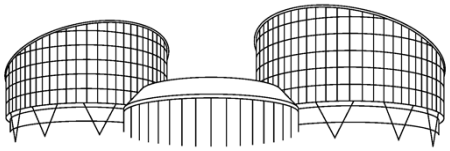

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF AL ALO v. SLOVAKIA

(Application no. 32084/19)

JUDGMENT

Art 6 § 1 (criminal) + Art 6 § 3 (d) • Fair hearing • No acceptable grounds and insufficient counterbalancing factors for depriving applicant of possibility to examine or have examined expelled migrants as witnesses, whose evidence carried significant weight in his conviction for migrant smuggling • No waiver through applicant's non-attendance at pre-trial questioning of witnesses in the case circumstances

STRASBOURG

10 February 2022

In the case of Al Alo v. Slovakia,

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

Marko Bošnjak, *President,*
Péter Paczolay,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 32084/19) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Syrian national, Mr Jamal Al Alo ("the applicant"), on 17 January 2020;

the decision to give notice to the Government of the Slovak Republic ("the Government") of the complaints under Article 6 §§ 1 and 3 (c) and (d) of the Convention concerning the role played in the applicant's trial and conviction by evidence taken in his absence at the pre-trial stage when he had no legal representation from witnesses who were absent at the trial and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 11 January 2022,

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

INTRODUCTION

1. The application concerns the applicant's trial and conviction in Slovakia on charges of migrant smuggling. An important part of the evidence against him came from the migrants, who were questioned only at the pre-trial stage of the proceedings. These witnesses were then expelled from Slovakia and absent from the applicant's trial. Not being assisted by a lawyer at the time of their pre-trial questioning, the applicant did not attend it.

THE FACTS

2. The applicant was born in 1981 and is serving a term of imprisonment in Dubnica nad Váhom Prison. Having been granted legal aid, he was represented before the Court by Mr N. Alyasry, a lawyer practising in Nitra.

3. The Government were represented by their co-Agent, Ms M. Bálintová.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. INITIAL PROCEDURAL ACTIONS

5. On 26 January 2017 police officers A. and B. monitored the applicant in Bratislava following intelligence to the effect that a migrant-smuggling operation in which he was involved was underway. He was seen with two foreigners, C. and D., who entered a taxi that drove off towards Slovakia's border with Austria. The officers intercepted the car and detained C. and D.

6. On 28 January 2017 the applicant was charged with colluding with others to smuggle migrants; he was then interviewed by the police as a person charged with an offence (*obvinený*), with the assistance of an Arab-speaking interpreter.

The record of the interview contains a pre-printed reference to Article 213 of the Code of Criminal Procedure (Law no. 301/2005 Coll., as amended – "the CCP"). Paragraph 1 of that provision stipulates that a charged person may be permitted to attend witness interviews and to question those witnesses himself, and that such permission is to be granted especially if the charged person has no lawyer and there are grounds to believe that it would not be possible for such witnesses to be heard at trial.

The record of the interview furthermore notes that the applicant decided not to appoint a lawyer and not to avail himself of his right to attend witness interviews. As regards the language in which the interview would be conducted, he submitted that he did not understand legal matters, that he had not completed his secondary school education and that his reading and writing abilities were not strong. He accordingly asked that everything be translated and explained to him by the interpreter.

As regards the substance of the charge, the applicant submitted and maintained throughout the proceedings that he had been led to believe that C. and D. were the children of an acquaintance of his father, and that he had merely provided them with accommodation and transportation (at the expense of that acquaintance); he was not aware of having engaged in any wrongdoing.

7. According to a note in the case file the applicant was informed on 28 January 2017 that C. and D. would be interviewed as witnesses later that day.

8. In those interviews, C. and D. related their story, admitting that they were illegal migrants heading for western Europe and alleging that the applicant had played a role in facilitating that journey. The applicant did not attend the interviews, and nor did anyone on his behalf.

9. On 29 January 2017 the applicant was assigned a court-appointed lawyer because, having been placed in pre-trial detention, legal representation was at this stage mandatory under Article 37 § 1 (a) of the CCP. Thenceforth he was assisted by that lawyer and later by a lawyer of his choice appointed to him by his brother.

