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THE LIMITS OF THE USE OF UNDERCOVER AGENTS AND THE RIGHT TO A FAIR TRIAL UNDER ARTICLE 6(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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***Annotation.** Various special investigative methods are more often applied nowadays; their use is unavoidably induced by today's reality in combating organised crime in the spheres such as corruption, prostitution, drug trafficking, trafficking in persons, money counterfeit and etc. Therefore, special secret investigative methods are more often used and they are very effective in gathering evidence for the purpose of detecting and investigating very well-organised or latent crimes. Both the Convention on the Protection on Human Rights and Fundamental Freedoms (hereinafter – the Convention) itself, i.e. its Article 6,¹ and other international instruments, such as the Council of Europe's Criminal Law Convention, the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and others,² do not prohibit the use of special investigative methods, provided that their use does not violate human rights.*

The use of special investigative methods, such as undercover agents or other undercover investigative methods, cannot in itself infringe human rights and the right to a fair trial;

- 1 *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 49-50; *Eurofinacom v. France*, (dec.), no. 58753/00, ECHR 2004-VII.
- 2 For instance, the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, and the UN Convention against illicit trafficking in narcotic drugs and psychotropic substances.

however, its use must have clear limits and safeguards.³

The recent judgements of the European Court of Human Rights (hereinafter – the Court or ECHR) regarding the use of undercover agents confirm that the use of undercover agents in certain types of cases is often unavoidable and also very problematic, because the Court imposes on the member states of the Convention increasingly wider obligations. Partly this is determined by the fact that the current jurisprudence of the Court is still in the state of formation, therefore many questions are left unanswered.

The article analyzes the Court's jurisprudence both in the cases against Lithuania and other member states of the Convention regarding the use of undercover agents and the protection of the right to a fair trial under Article 6 (1) of the Convention, with particular emphasis to the most recent Court's jurisprudence and the cases against Lithuania.⁴ Both the cases where the violations of the right to a fair trial have been established and the cases that serve as examples of good practice are analyzed. The author has distinguished four criteria with regard to the current jurisprudence of the Court, which are examined in four separate parts of the article: the issues related to the limits of undercover agents' involvement; the use of evidence acquired as a result of the use of undercover agents; the possibility to challenge the fact of entrapment and the protection of principles of equality of arms and adversarial process. In the end the author makes an overall conclusion that the use of undercover agents is still very problematic and not yet determined by the Court's practice; therefore it results in more infringements of the right to a fair trial and thus causes problems of application and regulation in the national law.

It should be observed that the concepts entrapment (pranc. – provocation; liet - provokavimas) and incitement, instigation (pranc. – guet-apens; liet. - kurstymas) are used in this article as synonyms because the Court in the cases against Lithuania and in cases against other states uses both concepts to define an activity in breach with Article 6 (1).⁵

Keywords: European Court of Human Rights, European Convention on Human Rights the right to a fair trial, undercover agents, incitement to commit a criminal act, the use of evidence, the principles of equality of arms and adversarial process.

Introduction

The problem regarding the use of undercover agents in the context of Article 6 (1) of the European Convention of Human Rights has been partly analysed by foreign⁶

3 *Ramanauskas v. Lithuania*, § 51; *Eurofinacom v. France*.

4 *Ramanauskas v. Lithuania*; *Malininas v. Lithuania*, no. 10071/04; *Miliniene v. Lithuania*, no. 74355/01; *Lenkauskienė v. Lithuania*, (dec.), no. 6788/02; *Bendžius v. Lithuania*, (dec.), no. 67506/01, 26 April 2005; *Bendžius v. Lithuania*, (dec.), no. 67506/01, 28 March 2005.

5 *Ramanauskas v. Lithuania*, § 55; *Miliniene v. Lithuania*, § 35-36; *Malininas v. Lithuania*, § 34; *Eurofinacom v. France*; *Vanyan v. Russia*, § 47; *Teixeira de Castro v. Portugal*, 9 June 1998, § 38-39, Reports 1998-IV.

6 Trechsel, S. *Human Rights in Criminal Proceedings*. Academy of European Law, European University Institute. Oxford: Oxford University Press, 2005; Emmerson, B. Q. C.; Ashworth, A.; Macdonald, A. *Human Rights and Criminal Justice*. 3rd edition. London: Sweet and Maxwell, 2007, p. 60-605; Emson, R. *Evi-*

and Lithuanian authors,⁷ although such analysis was confined to the examination of the judgments adopted by the European Court of Human Rights in the last century. Nowadays, the problem of the use of undercover agents in the context of Article 6 (1) of the Convention is becoming extremely relevant both with regard to Lithuania and all the Council of Europe's members, taking into account the recent five judgments adopted against Lithuania.⁸ Considering the current jurisprudence of the Court, the use of undercover agents is very relevant and provides the guidelines for the Lithuanian judges and lawyers-practitioners, because after the adoption of the judgments against Lithuania in 2008, the issue on the use of undercover agents has been not analyzed by Lithuanian academics. The author assesses the newest Courts' jurisprudence both positively and negatively. Therefore, in this article the author's analyses the newest jurisprudence of the Court regarding the above-mentioned issue, distinguishing certain criteria on the use of undercover agents and revealing the most problematic issues on the protection of the right to a fair trial as a result of the use of undercover agents. This analysis should help to fill the gap existing today.

It should also be stressed that the analysis of the application of undercover agents is confined to the analysis under Article 6 (1) because in such cases, especially with regard to the use and assessment of evidence acquired as a result of activity of undercover agents, the protection of other Convention rights very often emerges i.e. the protection of the rights under Article 3, 8 and 13.⁹

This article aims to distinguish the criteria developed in the ECHR jurisprudence revealing the difficulty in applying certain criteria. Suggestions are given for the more effective protection of the right to a fair trial under Article 6 (1) of the Convention, with the reference to the previous and newest jurisprudence of ECHR on the use of undercover agents.

The object of this article – the overall analysis of the jurisprudence of the European Court of Human Rights relating to the problems of using undercover agents and protecting the right to a fair trial under Article 6 (1) of the Convention. The conclusions of this

dence. 3rd edition. Houndmills: Palgrave Macmillan, 2006, p. 322-329; Ashworth, A.; Redmayne, M. *The Criminal Process*. 3rd edition. Oxford: Oxford University Press, 2005, p. 260-263.

- 7 For instance, see the following articles: Goda, G. The Right of the Accused to put Questions to the Prosecution Witnesses as the Right of a Person. *Teisė*. 2000, 36; Goda, G. The Activity of Agent Provocateur and the Right to a Fair Trial. *Teisė*, 2000, 37; Goda, G. The Problems of Legal Regulation and Perspectives of the Operational Activity. *Teisė*. 2006, 58.
- 8 In cases *Ramanauskas v. Lithuania* and *Malininas v. Lithuania*, the infringements of the right to a fair trial were found. In the case *Miliniénė v. Lithuania* no violation was found with regard to the right to a fair trial. In the case *Lenkauskienė v. Lithuania* the Court adopted a decision, which declared the application inadmissible because the applicant has not used all the effective domestic legal remedies, while in the case of *Bendžius v. Lithuania* the application was struck out of the list of cases because the applicant has lost interest in pursuing the application. In all these cases the applicants claimed violation of the right to a fair trial on the basis that they were incited to commit a criminal act using undercover agents.
- 9 *Allan v. United Kingdom*, no. 48539/99, ECHR 2002-IX; *Khan v. United Kingdom*, no. 35394/97, ECHR 2000-V; *P. G. and J. H. v. United Kingdom*, no. 44787/98; *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006.

article are based on systematic analysis, logical, comparative and case analysis scientific research methods.

