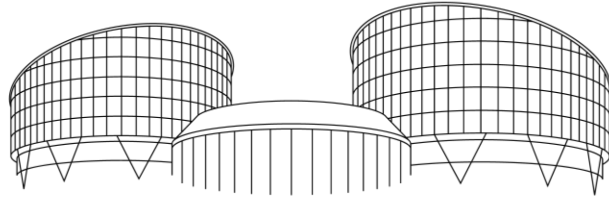

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF VIDGEN v. THE NETHERLANDS

(Application no. 29353/06)

JUDGMENT

STRASBOURG

10 July 2012

FINAL

10/10/2012

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

In the case of Vidgen v. the Netherlands**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Egbert Myjer,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Kristina Pardalos, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 19 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 29353/06) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Nicholas Otto Vidgen ("the applicant"), on 17 July 2006.

2. The applicant was represented by Mr G. Meijers, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicant alleged that his criminal conviction was based solely or to a decisive extent on the statements of a witness whom he had not been able to examine.

4. On 15 January 2009 the President of the Third 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 (former Article 29 § 3).

5. The Government of the United Kingdom, who had been invited to submit written observations on the case, declined to exercise that right (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1958 and, as far as the Court is aware, lives in London.

7. On 5 September 2003 the Utrecht Regional Court (*rechtbank*) found the applicant guilty of being a co-perpetrator of the offence of transporting a shipment of tablets containing a psychotropic substance the trade of which is illegal in all countries concerned, namely 3,4-methylenedioxy-N-methylamphetamine ("MDMA" for short, known in its street pill form as "ecstasy" or "XTC" – the latter designation will be used in this judgment hereafter) from the Netherlands to Germany with the intention of ultimately shipping it to Australia. According to the judgment, the XTC was to be hidden in the cylinders and crankcases of motor car engines that would then be shipped to a business, H. Autosport, in Sydney, New South Wales, which company had been set up by the applicant with a view to importing engine parts from Europe. The applicant was sentenced to five years' imprisonment.

8. The proceedings against the applicant were held separately from the proceedings against his co-accused, amongst whom were A., M. and the applicant's father, Mr K. Vidgen. The suspects A. and M. were in fact put on trial in Germany. On 13 November 2002 they were convicted and given prison sentences by the Regional Court (*Landgericht*) of Aachen in Germany for their part in the crimes. They had both made full confessions and given detailed statements to the German prosecutors, a fact that was taken into account in sentencing.

9. At no point throughout the criminal proceedings against him did the applicant deny that he had been involved in shipping motor car engines to his business in Sydney. However, he denied all knowledge of the use of those engines to smuggle XTC and hence any criminal intent directed towards that end. His defence was focused on this point.

10. Virtually all the evidence presented before the Utrecht Regional Court to prove the applicant's intent and participation in committing the offence was taken from the statements given by M. to the German prosecutors and later on to Netherlands police investigators during the pre-trial stage of the proceedings against the applicant. Particular weight was given to statements M. had made with regard to a handwritten note, found in his dwelling, which contained the address of H. Autosport in Australia.

11. The applicant had repeatedly requested to be allowed to question M. since neither he nor his counsel had been present when M. had given these statements. At a hearing on 14 May 2003 the Regional Court noted that both parties had, in the meantime, been to Germany to question the witnesses A. and M. The applicant however specified that the German investigating

judge had done all the questioning and that he himself had not been able to put any questions to the witnesses. It also appeared that M. had refused to answer questions or repeat the statements he had made previously. Furthermore, the prosecutor stated that there had appeared to be a problem with the interpreter assisting the witness M. The applicant requested further questioning of the witnesses so that he would actually be able to put his own questions to them.

12. At the same hearing the Regional Court decided that the statements given to the German prosecutor by A. and M. would be added to the case file together with the records of their German trial.

13. In its judgment of 5 September 2003, the Regional Court, finding that the applicant had been able to put questions to M. twice (though without specifying when or where), considered that the use in evidence of the statements given by M. in Germany did not violate the provisions of Article 6 of the Convention. The fact that M. had chosen to avail himself of his right not to testify did not alter this situation. The Regional Court also found that M.'s statements were sufficiently supported by other evidence to be allowed to serve as the basis for the applicant's conviction.

