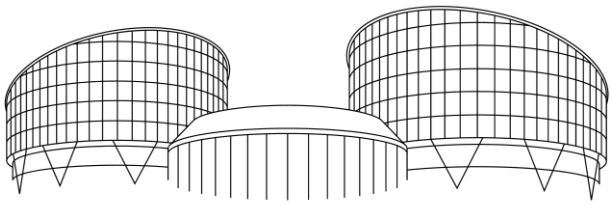

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ŠTEFANČIČ v. SLOVENIA

(Application no. 18027/05)

JUDGMENT

STRASBOURG

25 October 2012

FINAL

25/01/2013

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

In the case of Štefančič v. Slovenia,

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

Dean Spielmann, *President*,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki,
Paul Lemmens, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 18027/05) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Branimir Štefančič ("the applicant"), on 6 May 2005.

2. The applicant was represented by Mr Z. Klun, a lawyer practising in Ljubljana. The Slovenian Government ("the Government") were represented by their Agent, Mr B. Tratar, State Attorney General.

3. The applicant alleged that his criminal trial had been unfair, as he had been convicted on the basis of the statement of a witness whom he had not had the opportunity to cross-examine and because the attendance of defence witnesses in court had not been ensured, with the result that they had not been examined.

4. On 30 September 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Škofja Loka.

6. On an unspecified date, the applicant and another individual, M.K., were charged under Article 196, paragraph 2 of the Slovenian Penal Code with the criminal offence of unlawfully manufacturing and trading in

narcotics. They were accused of being involved in the organisation of drug trafficking which had been carried out by J.G., who had already been convicted of this in London. Another person, D.M., who had been convicted in Freiburg (Germany), was involved in the trafficking.

7. By letter of 7 January 2000 and during a telephone call on 14 January 2000, the applicant's lawyer was informed of the investigating judge's decision to question J.G. as a witness in London, where he was being held in a prison.

8. On 18 January 2000 the investigating judge, accompanied by M.K.'s representative and the public prosecutor, questioned J.G. in London. J.G. had specified that his participation to the meeting was conditional upon the fact that he would not be compelled to answer questions put by the defence; as a consequence, M.K.'s representative was unable to put any questions to him.

9. During questioning, J.G. explained that he had met D.M. in 1990 in Germany. D.M. later contacted him about transporting a car from Slovenia to elsewhere in Europe and mentioned people from Slovenia, including the applicant, who would organise the transport. J.G. and D.M. came together to Slovenia on 12 February 1998 and stayed in the Hotel Medno. They were visited there by the applicant and M.K. On this occasion, J.G. received an envelope from the applicant: he stated that he thought that it contained money for the purchase of a car, but later realised that it was a package of heroin and that he was supposed to smuggle drugs in the future. According to J.G.'s version of events, he came to Slovenia again on 26 February 1998, taking a train from Feldkirch (Austria) to Ljubljana. In Ljubljana he met M.K., who told him about the first drug transfer from Hungary to Germany and gave him a mobile phone with a Slovenian SIM card. Later that day, J.G. met the applicant and M.K. at the Hotel Medno. They told him where in Hungary he had to go, but that plan was never implemented. J.G. subsequently bought a car for a drug transfer from Croatia to Hamburg. His contact with M.K., who, unlike the applicant, could speak English, was made using the mobile phone which had been given to him during his second visit to Slovenia. J.G. met the applicant and M.K. in Munich and Stuttgart, where they told him about a new drug transfer from Croatia to Great Britain. He was again given instructions by M.K. using the mobile phone. J.G. identified both the applicant and M.K. from a series of photographs.

10. The trial court subsequently called: (i) witness D.Š., who testified that he had introduced the applicant to D.M. in the context of a business involving the sale of apartments; (ii) an undercover agent who was involved in another case and whose testimony was consequently held by the trial court to be inadmissible in the proceedings concerning the applicant; and (iii) an anonymous witness, who also confirmed that the applicant and D.M. knew each other because they had both been present at the meeting

concerning the sale of certain apartments. The court also admitted as evidence: (i) the statement taken from J.G. on 18 January 2000 in London; (ii) the guest records of the Hotel Medno relating to the dates 13 and 27 February 1998; (iii) the records of phone calls made on the Slovenian SIM card found in possession of J.G. on the date of his arrest; and (iv) the judgment of the Freiburg Regional Court concerning the criminal proceedings against D.M.