1. The Limits of Undercover Agents' Involvement

The Court for the first time encountered the problem of participation of undercover agents in crime investigation in the case *Lüdi v. Switzerland*,¹⁰ which was more developed in the later Court's jurisprudence, case *Teixeira de Castro v. Portugal*¹¹ (hereinafter – *Teixeira* case). Doubtless that both cases are classical and precedent cases and the developed practice regarding the participation of undercover agents in crime investigation is relied on till this date. The Court, both in *Teixeira* case and the judgement adopted later (*Ramanauskas v. Lithuania*) noticed that the application of special investigative methods, in particular, undercover techniques – i.e. undercover agents, cannot in itself infringe Article 6 (1) of the Convention. Their use may be tolerated provided that it is subject to clear restrictions and safeguards.¹² The national law must be precisely clear, so persons can clearly understand in which circumstances and conditions the officers can apply undercover investigative methods. Moreover, the state is under a positive obligation to ensure that its legal acts would provide guarantees, which would help to avoid abuse and misuse of power while secretly following persons.¹³

In 2008 in the case of *Ramanauskas v. Lithuania*, the Court thoroughly explained its position regarding the application of such undercover agents and the use of evidence acquired as a result of the use of undercover agents. The Court maintained that 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 base a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against an abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question.¹⁴ While the rise in organised crime requires to adopt appropriate measures, 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 offences, from the most straightforward to the most complex. The right to the fair administration of justice holds such a prominent place in a democratic society that it cannot be sacrificed for the sake of expedience.¹⁵

After analysis of the jurisprudence of the Court, the use of undercover agents, i.e. both acting as law-enforcement officers and private persons and according to Lithuanian

10 *Lüdi v. Switzerland*, 15 June 1992, § 42-50, 28, Series A no.238.

11 *Teixeira de Castro v. Portugal*.

12 *Ibid.*, § 36; *Ramanauskas v. Lithuania*, § 51, 53-54.

13 *Kopp v. Switzerland*, 25 March 1998, § 64, Reports 1998-II.

14 *Ramanauskas v. Lithuania*, § 53; *Khudobin v. Russia*, no. 59696/00, § 35; *Klass and Others v. Germany*, 6 September 1978, § 52-56, Series A no. 28.

15 *Ramanauskas v. Lithuania*, §53.

legislation, using them in the context of *criminal conduct simulation model*¹⁶ (hereinafter – CCSM), raises several problematic issues: the limits for the undercover agents' involvement; 2) the use of evidence acquired as a result of the use of undercover agents in a criminal case; 3) the possibility to challenge the issue of entrapment and 4) the protection of the principles of equality of arms and adversarial process.

Proceeding to the more detailed analysis of the first criterion – *the involvement limits of the undercover agents* – it should be mentioned that the Court very clearly distinguishes two notions: who is an *undercover agent* (liet. – *slaptas agentas*) and an *agent provocateur* (liet. – *agentas provokatorius*). Already in *Teixeira* case, the developed legal theory of Portugal legal scientists was taken into consideration. The theory draws the distinction between those two concepts stating *that the undercover agent's activity confines to gathering information, while the latter's activity actually incites people to commit a criminal act*.¹⁷ It must be further stressed that in distinguishing those two notions, the main aspect is whether the involvement of the undercover agent investigating a criminal act is confined to an essentially passive investigation of the on-going criminal act. The investigation of the on-going criminal act in an *essential passive manner* is firstly confined to the “*joining*” of the on-going criminal act rather than inciting in active manner to commit a criminal act.¹⁸ *Miliniene v. Lithuania* is the first case, where the Court very clearly stated that the *joining* to the on-going criminal act is within the bounds of undercover agent, thus it does not breach the right to a fair trial.¹⁹ Due to actions of an agent provocateur, a person is incited to commit a criminal act, which would not have been committed without the intervention of such actions; thus this is beyond the bounds of the undercover agent's work.²⁰ In the case of *Ramanauskas v. Lithuania*, the Court itself formulated the concept of entrapment in breach of Article 6 (1) of the Convention: “*Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.*”²¹ In this way, the conferred public power is abused and the limits of the legal activity are overstepped. After analysing the jurisprudence on this issue, while making a conclusion whether undercover agents have

16 The Law of the Republic of Lithuania on the Operational Activity. *Official Gazette*, 2002, No. 65-2633, Article 3 (19). Criminal conduct simulation model – authorised acts, formally having the elements of criminal act or other law offence, which are performed for the purpose of protecting from criminal attempt the person's rights and freedoms, property, public and state security protected by the law.

17 *Teixeira de Castro v. Portugal*, §27.

18 *Miliniene v. Lithuania*, §38.

19 *Ibid.*; Also see the case of *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI) where the Court also did not find the breach of the right to a fair trial because the activity of the undercover agents have not gone beyond the investigating criminal act in essential passive manner, since they joined the on-going criminal act and their activity was controlled by the investigating institution; *Lüdi v. Switzerland*.

20 *Sequeira v. Portugal*; *Ramanauskas v. Lithuania*, § 73; *Vanyan v. Russia*, no. 53203/99, § 47.

21 *Ramanauskas v. Lithuania* § 55.

overstepped the limits of investigation of the criminal act in an essential passive manner i.e. whether a person was incited to commit a criminal act, the Court takes into account the following aspects:

- reasonable grounds/good reason to suspect that the person is involved in a similar criminal activity or has committed a similar criminal act beforehand;²²
- legality of the undercover agents' activity;²³
- the scope of the undercover agents' involvement²⁴.

1.1. Reasonable Grounds to Suspect that the Person Is Involved in a Similar Criminal Activity or Has Committed a Similar Criminal Act Beforehand

With respect to the first mentioned aspect, the question arises what is the meaning of the *reasonable grounds* to suspect that the person is involved in a similar criminal activity or has committed a similar criminal act beforehand. Can it be compared to the phrase "*reasonable suspicion*" established in Article 5 (1) of the Convention? Although the Court has not given an interpretation of this phrase, in the author's opinion, the phrase "*reasonable grounds*" could be interpreted analogously as the Court's interpreted phrase "*reasonable suspicion*" established in Article 5 (1) of the Convention, which in the Court's opinion cannot be compared to the *bona fide* concept. In the case of *Fox, Campbell and Hartley v. the*, the Court emphasised that the phrase "*reasonable suspicion*" presupposes the existence of facts or information which would satisfy an objective and impartial observer that the person concerned may have committed the offence.²⁵ This conclusion is partly presupposed by the Court's decisions adopted in *Eurofinacom v. France* and *Sequeira v. Portugal* cases, where the Court stated that suspicion must be based on concrete evidence showing that initial steps have been taken to commit the acts constituting the offence for which the "defendant" is subsequently prosecuted.²⁶ Thus in the case of *Vanyan v. Russia*, the mere claim that the police possessed information concerning the person's involvement in drug-dealing was not enough,²⁷ as well as if a suspicion is based solely on hearsay²⁸ and if such information regarding the person's previous involvement into a similar criminal activity is presented by the only source – the police agent.²⁹

The other question, which arises while assessing this criterion, is whether the reasonable grounds to suspect that the person is involved in a similar criminal activity is sufficient or whether it is necessary that such a person would be convicted for a similar

22 *Teixeira de Castro v. Portugal*, § 38; *Ramanauskas v. Lithuania*, § 67, *Malininas v. Lithuania*, § 36.