10. On 27 February 2017 the applicant was interviewed again, this time in the presence of his lawyer. A pre-printed introduction to the record of the questioning contained a reference to the above-noted provision of Article 213 of the CCP. The record also noted that the applicant did not wish to exercise the right to be present when investigative measures such as witness interviews were being taken, instead asking for invitations to attend such measures to be addressed to his lawyer. The record contained a further reference to this matter, and stated that the applicant had acknowledged that he had been aware of the said right under Article 213 but that he waived it. As to the substance of the charge, he exercised his right to remain silent.

II. TRIAL AND APPEALS

11. The applicant was indicted to stand trial before the Bratislava V District Court.

12. In its examination of the case, the District Court took note of the pre-trial statements of C. and D. (see paragraph 8 above). It also took evidence from A. and B. (concerning the circumstances surrounding their surveillance of the applicant and their intercepting the car containing C. and D.), the taxi driver and another witness, and an expert witness, and also examined documentary evidence.

13. In a judgment of 11 May 2017, the District Court found the applicant guilty and sentenced him to five years' imprisonment. The judgment referred to the evidence listed above, finding that the incriminating evidence was consistent and that "no reasons [had been] established not to believe it". On the other hand, the court did not "believe" the defence. Neither the text of the judgment nor any other material in the Court's possession disclose any attempt on the part of the District Court to hear C. and D. as witnesses.

14. The applicant appealed to the Bratislava Regional Court. He advanced numerous arguments, including the argument that (in violation of the applicable procedural rules and principles) the witnesses C. and D. had not been heard by a court. Even though he had asked throughout the proceedings for C. and D. to be heard and (according to him) it had not been possible to exclude that they were still on the territory of Slovakia, the court had failed to summon them or to enquire into their whereabouts. It was accordingly impossible to establish why (under Article 263 § 3 (a) of the CCP) the court had deemed C. and D. to be "unreachable" for the purposes of – exceptionally – admitting in evidence their pre-trial statements. Moreover, and in any event, their pre-trial statements had not been taken in conformity with the applicable procedural requirements, which had been a further requirement for their admission in evidence under that provision. The trial court had completely ignored the applicant's arguments in that respect. Among other things, the applicant asserted that, given the circumstances, there had been doubts about his ability to defend his rights. Accordingly, from the moment when he had

been charged, it should have been mandatory (under Article 37 § 2 of the CCP) for him to have the assistance of a lawyer. In that regard, he emphasised that he had indicated at the outset that he had difficulties with reading and writing and had not even completed his basic education. This was aggravated by the fact that as a foreigner he came from an entirely different cultural and legal background. These handicaps could not have been offset by the involvement of an interpreter, since an interpreter's function was fundamentally different from that of a lawyer.

15. In a submission of 14 July 2017 the applicant amended his appeal by providing the court with addresses for C. in Romania and D. in Denmark, as well as with copies of the asylum seeker's identification documents that had been issued to them by those countries.

16. In a decision of 8 August 2017 the Regional Court dismissed the applicant's appeal. By way of a preface, it observed that the trial court had taken and properly assessed all the evidence available. Although the "reasoning behind its judgment, as indicated in its written version" was deficient to the extent that "the reasoning was on the limit of being reviewable", its factual and legal conclusions were correct. The deficiencies in question could be rectified by the Regional Court. The first-instance judgment thus did not call for it to be quashed. In a similar vein, the Regional Court acknowledged that there had been certain flaws at the pre-trial stage of the proceedings. Those had not been, however, so grave as to render the pre-trial statements of C. and D. "unusable" at trial.

17. The Regional Court noted that C. and D. had been expelled from the country, as they had had no right to stay there. If the applicant had wished for them to be heard at trial, it had been incumbent on the defence to show that they would be allowed to enter Slovakia. As the defence had failed to do so, C. and D. had had to be considered "unreachable" for the purposes of the trial.

The Regional Court furthermore observed that the applicant had been notified of the upcoming pre-trial questioning of C. and D., scheduled for 28 January 2017. It had been his free choice not to avail himself of his right to attend and to question them. Given those circumstances, the applicant's right to an adversarial trial in respect of the questioning of C. and D. was to be seen as having been respected.

18. Moreover, as to the applicant's ability to defend himself, there could not be any reasonable doubt that he had been able to do so adequately, especially in view of the fact that he (i) had been assisted by an interpreter (ii) had lived in Slovakia for some ten years and had been integrated into society there, and (iii) was able to communicate in at least three languages.

