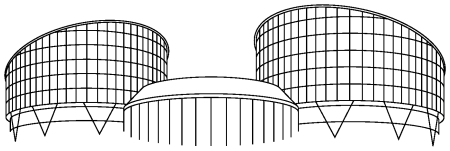

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF RAMANAUSKAS v. LITHUANIA (No. 2)

(Application no. 55146/14)

JUDGMENT

STRASBOURG

20 February 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ramanauskas v. Lithuania (No. 2),

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Carlo Ranzoni,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 16 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 55146/14) against the Republic of Lithuania, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Kęstas Ramanauskas ("the applicant"), on 28 July 2014.

2. The applicant was represented by Mr M. Zabita, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. On 9 November 2016 the complaints concerning fair hearing and alleged incitement to commit the offence of taking a bribe were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1966 and lives in Kaišiadorys.

5. The applicant worked as a lawyer in his own private practice.

6. On 28 January 2011 V.Š., a convicted prisoner, provided a statement to the Special Investigation Service (*Specialiųjų tyrimų tarnyba*, hereinafter "the STT") and stated the following. He had heard from other inmates that the deputy head of Pravieniškės Correctional Facility, L.D., took bribes to transfer inmates to units with lighter security and that L.D. had mentioned

to V.Š. that it was possible to be released on probation for money. V.Š. was questioned by the STT and stated that in December 2010 L.D. had asked him to his office and enquired whether he wanted to be released early. L.D. had indicated that he had a friend who could help V.Š. obtain release on probation and promised to organise a meeting with him. V.Š. was asked again that month by L.D. to go to the latter's office, where he met the applicant (see paragraph 7 below). V.Š. asked the applicant what he should do in order to obtain release on probation. The applicant stated that V.Š. would first have to be transferred to a unit with lighter security. V.Š. asked the applicant how much it would cost him and the applicant replied that Kaišiadorys [District Court] would cost him 7,000 Lithuanian litai (LTL, approximately 2,027 euros (EUR)). After that the applicant indicated several judges that would agree to release V.Š. on probation. The applicant also stated that the cost for the same thing in the Kaunas Regional Court would be approximately LTL 10,000 (approximately EUR 2,896) but that that was not the final amount. The applicant also mentioned that V.Š. would have to pay LTL 1,000 (approximately EUR 290) for the transfer to a unit with lower security. After that conversation V.Š. started recording his discussions with L.D. and the applicant using a voice recorder watch which he said he had obtained from other inmates in exchange for cigarettes. Figures mentioned during the other meetings were LTL 2,000 (approximately EUR 579) for the transfer to another unit and LTL 12,000 (approximately EUR 3,475) for the judges at the Kaunas Regional Court as that amount could be more easily divided in three than LTL 10,000. V.Š. stated that no agreement on legal services had been concluded with the applicant. V.Š. then contacted an acquaintance, G.T., a former police officer who promised to contact the authorities.

7. The transcript of the conversation recorded between V.Š. and the applicant on 26 January 2011 showed that V.Š. had around LTL 35,000 (approximately EUR 10,137). The conversation went as follows:

> "The applicant: ' ...You understand that the intermediary who will go will also need some, and..'
>
> ...
>
> The applicant: 'You know, salaries there are [LTL] 7,000, so you know...'
>
> The applicant: 'As with [D], when he brought, looked, he went there with those pennies, [they] said no, and he did not have any more...'
>
> V.Š.: 'Listen, I will be honest, for example I said, the deputy head asked me, asked. I told him that I will have ten, ten euros, so to say thirty five litai.'
>
> The applicant: '... With that, we can easily talk about Kaunas.'
>
> ...
>
> The applicant: 'I believe you. I think that it will go through with such an amount of money.'"

The applicant told V.Š. that that amount might not actually be necessary. V.Š. then told the applicant that G.T. would contact him and give him LTL 2,000 (EUR 579). The applicant also told V.Š. that he had won a case against Lithuania at the Court and that he had not accepted a bribe in that case. The conversation went as follows:

> "The applicant: 'I have already been burnt and only got things straight in Strasbourg. I have won [in] the Strasbourg Court against Lithuania. I previously worked as a prosecutor.'
>
> V.Š.: 'The deputy did not tell me anything.'
>
> The applicant: 'I could go back to being a prosecutor. I have won a case against Lithuania in Strasbourg.'
>
> V.Š.: 'I will ... shake your hand. I can say ... that this seems unreal to me.'
>
> The applicant: '... The prosecutor with a bribe... Strasbourg proved that it was a provocation. I proved it in Strasbourg. The proceedings [there] took eight years.'
>
> The applicant: 'It was nothing to do with a bribe .... I ... bought an apartment, I asked someone to give me a loan... He ... was in prison later. He was released... and became a snitch.'
>
> V.Š.: 'A friend'.
>
> The applicant: '... He used to sleep at my mother's place... I don't know where he disappeared to. He will not die a natural death. I was not the only one he set up. Two judges in Kaunas as well.'
>
> ...
>
> The applicant: 'And I won a case in Strasbourg later. The Supreme Court rehabilitated me.'
>
> V.Š.: 'Yes.'
>
> The applicant: 'The Grand Chamber of seventeen judges, the plenary session for criminal cases.'
>
> ...
>
> The applicant: 'So look. When will that person come? So that I know what ...'
>
> V.Š.: 'So I can call you and simply say one word. Tomorrow, the day after tomorrow.'"

The applicant asked V.Š. to make sure that G.T. did not tell anyone about the agreement and V.Š. assured him that G.T. would not ask any questions.

8. On 31 January the STT asked a prosecutor to apply to a pre-trial judge for authorisation for G.T. and V.Š. to offer and give a bribe to L.D. and the applicant, in accordance with the provisions of domestic law. The prosecutor also sought permission to make video and/or voice-recordings, to take pictures and to allow three officers to monitor L.D.'s and the applicant's telephone conversations. The prosecutor also asked the Vilnius City Second District Court on the STT's behalf to authorise covert surveillance of the applicant and L.D. for two months. The STT additionally

informed the prosecutor that a pre-trial investigation had been opened against L.D. and the applicant.

9. On the same day the Vilnius City Second District Court authorised taps on the telephones of L.D., V.Š., G.T. and the applicant and allowed G.T. and V.Š. to perform actions which imitated criminal conduct for two months, until 31 March 2011. V.Š. was allowed to use various types of telecommunications and electronic network measures.

10. On 31 January 2011 V.Š. was transferred to a unit with lighter security, based on good behaviour and active participation in the commemoration of the Day of the Defenders of Freedom.

11. On 31 January 2011 G.T. was questioned by the STT. He stated that he had visited V.Š. earlier in January 2011 and that the latter had asked him whether he could give LTL 2,000 to someone. G.T. had agreed.

12. On 1 February 2011 V.Š. and G.T. signed documents stating that they were not allowed to incite someone to commit an offence.

13. On the same day the applicant visited V.Š. and they talked about the situation of V.Š.

14. Later that day G.T. called the applicant and agreed to meet him the following day. After the meeting G.T. left LTL 2,000, given to him by the STT officers, in the side pocket of the applicant's car.

15. On 3 February 2011 V.Š. called the applicant and asked how matters were proceeding. The applicant said that he would call back, but later asked to call the following Tuesday. On 10 February 2011 V.Š. called the applicant and said that they would be in touch; he also asked if the applicant would pay him a visit and the applicant said that he would come at some point in the future. On 14 February 2014 V.Š. called the applicant and said that he had received a character reference from the psychologist and the applicant stated that he would be in touch. V.Š. then asked the applicant whether he should call him and the applicant said that he could call when the documents for his transfer to a unit with lighter security were ready. On 19 February 2011 V.Š. called the applicant and informed him that the documents for the court had already been prepared. The applicant stated that he would be in touch and would come to visit V.Š. because they could not talk on the telephone. The applicant said that V.Š. could call him the following Wednesday or Thursday but then decided that Wednesday would be the best day. On 1-3 March 2011 V.Š. called L.D. and complained that he could not reach the applicant and asked for help in finding him. On 3 March 2011 L.D. called a certain A. and asked him where the applicant was. A. told him that it was not the first time that the applicant had disappeared.

16. On 7 March 2011 L.D. called the applicant and said that people were looking for him. The applicant said that V.Š.'s case was still in progress. L.D. asked the applicant to come and meet V.Š. and the applicant said that he had understood. V.Š. then called the applicant, who said he was going to

visit him in a few hours and that they would talk in person. V.Š. again called the applicant later that day and asked whether he should bring the medical certificate to the meeting and the applicant said that he was already in the correctional facility. During the visit they discussed the fact that V.Š.'s case had not yet been transferred to court. V.Š. asked whether the applicant still had the necessary access [in the Kaunas Regional Court]. The applicant confirmed that he did, that the person concerned was coming back from Austria the following Monday and that without that person the matter could not be settled there. The applicant asked whether V.Š. wanted him to participate in a hearing before the court of first instance and V.Š. said yes. Then they talked about someone else's situation and the applicant said that he knew the prosecutor and had bought him. The applicant further said that not every prosecutor could be bought but there were two he could buy. V.Š. said that he had LTL 30,000 (approximately EUR 8,689) and it did not matter for what [court] he had to pay. The applicant then asked V.Š. to speak quieter. He also asked V.Š. to call him from time to time. V.Š. asked whether he would have to pay something before the hearing in the Kaišiadorys District Court and the applicant said he would not have to give much because the chances were fifty-fifty. The applicant also stated that the rest of the money would be held in reserve for Kaunas [Regional Court] and he would take LTL 1,000 for Kaišiadorys [District Court]. Later in the same conversation he mentioned LTL 1,500 (approximately EUR 434). The applicant asked V.Š. to get in touch with his contact person, who was to call and meet the applicant in the evening. After the applicant had left the correctional facility V.Š. called him and told him that the papers had been sent to the court on the twenty-third. The applicant asked V.Š. to call him in an hour. When V.Š. called, the applicant told him that the hearing would take place on 23 March and that the applicant would participate in it; he also asked to call him in the evening.