23 *Teixeira de Castro v. Portugal*, § 38; *Ramanauskas v. Lithuania*, § 63-64; *Miliniene v. Lithuania*, § 37.

24 *Ramanauskas v. Lithuania*, § 67; *Teixeira de Castro v. Portugal*, § 38; *Malininas v. Lithuania*, § 37.

25 *Fox, Campbell and Hartley v. United Kingdom*, 30 August 1990, §32-35, Series A no. 182.

26 *Eurofinacom v. France*; *Sequeira v. Portugal*.

27 *Vanyan v. Russia*, § 49.

28 *Ramanauskas v. Lithuania*, §67.

29 *Khudobin v. Russia*, § 134.; *V. v. Finland*, no. 40412/98, § 70.

or another criminal act beforehand? The answer to this question is still pending, but the Court should provide the answer to it on the basis of the today's cases. In most of the current cases the Court adjudged the breach of the right to a fair trial, when persons accused for the commitment of a criminal act using the undercover agents were not convicted beforehand for a similar or another crime,³⁰ while the opposite conclusion has been made in the cases where persons were convicted beforehand,³¹ although this is not the strict rule.³² However, this aspect itself is not decisive because the Court also pays attention to the subjective aspect – predisposition to commit a criminal act prior an approach of the undercover agent or the use of other undercover investigative methods. A person's predisposition to commit a criminal act is a very subjective aspect, which often cannot be easily detected, thus in the author's opinion, the objective aspect of this criterion – the information about the person's involvement into a similar criminal activity – should be considered as more weighty.

1.2. Legality of Undercover Agents' Activity

The second criterion assessed by the Court is a procedural one – the *legality of undercover agents' activity*. Firstly, for the use of such a special investigative method, it is necessary that the concrete investigative method is authorised and the procedure of authorisation is clear and foreseeable; second, the proper supervision of such a method must be conducted by a competent investigating institution. The Court's jurisprudence proves that the procedure for authorising a concrete investigative method should be clear and the information regarding the authorised investigative method is presented in a procedural document should be exhaustive, evaluating the reasons for such a method to be applied, purposes and the limits of the persons' involvement into such an investigative method.³³ Thus, an administrative decision by which such an investigative method is authorised and which does not contain full information on purposes and reasons of applying such a method is not sufficient.³⁴ However the worst situation is when firstly the actions using special undercover investigative method are performed and only later the application of such a method is authorised. The case of *Ramanauskas v. Lithuania* is the exact example, where such a situation occurred. The Court does not tolerate such cases because the performed actions are illegal and the investigative institutions try to avoid responsibility. In the case of *Ramanauskas v. Lithuania* the Court maintained that it was particularly important that the authorities should have assumed responsibility at the initial phase of the operation and the persons who committed illegal acts should have been prosecuted, and it did not happen in this case.³⁵

30 *Ramanauskas v. Lithuania*, § 67; *Malininas v. Lithuania*, § 36; *Khudobin v. Russia*, § 134; *Edwards and Lewis v. the [GC]*, no. 39647/98, 40461/98, § 46, ECHR 2004-X.

31 *Eurofinacom v. France*; *Sequeira v. Portugal*.

32 *Miliniënė v. Lithuania*, § 37; *Shannon v. the (dec.)*, no. 67537/01.

33 *Khudobin v. Russia*, § 135; *Ramanauskas v. Lithuania*, § 71; *Eurofinacom v. France*.

34 *Khudobin v. Russia*, § 135.

35 *Ramanauskas v. Lithuania*, § 63.

1.3. The Scope of the Undercover Agents' Involvement

The third aspect – the scope of the undercover agents' involvement – causes most of the problems. Firstly, the question arises how the undercover agent can act passively if he has to perform actions that create the conditions for committing a criminal act? Secondly, what should be the level of the activity's intensity, i.e. how many times a person should be provided with the conditions for the commitment of a criminal act? There is no one unambiguous and clear answer. Many cases confirm that undercover agents are only allowed to join the on-going criminal act; however, for the performance of their task in practice, active actions are needed and they should confine to the creation of the usual situation, where the suspect would act in the same way as with any potential client or person. Any additional temptation by large amounts of money or permanent, intensive inducement to commit a criminal act shall be considered as incitement to commit a criminal act by the state itself creating it. Thus in the case of *Ramanauskas v. Lithuania* the Court stated that the investigation of the criminal act was beyond the bounds of the investigation in an essential passive manner because all the meetings with the agents provocateur and the applicant took place exceptionally on the initiative of the agents provocateur and the applicant was clearly incited to commit a criminal act.³⁶ In the case of *Malininas v. Lithuania*, the Court concluded that there was an apparent instigation to commit a criminal act by intensively offering a significant sum of money for the supply of a large amount of drugs.³⁷ Moreover, in both cases *Ramanauskas v. Lithuania* and *Malininas v. Lithuania*, the Court recognised that the initiative came not from the applicants but from the agents provocateur. Meanwhile, in cases when the initiative comes from the suspect himself, the element of fairness is not infringed and such a person cannot be said to be a victim of incitement.³⁸

Nevertheless, in other cases it is quite difficult to detect the level of intensity of the undercover agents and the situation itself is fairly similar to the ordinary one, in which any person would act in the same way. The activity of the undercover agent in the case of *Vanyan v. Russia* could be compared to the ordinary situation, where any client or person would act similarly,³⁹ thus in such cases the Court pays attention to other criteria, especially to a person's predisposition to commit a criminal act, which taken together may condition the incitement to commit a criminal act. Thus one thing is absolutely clear that the application of such an investigative method that involves undercover agents is not an easy task because the activity of such undercover agents may amount to the ordinary

36 *Ibid.*, § 67.

37 *Malininas v. Lithuania*, § 37.

38 *Butkevicius v. Lithuania* (dec.), no. 48297/99, ECHR 2002-II.

39 In the case of *Vanyan v. Russia*, § 14, 48-49 the Court found that the activity of undercover agent performing a test-purchase under control of the investigating institution went beyond the limits of the investigating criminal act in an essential passive manner, although the situation itself was very similar to an ordinary one. The secret informant, who knew the applicant suspect of the drug trafficking asked him to sell drugs and bought from him the amount of 0,008 grams heroin. Such a situation can be easily equated to an ordinary situation taking into account that the secret informant knew the applicant and the amount of heroin. Also see the case of *Khudobin v. Russia*, which also involved a test-purchase.

situation, but all the other criteria and the overall process may determine the breach of the element of fairness.

