant; and the circumstances surrounding V.'s attempted withdrawal of his statements against the applicant.

Seven experts were examined: a technical expert gave explanations about the recording of data received by way of a radio-transmitting device; a sound expert explained how a transcript of the recording of the applicant's conversation with V. had been produced; two expert linguists submitted that they had used both the tape and the recording transcript in their examination; an expert psychologist answered questions concerning his findings (evidence subsequently excluded as obtained unlawfully – see paragraph 43 below); and two corroborative experts upheld the conclusions of the expert linguists and the sound

43 below), and two corroborative experts upheld the conclusions of the expert linguists and the sound experts.

Seven attesting witnesses answered questions concerning their participation in various investigative measures: the receipt of the gun handed in by V., the copying of the video and audio tapes, the treatment of the material exhibits with a chemical agent, the "discovery of the corpses" in the operative experiment, and the house search.

Four investigation officers were examined: an FSB officer submitted that on 18 September 2000 V. had written a statement in his presence that the applicant had ordered him to kill S., and had handed in the gun; he also explained how the operative experiment had been carried out; two officers of the prosecutor's office and one officer of the Interior Ministry also described the operative experiment and explained how the copies of the recording of the applicant's conversation with V. had been made.

38. On 15 May 2002 during the court hearing the prosecutor requested to read out the records of the questioning of five witnesses not present at the hearing. The statements made by V. during the pre-trial investigation were among them.

39. The applicant's counsel said that he had no objections. The court decided to grant the request, having noted that "the court took exhaustive measures to call these witnesses to the court hearing and found that ... V.'s whereabouts could not be established and he could not be called to the courtroom even though a number of operational search measures were taken by the FSB and an enquiry was made to the National Central Bureau of Interpol by the Ministry of the Interior ...". These statements were admitted as evidence.

40. The court also examined evidence relating to V.'s attempted withdrawal of his statements against the applicant. It established that during the investigation V. had already complained that pressure had been exerted on him to repudiate his statements against the applicant. It also established that the witness D., who was present at the consulate when V. had repudiated his statements, was a close friend of the applicant. The other witness, Y.S., had arrived at the consulate late and did not see the document before it was certified.

41. It was also noted that both the applicant and V. had undergone a psychiatric examination during the investigation and both had been found fit to participate in the criminal proceedings.

42. Other evidence examined by the court included: expert reports produced by chemical, ballistics, linguistic, sound and technical experts; written reports on the operative experiment; V.'s written statement of 18 September 2000; a certified description of the gun handed in by V.; and records of the applicant's confrontation with V. on 20 October 2000.

43. The applicant challenged a number of items of evidence, claiming that they had been obtained unlawfully. The court excluded some of them, in particular the expert report by a psychologist who had examined the recording of the applicant's conversation with V. and the police report on the search carried out on 4 October 2000. The attempt to challenge the audio tape containing the recording of the applicant's conversation with V., and the copies of the tape, was not successful and they were admitted as lawfully obtained evidence.

44. On 19 June 2002 the Meshchanskiy District Court of Moscow gave judgment, finding the applicant guilty of conspiracy to murder and conspiracy to acquire, possess and handle firearms. The finding of guilt was based on the following evidence: the initial statement by V. that the applicant had ordered him to kill S.; the gun V. had handed in; the statements V. had made in front of the applicant when they had been confronted during the questioning on 10 October 2000; numerous witness statements confirming the existence of a conflict between the applicant and S.; and the physical evidence obtained through the covert operation, namely the watches and the feasibility study. Although the recording of the applicant's conversation with V. was played at the hearing, its contents did not feature among the evidence or as part of the court's reasoning. In so far as the record was mentioned in the judgment, the court relied solely on the conclusions of the linguistic experts (see paragraph 30 above) and on several reports confirming that the tape had not been tampered with.

45. The court sentenced the applicant to six and a half years' imprisonment and, having deducted the time already spent in pre-trial detention, conditionally released him on five years' probation.

46. The applicant appealed against the judgment, challenging, *inter alia*, the admissibility of the evidence obtained through the covert operation and the court's interpretation of the physical evidence and the witnesses' testimonies.

47. On 1 October 2002 the Moscow City Court upheld the applicant's conviction and dismissed his appeal, including the arguments relating to the admissibility of evidence.

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48. On 22 June 2004 the Supreme Court of the Russian Federation examined the applicant's case in supervisory proceedings. It modified the judgment of 19 June 2002 and the appeal decision of 1 October 2002, redefining the legal classification of one of the offences committed by the applicant. It found the applicant guilty of "incitement to commit a crime involving a murder", and not "conspiracy to murder". The rest of the judgment, including the sentence, remained unchanged.

II. RELEVANT DOMESTIC LAW

A. Pre-trial detention

49. Until 1 July 2002 criminal-law matters were governed by the Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic (CCrP).

50. "Preventive measures" or "measures of restraint" included an undertaking not to leave a town or region, personal security, bail and detention on remand (Article 89). A decision to detain someone on remand could be taken by a prosecutor or a court (Articles 11, 89 and 96).

1. Grounds for detention on remand

51. When deciding whether to remand an accused in custody, the competent authority was required to consider whether there were "sufficient grounds to believe" that he or she would abscond during the investigation or trial or obstruct the establishment of the truth or reoffend (Article 89). It also had to take into account the gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances (Article 91).

52. Before 14 March 2001, detention on remand was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Article 96). On 14 March 2001 the CCrP was amended to permit defendants to be remanded in custody if the charge carried a sentence of at least two years' imprisonment or if they had previously defaulted or had no permanent residence in Russia or if their identity could not be ascertained. The amendments of 14 March 2001 also repealed the provision that permitted defendants to be remanded in custody on the sole ground of the dangerous nature of the criminal offence committed.

2. Time-limits for detention on remand

53. The CCrP provided for a distinction between two types of detention on remand: the first being "during the investigation", that is, while a competent agency – the police or a prosecutor's office – was investigating the case, and the second being "before the court" (or "during the judicial proceedings"), at the judicial stage. Although there was no difference in practice between them (the detainee was held in the same detention facility), the calculation of the time-limits was different.

54. From the date the prosecutor referred the case to the trial court, the defendant's detention was classified as "before the court" (or "during the judicial proceedings").

55. Before 14 March 2001 the CCrP did not set any time-limit for detention "during the judicial proceedings". On 14 March 2001 a new Article 239-1 was inserted which established that the period of detention "during the judicial proceedings" could not generally exceed six months from the date the court received the file. However, if there was evidence to show that the defendant's release might impede a thorough, complete and objective examination of the case, a court could – of its own motion or on a request by a prosecutor – extend the detention by no longer than three months. These provisions did not apply to defendants charged with particularly serious criminal offences.

B. Operative experiments

56. The Operational-Search Activities Act of 12 August 1995 (no. 144-FZ) provides, in so far as relevant, as follows:

Section 6: Operational-search activities

"In carrying out investigations the following measures may be taken:

...

9. supervision of postal, telegraphic and other communications;

10. telephone interception;

11. collection of data from technical channels of communication;

...

14. operative experiments.

...

Operational-search activities involving supervision of postal, telegraphic and other communications, telephone interception through [telecommunication companies], and the collection of data from technical channels of communication are to be carried out by technical means by the Federal Security Service and the agencies of the Interior Ministry in accordance with decisions and agreements signed between the agencies involved.

..."

Section 8: Conditions governing the performance of operational-search activities

"Operational-search activities involving interference with the constitutional right to privacy of postal, telegraphic and other communications transmitted by means of wire or mail services, or with the privacy of the home, may be conducted, subject to a judicial decision, following the receipt of information concerning:

1. the appearance that an offence has been committed or is ongoing, or a conspiracy to commit an offence whose investigation is mandatory;

2. persons conspiring to commit, or committing, or having committed an offence whose investigation is mandatory;

...

