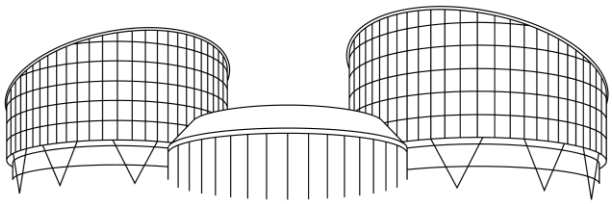

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF LALAS v. LITHUANIA

(Application no. 13109/04)

JUDGMENT

STRASBOURG

1 March 2011

FINAL

01/06/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lalas v. Lithuania**,**

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Ireneu Cabral Barreto,
David Thór Björgvinsson,
Giorgio Malinverni,
András Sajó,
Işıl Karakaş, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 8 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 13109/04) 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, Marius Lalas ("the applicant"), on 12 April 2004.

2. The applicant was represented by Mr O. Martinkus, a lawyer practising in Klaipeda. The Lithuanian Government ("the Government") were represented by their Agent, Ms Elvyra Baltutytė.

3. The applicant alleged that, in breach of Article 6 § 1 of the Convention, he had been subjected to entrapment, and had thus been unfairly convicted of drug dealing. He further complained that certain essential evidence had not been disclosed at his trial.

4. On 9 June 2009 the President of the Second Section decided to give notice of the applicant's complaints under Article 6 § 1 of the Convention. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Marius Lalas, is a Lithuanian national who was born in 1978. The place where the applicant lives is unknown, as he is in hiding (see paragraph 23).

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

7. On 19 February 2003 the Kaišiadorys District Court convicted the applicant, together with his accomplice M., of attempted drug dealing in large quantities (Articles 16 § 2 and 232-1 § 5 of the Criminal Court as then in force). The court established that the offence had been disclosed using a "criminal conduct simulation model" ("the model"), which had been authorised against M. by the Prosecutor General on 29 May 2002.

8. The court found that in June 2002 (4 June according to the Government) V., a policeman acting as an undercover agent under the model, had approached M. and, during their conversation on various topics, asked where he could get psychotropic drugs. M. had said that he could procure and sell samples to the policeman straight away and more thereafter if the samples were good. The samples would cost from 15 to 21 Lithuanian Litai ("LTL") (about 5 euros) per gram, depending on the quantities required. He had refused to lower the price for the first transaction, but suggested that it might be cheaper if V. needed a regular supply. However, the officer had replied that he could not wait and they had agreed to telephone each other on the matter. V. had to undergo a hospital intervention**.** Thereafter, it was M. who contacted V., suggesting a meeting so that he could provide V. with drug samples.

9. On an unknown date, M. had contacted the applicant with a request to obtain the drugs (0,5 kg), as V. liked the samples. The applicant had agreed to procure the narcotics. The Government contended that the applicant had contacted an acquaintance who had provided him with drugs.

10. On 21 June 2002, the applicant and M. had sold V. a few samples. The Government contended that the applicant had provided just one sample of amphetamines and stressed that he had stayed in the car while M. went to V.'s car.

11. On 23 June, V. had telephoned M., requesting more drugs for a total sum of USD 3,000. On 25 June the applicant and M. had provided V. with 250 grams of amphetamines. The applicant and his accomplice had been arrested immediately. Both had pleaded guilty to the attempted drug offence.

12. The court questioned V. as an anonymous witness in private, outside the courtroom via an audio relay. His identity was not disclosed in order to protect him and the proper functioning of the police drug squad. At that stage the defence did not put any questions to V. After V.'s testimony had been read out by the trial judge, the defence formulated some questions which were put to him by the judge and answered. The other evidence examined by the court included the transcripts of the conversations between V. and M., the testimony of another police officer who had acted as V.'s back-up during the operation, of their supervising officer and of the applicant and his co-accused, as well as an expert's findings.

13. The documents relating to the use of the model were classified as secret and were not disclosed to the defence because they would have disclosed the identity of the police officers involved and the operational methods of the drug squad. The Government contended that the applicant was not, however, denied access to information about the execution of the model.

14. Defence counsel, in his final submissions to the trial court, contended that the undercover police officer V. had acted unlawfully and that the applicant had been incited to commit the offence. Consequently, the officer's evidence could not be relied on. Furthermore, counsel contended that the applicant had never been involved in drug dealing before.

