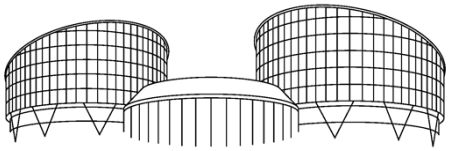

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

# CASE OF MIHELJ v. SLOVENIA

*(Application no. 14204/07)*

JUDGMENT

STRASBOURG

15 January 2015

**FINAL**

15/04/2015

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of Mihelj v. Slovenia,**

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 9 December 2014,

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

# PROCEDURE

1. The case originated in an application (no. 14204/07) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Zdravko Mihelj ("the applicant"), on 23 March 2007.

2. The applicant was represented by Ms M. Verstovšek, a lawyer practising in Celje. The Slovenian Government ("the Government") were represented by their Agent, Mrs T. Mihelič Žitko, State Attorney.

3. The applicant alleged that the trial *in absentia* had violated his rights of defence, since the indictment was modified at a hearing at which he had not been present.

4. On 13 September 2012 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1965 and lives in Ljubljana. Following a request for a criminal investigation against the applicant lodged by M.K. on 25 March 1999 and amended on 9 July 1999, on 30 July 1999 the applicant was summoned as accused to appear before the investigating judge of the Ljubljana District Court. He was also notified of the charge of aggravated

fraud under section 217 § 2 of the Criminal Code, and the underlying allegations submitted by M.K.

6. On 6 September 1999 the applicant was heard by the investigating judge. He denied the charge and submitted a number of documents in support of his position that the accusations were fabricated and unfounded, but was unwilling to answer any of the questions posed by M.K.'s legal counsel.

7. On 17 September 1999 the investigating judge of the Ljubljana District Court issued an order for an investigation of aggravated fraud against the applicant. In the course of that investigation, two witnesses were heard who confirmed M.K.'s version of events. The applicant was not present during these examinations, although the investigating judge ordered him to be notified thereof. Judicial records contain no evidence that the applicant received a summons.

8. After the investigation was concluded, on 10 November 1999, the Ljubljana District State Prosecutor's Office took over the proceedings and on 4 February 2000 lodged an indictment for attempted aggravated fraud under Article 217 §§ 1 and 2 in conjunction with Article 22 of the Criminal Code. The indictment stated that the applicant had deceived M.K. into believing that he could assist her in preventing her husband from claiming ownership of her share of their joint property, namely the family house. The applicant had taken advantage of M.K.'s age and naivety and persuaded her to sign a fictitious loan agreement stating that he would lend her 50,000 German marks (DEM), equivalent to 4,691,500 Slovenian tolars (SIT), which was to be secured with a mortgage on her share of the family house, despite the fact that M.K. did not owe him anything, which he was well aware of. For this purpose, the applicant had M.K. sign an authority form authorising him to take all measures necessary for the execution of the loan agreement. On that basis, the applicant had the mortgage against M.K.'s property entered in the land register, prejudicing the value of her property in the amount of SIT 4,691,500. Moreover, M.K. paid the applicant SIT 225,000 in several instalments for the "favour" he had done her.

9. Having been served with the indictment, the applicant lodged an objection, reiterating that M.K.'s accusations of fraud were fabricated and arguing that he would not be able to enter a mortgage in his favour in the land register without M.K.'s cooperation. The objection was rejected by the pre-trial panel on 7 July 2000. The latter noted in its decision that the criminal offence should be reclassified as attempted fraud under Article 217 § 1 in conjunction with section 22 of the Criminal Code, as the value at issue did not reach the statutory threshold of significant pecuniary damage. Accordingly, the Ljubljana District Court no longer had jurisdiction over the case, which was to be referred to the Ljubljana Local Court. The applicant was served with the decision and appealed against it; however, his appeal was dismissed as unfounded.

10. Following the transfer of jurisdiction to the local court, the ensuing court proceedings were conducted under the rules of summary procedure.