On the other hand, can every type of activity of police be considered as incitement to commit a criminal act? The answer to this question perfectly illustrates a *test-purchase* for the purpose of detecting administrative law offence in the case of *Kuzmickaja v. Lithuania*.⁴⁰ In this case, a police officer, posing as a private person, has performed a test-purchase buying two glasses of brandy for the purpose of detecting whether the same amount of alcohol was served as indicated in the menu at the applicant's bar. The police officer asked for two glasses of brandy of the amount of 50 grams and he was served two glasses containing 40 and 44 grams of alcohol. The Court has established that the applicant was not incited to commit an administrative law offence and gave the following arguments: despite the fact that such a test-purchase has not been regulated by the national law and the resultant evidence might have given rise to certain criticism, it could not be concluded that the lack of detailed regulation for the specific purchase in the present case had rendered the police action illegal or arbitrary. Besides, the Court distinguished this case from *Teixeira* and *Lenkauskienė v. Lithuania* cases, maintaining that the police officer lawfully purchased a drink at the applicant's bar, as any ordinary citizen might have done, thus such a police role does not strike the Court as an abusive or arbitrary technique in the investigation of suspected criminal behaviour. It should be observed that the Court also distinguished this case from *Khudobin v. Russia* and *Vanyan v. Russia* cases, where test-purchases of drugs were also performed, however without giving sufficient arguments why this case was different from the cases against Russia.⁴¹ In the author's opinion, the only argument allowing the Court to treat the case of *Kuzmickaja v. Lithuania* as a different case is the fact that in this case, the police officers' acts were legal, and in the cases against Russia - illegal (buying drugs). However, in all three cases where undercover agents were used in some way, the situation was similar to the ordinary one, where the suspects would have acted in the same way if they were addressed by any other typical client. Therefore, it is considered that the Court should have given other additional arguments because as it could be read indirectly from the decision given in *Kuzmickaja v. Lithuania* case, the minor aspect of the offence (administrative law offence) cannot be the main reason to treat such a situation differently, a fortiori in all the three cases the criminal charge was determined. In the author's view, while performing a test-purchase regulated by both the criminal law and administrative law, the same criteria should be assessed, i.e. reasonable grounds to suspect that the person is involved in a similar criminal activity or has committed a similar criminal act beforehand, legality of the undercover agents' activity and the scope of the undercover agents' involvement. The opinion is grounded on the fact that in both cases, the same aim is pursued – to detect illegal acts and to punish persons guilty for such acts, while the nature of the offence (whether it is an administrative law offence, a criminal act or a disciplinary offence) should not have an effect because according to the Court's

40 *Kuzmickaja v. Lithuania* (dec.), no. 27968/03.

41 *Ibid.*

jurisprudence, all these offences can be treated as criminal⁴² despite the fact how the national law classifies them.

In the author's view, the predisposition to commit a criminal act is a fairly abstract issue, which is difficult to prove, and thus it is doubtful whether the Court should pay so much attention to this aspect. Therefore, with regard to the current Court jurisprudence it is not clear whether a purse left in a park for the purpose of arresting a person who would take it or an unattended slightly open van with cigarettes could be considered as an incitement to commit a criminal act.

2. The Use of the Evidence in the Case Acquired as a Result of the Use of Undercover Agents

According to the case of *Khan v. the*, the Court's duty under Article 19 of the Convention confers to ensure the observance of the obligations undertaken by the Contracting States to the Convention.⁴³ The Court in many cases has clearly laid down the general rules on the use of evidence in the proceedings and stated that the admissibility of evidence is primarily a matter for regulation by national law; as a rule, it is for the national courts to assess the evidence before them. The Court is not competent to give its opinion on the admissibility on evidence and to assess it.⁴⁴ The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.⁴⁵ Moreover, the Court's task is not to determine whether certain items of evidence were obtained unlawfully, but rather, to examine whether such "unlawfulness" resulted in infringement of another right protected by the Convention.⁴⁶ In addition to that, it is not the Court's function to deal with errors of fact or of law allegedly committed by a national court. 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 therefore primarily a matter for regulation under national law.⁴⁷ It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, whether the applicant was guilty

42 *Ibid.*; *Engel and Others v. Netherlands*, 8 June 1976, § 82, Series A no. 22; *Jussila v. Finland*, [GC], no. 73053/01, § 30; *Lauko v. Slovakia*, 2 September 1998, § 57, Reports 1998-VI; *Ziliberberg v. Moldova*, no. 61821/00, § 34; *Ozturk v. Germany*, 21 February 1984, § 49-56, Series A no. 73.

43 *Khan v. United Kingdom*, § 34.

44 *Asch v. Austria*, 24 April 1997, § 26, Series A no. 203; *Teixeira de Castro v. Portugal*, § 34; *Ramanauskas v. Lithuania*, § 52; *Gafgen v. Germany*, no. 22978/05, § 95-98; *Khan v. the*, § 34.; *Lüdi v. Switzerland*, § 43; *Bykov v. Russia* [GC], no. 4378/02, § 88-89; *Schenk v. Switzerland*, 12 July 1988, § 45-49, Series A no. 140; *Allan v. United Kingdom*, no. 48539/99, ECHR 2002-IX, § 42.; *Eurofinacom v. France*; *Shannon v. United Kingdom*.

45 *Teixeira de Castro v. Portugal*, § 34, *Ramanauskas v. Lithuania*, § 52; *Eurofinacom v. France*; *Sequeira v. Portugal*; *Vanyan v. Russia*, § 45; *Shannon v. United Kingdom*.

46 *Ramanauskas v. Lithuania*, § 52; *Gafgen v. Germany*, § 97; *Khan v.*, § 34; *P. G. and J. H. v. United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX.

47 *Khan v. United Kingdom*, § 34; *Schenk v. Switzerland*, § 45-46; *Teixeira de Castro v. Portugal*, § 34; *Gafgen v. Germany*, § 96.

or not.⁴⁸ Moreover, the Court is not competent to determine whether certain items of evidence were obtained unlawfully.⁴⁹

It should be also stressed that the Court particularly takes into consideration the use of evidence recovered by a measure found to be in breach of Article 3 in criminal proceedings. The Court holds that the use of such evidence, obtained as a result of a violation of one of the core rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings.⁵⁰ Furthermore, it usually preconditions the breach of the right to a fair trial; however, it is not always the rule when the Court finds the evidence to be collected in breach of Article 8.⁵¹ In this regard, a very recent judgment of the Grand Chamber in the case of *Bykov v. Russia* should be taken into consideration.⁵² In this case, a covert police operation was performed in order to obtain evidence of the applicant's intention to murder a person. The majority of the Grand Chamber decided that the evidence was obtained in breach of Article 8 of the Convention; however, the Grand Chamber refused to recognise that the fairness of the proceedings was violated. The Court's view regarding the evidence obtained in breaching one Convention right (established under Article 8) remained unchanged, maintaining the position that such evidence used in the proceedings, no matter whether it formed the sole or subsidiary basis for the conviction does not breach another Convention right – Article 6, in particular the fairness of the proceedings.⁵³ Such Court's view can be highly criticized because it presupposes the rule that what is prohibited by one Convention provision (Article 8) is accepted under another (Article 6).⁵⁴ Moreover, this position undermines the aspect of fairness as well as its effectiveness, and effectiveness of Article 8. Last but not least, such judgement of the Court's once again allows to conclude that there is a certain hierarchy of the rights established by the Convention. Moreover, it should also be taken into consideration that in certain cases, the use of evidence may result in the issue of ensuring the right to silence.⁵⁵

