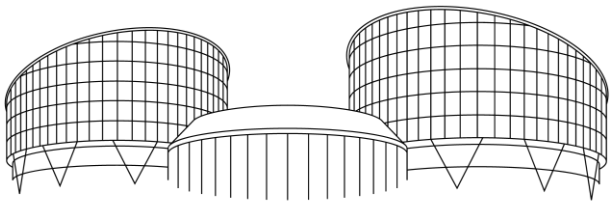

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF JAKUBCZYK v. POLAND

(Application no. 17354/04)

JUDGMENT

STRASBOURG

10 May 2011

FINAL

10/08/2011

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

In the case of Jakubczyk v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 12 April 2011,

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

PROCEDURE

1. The case originated in an application (no. 17354/04) 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 Ryszard Jakubczyk ("the applicant"), on 22 April 2004.

2. The applicant was represented by Ms M. Gąsiorowska, a lawyer practising in Warsaw. The Polish Government were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his rights under Article 6 §§ 1 and 3 (d) of the Convention had been violated, as he had had no opportunity to examine the main witnesses in the criminal proceedings against him.

4. On 24 April 2008 the President of the Fourth Section 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Kielce.

A. Investigation and trial

6. On 13 December 2000 the police entered premises in B., owned by one of the applicant's associates, where they discovered a chemical laboratory, substances that turned out to be precursors necessary for the production of narcotics, and various appliances, *inter alia*, for the production of pills.

7. On 15 December 2000 the applicant was arrested by the police. On 17 December 2000 the Kielce District Court (*Sąd Rejonowy*) decided to remand him in custody on suspicion of producing psychotropic substances.

8. Subsequently his detention was extended.

9. On 11 December 2001 the applicant was indicted before the Kielce Regional Court (*Sąd Okręgowy*) on charges of leading an organised criminal gang that between 1996 and 15 December 2000 had produced large quantities of amphetamine, heroin and cocaine. Simultaneously, three other persons were indicted in the same set of proceedings.

10. At the same time the prosecutor severed other charges against the applicant related to illegal transport of psychotropic substances to Austria and other European countries and releasing drugs into circulation in those countries.

11. On 15 January 2002 the trial court held the first hearing in the case.

12. On 27 November 2002 the Kielce Regional Court held a hearing at which the prosecutor sought to read out statements made by a certain W.P. as well as by J.K., B.S., and G.C. The applicant's lawyer objected to this, submitting that the statements in question had been made before the Austrian courts in another set of criminal proceedings in which those individuals had been the accused, and thus they had not received a warning about criminal liability for making untruthful statements. He also submitted that the Polish authorities had made no attempt to hear those individuals in Poland at the preparatory stage of the proceedings. Moreover, he challenged the legal basis that could allow statements made before foreign courts to be read out.

Nevertheless, the trial court decided to read out the statements made by W.P. and others. The court based its decision on Article 587 of the Code of Criminal Procedure and others, which allowed statements made by both witnesses and accused in another set of proceedings to be read out. It agreed that it had not been obvious whether this provision could be applicable to a situation where the actions of foreign authorities had not been taken at the request of the Polish authorities; however this doubt had been dismissed by the Supreme Court in its decision of 28 March 2002. The Regional Court examined the rules of Austrian Criminal Procedure and concluded that they did not conflict with the principles and guarantees provided by the Polish legal order.

13. At a hearing held on 20 February 2003 the trial court started reading out the statements of W.P. and others. The applicant contested the truthfulness of W.P.'s testimony.

14. On 19 March 2003 the applicant's lawyers requested the trial court, *inter alia*, to hear witnesses W.P. and B.S. in person before the trial court in order to confront them. They pointed to discrepancies in their statements which could only be verified by hearing them in person before the trial court.

15. On the same date the Regional Prosecutor submitted to the court his reply to the applicant's request, in which he was not opposed to W.P. and B.S. being heard by a delegated judge, as they had not so far been heard by the Polish authorities in connection with this set of proceedings.

16. On 26 March 2003 the Kielce Regional Court refused the applicant's request for W.P. and B.S. to be heard in person without specifying the reasons for the refusal.

B. The first-instance judgment

17. On 30 May 2003 the trial court gave judgment in the case. The applicant was convicted of the following offences, committed on an unspecified date between 1997 and 15 December 2000:

1) storing and possessing large quantities of psychotropic substances,

2) storing, owning and acquiring equipment necessary for illegal production of psychotropic substances, and

3) producing large quantities of psychotropic substances, particularly amphetamines.