11. The applicant having failed to collect the first two summonses to the hearing which was to take place on 22 January 2002, the hearing was rescheduled for 29 March 2002. A summons to this later hearing was served on the applicant on 4 February 2002 through the court courier service at both his home and his work address, and subsequently on 6 February 2002 by post, again at both his home and his work address. On 28 March 2002 the applicant sent a letter to the court in which he objected to the hearing, alleging that he had received four identical summonses which contained no explanation but only an indication of legal classification of the criminal offence in question. The applicant's objection to the hearing was received by the local court on 29 March 2002.

12. On 29 March 2002 the Ljubljana Local Court held a hearing in the absence of the applicant, having found that he had not provided justification for his absence, although he had been duly summoned, that he had already been questioned during the investigation, and that his presence at the hearing was not necessary to establish the facts of the case. Thus, the legal requirements for trial *in absentia* had been met. The court examined M.K. and the two witnesses who had already been questioned during the investigation; their accounts corresponded to their previous statements. In her concluding remarks the district state prosecutor modified the indictment, reclassifying the offence to the actual criminal offence of fraud, rather than attempted fraud. She also added some details to the facts on which the indictment was based, in particular the allegation that the applicant had lied to M.K. that there would be expenses with regard to the entry of the mortgage in the land registry, for which she had paid him a total of SIT 225,000.

13. Having concluded the hearing, the court found the applicant guilty of the criminal offence as specified in the modified indictment, and sentenced him to seven months in prison. M.K. was invited to pursue her pecuniary claim in civil proceedings.

14. The applicant appealed to the Ljubljana Higher Court, arguing that the statement he had given during the investigation could not suffice for the trial purposes, as an indictment had not yet been lodged and thus could not be disputed. He pointed out that a statement given in the investigation could relate to one criminal offence, while the indictment could be lodged for a completely different criminal offence. He was therefore of the view that the provisions on trial *in absentia* should only be applied to cases where the defendant was questioned after the lodging of the indictment. Moreover, he disputed the credibility of the two witnesses and referred to the loan agreement and other documents he had submitted to the court during the investigation, claiming that M.K. was evading her contractual obligations

and charging him with fraud for that reason. He also challenged the imposed prison sentence.

15. On 18 September 2002 the Ljubljana Higher Court dismissed the applicant's appeal as unfounded and upheld the first-instance judgment. The higher court found that the applicant's defence right had not been violated by the fact that he was not present at the hearing. It noted that the accused had the right to attend the summary proceedings, but that he was not obliged to do so. The court noted that the applicant had been heard during the investigation, had received the indictment and had been duly summoned to the hearing, where he would have had the opportunity to make a statement and examine witnesses against him. However, given that the facts of the case had been clear and fully established, the higher court took the view that the applicant's presence at the hearing had not been necessary. In this connection, the court held that a hearing should only be discontinued if the description of the criminal offence in the indictment, albeit based on the same factual elements as before, was substantially changed. In such a case, the defendant ought to be informed thereof and summoned to attend a new hearing. However, this was not the case in the circumstances complained of by the applicant.

16. The applicant appealed on points of law, reiterating that he should not have been tried *in absentia*, as he had been questioned only before the indictment was lodged. Moreover, he had not been given the opportunity to cross-examine the witnesses against him.

17. On 13 November 2003 the Supreme Court delivered its judgment, in which it upheld the lower courts' decisions. The Supreme Court found that the offence which prompted the investigation against the applicant was identical to the offence with which the applicant was later charged. Furthermore, the hearing before the court did not bring to light any new information that had not already been uncovered during the investigation. Referring to section 442 of the Criminal Procedure Act, which sets out the conditions for conducting a hearing *in absentia*, the Supreme Court noted that the defendant had the right to attend the hearing, but that this right could under certain circumstances be waived. It also noted that the applicant had been duly summoned and warned that the hearing could be held in his absence. As regards the examination of witnesses during the investigation, the Supreme Court noted that while there were no indications in the case file that the applicant had been notified of it, this procedural breach had been remedied by the hearing at which M.K. and the other two witnesses had been re-examined. The applicant had had the opportunity to attend the hearing, but had waived his right.

