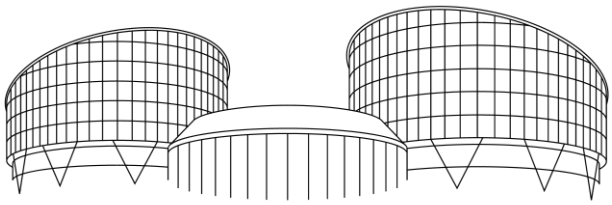

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF DAVITIDZE v. RUSSIA

(Application no. 8810/05)

JUDGMENT

STRASBOURG

30 May 2013

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 Davitidze v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 7 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 8810/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr Levan Aleksandrovich Davitidze ("the applicant"), on 7 February 2005.

2. The applicant was represented by Mr A. Yablokov, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that the use of force against him during the arrest had been excessive and that there had been no effective investigation; that he had not been provided with adequate medical assistance after the arrest and during his detention in the remand centre pending investigation in his criminal case; and that he had not had a fair trial, *inter alia*, on account of police entrapment. He referred to Articles 3 and 6 of the Convention.

4. On 25 November 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). On the same date, the Georgian Government were informed of their right to intervene in the proceedings in accordance with Article 36 § 1. They chose not to avail themselves of this right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960. It appears that the applicant is currently serving a sentence of imprisonment in the Stavropol Region, Russia.

A. The "test purchase" of drugs and the applicant's arrest on 20 August 2003

1. The Government's account

6. On an unspecified date and in unspecified circumstances, the applicant acquired 13.4 g of heroin and divided it into two parcels.

7. On 20 August 2003 a Mr S. came to Obruchevskiy police station in Moscow and made a written statement indicating that he had met a Mr T., who had told him that a person of "Georgian origin" named Levan, around 40 years old, was a heroin supplier. S. expressed his readiness to assist the police in collecting evidence of Levan's alleged criminal activities (see also paragraph 17 below).

8. On the same date, referring to S.'s statement, Police Officer K. issued an order authorising a "test purchase" of drugs:

> "... [S.] stated that he had become acquainted with a person of Georgian origin; this man had offered him heroin for 600 roubles per gram. Their meeting is expected to take place today, when this man will hand over heroin to [S.] ... I order a "test purchase" of drugs in order to document the criminal activities of an unidentified person called "Levan" and arrest him *in flagrante delicto*."

This order bears the approval note and signature of the chief officer of the police station.

9. As is stated in the police records, S. was subjected to a body search in the presence of two attesting witnesses. The search disclosed that he had no drugs or other prohibited items on him. The police then provided S. with 100 US dollars (USD) and 3,000 Russian roubles (RUB). Before that, the banknotes had been photocopied and a record was drawn up to document this.

10. The applicant was arrested after he had handed over one of the two parcels of heroin (weighing 6.9 g) to S. This parcel was seized from S. in the police station. The money (the above-mentioned banknotes) and the other parcel (weighing 6.5 g) were seized from the applicant in the police station.

2. The applicant's account

11. In July and August 2003 the applicant was undergoing outpatient treatment at a psychiatric hospital for cyclothymic disorder.

12. According to the applicant, on 20 August 2003 T. called him and asked for two anti-anxiety pills for his insomnia. The applicant's friend drove him to T.'s place, where the applicant handed over the pills to T. T. gave the applicant USD 100 and RUB 3,000 as repayment of a debt. T. also introduced him to S., who asked for help with his drug addiction. The applicant refused to get involved and recommended inpatient treatment in a specialised hospital. The applicant left the house and was soon stopped by two men, who introduced themselves as police officers. The applicant complied with the officers' request and presented his passport. Immediately thereafter, they attempted to handcuff him. While he did not resist his handcuffing with one hand, he resisted when the officer(s) started to twist his other arm behind his back. His resistance consisted of pressing his arm against his body and was a natural reaction to the pain caused by the arm twisting. Immediately thereafter, the officer(s) twice used a "suffocating" technique on him and beat him up. One of the officers hit him several times with a gun handle/barrel. The applicant sustained a concussion, a closed fracture of the jaw and numerous bruises.

13. The applicant submitted to the Court that he had been taken to a police station, through the back door and without any formal recording of his arrival. The officers had threatened him and had punched and kicked him.

14. In the applicant's submission, he had been suffering from severe pain and had remained under the influence of medication he had received in the hospital before his arrest. The officers had insisted that he confess to supplying drugs and "surrender" the drugs he had on him. The officers told him that after this they would allow the provision of medical assistance to him and would allow him to call his family. According to the applicant, he had not had any drugs on him and thus had not been able to comply with the officers' order. However, he had managed to talk to his wife using a mobile phone.

B. Criminal proceedings against the applicant

15. It appears that on 21 August 2003 Ms A., acting head of the Investigations Unit at Obruchevskiy police station, interviewed the applicant in the presence of lawyer To., who advised him to admit to the charges. The applicant made self-incriminating statements. The record of this interrogation was subsequently invalidated by the trial court because the applicant had not been properly informed that any self-incriminating statements he made could subsequently be used to convict him.

16. The applicant claimed before the Court that he had complained to the investigator of the use of force during his arrest. In view of his psychiatric illness, for which he was receiving medication, the stress he had felt following his arrest and his physical suffering from the fracture of his jaw, he had not insisted on his complaint being recorded in the written record. It appears that by a decision of 12 August 2004 the Moscow Bar Association decided that To. should be disbarred. The Bar Association established that, being told by the applicant of his psychiatric condition and his jaw injury, counsel had not sought any forensic examination or lodged any motions before the courts or submissions before the public authorities involved**.**

17. Also on 21 August 2003, investigator F. of the Investigations Unit at Obruchevskiy police station interviewed S., who made the following statement:

> "Some time ago I met T. and learnt that he consumed drugs. He told me that he had been buying them from Levan, who supplied large quantities and always had drugs on him ... T. dismissed my request to meet Levan ... I was waiting for an occasion to see Levan when I happened to meet with T. It happened on the same day, 20 August 2003, when I went to T.'s place. He told me that Levan would arrive soon. T. did not tell me that Levan would bring heroin but I guessed that he would ... When I again asked to be introduced to Levan, T. told me that Levan would call again and that we would meet him. I did not specify why I wanted to meet Levan ... When we met (for the first time), I took him aside and asked him to sell me some heroin. He accepted. I gave him 100 dollars and 3,000 roubles and he gave me a black parcel ..."

S. added a handwritten note to the record stating that T. had only told him about the possibility of buying drugs from Levan and that T. had not previously bought any drugs from him.