The court found that the applicant had acted together with three accomplices; however it acquitted him of the charge of leading an organised criminal gang. The court sentenced the applicant to nine years' imprisonment and a fine.

18. The facts of the case were established on the basis of the following:

1) expert opinions submitted by nine different experts, including an opinion prepared in cooperation with the Forensic Institute in Wiesbaden (Germany);

2) statements made by thirty-three individuals, witnesses and co-accused;

3) statements made by W.P., B.S. and others heard before the Austrian authorities, including those read out at the hearing;

4) documents: records of searches of premises, notes on use of a police dog and scent identification, records of *in situ* inspection, forensic opinions, documents, inspection of pieces of evidence produced at the hearing, documents held in the secret registry, documents submitted by witness T.S., photographic documentation of pieces of evidence, and official correspondence related to pieces of evidence.

Some of the evidence referred to above had been collected in another set of criminal proceedings against the applicant (regarding charges severed in 2001, see paragraph 10 above).

19. In reconstructing the facts of the case the trial court firstly examined the type and quantity of chemical substances seized during the search of five rooms of the laboratory in B. and the possible time frame of the activity of the laboratory. The written reasons of the judgment in this respect are detailed and extensive. The court examined at length the results of the searches of the laboratory, which had been conducted by several experts, who had collected about 100 samples of chemical substances as well as video and photographic evidence. The trial court examined the scientific methodology employed by experts, and the procedures followed, in the light of the allegations made by the accused that some of the evidence against them had been fabricated.

20. The court further examined the involvement of each of the co-accused in the activities with which they had been charged. As regards the applicant, the trial court referred to comparisons made by Polish and German experts of chemical substances found in the laboratory to ecstasy pills confiscated in several European countries, notably in Austria. The experts considered that it was most probable that the drugs found abroad had been produced in the laboratory in B. The link between the applicant, the other co-accused, and the activity of the laboratory was established on the basis of various pieces of evidence examined at length by the trial court as well as circumstantial evidence.

21. The trial court assessed the credibility of statements obtained from W.P. and others by the Austrian courts and investigating authorities, which had been read out at the hearing, and determined that they were worthy evidence (*pełnowartościowy materiał dowodowy*). They enabled the existence of personal connections between the applicant and drug dealers arrested in Austria, in particular W.P., to be established The court considered this evidence to corroborate what had been established by experts, namely that the drugs found abroad had in fact been produced in the laboratory in B. The trial court considered that W.P. in his statements had been incriminating himself to a far greater extent than the applicant. W.P. considered himself the main organiser of drug-related dealings and depicted the applicant as an ineffective executor of his instructions.

C. The appellate and cassation proceedings

22. On 31 December 2003 the applicant lodged an appeal against the judgment. He complained in particular that W.P.'s statements, as well as those of three other witnesses, had been read out before the trial court although they had not been requested by the Polish authorities as provided by Article 587 of the Code. The applicant also contested the trial court's refusal of his request for

W.P. to be heard in person. Moreover, the appeal challenged the trial court's finding that the applicant had been producing drugs up to 15 December 2000. He submitted that the condition of the laboratory when it was searched on 13 December 2000 showed that it had not been used recently. Thus the trial court was wrong to conclude that the applicant had been committing an offence continuously up to 15 December 2000 and to apply the more severe legal regulation that entered into force on 12 December 2000.

23. The prosecutor also lodged an appeal, alleging that it had been sufficiently proved that the applicant had acted as a leader of an organised criminal gang.

24. On 8 April 2004 the Krakow Court of Appeal (*Sąd Apelacyjny*) held a hearing and upheld the impugned judgment. The court considered that the first-instance court had been right to read out the statements of W.P. and others made before the Austrian court and that it had correctly applied the legal provisions in the light of the Supreme Court's interpretation set out in its decision of 28 March 2002. The appellate court also dismissed the arguments that the applicant had not been producing any illegal substances immediately before and after 12 December 2000. The court considered that the police had secured in his laboratory large quantities of substances for the production of narcotics, with appliances which had not been dismantled and showed signs of recent use. According to the court, a laboratory of that kind did not work steadily and produce constantly, but had periods of stagnation, waiting for the following stages of the production, but nevertheless with the intention of continuing such activity.