17. On 9 March 2011 V.Š. called the applicant, who said that he would write him a message. On 14 March 2011 V.Š. called the applicant and they again discussed V.Š.'s situation. On 17 March 2011 V.Š. called the applicant and the applicant said that they would keep in touch after the following Sunday, and V.Š. was asked to call on Monday after lunch. On 18 March 2011 V.Š. called the applicant, who said that he would not participate in the hearing at the court of first instance regarding V.Š.'s release on probation and that if something happened he would inform V.Š. On 21 March 2011 V.Š. called the applicant, who confirmed his intention as regards the court of first instance because he did not expect anything good to come out of it. However, he said he would try to talk to someone and V.Š. said he would not forget his debt to the applicant. On 23 March 2011 V.Š. called the applicant and informed him that the Kaišiadorys District Court had decided not to release him on probation. The applicant then said that he would visit V.Š. so he could sign an appeal. On 23 March 2011 V.Š.

called L.D. and asked him to ask the applicant about his chances to be released on probation. L.D. called the applicant the same day and asked how matters were proceeding with their client. The applicant said that he would come on Friday and that they would talk then. On 25 March 2011 the applicant visited V.Š., who signed some blank pieces of paper, on which the applicant said he would later write an appeal. V.Š. asked whether they would be covered by the amount they had discussed before. The applicant said that he would see, that he had talked with the men in question and asked them to do everything and that they would receive some money. V.Š. then told the applicant that his contact person would come the following Monday. After that, they discussed amounts and the applicant told V.Š. that the entire sum discussed would be necessary. V.Š. asked whether they were talking about thirty [thousand] and whether that amount included the applicant's share and the applicant said it did. The applicant also said that before that amount would have guaranteed his release on probation one hundred percent but that now there was some trouble. The applicant then told V.Š. to call his contact person and ask him to meet the applicant on Monday. V.Š. asked whether his person (G.T.) should bring thirty (thousand) and the applicant confirmed that he should.

18. On 29 March 2011 the applicant and G.T. met in the applicant's car, where LTL 30,000 was given to the applicant so that he could secure V.Š.'s release on probation. The applicant was arrested by STT officers immediately afterwards and the money was found in the side door pocket of the applicant's car.

19. V.Š. was questioned additionally on 30 March 2011. He stated that L.D. had talked of the applicant as a reliable person who had access to prosecutors and judges. V.Š. also showed that L.D. had been the first one to start a conversation about the possibility of V.Š. being released on probation and that L.D. had told him several times before that "serious men pay money and are released and do not sit in prison" (*rimti vyrai moka pinigus ir eina į laisvę, o ne sėdi kalėjime*).

20. On 8 April 2011 the Kaunas Regional Court dismissed V.Š.'s appeal and upheld the first-instance decision not to release him on probation.

21. On 9 August 2011 a bill of indictment was drawn up against L.D. and the applicant. The applicant was accused of promising to influence L.D. and the judges at the Kaišiadorys District Court and the Kaunas Regional Court with a bribe so that V.Š. would be released on probation. He was also accused of taking a bribe of LTL 2,000 and LTL 30,000 respectively on two occasions.

22. On 31 August 2011 the Court of Appeal examined an application by the prosecutor to transfer the criminal case from the Kaišiadorys District Court. The Court of Appeal held that the applicant had stated that he could influence two judges in Kaišiadorys and thus decided to transfer the case to the Kėdainiai District Court so that the proceedings would be fair.

23. On 19 October 2011 the Vilnius City Third District Court approved an application by V.Š. to be released on probation. The court held that at that time V.Š. was serving his sentence in Vilnius Correctional Facility, where he had taken part in the social rehabilitation, legal and social education programmes and had provided information that he would be employed on release.

24. By a judgment of 18 July 2012 the Kėdainiai District Court found the applicant guilty of bribing an intermediary and sentenced him to sixty days in prison. The court found it established that G.T. had given the applicant LTL 2,000 and LTL 30,000 respectively during their meetings on 2 February and 29 March 2011 in return for a promise that the applicant would help in the proceedings for V.Š.'s release on probation. The applicant pleaded not guilty and stated that an act of provocation had been organised against him. He also stated that the money he had received was remuneration for his services as V.Š.'s lawyer. The applicant said that although no agreement on the provision of legal assistance had been concluded, he had intended to conclude one after the proceedings for V.Š.'s release on probation. The applicant refused to provide comments on the recordings and stated that his conversations with V.Š. were irrelevant because he had only wanted to show that he was working on his case. Those conversations had not been of any consequence as he had not been able to influence L.D. or the judges at Kaišiadorys District Court and Kaunas Regional Court (*Pokalbių telefonu ir įrašu su V.[Š.] nekomentuoja, paaiškindamas, kad visi jo pokalbiai su V.[Š.] buvo dėl akių, kadangi kažką kalbėti su V.[Š.] reikėjo, tad nieko nereiškiančiais pokalbiais jis tik siekė parodyti, kad dirba, tačiau tuo jis nesiekė sukelti jokių pasekmių, kadangi negalėjo paveikti nei L.[D.], nei Kaišiadorių apylinkės ar Kauno apygardos teismo teisėjų*). G.T. stated that he had known V.Š. since 2000 and that V.Š. had called him and asked for help. When G.T. had gone to Pravieniškės Correctional Facility, V.Š. had told him that the applicant required money and that V.Š. doubted that the money would be used in the proper way.

The court's conclusions were based on the evidence given by V.Š., G.T., L.D. and other employees of Pravieniškės Correctional Facility. It also addressed the secret recordings of the applicant's conversations, including those recorded prior to the authorisation for actions imitating criminal conduct. The court held that the transcripts of the conversations between the applicant and V.Š. showed that the applicant had been the first to indicate the amounts of money to be paid. The applicant's statement that he had been going to conclude an agreement on legal services after he had taken LTL 30,000 were refuted by his conversation with G.T., where the applicant had stated that in case of failure he would keep 20% of the money and return the rest. The video-recordings showed that the applicant had not counted the money and that he had indicated to G.T. to put it in the side pocket of the car door. That allowed the court to draw the conclusion that

the applicant realised that the money was remuneration for his criminal activity. The court further held that V.Š.'s testimony, voice and video-recordings showed that the applicant had not been incited to take a bribe and that the criminal conduct simulation model had been applied within the limits prescribed by the court (see paragraph 12 above). By the same judgment the Kėdainiai District Court found L.D. guilty of abuse of office and forgery, which had allowed V.Š. to be transferred to a unit with lighter security (see paragraph 10 above). It ordered L.D. to pay a fine of LTL 12,480 (approximately EUR 3,614). L.D. pleaded guilty, but stated that V.Š. had named the applicant as a lawyer that could help him obtain release on probation. The court decided to return the recorder watch to V.Š.

25. The applicant and L.D. lodged an appeal. The applicant argued that the provisions of domestic law had been applied incorrectly, that V.Š. and G.T. used undue pressure, and that V.Š. had used unauthorised equipment, the recorder watch, which he had not been allowed to have in prison. The applicant asked the appellate court to question V.Š. and ask him how he had acquired such a watch in a correctional facility. The applicant also stated that L.D. had overseen matters relating to V.Š.'s transfer to a unit with lighter security and that there was no evidence that he had tried to bribe L.D. The applicant also stated that he had never named any specific person in the courts whom he would have bribed because he had not intended to perform such an act. He had only talked to V.Š. about the outcome of the proceedings for release on probation because V.Š. had called him constantly.

26. On 23 October 2012 the Court of Appeal approved an application by the prosecutor to transfer the case to Panevėžys Regional Court from Kaunas Regional Court for examination on appeal in order to have a fair trial.

27. The Panevėžys Regional Court held an oral hearing where several witnesses, including V.Š., had been questioned. On 13 June 2013 the Panevėžys Regional Court held that V.Š. had purchased the watch for his personal use and that the provisions of domestic law did not directly prohibit the use of such equipment in prison. The court also held that the initial contact between V.Š. and the applicant had been arranged by L.D., that V.Š. had not known the applicant beforehand and had not had any motive to incite him to commit a crime. The court also found that no agreement on the provision of legal services had been concluded between the applicant and V.Š. and that the applicant's argument that he had intended to conclude one later had been dismissed as an attempt to improve his situation. On the basis of the audio-recordings, the court also observed that the applicant had been the first to say that he could settle the matter for money. The court also found that there had been no incitement and that the authorities had not put any active pressure on the applicant to commit an offence. On the contrary, the applicant had incited V.Š. to give him an

amount that would be sufficient for himself, an intermediary and three court judges. The court also held that at the time the offence had been committed, Article 226 § 1 of the Criminal Code provided for two alternative sentences for bribery of an intermediary: arrest or imprisonment for up to three years. On 5 July 2011 the Criminal Code had been amended and the applicant's offence had then satisfied the requirements of Article 226 § 2 of the Criminal Code, which provided for various sentences: a fine, arrest or imprisonment for up to five years. As the provision in force provided for a more lenient sentence, the court decided to impose a fine of LTL 65,000 (approximately EUR 18,825). The court dismissed L.D.'s appeal by the same judgment.

28. The applicant lodged an appeal on points of law. He again argued that he had been incited to commit an offence, that V.Š., as a convicted prisoner, was not allowed to have recording equipment, that he had been provided with that equipment by the STT, and that the transcripts of the recordings should not have been used as evidence against him in the case. The applicant also alleged that the LTL 2,000 had been remuneration for his legal services and that he had not actually taken the LTL 30,000 from G.T., who had simply left the money in his car. The applicant further complained that the court of first instance had not even assessed whether the evidence had been lawfully collected. The appellate court, in turn, had approved evidence that had been gathered unlawfully and had misinterpreted domestic law. The applicant also argued that V.Š.'s testimony had contradicted itself: it was not clear who had informed the STT about the alleged crime.