18. S. died in October 2003.

19. The applicant was charged with unlawful procurement, possession and supply of heroin. On an unspecified date, the applicant retracted his earlier statement alleging that the drugs had been planted on him in the police station. He asked for a confrontation to be held with the attesting witnesses who had been present during his body search on 20 August 2003.

20. The criminal case against the applicant was set for trial before the Gagarinskiy District Court in Moscow. A number of trial hearings were held between November 2003 and April 2004.

21. It appears that in or around November 2003 new counsel was assigned or retained to defend the applicant. Counsel complained before the trial court about the issues relating to the use of excessive force against the applicant during his arrest.

22. At the trial the applicant stated that he had agreed to supply two anti-anxiety pills to T. According to the applicant, the drugs had been planted on him at the police station. The trial judge examined the applicant's version of events, heard a number of witnesses on his behalf and dismissed the applicant's arguments as unfounded.

23. The court heard Mr Ma., who had allegedly taken the applicant in his car to T.'s place. Ma. affirmed that he had seen two men approach the applicant, who had presented some documents. As soon as a third man had arrived, they had started to twist the applicant's arms and use "wrestling techniques". Being afraid, Ma. had left in his car.

24. The trial court also heard Ms Ko., who stated that she had attended the same school as S. and that S. had introduced her to drugs. She had last seen him in 1996. According to Ko., S. had been a police informant. The trial court noted that this statement was unsubstantiated and based on conjecture. The court concluded that it could not cast doubt on S.'s voluntary decision to assist the police in uncovering criminal activities relating to drug trafficking.

25. The trial judge declared admissible most pieces of physical and other evidence collected during the test purchase and thereafter. Despite the applicant's objections, the trial judge declared S.'s pre-trial deposition admissible. Upon the applicant's request, the court heard a handwriting expert who testified that he had "serious doubts" that the statement made on 20 August 2003 and the subsequent deposition had been signed by the same person.

26. Although the money and the parcel of heroin were not presented at the trial, the judge based her assessment on the relevant written record.

27. The court heard T., who had introduced S. to the applicant. T. submitted that he had known the applicant for four years and that S. had been aware that the applicant had "healed" his drug addiction. T. had dismissed S.'s requests to meet the applicant because T. had owed USD 1,000 to the applicant and had not wanted to see him. After S. had offered to advance up to USD 300 to T. if he arranged a meeting, T. had called the applicant and had asked him for some medication he could not buy himself. After some hesitation, the applicant had agreed to meet T. Later on, S. had returned to T.'s place and had handed over USD 100 and RUB 3,000 to T. When the applicant had arrived, T. had handed over the money to him. At that point, the applicant was first told of S. and introduced to him. The applicant had told S. that he could not help him with his drug addiction.

28. The court also examined T.'s pre-trial statement in which he had stated that S. had asked him where he had acquired drugs. T. had replied vaguely that he knew someone called Levan who could supply a substantial quantity of drugs and normally had drugs on him. T. had told S. that he did not buy drugs from him. Without specifying the purpose, S. had asked to meet Levan. When S. had arrived at T.'s place on 20 August 2003, the applicant had been about to arrive too. They had all met in front of the house. S. had talked to the applicant about something.

29. At the trial the applicant maintained that the officers, in particular Officer M., had beaten him up during his arrest and that one of them had hit

him on the face with a gun; he, however, admitted that he had resisted handcuffing.

30. Officer K. was questioned at the trial as a witness, having been warned that he could face criminal liability for false testimony or a refusal to testify. The officer agreed to testify and was interviewed in the presence of the applicant. The officer stated that he had had to use a combat fighting/wrestling technique and to handcuff the applicant with one hand because he had been swinging his hands and had tried to escape; that he and the applicant had fallen to the ground on several occasions; that he had sustained a cut lip but had not sought medical assistance; and that there had been no visible injuries on the applicant after the arrest and that he had not had any difficulty talking.

31. Officers Su. and M. were also questioned at the trial and confirmed K.'s testimony. Investigator F. affirmed that she had not been alerted to any physical or psychological duress against the applicant, and that counsel had been present during the interviews.

32. In the meantime, on 15 April 2004 the Gagarinskiy district prosecutor refused to bring criminal proceedings against the officers (see paragraph 43 below).

33. By a judgment of 30 April 2004 the District Court convicted the applicant of the procurement, possession and supply of heroin. It sentenced him to eight years' imprisonment.

34. The applicant appealed. He argued that the statements of the police officers and S. were contradictory and should not have served as a basis for convicting him; and that there were discrepancies between the timing of various events and the compiling of related procedural documents.

35. On 17 August 2004 the Moscow City Court upheld the judgment.

36. On 13 March 2009 the Presidium of the City Court considered that since the drugs had been seized during a test purchase from the applicant, he should be convicted of an attempted offence relating to the supply of drugs. The Presidium Court "excluded" his conviction of procurement and possession of drugs. As a result of this supervisory review, the applicant was sentenced to seven years and six months' imprisonment.

C. The inquiry into the allegation of police brutality

37. From 20 or 21 to 24 August 2003 the applicant was held in a temporary detention centre. On 24 August 2003 Moscow remand centre no. 77/2 refused to admit him in view of his apparent injuries. Before or after this, the applicant was taken to the trauma unit in hospital no. 1. In the afternoon, he was taken to hospital no. 36, where a doctor confirmed that he had suffered a fracture of the jaw. The applicant was then detained in the medical unit of remand centre no. 77/1 from 24 August to 8 September

2003 and was provided with medical assistance in relation to the fracture of the jaw. Thereafter, the applicant was kept in remand centre no. 77/2.

38. According to the applicant, he complained about his state of health in the temporary detention centre and remand centre no. 77/2. There was no inquiry about the use of force against him during the arrest, neither in these detention facilities nor after his admission to remand centre no. 77/1.

39. The applicant submitted that on an unspecified date he had written to the Prosecutor General's Office complaining of ill-treatment during and after his arrest on 20 August 2003. He received no reply.

40. In October 2003 the applicant gave his wife written authority to act on his behalf and represent him before various public authorities.

41. While the applicant's trial was pending (see above), on 19 March 2004 his wife complained to various public authorities, including the prosecutor's office, alleging that the case against the applicant had been "fabricated", that the evidence had been manipulated and that the applicant had been ill-treated during his arrest.