Proceeding from the more general principles on the rules of evidence to the more specific ones, it should be stated that the Court has given certain guidelines in its jurisprudence on the use of evidence collected by undercover agents in late stages of the judicial process. First, it should be observed that the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may

48 *Khan v. United Kingdom*, § 34; *Gafgen v. Germany*, § 96; *Jalloh v. Germany*, § 94-95.

49 *Ramanauskas v. Lithuania* § 52; *Gafgen v. Germany*, § 97; *Khan v. United Kingdom*, § 34; *P. G. and J. H. v. United Kingdom*, § 76; *Allan v. United Kingdom*, § 42. *Gafgen v. Germany*, § 98; *Jalloh v. Germany*, § 99, 104; *Göçmen v. Turkey*, no. 72000/01, § 73.

50 *Gafgen v. Germany*, § 98; *İçöz v. Turkey* (dec.), no. 54919/00; *Jalloh v. Germany*, § 99, 104; *Göçmen v. Turkey*, § 73.

51 *Khan v. United Kingdom*; *P. G. and J. H. v. United Kingdom*; *Schenk v. Switzerland*; *Allan v. United Kingdom*.

52 *Bykov v. Russia* [GC], no. 4378/02.

53 See also *Khan v. United Kingdom*; *P. G. and J. H. v. United Kingdom*; *Allan v. United Kingdom*, § 48.

54 See also the Concurring opinion of Judge Cabral Barreto and Partly dissenting opinion of Judge Spielmann joined by Judges Rozakis, Tulkens, Casadevall and Mijović in the case of *Bykov v. Russia*.

55 *Allan v. United Kingdom*, § 44; *Jalloh v. Germany*, § 100-102, 108-109; *Bykov v. Russia*, § 99-104.

warrant it, on sources such as undercover agents. However, the subsequent use of such sources by the trial court to find a conviction is a different matter.⁵⁶ Furthermore, the following principles can be distinguished. Firstly, the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards. The public interest cannot justify the use of evidence obtained as a result of police incitement because to do so would expose the accused to the risk of being definitively deprived of a fair trial, from the outset even if it concerns the combat with terrorism, corruption or drug trafficking and etc.⁵⁷ Besides, although the rise in organised crime requires to adopt appropriate measures, the right to a fair trial, which infers the requirement of the proper administration of justice, should not be violated. The right to the fair administration of justice holds such a prominent place in a democratic society that it cannot be sacrificed for the sake of expedience.⁵⁸

Secondly, if a national court decides that the person was incited to commit a criminal act, all the evidence resultant from such incitement must be excluded and cannot be used in a case. Moreover, such evidence cannot be used if the special investigative methods were used without a sufficient legal framework or adequate safeguards.⁵⁹ Thirdly, the Court always assesses whether such evidence have been the sole evidence to substantiate a person's guilt. If it is established by the court that a person was incited to commit a criminal act and the evidence resultant from such activity is the only one on which the finding of a person's guilt is based, this is the ground to recognise the breach of the right to a fair trial.⁶⁰ Thus, the Court assessing the proceedings as a whole and adjudging that there was no breach of the right to a fair trial also pays attention to the fact that the person's guilt is not based only on the undercover agents' evidence, even if the Court does not recognise that a person was not incited to commit a criminal act.⁶¹ On the other hand, even if the evidence is acquired by the undercover agent who is not a law-enforcement officer but whose involvement could have causes incitement to commit a criminal act and thus a breach of Article 6 (1) of the Convention, the only evidence acquired in such a way, and decisive to find a person guilty may not determine the infringement of the right to a fair trial if the person's predisposition to commit a criminal act is proved and the activity of the undercover agent has not gone beyond the investigation of a criminal act in a passive manner.⁶² Therefore, even if it is decided that a person was not incited to commit a criminal act using undercover agents, the resultant evidence may be the sole evidence to substantiate the person's guilt, if the rest of the factors do not condition unfairness of the proceedings as a whole.

56 *Teixeira de Castro v. Portugal*, § 35; *Kostovski v. Netherlands*, 20 November 1989, § 44, Series A no. 166; *Eurofinacom v. France*.

57 *Teixeira de Castro v. Portugal*, § 35-36, 39; *Khudobin v. Russia*, § 128; *Vanyan v. Russia*, § 46-47; *Eurofinacom v. France*.

58 *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11; *Ramanauskas v. Lithuania*, § 53.

59 *Ramanauskas v. Lithuania*, § 60; *Khudobin v. Russia*, §133-135; *Eurofinacom v. France* .

60 *Ramanauskas v. Lithuania*, § 72; *Vanyan v. Russia*, § 49.

61 *Sequeira v. Portugal*; *Eurofinacom v. France* .

62 *Shannon v. United Kingdom*.

3. The Possibility to Challenge the Issue of Entrapment

In the case of *Khudobin v. Russia* it was noticed that the lack of possibility of judicial supervision assessing the use of special investigative methods is one of the conditions determining the breach of the right to a fair trial.⁶³ On the basis of the latter case and the case of *Ramanauskas v. Lithuania* it could be clearly seen that as regards using the undercover agents, the aspect of fairness establishes a clear positive obligation to the national courts to assess whether a person was incited to commit a criminal act. Moreover, in case of using undercover agents, the national court must assess the reasons for applying such a method, involvement of undercover agents into a criminal act and the nature of any incitement or pressure to which the applicant had been subjected.⁶⁴ Moreover, the suspect himself must have the possibility to challenge the legality of using such a method and the national court must adequately assess such statement of the suspect assessing both the factual circumstances of the case and issues of law. Therefore, in the case of *Ramanauskas v. Lithuania*, the Court evaluating if the proceedings as a whole were fair, paid attention to the fact that despite the fact the applicant throughout the whole proceedings maintained that he was incited to commit a criminal act, the national courts had not taken it into consideration and had not assessed it. Furthermore, the Supreme Court of Lithuania found that once the applicant's guilty had been established, the question whether there had been any outside influence on his intention to commit the offence became irrelevant.⁶⁵ In such cases, the right to a fair trial is undoubtedly breached. However, in the case of *Miliniene v. Lithuania* the Court has not found the breach of the right to a fair trial, haven considered the fact that the applicant had full and effective opportunity to challenge the issue of incitement, as well as the authenticity and accuracy of the evidence, and the Supreme Court of Lithuania gave a reasoned response to that question.⁶⁶

4. The Protection of Principles of Adversarial Process and Equality of Arms

In the jurisprudence of the ECHR the issue of the possibility to confer the status of anonymous witness or victim is not questionable; however the exceptional use of evidence provided and motivating the conviction by them and motivating the conviction is stressed. Assessing the proceedings as a whole in case the undercover agents have been used, and trying to clarify whether the aspect of fairness was respected, the Court also takes procedural aspects into consideration. I.e. the Court evaluates whether the principles of equality of arms and adversarial process have been respected, allowing the accused

63 *Khudobin v. Russia*, § 135; *Miliniene v. Lithuania*, § 39.