Operative experiments may only be conducted for the detection, prevention, interruption and investigation of a serious crime, or for the identification of persons preparing, committing or having committed it.

..."

Section 9: Grounds and procedure for judicial authorisation of operational-search activities involving interference with the constitutional rights of individuals

"The examination of requests for the taking of measures involving interference with the constitutional right to privacy of correspondence and telephone, postal, telegraphic and other communications transmitted by means of wire or mail services, or with the right to privacy of the home, shall fall within the competence of a court at the place where the requested measure is to be carried out or at the place where the requesting body is located. The request must be examined immediately by a single judge; the examination of the request may not be refused.

...

The judge examining the request shall decide whether to authorise measures involving interference with the above-mentioned constitutional right, or to refuse authorisation, indicating reasons.

..."

Section 11: Use of information obtained through operational-search activities

"Information gathered as a result of operational-search activities may be used for the preparation and conduct of the investigation and court proceedings ... and used as evidence in criminal proceedings in accordance with legal provisions regulating the collection, evaluation and assessment of evidence. ..."

C. Evidence in criminal proceedings

57. Article 69 of the CCrP provided as follows:

"...

Evidence obtained in breach of the law shall be considered to have no legal force and cannot be relied on as grounds for criminal charges."

The 2001 Code of Criminal Procedure of the Russian Federation, which replaced the CCrP of the Russian Soviet Federative Socialist Republic from 1 July 2002, provides as follows, in so far as relevant:

Article 75: Inadmissible evidence

"1. Evidence obtained in breach of this Code shall be inadmissible. Inadmissible evidence shall have no legal force and

cannot be relied on as grounds for criminal charges or for proving any of the [circumstances for which evidence is required in criminal proceedings].

..."

Article 235

"...

5. If a court decides to exclude evidence, that evidence shall have no legal force and cannot be relied on in a judgment or other judicial decision, or be examined or used during the trial.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

58. The applicant complained that his pre-trial detention had been excessively long and that it had been successively extended without any indication of relevant and sufficient reasons. He relied on Article 5 § 3 of the Convention, which provides as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

59. The Government submitted that the applicant's detention had not been excessively long and argued that the investigation of his case had taken time because of its complexity and scale. They also claimed that, given his personality, there had been an obvious risk that the applicant might evade prosecution, influence witnesses and obstruct the course of justice, which justified his continued detention.

60. The applicant maintained his complaint, claiming that the grounds given for his detention and its repeated extension had been unsupported by any reasoning or factual information.

61. According to the Court's settled case-law, the presumption under Article 5 is in favour of release. As established in *Neumeister v. Austria* (27 June 1968, § 4, Series A no. 8), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.

62. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI).

63. The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, *Weinsztal v. Poland,* no. 43748/98, § 50, 30 May 2006, and *McKay v. the United Kingdom* [GC], no. 543/03, § 43, ECHR 2006-X).

64. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings (see, among other authorities, *Letellier v. France*, 26 June 1991, § 35, Series A no. 207, and *Yağcı and Sargın v. Turkey*, 8 June 1995, § 50, Series A no. 319-A). In this connection, the Court reiterates that the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release

making it incumbent on the detained person to demonstrate the existence of reasons warranting his release (see *Ilijkov v. Bulgaria*, no. 33977/96, § 85, 26 July 2001).

65. Turning to the instant case, the Court observes that the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings. Moreover, from 7 September 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial.

66. As regards the Government's argument that the circumstances of the case and the applicant's personality were self-evident for the purpose of justifying his pre-trial detention, the Court does not consider that this in itself absolved the courts from the obligation to set out reasons for coming to this conclusion, in particular in the decisions taken at later stages. It reiterates that where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention (see *Panchenko v. Russia*, no. 45100/98, §§ 99 and 105, 8 February 2005, and *Ilijkov*, cited above, § 86).

67. The Court therefore finds that the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, eight months and 15 days.

68. There has therefore been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The applicant complained that the covert operation had involved an unlawful intrusion into his home and that the interception and recording of his conversation with V. had interfered with his private life. He alleged a violation of Article 8 of the Convention, which reads as follows:

> "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."

70. The Government maintained that the covert operation, and in particular the interception and recording of the applicant's conversation with V., had been conducted in accordance with the Operational-Search Activities Act. They claimed that it constituted an "operative experiment" within the meaning of the Act. They further argued that no judicial authorisation had been required for the purposes of the present case because pursuant to section 8 of the Act, it was only required for the interception of communications transmitted by means of wire channels or mail services, none of which had been employed in the covert operation at issue. They also denied that there had been an intrusion into the applicant's home since the "guest house" could not be considered his home, and in any case he had let V. in voluntarily. They further claimed that in the circumstances of the case the covert operation had been indispensable because without the interception of the applicant's conversation with V. it would have been impossible to verify the suspicion that he had committed a serious crime. They contended that the measures taken to investigate the crime had been proportionate to the seriousness of the offence in question.

71. The applicant maintained, on the contrary, that the covert operation had involved an unlawful and unjustified interference with his right to respect for his private life and home. He claimed that there had been an unlawful intrusion into his home and contested the Government's argument that he had not objected to V.'s entry because his consent had not extended to accepting a police agent on his premises. He also claimed that the recording of his conversation with V. had interfered with his privacy and had therefore required prior judicial authorisation.

72. The Court notes that it is not in dispute that the measures carried out by the police in the conduct of the covert operation amounted to an interference with the applicant's right to respect for his private life

under Article 8 § 1 of the Convention (see *Wood v. the United Kingdom*, no. 23414/02, § 29, 16 November 2004; *M.M. v. the Netherlands*, no. 39339/98, §§ 36-42, 8 April 2003; and *A. v. France*, 23 November 1993, Series A no. 277-B). The principal issue is whether this interference was justified under Article 8 § 2, notably whether it was "in accordance with the law" and "necessary in a democratic society", for one of the purposes enumerated in that paragraph.

73. In this connection, the Court notes that the domestic authorities put forward two arguments in support of the view that the covert operation had been lawful. The first-instance court found that there had been no "intrusion" or breach of the applicant's privacy because of the absence of objections to V.'s entry into the premises and because of the "non-private" purpose of these premises. The prosecutor's office, in addition to that, maintained that the covert operation had been lawful because it had not involved any activity subject to special legal requirements and the police had thus remained within the domain of their own discretion.

74. The Court observes that the Operational-Search Activities Act is expressly intended to protect individual privacy by requiring judicial authorisation for any operational-search activities that could interfere with it. The Act specifies two types of protected privacy: firstly, privacy of communications by wire or mail services and, secondly, privacy of the home. As regards the latter, the domestic authorities, notably the Meshchanskiy District Court of Moscow, argued that V.'s entering the "guest house" with the applicant's consent did not constitute an intrusion amounting to interference with the privacy of the applicant's home. As to the question of privacy of communications, it was only addressed as a separate issue in the prosecutor's decision dismissing the applicant's complaint. In his opinion, the applicant's conversation with V. remained outside the scope of protection offered by the Act because it did not involve the use of "wire or mail services". The same argument was put forward by the Government, who considered that the requirement of judicial authorisation did not extend to the use of the radio-transmitting device and that the covert operation could not therefore be said to have breached domestic law.

75. Having regard to the above, it is clear that the domestic authorities did not interpret the Operational-Search Activities Act as requiring prior judicial authorisation in the circumstances of the case at hand, since the case was found not to involve the applicant's "home" or the use of wire or mail services within the meaning of section 8 of the Act. The measure was considered to be an investigative step within the domain of the investigating authorities' own discretion.

76. The Court reiterates that the phrase "in accordance with the law" not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. In the context of covert surveillance by public authorities, in this instance the police, domestic law must provide protection against arbitrary interference with an individual's right under Article 8. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures (see *Khan v. the United Kingdom*, no. 35394/97, § 26, ECHR 2000-V).