42. On an unspecified date, an initial inquiry (*доследственная проверка*) was opened.

43. Officer M. stated that they had had to restrain the applicant using a wrestling technique because he had resisted arrest. Officers K. and Su. submitted that the applicant had actively resisted arrest. Officer R. stated that in the police station the applicant had been "in good health", without any bodily injuries and had provided clear answers to various questions. On 15 April 2004 the Gagarinskiy district prosecutor refused to bring criminal proceedings against the officers for abuse of power (Article 286 of the Criminal Code). The prosecutor relied on the depositions made by the officers and referred to the applicant's statements made during his trial.

44. The applicant's wife sought judicial review of the above refusal. She argued that the initial inquiry had not been thorough, and asked the court to order a forensic report in order to clarify whether the applicant's injuries had been sustained (i) during his and K.'s falling down to the ground following the use of a combat fighting or wrestling technique by this officer, or (ii) because K. had hit him with a gun handle/barrel.

45. On 18 June 2004 the Gagarinskiy District Court examined the above refusal on judicial review. Having heard the applicant's wife and a lawyer, the court upheld the refusal, noting that the prosecutor's decision had relied on the depositions made by the officers and "other witnesses who had testified at the trial". Lastly, the court stated that it had no jurisdiction to order a forensic medical examination of the applicant's injuries.

46. On 7 July 2004 the Moscow City Court upheld the first-instance judgment. It held as follows:

> "The [lower] court confirmed the conclusions of the inquiry to the effect that [the applicant] had sustained a fracture of the jaw during his arrest when he displayed resistance to the police".

47. However, on 24 September 2004 the higher prosecutor annulled the refusal of 15 April 2004. He indicated that the inquiry had been insufficiently thorough because some of the allegations made by the applicant's wife had not been properly assessed; and several persons had not been interviewed, including investigator F., who had dealt with the applicant's criminal case, and the attesting witnesses who had been present on 20 August 2003.

48. In the resumed inquiry, Mr Ro. stated that he had been an attesting witness and that "all measures relating to the applicant taken in his presence had been lawful". Investigator F. made no statement relating to the alleged ill-treatment. Instead, she refuted the allegation concerning the alleged seizure of money from the applicant.

49. On 21 October 2004 another prosecutor in the Gagarinskiy District Prosecutor's Office refused to prosecute the officers under Article 286 of the Criminal Code. The refusal referred to various testimonies given at the trial and the factual and legal findings made in respect of the applicant in the trial judgment.

50. The higher prosecutor confirmed this decision on 25 October 2004. However, on 27 December 2004 the District Court annulled the refusal of 21 October 2004. It indicated in substance that the complaint concerned allegations of ill-treatment and abusive use of force, rather than abuse of power.

51. A further inquiry was entrusted to the same district prosecutor. On 11 March 2005 he issued a decision refusing to prosecute the officers for abuse of power, forced testimony and falsification of evidence (Articles 286, 301-303, 306-307 of the Criminal Code). It appears that that decision was later annulled for unspecified reasons.

52. On 14 September 2005 the district prosecutor re-examined the above matters and again refused to prosecute the officers. The prosecutor referred to a medical forensic report of an unspecified date which had concluded that the applicant had suffered a haematoma in his left scapular area. This haematoma did not amount to health damage by national standards. In view of the absence of any description of the haematoma (colour, form, size, etc.), it was not possible to determine the timing of this injury.

53. On 7 November 2005 the Moscow deputy prosecutor annulled the above decision and held that the lower prosecutor should have collected more medical evidence and should have commissioned a forensic report in order to determine the origin and the exact nature of the injuries.

54. During the resumed inquiry, the applicant's medical file compiled in the remand centre had been seized. The State forensic expert office refused to carry out a forensic examination in the absence of the X-ray images taken in the hospital in August 2003. However, the prosecutor had had access to the applicant's medical file compiled in prison, including recent X-ray images. On 22 February 2006 an expert issued a report indicating that in

addition to the hematoma the applicant had sustained bruises on his right shoulder-blade, hips, his left iliac region and both sides of the groin. Those bruises had been inflicted by blows with a solid item or items. However, the expert was unable to determine the date when they had been sustained due to the "incompleteness of the initial information". According to the information in the applicant's remand file, the applicant had suffered a closed fracture of the jaw. However, the expert was again unable to confirm that it had been sustained in August 2003.

55. The prosecutor also heard Ms A., the investigator who had interviewed the applicant on 21 August 2003 (see paragraph 15 above). She stated that she could not remember the circumstances of that interview well, but stated that she had not been aware that the applicant had been suffering from a psychiatric condition.

56. On 17 March 2006 the district prosecutor decided not to institute criminal proceedings against the officers**.**

57. On 5 July 2006 the Moscow deputy prosecutor annulled the above decision and ordered the district prosecutor to take measures to obtain the applicant's medical file compiled in hospital no. 36. It appeared that the file was, at the time, in the possession of an Officer P. The Moscow deputy prosecutor also required that the lower prosecutor ask for official confirmation that the remand centre had not been (or no longer was) in possession of the applicant's 2003 X-ray images; and that an expert be provided with a copy of the officers' statements on the use of force.

58. On 11 January 2007 the expert confirmed the findings made in the report of 22 February 2006.

59. On 25 January 2007 the district prosecutor re-examined the matter and refused to prosecute the officers**.** In addition to his previous findings, he added that he had received the applicant's hospital file and had ordered a new forensic report.

60. On 3 April 2007 that decision was annulled, because the prosecutor had not properly examined the complaint relating to the test purchase and the alleged falsification of procedural documents.

61. On 9 June 2007 the district prosecutor issued a new refusal to initiate criminal proceedings, upholding the findings made in the decision of 25 January 2007 in relation to the alleged ill-treatment.

62. The applicant sought judicial review of the above refusal. On 4 December 2007 the District Court annulled the decision of 9 June 2007 because the district prosecutor had not properly addressed the ill-treatment complaint. On 23 January 2008 the City Court set aside this judgment.

63. Having re-examined the case, on 8 February 2008 another District Court judge upheld the decision of 9 June 2007. On 12 March 2008 the City Court upheld that judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Investigative techniques

64. The Operational-Search Activities Act 1995 (Federal Law no. 144-FZ of 12 August 1995) provides for overt or covert activities carried out by operational divisions of certain State agencies (section 1 of the Act). Operational-search activities are aimed at detecting, preventing, intercepting and investigating criminal offences, as well as searching for and identifying those responsible for planning or committing them (section 2). A person who considers that an agency conducting operational-search activities has acted in breach of his or her rights and freedoms may challenge the acts of that agency before a higher-ranking agency conducting operational-search activities, a prosecutor's office or a court (section 5). On 24 July 2007 section 5 of the Act was amended to prohibit agencies conducting operational-search activities from directly or indirectly inducing or inciting the commission of offences.