29. On 28 January 2014 the Supreme Court dismissed the applicant's appeal on points of law. The court held that the pre-trial investigation had been opened on 28 January 2011 upon the request of V.Š. Together with his testimony, V.Š. had given the authorities his voice-recording watch, where he had recorded his conversations with L.D. and the applicant. The court held that convicted prisoners who used voice recorders breached internal prison regulations, but that did not mean that officers who carried out a pre-trial investigation and obtained information from such a voice recorder acted unlawfully. The court also held that the finding of the applicant's guilt had not been based solely on the evidence obtained from V.Š.'s watch. The court observed that L.D. had suggested the applicant as a lawyer because he knew the prosecutors and judges dealing with V.Š.'s case, while L.D. had not incited the applicant to take bribes. By the same judgment the Supreme Court left an appeal on points of law by L.D. unexamined because therein he had raised arguments that had not been raised before the appellate court.

30. On 19 December 2014 the Supreme Court examined an application by the applicant to reopen the proceedings. It decided not to do so, but reduced the fine to LTL 13,000 (approximately EUR 3,765).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Pertinent domestic legislation

31. Article 226 § 1 of the Criminal Code, the provision on bribery applicable at the time of the offence, provided for the punishment of someone who, by taking advantage of his or her social status, office, powers, family ties, contacts or other possible influence on a State or municipal institution or agency, international public organisation or a civil servant or similar person, promised to influence the respective authority, civil servant or similar person in return for a bribe to persuade them to act in a certain manner, either lawful or unlawful, or not to act. The sanction was either arrest or imprisonment for up to three years. From 5 July 2011, the punishment under Article 226 § 1 for the same acts, including offers of bribes to a third person, whether directly or not, or where one was promised, agreed, or given, was changed to a fine, restriction of liberty, arrest or imprisonment for up to four years. Article 226 § 2 applied to the same acts, carried out on a person's own behalf or for someone else, where a person promised to take a bribe or required one. The sanction was a fine, arrest or imprisonment of up to five years.

32. Article 20 of the Code of Criminal Procedure provided that evidence in criminal proceedings was material obtained in a manner provided for by law. The admissibility of evidence had to be decided by a judge or a court examining the matter on a case-by-case basis. Only material obtained in a lawful manner which could be verified by procedural actions established in the Code of Criminal Procedure could be admitted as evidence. Judges assessed the evidence according to their inner convictions, based on a detailed and impartial assessment of all the circumstances of the case in accordance with the law.

33. Article 158 of the Code of Criminal Procedure provided that in order to investigate crimes of abuse of office and bribery, among others, pre-trial officers could carry out an investigation without disclosing their identity. The actions of such officers had to be authorised by a pre-trial judge and could only be carried out if there was enough information about a criminal activity. The pre-trial judge had to take a decision after receiving a request from a prosecutor. The decision had to indicate the persons who were authorised to perform undercover activities; the person against whom the actions were to be performed; information about the criminal activity; the specific acts that could be performed; the ultimate aim; and the duration of the undercover activities. It was prohibited to incite a person to commit an offence. Pre-trial officers could not apply restrictive measures in the absence of a separate decision, unless there was an urgent need. In extraordinary circumstances, the undercover activities could be performed by persons who were not pre-trial officers if it was not possible to establish

who the guilty persons were. Those persons could be questioned as witnesses and be provided with anonymity.

34. Article 159 § 1 of the Code of Criminal Procedure provided that a prosecutor who had received information that a person had been asked to commit a crime or participate in one could ask an investigating judge to authorise acts simulating criminal conduct (*nusikalstamą veiką imituojančius veiksmus*). Article 159 § 2 provided that a pre-trial judge had to authorise such acts. The decision had to indicate the person who could perform the acts; the person against whom they were directed; information about the criminal activity in question; the specific actions that could be performed; the ultimate aim; and the duration of the acts. Article 159 § 3 provided that it was prohibited to incite a person to commit an offence in the course of acts simulating criminal conduct.

35. Article 3 § 20 of the Law on Operational Activities, in force at the material time, defined a criminal conduct simulation model (*nusikalstamos veikos imitacijos modelis*) as a set of actions entailing the elements of an offence, performed in order to protect personal rights and freedoms, property, or the security of society and the State from criminality.

36. Article 6 § 5 of the Law on Operational Activities provided that units carrying out operational activities were prohibited from provoking people into committing criminal offences. Provocation was defined as pressure, active incitement or instigation to commit a criminal act by restricting a person's freedom of action, where it results in committing or attempting to commit a criminal act which the person had not planned to commit before.

37. Article 12 § 1 of the Law on Operational Activities provided that the criminal conduct simulation model had to be authorised by the Prosecutor General or a deputy, or a regional chief prosecutor or his or her deputy. Application first had to be made by the head of the unit of operational activities or his or her deputy. The application had to include the name, surname and the duties of the officer applying for authorisation; information on the necessity to apply the criminal conduct simulation model; information about the people against whom the model was to be used; the limits of the conduct intended to be simulated under a specific provision of the Criminal Code or the Code of Administrative Offences; the people who were to simulate the criminal conduct; the duration of the simulation; and the ultimate aim.

38. Annex no. 1 to the Code for the Execution of Sentences at the material time read that prisoners were prohibited from having voice recorders.

39. Recommendations approved by the Prosecutor General on the Application of the Law on Operational Activities and the Code of Criminal Procedure of 12 October 2007 provided that it was prohibited to incite a person to commit an offence while performing a criminal conduct simulation model. Prior information as to a person's intention to commit an

offence was necessary and a person authorised to perform acts within a criminal conduct simulation model had to be made familiar with the ruling of the pre-trial judge indicating the specific acts allowed.

B. Pertinent domestic case-law

40. On 8 May 2000 the Constitutional Court ruled on the compatibility of the provisions of the Law on Operational Activities with the Constitution. The court relied on the practice of the Court, where it had been established that the use of clandestine measures, as such, was not contrary to the European Convention on Human Rights, as long as such measures were based on legislation that was clear and foreseeable in effect and were proportionate to the legitimate aims pursued. The Constitutional Court emphasised that the criminal conduct simulation model was only allowed when used to "join" (*prisijungti*) ongoing criminal activities because such activities were happening without any effort from people taking part in undercover operational activities. The undercover agents only simulated acts as part of a criminal activity that was planned or had already commenced. It was prohibited to incite someone to commit a new offence or one that had been commenced but later terminated during the use of the criminal conduct simulation model. The criminal conduct simulation model was unlawful if the limits that had been set for it were exceeded or if someone had been incited to commit an offence. The assessment of those circumstances was a matter for the court. It was for the courts of ordinary jurisdiction dealing with allegations of incitement or other forms of abuse of the model to establish in each particular case whether the investigating authorities had gone beyond the limits of the legal framework within which the model had been authorised.

41. In an unrelated case, the Supreme Court established rules to be followed to determine whether the use of the criminal conduct simulation model or similar special investigative techniques had involved incitement. It held that actions like the criminal conduct simulation model could only be performed when there was objective evidence suggesting that a person was predisposed to commit an offence (rumours were not enough). Private individuals could only act as undercover agents after they had informed the authorities about a criminal act that was likely to be committed. A conclusion of incitement could be drawn even if the officers' act of instigation was not intense or insistent, or if the suspect had been contacted through unsuspecting third persons. It was for the authorities to prove that there had been no incitement. If there had been incitement, all the evidence obtained as a result of such an act had to be excluded from the case (decision of 16 December 2008, no. 2A-P-6/2008).

42. In an unrelated case, the Supreme Court held that the sole fact that a convicted prisoner used a voice recorder that was prohibited in a

correctional facility did not mean that the pre-trial investigation officers in the case had acted unlawfully by obtaining voice recordings from that inmate. An important factor was that the recording was not the only evidence in the case (decision of 12 February 2013, no. 2K-75/2013).

THE LAW

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

43. The applicant complained that he had not had a fair trial in the determination of the criminal charge against him. In particular, he stated that he had been incited to commit the offence of taking a bribe, for which he had been sentenced by the domestic courts. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

44. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

45. The applicant noted that the grounds for opening a pre-trial investigation were the recordings which V.Š. had made with a watch that he had been prohibited from having in a correctional facility. The first set of acts of provocation had been performed before the court had authorised actions imitating criminal conduct (see paragraphs 7-9 above). The applicant also submitted that G.T. was a former police officer. The applicant added that V.Š. had been a secret police informant on the illegal possession of drugs in the correctional facility and that he had worked with the police before.

46. The applicant further submitted that he had not initiated any meetings with V.Š. and G.T. and that they had actively sought him out and constantly called him. The money given to him by G.T. had been

remuneration for his legal services. Although no agreement on the provision of such services had been concluded, he had orally agreed to represent V.Š.'s interests and had planned to sign all the necessary documents when the proceedings regarding his release on probation were over. The specific amount of LTL 30,000 had been proposed by V.Š. as a bribe for the judges at the Kaunas Regional Court and the applicant thought that it was a clear incitement exceeding the limits of authorised actions imitating criminal conduct.

47. Finally, V.Š. had been released on probation by the Kaišiadorys District Court on 19 October 2011. The applicant submitted that that had happened because V.Š. had successfully performed the task set for him by the authorities of inciting the applicant to commit the offence in question.

(b) The Government

48. The Government stated that the authorities had confined themselves to investigating the criminal activity in question in an essentially passive manner because the information that the applicant might be taking bribes had come from V.Š., who was a private individual. Although V.Š. had provided his recording watch, which had his conversations with the applicant, the pre-trial judge had authorised actions simulating criminal conduct three days after the authorities had been informed about the alleged criminal activity. That meant that from the very beginning the use of such actions had been supervised by the prosecutor and the pre-trial judge, which provided more extensive procedural guarantees than the ones provided for under the criminal conduct simulation model. The procedure for the authorisation of investigative measures was also clear and foreseeable.