19. As to the substance of the case, the Regional Court acknowledged that the evidence given by C. and D. had been pivotal (*nosné dôkazy*) to establishing the applicant's guilt; that evidence had dispelled any reasonable doubt in that respect. In particular, C. and D. had submitted nothing to support the applicant's original indication to the police that he had considered them

to be mere "tourists"; rather, they had submitted that they had obtained his telephone number from a trafficker in Turkey and that the applicant's task had been to arrange for their transfer to Germany as a part of a deal arranged and paid for previously. This evidence was to be seen in conjunction with that given by A. and B., which had concerned the events preceding the interception of the taxi taking A. and B. towards the border with Austria.

20. The applicant appealed on points of law. Advancing similar arguments as those advanced before, he argued that there had been a violation of his defence rights and that his conviction had been based on evidence that had not been examined by the court in a lawful manner, within the meaning of Article 371 § 1 (c) and (g) of the CCP.

21. The Supreme Court rejected the applicant's appeal on 28 March 2018. It endorsed the lower courts' view that at the given stage of the proceedings there had been no case of mandatory legal representation under Article 37 § 1 of the CCP. There had accordingly been no violation of the applicant's defence rights. As regards the lawfulness of the use as evidence of the pre-trial statements given by C. and D., the applicant's arguments had been answered in sufficient detail by the lower courts, and the Supreme Court had nothing to add.

III. FINAL DOMESTIC DECISION

22. The applicant further advanced essentially the same arguments by means of lodging a complaint with the Constitutional Court under Article 127 of the Constitution, alleging, *inter alia*, a violation of his rights under Article 6 §§ 1 and 3 (c) and (d) of the Convention.

23. On 22 October 2019 the Constitutional Court declared the complaint inadmissible as manifestly ill-founded. Citing extensively from the decisions of the Regional Court and the Supreme Court, it found that they had adequately addressed all relevant aspects of the case and that their decisions had disclosed no indication of any irregularity or arbitrariness.

The decision was served on the applicant on 8 November 2019, and it was not amenable to appeal.

RELEVANT LEGAL FRAMEWORK

I. CODE OF CRIMINAL PROCEDURE

24. Article 37 defines instances in which legal representation is mandatory. Such is the case, *inter alia*, if the person charged with an offence is remanded in detention (paragraph 1 (a)) or if it is considered indispensable, especially because there are doubts about that person's ability to defend him or herself (paragraph 2).

25. The participation of the person charged with an offence in measures of investigation is governed by Article 213. Pursuant to its paragraph 1, that person may be permitted to attend such measures and to question witnesses, and the permission is to be granted especially if the charged person has no lawyer and there are grounds to believe that it would not be possible for such witnesses to be heard at trial.

26. Admission in evidence of pre-trial statements of witnesses instead of hearing them as witnesses at trial is regulated by Article 263. Under its paragraph 3 (a), pre-trial witness statements may be admitted in evidence if they were taken in conformity with the applicable procedural requirements and if, *inter alia*, the witness has become unreachable on account of a long-term stay abroad. If however at the time of the taking of the statement there was a justified assumption that it would not be possible to hear the witness at trial, the pre-trial statement may only be admitted if the charged person and, as the case may be, his or her lawyer had duly been notified of the upcoming questioning.

27. Grounds for the admissibility of an appeal on points of law are defined in Article 371 and include instances of a fundamental breach of the rights of the defence (paragraph 1 (c)) and instances in which the impugned decision is based on evidence that has not been examined by the court in a lawful manner (paragraph 1 (g)).

II. EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

28. On 29 May 2000 the Council of the European Union adopted the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01). It aims at facilitating mutual judicial assistance between the authorities of the member States and supplements the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters. In its relevant part, Article 10 regulates hearings conducted via video conference as follows:

> "1. If a person is in one Member State's territory and has to be heard as a witness ... by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference ...
>
> 2. The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law ..."

29. The Convention constitutes part of the legal order of the Kingdom of Denmark (executive order no. 11 of 25/8/2016), Romania (the Mutual Assistance in Criminal Matters Act – Law no. 304/2004 Coll., as amended) and the Slovak Republic (Notice of the Ministry of Foreign Affairs no. 572/2006 Coll.).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant complained that his trial had fallen short of the guarantees of Article 6 §§ 1 and 3 (c) and (d) of the Convention, the relevant part of which 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:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

31. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Parties' arguments

32. The applicant complained that he had not been provided with legal assistance at the early stages of the proceedings and that his conviction had been essentially based on the pre-trial statements of C. and D., whom he had been unable to examine at trial.