15. At the same time, M.'s defence counsel argued that the initial conversations between V. and M. had deliberately not been recorded by the police officer and that was because the crime was provoked.

16. The trial court concluded that the use of the model in the case had been lawful. The court observed *inter alia*:

> "[T]he Criminal Conduct Simulation Model is used to collect evidence about the criminal activities of a particular person. That is what happened in the present case. Having obtained information that M. ... was selling psychotropic substances, the police officer - whose identity was concealed - expressed his wish to get some drugs. The subsequent activities of [both the applicant and his accomplice], i.e. the selling of a large quantity of drugs, were in part determined by the conduct of the police officer."

17. The court acknowledged that the applicant's and his accomplice's conduct had been influenced by Officer V. from the outset, and commented at the sentencing stage that it had not been established that the applicant and M. had sold or tried to sell drugs to anyone other than this officer.

18. The applicant was convicted of the attempted offence and sentenced to three years' imprisonment, as well as to the confiscation of LTL 2,000 (approximately 580 euros).

19. The applicant appealed to the Kaunas Regional Court. His defence counsel argued that the sentence imposed was too heavy. Taking into account the established circumstances of the case – that the crime was incited by the police officers and that the applicant had not even been mentioned in the authorisation for the model – the officers had controlled the actions of the applicant and his accomplice. As there was no real damage done to the interests protected by law, and the applicant had acknowledged his guilt, the goal of punishment could be reached by imposing another sentence. The Government contended that the applicant had not claimed that V. had overstepped the legitimate limits of investigation by influencing and inciting M. and the applicant to sell a large quantity of drugs: he had mainly raised issues relating to the punishment and had claimed that he had been drawn into committing the crime by M.

20. On 10 June 2003 the Kaunas Regional Court upheld the conviction, considering that the applicant was guilty of a completed offence. The court also re-classified the conviction under Article 260 § 2 of the new Criminal Code and set the sentence at eight years of imprisonment. With respect to the applicant's entrapment allegations, the court noted:

> "The court finds the [applicant's] arguments that he was drawn into committing the crime by M. unfounded. The evidence shows that M., as the person who carried out the crime, had already been detected when drug-related crimes were being investigated. The case file shows that both M. and Lalas actively carried out the crime. ... [I]n establishing the persons involved in drug-dealing, [the officers] did not overstep the limits of the Criminal Conduct Simulation Model. ... [T]he police have only uncovered the ring of persons committing crimes and brought to an end their criminal activities. The officers joined in the crime that was already taking place ... Having established the group of accomplices, the officers brought to an end their criminal activities, but did not influence or incite them."

21. The applicant lodged a cassation appeal. He alleged that the police actions had been unlawful. He argued that the authorities had applied the Criminal Conduct Simulation Model, as a consequence of which he had been induced into a crime by assisting M. to fulfil the police officer's lucrative request to procure drugs. The applicant observed that he had acted on the police officer's instructions. The lower courts had had no data that before the model had been sanctioned either the applicant or M. had ever been involved in similar or any other crimes. The applicant alleged that, at least from 21 June 2002, the police had known that he was an accomplice of M. However, the authorities had failed to sanction the application of the Criminal Conduct Simulation Model against him and, moreover, had continued provoking him to sell drugs in even larger quantities. Lastly, the applicant claimed a breach of his defence rights, alleging that he could not acquaint himself with the documents related to the authorisation to use the simulation model.

22. The Supreme Court dismissed the applicant's cassation appeal on 14 October 2003. As regards the lawfulness of the Model, it held:

> "In the present case, the Criminal Conduct Simulation Model ... was applied in order to protect society and the State from the challenges posed by the consumption and illegal circulation of drugs and psychotropic substances. The model was sanctioned by the Prosecutor General, in view of the possession of information about M. selling narcotic substances. Such data ... is a lawful ground for the use of the model.
>
> By entering into contact with M. and offering to buy psychotropic substances from him ..., V. only joined in the criminal activity of M. and uncovered his accomplice. Such actions cannot be considered as entrapment (*nusikaltimo provokavimas*): it appears from the case file that M. and Lalas were not subject to any pressure ... [The applicants'] allegation that the police undercover agent drew into the crime (*paskatino*) persons who had never offended before to commit a serious crime, is unsubstantiated. On the contrary, the use of [the model] helped to stop the criminal activity. ...