77. The Court further observes that the Operational-Search Activities Act permitted so-called "operative experiments" to be conducted for the investigation of serious crime. While the law itself did not define what measures such "experiments" could involve, the national authorities took the view that there existed no statutory system in Russian law regulating the interception or recording of private communications through a radio-transmitting device. The Government argued that the existing regulations on telephone tapping were not applicable to radio-transmitting devices and could not be extended to them by analogy. On the contrary, they emphasised the difference between the two by indicating that no judicial authorisation for the use of a radio-transmitting device was required, for the reason that this technology fell outside the scope of any existing regulations. Thus, the Government considered that the use of technology not listed in section 8 of the Operational-Search Activities Act for the interception was not subject to the formal requirements imposed by the Act.

78. The Court has consistently held that when it comes to the interception of communications for the purpose of a police investigation, "the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence" (see *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82). In particular, in order to comply with the requirement of the "quality of the law", a law which confers discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. The degree of precision

required of the "law" in this connection will depend upon the particular subject-matter. Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Huvig v. France*, 24 April 1990, §§ 29 and 32, Series A no. 176-B; *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II; and *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V).

79. In the Court's opinion, these principles apply equally to the use of a radio-transmitting device, which, in terms of the nature and degree of the intrusion involved, is virtually identical to telephone tapping.

80. In the instant case, the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. In particular, the legal discretion of the authorities to order the interception was not subject to any conditions, and the scope and the manner of its exercise were not defined; no other specific safeguards were provided for. Given the absence of specific regulations providing safeguards, the Court is not satisfied that, as claimed by the Government, the possibility for the applicant to bring court proceedings seeking to declare the "operative experiment" unlawful and to request the exclusion of its results as unlawfully obtained evidence met the above requirements.

81. It follows that in the absence of specific and detailed regulations, the use of this surveillance technique as part of an "operative experiment" was not accompanied by adequate safeguards against various possible abuses. Accordingly, its use was open to arbitrariness and was inconsistent with the requirement of lawfulness.

82. The Court concludes that the interference with the applicant's right to respect for private life was not "in accordance with the law", as required by Article 8 § 2 of the Convention. In the light of this conclusion, the Court is not required to determine whether the interference was "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8. Nor is it necessary to consider whether the covert operation also constituted an interference with the applicant's right to respect for his home.

83. Accordingly, there has been a violation of Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

84. The applicant complained that he had been tricked by the police into making self-incriminating statements in his conversation with V. and that the court had admitted the record of this conversation as evidence at the trial. He alleged a violation of Article 6 § 1, which provides, in so far as relevant:

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

85. The Government submitted that the criminal proceedings against the applicant had been conducted lawfully and with due respect for the rights of the accused. They pointed out that the applicant's conviction had been based on an ample body of evidence of which only part had been obtained through the covert operation. The evidence relied on by the courts had included statements by more than 40 witnesses, expert opinions, and various items of physical and documentary evidence which provided a broad and consistent basis for the finding of guilt. The Government pointed out that it had been open to the applicant to challenge in adversarial proceedings the evidence obtained through the covert operation and that he had availed himself of this possibility.

86. The Government further maintained that the collection and the use of evidence against the applicant had involved no breach of his right to silence, or oppression, or defiance of his will. They pointed out that at the time when the recording was made the applicant had not been in detention and had not known about the investigation. In his conversation with V. he had acted freely and had been on an equal footing with his interlocutor, who had not been in a position to put any pressure on him. The Government contended that the evidence obtained through the covert operation had been perfectly reliable and that there had been no grounds to exclude the recording or other related evidence. In this connection, they argued that the present case should be distinguished from the case of *Allan v. the United*

Kingdom (no. 48539/99, ECHR 2002-IX), where the covert operation had taken place in a detention facility at a time when the applicant had been particularly vulnerable, and the Court had described this as "oppressive".

87. The applicant, on the contrary, maintained that his conviction had been based on illegally obtained evidence, in breach of his right to remain silent and the privilege against self-incrimination. He alleged that his conversation with V. had in fact constituted a concealed interrogation, unaccompanied by any procedural guarantees. Finally, he denied that the record of this conversation had any probative value and claimed that it should not have been admitted as evidence at trial.

A. General principles established in the Court's case-law

88. The Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV; and *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX).

89. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see, among other authorities, *Khan*, cited above, § 34; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Heglas v. the Czech Republic*, no. 5935/02, §§ 89-92, 1 March 2007; and *Allan*, cited above, § 42).

90. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, among other authorities, *Khan*, cited above, §§ 35 and 37, and *Allan*, cited above, § 43).

91. As regards, in particular, the examination of the nature of the Convention violation found, the Court observes that notably in the cases of *Khan* (cited above, §§ 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, §§ 37-38) it found the use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for their private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.

92. As regards the privilege against self-incrimination or the right to remain silent, the Court reiterates that these are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports* 1996-I). The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saunders v. the United Kingdom*, 17 December 1996, §§ 68-69, *Reports* 1996-VI; *Allan*, cited above, § 44; *Jalloh*, cited above, §§ 94-117; and *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, §§ 53-63, ECHR 2007-...). In examining whether a procedure has extinguished the very

essence of the privilege against self-incrimination, the Court must examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 54-55, ECHR 2000-XII, and *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III).

93. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, *mutatis mutandis*, *Heaney and McGuinness*, cited above, §§ 57-58).

B. Application of those principles to the present case

94. The Court observes that in contesting at his trial the use of the material obtained through the "operative experiment", the applicant put forward two arguments. Firstly, he argued that the evidence obtained from the covert operation, in particular the recording of his conversation with V., was unreliable and open to a different interpretation from that given by the domestic courts. Secondly, he alleged that the use of such evidence ran counter to the privilege against self-incrimination and his right to remain silent.

95. As regards the first point, the Court reiterates that where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see *Allan*, cited above, § 47). In the present case, the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal. The grounds for the challenge were the alleged unlawfulness and trickery in obtaining evidence and the alleged misinterpretation of the conversation recorded on the tape. Each of these points was addressed by the courts and dismissed in reasoned decisions. The Court notes that the applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence.

96. The Court further observes that the impugned recording, together with the physical evidence obtained through the covert operation, was not the only evidence relied on by the domestic court as the basis for the applicant's conviction. In fact, the key evidence for the prosecution was the initial statement by V., who had reported to the FSB that the applicant had ordered him to kill S., and had handed in the gun (see paragraph 10 above). This statement, which gave rise to the investigation, was made by V. before, and independently from, the covert operation, in his capacity as a private individual and not as a police informant. Furthermore, he reiterated his incriminating statements during his subsequent questioning on several occasions and during the confrontation between him and the applicant at the pre-trial stage.

97. While it is true that V. was not cross-examined at the trial, the failure to do so was not imputable to the authorities, who took all necessary steps to establish his whereabouts and have him attend the trial, including by seeking the assistance of Interpol. The trial court thoroughly examined the circumstances of V.'s withdrawal of his incriminating statements and came to a reasoned conclusion that the repudiation was not trustworthy. Moreover, the applicant was given an opportunity to question V. on the substance of his incriminating statements when they were confronted during the questioning on 10 October 2000. Some importance is also to be attached to the fact that the applicant's counsel expressly agreed to having V.'s pre-trial testimonies read out in open court. Finally, V.'s incriminating statements were corroborated by circumstantial evidence, in particular numerous witness testimonies confirming the existence of a conflict of interests between the applicant and S.

98. In view of the above, the Court accepts that the evidence obtained from the covert operation was not the sole basis for the applicant's conviction, corroborated as it was by other conclusive evidence. Nothing has been shown to support the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary.

99. It remains for the Court to examine whether the covert operation, and the use of evidence obtained thereby, involved a breach of the applicant's right not to incriminate himself and to remain silent. The applicant argued that the police had overstepped the limits of permissible behaviour by secretly recording his conversation with V., who was acting on their instructions. He claimed that his conviction had resulted from trickery and subterfuge incompatible with the notion of a fair trial.

