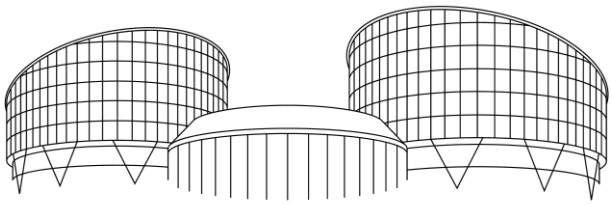

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KOSTECKI v. POLAND

(Application no. 14932/09)

JUDGMENT

STRASBOURG

4 June 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 Kostecki v. Poland,

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

Ineta Ziemele, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Krzysztof Wojtyczek, *judges*,

and Françoise Elens-Passos, Section Registrar,

Having deliberated in private on 14 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 14932/09) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Rafał Kostecki ("the applicant"), on 22 December 2008.

2. The applicant, who had been granted legal aid, was represented by Mr H. Łapiński, a lawyer practising in Białystok. The Polish Government ("the Government") were represented by their Agent, first Mr J. Wołąsiewicz and, subsequently, Ms J. Chrzanowska, both of the Ministry of Foreign Affairs.

3. On 12 January 2010 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1974 and lives in Zambrów.

A. The applicant's detention and criminal proceedings against him

5. On 29 October 2003 the applicant was arrested on suspicion of, *inter alia*, drug trafficking as part of an organised criminal group. Subsequently, he was remanded in custody.

6. On 1 August 2004, while the applicant was under psychiatric observation, he fled from hospital.

7. On 23 September 2005 he was arrested in Belgium on the basis of a European arrest warrant issued against him. He unsuccessfully contested his extradition to Poland.

8. On 30 November 2005 the applicant was returned to Poland and detained again.

9. On 15 December 2005 the bill of indictment against the applicant was lodged with the Białystok District Court. The applicant was charged with (I) trafficking in a significant quantity of drugs, (II) leading an organised armed criminal group, (III) attempted armed robbery, (IV) trafficking in arms and (V) escape from a psychiatric hospital.

10. On 28 December 2005, 13 March, 22 June, 15 September and 12 December 2006, and 21 June 2007 the Białystok Regional Court gave decisions extending the applicant's detention.

11. On 13 February 2006 the trial began.

12. On 27 June 2006 the trial court summoned witness Ł.K. by post. It also requested the police to serve a summons on this witness. The police carried out an inquiry and established that Ł.K. was living in England at an unspecified address and that the date of his return to Poland remained unknown. On 5 July 2006 the Siemiatycze Police informed the court that a summons could not be served on the witness for the above reasons.

13. At the hearing held on 10 July 2006 the prosecutor requested the trial court to read out the statements of witnesses who were abroad. The applicant's counsel objected to this request. The trial court decided that the statements of witnesses Ł.K. and M.K. given in the course of the investigation should be read out pursuant to Article 391 § 1 of the Code of Criminal Procedure since they lived abroad and their date of return to Poland remained unknown; thus, there was no possibility to hear them before the court.

The applicant commented that the statements made by Ł.K. were untrue. He admitted that he had sold small quantities of drugs to Ł.K. on two or three occasions. The applicant requested that the court establish Ł.K.'s address because "he had many questions to ask him".

14. At the hearing on 1 August 2006 witness D.B. testified. He stated that in 2002 or 2003 he had started receiving drugs from the applicant and that this had continued until October – November 2003. The applicant had been D.B.'s only supplier. During that period there had been a few dozen transactions with the applicant. He had been selling drugs received from the

applicant and had then paid him back. D.B. answered questions put to him by the applicant.

15. Witness Ł.B. testified that he had been selling drugs supplied exclusively by the applicant.

16. At the same hearing the applicant requested that Ł.K. be questioned by way of international judicial assistance by a court in Ireland. He submitted that the witness was living in Ireland and provided his address there. The prosecutor left the matter to the court's discretion.

17. At the hearing on 15 September 2006 the prosecutor supported the applicant's request as regards the questioning of Ł.K. by means of international judicial assistance. The trial court dismissed the applicant's request holding that:

"...the witness is abroad and his statements were read out in accordance with Article 391 § 1 of the Code of Criminal Procedure."