11. That judgment had established that D.M. and J.G. knew each other and that they had planned a drug transfer from Slovenia to Central Europe. Moreover, it had been D.M. who had introduced J.G. to the applicant and M.K. The Freiburg Regional Court had further established that on 12 February 1998 D.M. and J.G. had gone to the Hotel Medno in Ljubljana, where they had met the applicant and M.K., that a second visit to Slovenia had taken place on 26 February 1998, that J.G. had received a mobile phone from M.K. which had been used to give him instructions about the drug transfers, that J.G. had delivered drugs in Hamburg and in Great Britain and that he had met the applicant and M.K. twice in Germany.

12. At a hearing on 18 May 2000, the court read out J.G.'s statement of 18 January 2000. While the public prosecutor and M.K.'s representative agreed to this, the applicant's representative objected and requested that J.G. be examined in court. His request was rejected by the court, referring to section 340 of the Criminal Procedure Act 1994 (hereinafter, "the CP Act" – see paragraph 22 below).

13. At a hearing on 29 May 2000, the applicant requested that his mother, brother and wife be called to give evidence relating to his state of health and his medical appointments during the period in question. The court rejected the request, finding that the applicant's state of health could be verified on the basis of his medical records.

14. On 31 May 2000 the applicant was convicted and sentenced to nine years' imprisonment for being part of a criminal enterprise, together with J.G. and D.M., which had drug trafficking from Croatia to Western Europe as its purpose. The court found that the applicant and his co-accused, M.K., together with D.M., had organised and assisted the sale of heroin which had been trafficked by J.G. on two occasions in March 1998. On one occasion, 30 kg of heroin had been trafficked to Hamburg, and on another occasion, 54 kg of heroin had been trafficked to London. The court also found that the applicant had not attended any medical appointments on the dates on which the alleged acts were committed.

15. In its judgment, the court rejected the applicant's argument that J.G. should have been examined at trial. The court relied on the fact that J.G. had been sentenced to sixteen years in prison and that it could not therefore have been expected that the British authorities would bring him before a Slovenian court in order to testify. It also rejected the applicant's argument that J.G. was mentally ill, finding that his answers had been clear and

coherent and that the issue of his mental state had already been assessed by the Freiburg Regional Court, which had found that his testimony had been fully credible. The court also observed that the defence had been aware that J.G. would not answer questions other than those put to him by the investigating judge or the prosecutor. It further found that M.K.'s representative, who had been present at the examination, had not even attempted to put questions to J.G., nor had she asked the investigating judge to do so on her behalf.

16. In its reasons for convicting the applicant, the court stated that it had followed the description of the relevant events given by J.G. on 18 January 2000, which had been coherent and supported by corroborating evidence. The evidence, including telephone records and train tickets, had supported J.G.'s statement regarding the trips he had taken in order to bring the drugs to Hamburg and London. In particular, the train tickets found on J.G. on the date of his arrest had corresponded to the dates of his alleged meetings with D.M. Moreover, from the date on which he had received the mobile phone from M.K. until the date of his arrest in London, J.G.'s Slovenian SIM card had recorded that calls had been received from different telephone boxes in the area near Škofja Loka, the city where the applicant and M.K. had lived. These phone calls had matched with the dates and locations of the drug transfers which J.G. had allegedly undertaken under the instructions of the applicant and M.K.

17. In addition, the court found that J.G. had picked out the applicant and M.K. from twenty-four photos of different people and "had previously described both of them and stated that he had met them on several occasions". It further stated:

> "On the basis of the above, the court considers it proven that the accused colluded with D.M. and J.G. for the purpose of committing criminal offences. The witnesses confirmed that [the applicant] had met D.M., and that [his co-accused] had also enquired about him. J.G. indicated the time from which he had been D.M.'s friend and from which they had reconnected. Immediately after J.G.'s release from hospital, D.M. contacted him and took advantage of his position. It can also be seen from the Freiburg Regional Court's judgment that D.M. was in contact with J.G. on a continuous basis. All four of them were together on 12 February and 13 February in the Hotel Medno, where they started planning the trafficking."