49. The Government further submitted that V.Š. had begun collaborating with the authorities after the applicant had approached him with a proposal to arrange his release on probation. The actions imitating criminal conduct had therefore been used to join a criminal act that had already commenced. In contrast to the case of *Ramanauskas v. Lithuania* ([GC], no. 74420/01, ECHR 2008), the authorities' role had been limited to prosecuting the applicant on the basis of information handed to them by a third party. V.Š.'s calls to the applicant could not lead to a conclusion that the applicant had been incited. During those conversations the applicant had spoken in vague terms, had mentioned that he had already been "burnt" and had only "got things straight" in Strasbourg, which, in the Government's view, was a clear indication that he had understood that his actions were unlawful.

50. The Government argued that after the Grand Chamber judgment in *Ramanauskas* (ibid.), the authorities and the national courts had started assessing the lawfulness of the authorisation and implementation of the criminal conduct simulation model and similar actions more thoroughly. The Government argued that throughout the proceedings against the applicant the criteria formulated by the Court and later followed by the

domestic courts had been scrupulously followed (see paragraph 41 above). The acquisition of the voice recordings made by V.Š. prior to the authorisation of the actions simulating criminal conduct had been analysed by the domestic courts (see paragraphs 27 and 29 above). The Government also submitted that the applicant had been able to put clear arguments about incitement before the domestic courts and they had provided reasoned responses. Witnesses were called and examined during the hearings and the applicant and his lawyer had been able to ask them questions.

51. Finally, the Government submitted that V.Š. had been released on probation in October 2011 because by that time he had spent nine months in the unit with lighter security and was serving his sentence in Vilnius Correctional Facility. There, he had taken part in the social rehabilitation, legal and social education programmes and had provided information that he would be employed on release.

2. The Court's assessment

(a) General principles

52. The Court has recognised in general that the rise in organised crime and difficulties encountered by law-enforcement bodies in detecting and investigating offences has warranted appropriate measures being taken. It has stressed that the police are increasingly required to make use of undercover agents, informants and covert practices, particularly in tackling organised crime and corruption (see *Ramanauskas*, cited above, § 49). The Court has consistently accepted the use of undercover investigative techniques in combatting crime. It has held on several occasions that undercover operations *per se* did not interfere with the right to a fair trial and that the presence of clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment (see ibid., §§ 51 and 53, *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, § 77, 16 July 2015, and *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, § 50, 30 October 2014, with further references).

53. The general principles concerning the issue of entrapment are set out in the case of *Ramanauskas* (cited above, §§ 49-61).

54. In so far as police incitement is concerned, the Court held that the right to a fair trial would be violated where police officers had stepped beyond an essentially passive investigation of a suspect's criminal activities and had exercised an influence such as to incite the commission of an offence that would otherwise not have been committed (see *Teixeira de Castro v. Portugal*, 9 June 1998, § 38, *Reports of Judgments and Decisions* 1998-IV). In *Vanyan v. Russia* (no. 53203/99, §§ 45-50, 15 December 2005) the Court went further and considered that the issue of entrapment could be relevant even where the operation in question had been

carried out by a private individual acting as an undercover agent, when it had actually been organised and supervised by the police.

55. In its extensive case-law on the subject the Court has developed criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations. While it is not possible to reduce the variety of situations which might occur in this context to a mere checklist of simplified criteria, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement. The relevant criteria determining the Court's examination in this context are set out in the case of *Bannikova v. Russia* (no. 18757/06, §§ 37-65, 4 November 2010). They were recently summarised in the case of *Matanović v. Croatia* (no. 2742/12, §§ 123-135, 4 April 2017).

(i) Substantive test of incitement

56. When examining an arguable plea of entrapment by an applicant, the Court will attempt, as a first step, to establish on the basis of the available material whether the offence would have been committed without the authorities' intervention, that is to say whether the investigation was "essentially passive". In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation, in particular, whether there were objective suspicions that the applicant had been involved in criminal activity or had been predisposed to commit a criminal offence until he was approached by the police (see *Furcht v. Germany*, no. 54648/09, § 51, 23 October 2014) and the conduct of the authorities carrying it out, specifically whether the authorities exerted such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Ramanauskas*, cited above, § 55; *Furcht*, cited above, § 48; *Morari v. the Republic of Moldova*, no. 65311/09, § 31, 8 March 2016; and *Matanović*, cited above, § 123). The Court reiterates that where police involvement is limited to assisting a private party in recording the commission of an illegal act by another private party, the determinative factor remains the conduct of those two individuals (see *Milinienė v. Lithuania*, no. 74355/01, § 38, 24 June 2008).

57. Lastly, the Court has also emphasised the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It has considered judicial supervision as the most appropriate means in cases involving covert operations (see *Matanović*, cited above, § 124, with further references).

(ii) Procedural test of incitement

58. As a second step, the Court will examine the way the domestic courts dealt with an applicant's plea of incitement, which is the procedural part of its examination of the *agent provocateur* complaint (see *Bannikova*, cited above, §§ 51-65, with further references).

59. As the starting point, the Court must be satisfied with the domestic courts' capacity to deal with such a complaint in a manner compatible with the right to a fair hearing. It should therefore verify whether an arguable complaint of incitement constitutes a substantive defence under domestic law, or gives grounds for the exclusion of evidence, or leads to similar consequences. Although the Court will generally leave it to the domestic authorities to decide what procedure must be followed by the judiciary when faced with a plea of incitement, it requires such a procedure to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment (see *Matanović*, cited above, § 126).

60. Moreover, the principles of adversarial proceedings and equality of arms are indispensable in the determination of an *agent provocateur* claim, as well as the procedural guarantees related to the disclosure of evidence and questioning of the undercover agents and other witnesses who could testify on the issue of incitement (see *Bannikova*, cited above, §§ 58-65).

61. In that connection, the Court also reiterates that it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (ibid., § 48, and *Ramanauskas*, cited above, §§ 70-71).

(iii) Methodology of the Court's assessment

62. The Methodology of the Court's assessment was set out in the case of *Matanović* (cited above) and it is as follows.

(a) A preliminary consideration in its assessment of a complaint of incitement relates to the existence of an arguable complaint that an applicant was subjected to incitement by the State authorities. In this connection, in order to proceed with further assessment, the Court must satisfy itself that the situation under examination falls *prima facie* within the category of "entrapment cases". If the Court is satisfied that the applicant's complaint falls to be examined within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement (ibid., §§ 131-132).

(b) Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the

subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention (ibid., § 133).

(c) However, if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement, contrary to Article 6 § 1 of the Convention, it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement (ibid., § 134).

(b) Application of the general principles to the present case

63. The Court firstly notes that the applicant was found guilty of accepting bribes of LTL 2,000 and LTL 30,000 respectively in return for a promise to help in the proceedings for V.Š.'s release on probation.

64. The Court also notes that the Government have not objected that the present case fell within the category of "entrapment cases" and the Court has already declared the application admissible (see paragraph 44 above). It will thus proceed on the assumption that it falls within the category of "entrapment cases".

65. The Court observes that V.Š. was a private individual who was introduced to the applicant by L.D., who contacted the applicant. In that connection, the Court finds that the applicant's allegations that V.Š. had previously worked as a police agent were not proven and are irrelevant. Even assuming that V.Š. had previously worked as a police agent, that would not change his status as a private individual in the present case or the nature of the applicant's actions from the moment L.D. introduced him to V.Š. In fact, there is nothing to suggest that when he initially contacted the applicant, V.Š. was acting as an agent of the State, for the prosecuting authorities on their instructions or otherwise under their control or that he had any ulterior motives. Therefore, the present case does not concern undercover police work, but rather the acts of a private individual acting under police supervision.

66. The Court notes that the prosecuting authorities only instructed V.Š. and G.T. on the actions they could perform after V.Š. had reported the applicant's corrupt offers (see paragraph 12 above). Indeed, the first allegations that the applicant might have been asking for bribes were made by V.Š., who on 28 January 2011 contacted the STT through G.T. (see paragraph 6 above); three days later he and G.T. were granted authorisation to perform actions imitating criminal conduct (see paragraphs 8 and 9 above). The Court sees nothing inadequate or arbitrary in the latter decision (see *Matanović*, cited above, § 139).

67. The Court further observes that it can be seen from the information before it that the recordings of the conversations between the applicant and

V.Š., the applicant and G.T., and V.Š. and L.D. demonstrate that it was the applicant who explained the possibility of bribing the judges, including the specific amounts to be paid (see paragraphs 6, 7, 16 and 17 above; compare and contrast *Pareniuc v. the Republic of Moldova*, no. 17953/08, § 39, 1 July 2014) and that it was him who talked about the case he had won against Lithuania before the Court, on the basis of false information that he had not accepted a bribe in that case, when the taking of the bribe had never been disputed in the Strasbourg proceedings (see paragraph 7 above, see also *Ramanauskas*, cited above, § 72).

68. The Court cannot accept the applicant's argument that G.T. left LTL 30,000 in his car door side pocket as remuneration for his legal services especially as no agreement on the provision of legal assistance had been concluded (see paragraph 46 above) and because it is clear from the information available to the Court that the applicant himself paid EUR 579 to his lawyer in the criminal proceedings against him, more than sixteen times less than the alleged cost of his representation for release on probation. Moreover, if the applicant thought that V.Š. was insisting on him bribing the judges, he did not take any steps to inform the authorities. Therefore, there are no elements to suggest that the actions of V.Š. and G.T. had incited the applicant to commit the offence of which he was convicted since at the time the money was given to him the police were already in possession of information suggesting that he had actually demanded a bribe (compare and contrast *Pareniuc*, cited above § 38). Even though it is true that V.Š. called the applicant several times, he was also asked to do so by the applicant himself (see paragraph 15 above; compare and contrast *Morari*, cited above § 36).