64 *Ramanauskas v. Lithuania*, § 71.

65 *Ibid.*, § 72.

66 *Miliniene v. Lithuania*, § 39; *Sequeira v. Portugal*.

to challenge the issue of entrapment and how the evidence resultant from such activity has been considered.⁶⁷ The respect of principles of equality of arms and adversarial process is one of the most problematic aspects related to the use of undercover agents. The biggest problem with regard to them is the issue of the interrogation of the undercover agents, who very often acquire the status of anonymous witnesses and whose evidence are often the sole or decisive in finding the person guilty in the case. Thus, the accused does not have the possibility to question these witnesses for the purpose of verifying the credibility and reliability of such undercover agents' testimony, who acquire the status of anonymous witnesses or are left without being questioned at all. The jurisprudence of the Court shows that the grant of the status of anonymous witness and the issues of disclosing the evidence are the main problems related to the defence rights, which will be further analysed.

4.1. Anonymous Witnesses

In the both cases *Ramanauskas v. Lithuania* and *Khudobin v. Russia*, the applicants (the accused) had not the possibility to put questions to the persons whose testimony had a decisive role convicting them; the applicants were deprived of such a possibility without any reason. It should be noticed that in the case of *Lüdi v. Switzerland*, the suspect could not question the undercover agent because he acquired the status of anonymous witness. The status was granted with the aim to use the agent in the subsequent similar operations related to drug trafficking, and also to protect his identity. The situation when undercover agents become anonymous witnesses causes many problems with protection of the procedural defence rights, specifically the principles of equality of arms and adversarial process. It should be emphasised that in such situations, the conflict of two rights is very manifest: the protection of the anonymous witnesses on the one hand and the protection of the procedural defence rights on the other hand.⁶⁸

In the case of *Kostovski v. Netherlands*, the Court for the first time encountered with the aforementioned conflict of two rights; it stated that in principle, all the evidence must be produced in the presence of the accused at a public hearing, with a view to an adversarial argument for the protection of the procedural defence rights. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.⁶⁹ The use of testimony given by anonymous witnesses *per se* does not in itself infringe the Convention,⁷⁰ however if the witnesses acquire anonymity, the defence rights are restricted. Therefore, the Conven-

67 *Ramanauskas v. Lithuania*, § 61; *Edwards and Lewis v. United Kingdom*, [GC], nos. 39647/98 and 40461/98, § 46-48.

68 On the issue concerning the conflict of the Convention rights see the article of Štarienė. L. The Character, Place and the Level of Protection of the Right to a Fair Trial under Article 6 of the European Convention on Human Rights with regard to the Other Convention Rights. *Jurisprudencija*. 2006, 10 (88): 40-48.

69 *Kostovski v. Netherlands*, § 41.

70 *Birutis and Others v. Lithuania*, no. 47698/99, 48115/99, § 29; *Doorson v. Netherlands*, 26 March 1996, § 69, *Reports* 1996-II; *Van Mechelen and Others v. Netherlands*, 23 April 1997, § 52, *Reports* 1997-VII.

tion requires that the handicaps under which the defence operates should be sufficiently counterbalanced by the procedures followed by the judicial authorities and the applicant should not be prevented from testing the anonymous witness's reliability.⁷¹ It should be stressed that it is very important to test the credibility of the testimony because in such cases, several risk factors arise with regard to anonymous witnesses.⁷² And in such a case when the issue of the relation on the protection of the anonymous witnesses and defence rights emerges, the balance of these two rights should be guaranteed.⁷³

Moreover, in the case of *Doorson v. Netherlands*, it was stated that the evidence received in circumstances when the defence rights cannot be protected in the way the Convention requires, such evidence should be examined with extreme care.⁷⁴ On the basis of the analysed Court's jurisprudence, the grant of anonymous witness status should be strictly necessary because otherwise the defence right to an adversarial process is very much restricted. Thus in the case of *Lüdi v. Switzerland*, the Court gave no detailed arguments in deciding that in such circumstances as in the latter case, it was possible to keep the undercover agent's anonymity making use of him for the later secret operations and to guarantee the procedural rights of the accused at the same time.

In its later practice, the Court's opinion regarding the grant of the status anonymous witness to undercover agents and guarantee of the principles of equality of arms and adversarial process became even stricter. The Court laid down the principles that should be followed in assessing the legality of anonymous witness testimony in the case of *Van Mechelen and Others v. Netherlands*.⁷⁵ The use of testimony given by the anonymous witnesses is justified when there is necessity to protect their interests and if their use does not deprive from the right to defence and the right to a fair trial. The defence must be given the possibility to question the witnesses because the anonymity of witnesses restricts the defence right to question their reliability and to give the arguments on the possible personal hostility or prejudice with regard to the accused. Such handicaps must be sufficiently counterbalanced by the procedures followed by the judicial authorities.⁷⁶ In this case, it was maintained that the police might want to ensure legal preservation of the anonymity of the agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations; however such classification of the witnesses could not infringe the person's defence rights. It was also decided in this case that the granted anonymity status to the police officers was not necessary because their position was to some extent different from that of a disinterested witness or a victim. Therefore, taking into account that they received information performing their duties, they should have given evidence in open court. Meanwhile, in

71 *Kostovski v. Netherlands*, § 42; *Krasniki v. Czech Republic*, no, 51277/99, § 76.

72 Explanatory Memorandum. Recommendation No. (97) 13 of the Committee of Ministers to Member States On Intimidation of Witnesses and Rights of Defence. [interactive]. [accessed 2008-11-20]. <<https://wcd.coe.int/ViewDoc.jsp?id=584079&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>>.

73 *Kostovski v. Netherlands*, § 43.

74 *Doorson v. Netherlands*, § 76.

75 *Van Mechelen and Others v. Netherlands*, § 57.