18. The applicant lodged a constitutional complaint, which was declared admissible on 29 May 2006.

19. On 9 November 2006 the Constitutional Court delivered a decision finding that the applicant's constitutional rights had not been violated. The

court noted that the applicant had been heard during the investigation and that the charges in the request for the investigation and the indictment which had been lodged after the investigation and served on him had concerned the same acts and the same alleged offence, regardless of some differences in the wording. They both charged the applicant with misleading M.K. into concluding a fictitious agreement with him with the intent of acquiring illicit pecuniary gain. Observing that the indictment had been modified at the hearing, the Constitutional Court held that although the offence had been reclassified as actual fraud, and no longer as attempted fraud, the charge had remained the same in terms of content as regards the applicant's conduct and the circumstances in which the offence had been committed. Having regard to that, as well as the fact that the applicant had been duly summoned to the hearing and had failed to provide any valid reason for his absence, the Constitutional Court held that the local court had had no obligation to ensure the applicant's presence at the hearing. Moreover, the Constitutional Court observed that the applicant had not even alleged that the criminal offence which was the subject of the investigation was different from the one examined at the court hearing. He had merely drawn attention to the fact that "a prosecutor may file an indictment for a completely different criminal offence after the investigation is completed". It was also found that the applicant could have requested an adjournment of the hearing, but did not do so, and instead had failed to appear without specifying any valid reason. Finally, as regards the examination of the witnesses, the Constitutional Court reached the same conclusion as the Supreme Court had previously.

## II. RELEVANT DOMESTIC LAW

20. The relevant provisions of the Criminal Code, as in force at the material time, are as follows:

**Article 22 (Criminal Attempt)**

"(1) A person who initiates a criminal offence but does not complete it shall be punished for a criminal attempt, provided that such an attempt concerns a criminal offence for which a sentence of imprisonment of three years or more may be imposed under the law; attempts involving any other criminal offence shall be punishable only when it is so expressly stipulated by the law.

(2) A perpetrator of an attempted criminal offence shall be sentenced within the limits prescribed for the main offence or shall receive a lesser sentence."

**Article 217 (Fraud)**

"(1) A person who, with the intention of unlawfully acquiring pecuniary benefit for himself or a third person, by dishonest representation or concealing of facts leads another person into error or keeps him in error, thereby inducing him to do any act or

to abstain from doing any act to the detriment of his or another person's property shall be sentenced to imprisonment for not more than three years.

(2) If, as a result of the offence under the preceding paragraph, the perpetrator has caused a significant loss of property, he shall be sentenced to imprisonment for not less than one and not more than eight years ..."

21. The relevant provisions of the Criminal Procedure Act on the appeal procedure, as in force at the material time, are as follows:

**Section 370**

"A judgement may be challenged:

1) on the ground of substantial violation of provisions of the criminal procedure;

2) on grounds of violation of criminal law;

3) on the ground of erroneous or incomplete determination of the factual situation;

4) on account of a decision on criminal sanctions, confiscation of proceeds, costs of criminal proceedings, indemnification claims and the announcement of the judgement in the press and on radio or television."

**Section 371**

"(1) A substantial violation of provisions of the criminal procedure shall be deemed to exist:

3) where a hearing was conducted in the absence of persons whose presence at the hearing is obligatory under law ...

(2) A substantial violation of the provisions of the criminal procedure shall also be seen to exist if in preparations for the hearing or in the course of the hearing or in rendering the judgement the court omitted to apply a provision of this Act or applied it incorrectly, or if the court in the course of the hearing violated the rights of the defence, which influenced or might have influenced the legality and regularity of the judgement."

**Section 377**

(1) When a court of second instance receives files with an appeal, the files shall be assigned to the reporting judge in accordance with the court rules. If a criminal offence subject to state prosecution is involved, the reporting judge shall send the files to the competent state prosecutor, who shall examine and return them to the court without delay ...

(3) After the state prosecutor has returned the files, the presiding judge shall schedule the session of the panel..."

**Section 378**

"(1) Notice of the session of the panel shall be sent to the competent state prosecutor where a criminal offence which is prosecuted is involved, and to the accused, defence counsel, the injured party acting as prosecutor or the private prosecutor, but only if any one of them so request in the appeal or response to the appeal.