65. Operational-search activities may be performed when there are pending criminal proceedings or information has been obtained by the agencies conducting operational-search activities which indicates that an offence is being planned or has already been committed, or points to persons who are planning or committing or have committed an offence, if there is insufficient evidence for a decision to institute criminal proceedings (section 7). Test purchases or infiltration by agents of the agencies conducting operational-search activities or individuals assisting them, must be carried out pursuant to an order issued by the head of the agency conducting operational-search activities (section 8).

66. Information gathered as a result of operational-search activities may be used for the preparation and conduct of the investigation and court proceedings and used as evidence in criminal proceedings in accordance with legal provisions regulating the collection, evaluation and assessment of evidence (section 11).

B. Use of force by the police and medical assistance to detainees

67. The Police Act 1991 (Federal Law no. 1026-I of 18 April 1991) authorises police officers to use physical force, including combat fighting techniques, for putting an end to criminal offences, for apprehending offenders, and for overcoming resistance to lawful orders, if less intrusive means have not allowed the officer(s) to fulfil his or her functions (section 13 of the Act).

68. Everyone should comply with a lawful order given by a police officer. Failure to comply with such an order or obstruction in relation to such an order entails legal liability on the part of the person concerned.

Police officers cannot be held responsible for pecuniary, non-pecuniary or health damage which was caused by the use of physical force, if the damage is proportionate to the force applied to the person concerned (section 23 of the Act).

69. According to the Internal Regulations for Temporary Detention Centres, adopted by the Ministry of the Interior on 26 January 1996, the officer on duty at a detention centre should question detainees upon their arrival there as to their state of health and possible complaints (§ 9.3). If a complaint has been raised, or in view of the detainee's visible injuries or symptoms, the officer should immediately call for an emergency squad. The above matters should be recorded in the relevant logbook. If the detainee has sustained physical injuries, his medical examination should be carried out at a hospital without delay or at another medical institution upon the detainee's request.

70. Pursuant to the Internal Regulations for Remand Centres, adopted by the Ministry of Justice on 12 May 2000 and amended in 2002, on their arrival at the remand centre detainees should undergo a medical check (§§ 16 and 130). If physical injuries have been detected, the medical staff should issue a certificate and an inquiry should be ordered. Its conclusions should be forwarded to a prosecutor, who should decide whether or not to open a criminal case (§§ 16 and 137).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

71. The applicant complained under Article 3 of the Convention that he had been ill-treated up by police officers on 20 and 21 August 2003, and that there had been no effective investigation into the alleged ill-treatment.

72. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

73. The applicant alleged that he had been ill-treated during his arrest. There had been no proof of the applicant's active resistance to his arrest. He had complied with the officers' orders and had presented his identity documents. He had not been warned that force could be used against him. His resistance had been no more than a spontaneous reaction to the

unexpected recourse to force against him and the physical pain caused by the twisting of his arm by the officer. The ensuing beatings and his being hit with a gun had been both unlawful and disproportionate.

74. The applicant also argued that later on in the police station he had also been ill-treated, intimidated and threatened in order to obtain a confession (see paragraphs 12-14 above).

75. Furthermore, the applicant contended that all his complaints, including those made before the investigator on 21 August 2003, had been left unanswered. No inquiry had been initiated to promptly deal with his allegations of ill-treatment.

2. The Government

76. The Government submitted that the applicant had actively resisted his arrest on 20 August 2003. The police had lawfully used physical force against him, which thus could not have amounted to a form of degrading or inhuman treatment. Later on, the applicant had been interviewed in the presence of a lawyer and had made no complaints about his health. All circumstances relating to the arrest had been subject to a through inquiry, which had included the collection of depositions (from the police officers, other public officials, the lawyer and others) and medical evidence such as a forensic examination.

B. The Court's assessment

1. Admissibility

77. The Court notes that this part of the application 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.

2. Merits

(a) Use of force against the applicant and alleged beatings

(i) General principles

78. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. In order to fall within the scope of Article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25).

79. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see, among others, *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV, and *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336, concerning allegations of ill-treatment in police custody or detention facilities).

80. In respect of recourse to physical force during an arrest, the Court reiterates that while Article 3 does not prohibit the use of force for effecting a lawful arrest, such force must not be excessive (see, among others, *Polyakov v. Russia*, no. 77018/01, § 25, 29 January 2009).

81. The Court reiterates that, in view of the subsidiary nature of its role, it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case. The Court has held in various contexts that where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see, among other authorities, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 179 and 180, 24 March 2011). Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (ibid.).

82. At the same time, in accordance with Article 19 of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Where allegations are made under Article 3 of the Convention, the Court must apply a particularly thorough scrutiny.

83. In assessing evidence in cases concerning Article 3 of the Convention, the Court has generally applied the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this

connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII).

84. Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. The Court reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; and *Creangă v. Romania* [GC], no. 29226/03, § 90, 23 February 2012).

(ii) Application of the principles to the present case

85. Along with the allegation of beating during his arrest, the applicant also alleged before the Court that after he was taken to the police station the arresting officer(s) had punched and kicked him. It remains unclear, however, whether this allegation was sufficiently raised in the domestic proceedings. The domestic decisions and the Government's observations contain no specific findings in this respect. The Court will assess whether the use of force during the applicant's arrest was excessive, presuming that that all the injuries (complained of and documented) were sustained during the arrest.

86. The applicant sustained a fracture of the jaw and some other injuries (see paragraphs 37, 46, 52 and 54 above). Although some of the injuries did not constitute damage to health by national standards, this does not prevent the national authorities and the Court from establishing whether those injuries were sufficiently serious to reach the "minimum level of severity" under Article 3 of the Convention. Giving an affirmative answer to this, it remains for the Court to examine whether the State should be held responsible under Article 3 for the injuries.

87. The domestic inquiry concluded that the applicant had resisted a lawful arrest and that the police officers had had to apply physical force and handcuffing to overcome the applicant's resistance.

88. Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the Court has previously stated, particularly in the context of Article 2 of the Convention, that an impossible burden should not be imposed on the authorities when

they have to face situations of disorder or violence capable of giving rise to unpredictable developments (see *Makaratzis v. Greece* [GC], no. 50385/99, § 69, ECHR 2004-XI, and *Zelilof v. Greece*, no. 17060/03, § 48, 24 May 2007).