18. The applicant appealed. He alleged that the judgment had been based predominantly on J.G.'s statement, which was of questionable credibility. He submitted that the documents in the case file had shown that J.G. was mentally ill, had been treated in a psychiatric hospital several times, including most recently shortly before his arrest, and that he was easily manipulated. For those reasons, the applicant had requested that the court call J.G. for examination at trial. Referring to Article 6 of the Convention, the applicant alleged that his right to examine a key witness should have had precedence over the logistical difficulties and financial consequences connected with the organisation of the witness's attendance at the hearing.

He also complained about the court's refusal to call his mother, his brother and the representative of his co-accused as witnesses.

19. On 6 December 2000 the Ljubljana Higher Court dismissed the appeal. It agreed with the lower court as regards the credibility of J.G.'s testimony. In relation to the fact that J.G. had not been examined at the hearing, it found the following:

> "The court's decision to read out the testimony of J.G. was made under section 340, paragraph 1, point 1, on the well-founded basis that J.G. was serving a sixteen-year prison sentence in London. The representative of the accused had been informed of the examination before the British court beforehand but decided not to attend. The other examinations of this witness and the final judgment of the German court, which have been mentioned already, were sufficient to assess the credibility of this witness. Article 6 of the Convention was not violated because the accused were unable to directly examine this witness, contrary to the appellant's incorrect contention. The proven credibility of this witness was such that the participation of both accused [in J.G.'s questioning] could not have affected [his statement's] evidential value ... As can be seen from the written grounds of the judgment, the court also relied on J.G.'s statements obtained in the proceedings before the British courts[1] and the final judgment of the German court, which were valid evidence because their lawfulness was not questionable as [a result of the fact that] the judgments were final. Although M.K.'s representative was unable to put any questions to J.G. (in accordance with the conditions set by J.G.), the rights of the defence were not violated as otherwise the witness would have refused to participate. In this connection, the court rightly found that the [applicant's] representative could have put questions to J.G. through the investigating judge but did not make use of this possibility."

20. The applicant and M.K. lodged appeals on points of law. On 3 April 2003 the Supreme Court of Slovenia upheld their appeals in part in respect of the legal qualification of the offence and reduced their sentences to eight years' imprisonment each. It dismissed the remainder of the appeals. It found that the applicant's representative had been given an opportunity to participate in the examination of J.G. and should have been aware of the possibility that the witness would not be examined again at trial, as stipulated in section 167, paragraph 2 of the CP Act (see paragraph 22 below). It also dismissed the applicant's argument that he could not have afforded his representative's travel expenses, finding that no request had been made to cover such expenses from State funds.

21. On 25 July 2003 the applicant lodged a constitutional appeal alleging a violation of his defence rights. On 6 December 2004 the Constitutional Court dismissed the appeal as manifestly ill-founded. It endorsed the reasons given by the Supreme Court.

[1] These statements substantially matched with the statement made by J.G. on 18 January 2000.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Procedure Act

22. The relevant provisions of the CP Act (*Zakon o kazenskem postopku*, Official Gazette no. 63/94) read as follows:

Section 167

"...

(2) The aim of an investigation is to gather the evidence and data necessary for deciding whether to bring charges or discontinue proceedings, evidence whose reproduction at the main hearing might be impossible or very difficult, and other evidence which might be useful for the proceedings and whose taking appears warranted by the circumstances of the case."

Section 178

"...

(4) The state prosecutor, the accused and his defence counsel may attend the examination of a witness. The injured party may attend the examination of a witness only if the witness is not likely to appear at the main hearing.

...

(6) If a person who has been sent a notice of any intended questioning fails to appear, the questioning may be performed in his absence. ...

(7) The parties and defence counsel present during a questioning session may seek clarification of certain matters by putting questions to the accused, witness or expert. As a rule, the questions shall first be put by the state prosecutor, then by the accused and his counsel and finally by the investigating judge. The investigating judge shall not allow a question or an answer if they are not permitted or are irrelevant to the matter considered. ... Persons present at a questioning session shall have the right to demand that their remarks concerning the asking of individual questions be entered in the record, and may propose that individual pieces of evidence be taken.

..."

Section 183

"If the parties and defence counsel did not attend certain a questioning session and the investigative judge considers that it would be advantageous for the further course of the procedure if they were acquainted with critical evidence, he shall inform them that this evidence will be available within a specific period and that they may make motions for new evidence to be taken."