33. He reiterated his arguments, as advanced at the national level, and disagreed with the domestic courts' conclusions as to his ability to defend himself in person. Although it was true that he had been informed of his right to instruct a lawyer, he had not been advised of the gravity of the charge and of the various procedural implications. The authorities had never had any genuine intention of facilitating the exercise of his defence rights in relation to the initial taking of evidence from C. and D.

34. Throughout the entire subsequent course of the proceedings the applicant had actively sought an opportunity to examine C. and D. as witnesses. The trial court had ignored his request in that respect and the

appellate court had refused it without making any attempt to ensure their attendance, even though the applicant had provided it with their respective addresses and copies of their respective identification documents. There had been no valid reason for considering them unreachable for the purposes of the proceedings, since they could have been heard under the applicable procedures regarding the provision of mutual assistance in criminal matters. The Regional Court had made an offhand finding that C. and D. had been expelled from Slovakia, even though no evidence to that effect had been available. To require of the applicant to show that they would be allowed to re-enter Slovakia in such circumstances had been purely arbitrary. The fact that he had been unable to examine C. and D. at trial had not been compensated for by any measures aimed at safeguarding his procedural rights.

35. The Government argued that there had been no requirement that the applicant should have legal representation at the moment that he had been charged. His arguments before the Court were identical to those that had been examined and dismissed previously at the national level. According to the assessment made by the domestic authorities, there had been no doubts about the applicant's ability to defend himself. The Government added that there had been no indication of any intellectual deficit on the applicant's part and that there had been nothing out of the ordinary in how his appearances before (and his examinations by) the domestic authorities had taken place.

36. When the charge had been brought against him, the applicant had had the right to appoint a lawyer; he had been informed of that right, but he had decided not to avail himself of it. There were no doubts that his decision to that effect had been entirely free.

37. As soon as the applicant had been placed in pre-trial detention, legal representation had become mandatory; accordingly, he had been appointed a lawyer, and he had benefited from legal representation throughout the proceedings.

38. The Government contended that a similar situation had applied in respect of the applicant's right to attend the pre-trial questioning of C. and D., in that he had been duly informed that it had been scheduled but had decided not to exercise his right. He had indeed done so twice – without the assistance of a lawyer on 28 January 2017, and with the assistance of a lawyer on 27 February 2017. Accordingly, the pre-trial statements of C. and D. had been taken with due regard to the principle of adversarial proceedings. The Government also emphasised that the statements of C. and D. of 28 January 2017 had been taken after the applicant had been charged and that any other applicable rules of procedure had likewise been respected.

39. As to the admission as evidence during the trial proceedings of the pre-trial statements given by C. and D., the Government contended first of all that it was not the Court's task to scrutinise the admissibility of evidence in domestic proceedings. Nevertheless, they pointed to the conclusion of the

domestic authorities that, at the trial level, C. and D. had been "unreachable" for the purposes of the proceedings, which had been one of the conditions for admitting their pre-trial statements as evidence during the trial. The Government added that although the applicants had provided the appellate court with the addresses of C. and D. in Romania and Denmark, these had only been "administrative (fictitious) addresses". Even if they had been staying at these addresses, "there [had been] no logical reason for them to re-enter Slovakia, which in their own submission had only been a transit station on their way to [western Europe]". The Government argued that these facts had already been clear to the authorities at the pre-trial stage of the proceedings, and that that had been the reason why C. and D. had been interviewed after the bringing of the charges against the applicant "with due regard to the principle of adversarial proceedings, when the applicant had had a real opportunity to attend their respective questioning and to challenge their statements". Accordingly, in the Government's view, the authorities had made efforts to enable the applicant to make use of his right to examine those witnesses, in accordance with the principle of adversarial proceedings. On that count, the Government argued that the present case was different from that of *Vronchenko v. Estonia* (no. 59632/09, § 61, 18 July 2013).

40. Lastly, the Government stated that the applicant's arguments had been purely procedural, with no objections being made in relation to the actual assessment of the evidence from C. and D. In their view, the applicant had been given ample opportunity to challenge any evidence against him, and the domestic courts had given adequate responses to all his arguments.

2. The Court's assessment

41. The Court notes that the applicant's complaints under Article 6 §§ 1 and 3 (c) and (d) are interlinked, in the manner specified below. It finds it opportune to start its analysis of the case by focusing on the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention.