100. The Court recently examined similar allegations in the case of *Heglas* (cited above). In that case the applicant had admitted his participation in a robbery in the course of a conversation with a person who had been fitted by the police with a listening device hidden under her clothes. The Court dismissed the applicant's complaint under Article 6 of the Convention concerning the use of the recording, finding that he had had the benefit of adversarial proceedings, that his conviction had also been based on evidence other than the impugned recording, and that the measure had been aimed at detecting a serious offence and had thus served an important public interest. The applicant, before the recording was made, had not been officially questioned about, or charged with, the criminal offence.

101. The circumstances of the covert operation conducted in the *Heglas* case were essentially different from those of the *Allan* case (cited above), where a violation of Article 6 was found. In the latter case the applicant was in pre-trial detention and expressed his wish to remain silent when questioned by the investigators. However, the police primed the applicant's cellmate to take advantage of the applicant's vulnerable and susceptible state following lengthy periods of interrogation. The Court, relying on a combination of these factors, considered that the authorities' conduct amounted to coercion and oppression and found that the information had been obtained in defiance of the applicant's will.

102. The Court notes that in the present case the applicant had not been under any pressure to receive V. at his "guest house", to speak to him, or to make any specific comments on the matter raised by V. Unlike the applicant in the *Allan* case (cited above), the applicant was not detained on remand but was at liberty on his own premises attended by security and other personnel. The nature of his relations with V. – subordination of the latter to the applicant – did not impose any particular form of behaviour on him. In other words, the applicant was free to see V. and to talk to him, or to refuse to do so. It appears that he was willing to continue the conversation started by V. because its subject matter was of personal interest to him. Thus, the Court is not convinced that the obtaining of evidence was tainted with the element of coercion or oppression which in the *Allan* case the Court found to amount to a breach of the applicant's right to remain silent.

103. The Court also attaches weight to the fact that in making their assessment the domestic courts did not directly rely on the recording of the applicant's conversation with V., or its transcript, and did not seek to interpret specific statements made by the applicant during the conversation. Instead they examined the expert report drawn up on the conversation in order to assess his relations with V. and the manner in which he involved himself in the dialogue. Moreover, at the trial the recording was not treated as a plain confession or an admission of knowledge capable of lying at the core of a finding of guilt; it played a limited role in a complex body of evidence assessed by the court.

104. Having examined the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation was put, the Court finds that the proceedings in the applicant's case, considered as a whole, were not contrary to the requirements of a fair trial.

105. It follows that there has been no violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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."

107. The applicant claimed compensation for the pecuniary and non-pecuniary damage sustained as a result of the alleged violations of the Convention.

108. As regards pecuniary damage, the applicant claimed 4,059,061.80 Russian roubles (119,089.25 euros (EUR)), which represented his loss of earnings during his pre-trial detention. As regards non-pecuniary damage, the applicant claimed that he had suffered emotional distress and a diminished quality of life and requested compensation for this in an amount to be determined by the Court.

109. The Government contested these claims as manifestly ill-founded. They considered that any finding by the Court of a violation would constitute sufficient just satisfaction in the present case.

110. The Court notes that the applicant's claim for pecuniary damage relates to the complaint about his pre-trial detention, in respect of which a violation of Article 5 § 3 has been found (see paragraph 68 above). It reiterates that there must be a clear causal connection between the damage claimed by the

above). It reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994, §§ 16-20, Series A no. 285-C; see also *Berktay v. Turkey*, no. 22493/93, § 215, 1 March 2001). The Court does not discern any causal link between the authorities' failure to adduce relevant and sufficient reasons for the applicant's continued detention and the loss of income he alleged (see *Dzelili v. Germany*, no. 65745/01, §§ 107-13, 10 November 2005).

111. On the other hand, it considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Considering the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 under this head.

B. Costs and expenses

112. In the proceedings before the Chamber the applicant claimed EUR 93,246.25 in respect of costs and expenses. For his legal representation before the domestic courts the applicant paid the equivalent of EUR 60,691.61 to Mr G. Padva, his defence counsel in the criminal proceedings. He submitted a full set of receipts confirming the payment of this sum to Mr Padva's office. In the proceedings before the Court, the applicant was also represented by Mr Krauss and Mr J. Pastille, to whom he paid an aggregate amount of EUR 69,839.64 (EUR 32,554.64 in the proceedings before the Chamber and EUR 37,285 before the Grand Chamber). In respect of their services he provided an invoice for 25,583.70 United States dollars, indicating the number of hours and the hourly rates used as a basis, plus various expenses. Two further invoices – by Mr Pastille for EUR 5,000 and by a law firm, "Rusanovs, Rode, Buss", for EUR 7,500 – did not contain any particulars. Following the public hearing before the Grand Chamber the applicant supplemented the claims and provided an invoice for EUR 37,285 which comprised EUR 30,600 in respect of lawyers' fees, indicating the number of hours spent by each counsel and adviser, and EUR 6,685 for travel expenses.

113. The Government claimed that these expenditures had not been incurred necessarily and were unreasonable as to quantum. They considered that the number of legal counsel engaged in the case was not justified by the circumstances or the complexity of the case. Commenting on specific sums, they pointed out that Mr Padva's invoice contained no itemised list of services rendered to the applicant under the legal services agreement. They also disputed the hourly rates charged by Mr Krauss, Mr Pastille and their associates, claiming that they were unreasonable and in excess of the average legal rates. They also challenged the invoices for EUR 5,000 and for EUR 7,500, claiming that in the absence of any itemised list of services or financial receipts there was no proof that these expenses had actually been incurred. The Government considered that a sum of EUR 3,000 would be sufficient under this head.

114. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Furthermore, legal costs are recoverable only in so far as they relate to the violation found (see, for example, *I.J.L. and Others v. the United Kingdom* (just satisfaction), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). In the instant case, the Court considers the amount claimed excessive, given that a number of the applicant's complaints were either declared inadmissible or did not result in a finding of a violation of the Convention (see *Bykov v. Russia* (dec.), no. 4378/02, 7 September 2006, and paragraph 105 above). Moreover, the applicant's submissions contain no information on the specific services covered by the invoices. Thus, the Court considers that a significant reduction is necessary on both accounts. Having regard to all relevant factors, the Court considers it reasonable to award the sum of EUR 25,000 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

C. Default interest

115. 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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

3. *Holds* by eleven votes to six that there has been no violation of Article 6 of the Convention;

4. *Holds*
   (a) (i) by twelve votes to five that the respondent State is to pay the applicant, within three months, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
   (ii) unanimously that the respondent State is to pay the applicant, within three months, EUR 25,000 (twenty-five thousand euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement plus any tax that may be chargeable to the applicant on that amount;
   (b) unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously 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 10 March 2009.

Michael O'Boyle Jean-Paul Costa
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:
(a) concurring opinion of Judge Cabral Barreto;
(b) concurring opinion of Judge Kovler;
(c) partially dissenting opinion of Judge Costa;
(d) partially dissenting opinion of Judge Spielmann, joined by Judges Rozakis, Tulkens, Casadevall and Mijović.

J.-P.C.
M.O'B.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I agree with the majority's finding that there was no violation of Article 6 of the Convention in the present case.

However, to my mind it is not enough to say, as the majority do, that the proceedings, considered as a whole, were not contrary to the requirements of a fair trial.

I find it regrettable that the Grand Chamber missed the opportunity to clarify once and for all an issue on which the Court has long been divided: whether the use in criminal proceedings of evidence obtained

in breach of Article 8 of the Convention undermines the fairness of a trial as protected by Article 6.

1. The Court's case-law on this subject dates back to *Schenk v. Switzerland* (12 July 1988, Series A no. 140).

In concluding by a majority that the use of the disputed recording in evidence had not deprived the applicant of a fair trial, the Court mainly relied on the fact that the rights of the defence had not been disregarded.