Section 288

"(1) ... Witnesses and experts proposed by the prosecutor in the indictment and by the accused in his defence to the indictment, except those whose examination at the main hearing is not necessary in the opinion of the presiding judge, shall also be summoned to the main hearing. ..."

Section 337

"(1) If it transpires in the course of the main hearing that a witness or an expert is unable to appear in court or his appearance would involve great difficulty, and the panel maintains that his testimony is important, the panel may order that he be examined outside the main hearing by the presiding judge, or a judge on the panel, or the investigating judge of the court in whose territory the witness or the expert resides.

...

(3) The parties and the injured person shall always be advised when and where a witness shall be examined, or when and where an inspection or reconstruction of an event shall take place, and shall be instructed that they may attend these events. If the defendant has been remanded in custody, the panel shall determine whether his presence is necessary during these actions. ..."

Section 340

"(1) In addition to the instances specified in the present Code, the records of the testimonies of witnesses, co-defendants or convicted persons who were involved in the offence, as well as expert reports and expert opinions, may on the basis of a decision of the panel be read out only in the following instances:

(i) if the persons questioned have died, or have been affected by a mental disease, or cannot be found, or are unable to appear in court due to old age, illness or some other weighty reason, or their appearance would involve great difficulty;

(ii) if witnesses or experts refuse to testify at the main hearing without legal justification.

(2) Subject to the consent of the parties, the panel may decide that the record of a previous examination of a witness or an expert, or the written findings and opinion of the expert, be read out in court in the absence of the witness or the expert, whether or not the witness or the expert were summoned to appear at the main hearing.

...

(4) The reasons for the reading out of the record shall be indicated in the record of the main hearing ..."

Section 342

"After the examination of each witness or expert, as well as after the reading of each record or other written document, the presiding judge shall invite the parties and the injured person to make comments if they so wish."

B. Case-law of the Constitutional Court, of the Supreme Court and of the Higher Courts

23. The Constitutional Court held that the "extreme ill-health" of two witnesses (the alleged victims of a crime) was a "justified and unavoidable derogation" from the principle of direct examination of witnesses. Nevertheless, the accused should have been given the opportunity to question the victims, and in this respect it was enough that he had been invited, during the investigation, to be present at their examination

conducted by the investigating judge (decision Up-207/99 of 4 July 2002; see also judgment no. III Kp 11324/2010 of the Ljubljana Higher Court of 9 June 2010). In a decision of 18 October 2007 (Up-849/05), the Constitutional Court considered that it was not possible to refer to a violation of the right to examine the witnesses for the prosecution when the authorities had acted with due diligence in their efforts to ensure that the accused had the benefit of this right (it is worth noting that in this case, according to the Constitutional Court, the statements of the victims were not the sole and key evidence against the accused).

24. In a judgment of 21 May 2009 (no. I Ips 14/2009), the Supreme Court noted that, according to section 340(1) of the CP Act (see paragraph 22 above), the records of statements could be read at trial in the event that the witnesses could not be found. If the accused was provided with an opportunity "to be present at the hearing of this evidence", the statements in question could be read out even without his consent. Furthermore, there was no violation of the procedural rights of the accused if he and his counsel were summoned to attend the examination of a witness who could not give evidence at trial (see judgment no. I Ips 507/2008 of 9 April 2009, and judgment no. I Ips 190/2006 of 17 May 2007). Conversely, such a violation would occur when, in the absence of any obstacle to such an act, the investigating judge failed to inform the suspect of the examination of a witness whose statements were subsequently read out at trial (see judgment no. I Ips 88/2008 of 16 October 2008).

25. Section 340 of the CP Act indicates the cases in which it is admissible to make an exception to the principle that evidence at the main hearing shall be taken directly before the trial chamber (the "principle of immediacy" – see Supreme Court judgment no. I Ips 330/2006 of 24 April 2008). A party who has explicitly agreed to the reading of a witness's testimony cannot rely upon the right to cross-examine the witness in question at the trial hearing (see decision no. Kp 115/2000 of the Celje Higher Court of 23 March 2000, and decision no. Kp 28/2008 of the Koper Higher Court of 6 February 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION BY REASON OF ADMITTANCE AND USE AGAINST THE APPLICANT OF THE STATEMENT MADE BY J.G. IN LONDON

26. The applicant considered that his conviction had been based to a decisive extent on the statement made to the investigating judge by J.G. and

underlined that, in breach of Article 6 § 3 (d) of the Convention, he had not been given the opportunity to cross-examine this key witness directly and/or at trial with a view to adversarial argument.