76 *Ibid.*, § 54, 62; *Birutis and Others v. Lithuania*, § 29.

the case of *Visser v. Netherlands*, the Court found that the defence rights were restricted on the basis that the national courts had not assessed the reasonableness of granting the anonymity to a witness.⁷⁷

Differently from the prior cases, the Court assessed the fact that the issue to confer the status of anonymity was adequately analysed and well-founded and the reliability of the anonymous witness was adequately examined. The complaint with regard to the impossibility to question anonymous witnesses was declared as manifestly ill-founded in the case *Kok v. Netherlands*.⁷⁸ According to the Court's argumentation the grant of the status of anonymous witness's should be first of all very well founded and justifiable. Thus, the author raises a question whether on the whole it is reasonable to grant the anonymity to an undercover agent because generally during the proceedings it comes to light that the undercover agent had been used or CCSM had been applied, therefore the accused knows such a person or persons at least from the appearance. In such cases, for the purpose of keeping the undercover agent's identity in order to use him in the later secret operations, only the personal data of such a witness could be not revealed, and the case should be examined in a closed court session thus guaranteeing the defence right to question such witnesses. It is another question whether it would be in fact possible to use such an undercover agent in later secret operations and whether the protection of the witnesses would be wholly guaranteed. However, in this way the balance of two competing interests would be the most achieved. The case of *Van Mechelen and Others v. Netherlands* also allows to conclude that by way of protecting defence procedural rights, the member states of the Convention are obliged to classify both ordinary witnesses and undercover agents only in exceptional cases when they are faced with real danger. This means that while the anonymity may be conferred to an ordinary witness, the basis could be nevertheless insufficient to apply it to a police officer.

Finally, the decision in the case of *Kok v. Netherlands*, where the accused did not have the possibility to ask direct questions to an anonymous witness and thus to test the credibility of his testimony, allows to draw a conclusion that first, the reasonableness of conferring the status of anonymity and assessment of a witness's credibility have decisive importance in deciding the question whether the defence rights with regard to questioning anonymous witnesses have been infringed.⁷⁹ It was mentioned that in both cases of *Van Mechelen and Others v. Netherlands* and *Kok v. Netherlands* the applicants did not have the possibility to question a witness directly and to observe his behaviour, thus they could not themselves test the credibility and reliance of such testimony. However, the final decisions in these cases are different. In the case of *Kok v. Netherlands* there was no infringement found due to the fact that the applicant could not directly question a witness and thus to observe his behaviour. However, in the case of *Van Mechelen and Others v. Netherlands* such an interrogation procedure when the applicant could not directly question a witness had not been counterbalanced with the handicaps of the defence rights because the other aspects also had influence to such a

77 *Visser v. Netherlands*, no. 26668/95, § 47-48.

78 *Kok v. Netherlands* (dec.), no. 43149/98, ECHR 2000-VI.

79 *Ibid.*

conclusion. Therefore, the case of *Kok v. Netherlands* allows to make a conclusion that the impossibility of the defence to observe the behaviour of the witness directly is not decisive if the issue of reliability of such a witness was thoroughly examined by the officer questioning him and the issue of conferring the status of anonymity was adequately examined. Therefore, the defence rights in this way are not unduly handicapped (for the recognition of their breach) and the process of questioning itself guarantees the principle of adversarial process and counterbalances the handicaps of the defence rights. In the case of *Van Mechelen and Others v. Netherlands* the Court itself recognized that the issue of reliability of anonymous witnesses was very thoroughly examined, and found the breach of the right to a fair trial.

Finally, the conviction cannot be based exclusively on the anonymous witnesses' testimony⁸⁰ or such testimony, provided it is not the sole evidence, cannot have the decisive influence for finding the person guilty.⁸¹ Therefore, if the testimony of an anonymous witness is not decisive for finding the person guilty, the defence rights are handicapped to a much lesser degree.⁸²

4.2. Disclosure of Evidence

Disclosure of evidence is another case when the principle of adversarial process is very often breached, which at the same time conditions the infringement of fairness. According to the Court's jurisprudence *the principle of adversarial process means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.*⁸³ The principle of adversarial process is very closely connected with the principle of equality of arms, which implies *that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.*⁸⁴ Moreover, Article 6 (1) of the Convention also requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.⁸⁵ However, such requirement to disclose the evidence is not absolute. As well as in the case regarding anonymous witnesses, the disclosure of evidence raises the issue of the balance of the rights. While substantiating the view that the entitlement to disclose evidence is not absolute, the Court *a priori* names the possible conflict of interests stating that *„in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused.*⁸⁶ Moreover, in certain cases the aim to protect the fundamental rights of other

80 *Van Mechelen and Others v. Netherlands*, § 55; *Doorson v. Netherlands*, § 76; *Birutis and Others v. Lithuania*, § 29; *Taal v. Estonia*, no. 13249/02, § 31, 33.

81 *Lüdi v. Switzerland*.

82 *Visser v. Netherlands*, § 46; *Kok v. Netherlands*.

83 *Ruiz Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262.

84 *Dombo Beheer BV v. Netherlands*, 27 October 1993, § 33, Series A no. 274.

85 *Rowe and Davis v. United Kingdom*, [GC], no. 28901/95, § 60, ECHR 2000-II; *Edwards and Lewis v. United Kingdom*, § 46; *V. v. Finland*, § 74.

86 *Jasper v. United Kingdom*, no. 27052/95, § 61; *Rowe and Davis v. United Kingdom*, § 61; *Edwards and Lewis v. United Kingdom*, § 53.

people or to safeguard an important public interest may condition non disclosure of evidence to the defence. In any case, only the measures restricting the defence rights that are strictly necessary are allowed under Article 6 (1) of the Convention. However, after applying such measures, in order to ensure that the accused receives a fair trial, any difficulties caused by the limitation of defence rights must be sufficiently counterbalanced with the procedures followed by the judicial authorities.⁸⁷ Thus, the judge passing the conviction has an important role and must adequately assess the evidence in deciding upon the issue of their disclosure to the defence. Finally, in cases where evidence has been withheld from the defence on public interest grounds, however, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary because as a general rule, it is for the national courts to assess the evidence before them. Instead, the Court's task is to ascertain whether the decision-making procedure applied in each case had complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.⁸⁸

The non disclosure of evidence to the defence both in the cases involving and not involving the participation of undercover agents, determines the breach of the principles of the equality of arms and the adversarial process if such evidence have impact on passing the final judgements. The issue of disclosure of evidence and the proper protection of the defence rights becomes extremely problematic in cases where undercover agents are used in the framework of certain secret operations because very often the data related to authorising such secret operations are secret and acquire the status of evidence in the case. In the case of *Edwards and Lewis v.*,⁸⁹ using the undercover agents in the frame of a secret police operation, the applicants were arrested in the process of committing crimes; the first applicant was arrested for drug trafficking and the second – for money counterfeit. The prosecution based its charge on the secret evidence, and only the prosecutors and the judge could get acquainted with such secret information. The applicants unsuccessfully challenged the fact of the incitement because they could not get acquainted with the secret information, and thus they could not properly challenge the fact of incitement. Moreover, one of the applicants could not challenge the information that he was involved into drug trafficking before the events followed by his arrest and prosecution, because this information was secret. In this way, the defence rights were limited to such an extent that the principles of equality of arms and adversarial process had been breached.

It would also be the infringement of the aspect of fairness breaching the principle of adversarial process and the equality of arms, if the defence is not be presented with the important information on time, as it was maintained in the case of *V. v. Finland*.⁹⁰

87 *Edwards and Lewis v. United Kingdom*, § 46.

88 *P. G. and J. H. v. United Kingdom*, no. 44787/98, § 69, ECHR 2001-IX; *Rowe and Davis v. United Kingdom*, § 62.