(a) Applicable principles

42. 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 *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, 15 December 2015, and *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 *Schatschaschwili,* cited above, §101, and *Gäfgen v. Germany*

[GC], no. 22978/05, § 175, ECHR 2010) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, 15 December 2011). 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).

43. In *Al-Khawaja and Tahery v. the United Kingdom*, cited above, §§ 119-147 the Grand Chamber clarified the principles to be applied when a witness does not attend a public trial. These principles may be summarised as follows (see *Seton v. the United Kingdom*, no. 55287/10, § 58, 31 March 2016):

(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, as 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 other incriminating 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.

44. Those principles have been further clarified in *Schatschaschwili* (cited above, §§ 111-131), in which the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair.

45. In *Schatschaschwili* (cited above, §§ 125-131), the Court identified some of the counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of untested witness evidence at the trial. These counterbalancing factors must permit a fair and

proper assessment of the reliability of that evidence. They include the following:

(i) whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available. Any directions given to the jury by the trial judge regarding the absent witnesses' evidence is another important consideration;

(ii) reproduction at the trial of a video recording of the absent witness's questioning at the investigation stage in order to allow the court, prosecution and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability;

(iii) availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; further factual evidence, forensic evidence and expert reports; similarity in the description of events by other witnesses, in particular if such witnesses are cross-examined at trial;

(iv) possibility for the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial;

(v) possibility for the applicant or defence counsel to question the witness during the investigation stage. The Court has found in that context that where the investigating authorities had already taken the view at the investigation stage that a witness would not be heard at the trial, it was essential to give the defence an opportunity to have questions put to the victim during the preliminary investigation;

(vi) the defendant must be afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses. Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation.

(b) Application of these principles to the present case

(i) Whether there was a good reason for admitting pre-trial evidence from C. and D., as absent witnesses, at the applicant's trial

46. It is undisputed that the pre-trial statements of C. and D. were admitted in evidence at the applicant's trial, even though he had opposed admitting

them and even though these witnesses did not appear at his trial, despite his having asked for it.

47. In terms of national law, this course of action was envisaged under Article 263 § 3 (a) of the CCP, which permits the admission as evidence during trial proceedings of pre-trial statements given by a witness who is unreachable for the purposes of the trial proceedings on account of a long-term stay abroad. As a matter of principle, such grounds may be accepted as justifying the admission as evidence during trial proceedings of statements made by a witness at the pre-trial stage. However, the validity of such grounds in each case must be established on the basis of the specific facts in question.

48. As was stated by the Regional Court, the reason why the courts considered C. and D. to be unreachable for the purposes of the applicant's trial was that they were living outside Slovakia, following their expulsion from that country, and that there were no grounds to expect that they would be motivated or allowed to come back to Slovakia to appear at the applicant's trial.

49. The domestic courts reached this conclusion even though, in the course of the proceedings in respect of his appeal, the applicant provided them with addresses for these witnesses and with copies of their identity documents. The courts concluded that his doing so was not sufficient, as it had been his procedural duty to show that these witnesses would have been permitted to re-enter Slovakia.

50. In that respect, the Court notes that there is no indication that such a distribution of the burden of proof with regard to the possibility for a foreign witness to enter Slovakia for the purposes of giving evidence in court had any basis in statute or established practice. It also notes the applicant's argument, to which the Government have not responded (and which in principle appears to be borne out by the contents of the case file) that no details and circumstances regarding the expulsion were documented and examined in the course of the proceedings. This includes such details as the date on which the expulsion took place, which in the Court's view needs to be seen in the light of the argument (which the applicant advanced in his appeal) that it could not be excluded that at that time C. and D. were still to be found on the territory of Slovakia (see paragraph 14 above) and the respondent Contracting Party's duty to take positive steps to enable an accused to examine or have examined witnesses against him (see *Schatschaschwili*, cited above, § 120, with further references).

51. Moreover, the Court notes the possibility, to which the Government likewise in no manner responded, of securing the appearance of witnesses at trial via remote means under the Convention on Mutual Assistance in Criminal Matters between the member States of the European Union, which is applicable to all the States involved in the applicant's case.

52. As regards the Government's observations that the addresses provided by the applicant for C. and D. were "administrative" or "fictitious" and that there were no logical reasons for them to re-enter Slovakia, these propositions (however categorical in tone) appear not to have been based on any specific enquiries. Accordingly, they amount to unsubstantiated presumptions which the Court finds to be incompatible with the duty to make all reasonable efforts to secure the attendance of absent witnesses at trial (ibid., § 121, with further references).