Insofar as relevant, Article 6 of the Convention reads 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;
>
> ..."

27. The Government contested that argument.

A. Admissibility

28. 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. Arguments of the parties

(a) The Government

29. The Government underlined that the admissibility of evidence was primarily a matter for regulation by national law and that the use of evidence obtained at the pre-trial stage was not in itself incompatible with Article 6 of the Convention. In the present case, the decision of the first-instance court had been issued following an extensive and exhaustive hearing of evidence and had been upheld by all of the domestic appellate courts. The first-instance court had rightly based its judgment on the statement of J.G., who had been examined by the investigating judge in London and whose statement had been in all key respects identical to his defence before the criminal court in London and consistent with the findings of the final judgment of the Freiburg Regional Court sentencing the fourth member of the criminal group, D.M., for the same criminal offence. The possibility that J.G. had been manipulated should be excluded, as his mental capacity had been verified and several questions and follow-on questions had been put to him.

30. Moreover, the first-instance judgment had not been exclusively based on J.G.'s statement, but had also relied on other evidence, namely: the statements of other witnesses; the records of the testimony given before the British authorities by J.G.; the guest book of the Hotel Medno for 13 and 27 February 1998; the records of the outgoing and incoming phone numbers of 30 April 1999 on J.G.'s Slovenian SIM card; a chemical analysis of 54.3 kilograms of heroin; the criminal records of the defendants; and the judgment of the Freiburg Criminal Court in the case against D.M. The credibility of the J.G.'s statement had been corroborated by the telephone calls recorded as received by his Slovenian SIM card, which had fully matched his recollection of the time and locations of his movements though different countries. Furthermore, his meeting with D.M. had been confirmed by a train ticket and his meetings with the defendants had matched with the dates on which J.G. and D.M. had stayed at the Hotel Medno. In the Government's opinion, J.G.'s statement had been neither the sole nor the decisive evidence against the applicant, but rather a piece of evidence supported by a number of other pieces of parallel evidence (see, *mutatis mutandis*, *Mika v. Sweden* (dec.), no. 31243/06, 27 January 2009).

31. The decision to read out J.G.'s statement had been based on section 340(1) of the CP Act, as the court had held that the fact that the witness was serving a sixteen year prison sentence in England was a weighty reason for his inability to appear in court. According to the Government, in such circumstances it would have been virtually impossible to question J.G. before a court in Slovenia.

32. Moreover, the applicant had been given an adequate and proper opportunity to challenge and question the witness. Indeed, his lawyer had been informed in due time (on 7 January by letter and on 14 January 2000 by phone) about the examination of J.G. in England, but had failed to attend. By attending, the applicant's lawyer would have had the opportunity to ask questions on behalf of the applicant and to make comments on and motions about J.G.'s statement. The defence had accepted the risk that it might not be possible to exercise those rights at the main hearing. The investigating judge had examined J.G. on 18 January 2000 in London, in the presence of the state prosecutor and counsel for the applicant's co-defendant, M.K. It did not appear from the case file that the applicant or his lawyer had informed the court that they would not attend the examination of the witness as a result of difficulties arising from a lack of financial resources. They had also failed to ask that the applicant's lawyer's travel expenses be paid from State funds. The defence had not explicitly stated, at that stage or later in the proceedings, which questions it would have put to J.G. had he been summoned to appear at the trial hearing.

33. It was to be borne in mind that the Slovenian courts had also legitimately relied on the testimony given by J.G. in the criminal proceedings in England and on the content of the final judgment delivered

in Germany. These documents had given enough grounds to assess the credibility of the witness. The fact that during questioning on 18 January 2000 counsel for the applicant's co-defendant had not been allowed to put questions to J.G. could not constitute a violation of the rights of the defence, as J.G. would otherwise have not answered any questions or the examination would have been interrupted. Counsel could have put questions to J.G. through the investigating judge, but had failed to make use of this possibility.