69. In those circumstances, the Court does not find any signs of wrongdoing in the prosecuting authorities' conduct of the operation or of the prosecuting authorities' role being the determining factor. The determining factor was the applicant's conduct in his contacts with V.Š. and G.T. The Court therefore accepts that, on balance, the prosecuting authorities may be said to have "joined" the criminal activity rather than to have initiated it (see *Milinienė*, cited above, § 38).

70. Having regard to the foregoing, the Court concludes that no entrapment of incitement to commit an offence took place in the present case, and therefore the subsequent use of evidence so obtained in criminal proceedings against the applicant raised no issue under Article 6 § 1 of the Convention. As already mentioned, if the Court finds that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence that will normally be sufficient for the Court to conclude that there was no incitement. As the Court has already concluded, in the present case there was no incitement for the applicant to commit an offence, thus there are no exceptional circumstances to examine the manner in which the domestic

courts dealt with the applicant's plea (see, *a contrario*, *Mills v. Ireland* (dec.) [Committee], no. 50468/16, § 29, 10 October 2017).

71. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 20 February 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kūris is annexed to this judgment.

G.Y.
A.N.T.

CONCURRING OPINION OF JUDGE KŪRIS

I

1. This is an outstanding case – owing not only and not so much to its own merits, but more to its relation to one earlier case initiated by the same applicant, *Ramanauskas v. Lithuania* ([GC], no. 74420/01, ECHR 2008). The present judgment sheds some new light on that ten-year-old judgment and, more generally, on the Court's methodology of the assessment of proof and also, conceivably, on its predisposition to give or not to give credence to the parties' submissions in the *agent provocateur* cases.

2. Mr Ramanauskas, a professional lawyer with years of experience, applied to the Court again for a similar reason: the alleged incitement to commit a crime. In his first case he admitted that he had succumbed to what he called "undue pressure" and had taken a bribe. In the instant case he pleaded not guilty: allegedly there had been an incitement, but no criminal activity on his part. For most people it is enough to step on a rake once. Others keep trying, especially if stepping for the first time did not hurt or the bruises paid off.

3. In the first case the Court found for the applicant. Being ceremonially recognised to have fallen victim of a malicious provocation staged by the authorities, he was acquitted. His slate having been cleaned, he could even have returned to his prosecutorial position. He chose to start a new career as an advocate. In this new capacity, he did not dilly-dally about visiting (at the invitation of an officer at a correctional facility, who admitted his guilt and was convicted) a prisoner to consult the latter on the matter of how much it would cost him in bribes to be released on probation and to receive cash for illicit activities from an intermediary. Whether the applicant would have greased anyone's palms in the judicial system (he mentioned names) or would have pocketed all or part of the money without having accommodated the alleged instigator with the "service" requested would be a matter of sheer speculation. What *is* certain is that he promised to provide the illicit "service" and accepted the money.

4. *Ramanauskas v. Lithuania* (cited above) is a landmark case indeed. As a Grand Chamber judgment, it has attained the status of a leading case and is repeatedly cited in just about all the subsequent *agent provocateur* cases, not excluding the instant one. It would be *that* judgment in which the relevant principles, which I do not intend to contest here *in their essence*, are set out.

5. But does that judgment *as a whole* (not confined to its doctrinal part) still maintain the quality of an *authority* – not in the specific power-related or judicial sense, but in the original meaning of the word (*auctoritas*) with its connotations of particular convincingness, reputation and legitimacy? Today one perhaps could doubt this – not completely gratuitously.

6. Whatever its doctrinal merits, that judgment effectively exonerated the applicant from culpability for his hapless frailty to the lure of felonious honorarium and veritably *emboldened* him to embark on yet another bribery exploit. Buoyed up by his recent triumph in Strasbourg, he exulted over it (with a bit of varnish) to his collocutor, the alleged instigator. When caught red-handed, the applicant (as was his habit?) protested that he had fallen victim to a provocation and provided a preposterous explanation as to the *purpose for which* he had accepted the money and no explanations as to the *reason for which* the authorities might once again have been after him.

7. It is hard to shake the impression that this prosecutor-turned-convict-turned-applicant-turned-acquitted-turned-advocate expected the Lithuanian courts to swallow any old story furnished by him, because, from the normative angle, they were under an *obligation* to give credence hook, line and sinker to virtually any tale. Indeed, it is well-nigh impossible to rebut *with one hundred percent certainty* even the most inconceivable version of events of a person claiming to have fallen victim of an entrapment. Should the domestic courts not buy the applicant's story, this *had to* be done by ECtHR, which in its innocence imposed on itself an obligation to assess the alleged victims' allegations leniently, even gullibly, if *Ramanauskas v. Lithuania* (cited above) is read for what it says. In the Court's words, which not only migrate through its subsequent case-law, but also have set themselves firmly in domestic case-law (see paragraph 41 of the judgment), "[i]t falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not *wholly* improbable" and "[i]n the absence of *any* such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to *uncover the truth* in order to determine whether there was any incitement" (see *Ramanauskas,* § 70, cited above; my emphasis).

II

8. The first of the quotes provided in the preceding paragraph includes the word "wholly". The *key* word. Dictionaries instruct us that "wholly" means "fully", "totally", "absolutely", "perfectly", etc. But let us start with the second quote cited, the "uncovering the truth" clause.

9. There is no need to enter into the philosophical facets of the notion of "truth" and the conundrum of the "truth's" full attainability, which, as we know, is often frugal. No one will ever learn for sure whether the Grand Chamber was (or was not) purposely mindful of these entanglements, but it skilfully (or happily) escaped the subaqueous rocks of epistemology, as it phrased the "uncovering the truth" clause quite cautiously. The Court does not require that the "truth" be "uncovered" in its entirety, only that the "necessary steps" be taken to lead in the direction of its "uncovering", and only insofar they are "necessary" to "determine whether there was any

incitement". Also, it is not made explicit that *all* the "steps" must be taken, only those "necessary". The Court understandingly notes that it is "aware of the difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences" (ibid., § 49) and that it is "mindful of ... the difficulties of the task of investigating offences" (ibid., § 73). One presumes that it should be no less sensitive to the difficulties encountered by the courts dealing with the cases, where the persons implicated in corrupt activities claim to have been incited to commit them. It is especially onerous for the courts to "uncover the truth", when they have to choose between competing testimonies, where the prosecution's version is only feebly supported, or even not supported, by a plethora of authorities-unrelated witnesses' testimonies or non-testimonial evidence, while the defendant's story, though implausible in real life, could have been "not wholly improbable" under some extremely fluky, fortuitous coincidence of circumstances. The crucial factor is whether the Court grants the alleged victim's version the benefit of doubt or dismisses it as "wholly improbable". If that version is potent or, on the contrary, utterly fantastic, the Court's task is relatively easy. Still, there is no sharp boundary between the core of undisputable plausibility and the surrounding province of sheer wanderings: in both these domains the certainty of getting closer to the "truth" raises no great concerns, but between them lies (if I may import this Wittgensteinian-Hartian construct) the penumbra of doubt where a greater or lesser judicial discretion is exercised. When the Court is necessitated to enter that penumbra, it faces the delicacy of walking the fine line between remaining the master of "characterisation to be given in law to the facts of the case", as it often rightly calls itself, and mutating into being the master of such recognition or refutation of the facts presented by the parties where it effectively *discovers* them, thus becoming a "fourth-instance court" (or even a "first-instance court").

These considerations impel us to have a closer look at the other clause cited in paragraph 7 above – the "not wholly improbable" clause.

10. The Court can hardly be said to have been sufficiently vigilant in wording that clause – at least, it was not as circumspect as in phrasing the "uncover the truth" clause. In *Ramanauskas v. Lithuania* (cited above) the "not wholly improbable" clause has become the Court's translation of (and a surrogate to) the well-known and long-lived adage *in dubio pro reo*, which is one of the pillars of the fair criminal procedure in particular and of the rule of law in general. *In dubio pro reo* requires that any *reasonable* doubt must benefit the accused. The latter thus must assuredly benefit also from a doubt as to whether he or she had not been incited to commit a criminal offence which otherwise would have not been committed, but *only from such a doubt* which allows for the possibility (or probability), however slight, that the events evolved in some condonable way, different from the one asserted by the prosecution, but altogether not unlikely in comparison to

how things *normally are* in *life*. *In dubio pro reo* is a pragmatic principle. It does not give a blind eye on the *shared human experience*.

11. In contrast to *in dubio pro reo* with its reliance on the perception of how things normally are in life, the "not *wholly* improbable" is an absolutist formula. It explicitly postulates not the "beyond the reasonable doubt" standard, but the one where there *can be* left no doubt *at all*. By employing the formalistic, arithmetic-scented adverb "wholly", the Court substituted the *complete* improbability, or the probability that equals zero, for the *pragmatically reasonable* impossibility, or the chance that something took place being *factually* inconceivable from the angle of the shared human experience, or the knowledge of how things *normally are in life*. By confusing the improbability as an arithmetical zero and the improbability as pragmatically reasonable impossibility, the clause in question tells that the accused *must* benefit from *virtually any* doubt, however meagre, unless the latter is *absolutely* hollow, unnatural, i.e. "*wholly* improbable", because everything what is not unnatural is also "not wholly improbable" by definition. The accused thus should benefit also from doubts which are artificially invented and purely imaginative, but not "unnatural" in the strict sense of the word. It would be very difficult to conclusively rebut each and every fanciful version, if the probability of them having taken place does not render them unnatural and therefore does not equal zero.