89. According to the Court's case-law, the substantive limb of Article 3 of the Convention requires that a proper assessment of an allegedly excessive use of force should determine whether the degree of physical force was excessive, having regard to the relevant circumstances such as the person's own conduct. Turning to the circumstances of the present case, the Court is not satisfied that the domestic inquiry in the present case resulted in an assessment which corresponded, at least in substance, to this requirement. Nor did the judicial proceedings under Article 125 of the CCrP cure any related defects.

90. The Court observes that the applicant's injuries were sustained during a police operation. Nothing in the circumstances of the present case disclosed any particular urgency. Thus, the authorities should have been able to plan their operation (see *Rehbock v. Slovenia*, no. 29462/95, § 72, ECHR 2000-XII). In this connection, it transpires that the police operation was carried out by three police officers, who also effected the applicant's arrest. It appears that before proceeding to arrest the applicant, they identified themselves and asked the applicant to produce his identity document, which he did. The subsequent events are a matter of disagreement between the parties.

91. The Court was not provided with any reports or depositions made in August 2003 by the police officers, for instance to their superiors, in relation to the use of force or firearms during the applicant's arrest. The domestic decisions taken in 2004 and thereafter mentioned the applicant's resistance during the arrest, at times qualifying it as active. Indeed, Officer K. stated at the applicant's criminal trial that while he was trying to apprehend the applicant, the latter's resistance had caused them to fall down to the ground. This might have accounted for certain minor injuries. Similarly, it might be relevant to assess whether the officer(s) sustained any injuries during the applicant's arrest. However, it does not follow from the available decisions that these factors were part of the domestic assessment during the inquiry.

92. The Court is not oblivious to the fact that the Police Act authorised police officers to use physical force, if less intrusive means had not allowed the officer(s) to fulfil his or her functions (section 13 of the Act). Police officers could not be held responsible for damage which was caused by the use of physical force, if the damage was proportionate to the force applied to the person concerned (section 23 of the Act).

93. In fact, in the present case no fair attempt was made to ascertain exactly what such resistance had consisted of (an attempt to run away, use of coarse language, use of martial arts, or some other form of resistance) or

to determine the exact scope of the officers' perception of the situation, their actual reaction to it and the proportionality of such reaction. In particular, the Court is not convinced that the injuries, in particular the fracture of the jaw, were caused during the applicant's and the officer's falling down to the ground following the use of a combat fighting or wrestling technique by this officer. No clear stance was taken by the inquiring authority as to whether any officer was in possession of a firearm and could have used it to inflict the facture of the jaw, as was consistently alleged by the applicant.

94. Despite the applicant's specific allegation against one of the arresting officers, the national authorities provided no plausible explanation relating to the circumstances in which the applicant sustained the fracture of the jaw during the arrest.

95. In addition, the Court notes that, while the use of force against the applicant was an established fact, the available material does not disclose that the applicant was taken, without delay, before a medical professional or that he was provided with any immediate medical assistance in relation to his physical injuries, in particular as regards the fracture of the jaw (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII, and *Barabanshchikov v. Russia*, no. 36220/02, § 46, 8 January 2009).

96. In view of the foregoing considerations, while accepting that the applicant showed some resistance during his arrest, the Court concludes that it has not been convincingly shown that the officers' recourse to physical force, which entailed relatively significant injuries, was not excessive. Such use of force had as a consequence injuries which caused serious suffering to the applicant, of a nature amounting to inhuman treatment (see *Rehbock*, cited above, § 77).

97. Therefore, the Court concludes that the circumstances of the present case disclose a breach of Article 3 of the Convention on account of the excessive use of force against the applicant.

(b) Alleged lack of effective investigation in respect of the beatings

(i) General principles

98. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by agents of the State in breach of Article 3 there should be a thorough and effective investigation (see, among others, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII, and *Gäfgen v. Germany* [GC], no. 22978/05, § 117, 1 June 2010).

99. While not every investigation should necessarily come to a conclusion which coincides with the claimant's account of events, any investigation should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Mahmut Kaya*

v. Turkey, no. 22535/93, § 124, ECHR 2000-III, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

100. The investigation into credible allegations of ill-treatment must be thorough. This means that the authorities must make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions (see *Assenov and others*, cited above, § 103 et seq.). They must take all reasonable steps available to them to secure evidence concerning the incident, including eyewitness testimony and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 104 et seq., ECHR 1999-IV, and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). In addition, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time, consideration being given to the date of commencement of investigations, delays in taking statements and the length of time taken to complete the investigation (see *Labita v. Italy* [GC], no. 26772/95, § 133 et seq., ECHR 2000-IV, and *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the applicable standard.

(ii) Application of the principles to the present case

101. Turning to the present case, the Court reiterates that the applicant's injuries and his allegations against the police officers were sufficiently serious to reach the "minimum level of severity" required under Article 3 of the Convention. Furthermore, the applicant's allegations were "arguable" and thus required there to be an investigation by the national authorities.

102. It should first be ascertained when the relevant national authority, which should be independent of the suspected perpetrators and the agency they served, first became aware or ought to have become aware of the possibility that the applicant sustained injuries at the hands of police officers.

103. The Government in the present case has not specified when the authorities first became aware of the possible ill-treatment or excessive use of force. Nor was it suggested that any delay in the applicant's own raising such complaints affected, in any significant way, the effectiveness of the investigation.

104. The applicant alleged that in the first weeks after his arrest he had not had effective legal assistance; after his arrest he had been in a state of extreme stress; and, as a result of his psychological/psychiatric condition and the physical pain he had been suffering at that time, he had not insisted on his complaint of ill-treatment being recorded in writing when he had been interviewed by an investigator of the Investigations Unit at Obruchevskiy police station in relation to the criminal charges against him (see paragraph 16 above).

105. It does not transpire from the materials before the Court that the applicant, a lawyer or, for instance, the applicant's next of kin took any immediate action to inform the national authorities of the ill-treatment allegedly inflicted on the applicant on 20 and 21 August 2003 by the officers of the Obruchevskiy police station. The Court observes that the matters relating to the circumstances of the applicant's arrest were first raised at the beginning of the applicant's trial in November 2003. A separate formal complaint was lodged not earlier than in March or April 2004 by the applicant's wife.

106. In the Court's view, it would have been preferable that the matter be raised immediately before an impartial authority or public official independent of the suspected perpetrators and the agency they served (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 325, ECHR 2007-II, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91 and 92, ECHR 1999-III).