53. Given these circumstances, and noting that there were available specific and direct means of ensuring the attendance as witnesses of C. and D. at the applicant's trial and that no acceptable explanation has been presented for the domestic authorities' failure to resort to those means, the Court concludes that on the facts of this case there were no good reasons for accepting the pre-trial statements given by C. and D. in lieu of them actually attending the applicant's trial and being examined in person during the trial proceedings.

54. Indeed, the domestic authorities' failure to take any positive steps towards enabling the applicant to examine or have examined C. and D. as witnesses against him at trial evokes similarities with (rather than distinguishing it from, as argued by the Government – see paragraph 39 above) the case of *Vronchenko* (cited above).

(ii) Whether the applicant's conviction was based solely or mainly on evidence from C. and D.

55. The Regional Court found specifically that evidence given by C. and D. had been "pivotal" for the applicant's conviction. Irrespective of whether it is to be seen so alone or in conjunction with evidence given by A. and B., it is beyond reasonable argument that at the very least it carried significant weight and that its admission may have handicapped the defence. After all, not even the Government have raised any objections in this respect.

(iii) Whether there were sufficient counterbalancing factors

56. The Court reiterates that, while the absence of a good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial, the lack of it in respect of a prosecution witness is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see *Schatschaschwili*, cited above, §113). Furthermore, the Court has held that the ability to confront a witness for the prosecution at the investigation stage is an important procedural safeguard which can compensate for the handicaps faced by the defence on account of absence of such a witness from the trial (see *Palchik v. Ukraine*, no. 16980/06, § 50, 2 March 2017,with further references).

57. In line with the general Convention requirements, the applicable national statute (Article 263 § 3 (a)) provides a safeguard in that a charged person must be notified of any upcoming witness interview and the national courts interpret this requirement as aiming to ensure that witness interviews take place in a manner that is in conformity with the principle of adversarial proceedings. However, the issue arising in the present case is linked with the fact that national courts consider that principle respected even if the charged person does not in fact attend the witness interviews in question, provided that he or she has been notified that they are to take place and has freely decided not to attend (see paragraph 17 above).

58. It is uncontested in the present case that the impugned pre-trial statements given by C. and D. were taken in the applicant's absence, that he was notified of them prior to their taking place, and that he freely chose not to attend. On that basis, similarly to the national courts, the Government argued that in relation to the pre-trial statements of C. and D. the principle of adversarial proceedings had been respected (see paragraph 38 above). The Court for its part considers that, in substance, the Government's argument amounts to one of a waiver of rights.

59. Without taking a stance as to whether such a waiver alone, if valid, would constitute a sufficient counterbalancing factor, the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving – of his or her own free will, either expressly or tacitly – his or her entitlement to the guarantees of a fair trial. However, if this right was waived, the Court must examine whether the circumstances surrounding the waiver were compatible with the requirements of the Convention. Among other things, the waiver must be attended by minimum safeguards commensurate with the waiver's importance. In so far as a waiver of an important Article 6 right is implicit, it must be shown that the applicant could reasonably have foreseen the consequences of his or her conduct (see *Zachar and Čierny v. Slovakia*, nos. 29376/12 and 29384/12, §§ 60 and 68, 21 July 2015, with further references).

60. With that in mind, the Court observes first of all that there is nothing to suggest that the applicant expressly decided to waive his right to examine or have examined C. and D. His decision to that effect was limited to their pre-trial questioning on 28 January 2017. On that occasion, any instructions as regards his right to attend their questioning and to examine them during the course of that questioning were given to him via the first pages of the pre-printed forms on which his own pre-trial statements had been transcribed. Such instructions went as far as informing the applicant, without providing any commentary or further explanation, that he had the right to be present when procedural actions at the pre-trial stage were being taken and, in respect of the questioning of witnesses, to put questions to them. Conversely, there has been no allegation or other indication that any individualised advice about the consequences of not exercising this right was provided to him, in

particular as regards the possibility for any pre-trial statements to be used in evidence at trial if the witness became "unreachable", as defined under national law (see, *mutatis mutandis*, *Zachar and Čierny*, cited above, § 70).