12. Maybe the above is mere quibbling. Chicanery? Not really. The legal text is read, *prima facie*, according to its plain meaning. True, literal reading is seldom the ultimate reading. Maybe therefore a more liberal reading of the "not wholly improbable" clause is warranted? Yes and no. Yes, because, as is generally accepted, the plain meaning of the provisions must not be given (and in the Court's case-law at large is not given) undue prominence. There is a range of interpretative instruments aimed at alleviating the constraints of the plain meaning rule, e.g.: the golden rule (in its narrower or broader versions); the mischief rule; the purposive approach; etc. Even the plain meaning rule itself has its softer version, not rejected even by the most ardent adherents of textualism. These instruments, in principle, allow for not applying the "not wholly improbable" clause in its strictly verbatim sense and not to take at face value *any* story of the alleged victim of incitement to commit a criminal act, provided that it is not unnatural, although, if assessed from the pragmatically reasonable angle, quite absurd indeed. But there are caveats. Firstly, these instruments are meant, on the whole, for statutory and constitutional interpretation and not for that of doctrinal provisions of the courts' case-law. Another caveat pertains to the *factual* side of adjudication: in the Court's case-law the "not wholly improbable" clause is at times taken *exactly* for what it literally says (for a recent example see *Pătraşcu v. Romania*, no. 7600/09, §§ 38 and 49, 14 February 2017). Even if it might have been worded, in *Ramanauskas v. Lithuania* (cited above), so strictly with no special intention, the later ordaining, even if infrequent (contrast

Bannikova v. Russia, no. 18757/06, 4 November 2010), of the letter of the tenet to its rigid meaning does not warrant dismissing the criticism of the wording of the clause in question as a mere carping at trifles.

13. One may wish (as I do) that, in lieu of the absolutist, even somewhat extremist formula "not *wholly* improbable", a temperate down-to-earth and middle-of-the-road formula "not *reasonably* improbable" (or "impossible", "implausible", etc.) was coined in *Ramanauskas v. Lithuania* (cited above) or fine-tuned in the subsequent case-law thus remedying the *fait accompli*. The doctrinal guidance for endowing with the benefit of doubt, but in fact with the "judicial belief", formally not unnatural, but nevertheless ludicrous stories which very few (if anyone at all) can believe on the basis of the shared human experience thus would have been eliminated, at least minimised. And *vice versa*: if the clause in question is applied literally in the case, in which the contention regarding the "truth" not yet "uncovered" boils down in essence to "his word against theirs" contraposition, then not the prosecution, but only the alleged victim of an incitement can effectively enjoy the benefit of doubt; such a defendant must be ultimately acquitted.

14. In the disputes of "his word against theirs" type the whole "truth" is hardly attainable. The conviction of the accused, whose unrealistic story the court has not bought, may still leave some doubt (even if minuscule): *what if* the events *did* in fact happen contrary to how things normally are in life? On the other hand, the exculpation of the accused on the sole ground that the prosecution failed to provide cast-iron proof that there was no incitement, whereas the defendant furnished the story which could not be rebutted with one hundred percent certainty because it indeed could hold true under some extremely unlikely amalgamation of circumstances, may also be far from "uncovering the truth". As the "absence of any such proof" may not be unequivocal, which side to take is a matter of balancing of proof by the Court – at times not an easy task. Still, it is the accused who must benefit from any doubt. If his or her exculpation on the basis of the "absence of any such proof" leaves too much room for doubt, the "not wholly improbable" clause can be succoured by the "uncovering the truth" clause: with hindsight it is easy (and tempting) to hold that the domestic courts had not taken *all* the "steps" that might have been "necessary" for "uncovering" the "truth", even if in practice it would have been disadvantageous or hardly possible to take *every* "step" which one might envisage. What latitude for discretion: though it is not explicitly required that *all* the "necessary steps" are taken, it is in fact one and the same thing to say that the "necessary steps" had not been taken or that *not all* of them had been taken. For the finding of a violation of Article 6 § 1 of the Convention it may suffice to highlight one single "necessary step" and to mark it as "not taken", even if its usefulness or practicability could reasonably have been seen differently at the material time.

III

15. *Ramanauskas v. Lithuania* (cited above) was an almost typical "his word against theirs" case, save that "their words" were partly supported by other evidence, including the authorised secret recordings of the applicant's conversations with one of the alleged instigators. Conflicting testimonies as to "who incited whom to give or accept the bribe" were provided: the applicant alleged instigators attributed the mentioning of the money to the applicant, while he blamed them. The Supreme Court admitted the difficulty of "establish[ing] who was the instigator of giving and accepting the bribe", but held that "[e]ven assuming that [Mr] Ramanauskas was incited by [other persons] to accept a bribe, ... *the incitement took the form of an offer*, and not of threats or blackmail", and [h]e was therefore able to decline (and ought to have declined) the illegal offer ... [however, he] accepted [the bribe] of his own free will" (ibid., § 27; my emphasis). That was sufficient for the conviction. ECtHR summed up that approach by stating that "[o]nce [the applicant's] guilt had been established, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant" and observed that a "confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects" (ibid., § 72). Given that the Supreme Court itself conceded that "the incitement took place", although it clearly meant the alleged instigators' request to secure the acquittal of a third person and *not the offer of the "reward"* to the applicant, the Government's case was hopeless. At the heart of its failure to convince the Court that the offence would have been committed without the outside influence was not that the Supreme Court erred by not establishing with one hundred percent certainty that the applicant had not been incited to take the bribe (that part of the "truth" did not lend itself to "uncovering"), but that it was satisfied – in line with domestic criminal law – with the mere fact that he had taken it. The Court, however, was not satisfied with that.

16. I am prepared to accept that for the finding of a violation of Article 6 § 1 it was enough that the Supreme Court held it to be "irrelevant" whether there had or had not been an incitement. (It also went into the terminological considerations on the similarities and differences between "provocation", "incitement" and "inducement" (ibid., § 27), which obscured the reasoning or, rather, its understanding in Strasbourg). The judgment leaves little doubt that this was a fatal slip: under the Convention, as interpreted by the Court, one cannot be convicted on the sole basis, in principle, of the commission of a crime without the possibility of an incitement being excluded.

17. There is a difference between not excluding a possibility and stating that it had materialised. While the Supreme Court held it to be irrelevant for the conviction of the applicant that he had been asked to perform illicit actions on behalf of a third person and in this respect had been incited, but

admitted its inability to establish "who was the instigator of giving and accepting the bribe", The Court, however, was not sophisticated at all in distinguishing between the request to perform the said actions and the offer to "remunerate" them. Both would constitute an incitement. The question remains whether they should be seen as one "compound" initiative or two (related, of course) intiatives. It was accepted even by the Supreme Court that the applicant had been solicited to commit the first set of illicit actions. But it could well have been that he would not have agreed to commit them if the alleged instigator had not agreed to *his* request for "reward". The Supreme Court admitted the "first" incitement and left the question open as to the "second" one, but held that they were irrelevant for the conviction. In contrast to that, the Court's judgment is worded so as to make it clear that *also the initiative regarding the "remuneration"* had come from the "outside". E.g., it is stated that the applicant "*had apparently agreed* to seek to have a third person acquitted in return for a bribe of USD 3,000"; or that "the actions of [the alleged instigators] had the effect of inciting the applicant to commit the *offence of which he was convicted*", i.e. accepting a *bribe*, that is to say, a "reward" (ibid., §§ 62 and 73; my emphasis). Where the domestic courts, which directly examined all the evidence before them, failed to "uncover the truth", that mission was accomplished *from a distance*. While the Supreme Court employed the fiction of division of the incitement to commit a criminal offence into two elements (not a meaningless analytical enterprise as such), ECtHR no less fictitiously employed the inductive inference and discovered that what was true of a part was true of a whole. Not only that was not necessary for the substantiation of the finding of a violation of Article 6 § 1 – that diminished the strength of the whole reasoning.

18. Another fiction employed in *Ramanauskas v. Lithuania* (cited above) also amounting to establishing of the fact, is worthwhile mentioning. The Supreme Court established that one of the alleged instigators was a "police driver" who initially acted "in a private capacity". The Court "promoted" that person to the rank of an "officer of a special anti-corruption police unit" (this is the same Special Investigation Service, as in the instant case, only then its name was translated loosely; ibid., §§ 13 and 27). Well, being a police driver does not make one an "officer", even if one acts as an undercover agent. Why was such a sham transmutation resorted to at all? One could surmise that otherwise the Court would not have had a sufficiently solid basis for inferring that the "Lithuanian authorities' responsibility *was engaged* ... for the actions of [the alleged instigators] *prior* to the authorisation of the [criminal conduct simulation] model". This *factual* inference is drawn from the fact that "no satisfactory explanation has been provided as to what reasons or personal motives could have led [the driver-officer in question] to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he was

not prosecuted for his acts during this preliminary phase". True: no such explanation has been provided (ostensibly because the relevant file had been destroyed upon the expiry of the period established in the law, which presumably preceded the communication of the case to the Government). The Court *might* have inferred rightly – but it might have erred. There is a difference between the *Government not proving* their case before the Court and the *Court discovering itself that the facts were different* from those presented. The reasoning cited above erases that difference. Without going into a greater detail, I would only note that in order to additionally support the inference regarding the "authorities' responsibility ... for the actions ... *prior* to the authorisation of the model", which belongs to the domain of "is", the Court resorted to an argument from the domain of "ought to be": "To hold otherwise would open the way to abuses and arbitrariness by allowing the applicable principles to be circumvented through the "privatisation" of police incitement" (ibid., § 65). It is a moralistic fallacy in its prime.