107. In this connection, the Court doubts that an official of the Investigations Unit at Obruchevskiy police station in charge of a criminal investigation in respect of the applicant would have been a national authority sufficiently independent of the police officers of the Obruchevskiy police station and the police station itself to deal with an ill-treatment complaint.

108. Be that as it may, on 24 August 2003, that is several days after the applicant's arrest, certain injuries were detected on the applicant's body (see paragraphs 37-38 above), thus providing the authorities with an opportunity to clarify the circumstances in which physical force had been used against the applicant. In the circumstances of the case, the Court is not prepared to draw adverse inferences from the delay in the applicant's raising the matter before the national authorities (see, for comparison, *Sokurenko v. Russia*, no. 33619/04, § 66, 10 January 2012, and *A.A. v. Russia*, no. 49097/08, § 88, 17 January 2012).

109. The Court accepts that even before March or April 2004 the national authorities ought to have been aware of the use of force against the applicant and the presence of certain injuries. It follows that an investigation should have been carried out. It was incumbent on the national authorities to respond to the applicant's claim, which was clearly credible, without undue delay and to provide a plausible explanation for the applicant's injuries.

110. Although the relevant proceedings at the national level spanned over four years, it should be accepted that some investigation was carried out during this period of time. Efforts were made to detect and correct certain shortcomings of the initial inquiry in the course of the additional inquiries.

111. The Court notes at this juncture that the initial inquiry and the prosecutors' refusal to prosecute the officers both related to Article 286 of the Criminal Code, which concerned the offence of abuse of power by a

public official. In determining whether there has been a breach of Article 2 or 3, the responsibility of a State under the Convention, arising from the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in national proceedings (see *Golubeva v. Russia*, no. 1062/03, § 98, 17 December 2009, with further references). As confirmed in substance by the domestic court on judicial review (see paragraph 50 above), the applicant's complaint related to possible ill-treatment and abusive use of physical force, rather than abuse of power. However, the Court does not have at its disposal enough material to conclude that the legal classification given to the applicant's complaint was such as to impinge upon the inquiring authority's ability to establish the relevant factual and legal elements in terms of Article 3 of the Convention, or adversely affect the effectiveness of the investigation, which is discussed below.

112. The first refusal to prosecute was issued in April 2004, some two weeks before the closure of the applicant's trial. This refusal was based on the officers' concordant statements, whereas, apparently, the applicant was not interviewed by the official in charge of the inquiry. This official preferred to rely on the trial record containing the applicant's testimony in relation to the circumstances of his arrest. Indeed, the Court observes that there was a relatively short lapse of time between the alleged ill-treatment and the submission of the applicant's criminal case for trial. The trial court heard the arresting officers as witnesses, who were warned that they could face criminal liability for false testimony or for a refusal to testify. As follows from the detailed transcripts of the trial hearings, the applicant and his lawyer were afforded the opportunity to examine these officers and cast doubt on the authenticity and credibility of their statements, at least in so far as they were relevant to the determination of the criminal charge against the applicant.

113. It remained incumbent on the authority in charge of the ill-treatment inquiry to assess all relevant evidence. In this connection, it should be noted that no medical evidence was obtained or assessed during the initial inquiry. No assessment was made as to the correlation between the injuries sustained and the nature and intensity of the resistance to arrest on the part of the applicant. While declining jurisdiction to order an expert report, on judicial review in June 2004 the district court did not find it appropriate to declare the refusal to prosecute unlawful or lacking sufficient reasons. In July 2004 the appeal court upheld the lower court's findings. In view of the above, it is clear that no investigative measures were taken between April and September 2004, when the inquiry was resumed.

114. It should be noted that the resumption of the inquiry in September 2004 led to the interview of an attesting witness who had seen the applicant on the day of the arrest. The investigator who had interviewed the applicant in August 2003 was also interviewed but, for unspecified reasons, provided

no statement in relation to the alleged ill-treatment. The above was taken into account when a new refusal to prosecute was issued. It remained the case that no medical evidence was collected and assessed.

115. The Court stresses that proper medical examinations are an essential safeguard against ill-treatment (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, §§ 55 and 118, ECHR 2000-X, and numerous cases concerning Russia, for instance, *Maksimov v. Russia*, no. 43233/02, § 88, 18 March 2010). When a medical doctor writes a report after examining a person who has claimed to have been subjected to ill-treatment, it is important that the doctor states the degree of consistency with the account of the ill-treatment. A conclusion indicating the degree of support for the description of the alleged ill-treatment should be based on a discussion of possible different diagnoses (injuries not relating to ill-treatment, including self-inflicted injuries and diseases) (see *Barabanshchikov*, cited above, § 59).

116. In fact, the inquiring authority only started to refer to medical evidence a year after the alleged ill-treatment had occurred. However, the experts could not draw any proper conclusions because of the insufficient quality or incompleteness of the existing medical documents (see paragraphs 37, 52 and 54 above).

117. As stated above (see paragraphs 91-94 above), the domestic inquiry cannot be said to have followed, at least in substance, the approach required under Article 3 of the Convention for establishing whether the officers' recourse to force against the applicant was (or was not) excessive. While not every investigation should necessarily come to a conclusion which coincides with the claimant's account of events, the investigation should have been capable of leading to the establishment of the relevant facts of the case.

118. Having regard to the above shortcomings and the slow pace of the inquiry, the Court concludes that the investigation in the present case did not comply with the requirements of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF MEDICAL ASSISTANCE

119. The applicant also made a separate complaint under Article 3 of the Convention (quoted above) that he had not been provided with immediate medical aid following his arrest and that he had not received regular medical care for his psychiatric condition during his pre-trial detention between August and November 2003.

A. The parties' submissions

1. The Government

120. The Government argued that by virtue of the six-month rule under Article 35 § 1 of the Convention, the applicant could only complain about matters relating to medical issues which had occurred within the six months before the date of his application before the Court. As his medical complaint related to specific omissions in 2003, he had not complied with the six-month rule. In any event, the applicant had applied to the Court with such complaints before the completion of the supervisory review procedure in his criminal case.

121. As to the substance of the complaints, the Government submitted that after the arrest the applicant had been interviewed in the presence of a lawyer and had made no complaints about his health. The police had taken all necessary measures to safeguard his health by arranging for him to have a medical examination in a hospital. The Government considered that the applicant had been provided with medical assistance after his arrest.

122. The Government also submitted that during his first interview with the investigator the applicant had not referred to having a mental illness. Nor had he informed the medical staff of the hospital or the medical unit of the remand centre. He could have submitted medical documents predating his detention and could have asked for inpatient treatment in the medical unit of the remand centre. In any event, he had not required any particular type of treatment.