> The information which is obtained by use of the [model] constitutes a State secret ... and is accessible only to persons who have special authorisation. Neither [the applicant] nor his lawyer has such authorisation. Consequently, the fact that secret operative information was not disclosed to them cannot be regarded as a violation of the applicant's defence rights. It should be noted that the first instance court acquainted itself with the secret operative information and its sources, and properly evaluated the lawfulness of the model."

As regards the qualification of the offence the Supreme Court held that "the activities [of Malininas and Lalas] which constituted the objective part of the norm of § 2 of Article 260 of the Criminal Code were controlled by the officials and partially realised under their influence." The applicant's conviction was again re-classified as an attempt to sell drugs in large quantities (Articles 22 § 1 and 260 § 2 of the new Criminal Code), and the sentence of eight years' imprisonment was maintained.

23. On 3 March 2004, the applicant's defence counsel submitted a request to the Supreme Court for reopening the case, claiming that the courts' decisions were based on inappropriate evidence which had been gathered unlawfully. This request was dismissed by the Supreme Court on 30 March 2004, on the ground that the arguments submitted by the applicant were intended to contest the factual background of the case and therefore were not a ground for reopening the case according to domestic law. The Government indicated that at the time when the request for reopening was lodged the applicant had already gone into hiding.

24. The Government submitted information about M.'s request for reopening his case, which has been granted by the Supreme Court on 18 December 2008 after the judgment of the Court in the *Malininas* case (*Malininas v. Lithuania*, no. 10071/04, 1 July 2008).

II. RELEVANT DOMESTIC LAW AND PRACTICE, AND RELEVANT INTERNATIONAL LAW

25. The relevant domestic law and practice, as well as the relevant international law, concerning police undercover activities and Criminal Conduct Simulation Models, have been summarised in the judgment of 5 February 2008 in the case of *Ramanauskas v. Lithuania* ([GC] no. 74420/01, §§ 31-37).

THE LAW

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

26. The applicant complained that he had been subjected to entrapment and thus had been unfairly convicted of drug-dealing. He further complained about the non-disclosure at his trial of certain evidence relating to the authorisation and use of the Criminal Conduct Simulation Model. The applicant also invoked Articles 1 and 13 of the Convention (the right to have an effective remedy before a national authority) but the Court will limit its examination to the key issue under Article 6 § 1.

27. Article 6 § 1 of the Convention provides, insofar relevant, as follows:

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

A. The parties' submissions

1. The Government

28. The Government contended that the applicant had not suffered any entrapment and consequently the application was manifestly ill-founded. Alternatively they argued that the applicant could not be considered as a victim of entrapment within the meaning of Article 34 of the Convention.

29. The applicant's situation had to be assessed separately from his accomplice's one, as facts relating to M. and the undercover police officer V., in so far as they concerned the execution of the Criminal Conduct Simulation Model, were irrelevant in this case. The model had not been authorised in respect of the applicant but only in respect of his co-defendant. There was no direct causal link between the measure taken against M. by the competent authorities and the violations alleged by the applicant. The model had been authorised because the investigating authorities had preliminary information that M. was dealing with narcotic-psychotropic substances. Its aim was "to identify the participants in the criminal activity, to document their activity and to prosecute the guilty persons". No action under the model had been performed in respect of the applicant by the undercover police.

30. Referring to *Pyrgiotakis v. Greece* (no. 15100/06, 21 February 2008) the Government stressed that the applicant had confessed to his crime. He had never had direct contact with V. but had been asked to join the criminal activity by M. He had also participated financially as he had lent LTL 1,500 to M. for purchasing the drugs. He had had no problem supplying the drugs.

He had thus committed and actively carried out the crime of his own will. Therefore, the authorities cannot be held responsible for the actions of a private person.

31. As regards the Criminal Conduct Simulation Model authorised in respect of M., the Government submitted that it was an essential tool to prevent the spread of such crimes which pose a dangerous threat to society. The model had a clear legal basis and its execution was strictly controlled by the authorities. There had to be preliminary information about the preparation or execution of a serious crime, put in the form of a reasoned, written request for the authorisation of a Criminal Conduct Simulation Model from the police narcotics department to the institutionally independent Prosecutor General or his/her Deputy, who were obliged to supervise the legality of the operation. The preliminary operational information – that the applicant's accomplice was selling drugs – had been verified by Officer V. On that basis, he had applied to the Prosecutor General to authorise the simulation model. The Government submitted a document (criminal police bureau document n. 38S1493) which states that "there is information obtained about S. Malininas under the name of *Malina*".