19. In general, the Court's whole assessment of the situation addressed in *Ramanauskas v. Lithuania* (cited above) is permeated with distrust of the authorities' every submission: they all are rejected without mercy. To single one out: in the Court's words, the alleged instigators' contact with the applicant had been a "blatant prompting ... to perform criminal acts, although there was no objective evidence – other than rumours – to suggest that he had been intending to engage in such activity" (ibid., § 67). While the domestic courts are criticised for not having "establish[ed] ... the reasons why the operation had been mounted" (ibid, § 71), it appears that the Court itself established that there were *no serious* reasons (the operative information being derogatorily dubbed "rumours"). The rest we know: violation of Article 6 § 1 and financial compensation → acquittal → new career → bragging about the victory in Strasbourg → another bribe → Strasbourg again; but all that is *a posteriori*. The applicant's conversations dealt with in the instant case (by the way, what is reproduced in the judgment from his speech had to be expurgated and some parlance has not been reproduced so that the judgment does not become an 18+ reading) demonstrate that one must think twice before taking as gospel truth that the applicant himself would never-never seek being bribed and that it is (usually?) someone else who first offers him the "remuneration".

20. That much to the application of the "not wholly improbable" clause. But the finding reached on this basis was also supported by praying in aid the "uncovering the truth" clause. As the applicant's story, in the Court's opinion, was "not wholly improbable", it merited the "necessary steps" leading to the direction of "uncovering" of the "truth". One "step" seems to have been playing truant. The domestic courts did not call to testify in court one of the two alleged instigators, the intermediary of the "driver-officer" discussed above, whom the Court has not labelled an "officer" of a special

service, but still rightly held to "app[arently] hav[ing] played a significant role in the events leading up to the giving of the bribe" (ibid., § 71). His confrontation with the applicant in the courtroom might have shed more light on the matter. But he could not be traced. The trial court was therefore cautious; it "did not take into account [that witness' statement at the pre-trial stage] in determining the applicant's guilt" and based the conviction on other evidence (ibid., § 24). However, the Supreme Court held that it was unnecessary to exclude that evidence, because according to domestic criminal law, regardless of who was the instigator, the crime had nevertheless been committed and entailed responsibility (see paragraphs 15 and 17 above). The non-exclusion of the impugned evidence might have been nominally in line with the Court's requirement that "all evidence obtained as a result of police incitement must be excluded" (see *Ramanauskas*, § 60, cited above), because it was not established that there had been an incitement regarding money changing hands (however critically this approach was assessed by ECtHR).

21. Equality of arms is a serious matter. I am ready to agree with the Grand Chamber that the presence, in the courtroom, of the witness in question was desirable: even if his confrontation with the applicant in court would not necessarily have helped to get much closer to the "truth", the courts at least would have taken one more "necessary step" in that direction. I am also prepared to agree that, in principle, the authorities should have shown as great a diligence in tracing that person as possible. But *what* was *possible* at the material time and *what* diligence would have *sufficed*? Could the authorities *reasonably* have foreseen that that person would become untraceable? If so, should they have imposed restrictions on that person's freedom of movement in order to secure his presence at the trial? What restrictions? Would they have not infringed his rights? It is easy to judge with hindsight. However, *if* at the time of the trial the witness' whereabouts had *indeed* not been known to the authorities (this was not rebutted by anyone), the Court's *ex post facto* consideration that his presence should nonetheless have been secured amounted to the predetermination of the Government's case being doomed to failure. It also appears that if that witness could not be traced, the case would have had to be closed, with the option of allowing the applicant (if he insisted) to continue working as a prosecutor. It would have been some accomplishment in vindicating the individual's "rights" at any cost.

22. To enhance the cogency of the "necessary step" exercise, the latter is presented *in context*. The domestic courts are criticised for not having undertaken a "thorough examination ... of ... whether or not [the authorities] had incited the commission of a criminal act" by "establish[ing] in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected" (ibid, § 71). Some of

these elements *were in fact* examined by the Supreme Court. For instance, although the trial court's judgment indeed "did not contain any discussion of the authorisation and implementation of the [criminal conduct simulation] model", that was dealt with by the Supreme Court (ibid., §§ 24 and 27). It is a matter of assessing whether the "examination" was "thorough" enough. But even if it was not, all the points of criticism mentioned above boil down to one single point – that the person in question "was never called as a witness in the case since he could not be traced". It is hardly possible to agree with the straightforward inference that because of that person's absence the defendant was deprived of the "opportunity to *state his case on each of these points*" (ibid., § 71; my emphasis), especially as all "other" points are not "other" at all but derivatives of the one "necessary step" not taken.

23. What is striking in *Ramanauskas v. Lithuania* (cited above) is that the Court's reasoning passes over in silence one circumstance which the domestic courts saw as having been of some importance (which does not bail out their domestic law-based, but nevertheless ill-fated stance on the "irrelevance" of incitement). The fact is overlooked (or deliberately ignored?) that the applicant was not just anybody, *but a prosecutor*. Prosecutors are supposed to be immune to incitements, aren't they? If such attempts are made, they must report the matter so that the appropriate measures can be taken. If a prosecutor had not reported the illicit offer, but had accepted it, why should his or her version be given effectively more credence than that of the one who had reported? With hindsight, now it is clear (also for the Court) that the applicant's first publicly disclosed "entrapment" had hardly been set for anyone's sick or squint-eyed amusement, so there must have been reasonable grounds for not giving his version preference over that of the prosecution. So *what if* the Supreme Court had not fairly admitted that it was not able to "uncover the truth" and had not made it clear that it did not care whether there was an incitement, but had deflated the applicant's story as "wholly improbable", the one backed by no evidence other than circumstantial, whereas that of the prosecution was supported by some (not only "rumours")? Would it have satisfied the Court's rigid standard of "not wholly improbable"? Who knows.

IV

24. As has been mentioned, in the instant case the applicant again failed to provide any coherent explanation as to *why* he attracted the special services' attention. Also his explanations regarding the *purpose* for which he had accepted the money ("legal services"?! *what* "services" *precisely*?! had he *already* provided *any*?!) were incomparably more grotesque than those to which he resorted in his first case. (In addition, lightning never

strikes twice in the same place, as the saying goes; however, that would indeed be secondary.)

25. But was the applicant's story "wholly improbable" in the literal sense of the "not wholly improbable" clause? Of course not, because it is *not unnatural*. There will always remain a probability (even if it will amount to a fraction of a unit where the decimal separator is followed immediately by several zeros) that the applicant did indeed blather this and that to his collocutor, the prisoner (as well as to his intermediary), without really contemplating doing anything illegal, or that he indeed intended to provide his "client" with certain "legal services", albeit disclosed neither to the domestic courts nor to this Court, for which he was grossly, even disproportionally (see paragraph 68 of the judgment) "remunerated" in advance without any formal contract. The formalistic approach would suggest that the applicant might have acted carelessly and irresponsibly, but nonetheless not illegally: the fact that people sometimes act carelessly or irresponsibly is a fact of life. Nothing, virtually nothing in the applicant's version of events contradicts the laws of nature (or of society, for that matter).

26. *What* that version is at odds with as "wholly improbable" is the reasonable mind, the shared knowledge of how things are in life. "*Wholly* improbable" in the instant case (exceptionally?) has been understood as "*reasonably* improbable". The Court thus has not applied the "not wholly improbable" clause uncritically – and for a good reason. When the applicant had gone to see the prisoner who wanted to be released on probation, he clearly knew the reason for which they had to meet. The applicant had been the first to mention the "price" to his collocutor. Unsolicited, he had also mentioned an earlier instance of bribery attempted by him (whether it was true or not). His phone conversations with his "client" are most revealing. And so on, and so forth. Finally, the applicant had accepted the cash. All this (in a nutshell) renders his story about entrapment contrary to common sense. Hardly anyone, therefore, would be able to believe it, not even ECtHR, even though it was the Court's Grand Chamber which authored the extremely restrictive (from the point of view of the respondent governments) or extremely permissive (from the point of view of the applicants) "not wholly improbable" clause which translated, for the purposes of application in the *agent provocateur* cases, the pragmatic adage *in dubio pro reo* in an utterly peculiar way. This time, however, the Court was not overly legalistically naïve.

V

27. Since *Ramanauskas v. Lithuania* (cited above), the Court's case-law on *agents provocateurs* has undergone at least one important development. No, the Court has not formally renounced the "not wholly improbable"

clause. It is, perhaps unfortunately, not in the habit of the Court to explicitly indicate that a certain part of its doctrine has been effectively overruled by the subsequent case-law; that somewhat antiquated case-law is therefore fragmentarily cited in later judgments and decisions, as if it still maintains the same jurisprudential force. (As already mentioned, the present judgment also cites the Grand Chamber's "not wholly improbable" clause, which was never formally rephrased.)

28. The development discussed here pertains to the new methodology for examining *agent provocateur* complaints. In 2017, the Court crystallised something which up to then had been present in its case-law only in a sketchy, fractional and rudimentary way: the so-called *Matanović* methodology (see paragraph 62 if the judgment). In *Matanović v. Croatia* (no. 2742/12, 4 April 2017), the Court found that the establishment "with a sufficient degree of certainty" that the "domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence" (substantive test of incitement) dispenses the Court from the need to proceed with the examination of the way the domestic courts dealt with an applicant's plea of incitement, including compatibility with the Convention standards pertaining to a fair hearing (procedural test of incitement). If the Court is convinced that no entrapment took place, "that will *normally* be sufficient for [it] to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention (ibid., § 133; my emphasis; also see *Grba v. Croatia*, no. 47074/12, 23 November 2017 (not yet final)).

29. The Court used to dismiss complaints regarding alleged incitement on the grounds that no incitement had taken place even before the *Matanovič* methodology was set out (see, for example, *Eurofinacom v. France* (dec.), no. 58753/00, 24 June 2003; *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008; *Trifontsov v. Russia* (dec.), no. 12025/02, 9 October 2012; and *Lyubchenko v. Ukraine* (dec.), no. 3460/05, 31 May 2016). But since *Matanovič v. Croatia* (cited above), not only has the possibility of such dismissal become more veracious, but the tendency may emerge that such complaints are dismissed as manifestly ill-founded (in accordance with Article 35 §§ 3 (a) and 4 not only by a seven-member Chamber, but by a three-member committee (see, *mutatis mutandis*, *Mills v. Ireland* (dec.), no. 50468/16, 10 October 2017). If, however, the application is not manifestly ill-founded, the Court proceeds with its examination on the merits under the substantive test of incitement, but having established that there was no incitement, does not carry out the procedural test.