18. At the same hearing the applicant explained that he had sold drugs to Ł.K. but not in such large quantities as claimed by Ł.K. in the investigation. He also admitted that he had sold small quantities of drugs to D.B. and Ł.B. All in all, he stated to have sold half a kilogram of marihuana, 500-600 grams of amphetamine and 250-300 ecstasy tablets.

19. In a pleading of 12 October 2006 the applicant requested the court to hear a group of thirteen witnesses. They were to testify about the quantity of drugs trafficked by the applicant and that the applicant had not been the only supplier of drugs to the witnesses who had incriminated him. At the hearing held on 17 October 2006 the trial court dismissed the applicant's request to hear those witnesses, considering that their evidence was irrelevant for the outcome of the case.

20. At the hearing on 16 November 2006, the trial court decided that the statements of witness K.M. given in the course of the investigation be read out in accordance with Article 391 § 1 of the Code of Criminal Procedure. It noted that it resulted from the police inquiry that a summons could not have been served on this witness as he was not living at his place of residence. The applicant commented that the statements of K.M. were untrue.

21. At the same hearing, the applicant requested the trial court to establish the address of Ł.K. with the assistance of a probation officer (*kurator*). He submitted that Ł.K. had been placed under the supervision of a probation officer and argued that Ł.K. was under an obligation to remain in permanent contact with him. The trial court dismissed the applicant's request holding that:

"...the witness in question is abroad, his statements [made during the investigation] have been read out and attempts to establish his current address are immaterial for the outcome of the proceedings."

22. At the hearing on 5 December 2006 the trial court informed the applicant that the third charge (attempted armed robbery) could be reclassified as trespass.

23. On 12 December 2006 the Białystok District Court gave judgment. It convicted the applicant of drug trafficking on the basis of section 56 § 3 in conjunction with section 59 § 1 of the Drug Addiction (Combating) Act 2005, which provided for a fine and deprivation of liberty for up to ten years for trafficking in psychoactive substances in "significant quantities".

The trial court further convicted the applicant of trespass, trafficking in arms and escape. It sentenced him to a cumulative penalty of five years' imprisonment. The applicant was acquitted of the charge of leading an organised armed criminal group.

24. In respect of the charge of trafficking in drugs, the trial court held:

> "With regard to the first charge, i.e. trafficking in drugs, it is first of all the testimonies of persons who were directly involved in the [alleged] criminal activities and who described them in detail, which persuade the court of R. Kostecki's guilt. It concerns primarily [testimonies] of Ł.K., brothers D.B. and Ł.B. as well as K.M. These witnesses (...) in the course of the proceedings on a few occasions explained in detail their past, indicating persons with whom they had traded in drugs. They indicated not only the names or nicknames of the persons who had sold them drugs, but also indicated their buyers. They also indicated the quantity of drugs sold and their price. What is most important, they described in unison the role of R. Kostecki in the enterprise.
>
> It transpires from the testimonies of D.B. and Ł.B. that the defendant [the applicant] proposed to cooperate with them in distributing drugs. They were to sell drugs supplied by Rafał Kostecki and then to pay him back. (...)
>
> Ł.K. described cooperation with the defendant in a similar manner. (...)
>
> K.M. also made statements incriminating the applicant. (...) It is true that in the course of the [separate] trial in a case before the Białystok Regional Court III K 144/04 K.M. attempted to change his statements and argued that Rafał Kostecki had nothing to do with drugs; however, it was difficult to consider these statements convincing in the light of the earlier coherent and detailed depositions."

The trial court considered the testimonies of those witnesses to be credible as they were concordant, detailed and mutually complementary. According to these testimonies there was no doubt for the court that the applicant had been involved in trafficking in significant quantities of drugs.

25. The trial court further held that:

> "The assessment of the credibility of those testimonies is certainly not affected by the fact that Ł.K. and K.M. could not have been heard directly before the court. These witnesses do not live at their places of residence and the court had good reason to disclose the testimonies of these witnesses in accordance with Article 391 § 1 of the Code of Criminal Procedure."