32. The model was confidential, albeit disclosed to the trial court, until the close of the criminal proceedings, whereupon certain information about the written request could be revealed, whilst excluding police investigative methods and the identities of the officers involved in the operation. The Government submitted that the applicant had not shown how such disclosure of the model and the identity of Officer V. could have assisted his defence. The evidence gathered in the present case had confirmed the preliminary information gathered by the police in respect of M. and was acquired in strict accordance with the authorised model.

33. The Government stressed that the applicant's conviction was not based solely on the testimony of the undercover, anonymous police officer, which anyway the applicant had been able to challenge by putting questions through the trial judge. There had been other convincing evidence on the arrest of the applicant and his accomplice, their confessions at that time and their testimony in court, the testimony of the other back-up officer in the operation and of the supervising officer, as well as an expert's findings. The courts also considered the submissions by the applicant and his co-defendant. V.'s testimony did not have such significant relevance in respect of the applicant because it mostly concerned M.

34. The authorisation and execution of the model were subject to judicial scrutiny. Any illegality in either of these aspects would have rendered the evidence obtained thereby inadmissible. However, unlawful incitement was not raised by the applicant before or during the trial. The entrapment allegations were not formulated "as an essential argument of defence". They were merely mentioned in the applicant's appeal ("the impulse to commit

the crime was given by the State officers") among other arguments which were meant to substantiate the request for a milder sentence. The entrapment arguments were set more clearly in his cassation appeal, where the applicant contested the legality of the authorisation and the way of applying the model. Moreover, the defence counsel was contradictory in appeal and cassation appeal, since he stated that the applicant was drawn into committing the crime by his accomplice M. and at the same time argued that the applicant had been incited by V., a person who had never had contact with him. Nevertheless, the courts had examined the question when considering the lawfulness of the model and they had assessed the respective roles of the officer, the co-defendant and applicant. In its decision of 14 October 2003, the Supreme Court had made a thorough assessment of the applicant's arguments. The conclusion was that the applicant had had the deliberate intention of selling the drugs at their current market value. Accordingly, the officer's behaviour did not amount to a provocation or incitement.

35. As to the second aspect of the applicant's complaint under Article 6 § 1 of the Convention, the Government submitted that, despite Officer V.'s anonymity, the defence had had a full opportunity to question him, but his testimony had not been contested. Moreover, only part of the Criminal Conduct Simulation Model was withheld from the defence, pursuant to the Law on State and Service Secrets, namely the operational information about M.'s prior involvement in drug dealing and the written request by the police to the Prosecutor General for its authorisation. This was because it was necessary to protect the identity of the police officers involved in such undercover operations, as well as their working methods and sources, for future activities. However, these materials were not the basis of the applicant's conviction. All evidence about the execution of the model was in the criminal case file and available to the defence. The applicant was convicted solely on the basis of the evidence presented at the trial and which was open to challenge by the defence. Therefore the non-disclosure at stake had no significant importance (*Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000).

2. The applicant

36. The applicant objected to the Government's position that the police officers' actions were directed only against M. and claimed that he was subjected to entrapment. Despite the fact that the model authorised the police officers "to acquire narcotic psychotropic substances from M.", the officers themselves decided how many times and which quantity they wanted to buy. In reaching the conclusion that M. and the applicant were accomplices, the District Court established that they had been acting in concert, pursuing a common goal. It follows that the applicant's criminal act was influenced by the police officers and that the State must be held

responsible for the action of its officers. This was partially acknowledged in the District Court judgment wherein it observed that the subsequent activities of the co-defendants "were in part determined by the conduct of the police officers".

37. It cannot be said that the police officers joined in a crime that was already taking place, as M. had never been under indictment for any actions which justified the initiation of the model. The model had not been initiated lawfully as no information about criminal activities carried out by M. had been gathered by the police.