14. On 15 September 2003 the applicant lodged an appeal against the judgment of the Regional Court with the Amsterdam Court of Appeal (*gerechtshof*). At a hearing on 20 February 2004, the Court of Appeal granted the applicant's request for A. and M. to be summoned to appear before the court so that they could be heard, given the importance of their statements.

15. On 6 August 2004 A. and M. were both questioned as witnesses at a hearing before the Court of Appeal. A. stated that he knew the applicant but in general denied ever having talked to him about the XTC. On more specific questions he invoked his right not to testify (*verschoningsrecht*). A. also declared that everything M. had stated was a lie.

16. M. acknowledged that he had been questioned by Netherlands police investigators and admitted that he had been convicted of perjury some years earlier. He refused however to answer any substantive questions, invoking his right not to testify in connection with pending proceedings for his extradition to the Netherlands to stand trial on a charge of participation in a criminal organisation.

17. In his closing argument the applicant's counsel submitted that none of the evidence presented disclosed the applicant's intention to commit or participate in the commission of the criminal offence, save only the statement made by M. The applicant's counsel argued, with reference to the Court's case-law (including *Lucà v. Italy*, no. 33354/96, ECHR 2001-II), that the Regional Court had based its judgment solely or to a decisive extent on statements made by a witness whom the applicant had not been able to question, thus violating his right to a fair trial under Article 6.

18. On 13 December 2004 the Court of Appeal dismissed the applicant's appeal. It considered that the mere fact of M.'s refusal at the hearing to answer any substantive questions did not constitute a violation of the applicant's right to have witnesses against him examined. The court noted that M. had initially made a confession to the Netherlands police investigators and had given a full account of events, including about the involvement and extent of participation of his fellow perpetrators. In the course of interviews held at a later stage and at the hearing before the Court of Appeal on 6 August 2004, M. had invoked his right not to testify. The court noted, however, that M. had not invoked this right in respect of all questions put to him. Thus, he had in any event confirmed that he had indeed said what had been noted down by the Netherlands police investigators. The question nevertheless arose whether in these circumstances M.'s confessions could be used as evidence in the criminal proceedings against the applicant. For that to be the case, it was required that these statements be largely corroborated by other items of evidence relating to elements which were disputed by the applicant and in respect of which he had wanted to put questions to the witness M.

19. The Court of Appeal's reasoning included the following:

> "The defence has argued – in substance – that M.'s initial statements to the police cannot be admitted as evidence because he subsequently withdrew them and because the defence has had insufficient opportunity to question M. as a witness because – in connection with criminal proceedings pending against him in the Netherlands ... he had, at the hearing of 6 August 2004, repeatedly invoked the right not to testify.
>
> The court finds as follows as regards the reliability of the witness and fellow suspect M. and the right of the defence to question him. Initially, M. made a confession and gave a complete description of the facts, also relating to the involvement and participation of his fellow suspects. Later, questioned under letters rogatory and at the hearing of this court on 6 August 2004, M. invoked his right not to testify. M.'s refusal to testify at the hearing does not, in itself, violate the right of the defence to question him. In any case, M. has not invoked his right not to testify in response to all the questions put and he has at least confirmed that he has made to the Netherlands investigators the statement which they set down on paper. The question remains, however, to what extent in these circumstances the earlier confessions made by M. can and may be admitted as evidence in the present criminal case. For that, it will be required that these statements be largely corroborated (*in belangrijke mate worden bevestigd*) by other evidence on those aspects which [the applicant] contests and about which he would have wished to question the witness.
>
> The court notes that the suspects A. and M. were sentenced to imprisonment for 7 years and 4 years and 6 months, respectively, for the illegal import and the illegal trade in psychotropic substances by the *Landgericht* of Aachen. In arriving at a conviction, the German court has, in its judgment of 13 November 2002 ..., held as follows concerning A.:
>
> > '... In this connection ... it has to be noted in the suspect's favour that he made a complete confession at the trial, which made it easier especially for the suspect M. to repeat at the hearing the confession which he had already made already following his arrest, which moreover was thus confirmed. This chamber holds in favour of the

suspect A. that he has made his confession in spite of a concrete threat to his person and his family by the people in the background of this drugs deal. A.'s confession additionally has the effect of section 31 of the [German] Narcotics Act, ... The statement of the suspect M., which has already led to considerable success in clearing up this case and also in the Netherlands investigation, is strengthened (*bekrachtigd*) by the additional and confirming statement of the suspect A. ...'