26. The trial court considered the applicant's testimony to be unreliable. It noted that in the course of the investigation the applicant had claimed that we has innocent and had refused to make any statements. At the trial, he had initially refuted the incriminating testimonies of those witnesses, but eventually he had admitted to selling to brothers D.B. and Ł.B. as well as to Ł.K. only small quantities of drugs. In the court's view, the conduct of the applicant, who had decided to plead guilty in part at the end of the proceedings, was solely motivated by his desire to obtain a more lenient sentence.

27. The statements of M.K. were not relied on by the trial court.

28. The first-instance judgment was challenged by the applicant and his counsel. In his appeal the applicant argued, *inter alia*, that the trial court had breached the rules of criminal procedure by placing excessive reliance on the practice of reading out the statements given by witnesses in the course of the investigation. He alleged that the trial court had failed to clarify all relevant circumstances of the case, in particular by refusing to hear the thirteen witnesses indicated in his pleading of 12 October 2006. The applicant further argued that the trial court had erroneously determined that he had been trafficking in large quantities of drugs.

29. He also challenged his conviction for escape on the ground that this charge had not been included in the European arrest warrant. The prosecutor appealed against the sentence imposed on the applicant both in respect of individual offences and of the cumulative sentence.

30. On 20 September 2007 the Białystok Regional Court held a hearing. On 24 September 2007 it partly amended the first-instance judgment. The Regional Court quashed it in part as regards the conviction for escape and discontinued the proceedings in this respect. It found that the charge of escape had not been included in the European arrest warrant and the subsequent decisions of the Belgian courts allowing the applicant's extradition.

31. Furthermore, the appellate court increased the penalty in respect of the conviction for drug trafficking to 5 years and 6 months' imprisonment. In this respect, it found that the trial court had not sufficiently taken into account the circumstances militating against the applicant, such as his leading role in the drug trafficking venture, the very large quantities of drugs involved, his previous convictions and his behaviour during the proceedings (escape from the psychiatric hospital and going into hiding). Consequently, the appellate court increased the cumulative penalty to 6 years and 6 months' imprisonment. It upheld the remainder of the first-instance judgment.

32. The Regional Court found that the trial court had correctly assessed all the evidence in the case. In respect of the charge of drug trafficking, it held that the alleged failure of the trial court to elucidate all relevant circumstances had not been substantiated. With regard to the alleged breach of criminal procedure concerning the excessive use of Article 391 of the Code of Criminal Procedure, the appellate court found:

> "...the first-instance court undertook a series of measures aimed at a thorough examination of the circumstances of the case. In particular, the court made efforts to hear all key witnesses, including Ł.K. However, since Ł.K. was abroad at the material time (a request to hear this witness by means of international judicial assistance was dismissed by the decision of 15 September 2006) the court had the right to read out his statements made in the investigation stage of the proceedings.
>
> ...
>
> The first-instance court correctly dismissed the request to hear other witnesses proposed by the defendant, including those indicated in his pleading of 12 October 2006 (...). The circumstances on which they were to testify would have been irrelevant for the determination of the case, in particular in the light of other items of evidence...
>
> The first-instance court did not infringe the principle of directness [pursuant to which all evidence should normally be produced at a public hearing] and the applicant's right to defence. (...)
>
> In any event, M.K., as well as the above-mentioned Ł.K., were abroad. While, K.M. [also] referred to in the defendant's appeal was beyond the reach of the police. (...)
>
> There can be no agreement with the appellants who allege that the first-instance court determined the quantity (and the value) of drugs in an arbitrary manner. On the contrary – as it transpires from the written reasoning of the impugned judgment – the court's findings in this respect result from detailed (in so far as this is possible in this type of cases) [analysis of] witnesses' testimonies given – understandably, in particular in the circumstances of the present case – at the initial stage of the criminal proceedings, and in particular the testimonies of D.B. and Ł.B. (...)
>
> Significantly, as it transpires from the reasoning of the impugned judgment, the first-instance court took into account the minimum quantity and value [of drugs]. Therefore, it did not infringe Article 5 § 2 of the Code of Criminal Procedure (the *in dubio pro reo* principle)."

33. The applicant lodged a cassation appeal with the Supreme Court. He argued, *inter alia*, that the trial court had read out the statements of Ł.K., which constituted one of the most important items of evidence in his case, and by doing so had prevented the applicant from putting questions to him. He alleged a breach of his defence rights, invoking Article 391 § 1 of the Code of Criminal Procedure.