38. Moreover, defence counsel did not have the possibility to verify the lawfulness of the model as it was not established what facts known by the police officers had substantiated the execution of the model. The document (criminal police bureau document n. 38S1493) submitted by the Government contains no facts; it only states that "there is information obtained about S. Malininas under the name of *Malina*". The applicant observed that after the reopening of the criminal procedure in respect of M. the court dealing with the case had obtained from the police Service Note of 28 May 2002 N. 20438, wherein it is stated: "There is information obtained about the person named *Sieras* who participates in narcotic-psychotropic substances dealing in Klaipeda and smuggles the aforementioned substances to England, where his accomplices sell them. It has been established after the performed investigations that *Sieras* – the citizen S. Malininas – ....has previous convictions...". These documents were not seen by the applicant or his counsel and they could not have known about such documents during the case hearing. The documents above clearly showed that information about M.'s alleged criminal activity was contradictory: it remained unclear what M.'s nickname was and who the person in question was, since M. had no previous convictions prior to the present case. Therefore, no facts whatsoever had been gathered regarding M. criminal acts before the sanctioning of the model.

39. The applicant concluded that police officers had provoked the criminal act and contended that when State officers instigate models not to stop criminal acts but to test citizens' resistance to criminal activities this is to be considered as entrapment. Therefore, there had been a violation of the invoked provisions of the Convention.

B. Admissibility

40. In the light of the parties submissions, the Court finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Government's arguments, including the objection under Article 34 of the Convention, concern the merits of the case, which the Court will now proceed to examine. Accordingly, the application must be declared admissible.

C. Merits

41. The Court recalls its recent *Ramanauskas* judgment (cited above, §§ 49-74) in which it elaborated the concept of entrapment in breach of Article 6 § 1 of the Convention, as distinguished from the use of legitimate undercover techniques in criminal investigations. In respect of the former, there must be adequate safeguards against abuse, as the public interest cannot justify the use of evidence obtained as a result of police incitement (*Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-36, *Reports of Judgments and Decisions* 1998-IV). The Court has established that its function under Article 6 § 1 is to review the quality of the domestic courts' assessment of the alleged entrapment and to ensure that they adequately secured the accused's rights of defence, in particular the right to adversarial proceedings and to equality of arms (*Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46-48, ECHR 2004-X). Moreover, the Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and for assessment by the domestic courts (*Windisch v. Austria*, 27 September 1990, § 25, Series A no. 186).

42. As regards the issue of entrapment, the Court held as follows at § 55 of its *Ramanauskas* judgment:

> "Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Teixeira de Castro v. Portugal*, [judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV], ... p. 1463, § 38, and, by way of contrast, *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII)."

43. In the *Malininas* case the Court found that the applicant's accomplice had been incited to commit the offence by the police. It also found that M.'s plea of incitement was not adequately addressed by the domestic courts, in so far as relevant evidence was not disclosed to the defence or tested in an adversarial manner (*Malininas v. Lithuania*, no. 10071/04, §§ 36-37, 1 July 2008). The Court had regard to the following considerations: there was no evidence that M. had committed any drug offences beforehand; the Criminal Conduct Simulation Model was not fully disclosed before the trial court, particularly regarding the purported suspicions about M.'s previous conduct; it was Officer V. who took the initiative when he first approached M., asking where he could acquire illegal drugs, and M. then offered to supply them himself; as the transaction progressed, M. was offered a significant sum of money – USD 3,000 – to supply a large amount of narcotics – this obviously represented an inducement to produce the goods; and the first instance court recognised the decisive role played by the police.

44. In the present case, to ascertain whether or not the applicant was also subjected to entrapment and whether he was able to raise the issue of incitement effectively in the domestic proceedings, the Court has had regard to the following considerations.

45. The Court agrees with the Government's position that the Criminal Conduct Simulation Model had been authorised only in respect of M. Nevertheless, during the execution of the model, the police officers uncovered the persons committing crimes, including the applicant (see paragraphs 20 and 22 above). Even if the undercover agent V. had no direct contacts with the applicant, it was foreseeable for the police that in the execution of the model M. was likely to contact other people to participate in the crime because of the associational nature of drug-related crimes. Moreover, the applicant and M. were considered by the national courts as accomplices in the same crime, in which they acted with the same goal and for which both were convicted in the same criminal proceedings using the evidence obtained in execution of the model. The significant sum of money offered by V. to the applicant's accomplice M. then represented an inducement to produce narcotics also in respect of the applicant, as the subsequent activities of the applicant and his accomplice M. were in part determined by the conduct of the police officer. The first instance court recognised the decisive role played by the police in respect of both of the accomplices in inciting the commission of the crime (see paragraph 16 above). In the Court's view, these elements extended the role of the police beyond that of undercover agents to that of "agents provocateurs". They did not merely "join" an on-going offence; in the circumstances of the present case, they instigated it also in respect of the applicant (see *Malininas*, § 37). Furthermore, the Court notes that the domestic courts when convicting the applicant and his accomplice M. did not make any distinction as regards the fact that the model was authorised only in respect of M.