This finding shaped the development of our case-law; even where the manner in which evidence has been obtained has breached Article 8, a violation of Article 6 has been ruled out if the trial as a whole has been fair, and in particular if the rights of the defence have been respected.

Moreover, in principle, whether the evidence was the sole or a subsidiary basis for the conviction is not in itself decisive (see *Khan v. the United Kingdom*, no. 35394/97, § 26, ECHR 2000-V).

Similarly, it is immaterial whether the violation of Article 8 results from failure to comply with "domestic law" or with the Convention.

More recently, the Court applied these principles in *Heglas v. the Czech Republic* (no. 5935/02, 1 March 2007).

2. The case-law on this subject was last refined in *Jalloh v. Germany* ([GC], no. 54810/00, ECHR 2006-IX).

In that judgment the Court ruled that the use in criminal proceedings of evidence obtained through torture raised serious issues as to the fairness of such proceedings, even if the admission of the evidence in question had not been decisive in securing the suspect's conviction.

Consequently, the use of evidence obtained through torture will always breach Article 6 of the Convention, regardless of whether or not the evidence was a decisive factor in the conviction.

However, the Court has never really stated a position on the question of evidence obtained by means of inhuman or degrading treatment.

In certain circumstances, for example if an applicant is in detention, improper compulsion by the authorities to obtain a confession will contravene the principles of the right not to incriminate oneself and the right to remain silent (see *Allan v. the United Kingdom*, no. 48539/99, ECHR 2000-IX).

As regards the question of direct concern to us – and the *Heglas* judgment is a very recent example of this – where Article 8 is breached as a result of the way in which evidence was gathered, the decisive factor for a finding of a violation or no violation of Article 6 is whether the proceedings as a whole were fair, whether the rights of the defence were respected.

3. I personally would have liked the Grand Chamber to have adopted a new approach revising and clarifying its case-law.

3.1. Firstly, the Grand Chamber should have reaffirmed the position taken in *Jalloh* regarding evidence obtained through torture.

The mere recourse to torture is sufficient in itself to render the trial unfair, even if the evidence thereby obtained is not decisive in securing the accused's conviction; Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations, lends sufficient force to this argument.

However, we should also go a step further by stating unequivocally that the use of evidence obtained by means of an act classified as inhuman or degrading treatment automatically undermines the fairness of a trial, since the difference between torture and inhuman treatment is often difficult to establish and the nuances are sometimes tiny; furthermore, as a rule, both situations – torture and inhuman and degrading treatment – involve blunders by the authorities against an individual in a position of inferiority.

The Grand Chamber should in my opinion state firmly that any evidence obtained in breach of Article 3 in the course of a trial – through torture or ill-treatment – will always infringe Article 6 of the Convention, even if such evidence did not play a decisive part in the conviction, and even if the accused was able to challenge the evidence thus obtained, without leaving open the possibility of relying on the weight of public interest and the seriousness of the offence.

We must banish conduct that offends against civilised values and ensure that there is some form of severe punishment for acts which undermine our society's most deeply held values as protected by Article 3 of the Convention.

3.2. The four dissenting judges in the *Schenk* case (cited above), whose opinion was more or less followed by Judges Loucaides (in *Khan*, cited above) and Tulkens (in *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX), considered that a trial could not be described as "fair" where

evidence obtained in breach of a fundamental right guaranteed by the Convention had been admitted.

The "dissenters" could not accept that a trial could be "fair", as required by Article 6, if a person's guilt for any offence was established through evidence obtained in breach of the human rights guaranteed by the Convention.

The fairness required by Article 6 of the Convention also entails a requirement of lawfulness; a trial which has been conducted in breach of domestic law or the Convention can never be regarded as "fair".

The exclusion of evidence obtained in breach of, for example, the right to respect for private life guaranteed by the Convention should be considered an essential corollary of that right.

In the "dissenters'" view, evidence amounting to interference with the right to privacy can be admitted in court proceedings and can lead to a conviction for a crime only if the securing of such evidence satisfies the requirements of the second paragraph of Article 8, including the one at issue in the present case, that of being "in accordance with the law".

However, what is prohibited under one provision (Article 8) cannot be accepted under another (Article 6).

Lastly, there is a real danger to be averted, as Judge Loucaides stressed in the *Khan* case (cited above), and I quote: "If violating Article 8 can be accepted as 'fair' then I cannot see how the police can be effectively deterred from repeating their impermissible conduct."

3.3. I must say that I have a good deal of sympathy with this approach, which has the merit of clarity since the violation of Article 6 will be "automatic" once the violation of Article 8 has been found.

Nevertheless, I believe that if such an approach is adopted, certain considerations will arise as regards the consequences of the finding of a violation of Article 6.

Following this approach, once a violation has been found in cases where the accused's conviction was not solely or mainly based on the evidence in dispute, inferences will have to be drawn regarding the execution of the judgment if the evidence in question played only a subsidiary role in the conviction.

Furthermore, as regards the execution of judgments, not all violations of Article 6 will carry the same weight.

I am thinking of violations arising from a failure to comply with provisions concerning substantive rights as opposed to procedural rules.

Here, with regard to unlawful evidence, I wish to emphasise the distinction made by some legal experts between **prohibited evidence** – which relates to substantive law – and **improper evidence –** which relates to procedural rules.

We must distinguish between what strikes at the heart of a fair trial, what shocks the sensibilities of a democratic society, what runs counter to the fundamental values embodied in a State based on the rule of law, and a breach of procedural rules in the gathering of evidence.

For example, a breach of the right to confer freely with one's lawyer seems to me to be completely different from a breach resulting from the lack of judicial authorisation for telephone tapping of a suspect, where this flaw is subsequently redressed.

If a recording of the accused's conversation with his lawyer is used as a basis for convicting him, a more serious violation will result, calling for a more forceful attitude on the part of the Court, which may, for example, demand a new trial at which the use of the evidence in issue will be prohibited, and also award an appropriate sum for the damage sustained.

In the other scenario mentioned above, however, the finding of a violation should in itself be sufficient.

3.4. These considerations lead me to a more detailed examination of other aspects of the procedure, moving away from an "automatic" finding of a violation of Article 6 once a violation of Article 8 has been found: a violation of the latter provision does not automatically entail a violation of Article 6, but simply the presumption of a violation.

A finding of a violation or no violation will depend on the particular circumstances of the case at hand and the weighing up of the values protected by domestic law and the Convention and those in issue in the criminal proceedings.

It is true that such an approach would weaken the notion of a fair trial, which would become a variable-geometry concept.

However, this approach would have the advantage of not treating all situations on the same footing, since, as I have already observed, some violations of Article 8 are worse than others.

I will readily admit that there are risks in such an approach; the choice of the right criteria for finding a violation, and their subsequent application to the particular case, especially where the factual

circumstances are difficult to establish, will be a hazardous exercise.

Situations will thus arise when the presumption could be rebutted where the rights of the defence have been respected and where the weight of public interest in the applicant's conviction or other relevant grounds so require.

However, limits will always have to be set.

I would again refer to everything that strikes at the heart of a fair trial, shocks the sensitivities of a democratic society or runs counter to the fundamental values embodied in a State based on the rule of law. Once these values have been undermined, the presumption must be confirmed and a violation of Article 6 found; the public interest at stake or the question whether the rights of the defence have been respected will be immaterial.

The case-law of the Supreme Court of the United States refers in this connection to the falsehoods crucial to the facts of the case that can always result from interrogation techniques "so offensive to a civilized system of justice" that "they must be condemned" in the name of due process.

The Supreme Court of Canada makes a distinction between "dirty tricks" (which the community finds shocking) and mere "ruses", concluding that "*What should be repressed vigorously is conduct on [the authorities'] part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would ... pretending to be a truck driver to secure the conviction of a trafficker*" (Judge Lamer, individual opinion, in *R. v. Rothman*, [1981] 1 SCR 640; approved by the majority of the Supreme Court in *R. v. Collins*, [1987] 1 SCR 265, § 52, and *R. v. Oickle*, [2000] 2 SCR 3, § 66).