89 *Ibid.*

90 *V. v. Finland*, § 76-80.

Conclusions

1. On the basis of the analysed jurisprudence of the Court, the first conclusion should be made that the use of undercover agents, even in the field of combating such well organised crimes as drug trafficking, money counterfeit, prostitution or corruption, is allowed. However, such an investigative method must be lawful, the laws should establish clear limits of undercover agents' activity and safeguards must be foreseen and adequate supervision and judicial review of such a method should be stipulated. Nevertheless, such an investigative method is applied with great difficulty in the states' practise.

2. The use of undercover agents as an investigative method is extremely problematic nowadays, because it is also not clear whether more attention should be paid to the subjective aspects, such as the predisposition to commit a criminal act, or objective ones, such as the limits of the undercover agents' involvement. On the other hand, it is not quite clear what should be the level of intensity of the undercover agents' activity.

3. Though the analysis of the cases proves that to this date is not clear, which criteria are enough to establish a breach of the right to a fair trial by the use of undercover agents, the author suggests that in any case where undercover agents were used all the criteria developed in the case of *Ramanauskas v. Lithuania* should be assessed. Moreover, the author raises the question whether the criteria distinguished by the Court are sufficient?

4. The protection of the defence rights – the principles of equality of arms and adversarial process – using undercover agents is also very problematic from the perspective of member states' fulfilment of obligations. The analysis of the cases proved that the use of testimony given by undercover agents that acquire the status anonymous witnesses is possible only if they themselves give it and the accused is made the possibility to question them even though indirectly, otherwise such testimony should be dismissed since the principles of equality of arms and adversarial process are breached.

5. The disclosure of evidence raises the analogous problem when the evidence is the secret material, which can be presented only to the prosecution and the judge. Therefore, it is most probably impossible to protect the defence rights and to safeguard the public interest at the same time, unless such information has no meaning to the defence. However, this is highly unlikely, especially when the accused tries to challenge the issue of incitement to commit a criminal act. Therefore, it is presumed that in such cases, for the purpose of not revealing the police secret investigative methods, and to ensure the defence rights, the evidence that is secret should not be used in the proceedings.

6. Current reality proves that the Court's jurisprudence related to the use of undercover agents and the protection of the right to a fair trial is still at the stage of formation. Thus, the Court has to give answers to several questions for the purpose of thorough and effective protection of the right to a fair trial, and to enable the member states of the Convention to effectively fulfil their obligations under the international instrument.

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SLAPTŪJŲ AGENTŲ PANAUDOJIMO RIBOS IR TEISĖS Į TEISINGĄ TEISMĄ UŽTIKRINIMAS PAGAL EUROPOS ŽMOGAUS TEISIŲ KONVENCIJOS 6 STRAIPSNIO 1 DALĮ

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Santrauka. Šiandien vis dažniau yra taikomi įvairūs specialieji tyrimo metodai, kurių neišvengiamą panaudojimą skatina šiaandieninė tikrovė kovojant su organizuotu nusikaltamumu tokiose srityse kaip korupcija, prostitucija, narkotikų prekyba, prekyba žmonėmis, pinigų padirbinėjimas ir kitose. Todėl vis dažniau yra taikomi slapsti tyrimo metodai, kurie yra labai veiksmingi renkant įrodymus siekiant atskleisti ar tirti gerai organizuotus arba labai latentiškus nusikaltimus. Tiek pati Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija (toliau – Konvencija), t. y. jos 6 straipsnis, tiek kiti tarptautiniai teisės instrumentai, kaip, pavyzdžiui, 1999 m. sausio 27 d. Europos Tarybos baudžiamosios teisės konvencija dėl korupcijos, 1990 m. lapkričio 8 d. Europos Tarybos konvencija dėl pinigų išplovimo

ir nusikalstamu būdu įgytų pajamų paieškos, arešto bei konfiskavimo ir kiti nedraudžia naudoti specialiuosius tyrimo metodus, tačiau jų naudojimas negali pažeisti žmogaus teisių. Specialių tyrimo metodų, kaip slaptųjų agentų ar kitų slaptų tyrimo priemonių naudojimas, pats savaime nepažeidžia žmogaus teisių, o ir pačios teisės į teisingą teismą, tačiau jo panaudojimas turi turėti aiškias ribas bei saugiklius.

Pastaruoju metu priimti Europos Žmogaus Teisių Teismo (toliau – Teismas) sprendimai byloje dėl slaptųjų agentų panaudojimo patvirtina, kad slaptųjų agentų panaudojimas tam tikro tipo byloje yra dažnai neišvengiamas, tačiau itin sunkiai pritaikomas ir problemiškas, kadangi Teismas valstybėms Konvencijos dalyvėms nustato vis didesnius išpareigojimus. Iš dalies tai lemia faktas, kad šiandieninė Teismo jurisprudencija šiuo klausimu yra vis dar formavimosi stadijoje, kadangi lieka nemažai neatsakytų klausimų.

Straipsnyje yra detaliai analizuojama Teismo praktika tiek byloje prieš Lietuvą, tiek prieš kitas valstybes dėl slaptųjų agentų panaudojimo ir teisės į teisingą teismą pagal Konvencijos 6 straipsnio 1 dalį užtikrinimą, ypač daug dėmesio skiriant naujausiai pastarųjų metų Teismo jurisprudencijai bei byloms prieš Lietuvą. Straipsnyje analizuojama tiek bylos, kuriose konstatuoti teisės į teisingą teismą pažeidimai, tiek bylos, kaip geros praktikos pavyzdžiai. Atskirose keturiuose straipsnio dalyse detaliai analizuojami autorės išskirti keturi kriterijai atsižvelgiant į šiandieninę Teismo praktiką: slaptųjų agentų dalyvavimo ribos; įrodymų, gautų panaudojus slaptuosius agentus, panaudojimas byloje; galimybė ginčyti provokavimo klausimą bei šalių lygiateisiškumo bei rungtyniško proceso principų užtikrinimo klausimai darant apibendrintą išvadą, kad slaptųjų agentų panaudojimas vis dar yra problemiškas klausimas, kuris iki galo nėra Teismo praktikoje išaiškintas, o tai sukelia vis dažnesnius teisės į teisingą teismą pažeidimus bei kelia taikymo bei reglamentavimo problemų valstybių nacionalinėje teisėje.

Pastebėtina, kad šiame straipsnyje sąvokos provokavimas (angl. – entrapment; pranc. – guet-apens) ir kurstymas (angl. – incitement, instigation; pranc. provocation) yra vartojamos kaip sinonimai, kadangi tiek byloje prieš Lietuvą, tiek byloje prieš kitas valstybes Teismas vartoja abi sąvokas apibūdindamas tokią veiklą kaip prieštaraujančią Konvencijos 6 straipsnio 1 daliai.

Reikšminiai žodžiai: Žmogaus Teisių Teismas, Europos Žmogaus Teisių Konvencija, teisė į teisingą teismą, slapti agentai, provokavimas daryti nusikalstamą veiklą, įrodymų naudojimas, šalių lygiateisiškumo ir rungtyniško proceso principai.

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