34. According to the Government, the applicant could not rely on the judgments given by the Court in the cases of *Kostovski v. the Netherlands* (20 November 1989, Series A no. 166) and *Lüdi v. Switzerland* (15 June 1992, Series A no. 238), which concerned different factual situations (use of the statements of anonymous witnesses). In the present case, the witness had not been anonymous, had been examined before an investigating judge and the applicant had been given the opportunity to examine him in England through counsel (this last element also differentiated the present case from *A. v. Finland*, no. 40156/07, 28 September 2010). Relying on *Gorgievski v. the former Yugoslav Republic of Macedonia* (no. 18002/02, 16 July 2009), in which the Court concluded that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention, the Government argued that in the domestic proceedings the essential aim of a full "equality of arms" had been achieved.

(b) The applicant

35. The applicant did not submit observations in reply, but reiterated his wish to have his case examined by the Court.

2. The Court's assessment

(a) General principles

36. The Court reiterates that the guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that Article which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *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 victim(s) 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). It is also notable in this context that 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 the references therein).

37. The Grand Chamber has recently clarified the principles to be applied when a witness does not attend a public trial (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 119-147, 15 December 2011). These principles may be summarised as follows:

(i) the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

(ii) typical reasons for non-attendance are, like in the case of *Al-Khawaja and Tahery*, cited above, the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend trial;

(iii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iv) the admission as evidence of statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings;

(v) according to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(vi) in this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive;

(vii) however, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(viii) in particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a

conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures 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 to the case.

(b) Application of these principles to the present case

(i) Whether there was a good reason for admitting the evidence of J.G.

38. In the present case, the decision to admit J.G.'s pre-trial statement as evidence was based on section 340(1)(i) of the CP Act, a provision according to which "the records of the testimonies of witnesses ... may be read out ... if [the] appearance [of the witness at trial] would involve great difficulty" (see paragraph 22 above). According to the domestic courts, the great difficulty in question concerned the fact that J.G. had been sentenced to sixteen years' imprisonment and was serving his sentence in London, and it could not be expected that the British authorities would bring him before the Slovenian courts in order to testify (see paragraph 15 above).

39. The Court accepts that the practical difficulties connected to the transfer of the witness from the United Kingdom to Slovenia were legitimate reasons justifying his non-attendance at the trial. In this connection, it notes that the transfer of a convicted prisoner from one State to another entails a complex procedure requiring a number of security measures, notably when the two countries concerned are at significant distance. States cannot be considered obliged to run such a procedure in all the cases. This is especially true where, as in the present case, there is a possibility to hear the witness at stake in the country where he is held in custody. Therefore, the Court considers that there was sufficient justification for admitting J.G.'s statement.

(ii) Whether the testimony of J.G. was decisive for the applicant's conviction and whether the domestic system provided the applicant with adequate procedural safeguards

40. The Court notes that the domestic courts relied on J.G.'s testimony, which they considered fully credible (see paragraphs 15 and 19 above). The first-instance court followed the description of the relevant events given by J.G. on 18 January 2000, which in its opinion was coherent (see paragraph 16 above).

41. However, the Slovenian judges found several pieces of evidence corroborating J.G.'s account, notably the records of the Hotel Medno, the train tickets found on J.G. on the date of his arrest and the telephone records of his Slovenian SIM card, as well as the judgment of the Freiburg Regional Court and J.G.'s statements obtained in the proceedings before the British courts (see paragraphs 10, 11, 16 and 19 above). These elements confirmed J.G.'s whereabouts and the contacts he had had with persons residing in Slovenia. Moreover, other oral evidence produced before the first-instance court (see paragraph 10 (i) and (iii) above) proved that the applicant and D.M., one of the persons implicated in the drug-trafficking, knew each other and, as pointed out by the Government (see paragraph 30 above), 54.3 kilograms of heroin were found and chemically examined.

42. Under these circumstances, the Court is of the opinion that J.G.'s testimony was not the sole or decisive evidence against the applicant, but rather one of the elements which, examined in their individual probative value as well as in relation to the other available pieces of parallel evidence, led the Slovenian courts to convict the applicant for drug-trafficking (see, *mutatis mutandis*, *Sofri and Others v. Italy* (dec.), no. 37235/97, ECHR 2003-VIII, and *Carta v. Italy*, no. 4548/02, § 52, 20 April 2006).