2. The applicant

123. The applicant submitted that his complaint was not belated since he had raised it before the Court within six months after the appeal decision in his criminal case when he realised that his further attempts to obtain redress at the domestic level were likely to fail. As to the merits, he maintained his complaint arguing that he had not received any emergency medical assistance for his injuries sustained during the arrest. He also alleged that no medication or treatment had been given to him in the remand centre on account of his psychiatric condition.

A. The Court's assessment

Admissibility

124. The Court reiterates that the primary purpose of the six-month rule under Article 35 § 1 of the Convention is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of

time. It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the issues raised is rendered problematic (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 39, 29 June 2012).

125. As a rule, the six-month period runs from the final decision in the process of exhaustion of domestic remedies (see, among others, *Norkin v. Russia* (dec.), no. 21056/11, § 15, 5 February 2013). Where it was clear from the outset however that no effective remedy was available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the knowledge of that act or its effect on or prejudice to the applicant (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 72, 10 January 2012, with further references). Article 35 § 1 cannot be interpreted however in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, the Court considers that it may be appropriate for the purposes of Article 35 § 1 to take the start of the six month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Norkin*, cited above, § 15).

126. In cases where the relevant facts constitute a continuing situation and where there is no relevant final decision at the domestic level, the six-month period runs from the cessation of that situation (see *Ananyev and Others*, cited above, § 72).

127. The Court observes that the applicant's complaint, which was first raised before the Court in February 2005, is twofold: (i) the authorities' delay, between 20 and 24 August 2003, in providing him with medical aid in relation to the injuries sustained during the arrest, and (ii) the absence of regular medical care in relation to a psychiatric condition during his subsequent detention until in November 2003.

128. It has not been argued, and the Court does not consider, that the issue of first medical aid was raised, at least in substance, between 2004 and 2008 in the proceedings mentioned in paragraphs 41-63 above (see also the Court's findings in paragraphs 101-118 above). Nor does the Court agree with the applicant that the six-month period should be calculated with reference to the appeal decision dated 14 August 2004 in the applicant's criminal case. The issue of medical care was not subject to any substantive assessment in those proceedings, which, in any event, were unlikely to offer any relevant redress (see, by way of comparison, *Romanova v. Russia*, no. 23215/02, §§ 170-74, 11 October 2011). It has not been suggested that another "final decision" should be taken into consideration for the purpose

of the six-month rule under Article 35 § 1 of the Convention. The Court reiterates in this connection that it is incumbent, in the first place, on the applicant to substantiate that he has complied with the six-month requirement.

129. In the Court's view, the same considerations are valid for the applicant's second complaint relating to medical care during his subsequent detention until in November 2003.

130. Thus, even assuming, in the applicant's favour, that he has complied with the exhaustion requirement in respect of both complaints and that they are properly substantiated, the Court considers that they were raised belatedly before it.

131. It follows that this part of the application has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

132. The applicant complained under Article 6 of the Convention that he had been unfairly convicted of drug offences. He also alleged that these offences had been committed as a result of police entrapment.

133. Article 6 of the Convention reads, in its relevant parts, 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 applicant

134. With reference to his own version of events (see paragraphs 12-14 above), the applicant argued that before the test purchase he had not known S. and there had been no prior negotiation or arrangement between them as to the amount of drugs to be supplied and the price to be paid. The authorities had not had any reason to suspect that the applicant: (i) had been planning to commit a criminal offence or had committed one, as required by the Operational-Search Activities Act ("OSAA") for ordering a test purchase; or (ii) had been involved in any previous, ongoing or envisaged, criminal activity in relation to drug trafficking. The applicant had been entrapped by State agents and S., who had been acting under their instruction and supervision, into committing the criminal offence. The factual basis for the test purchase had been clearly insufficient and its purpose had been to create a criminal offence. The purchase had not been properly authorised in conformity with the OSAA. There had been no prior authorisation or subsequent supervision by a judicial authority. Without effective legal assistance at the pre-trial stage of the case, he had only been

able to raise complaints in this connection during the trial. However, during the trial he had not had any useful means of raising entrapment arguments, as a statutory prohibition of "incitement to a criminal offence" had only been introduced in 2007. Before the police officers had "allegedly seized" the remaining parcel of drugs from the applicant, they had beaten him up in the police station.

135. The applicant also alleged that unspecified pieces of evidence had been communicated to the trial judge without the defence's knowledge; that he had not been informed of his right to counsel upon his arrest; and that he had not been provided with sufficient opportunity to call additional witnesses.

2. The Government

136. Relying on the findings made by the trial court in the applicant's case, the Government argued that the authorities had not entrapped the applicant into committing any criminal offences. The decision to carry out a test purchase of drugs had been taken by a competent authority, the chief officer of the department of the Interior. This decision had been based on the information given by S., who had named the applicant as a drug seller. The foregoing had given rise to a reasonable suspicion against the applicant. The authorities had furnished a sum of money to S. and had supervised the test purchase. It had been aimed at verifying the information supplied by S., establishing the identities of persons involved in drug trafficking and putting an end to/preventing a criminal offence. Domestic legislation contained a number of guarantees for preventing abusive recourse to such an investigative technique.

137. The applicant's allegations of police entrapment had been subject to review by the prosecutor's office and the courts, amongst other occasions, when the applicant had challenged his arrest and the seizure of drugs from him. The trial court had granted the defence's requests to call a number of people as witnesses.

A. The Court's assessment

138. The Court will examine the applicant's general arguments relating to the alleged unfairness of the criminal proceedings against him, before turning to the specific issue of police entrapment, which is at the heart of the present complaint (see, for a similar approach, *Trifontsov v. Russia* (dec.), no. 12025/02, 9 October 2012).

1. Fairness: general issues

139. First of all, the Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in

so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Jalloh v. Germany* [GC], no. 54810/00, § 94, ECHR 2006-IX). The question which must be answered is whether the proceedings as a whole were fair. In so far as Article 6 of the Convention is concerned, it is not the Court's task to act as an appeal court of "fourth instance" by calling into question the outcome of the domestic proceedings.