In sentencing M., the German court has held as follows:

'Because, as in the case of the suspect A., the primary standard sentence of two to 15 years' imprisonment ... must be mitigated ... pursuant to section 31 of the [German] Narcotics Act. It must, however, be counted considerably in favour of the suspect M. that he has made a complete confession at an early stage of the investigation, although his family and he himself have received specific threats. This confession is also inspired by contrition and insight ..."

At this court's hearing of 6 August 2004 M. first stated that there had been a deal in his case and afterwards that there had never been any mention of a deal. On this ground, the court finds – contrary to what the defence has argued – that it is not established that there was a deal agreed between M. as suspect and the German prosecution service to make statements incriminating (also) his fellow suspects in exchange for a reduction of sentence. Conversely, the German court gave reasons for applying the mitigating factor contained in section 31 of the [German] Narcotics Act. M.'s confessions are also corroborated by the statement of A. and even extended despite threats to his person and family. This reinforces the credibility of M.'s confessions. The court does not give credence to the suggestion that A. had no choice, in view of the procedural attitude adopted by M., but to make a confession of his own, the less so since in so doing he has broadened M.'s statements.

At the court's hearing of 6 August 2004, M. stated that he had not felt at liberty to make [his own] statements before the German court and that the statements which he had made before the Netherlands investigators had been put into his mouth after they had driven him crazy by raising the case of B., whom he had known well. The court does not, however, consider it likely that M. did not make his confessions in complete freedom and in so doing takes into account what the German court found in its criminal judgment concerning the way in which M. had made his statements at the hearing in Germany and the fact that this statement confirmed what M. had earlier stated before the Netherlands investigators. In contrast, this court's own observation at the hearing has given it the impression that M. did not feel at liberty to make a true statement or in any case to confirm what he had earlier stated before the Netherlands investigators and the German criminal judge without further incriminating himself in view of the prosecution for which the Netherlands public prosecutor has requested his extradition. The court sees no circumstances on the basis of which it should be doubted that the statements initially taken from M. by the Netherlands investigators had lawfully come about; nor has the defence asked for the Netherlands investigators concerned who questioned M. to be called as witnesses. Finally, the statements of both M. and A. are supported in various stake-outs and the recordings of private communication (*opnemen van vertrouwelijke communicatie*, 'OVC's').

Considering the connection with A.'s confession before the German court and the other items of evidence the court concludes that M.'s statement about the involvement of [the applicant] in the facts charged ... is sufficiently corroborated by other evidence and can therefore be admitted as evidence by the court."

20. The evidence used by the Court of Appeal to ground the applicant's conviction was the following:

a) an official police record reflecting, among other things, a tipoff to the effect that A., the proprietor of a snack bar, dealt in XTC and maintained contacts with M. and "Grandpa" (K. Vidgen);
b) an intercepted telephone conversation in which M. tells a co-conspirator to send "the goods" to H. Autosport in Sydney, New South Wales;
c) an official police record to the effect that the applicant had arrived in Australia (the Court of Appeal linked this with item b);
d) an intercepted private conversation between A., M. and K. Vidgen in which they discuss the preparation of the motor car engines for shipping;
e) an intercepted private conversation between A., M., K. Vidgen and one W. in which they discuss how to disguise the smell of the XTC so as to foil sniffer dogs;
f) an intercepted private conversation between A., M. and K. Vidgen, apparently in a motor car, from which it appears that they are in a car park waiting for a police car to leave;
g) an official record reflecting the positive identification of one of the voices involved in the conversation listed above under e. as that of W.;
h) a translation from German into Dutch of an official German police record describing the finding of fifteen packages containing small tablets in the crankcase of a motor car engine found in a car breaker's yard in Germany;
i) a translation from German into Dutch of an official German police record describing the finding of XTC in nine other engines in the same car breaker's yard and the seizure of approximately 100 kilogrammes of tablets identified provisionally as XTC;
j) a translation from German into Dutch of an official German police record positively identifying a sample of the tablets as XTC after testing;
k) an official record drawn up by a Netherlands police officer covering a list of objects seized by the German police and the handing over by the latter of a small quantity of pills;
l) an official police record describing the provisional identification of two small sample of the above pills as XTC;
m) an official police record in which the first of the two small samples is positively identified as XTC;
n) an official police record in which the second of the two small samples is positively identified as XTC;
o) an official record of a search of M.'s dwelling, where a handwritten note was found giving the address of H. Autosport in Australia;

p) a translation from German into Dutch of an interview of M. conducted by a German police officer on 19 February 2002, containing the following:

"Question: You are now being shown a copy of the back of a page reading EXA03-02-01/003 and the text 'H.'. Who wrote that?