34. The applicant claimed that the courts had not used all available means to secure the presence of Ł.K. at the trial. He pointed to the fact that, at the material time, Ł.K. was under the supervision of a probation officer and that it would have been possible to summon him or to question him by means of international legal assistance.

35. The applicant further contested the refusal to hear a group of thirteen witnesses indicated in the pleading of 12 October 2006. In his view, their evidence would have been relevant for the outcome of the case. He also alleged that he could not have been convicted of trespass as this charge had not been listed in the European arrest warrant.

36. On 24 June 2008 the Supreme Court held a hearing in the presence of the applicant's lawyer and gave judgment. It quashed the Regional Court's judgment in respect of the applicant's conviction for trespass and discontinued the proceedings in this part. The Supreme Court dismissed the remainder of the cassation appeal as manifestly ill-founded.

37. With regard to the complaint about the refusal to hear a group of thirteen witnesses and the reading out of Ł.K.'s statements, the Supreme Court held:

> "As regards the complaints of an alleged violation of criminal procedure as a result of the trial court's refusal to hear thirteen witnesses and its reading out of the statements given by Ł.K. before the prosecutor, these are in fact directed against the trial court's judgment and it is obvious that, in a cassation appeal, only the judgment of the second-instance court may be challenged. The above complaints have already been raised in appeals and have been properly dismissed as ill-founded by the appellate court."

38. The Supreme Court's judgment with reasoning was served on the applicant on 8 September 2008.

39. On 22 December 2008 the applicant asked the Białystok Detention Centre authorities to send his application to the Court.

B. Interference with the applicant's correspondence with his lawyer

40. The applicant produced copies of envelopes and a letter from the authorities of the Białystok Detention Centre of 15 July 2008 confirming that the correspondence with his lawyer had been interfered with on 20 March and 4 September 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

41. Article 124 of the Code of Criminal Procedure, in so far as relevant, provides as follows:

> "The time-limit is respected if, before its expiry, a letter was handed over (...) in case of a person deprived of his or her liberty, to the administration of the respective detention facility."

42. Article 391 of the Code provides as follows:

> "1. If a witness has without good reason refused to testify, or has given testimony different from the previous one, or has stated that he does not remember certain details, or if he is abroad, or a summons cannot be served on him, or if he has not appeared as a result of obstacles that could not be removed or if the president of the court has declined to summon him by virtue of Article 333 § 2 [namely, because upon lodging the bill of indictment the prosecution asked that the records of his testimony be read out at trial], and also when a witness has died, the records of his previous statements may be read out, [regardless of whether they] were made during the investigation or before the court in the case in question or in another case or in any other procedure provided for by the law.
>
> 2. In the circumstances referred to in paragraph 1, and also in the case specified in Article 182 § 3, the records of evidence that a witness has given when heard as an accused may also be read out."

43. Section 56(1) of the Drug Addiction (Combating) Act 2005 (*Ottawa z 29 lipca 2005 r. o przeciwdziałaniu narkomanii*) provides as follows:

> "Whoever markets intoxicating or psychoactive substances or poppy straw or participates in the selling thereof shall be subject to a fine and imprisonment for a term of between six months and eight years."

44. Section 56(3) of the above-mentioned Act provides as follows:

> "If the subject of the offence referred to in subsection 1 is a significant quantity of intoxicating or psychoactive substances or poppy straw, the perpetrator shall be subject to a fine and imprisonment for up to ten years."

45. The notion of a "significant quantity" is not defined in the Act. The case-law of the Polish courts has established that a "significant quantity" is a quantity of intoxicating or psychoactive substances which could satisfy the needs of at least several dozen addicted persons (decision of the Supreme Court of 23 September 2009, I KZP 10/09) or that it is at least two kilograms of active substance, because at least twenty thousand portions can be produced out of this quantity (judgment of the Krakow Court of Appeal of 8 July 2009, II Aka 132/00).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

46. The applicant complained that his trial had been unfair in that he had been unable to examine witnesses whose statements had served as the main basis for his conviction in respect of the drug-trafficking charges, in particular Ł.K. He also complained about the refusal to hear thirteen witnesses indicated in his pleading of 12 October 2006. The relevant parts of Article 6 §§ 1 and 3 (d) provide as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

1. Compliance with the six-month requirement

47. The Government first raised a preliminary objection that the application had been lodged outside the six-month time-limit and therefore should be declared inadmissible in accordance with Article 35 § 1 of the Convention. The Government pointed to the fact that the final judgment had been given by the Supreme Court on 24 June 2008 and that the applicant's lawyer was present at the hearing at which the judgment was announced. Therefore, in the Government's view, the six-month time-limit should be calculated from that date, notwithstanding the fact that the judgment with reasoning was served on the applicant's lawyer on a later date.