(2) If an accused who is being held in detention or serving his sentence wishes to attend the session of the panel, he shall be enabled to do so.

(3) The session of the panel shall open with the report of the reporting judge on the factual situation. The panel may ask the parties present at the session to give the necessary explanations concerning the allegations in the appeal. The parties may move that certain files be read as a complement to the report and may give the necessary explanations of their positions as contained in the appeal or in the reply to the appeal, without repeating the contents of the report.

(4) If parties who were duly notified of the session fail to appear, the panel shall nevertheless hold the session. If the accused fails to report a change of address or place of residence, the panel shall hold the session even though the accused has not therefore been advised thereof...”

**Section 379**

“(1) The court of second instance shall adjudicate in a session of the panel or on the basis of a hearing.

(2) The decision on whether to conduct a hearing shall be made by the session of the panel of the court of second instance.”

**Section 380**

“(1) A hearing before the court of second instance shall only be conducted when, due to an erroneous or incomplete determination of the factual situation, new evidence has to be taken or evidence already taken has to be repeated, and when valid grounds exist for the case not to be returned to the court of first instance for retrial.

(2) A summons to appear at the hearing before the court of second instance shall be served on the accused and his counsel, the prosecutor, the injured party, legal representatives and attorneys of the injured party, of the injured party acting as prosecutor and of the private prosecutor, and those witnesses and experts whom the court decides to hear upon at the request of the parties or of its own motion...”

22. The relevant provisions of the Criminal Procedure Act on the summary procedure, as in force at the material time, are as follows:

**Section 439**

“(2) The accused shall be instructed in the summons that he may bring to the hearing evidence for his defence or inform the court of such evidence in due course so that it can be secured for the hearing. The summons shall include a warning that the hearing will be held in the accused’s absence, provided that the statutory conditions (first paragraph of section 442) are complied with. Together with the summons, the accused shall be served with a copy of the indictment or the private charge if these were not served on him immediately after they were examined (second paragraph of Article 435); he shall also be instructed in the summons that he is entitled to retain counsel and that, unless defence is mandatory, the main hearing shall not be adjourned if defence counsel fails to appear or if the accused decides to retain counsel only at the hearing itself...”

**Section 442**

(1) If the accused fails to attend the hearing despite the fact that he has been properly summoned, the judge may decide to conduct a hearing in his absence, if his presence is not necessary and if he was heard earlier in the proceedings...”

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

23. The applicant complained that the criminal trial and conviction *in absentia* following the modification of the indictment of which he had had no knowledge, as well as his inability to cross-examine witnesses for prosecution, were unfair within the meaning of Article 6 of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by [a] tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing ..."
>
> (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 ..."

24. The Government contested that argument.

### A. Admissibility

25. The Court notes that the complaints regarding the trial *in absentia* following the modification of the indictment and the inability to cross-examine witnesses for prosecution are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

#### *1. The parties' submissions*

26. The applicant complained that the criminal trial against him had been conducted *in absentia* despite the fact that he had only been questioned during the investigation, that is before the indictment against him had even been lodged. In the applicant's view, the statement given to the investigating judge could not be regarded as a "substitute" for a hearing before the trial judge. Moreover, the indictment had been modified at the hearing to which he had not been duly summoned, the domestic court failing to indicate in the summons in respect of what offence he had been invited to appear or when the alleged offence had been committed. The

applicant pointed out that all the documents in the case until that time had been issued by the Ljubljana District Court, while the summonses to the hearing had been sent to him by the Ljubljana Local Court; also, the case number had changed. Thus, the applicant had informed the court that he had had no knowledge of the proceedings against him; however, the court disregarded his objection although there had been no reason to believe that he had been abusing his rights. As a result, the applicant had been convicted without having had the opportunity to familiarise himself with the charges against him, as, contrary to the Government's argument, the indictment against him had been significantly modified at the hearing.