I must acknowledge, nevertheless, that all this involves a somewhat empiricist approach and a perhaps excessively discretionary power; however, I wonder how we can draw a firm, clear and distinct line between what might be acceptable and what cannot.

Here, I would return to the distinction between substantive and procedural.

I would say, generally speaking, that the use of any evidence that is not admissible under the member States' domestic law and the Convention will "automatically" entail a violation of the right to a fair trial.

The question whether or not the rights of the defence have been respected, the public interest at stake and all other circumstances are immaterial: a trial in which evidence thus obtained has served as a basis for a conviction will always be an unfair trial.

In that connection I would cite the example of the recording of the accused's conversation with his lawyer.

The gathering of evidence by this means must be discouraged at all costs, even where the evidence in question was merely additional or subsidiary and where a new trial is perhaps not warranted.

On the other hand, where procedural rules have not been complied with in respect of evidence that is normally admissible in member States and under international law – either because domestic law does not provide for such evidence or because, notwithstanding the fact that such evidence is admissible at domestic level, the conditions governing its use in the case at hand were not observed – in certain circumstances, particularly where the rights of the defence have been respected, and where the public interest must prevail over the interests of the individual, in view of the nature and seriousness of the offence, I would tend to conclude that there has been no breach of the rules of a fair trial.

In the present case, I consider that there was no violation because there was only a formal breach ("*in accordance with the law*") in obtaining evidence that, in principle, was admissible in a democratic society and the rights of the defence were, moreover, respected.

CONCURRING OPINION OF JUDGE KOVLER

(Translation)

I agree with the conclusions reached by the majority. I should nevertheless like to clarify my position on the complaints under Article 8 of the Convention as submitted by the applicant.

Before relinquishing jurisdiction on 22 November 2007 in favour of the Grand Chamber, the Chamber of seven judges, of which I was a member, summarised the complaints under Article 8 as follows in its admissibility decision of 7 September 2006: "*The applicant complained that the police conducting the covert operation unlawfully intruded into his home and interfered with his private life and correspondence by intercepting and recording his conversation with V. in violation of Article 8 of the Convention ...*" This complaint was declared admissible in its entirety.

According to the text of the Grand Chamber's judgment, "*the applicant complained ... about the covert recording made at his home*" (see paragraph 3). The statements of the facts (see paragraphs 35-36) and, above all, of the applicant's allegations thus portray the intrusion into his home as an unlawful and unjustified interference with his right to respect for his private life and home (see paragraphs 70-71). However, to my regret the Grand Chamber confines its conclusions to the finding that an "operative experiment" was not accompanied by adequate legal safeguards (see paragraph 81), before stating quite simply: "*Nor is it necessary to consider whether the covert operation also constituted an interference with the applicant's right to respect for his home*"(see paragraph 82). This was a missed opportunity to undertake a more nuanced assessment of all the applicant's complaints under Article 8, on the basis of the Court's substantial body of case-law in this area.

PARTLY DISSENTING OPINION OF JUDGE COSTA

(Translation)

1. I consider that there was a breach of Article 6 § 1 of the Convention in this case. The applicant's complaint that the criminal proceedings resulting in his conviction were unfair was mainly based on two arguments:

– that police trickery had caused him to incriminate himself; and

– that the instrument of such trickery – the recording of his conversation with V. – had been admitted in evidence.

2. Both these points may give rise to some uncertainty.

3. The police and the Federal Security Service (FSB) conducted a covert operation in which the central agent was V., who had allegedly been ordered by the applicant to kill the latter's former business associate, S., but had not carried out the murder, instead reporting the applicant to the FSB. The covert operation, aimed at obtaining evidence against the applicant, consisted in sending V. to the applicant's home and instructing V. to say that he had carried out the order to kill; at the same time, their conversation would be secretly recorded by a police officer stationed outside the house.

V.'s visit was itself preceded by the macabre staging several days earlier of the discovery of two dead bodies at S.'s home, spuriously identified as S. and his business partner, I. This was widely publicised.

4. This ploy, despite its specific characteristics, is not in itself far removed from the ruses, traps and stratagems used by the police to obtain confessions from persons suspected of criminal offences or to establish their guilt, and it would be naïve, indeed unreasonable, to seek to disarm the security forces, faced as they are with the rise in delinquency and crime.

5. Even so, not all methods used by the police are necessarily compatible with the rights guaranteed by the Convention. Thus, in a different context, the Court did not accept that a police ruse (nevertheless described by the Government as a "little ruse") was compatible with the right to liberty within the meaning of Article 5 (see *Čonka v. Belgium*, no. 51564/99, §§ 41-46, ECHR 2002-I). And in the present case the Court found that the unlawful interception of Mr Bykov's conversation with V. breached Article 8 of the Convention.

6. With regard to Article 6 § 1, I would not go so far as to take the view that the use of any evidence breaching the Convention as a basis for establishing the accused's guilt renders the trial unfair (as was argued by Judge Loucaides in his separate opinion in *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V). However, I do believe that the Court should undertake a careful examination of whether a trial based on such evidence complies with Article 6 § 1, a point to which I shall return later.

7. As regards the right not to incriminate oneself, an inherent aspect of the rights of the defence as affirmed in *John Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996-I), it normally entails the right for a person suspected of an offence to remain silent, including during

police questioning. Although the Court accepts that the right not to contribute to incriminating oneself is not absolute, it attaches considerable importance to it and has sometimes pointed out that it originates in Article 14 of the International Covenant on Civil and Political Rights (see *Funke v. France*, 25 February 1993, § 42, Series A no. 256-A).

8. The right to remain silent would be truly "theoretical and illusory" if it were accepted that the police had the right to "make a suspect talk" by using a covert recording of a conversation with an informer assigned the task of entrapping the suspect.

9. Yet that was exactly the case here. V. was in practice an "agent" of the security forces, and I can see similarities between the *Bykov* case and that of *Ramanauskas v. Lithuania* ([GC], no. 74420/01, ECHR 2008-...), in which the Grand Chamber unanimously found a violation of Article 6 § 1. The facts were different, but both cases involved simulation and provocation instigated by the security forces. By telling the applicant that he had carried out the killing, V. sought to induce the applicant, who was unaware that his conversation could be heard, to confirm that he had entered into a "contract" with him, in the criminal sense of the term.

10. The Court is obviously not, and should not become, a fourth-instance court. It does not have to decide (that is the task of the national courts) whether Mr Bykov was guilty of incitement to commit murder. Nor does it have to speculate on what the outcome of the trial would have been had it been fair. But it is precisely its task to rule on the fairness issue; and the use of this elaborately staged ploy (including the "fake" corpses) causes me to harbour strong doubts as to whether the presumption of innocence, the rights of the defence and, ultimately, the fairness of the trial were secured.

11. My doubts are entirely dispelled when I note that the evidence obtained in breach of Article 8 of the Convention played a decisive role in this context. I shall not expand on this point, which I consider is addressed very eloquently in the partly dissenting opinion of Judge Spielmann joined by Judges Rozakis, Tulkens, Casadevall and Mijović.

12. In my view, this decisive aspect is very important in law. If, besides the recording in issue (and the initial complaint against Mr Bykov by V., but that could have been one man's word against another), the Russian judges had based their findings on other evidence, there would still have been cause for uncertainty. A criminal trial is often complex, and the large number of items of evidence on which the judges' verdict is based may sometimes decontaminate the dubious evidence by absorbing it. That was not the case in this instance.