48. The applicant's lawyer submitted that the applicant had not been present at the hearing before the Supreme Court on 24 June 2008 because he was in prison at the time. He further argued that the lawyer who had represented the applicant before the domestic court had received the Supreme Court's judgment with reasoning on 8 September 2008 and that the six-month time-limit should be calculated from that date. Furthermore, the applicant's lawyer submitted that the applicant had sent his application from the Białystok Detention Centre in the manner provided for by the domestic legislation, namely he had asked the Detention Centre authorities

to send it on his behalf and he had written it on 22 December 2008. The applicant's lawyer produced a copy of a document confirming this submission and concluded that even if the six-month time-limit was to be calculated from the day on which the final judgment was given by the Supreme Court, the present application had been lodged within the six-month time-limit. He relied on Article 124 of the Code of Criminal Procedure (see relevant domestic law, above).

49. The Court observes that where the reasons for a final decision are relevant for the application to the Court, the six-month time-limit runs from the date on which the full text with reasoning is received by the applicant or his or her lawyer (see, mutatis mutandis, *Worm v. Austria*, 29 August 1997, § 33, *Reports of Judgments and Decisions* 1997-V). The Court further notes that, according to Article 535 § 3 of the Code of Criminal Procedure, the Supreme Court does not have to produce reasoning if it has dismissed a cassation appeal as manifestly ill-founded. In other cases reasoning is obligatory. In the present case the Supreme Court quashed the challenged judgment in part and dismissed the remainder of the cassation appeal. Thus, the Supreme Court was under an obligation to produce reasoning as regards the part of its judgment quashing the judgment of the second-instance court. The Supreme Court did not have to produce reasoning for the part of its judgment by which the remainder of the cassation appeal was dismissed. However, the Supreme Court decided to produce reasoning for the whole of its judgment and served the judgment with the reasoning on the applicant's lawyer on 8 September 2008. Therefore, the Court considers that the six-month time-limit should be calculated from that date.

50. In any event, it has been proved by the applicant's lawyer that on 22 December 2008 the applicant requested the Detention Centre authorities to send the application to the Court. The envelope in which the present application was sent to the Court bears a stamp with the date 29 December 2008. The applicant could not have had any influence on the date on which the Detention Centre authorities sent his letter to the Court. Therefore, in the Court's view, 22 December 2008 should be considered as the date on which the present application was lodged with the Court.

51. For these reasons, the Government's plea of inadmissibility on the ground of non-compliance with the six-month time-limit must be dismissed.

2. Exhaustion of domestic remedies

52. The Government further considered that the applicant had not exhausted all domestic remedies as required by Article 35 § 1 of the Convention. In particular, the applicant had not availed himself of the possibility of lodging a constitutional complaint with the Constitutional Court. If the applicant had been of the opinion that Article 391 of the Code of Criminal Procedure deprived him of direct access to the witness who had given evidence against him, then he should have availed himself of the

possibility of requesting the Constitutional Court to decide whether that Article was in contravention of the Constitution.

53. The applicant's lawyer first submitted that in the applicant's case all ordinary remedies available under Polish law, as well as the extraordinary remedy of a cassation appeal to the Supreme Court, had been exhausted. As regards the Government's argument concerning the constitutional complaint, the applicant's lawyer submitted that the first requirement referred to in the case of *Szott-Medyńska and Others* ((dec.), no. 47414/99, 9 October 2003) had not been met: Article 391 of the Code of Criminal Procedure had not constituted a direct basis for the domestic court's final judgment. This provision was only the basis for an incidental decision taken by the domestic court in the course of the proceedings, to read out the statements of one of the witnesses whose presence at the trial had not been secured. Thus, according to the applicant, there was no basis on which to challenge the constitutionality of the provision in question.