43. As the corroborative evidence pointed out in paragraph 41 above was particularly strong, the evidence of the absent witness cannot be treated as decisive. It follows that, differently from the case of *Tahery*, cited above, the applicant's defence rights were not, as such, unduly restricted by the absence of J.G. at trial.

44. Moreover, it is to be noted that in the present case the witness whose statement had been admitted in lieu of live evidence at trial was examined at a prior stage of the proceedings by the investigating judge, notably during a meeting held in London on 18 January 2000. The public prosecutor and a representative of the applicant's co-accused were also present (see paragraph 8 above). The applicant's representative was invited to this questioning session (see paragraph 7 above), but decided not to attend (see paragraph 19 above), thus missing an opportunity to test the truthfulness and reliability of J.G.'s testimony.

45. It is true that J.G. had made his attendance to the meeting conditional upon the fact that he would not be compelled to answer questions put by the defence and that M.K.'s representative, who was present at the questioning, could not directly cross-examine him (see paragraphs 8, 15 and 19 above). The Court notes, however, that J.G. could have refused to answer questions by the defence even if he had been examined at trial.

46. Moreover, as pointed out by the domestic courts, the defendants' representatives could have tried to put questions to J.G. through the investigating judge (see paragraphs 15 and 19 above). Should he refuse to answer, it was open to the applicant to use this fact before the Slovenian courts to undermine J.G.'s credibility. It is also worth noting that the

defence had a fair opportunity to comment on the evidence which was produced and to argue that little weight should be given to a statement made by a witness who had not been present at trial and failed to do so.

(iii) Conclusion

47. Against this background, and viewing the fairness of the proceedings as a whole, the Court considers that J.G.'s statement was not the sole or decisive evidence against the applicant and that the defence had at its disposal some procedural safeguards capable of counterbalancing, at least in part, the absence of this witness at trial. It follows that the admission in evidence of J.G.'s statements did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION BY REASON OF THE REJECTION OF THE APPLICANT'S REQUEST TO CALL WITNESSES ON HIS BEHALF

48. The applicant further complained that his request to call his mother and brother, as well as the lawyer of his co-accused, as witnesses at the hearing was rejected.

49. The Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of the evidence which defendants seek to adduce (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 68, Series A no. 146). More specifically, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the autonomous sense given to that word in the Convention system (see *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203). It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses: he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see *Perna v. Italy* [GC], no. 48898/99, § 29, 6 May 2003).

50. Article 6 § 3 (d) "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter" (see, among other authorities, *Engel and Others v. the Netherlands*, 8 June 1976, § 91, Series A no. 22, and *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158). The principle of equality of arms implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent" (see *Bulut v. Austria*, 22 February 1996, § 47, *Reports* 1996-II, and *Popov v. Russia*, no. 26853/04, § 177, 13 July 2006). In particular, where the applicant's conviction is based primarily on the assumption of his

being in a particular place at a particular time, the principle of equality of arms and, more generally, the right to a fair trial, implies that the applicant should be afforded a reasonable opportunity to challenge this assumption effectively (see *Popov*, cited above, § 183).

51. In the present case, the witnesses requested by the applicant (his close relatives and his co-defendant's lawyer) were proposed with the aim of having them testify as to his state of health and his medical appointments during the period in which he allegedly committed the offences. The first-instance court rejected this request, reasoning that these facts could have been verified on the basis of the applicant's medical records (see paragraph 13 above). Those records showed that the applicant had not attended any medical appointments on the dates on which the alleged acts were committed (see paragraph 14 above).

52. The Court agrees with the Slovenian tribunal on this point and considers that the decisions in which the national authorities refused the applicant's request are not open to criticism under Article 6, as he has not established that his request for evidence to be taken from his close relatives and from his co-defendant's lawyer would have brought new and relevant facts to light that would have been relevant for the determination of the charges against him (see, *mutatis mutandis*, *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001, and *Perna*, cited above, §§ 30-32). Nor was he put in a situation of disadvantage vis-à-vis the prosecution.

Under these circumstances, no appearance of a violation of Article 6 §§ 1 and 3 (d) of the Convention can be ascertained under this head.

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the admittance and use against the applicant of the statement made by J.G. in London 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 by reason of the admittance and use against the applicant of the statement made by J.G. in London.

Done in English, and notified in writing on 25 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President