140. Having examined the available material, the Court considers that the applicant's conviction was not based on any evidence obtained under duress or in breach of his right to legal assistance. It should also be noted that the applicant had ample opportunity to contest the admissibility and reliability of evidence before courts at two levels of jurisdiction, and that his arguments in this respect were properly addressed by the court of appeal. It does not appear that any undisclosed information played any role in the domestic decision-making process or judicial assessment. Even if the "test purchase" that led to the applicant's arrest and conviction was affected by some procedural defects from the standpoint of domestic law, nothing suggests that they were of such an extent and character as to make the applicant's conviction unfair within the meaning of Article 6 § 1 of the Convention (see *Trifontsov v. Russia* (dec.), cited above). The domestic courts are, in principle, better placed to judge the reliability of witnesses and the accuracy of investigation reports, as well as their formal compliance with domestic law. In these circumstances, the Court sees no reason to challenge the domestic courts' decision to admit in evidence material obtained as a result of the test purchase of drugs.

141. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Police entrapment

142. The main thrust of the applicant's arguments before the Court related to the alleged police entrapment, which he submitted had resulted in him committing a criminal offence. The applicant argued that the test purchase in his case had been ordered unlawfully, in the absence of prior information about any criminal activity on his part, and that the authorities had carried out the investigation in a manner that was not "essentially passive". He also referred to the lack of a regulatory framework providing for safeguards in the conduct of covert operations, and argued that the domestic court's reasons for dismissing his plea of entrapment were unconvincing.

143. The applicant did not sufficiently specify whether and how his above arguments related to the charges of procurement and possession of

drugs. In any event, it is notable that in 2009 the City Court set aside his conviction in respect of these charges. In these circumstances, the Court finds that the scope of the complaint before it is limited to the supply of drugs by the applicant to S. during the test purchase.

144. While the Court accepts the use of undercover agents as a legitimate investigative technique for combating serious crimes, it requires the provision of adequate safeguards against abuse, as the public interest cannot justify the use of evidence obtained as a result of what can be classified as police entrapment (see *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-36, *Reports* 1998-IV).

145. In cases where the main evidence originates from a covert operation, the authorities must be able to demonstrate that they had good reasons for mounting the covert operation and for targeting a particular person. In particular, they should be in possession of concrete and objective evidence showing that the applicant had taken initial steps to commit the acts constituting the offence for which he was subsequently prosecuted (see *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI; *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII; *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV; *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 63 and 64, ECHR 2008; and *Malininas v. Lithuania*, no. 10071/04, § 36, 1 July 2008).

146. In several cases against Russia, the Court has found that applicable domestic law did not provide for sufficient safeguards in relation to test purchases of drugs, and has stated the need for their judicial or other independent authorisation and supervision (see *Vanyan v. Russia*, no. 53203/99, §§ 46-49, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII (extracts); and *Bannikova v. Russia*, no. 18757/06, §§ 48-50, 4 November 2010). Furthermore, the Court has emphasised the role of domestic courts in dealing with criminal cases where the accused alleges that he was lured into committing an offence. Any arguable plea of entrapment places the courts under an obligation to examine it and make conclusive findings on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no entrapment (see *Ramanauskas*, cited above, §§ 70-71).

147. That being said, the Court is not persuaded that the situation under examination falls within the category of "entrapment cases", even *prima facie*. Consequently, the defects in Russian law and practice identified by the Court in some previous cases are irrelevant in the case at hand.

148. The Court notes at the outset some differences in the applicant's versions of events at the domestic level, and between his domestic versions and his arguments before this Court. The applicant argued before the trial court that on 20 August 2003 he had agreed to supply two anti-anxiety pills to T. In fact, even in his observations before the Court the applicant both submitted that the police "had allegedly seized" a parcel containing heroin

from him after his arrest and that they had "planted" drugs on him. Therefore, should the applicant be understood as contesting the factual assertion that he had been in possession of heroin parcels on 20 August 2003 and had handed one of them over to S., his arguments relating to police entrapment to commit a criminal offence appear to be devoid of substance.

149. In any event, it is notable that, as established by the national court, the applicant was able to supply over 6 grams of heroin, a non-negligible quantity, on the spot immediately after having been asked by S. T. stated in the domestic proceedings that the applicant normally had drugs on him for sale. There is no indication that the applicant was subjected to any pressure to commit the offence. It does not appear that he was contacted in advance with an offer to buy heroin from him.

150. The Court also observes that the test purchase was ordered following a voluntary contribution of information by a private source who subsequently acted in the test purchase as a buyer. This person reported the criminal activity of a person who (with reference to his first name and ethnic origin) could have been the applicant. The applicant contested that explanation and claimed that S. had been working as an informant for the police, and that he had previously participated in other test purchases. This argument was examined and dismissed by the national courts. The Court observes that it does not follow from the documentary evidence before it that S. was involved in unrelated test purchases carried out by the police. Thus, it has not been convincingly demonstrated that S. was engaged in any long-term cooperation with the investigating authorities.

151. The Court finds that the police's role in the matter was not abusive, given their obligation to verify complaints alleging the commission of offences, including serious crimes of drug trafficking which, because of their secretive nature, are sometimes not readily detectable by ordinary means. The Court considers that it has not been substantiated that there was any police entrapment in the present case.

152. It follows that this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

153. Lastly, the applicant complained under Articles 5 and 6 of the Convention in relation to his arrest, the initial period of his detention and the length of the criminal proceedings.

154. The Court has examined these complaints as submitted by the applicant. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, it finds that they do not disclose any appearance of a violation of the rights and

freedoms set out in the Convention or its Protocols. It follows that this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

155. 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."

A. Damage

156. The applicant claimed 26,452 euros (EUR) in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage.

157. The Government submitted that the pecuniary claim was unrelated to the alleged violations and that both claims were unsubstantiated.

158. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court notes that it has found violations under Article 3 of the Convention on account of the excessive use of force against the applicant and the authorities' failure to carry out an effective investigation. In these circumstances, the Court considers that the pain and frustration caused to the applicant cannot be compensated for by the mere finding of a violation. Having regard to the nature of the violations found and making its assessment on an equitable basis, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

159. The applicant also claimed EUR 3,566 and EUR 4,200 for legal fees in the domestic criminal proceedings against him and before the Court respectively; and EUR 1,476 for postal, translation and sundry expenses.

160. The Government contested the claims.

161. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the above criteria, the documents in its possession and in so far as only a part of the costs and expenses relates to the violations found under Article 3 of the Convention, the Court considers it reasonable to award the applicant EUR 2,130, plus any tax that may be changeable to the applicant, covering costs under all relevant heads.

C. Default interest

162. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the use of force against the applicant and the ineffective investigation admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention under its substantive aspect;

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural aspect;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that the respondent State is to pay the applicant, within the same period of time, EUR 2,130 (two thousand one hundred thirty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President