54. The Court considers that in the circumstances of the present case the alleged breach of the applicant's right to a fair trial cannot be said to have originated from the content of Article 391 of the Code of Criminal Procedure. Rather, it resulted from the manner in which this and other provisions of the Code were interpreted and applied by the courts in the applicant's case. However, the established jurisprudence of the Constitutional Court indicated that constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision were excluded from its jurisdiction (see *Długołęcki v. Poland*, no. 23806/03, § 25, 24 February 2009; and *R.R. v. Poland*, no. 27617/04, § 116, 26 May 2011). Furthermore, in the case of *Kachan v. Poland* (no. 11300/03, §§ 28-29, 3 November 2009), which concerned an analogous issue under the Convention, the Court examined and rejected a similar objection filed by the Government (see, also, *Fąfrowicz v. Poland*, no. 43609/07, § 41, 17 April 2012).

55. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

3. Conclusion as to admissibility

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

B. Merits

1. The parties' submissions

57. The Government submitted that the domestic courts had attempted with all due diligence to secure Ł.K.'s presence at trial. In particular they had ordered an inquiry to establish his place of residence. They further maintained that Ł.K. had not been the sole witness whose statements had served as the basis for the applicant's conviction. Apart from Ł.K. there had been three other witnesses who had confirmed the applicant's drug-related criminal activities. They also argued that the trial court had not been obliged to make use of international judicial assistance, since the applicant had not specified any questions that should have been put to the witness. Even if the questioning of Ł.K. had taken place abroad, it would not have guaranteed the rule of directness in the criminal trial. In conclusion, the Government invited the Court to reject the complaint under Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention as manifestly ill-founded.

58. The applicant's lawyer submitted that the statements given by Ł.K. had been identified as one of the most important pieces of evidence for the applicant's conviction. He further maintained that the courts at both levels of jurisdiction were aware of the fact that a probation officer had been appointed for Ł.K. and that Ł.K. was obliged to remain in permanent contact with him. The domestic court however did not make use of that information in spite of the fact that even the prosecutor present at the hearing on 15 September 2006 had recognised the importance of Ł.K.'s statements. The applicant's lawyer also submitted that by failing to hear the crucial witness directly, the trial court had been prevented from observing the witness' behaviour and reactions to the questions asked and thus could not properly assess Ł.K.'s credibility.

2. The Court's assessment

(a) Applicable principles

59. In the judgment of the Grand Chamber in the case of *Al-Khawaja and Tahery v. the United Kingdom* (nos. 26766/05 and 22228/06, § 118, 15 December 2011), the Court developed its earlier jurisprudence on absent witnesses. It recalled that the guarantees in paragraphs 3 of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court underlined that its primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, also *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010, with further references therein). In making this assessment the Court will look at the proceedings as a whole having regard

to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see, *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010-...) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II). Furthermore, the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Gäfgen*, cited above, § 162, and references therein).

60. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II; *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X).

61. There are two requirements which follow from the above general principle. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule"; see *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 119).

62. Where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must therefore subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including those that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 147).

(b) Application of the principles to the present case

63. As a preliminary remark, the Court observes that the applicant's conviction for trafficking in significant quantities of drugs was based mainly on the testimonies of four witnesses: Ł.K., D.B., Ł.B. and K.M. (see paragraph 24 above). Two of these witnesses (D.B. and Ł.B.) were heard directly before the trial court, while the two other witnesses (Ł.K. and K.M.) were not. The trial court read out their statements given in the course of the investigation. Consequently, the Court will examine the applicant's complaint under Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention in respect of the evidence given by those witnesses.

64. The Court will first examine whether there was a good reason for the non-attendance of witness Ł.K. It notes that the trial court attempted to summon this witness by post and requested police assistance in the service of the summons (see paragraph 12 above). Those efforts proved unsuccessful and the trial court was informed by the police that the witness was living in England at an unspecified address and that the date of his return to Poland remained unknown. In those circumstances, the trial court decided to read out his statements made in the course of the investigation. The Court notes that the trial court's decision to have recourse to Ł.K.'s depositions was based on Article 391 § 1 of the Code of Criminal Procedure which authorised such a course of action in the case of a witness who was abroad. The appellate court examined the applicant's challenge to this decision and confirmed that the decision had been correct (see paragraph 32 above).