25. In addition to the above-mentioned circumstantial evidence, the Court of Appeal analysed at length the statements made by W.P. and other witnesses heard in Austria and assessed their usefulness and veracity. It underlined that the applicant had never contested that he knew W.P. and had met him on several occasions, allegedly in the capacity of an expert consultant in chemistry. The court noted that W.P. had disclosed many elements of his dealings, which only in part concerned the applicant, without attempting to minimise his own role. His statements were considered logical and trustworthy and corroborated by those made by other witnesses.

26. On 15 July 2004 the applicant lodged a cassation appeal with the Supreme Court (*Sąd Najwyższy*).

27. On 19 October 2004 the Supreme Court decided not to hear the cassation appeal and refused to prepare written reasons for its decision.

II. RELEVANT DOMESTIC LAW

28. Article 390 § 1 of the 1997 Code of Criminal Procedure ("the Code") provides:

> "The accused has a right to be present during the taking of evidence in the proceedings."

29. Article 391 of the Code provides as follows:

> "1. If a witness has without good reason refused to testify, or has made a statement which differs from a 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 for good reason or if the president of the court has declined to summon him pursuant to Article 333 § 2 [because upon the lodging of the bill of indictment the prosecution has 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] have been made in 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."

30. According to Article 587 of the Code:

> "The official records of inspections, testimonies given by accused, witnesses or experts, or records of other evidentiary actions prepared upon a request from a Polish court or prosecutor, by the courts or prosecutors of foreign countries or by agencies performing under their supervision, may be read out at a hearing in accordance with the principles prescribed in Articles 389, 391 and 393. This may be done provided that the manner in which these actions are performed does not conflict with the principles of legal order in the Republic of Poland."

31. According to Article 590 § 4 of the Code, the provision above is applicable also to evidentiary materials obtained abroad even if the actions have not been taken at the request of a Polish court or prosecutor.

32. Section 40 (2) of the 1997 Prevention of Drug Addiction Act (*Ustawa o przeciwdziałaniu narkomanii*) provided that production of large quantities of psychotropic substances was liable to a penalty of up to five years' imprisonment. On 26 October 2000 the Act was amended with effect from 12 December 2000. As required by the amended section 40 (2) of the Act the offence in question became liable to a penalty of a minimum of three years' imprisonment; no maximum liability was set.

THE LAW

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

33. The applicant complained that the criminal proceedings against him had been unfair and that he had not been given the opportunity to examine or have examined the main witnesses against him whose statements had been the basis for his conviction. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

> "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 ..."

34. The Government contested that argument.

A. Admissibility

35. The Government raised a preliminary objection as to the non-exhaustion of domestic remedies by the applicant. They argued that the applicant could have lodged a constitutional complaint with the Constitutional Court alleging that Article 590 § 4 of the Code of Criminal Procedure and others were contrary to the Constitution.

36. The Court reiterates that Article 35 of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

37. The Court has also held that the constitutional complaint in Poland could be recognised as an effective remedy, within the meaning of the Convention, only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Court in which

unconstitutionality had been found (see *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005, and *Szott-Medynska*, cited above).

38. In this connection, the Court observes that the situation complained of by the applicant resulted from the way in which the relevant provisions allowing witness statements to be read out at a hearing were applied to the applicant's case. In that connection the Court points to the established case-law of the Constitutional Court, according to which constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision are excluded from its jurisdiction (see *Palusinski v. Poland* (dec.), no. 62414/00, ECHR 2006-XIV, and *Bobek v. Poland*, no. 68761/01, § 73, 17 July 2007). Therefore the Court considers that the constitutional complaint cannot be regarded with a sufficient degree of certainty as an effective remedy in the applicant's case.

It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

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

B. Merits

1. Arguments before the Court

40. The applicant complained that he had not been given the opportunity to cross-examine W.P., a key witness for the prosecution. The testimonies obtained before the Austrian authorities played an important role in his conviction. Nevertheless, the domestic authorities did not attempt to summon W.P. and other witnesses or to allow the applicant to put questions to them or confront them with other witnesses.

41. The Government firstly stressed that domestic law allowed the statements made by W.P. and other witnesses before the Austrian courts to be read out at the hearing. Moreover, the Government argued that the applicant's conviction had not been based solely or to a decisive extent on those statements. They merely supplemented other evidence examined by the trial court. Although the applicant did not have the opportunity to cross-examine these witnesses, he had had an opportunity to challenge their statements in his pleadings before the courts. The discrepancies in the statements of these witnesses, raised by the applicant, had been diligently examined by the Court of Appeal.

42. Finally, the Government noted that the applicant had not been put at a disadvantage *vis-à-vis* the prosecutor, as those witnesses had never been questioned by a Polish prosecutor either. In sum, the Government considered that the applicant's defence rights had not been restricted in a

manner incompatible with guarantees provided by Article 6 of the Convention.