27. Furthermore, the applicant alleged that he had not been invited to participate in the questioning of the witnesses against him during the investigation, in violation of the rules of the domestic criminal procedure. He pointed out that, given the delay of three years between the investigation and the trial, the witnesses surely would not have been able to remember much of the events related to his conviction. Also, having been absent from the hearing, the applicant had been completely prevented from questioning these witnesses.

28. The Government argued that the factual description of the criminal offence the applicant was charged with and its legal classification, as worded in the request for the investigation and the initial indictment of 4 February 2000, did not differ in any substantial manner from the indictment as modified at the hearing on 29 March 2002. In this connection, the Government pointed out that all three documents charged the applicant with deceiving M.K. into believing that he would help her preserve her property by concluding an appropriate contract with him. Taking advantage of M.K.'s naivety, the applicant had persuaded her to sign a fictitious loan agreement which was detrimental to her property, having secured his false claim through a mortgage.

29. As regards the legal classification of the offence, the charge in the request for the investigation concerned an offence of aggravated fraud (Articles 217 §§ 1 and 2 of the Criminal Code). In the initial indictment the charge was modified to attempted aggravated fraud (Articles 217 §§ 1 and 2 in conjunction with Article 22 of the Criminal Code), which was subsequently altered by the pre-trial panel of the Ljubljana District Court to attempted fraud (Article 217 § 1 in conjunction with Article 22 of the Criminal Code). The request, initial indictment and the decision of the pre-trial panel had all been served on the applicant. The modified indictment, however, which the applicant had not been acquainted with but which had served as the basis for his conviction, charged the applicant with the offence of fraud (Article 217 § 1 of the Criminal Code). In this regard, the Government relied on the view of the Constitutional Court that the indictment had not been modified in terms of content; hence, given the

circumstances, the Ljubljana Local Court had not been required to ensure the applicant's presence at the hearing.

30. Moreover, the Government asserted that the applicant had been served with the grounds for the indictment, which provided a detailed summary of the allegations made by M.K. and the two examined witnesses. He had also received the record of M.K.'s statement together with all the other evidence on which the indictment had been based. As the applicant had raised an objection to the indictment, he had also been served with the decision of the pre-trial panel of the Ljubljana District Court establishing that the amount of unlawful advantage allegedly secured by the applicant could not constitute an offence of attempted aggravated fraud, but only attempted fraud under Article 217 § 1 in conjunction with Article 22 of the Criminal Code, and that hence the jurisdiction over the case was therefore to be transferred from the Ljubljana District Court to the Ljubljana Local Court. Accordingly, the proceedings against the applicant were to continue under the provisions of the Criminal Procedure Act governing the summary procedure.

31. In view of all the documents that had been served on the applicant prior to the summonses to the hearing, the Government maintained that he had been well aware that criminal proceedings were pending against him and also what offence he had been charged with. Since the applicant had duly received the summonses to the hearing containing the legal classification of the offence, the Government argued that the applicant's "objection to the hearing" – a non-existent legal remedy under domestic law – was without merit. In their view, the objection and its content showed that the applicant had made a conscious decision not to attend the hearing. He had not provided any justification for his absence, nor had he proposed an adjournment of the hearing, although he had been warned in the summonses that the trial could be conducted *in absentia*. In this connection, the Government pointed out that for the hearing to be adjourned the applicant should have provided a reason for his absence, as well as relevant evidence proving that he had been unable to attend the hearing.

32. Having regard to the fact that the applicant had been heard during the investigation and had had the opportunity to comment on all the incriminating evidence on which the charge against him had been based, the Government was of the view that his presence at the hearing had not been necessary and he could thus be tried *in absentia*.

33. Finally, the Government underlined that the applicant had not explicitly complained before the domestic courts about the modification of the indictment, but had merely challenged the existence of the statutory conditions for the trial *in absentia*, the facts as established by the Ljubljana Local Court, and the sanction imposed. Nevertheless, the Ljubljana Higher Court had examined the reclassification of the offence, holding that the description of the offence in the indictment had not changed in any

substantial manner which would require it to be served on the applicant anew. However, if the higher court had found a violation of the right to defence under section 371 § 1 (3) of the Criminal Procedure Act on account of the applicant's having been tried *in absentia*, it would have set aside the judgment and remitted the case for retrial before the first-instance court. In this connection, the Government explained that the higher court only conducted hearings in cases where the facts had not been correctly or completely established.