65. At a later stage in the trial the applicant requested that the court question Ł.K. by way of international judicial assistance by a court in Ireland. This request was dismissed with reference to the fact that the witness was abroad and that his statements had already been read out in accordance with Article 391 § 1 of the Code of Criminal Procedure (see paragraph 17 above). The Court notes that it resulted from the police inquiry that the witness Ł.K. had been living in England at an unknown address. In light of the above, the Court does not discern anything irregular in the trial court's refusal to have recourse to international judicial assistance in Ireland, given that the police's inquiry indicated that the witness actually lived in England. The Court further considers that the trial court cannot be blamed for having failed to establish the address of Ł.K. with the assistance of a probation officer since it has not been established that this would have been any more effective in locating the witness than the previous police inquiry. The appellate court examined this point and found that the trial court had made suitable inquiries to locate Ł.K. (see paragraph 32 above). In conclusion, the Court is satisfied that the trial court made all reasonable efforts to secure Ł.K.'s attendance at the trial.

66. In so far as witness K.M. is concerned, the Court notes that the applicant did not complain in his cassation appeal to the Supreme Court about the failure to hear directly this witness (see paragraphs 33-34 above). For this reason, the Court is precluded from examining the complaint in respect of this witness. In any event, the Court notes that it resulted from the police inquiry ordered by the trial court that this witness had not lived at his place of residence. On this ground, the trial court proceeded to read K.M.'s statements made in the course of the investigation pursuant to Article 391 § 1 of the Code of Criminal Procedure. The appellate court confirmed that witness K.M. could not be traced by the police. Having regard to the foregoing, the Court finds that the trial court made all reasonable efforts to secure K.M.'s attendance at the trial.

67. Next, the Court will examine whether the applicant's conviction for trafficking in significant quantities of drugs was based solely or to a decisive degree on the depositions made by Ł.K. and K.M. On this issue, the Court's starting point is the judgments of the domestic courts. In view of their findings (see paragraphs 24 and 32 above), it observes that the untested statements of Ł.K. and K.M. were not the sole or decisive evidence for the outcome of the case against the applicant.

68. The trial court found that, in addition to the statements of Ł.K. and K.M., the drug-trafficking charges against the applicant were corroborated by other ample evidence, in particular the testimonies of the brothers D.B. and Ł.B. These two witnesses, who directly cooperated with the applicant in the drug-trafficking venture, made detailed and exhaustive depositions before the trial court on the nature of the criminal activities, the persons involved, the quantity of drugs and their price. The applicant was able to put questions to these two witnesses and contest their testimonies. The Court considers that it is of cardinal importance for its examination of the present case that the applicant's conviction was based to a considerable degree on the consistent evidence of these two witnesses.

69. The appellate court had to address the applicant's allegation of a breach of criminal procedure in that the trial court had excessively relied on untested witness statements given before the prosecutor. It thoroughly examined those allegations and rejected them as ill-founded. The Supreme Court came to a similar conclusion.

70. It is also of importance to note that the applicant admitted before the trial court that he had sold small quantities of drugs to Ł.K., D.B. and Ł.B. (see paragraph 18 above). With regard to the quantity of drugs, the Court notes that the applicant's allegation that the trial court had made arbitrary findings on this point was examined on appeal. The appellate court dismissed the applicant's argument, noting that the trial court's findings had been detailed and based in particular on the testimonies of D.B. and Ł.B. Furthermore, the trial court took into account the minimum quantity of

drugs in compliance with the principle *in dubio pro reo* (see paragraph 32 above).

71. The applicant's last complaint is related to the trial court's refusal to hear a group of thirteen witnesses indicated in his pleading of 12 October 2006. The Court recalls that the admissibility of evidence is a matter for regulation by national law and the national courts (see, case-law references above in paragraph 59). The trial court refused to admit the witness evidence proposed by the applicant on the ground that it was irrelevant for the outcome of the case. The appellate court and the Supreme Court confirmed the trial court's decision. The former court specifically found that the evidence sought by the applicant would have been irrelevant in the light of other evidence that had already been admitted.