2. The Court's assessment

(a) Applicable principles

43. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67).

44. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others*, cited above, p. 711, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

45. A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see *A.L. v. Finland*, no. 23220/04, § 37, 27 January 2009). As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements 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 are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the

Convention should, however, be treated with extreme care (see *Visser v. the Netherlands*, no. 26668/95, § 44, 14 February 2002; and *S.N. v Sweden*, no. 34209/96, § 53, ECHR 2002-V).

(b) Application of the above principles to the facts of the case

46. Turning to the circumstances of the instant case, the Court notes that the trial court considered as worthy evidence statements made by several witnesses, in particular by W.P., in the course of their trial before the Austrian courts. Their statements were read out at the applicant's trial and the applicant did not have the opportunity to challenge them directly. It is a matter of regret that the trial judge did not reason his decision not to hear W.P. and B.S. in person, and to allow the applicant's legal team to question them (see paragraph 16 above).

47. Nevertheless, the Court considers that the impugned statements were only one element of the extensive evidentiary material before the domestic court. In particular, the trial court relied to a great extent on the expert opinions submitted by a total of nine experts. Most of the evidence against the applicant came from the equipment seized, and from about 100 samples of chemical substances found in the laboratory in B. Moreover, the trial court heard other witnesses, thirty-three of whom were considered valuable for establishing the facts of the case. Finally, the court had at its disposal extensive documentary evidence including videotapes, photographs, records of searches of premises and notes on the use of a police dog (see paragraph 18 above).

The Court also observes that in the trial under consideration the applicant was convicted of offences related to production of drugs and storing equipment and substances for that purpose. The incriminating statements of W.P. and others were not of decisive importance for securing the applicant's conviction on these charges. It is to be noted that other charges related to illegal transport of psychotropic substances to Austria and other European countries and releasing drugs into circulation in those countries were severed to be dealt with in another set of the proceedings (see paragraph 10 above).

48. There was thus considerable alternative evidence before the trial court indicating that the applicant was guilty of the offences with which he was charged and the statements of W.P. and other witnesses read out at the hearing only served to corroborate the other evidence pointing to his guilt (compare and contrast cases concerning child sexual abuse, *S.N. v. Sweden*, cited above, § 52; *W.S. v. Poland*, no. 21508/02, § 57, 19 June 2007; *A.L. v. Finland*, cited above, §§ 41-44; and *A.S. v. Finland*, no. 40156/07, §§ 66-67, 28 September 2010).

49. In those circumstances the Court considers that the applicant's conviction was not based solely or to a decisive extent on the statements of the witnesses obtained from the Austrian authorities (compare and contrast

Demski v. Poland, no. 22695/03, § 41, 4 November 2008, and *Van Mechelen and Others*, cited above, p. 711, § 63).

50. The Court further notes that the applicant was aware of the identity of the witnesses in question. He had also access to all the statements used by the court, as they had been read out at the hearing. Although it had not been possible for the applicant to put questions directly to the witnesses, he nevertheless questioned their reliability at the hearings before the trial court, and in his written pleadings, appeal and cassation appeal.

In addition, the Court is satisfied that the domestic courts assessed the statements at issue with the particular care required (see paragraphs 21 and 25 above). They took into consideration various factors which were of relevance when it came to assessing their credibility and the veracity and the weight to be given to their statements (see *Gossa v. Poland*, no. 47986/99, § 62, 9 January 2007, and *Biełaj v. Poland*, no. 43643/04, § 61, 27 April 2010).

51. Having regard to the proceedings as a whole, the Court considers that the lack of opportunity to examine W.P. and other witnesses 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 paragraphs 1 and 3 (d) of Article 6, taken together. In reaching this conclusion due weight was given to the above conclusion that their testimony was not in any respect decisive for the conviction of the applicant.

The applicant's trial as a whole was thus not unfair.

52. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. The applicant complained of a violation of Article 7 § 1 of the Convention. He argued that the domestic courts determined that he had been involved in criminal activity up to 15 December 2000; thus they could apply the new law, which carried a heavier penalty, and which entered into force on 12 December 2000.

54. However, the Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

The Court finds that the facts of the case do not disclose any appearance of a violation of the above-mentioned provision.

55. It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applicant's complaint that he was denied the opportunity to examine or have examined witnesses against him admissible and the remainder of the application inadmissible;

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

Done in English, and notified in writing on 10 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President