Answer: It is not my handwriting.

Question: What does H. mean?

Answer: H. refers to H. Autosport. That is the address to which the engines seized in E. [where the car breakers' yard was located] were going to be shipped.

Question: Where is H. Autosport located?

Answer: It is in Sydney in Australia.

Question: Who wrote this note?

Answer: I suspect that Grandpa [the applicant's father's nickname] or Grandpa's son [i.e. the applicant] wrote the note. The first name of his son is Nick. Vidgen is Grandpa's last name."

Question: How long have you had the note with the text H. Autosport?

Answer: I reckon that I was given that note four months before my arrest. Four of us, that is to say A., Grandpa, his son Nick, and I, went for dinner at a Chinese restaurant in North Amsterdam. I don't know whether Grandpa or Nick wrote the note with the address, but at any rate A. then gave the note to me.

Question: What did you do with the Australian address 'H. Autosport'?

Answer: I phoned it through to H.

Question: What was the real intention of shipping engines to Australia in shipping containers?

Answer: To transport XTC pills to Australia in the engines."

q) a translation from German into Dutch of an interview of M. conducted by the same German police officer on 20 February 2002, from which it appears that a recording of a conversation held inside a motor car is played back to M., after which the following is said:

"Question: Where were you going when you held the conversation to which we have just listened?

Answer: We were on our way to a Greek restaurant.

Question: Who attended the meeting?

Answer: I, A., W. and the aforementioned Grandpa. Later on we were joined in the restaurant by H.

Question: What did you discuss there?

Answer: We discussed the engines.

Question: What is the relationship between these people?

Answer: I will now describe it as follows: A. is in touch with Grandpa. A. is also in touch with W. A. needs M. because M. can supply the pills. Grandpa has the

address where the pills have to be delivered. Grandpa's son then knows where to pick up the stuff. Grandpa and his son are in this together.

Question: Did Grandpa's son know what was in the engines?

Answer: Yes, he just did not know how much was in them. Neither did I.

Question: Whose idea was it to organise the transport in this way?

Answer: A. had the contact and the address in Australia. W. knows K., who has a car breaker's yard. I believe it was their idea.

Question: Who were you going to meet on 3 December 2001?

Answer: A. had an appointment that day with Grandpa and H. Earlier Ma. had asked Ba. whether Q. could drive a white van. A. had asked me to phone L. L. was to drive along in his black car. He was to drive in front of the van. We had all arranged to meet in front of the W. Hotel. Q. was there already with the van. A. and I had already gone to the W. Hotel with the white Volkswagen Bora. A. and I got into L.'s car. The white van was meant to follow us. Next we went to the V. Hotel near the town of H. [in the Netherlands]. There we parked the cars. Grandpa was already there. A. and Q. joined Grandpa at his table. They were later joined by H. H. then went outside and drove off with the white van. It was his job to load the engines into the van. I don't know where he wanted to collect the engines, that kept changing all the time. Sometimes from Ka., then from He., Ka.'s brother. Q. had to go with him.

The next meeting was in the industrial area of the town of H. It was about an hour before H. arrived with the white van. The engines were on board. I reckon that there were eight. The XTC tablets were inside the engines. After H. had come back with the van, Q. got into it. H. and Grandpa got into the Mercedes and L., A. and I got into the black Opel. We followed Grandpa and H. Then H. and Grandpa drove into the breaker's yard. I later understood from the file that the yard was called R. and was located in E. (a location in Germany). After Grandpa and H. had driven into the yard, A. and I turned back and retraced our route and drove past the yard one more time. We then drove back to the Netherlands.

I later overheard H. talking with A. in a low voice and I heard them say that it had all gone well.

A. and I then took the Volkswagen Bora to drive back to the town of H. A. was adamant that he wanted to go back to the town of H., because there were three more things to transport to E. the following day and he wanted to make the arrangements. It was agreed with L. that he would come to the V. Hotel in H. towards 11 or 12 p.m. We then got into the car with W. and went with him to H. It was agreed that Q. would drive the van to E. at least once more. There was a question whether H. might perhaps come along. W. L., A. and I drove to K. [the proprietor of the breaker's yard]. I seem to remember that Q. would be paid 1,000 Netherlands guilders (NLG) for the trip to E.