72. Having regard to the foregoing, and viewing the fairness of the proceedings as a whole, the Court considers that the lack of opportunity to examine Ł.K. and K.M. at the hearing did not, in the circumstances of the case, infringe the rights of the defence to such an extent that it constituted a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention. In reaching this conclusion due weight has been given to the above finding that Ł.K. and K.M.'s testimonies were not decisive for the conviction of the applicant. The applicant's trial as a whole was thus not unfair.

73. Accordingly, there has been no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. The applicant also complained under Article 5 § 3 of the Convention that the length of his pre-trial detention had been excessive. He further raised a complaint under Article 8 of the Convention that his correspondence with his lawyer had been interfered with.

75. As regards the complaint under Article 5 § 3 of the Convention the Court notes that the applicant's detention lasted from 29 October 2003 to 1 August 2004 when the applicant fled from hospital and, subsequently, from 30 November 2005 to 12 December 2006, when the applicant was convicted by the first-instance court (see paragraphs 5-6, 8 and 23 above).

76. As regards the complaint under Article 8 of the Convention, the applicant's correspondence with his lawyer was indeed interfered with on 20 March and 4 September 2006 (see paragraph 40 above).

77. However, the present application was lodged with the Court on 22 December 2008 (see paragraph 50 above). It follows that the complaints under Articles 5 § 3 and 8 of the Convention were lodged outside the six-month time-limit and must therefore be declared inadmissible under Article 35 §§ 1 and 4 of the Convention.

78. The applicant further complained under Article 6 § 1 of the Convention that the length of the criminal proceedings against him had been excessive.

79. The Court notes that, by virtue of section 5 of the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act") the applicant could have lodged a complaint about the unreasonable length of the proceedings with the relevant domestic court. The applicant failed to make use of that remedy.

80. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

Done in English, and notified in writing on 4 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President

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

I.Z.
F.E.P.

SEPARATE OPINION OF JUDGE DE GAETANO

1. Although I have voted in favour of a finding that in the instant case there was no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d), I have to register my disagreement with the inclusion in the judgment of §§ 59 to 62, and the apparent reliance by the Court in this case on all the principles laid down in *Al-Khawaja and Tahery v. the United Kingdom* ([GC] nos. 26766/05 and 22228/06, 15 December 2011). My disagreement is for substantially the same reasons that I advanced in my separate (albeit concurring) opinion in *Fąfrowicz v. Poland* (no. 43609/07, 17 April 2012).

2. In the instant case it is patently obvious from the judgments both of the first court (§§ 23 to 26) and of the appellate (Regional) court (§ 32) that the applicant's conviction for trafficking in drugs was not based solely or to any decisive degree on the evidence of Ł.K. and/or K.M. There was therefore no reason once again to water down the "minimum right" expressly guaranteed by Art. 6 § 3 (d) with unnecessary copious references to *Al-Khawaja and Tahery*.

3. In *Al-Khawaja and Tahery* the Grand Chamber attempted to accommodate certain provisions of English statutory law within the framework of Article 6, and this after criticism levelled both by the Court of Appeal and the Supreme Court of the United Kingdom at the Chamber judgment in respect of the same two applicants. In doing so, the Court went to great lengths to devise an "additional rule", namely "...whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability [of the admitted] evidence to take place" (§ 147 of the Grand Chamber judgment). Not only is this additional rule or criterion extremely vague but in the process – as highlighted in the joint separate opinion of judges Sajó and Karakaş in that case – the Court appears to have contradicted to a certain extent its previous *Salduz* judgment of 27 November 2008.

4. *Al-Khawaja and Tahery* is a very fact specific (one could almost say country specific) judgment. §§ 59 to 62 of the judgment in the instant case are – except for two words – a *verbatim* reproduction of §§ 53 to 55 of *Fąfrowicz*. One may well ask in the instant case, what are the "counterbalancing factors" to be considered or to be taken into account? None have been indicated in the judgment. Possibly none exist. In any case, none are necessary. The interests of justice would, in my view, have been better served by limiting the reasoning to the fact that "Ł.K. and K.M.'s testimonies [*recte*: statements] were not decisive for the conviction of the applicant" (§ 72).