61. The Court is of the opinion that the absence of any action on the part of the authorities of the respondent State aimed at ensuring the applicant's awareness of the consequences of not attending the pre-trial questioning of C. and D. was aggravated by the following two factors.

- Firstly, as submitted by the Government in their observations, it was already apparent to the authorities at the pre-trial stage of the proceedings that Slovakia was only a transit station for C. and D. on their way to western Europe, and it was for this reason that they sought to ensure their pre-trial questioning, having due regard for the principle of adversarial proceedings (see paragraph 39 above). In other words, in the Court's view, it must have been clear to the authorities that there was a real possibility that C. and D. would later be unavailable for the purposes of the trial.

- Secondly, apart from questions of language as such, it is uncontested that the applicant told the authorities during his initial questioning that he had difficulties in understanding legal matters (see paragraph 6 above).

62. It was in this context that the authorities provided the applicant with no indication as to what consequences his non-exercise of defence rights in relation to the pre-trial questioning of C. and D. (which he decided not to attend) could have on his right to an adversarial trial.

63. It is undisputed that the applicant's entire subsequent course of action was geared towards having C. and D. examined before a court. The fact that, – as argued by the Government (see paragraph 38 above) – during his questioning on 27 February 2017 the applicant repeated in the presence of his lawyer that he did not wish to be invited to the pre-trial questioning of witnesses makes no difference because, during the same questioning, the applicant insisted that his right to attend be exercised on his behalf by his lawyer (see paragraph 10 above).

64. Given these circumstances, the applicant's choice not to be personally present at the pre-trial questioning of C. and D. on 28 January 2017 and not to examine them on that particular occasion can by no means be accepted as implicitly constituting a complete waiver of his right to examine or have them examined under Article 6 § 3 (d) of the Convention. Moreover, even if it did constitute such a complete waiver, in the light of the above it was not attended by the minimum safeguards commensurate with that waiver's importance.

65. As regards any other possible safeguards, it has not escaped the Court's attention that the appellate court itself identified errors or flaws both in the pre-trial procedure and in the judgment of the District Court, the reasoning of which was found to be "on the limit" of being reviewable (see paragraph 16 above). Nevertheless, the Regional Court concluded that those errors were not of such a character and gravity as to call into question the outcome of the proceedings. The Court for its part views this finding in a

broader context, as exemplified by the Regional Court's findings in relation to the applicant's request that C. and D. be examined as witnesses (as analysed above). This context suggests a pattern of seeking to validate a flawed procedure, rather than to provide the applicant with any counterbalancing factors to compensate for the handicaps under which the defence laboured in the face of its inability to have C. and D. examined (see *Schatschaschwili*, cited above, §§ 125-131; see also *Breukhoven v. the Czech Republic*, no. 44438/06, § 56, 21 July 2011, with further references).

66. In sum, no other counterbalancing factors have been submitted by the Government or otherwise identified.

(c) Conclusion

67. The foregoing considerations allow for no other conclusion that, on no acceptable grounds and with no sufficient counterbalancing factors, the applicant was deprived of the possibility to examine or have examined witnesses whose evidence carried significant weight in his conviction. Accordingly, the proceedings against him as a whole were not fair.

68. There has thus been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

In view of that finding and the reasons behind it, the Court considers it unnecessary to examine separately the merits of the complaint lodged by the applicant under Article 6 § 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

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

A. Damage

70. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government argued that the claim was excessive and submitted that, should the Court find a violation of the applicant's Article 6 rights, the most appropriate redress for him would be the holding of a fresh trial.

72. The Court notes that, following its above-noted finding under Article 6, the domestic law entitles the applicants to challenge the conclusions of the domestic courts by means of lodging a request for the reopening of the proceedings. That possibility constitutes the most appropriate redress, given the circumstances of the case (see *Zachar and Čierny*, cited above, § 85, with further references).

73. Having regard to the above, the Court awards the applicant EUR 5,200 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

74. The applicant also claimed EUR 1,600 for legal fees and EUR 288 for translation costs incurred before the Court.

75. Not contesting the claim in principle, the Government invited the Court, if it were to find a violation of the applicant's rights, to award him an amount that was reasonable.

76. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to the above criteria, the Court considers that the claim is well founded. Taking into account the legal aid already granted (see paragraph 2 above), the Court awards the applicant EUR 1,038, covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that it is not necessary to examine separately the alleged violation of Article 6 § 3 (c) of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,038 (one thousand and thirty-eight euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 10 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President