13. All in all, while I fully understand the reasons why the Court did not find a violation of Article 6, I was unable to make the leap that would have allowed me to share the majority's view.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN JOINED BY JUDGES ROZAKIS, TULKENS, CASADEVALL AND MIJOVIĆ

(Translation)

1. I do not agree with the Court's conclusion that there was no violation of Article 6 of the Convention.

2. The question of respect for the right to a fair hearing arises in my opinion under two headings: the admission in criminal proceedings of evidence obtained in breach of Article 8, and the right to remain silent and not to incriminate oneself.

I. Admission in criminal proceedings of evidence obtained in breach of Article 8

3. I would observe that, having regard to the general principles set out in paragraphs 88-93 of the judgment, the Court reached a unanimous finding that the covert operation was conducted in breach of Article 8 of the Convention.

4. The simulation staged by the authorities, described in more detail in the part of the judgment concerning the circumstances of the case under the heading "Covert operation", was unlawful. As the Court observed in paragraph 80, the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. It accordingly found a violation of Article 8 of the Convention.

(a) The question of principle and the missed opportunity to strengthen practical and effective rights

5. After the Chamber had relinquished jurisdiction, the present case was sent to the Grand Chamber, which was afforded the opportunity to clarify and spell out its case-law on the use of unlawful evidence at a trial. The question of the admission in criminal proceedings of evidence obtained in breach of Article 8 is a question of principle that deserved an answer of principle, particularly as regards the need to ensure consistency between the Court's findings under the two Articles of the Convention (what is prohibited under Article 8 cannot be permitted under Article 6) and the need to stress the importance of the Article 8 rights at stake (bearing in mind the growing need to resort to unlawful investigative methods, especially in fighting crime and terrorism). As far as this question of principle is concerned, I would reiterate the arguments which my colleague Françoise Tulkens put forward in her partly dissenting opinion in *P.G. and J.H. v. the United Kingdom*.[1]

6. In the present case the violation of Article 8 was a particularly serious one, representing a manifest infringement of the fundamental rights protected by that provision. The use during a trial of evidence obtained in breach of Article 8 should have called for an extremely rigorous examination by the Court of the fairness of the proceedings. As the Court has already had occasion to emphasise, the Convention is to be read as a coherent whole.[2] I agree with the partly concurring, partly dissenting opinion expressed by Judge Loucaides in *Khan v. the United Kingdom*[3] and reiterated by Judge Tulkens in her above-mentioned partly dissenting opinion in *P.G. and J.H. v. the United Kingdom*:[4]

> "It is my opinion that the term 'fairness', when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a 'fair' trial if it is conducted in breach of the law."

7. In the present case the violation of Article 8 of the Convention found by the Court results, and indeed results exclusively, from the unlawfulness of the evidence in issue (see paragraph 82 of the judgment). Yet the fairness required by Article 6 of the Convention also entails a requirement of lawfulness.[5] Fairness presupposes respect for lawfulness and thus also, *a fortiori*, respect for the rights guaranteed by the Convention, which it is precisely the Court's task to supervise.

8. As regards the nature and scope of the Court's supervision, the Court rightly notes in the judgment that "*in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention*" (see paragraph 88). It follows, and I strongly agree with this observation, that

> "it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention".

9. Similarly, while it is not the role of the Court

> "to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible" (see paragraph 89 of the judgment),

the position is, however, different where, as in the present case, the evidence was obtained in breach of a right guaranteed by the Convention, seeing precisely that, where the taking of evidence is concerned, the Court must ensure observance by the Contracting States of their obligations under the Convention.

10. The judgment in the present case could have dispelled the uncertainties resulting from the Court's case-law on the subject by making clear that what is prohibited by one provision (Article 8) cannot be accepted under another (Article 6).

11. In finding that there was no violation of Article 6, the Court has undermined the effectiveness of Article 8. Yet the rights enshrined in the Convention cannot remain purely theoretical or virtual, since

> "the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective".[6]

12. The majority's view seems to me, moreover, to entail a real danger, one which has already been noted in the above-mentioned separate opinion in *Khan*[7] and reiterated in the above-mentioned separate opinion in *P.G. and J.H. v. the United Kingdom*:[8]

> "If violating Article 8 can be accepted as 'fair' then I cannot see how the police can be effectively deterred from repeating their impermissible conduct."

13. However, the Court has itself emphasised

> "the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action ..., including the guarantees contained in Articles 5 and 8 of the Convention".[9]

14. The judgment fails to provide a response to the questions raised in the partly dissenting opinion cited above:

> "Will there come a point at which the majority's reasoning will be applied where the evidence has been obtained in breach of other provisions of the Convention, such as Article 3, for example? Where and how should the line be drawn? According to which hierarchy in the guaranteed rights? Ultimately, the very notion of fairness in a trial might have a tendency to decline or become subject to shifting goalposts."[10]

15. So much, then, for the principles and for the (missed) opportunity afforded to the Grand Chamber to strengthen practical and effective rights.

(b) The decisive influence of the evidence obtained in breach of Article 8 of the Convention

16. Beyond the question of principle addressed above, I consider that the evidence obtained in breach of Article 8 caused the proceedings to be fatally flawed, since it decisively influenced the guilty verdict against the applicant.

17. Admittedly, it appears that the court in the present case based its decision on other items of evidence. Besides the evidence obtained by means of the covert operation, the following items unconnected with the operation seem to have been taken into account: the initial statement by V. that the applicant had ordered him to kill S.; the gun V. handed in to the FSB; and the records of the questioning of V. on subsequent occasions during the investigation. These items of evidence – all produced by V. – were challenged during the trial by the applicant, who for his part relied on V.'s subsequent withdrawal of his statements. However, the doubts as to the reliability of V.'s statements could not be dispelled since V. was absent and the authorities were unable to trace him and call him to appear in court, with the result that he could not be cross-examined during the trial (see paragraphs 38-40 of the judgment). The court eventually admitted the statements by V. as written evidence and, after examining the contradictory remarks he had made, concluded that the withdrawal appeared to have resulted from a subsequent arrangement between V. and the applicant. Accordingly – leaving aside the evidence obtained in breach of Article 8 of the Convention – the court reached its finding solely on the basis of V.'s initial statements incriminating the applicant.

18. Admittedly, the applicant had the opportunity to examine V. when they were brought face to face during the investigation, but I must emphasise that this meeting took place before V. withdrew his statements. Consequently, the applicant's lawyer was unable to cross-examine V. in the light of his withdrawal of the statements, either during the investigation or during the court hearings. However, as the Court emphasised in *Lucà v. Italy*, where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.[11]

(c) The need for the subsequent use of anonymous sources to be accompanied by adequate and sufficient guarantees

19. The fact that it was impossible to cross-examine V. in court also raises an issue in terms of the procedural right to challenge the evidence obtained as a result of the covert operation.

20. As the Court pointed out in the *Ramanauskas* judgment,[12] admittedly in an entirely different context, involving police incitement,

> "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*, 6 September 1978, §§ 52-56, Series A no. 28). 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*, 17 January 1970, § 25, Series A no. 11)."[13]

the same or equivalent (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11).

21. Admittedly, the other evidence used during the trial included numerous witness statements referring to the existence of a conflict of interests between the applicant and S., and other items confirming the accuracy of the description of the covert operation set out in the reports on the investigation. However, the probative value of such evidence was relatively minor. The fact that it was impossible to cross-examine V. in court therefore prevented the applicant from having full enjoyment of his procedural right to challenge the evidence obtained through the covert operation.

22. In short, I consider that the use of the evidence in issue irreparably impaired the applicant's defence rights. Such a conclusion would in itself have justified the finding of a violation of Article 6 of the Convention.