30. Mr Ramanauskas' second application could be declared manifestly ill-founded in the same way as the applications mentioned in the previous paragraph. But the *Matanović* methodology leaves leeway for examination

on the merits, as in the instant case, of even a poorly substantiated claim that a provocation had been staged against the incitement-prone, but otherwise allegedly law-abiding applicant, and the adoption not of a decision as to the (in)admissibility of the application but of a judgment where no violation of Article 6 § 1 is found. On the other hand, if there had been no incitement, a further examination of the complaint would have been excessive. Further (though this is not decisive), the notion of "normality" contained in the formula "that will *normally* be sufficient" perhaps covers the abnormality (notably, but not exclusively, in the eyes of societies and institutions faced with real difficulties in countering corruption from places other than ivory towers) of the same applicant's follow-up case regarding the similar complaint, after his victory in the first case effectively braced him to stay incitement-prone.

31. The Court limited itself to the substantive test of incitement and did not undertake the procedural one. No examination undertaken of the procedural facets could in any way have altered the finding that there had been no incitement. But had the Court nevertheless decided to proceed with the procedural test, the applicant's allegations would have appeared to have been no more convincing than those examined under the substantive test. The applicant pleaded not guilty before the domestic courts (see paragraphs 24 and 25 of the judgment). He accused two other persons of inciting the commission of the offence and claimed that one of them, the prisoner, had not been allowed to use a voice-recording watch, by which their conversations had been recorded, in prison and that he must have acquired one from the authorities. These allegations have been verified by the domestic courts (see paragraphs 27 and 29 of the judgment). Although the applicant had an effective opportunity to challenge the use of the evidence acquired from that prisoner's watch, he did not put forward *any* argument against the *authenticity* or *veracity* of the information obtained from it, but limited his objection exclusively to the formal use of such information in evidence during the proceedings. These arguments were given due consideration by the courts (see paragraphs 25, 27 and 29 of the judgment). The fact that the applicant was unsuccessful at each procedural step does not alter the fact that he had an effective opportunity to challenge the evidence and oppose its use (see, among many authorities, *Dragojević v. Croatia*, no. no. 68955/11, § 132, 15 January 2015). The domestic courts are, in principle, better placed to judge the reliability of evidence and its compliance with domestic law. What is of no less importance is that the impugned evidence was not the only evidence on which the conviction was based. The trial court took into account the applicant's statements and examined them against the testimony of the alleged instigators and of the officers of the Special Investigation Service, but also against those of the applicant's co-accused (who pleaded guilty and whom the applicant for some reason had not accused of incitement), as well as against the evidence

obtained after the authorisation of the actions simulating criminal conduct (see paragraphs 27 and 29 of the judgment); it also had regard to the applicant's entrapment plea, heard witnesses, and analysed voice and video-recordings and transcripts of the conversations between the applicant and the alleged instigators (compare *Lagutin and Others v. Russia*, nos. 6228/09 and 4 others, § 101, 24 April 2014). The court of appeal responded to the applicant's complaints of entrapment by once again analysing the audio-recordings, questioning the witnesses, who could testify on the issue of incitement, and they were heard in court and cross-examined by the applicant and his lawyer (see paragraph 29 of the judgment). The Supreme Court analysed the applicant's arguments and provided relevant reasoning for refusing his contentions (see paragraph 29 of the judgment). To sum up, the applicant's plea of incitement was adequately addressed by the domestic courts, which took all the possible "necessary steps" to "uncover the truth" and to eradicate the doubts as to whether the applicant had committed the criminal offence as a result of incitement by an *agent provocateur*.

32. It appears that the Lithuanian authorities, including the courts, learned the lesson taught by *Ramanauskas v. Lithuania* (cited above). They took cognisance and made good use of the general principles set out in that judgment. The applicant, who significantly contributed to the setting out of the relevant principles by providing the Court with an opportunity to look into his first publicly disclosed story of bribery and the way in which Convention law should be applied to his ventures, seems to have drawn other conclusions from his first case. But impunity should have its limits.

VI

33. The instant judgment also teaches lessons – not only the domestic authorities or the potential succumbers to provocations. The Court itself should also be drawing conclusions from its case-law. "A time to cast away stones, and a time to gather stones together" (Eccles. 3:5).

34. One conclusion may be that the general principles applicable in *agent provocateur* cases must be revisited. No fundamental overhaul of the doctrine is necessary. But the "not wholly improbable" clause must be tempered, its wording must be toned down. Meant to provide guidance in the alleged entrapment cases, that clause, in its literal reading, has, so to say, entrapped the Court itself, with its great reliance on repeated verbatim citations from its own case-law. By mechanically migrating from one case to another, it reinforces the ivory tower recommendation to take at face value even the reasonably improbable stories of the alleged victims of incitement and thus to mock of justice.

35. If (and when) the general principles applicable in *agent provocateur* cases are revisited, there should come into being *another* leading judgment

(or decision), preferably, of the Grand Chamber, on which the subsequent *agent provocateur* cases should be modelled. *Ramanauskas v. Lithuania* (cited above) can no longer fully perform this function, in particular because *now* it can be seen, at least by some, as besmirched by the fact of being *that* judgment which in fact reassured the applicant of his impunity and planted in him a hope (though eventually a baseless one) of the Court's *naïveté*. The fine-tuned doctrine should send a very clear message that the Court does not shut its eyes to the *real* difficulties which the domestic authorities encounter when countering crime in general and corruption in particular. A mere declaration (words which also migrate from case to case) that the Court is "mindful of ... the difficulties of the task of investigating offences" or that it is "aware of the difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences" (see paragraph 9 above) does not suffice. Worded in most general terms, this wishy-washy assurance does not even mention corruption, which, as a rule, is a clandestine activity. In this context, the Court should ask itself in each and every case pertaining to alleged incitement: what if the authorities had not performed the impugned operation? Or: what results would their inaction have brought about (on this I refer to my dissenting opinion in *Pătraşcu v. Romania*, cited above)?

36. If there are indeed factual and legal grounds for finding, in an *agent provocateur* case, a violation of the Convention, so be it. A breach of rights is a breach of rights. It would be unfair and unprofessional to defend the authorities *a priori*, also in view of the fact that provocation against opponents in particular and political justice in general are a growing reality in some states. Nevertheless, in the assessment of "his word against theirs" contrapositions in *agent provocateur* cases, the fact of *commission* of crime should be given some prominence. Also, it should matter, in particular in corruption cases, whether the alleged incitement (provided that it is established that it took place) included the offer of "reward" or not. These circumstances certainly cannot attain the status of evidence decisive for the determination of whether there was an incitement to commit a criminal offence, but they should not be completely dropped off the scales and treated as being no evidence at all. This is especially pertinent to cases where the alleged victim of an incitement is, say, a prosecutor (a judge, a law enforcement officer, etc.), whose obstinate refusal and/or inability to resist incitement undermines the very *raison d'être* of his or her being in the respective position and whose treatment, in the Court's case-law, as a "victim" on a par with an incitement-prone "man in the street" frustrates and erodes the individualised examination of facts by the courts as an inherent feature of modern Western (in particular European) law and brings us one step back to its earlier condition of the formal (mandatory and indiscriminate) assessment of evidence (on this I refer to my dissenting opinion in *Lisovskij v. Lithuania*, no. 36249/14, 2 May 2017) and a step

away from the ideals of substantive justice. This calls for a more nuanced approach, commensurate with the professional and civic function of alleged "professional" victims. If the undifferentiated application of the "not wholly improbable" clause is the standard, then, in the context of the instant case, why shouldn't the Court be no less clement to an advocate's depravity than to that of a prosecutor and not give an advocate's version of events the same benefit of doubt as to that of a prosecutor? However, the well-meant belief that human beings are *equally* incitement-prone must not be so all-embracing. The Court's big-heartedness should allow for at least some differentiation between a "man in the street" and state officials (prosecutors, policemen, judges, politicians, etc.), where the latter are bound to the requirement to resist incitement to commit a criminal offence in some stronger way than the former and must be more incitement-resistant, more unyielding to "outside influence". If being a professional office-holder has any added value, then one's added responsibility is yet another facet (out of many) of that added value, and its logical consequence. If this is so, the clause which (as I would like to hope) replaces the "not wholly improbable" clause, even if more or less easily applicable to a layman, should have some in-built reservations when applied to officials.

37. In particular, where the incitement is found to have taken place against, say, a judge, a prosecutor, etc., who had succumbed to it, *all* the pros and cons of awarding an outstanding amount in respect of damage to the victim of that incitement (who is, in fact, a victim of his own irresponsibility, cynicism and greed) should be considered – as comprehensively as possible. In such cases a formalistic approach is the enemy of a just one, and "equal justice" may turn into a caricature of justice. Even admitting that the finding in *Ramanauskas v. Lithuania* (cited above) was, overall (but not in every passage of argumentation), a reasoned one, the amount awarded to the applicant was barely explicable (to put it mildly). It drew gasps from many in the law enforcement and the judiciary. True, part of the amount awarded was compensation for "indisputabl[e] ... non-pecuniary damage, which cannot be compensated by the mere finding of a violation" (ibid., § 87), and the other part was compensation for the loss of earnings sustained by the applicant, because owing to his conviction he could no longer work as a prosecutor (at least while he was serving his sentence). Did the Court see the non-termination of the applicant's work as a prosecutor as a value which had to be compensated, and the non-pecuniary damage sustained by him because of his falling victim to a provocation not counterbalanced by any non-pecuniary or pecuniary damage sustained by society? Raising these questions and finding fair answers to them is yet another lesson to be learned (also) by the Court, albeit at some price and somewhat belatedly. Time will show whether or not this is mere wishful thinking.