46. As to the procedural aspect, in the Court's view the same conclusion as in the *Malininas* case must be drawn in the present case having regard to the following considerations. The Court notes that there was no evidence that either the applicant or his co-defendant had committed any drug offences beforehand. The Government contended that M. had a previous criminal record, but the documents submitted by the parties show that there were no clear indications about his prior involvement in drug dealing (see paragraph 38 above). No testimony was presented at the trial to show the co-defendants' prior involvement in this illegal trade. Moreover, the officers had no data about the applicant's involvement in drug dealing or about his prior knowledge of M.'s illegal activity before the moment the police officers initiated their operation. In particular, it appears that the criminal conduct simulation model available to the trial court was not fully disclosed to the applicant, particularly regarding suspicions about the co-defendants' previous conduct (paragraphs 13, 22 and 32 above). This

relevant evidence was thus not put openly before the trial court or tested in an adversarial manner. It follows that the applicant's plea of incitement was not adequately addressed by the domestic courts.

47. In the light of the foregoing considerations, the Court concludes that the aggregate of these elements undermined the fairness of the applicant's trial.

48. Consequently, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

50. The applicant claimed LTL 100,000 (about 28,962 euros) in respect of non-pecuniary damage. He did not claim reimbursement of costs and expenses.

51. The Government observed that the applicant has not proved the causal link between the alleged damage and the alleged violation of the Convention. They also considered this amount to be unreasoned, unsubstantiated and excessive.

52. In the light of the parties' submissions and the material in the case file, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant (*Malininas* cited above, § 42).

53. The Court is of the view that, where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial or a reopening of the case, if requested, as provided for by Article 456 of the Lithuanian Code of Criminal Procedure**,** represents in principle an appropriate way of redressing the violation (see *Öcalan v. Turkey*, no. 46221/99 [GC], § 210, *in fine*, ECHR 2005 – IV; *Kahraman v. Turkey*, no. 42104/02, § 44, 26 April 2007; *Malininas* cited above, § 43).

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by five votes to two that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by five votes to two that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;

4. *Dismisses* unanimously the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judges Malinverni and Sajó;
(b) Dissenting opinion of Judge Cabral Barreto;
(c) Dissenting opinion of Judge David Thór Björgvinsson.

S.H.N.
F.T.

CONCURRING OPINION OF JUDGES MALINVERNI AND SAJÓ

1. We agree in all respects with the Court's conclusions as to the violation of Article 6 § 1 of the Convention. We would, however, have liked the reasoning set out in paragraph 53 of the judgment, on account of its importance, to have been included in the operative provisions as well, for the following reasons.[1]

2. Firstly, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation or no violation of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention. It is therefore a matter of some significance, from a legal standpoint, for part of the Court's reasoning to appear also in the operative provisions.

3. And indeed, what the Court says in paragraph 53 of the judgment is in our view of the utmost importance. It reiterates that when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*). In the present case, the best means of achieving this is the reopening of the proceedings and the commencement of a new trial at which all the guarantees of a fair trial would be observed, provided, of course, that the applicant requests this option and it is available in the domestic law of the respondent State.

4. The reason why we wish to stress this point is that it must not be overlooked that the amounts which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature. Wherever possible, the Court should therefore seek to restore the *status quo ante* for the victim. It should even reserve its decision on just satisfaction and examine this issue, where necessary, only at a later stage, should the parties fail to settle their dispute satisfactorily.

5. Admittedly, States are not required by the Convention to introduce procedures in their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so, especially in criminal matters. We believe that where, as in the present case, the respondent State has equipped itself

[1] See *Salduz v. Turkey*, [GC] 36391/02 of 27 November 2008, Joint Concurring Opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska; see also *Cudak v.Lithuania*, [GC] 15869/02 of 23 March 2010, Concurring Opinion of Judge Malinverni, joined by Judges Casadevall, Cabral Barreto, Zagrebelsky and Popović.

with such a procedure, it is the Court's duty not only to note the existence of the procedure, but also to urge the authorities to make use of it, provided, of course, that the applicant so wishes. However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.