II. Respect for the right to remain silent and not to incriminate oneself

23. Lastly, the covert operation in my opinion infringed the applicant's right to remain silent and not to incriminate himself. None of the Court's case-law corresponds exactly to the facts of the present case. Once again, I regret that the Grand Chamber did not seize the opportunity to clarify the principles emerging, in particular, from its judgments in the cases of *Jalloh*,[14] *Allan*[15] and, to a lesser extent, *Ramanauskas*.[16]

24. In its *Jalloh* judgment of 11 July 2006 the Court reiterated the principle that

> "... the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent".[17]

25. In the case of *Jalloh* the authorities obtained real evidence against the applicant's will. The Court declared that the privilege against self-incrimination was applicable, stating the following:

> "... the principle against self-incrimination is applicable to the present proceedings.
>
> In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."[18]

26. These criteria are applicable in the present case, given that the substance of the matter concerns the recording of evidence obtained in breach of the privilege against self-incrimination. Concerning more specifically the public interest in securing the applicant's conviction, I do not consider that this can in any circumstances justify the use in evidence of recordings found to have been unlawful for the purposes of Article 8 of the Convention.[19]

27. The present case is similar to the case of *Allan*, in which the Court found a violation of Article 6.[20] Admittedly, unlike in *Allan*, the applicant in the present case was not in pre-trial detention but at liberty in his own property. It is also true that in *Allan* the applicant chose to remain silent.

28. However, those particular aspects are in my opinion not decisive, seeing that the informer V. was *de facto* an agent working for the authorities at the time when he recorded the conversation in issue.

29. In paragraph 51 of the *Allan* judgment the Court stated the following, referring to the case-law of the Supreme Court of Canada:[21]

> "Whether the right to silence is undermined to such an extent as to give rise to a violation of Article 6 of the Convention depends on all the circumstances of the individual case. In this regard, however, some guidance may be found in the decisions of the Supreme Court of Canada, ... in which the right to silence, in circumstances which bore some similarity to those in the present case, was examined in the context of section 7 of the Canadian Charter of Rights and Freedoms. There, the Canadian Supreme Court expressed the view that, where the informer who allegedly acted to subvert the right to silence of the accused was not obviously a State agent, the analysis should focus on both the relationship between the informer and the State and the relationship between the informer and the accused: the right to silence would only be infringed where the informer was acting as an agent of the State at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Whether an informer was to be regarded as a State agent depended on whether the exchange between the accused and the informer would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused."

30. In the present case the informer who acted on State instructions, subverting the applicant's right to remain silent, was obviously a State agent. The question arises whether the conversation between him and

the accused would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. The answer is no, and the recorded conversation was thus was the functional equivalent of an interrogation. The purpose of this ruse was, in particular, to reveal the existence of a particular offence, namely "conspiracy to murder". Among the constituent elements of this offence, the *mens rea* or element of intent plays a crucial, if not predominant, role. The grossly unlawful ruse staged by the authorities was aimed precisely at "uncovering" this essential element of the offence.

31. The fact that the applicant had not been charged is not decisive in my opinion either. In the *R. v. Hebert* decision (cited above) the Supreme Court of Canada stated the following:

> "The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory. As Ratushny writes (*Self-Incrimination in the Canadian Criminal Process* (1979), at p. 253):
>
> > 'Furthermore, our system meticulously provides for a public trial only after a specific accusation and where the accused is protected by detailed procedures and strict evidentiary rules. Ordinarily he is represented by a lawyer to ensure that he in fact received all of the protections to which he is entitled. The accused is under no legal or practical obligation to respond to the accusation until there is an evidentiary case to meet. There is a hypocrisy to a system which provides such protections but allows them all to be ignored at the pre-trial stage where interrogation frequently occurs in secret, after counsel has been denied, with no rules at all and often where the suspect or accused is deliberately misled about the evidence against him.'
>
> ...
>
> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities."[22]

32. However, in the present case, the applicant spoke without having given his free and informed consent.

33. I would add that to deny the right to remain silent and the right not to incriminate oneself simply because the applicant had not been charged or had not undergone initial questioning would leave the way open for abuses of procedure. The person concerned would be deprived of the opportunity to choose to speak or to remain silent at a later stage, for example during such questioning, and the principle would thus become devoid of all substance.

34. It is true that in the *R. v. Hebert* decision the Supreme Court of Canada also based its ruling on the fact that the person concerned was in detention:

> "[The rule] applies only after detention. Undercover operations prior to detention do not raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the *Charter* extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected."

35. However, I consider that the criterion applied by the Supreme Court in the context of detention is applicable *mutatis mutandis* to a situation where the person concerned is *de facto* under the authorities' control. This was so in the present case; the applicant was an unwitting protagonist in a set-up entirely orchestrated by the authorities. I would draw attention here to the very particular circumstances of the covert operation, which began with the staged discovery of two bodies and the announcement in the media that S. and I. had been shot dead. By the time V. arrived at the applicant's "guest house", the applicant was already under the influence of the erroneous information that a serious crime had been committed, and his belief was reinforced by V.'s admission that he had been the perpetrator. The applicant's conduct was therefore not solely, or mainly, guided by events which would have taken place under normal circumstances, but above all by the appearances created by the investigating authorities. To that extent, seeing that he was the victim of a ruse, his statements and reaction cannot reasonably be said to have been voluntary or spontaneous.

36. In the case of *Ramanauskas*, concerning police incitement, the Court reached the conclusion in its judgment of 5 February 2008 that

> "the actions ... had the effect of inciting the applicant *to commit the offence of which he was convicted*[,] that there is no indication that the offence would have been committed without their intervention [and that i]n 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" [23] (my italics)

Convention ." (my italics)

37. In the present case the purpose of the staged events was to make the applicant talk. The covert operation undermined the voluntary nature of the disclosures to such an extent that the right to remain silent and not to incriminate oneself was rendered devoid of all substance. As in the *Ramanauskas* case, the applicant was entrapped by a person controlled from a distance by the authorities, who staged a set-up using a private individual as an undercover agent. I thus consider that the information thereby obtained was disclosed through entrapment, against the applicant's will.[24]

III. Article 41 of the Convention

38. Lastly, I voted against point 4 (a) of the operative provisions. I consider that the award of 1,000 euros for non-pecuniary damage is insufficient, given the Court's finding of two violations.

1. *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX.

2. *Klass and Others v. Germany*, 6 September 1978, §§ 68-69, Series A no. 28.

3. *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V.

4. Cited above.

5. *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 102, ECHR 2000-VII.

1. See *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV; *Beer and Regan v. Germany* [GC], no. 28934/95, § 57, 18 February 1999; *García Manibardo v. Spain*, no. 38695/97, § 43, ECHR 2000-II; and *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008-....

2. Partly concurring, partly dissenting opinion of Judge Loucaides in *Khan*, cited above.

3. Partly dissenting opinion of Judge Tulkens in *P.G. and J.H.*, cited above.

4. See *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII.

5. Partly dissenting opinion of Judge Tulkens in *P.G. and J.H.*, cited above.

1. See *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II, and the references therein to *Unterpertinger v. Austria*, 24 November 1986, §§ 31-33, Series A no. 110; *Saïdi v. France*, 20 September 1993, §§ 43-44, Series A no. 261-C; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 55, *Reports* 1997-III; *Dorigo v. Italy*, application no. 33286/96, Commission's report of 9 September 1998, § 43, and, on the same case, Committee of Ministers Resolution DH (99) 258 of 15 April 1999.

1. *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008-....

2. Ibid., § 53.

1. *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX.

2. *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX.

3. Cited above.

4. *Jalloh*, cited above, § 101.

5. Ibid., §§ 116-17.

6. Compare with the concurring opinion of Sir Nicolas Bratza in *Jalloh*, cited above:
"... the scale of the drug dealing involved seems to me to be immaterial to the Convention issues raised under Article 6. The public interest in securing the applicant's conviction could not in my view in any circumstances have justified the use in evidence of drugs obtained by the treatment to which he was subjected."

7. *Allan*, cited above, § 52.

8. *R. v. Hebert* ([1990] 2 Supreme Court Reports 151).

1. Per McLachlin J.

1. *Ramanauskas*, cited above, § 73.

2. See, *mutatis mutandis, Allan*, cited above.