*2. The Court's assessment*

34. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

35. The Court reiterates that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). The Court also points out that the scope of Article 6 § 3 (a) must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II).

36. The fairness of proceedings must be assessed with regard to the proceedings as a whole (see *Dallos v. Hungary*, no. 29082/95, § 47, ECHR 2001‑II). Furthermore, the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence guaranteed by sub-paragraph (b) of Article 6 § 3 (see *Pélissier and Sassi*, cited above, § 54, and *Dallos*, cited above, ibid.).

37. Moreover, while it is of paramount importance that a defendant in criminal proceedings should be present during his or her trial, proceedings held in the absence of the accused are not always incompatible with the Convention if the person concerned can subsequently obtain from a court which has tried him a fresh determination of the merits of the charge, in respect of both law and fact (see, among other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 82, ECHR 2006-II), or if he or she can appeal against the conviction *in absentia* and is entitled to attend the hearing in the court of appeal, entailing the possibility of a fresh factual and legal determination of

the criminal charge (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

38. The Contracting States enjoy wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6, while at the same time preserving their effectiveness. The Court's task is to determine whether the result called for by the Convention has been achieved. In this regard, the resources available under domestic law must be shown to be effective where a person "charged with a criminal offence" has neither waived his right to appear and to defend himself nor sought to escape trial (see *Colozza v. Italy*, 12 February 1985, § 30, Series A no. 89).

39. In the present case, it was not disputed by the parties that the applicant was tried and convicted *in absentia*. Neither was it disputed that he could have had the judgment set aside and the case remitted for retrial before the court of first instance if it had been found that the statutory conditions for a trial *in absentia* under section 442 § 1 of the Criminal Procedure Act (see paragraph 22 above) had not been satisfied. However, in the applicant's case it was found that he had been heard during the investigation, had been duly summoned, and had been warned that the hearing could take place in his absence (see paragraphs 12, 15 and 17 above) and that he had not provided justification (see paragraph 12 above) or any valid reason for his absence (see paragraph 19 above). Moreover, no further clarification of the facts was required necessitating the applicant's presence at the hearing (see paragraph 15 above). Thus, the appeal courts confirmed the applicant's conviction *in absentia*.

40. The Court notes that, prior to receiving the summonses to the hearing, the applicant had been served with the indictment charging him with attempted aggravated fraud, to which he had objected. He then received the decision of the pre-trial panel of the Ljubljana District Court dismissing his objection. In this decision the offence he was charged with was reclassified to attempted fraud and the case was referred to the Ljubljana Local Court (see paragraph 9 above). Thus, the Court considers that the applicant could reasonably have expected to be summoned to appear before the latter court, regardless of the fact that the proceedings were commenced before the Ljubljana District Court. Moreover, the applicant himself acknowledged that the summonses to the hearing had included reference to the allegedly violated provisions of the Criminal Code, which had already been included in the decision of the pre-trial panel. In view of this, the Court is unable to accept the applicant's argument that he had lacked knowledge of what proceedings the summonses were referring to, especially since he did not allege that any other set of criminal proceedings concerning the same charge was pending against him at the time. In any event, the Court notes that the applicant received the summonses almost two months before the date of the hearing (see paragraph

11 above), and could therefore have brought any matter of controversy to the local court's attention sooner than one day before the hearing was to take place.

41. Having regard to the above, the Court agrees with the finding of the domestic courts that the applicant failed to provide a valid reason for his absence from the hearing, which would require at least a detailed examination and a reasoned response to his objection (see, *a contrario*, *Henri Rivière and Others v. France*, no. 46460/10, §§ 31-34, 25 July 2013). As nothing appears to have prevented him from attending the hearing, the Court agrees with the Government that the applicant was absent of his own will (see, *mutatis mutandis*, *Medenica v. Switzerland*, no. 20491/92, §§ 57-58, ECHR 2001-VI). In these circumstances, the Court is satisfied that the applicant's trial and conviction *in absentia* and the refusal of the domestic courts to set aside the judgment and order a retrial did not amount to a denial of justice.