Grandpa wanted 2.50 Netherlands Guilders (NLG) in total (the court understands this to be the price per pill), that is NLG 1 for himself and NLG 1.50 for his son. A. was going to get NLG 2 for each pill. When I say 'Grandpa' I mean K. Vidgen."

r) a translation from German into Dutch of an interview of M. again conducted by the same German police officer, this time on

21 February 2002, in which M. describes how the engines were bought in Belgium to be prepared by K. for shipping from Germany;

s) a translation from German into Dutch of an interview of M. conducted by the same German police officer on 5 March 2002, describing the transport of the engines to K.'s breaker's yard to be cleaned;

t) a translation of an official record of an interview of the witness M.M.S., conducted in Australia under letters rogatory, describing how, with his father's assistance, the applicant set up H. Autosports in Sydney, New South Wales, Australia with financial support from his father and how the applicant intended to receive a shipment of motor car engines from Germany;

u) finally, a statement made by the applicant at the hearing of the Regional Court of Utrecht to the effect that he had met A. in the Netherlands; that he had financed his business in Australia with his wife's money and a loan from his father; and that the address on the note was that of his business in Australia.

21. On 23 August 2005 the applicant lodged an appeal in on points of law (*cassatie*) with the Supreme Court. He submitted one ground of appeal (*cassatiemiddel*) raising two complaints: firstly, that the Court of Appeal had failed to present proper reasoning as to why it relied on one particular statement by M.; and secondly, that it had mistakenly concluded that the statements given by M. were sufficiently supported by other evidence to prove the applicant's intent to commit and participate in the commission of the crime.

22. On 7 February 2006 the Procurator General (*Procureur Generaal*) to the Supreme Court expressed as his advisory opinion that the second leg of the applicant's ground of appeal should be upheld. He considered that the evidence that had led to the applicant's conviction had been based solely or to a decisive extent on the statements made by M. at the pre-trial stage, thus leading to a violation of Article 6 § 3 (d) of the Convention. In particular, the Procurator General found that the Court of Appeal had merely sought to determine whether M.'s statements could be relied upon in the face of corroborating evidence; it had not, however, determined whether the applicant's conviction was based solely or to a decisive extent on M.'s statements.

23. On 6 June 2006 the Supreme Court dismissed the applicant's appeal on points of law and confirmed the judgment of the Court of Appeal. In its reasoning the Supreme Court did not deal directly with the first leg of the applicant's ground for appeal. As relevant to the case before this Court, the Supreme Court considered that the Court of Appeal had been entitled to rely on the statements made by M. since that witness had appeared at the hearing and the applicant had been able to put questions to him as well as present arguments relating to the validity of M.'s statements. The fact that M. had

invoked his right not to testify did not lead to a violation of Article 6 § 3 (d) of the Convention. *Ex proprio motu*, the Supreme Court held that the cassation proceedings had lasted too long, for which it compensated the applicant by reducing his prison sentence by six months. The judgment was published in Netherlands Law Reports (*Nederlandse Jurisprudentie*, "NJ") 2006, no. 332.

II. RELEVANT DOMESTIC LAW

A. The Code of Criminal Procedure

24. Articles of the Code of Criminal Procedure relevant to the case are the following:

Article 219

"A witness shall be excused the duty to answer a question put to him if in so doing he would expose himself or one of his relatives in the ascending or the descending line *ex transverso* [i.e. siblings, uncles, aunts, nieces and nephews, etc.], whether connected by blood or by marriage, in the second or third degree of kinship, or his spouse or former spouse, or registered partner or former registered partner, to the risk of criminal prosecution."

Article 339

"1. The following only shall be recognised as legal evidence:

1 . the court's own observation;

2°. statements made by the defendant;

3°. statements made by witnesses;

4°. statements made by experts;

5°. written documents.

2. No proof is required of generally known facts or circumstances."

Article 342

"1. ...

2. The court shall not hold it proven on the evidence of only one witness that the suspect has committed the act with which he is charged."

Article 344

"The expression 'written documents' means:

...

3. documents drawn up by public bodies or civil servants concerning matters coming within the competence entrusted to them, including documents drawn up by a person in the public service of a foreign state or an international intergovernmental organisation;

...

5. all other documents; but these shall only be valid in connection with the content of other items of evidence. ...”