6. Moreover, the Court has already included directions of this nature in the operative provisions of judgments. For example, in *Claes and Others v. Belgium* (nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, 2 June 2005) it held in point 5 (a) of the operative provisions of its judgment that "*unless it grants a request by [the] applicants for a retrial or for the proceedings to be reopened, the respondent State is to pay, within three months from the date on which the applicant in question indicates that he does not wish to submit such a request or it appears that he does not intend to do so, or from the date on which such a request is refused*", sums in respect of non-pecuniary damage and costs and expenses. Similarly, in *Lungoci v. Romania* (no. 62710/00, 26 January 2006) the Court held in point 3 (a) of the operative provisions of its judgment that "*the respondent State is to ensure that, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the proceedings are reopened if the applicant so desires, and at the same time is to pay her EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into Romanian lei at the rate applicable at the date of settlement*".

7. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers' task in discharging these functions.

8. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also, in the operative provisions, indicate to the State concerned the measures it considers the most appropriate to redress the violation.

DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I regret that I cannot follow the approach adopted by the majority of the Chamber in the present case for the same reasons which I expressed in my dissenting opinion in the case of *Malininas v. Lithuania*, no. 10071/04, 1 July 2008.

DISSENTING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON

I disagree with the majority that there has been a violation of Article 6 § 1 of the Convention in this case.

As explained above in the judgment, this case is closely linked to the case of *Malininas v. Lithuania* (judgment of 1 October 2008), where the Court also found a violation of Article 6 § 1 of the Convention.

In paragraph 45 above the majority accepts that the Criminal Conduct Simulation Model (the Model) had been authorised only in respect of Mr Malininas, the applicant in the above-mentioned case, and not at any time did the police agents have direct contact with the applicant in this case. In spite of this, the majority comes to the conclusion that, in the case of the applicant, the police agents did not "merely "join" an on-going offence; in the circumstances of the present case, they instigated it also in respect of the applicant."

My grounds for finding no violation is this case are the following:

Firstly, I believe that in the earlier case it had been sufficiently substantiated that Mr Malininas was predisposed to commit a drug offence before the Model was implemented. I would point out that this Court has accepted that the very circumstances in a particular case may be indicative of a pre-existing criminal activity or intent and thus justify undercover operations of the kind involved in the case. Among such factors is the demonstrated familiarity of a person with the drug market; such as knowledge of prices of different drugs, as well as an ability to obtain drugs at short notice (See *Bannikova v. Russia*, no. 18757/06, § 42, 4 November 2010, and *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV). A strong indication of Mr Malininas' primary involvement in drug dealings was his apparent familiarity with the drug market, when approached by the police agent, as he was already well informed about prices of psychotropic drugs, as well as about possible suppliers of such drugs, in particular Mr Lalas, the applicant in the case at hand. For this reason I believe the undercover operations against Mr Malininas were justified[1]. Thus it cannot be said that the police by way of unjustified undercover operations directed at Malininas instigated an offence in respect of the applicant in this case.

Secondly, as regards the applicant himself, and using the same criteria as above, it is striking that he was ready and able to fulfil Mr Malininas requests for psychotropic drugs worth of 3000 US dollars at relatively short notice. It is hardly conceivable that someone, to whom the world of drug trade was unknown before, would be able push through a deal of this

[1] See also Judge Cabral Barreto's dissenting opinion in the case of *Malininas v Lihuania*, cited above.

magnitude so quickly. This is enough to show that the applicant was clearly predisposed to commit a drug offence before the Model was implemented against Mr Malininas.

Thirdly, as stated earlier the applicant in this case was never mentioned in the authorisation for the Model (see paragraphs 19 and 45 above). It is furthermore not disputed that the undercover police agents never at any time contacted the applicant directly, but they only had contact with Mr Malininas. Under these circumstances it is of less relevance whether the applicant himself was predisposed to commit drug offences before the police officers approached Mr Malininas. The stark reality is that the applicant, without any direct incitement or pressure from the police agent, agreed to supply Mr Malininas, who was just another private individual, with large quantities of illegal drugs.

For these reasons I come to the conclusion that there has been no violation Article 6 § 1 in this case.