42. For the same reasons, the Court considers that the applicant's right to examine or cross-examine witnesses was not violated. As regards the applicant's complaint that he should have had the opportunity to question the witnesses during the investigation, the Court considers that Article 6 § 3 (d) does not require that the accused be confronted with witnesses prior to the trial, provided that these witnesses can, as in the present case, be challenged and questioned by the defence at the trial (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 51, *Reports of Judgments and Decisions* 1997-III). However, as the applicant chose not to attend the hearing, in the Court's opinion the applicant could reasonably have foreseen that he would not be able to cross-examine M.K. and the two witnesses against him.

43. Nonetheless, the Court does not consider that the applicant could reasonably have foreseen that he risked a conviction for fraud, especially since the initial charge against him involving the offence of aggravated fraud (see paragraph 7 above) had previously been replaced by attempted (aggravated) fraud (see paragraphs 8 and 9 above). In this connection, the Court notes that the distinction between attempt and completion of the criminal offence of fraud is whether the unlawful actions have or have not led to the acquisition of pecuniary benefit. In the context of the present case, the characterisation of the applicant's actions as either an attempted or an actual offence depended solely on whether or not his mortgage-secured claim giving rise to repayment obligations was considered an acquisition of a benefit. Thus, while the legal characterisation of the offence was changed at the trial, its factual description remained essentially the same. Moreover, considering the findings of the domestic courts as to the scheme executed by the applicant in order to make an unlawful gain (see paragraphs 8 and 12 above), in the Court's view there was little difference in the gravity of the initial and reclassified charge (see, *a contrario*, *Miraux v. France*,

no. 73529/01, § 36, 26 September 2006). Also, the Court observes that the reclassified charge did not aggravate the applicant's situation, as under domestic law an attempted offence was punishable within the limits of the sanction provided for a completed offence, although a lesser sanction could be imposed (see Article 22 of the Criminal Code in paragraph 20 above).

44. Furthermore, the applicant was made aware of the legal characterisation of the charge against him by way of the first-instance judgment. In this connection, the Court is satisfied that all its relevant legal and factual aspects could be challenged on appeal and that, even if no hearing was held before the Ljubljana Higher Court, the applicant could have sought leave to attend the session of the panel in order to explain his views (see Articles 370 and 378 of the Criminal Procedure Act in paragraph 21 above). However, the applicant made no such request. Neither did he allege that the classification of his actions as presented at the hearing had been erroneous, nor did he complain that the reclassification of the charge had violated his rights of defence. In both his appeal (see paragraph 14 above) and appeal on points of law (see paragraph 16 above) the applicant merely argued that the statement he had given during the investigation did not suffice for the purposes of trial *in absentia*, as at the time an indictment against him had not yet been lodged. Hence, the appeal courts limited their examination to establishing whether during the investigation the applicant had been able to state his case on all the relevant facts which were the basis for the indictment. It follows from the Constitutional Court decision that in his constitutional complaint the applicant also reiterated his argument as above, but did not challenge the reclassification of the charge at trial. Having regard to this, and noting that the facts underlying the charge had not changed, the Constitutional Court confirmed that the applicant's presence at the hearing had not been necessary.

45. In conclusion, the Court observes that the applicant has not alleged that he had been unable to advance his defence before the appeal courts in respect of the reclassified charge. However, as he did not raise this issue, in the Court's opinion he could not expect any of the alleged shortcomings resulting from the reclassification of the charge at trial to be rectified on appeal.

46. Consequently, there has been no violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (a), (b), (c) and (d).

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

47. Lastly, the applicant complained under Article 5 that he had been unjustly sentenced to seven months in prison due to the procedural errors committed in the criminal proceedings against him.

48. However, in the light of all the material in its possession, and in so far as the matter complained of is within its competence, the Court finds that

it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* admissible the complaints under Article 6 regarding the trial *in absentia*, examination of witnesses and reclassification of the criminal offence and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (a), (b), (c) and (d).

Done in English, and notified in writing on 15 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President