B. Case-law

25. In its judgment of 1 February 1994, NJ 1994, no. 427, the Supreme Court held that the use in evidence of an official report containing an incriminating statement not made at the trial hearing was not *ipso facto* impermissible, and in particular not incompatible with Article 6 §§ 1 and 3 (d). There would in any case be no incompatibility if the defence had had the opportunity to test the reliability of the statement and challenge it by questioning the person who had made it as a witness. Moreover, even if such an opportunity was lacking, the use in evidence of such a report was permissible if there was “considerable support” for the statement in other items of evidence (*die verklaring in belangrijke mate steun vindt in andere bewijsmiddelen*).

26. In its judgments of 14 April 1998, NJ 1999, no. 73, and 29 September 1998, NJ 1999, no. 74, the Supreme Court clarified the expression “considerable support” by construing it in the sense that it was already sufficient if the suspect’s involvement in the act charged was sufficiently confirmed by other evidence.

THE LAW

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

27. The applicant complained that the criminal proceedings against him had been unfair and that he had been convicted on the basis of statements made by M. without having had the opportunity to examine him. The applicant relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which read 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 ...

...”

28. The Government denied that there had been any such violation.

A. Admissibility

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

B. Merits

1. Argument before the Court

(a) Government

30. The Government was of the opinion that everything had been done that could have been expected in the present case. They indicated that the domestic courts had allowed the applicant every opportunity to hear M. and put questions to him that he considered relevant. They had also provided the opportunity for M. to be interviewed twice in Germany in the presence of the applicant's representative, and even for the applicant to put questions to M. Moreover, for the hearing before the Court of Appeal M. was transferred to the Netherlands from Germany where he was in detention.

31. The Government further pointed out that, by the time of his questioning before the Court of Appeal, M. was in the process of being extradited from Germany back to the Netherlands were he was due to stand trial himself for suspected participation in a criminal organisation. The presiding judge of the Court of Appeal had therefore instructed M. before the start of his testimony that he could invoke his right to remain silent in respect of each separate question. The Government, referring to *Saunders v. the United Kingdom*, 17 December 1996, § 68, *Reports of Judgments and Decisions* 1996-VI, indicated this was to ensure that M. would not be required to co-operate in providing evidence that could contribute to his criminal conviction. The domestic authorities had thus balanced against each other the right of the applicant to question witnesses and the right of the witness not to incriminate himself.

32. The Government also noted that the applicant had been able to challenge the reliability of M. and his testimony, and he had in fact done so at length. The Government thus considered that the decision of the Court in *Peltonen v. Finland* (dec.), no. 30409/96, 11 May 1999, confirmed that while further questioning of a witness who remained silent might be futile, this did not justify the conclusion that the applicant was denied the possibility of examining witnesses in accordance with the provisions of the Convention. Moreover, the Court of Appeal had seen no reasons to doubt the statements originally taken from M. by the Netherlands police investigators and had also observed that, in order further to challenge M.'s

statements, the applicant could have called the investigators as witnesses. This, the applicant had failed to do.

33. Finally, the Government was of the opinion that in deciding whether a defendant had had a fair trial, no decisive importance should be attached to the behaviour of any co-defendant or witness. In particular, due process could be frustrated by co-defendants or witnesses who repeatedly refused to answer questions by the defence. Witnesses would furthermore also be more liable to pressure from a defendant not to make incriminating statements.

34. The Government maintained that the proceedings as a whole were fair. They noted that both the Court of Appeal and the Supreme Court had indicated that, in addition to M.'s statements, there had been sufficient supporting evidence (*inter alia* various observations and recordings of confidential communications, as well as the statements made by witness A. in the German criminal case) for the domestic courts to reach the conclusions they did.

(b) Applicant

35. In the applicant's view, the Government's argument amounted to an admission that his conviction had been based exclusively, or at least to a decisive extent, on the statement made in the preliminary phase of the proceedings by the witness M., who had refused to submit to cross-examination by the defence.

36. It could not be decisive, as the Government appeared to suggest, that the applicant had admitted his involvement in the events, while denying any knowledge that he was conniving at the illicit transport of XTC tablets. The extent to which the witness's statement was disputed was irrelevant to the question whether the suspect had had sufficient opportunity actually to obtain evidence from the witness. This had in fact been recognised by the Advocate General to the Supreme Court, who had noted the absence of any evidence other than M.'s statement reflecting criminal intent to smuggle XTC tablets.

37. At the preliminary stage of the proceedings in Germany, M. had had a personal interest in making statements casting blame on other suspects. This, as well as his earlier conviction of perjury and the fact that he had in his earlier statement given no explanation as to how he had obtained his knowledge, affected the reliability of his evidence. Although the Government suggested that M.'s statement was sufficiently corroborated by other evidence, they failed to explain what evidence that might be.

2. Principles derived from the Court's case-law

38. As the Court held in *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 118-119, 15 December 2011, (case-law references omitted):

"118. The Court recalls 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 this provision 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 (...). 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 (...) and, where necessary, to the rights of witnesses (...). It is also recalled 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 (...).

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 (...).

...

119. Having regard to the Court's case-law, 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')."

39. As the Court held in *Lucà v. Italy*, no. 33354/96, §§ 38-41, ECHR 2001-II (case-law references omitted):

"40. As the Court has stated on a number of occasions (...), it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, 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 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 are restricted to an extent that is incompatible with the guarantees provided by Article 6 (...).

41. In that regard, the fact that the depositions were, as here, made by a co-accused rather than by a witness is of no relevance. In that connection, the Court reiterates that the term 'witness' has an 'autonomous' meaning in the Convention system (...). Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (...)."

40. In *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 131, the Court set out its understanding of the expression "decisive" as applied to evidence used to ground a conviction:

> "'Decisive' (or '*déterminante*') in this context means more than 'probative'. It further means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance, a test which ... would mean that virtually all evidence would qualify. Instead, 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."

41. In the same judgment (*loc. cit.*), § 147, the Court set out the consequences that should attach to any finding that a recorded statement by an absent witness was indeed the "sole or decisive" evidence grounding a conviction:

> "The Court therefore concludes that, 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 in the case."

3. Application of these principles

42. The starting point for the Court is the judgment of the Court of Appeal, which survived the appeal on points of law lodged by the applicant. The evidence on which the applicant was convicted included statements made by M. to a German police officer. However, invoking his privilege against self-incrimination, M. refused to allow these statements to be tested or challenged by or on behalf of the applicant. The respondent Party cannot be criticised for allowing M. to make use of rights which, as a criminal suspect, he enjoyed under Article 6 of the Convention (compare, *mutatis mutandis*, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II.

43. The Court must next determine whether the statements made by M. constituted, for present purposes, the "sole and decisive" evidence on which the applicant's conviction was based.

44. It was never in dispute that the applicant was planning to send motor car engines to his business in Australia – an act which, in itself, was not

unlawful. It is the applicant’s case that he was unaware of the plans of those later found to have been his co-conspirators to use those engines to smuggle XTC, and that the only evidence of his criminal intent consisted of the statements of M.

45. The items of evidence on which the Court of Appeal relied to ground the applicant’s conviction are set out in paragraph 20 above. Only four of these – items p), q), t) and u) – mention the applicant. Of these, the first two – the statements made by M. to a German police officer – connect the applicant to the attempt to smuggle the XTC. The other two are a statement taken from a witness in Australia describing the applicant’s business activities there and the applicant’s own statement in open court, from which it appears only that the applicant has met A. The remaining seventeen items implicate a variety of individuals, including A., M. and the applicant’s father K. Vidgen, in the use of the motor car engines for the purpose of smuggling XTC to Australia but not the applicant.

46. The Court thus concludes that M.’s statements to the German police officer were the “sole” evidence of the applicant’s criminal intent and thus “decisive” for the applicant’s conviction. The present case is therefore to be likened to *Lucà* and to Tahery’s case in *Al-Khawaja and Tahery*. The earlier admissibility decision in the case of *Peltonen*, prayed in aid by the Government, does not alter this finding. It is important to note that in the latter case, the domestic court relied on corroborating evidence in the form of statements of other witnesses, telephone traffic records and the presence of a sum of money in cash that could only be accounted for as the proceeds of crime.

47. Although it must be accepted that, as the Government state, reasonable attempts were made to allow the applicant to obtain answers from M., his persistence to remain silent made such questioning futile. The handicaps under which the defence laboured were therefore not offset by effective counterbalancing procedural measures.

4. Conclusion

48. The foregoing leads the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

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

50. The applicant did not submit any claim for just satisfaction and the Court sees no reason to make an award of its own motion.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 10 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada	Josep Casadevall
Registrar	President