



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

FOURTH SECTION

CASE OF FAŁROWICZ v. POLAND

(Application no. 43609/07)

JUDGMENT

STRASBOURG

17 April 2012

FINAL

17/07/2012

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

In the case of Fąfrowicz v. Poland,

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

David Thór Björgvinsson, *President*,

Lech Garlicki,

Päivi Hirvelä,

George Nicolaou,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 27 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 43609/07) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Robert Fąfrowicz (“the applicant”), on 17 September 2007.

2. The applicant was represented by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his trial had been unfair, in breach of Article 6 of the Convention.

4. On 10 November 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1971 and lives in Nowy Sącz.

6. On 27 January 2006 the applicant was arrested on suspicion of car theft and subsequently remanded in custody. On an unspecified later date he was charged with selling drugs. The charges concerning car theft were severed to be dealt with in another set of proceedings.

7. On 15 February 2006 a certain JH, a minor¹, was questioned by the police in respect of the car theft. On 27 February 2006 JH was questioned by the police in respect of the charge of selling drugs between September 2005 and 10 February 2006. He admitted that he had been selling drugs which he had received from the applicant. The questioning took place in the presence of a psychologist.

8. In her report dated 1 March 2006 the psychologist observed that JH's cognitive processes had functioned at the level commensurate to his age. She noted that his interpretation of the facts could have been slightly changed on account of his fear of the consequences of his acts. There could also have been minor inconsistencies with regard to the amount of drugs sold by the applicant to other persons. She also noted that JH had willingly presented the facts related to the drug transactions involving him and other persons.

9. JH was heard by the police as a juvenile suspect but no preventive measures were applied. The charges against him were to be examined separately by the Division for Family and Minors of the Nowy Sącz District Court. That court ordered an inquiry to be carried out at his home. On 10 July 2006 the report of the inquiry was submitted to the District Court. According to the report, JH had left Poland for the USA on 17 March 2006 and his parents did not know his address or telephone number. JH had not informed his parents of his plans to leave Poland and he had merely called them from the airport.

10. On 7 September 2006 the District Court requested the police to establish JH's place of residence. On 18 September 2006 the police informed the court that JH had been in Chicago as from April 2006 and that he was expected to return to Poland in the summer of 2008.

11. On 17 October 2006 the Nowy Sącz District Court decided not to institute proceedings against JH. It had regard to the fact that he had been in the USA since April 2006 and in those circumstances it would be impossible to apply to him the measures provided in the Juvenile Procedure Act (*ustawa o postępowaniu w sprawach nieletnich*).

12. On 19 August 2006 the prosecution filed a bill of indictment against the applicant with the Nowy Sącz Regional Court. The applicant was charged with offering drugs to a minor, JH, and with seven counts of selling drugs to JH, PK, SB, KJ, GS, TK and RG between June 2004 and 27 January 2006. The prosecutor requested the court to hear seventeen witnesses, including JH.

13. There were five other defendants in the case (WZ, GS, KJ, MG and TK) who were also charged with drug trafficking offences. Two of them, WZ and GS, were additionally charged with car theft. On 3 October 2006 the trial court severed the charges against MG and TK.

1. JH was born in 1989.

14. On 28 August 2006 the Nowy Sącz Regional Court scheduled hearing dates for 3, 9, 13, 16 and 17 October 2006. JH was summoned to testify on 9 October 2006. On 11 September 2006 JH's mother informed the trial court that JH resided in the USA where he was attending school. She produced photocopies of the plane tickets. On 18 September 2006 the police confirmed the above and informed the court that the date of JH's return to Poland was unknown.

15. On 9 October 2006 the trial court again summoned JH to give evidence on 17 October 2006. The police were asked to serve the summons or to establish the date of his return to Poland. On 13 October 2006 the police informed the court that the summons could not be served since JH was still in the USA and the date of his return remained unknown.

16. On 18 October 2006 the trial court again summoned JH to testify at the hearing. It also requested police assistance in establishing the date of his return to Poland. The police informed the court in their two letters of 26 October 2006 that JH was in Chicago. They notified the court that the date of his return to Poland was still unknown. They also reported that, according to the information obtained from JH's parents, JH would remain in the USA for several years as he was attending school.

17. The trial court held five hearings as scheduled and one additional hearing on 15 November 2006. At the hearing held on that date the prosecutor requested the court to read out the statements JH had made to the police. The applicant and his counsel objected. They argued that those depositions were the main incriminating evidence against the applicant and that they wanted to put questions to JH at the hearing. The trial court decided that JH's statements should be read out pursuant to Article 391 § 1 of the CCP since the witness was permanently abroad and his date of return to Poland remained unknown. It noted that in those circumstances it was not possible to grant the applicant's request to hear JH at the hearing.

18. The Nowy Sącz Regional Court gave judgment on 16 November 2006. It convicted the applicant as charged and sentenced him to four years' imprisonment and a fine of PLN 2,000. It further ordered him to make a payment of PLN 5,000 to an association assisting drug addicts.

19. The trial court established that the applicant had sold drugs as alleged in the bill of indictment. In this respect it relied on the statements of JH who had been heard by the police as a juvenile suspect. JH stated that the applicant had sold drugs to GS, TK, SB, RG and KJ in his presence. In his evidence, he described in detail the factual circumstances of those transactions and distinguished between transactions at which he had been present from those of which he had only heard.

The trial court considered JH's evidence reliable, having regard to its detail, certainty and consistency. The reliability of his evidence was enhanced by the fact that JH had known all the defendants well and had had no motive to incriminate them. Furthermore, the trial court considered that

JH's evidence was objective since he had not concealed any facts which might have put him in a negative light as he admitted that he had been selling the drugs for the applicant to KJ, GS, PK and AB and that he had stolen the car. On 14 February 2006 JH together with the two co-accused WZ and GS had stolen a car which indicated that they had trusted each other.

20. The applicant pleaded not guilty and decided not to testify. He stated that he had not sold or offered drugs to other persons and had not possessed them. He refused to answer any questions from the court and the parties.

21. According to the trial court, the credibility of the statements given by JH was supplemented by other evidence. Those statements were not the only incriminating evidence as they were confirmed in certain respects by evidence from PK, KJ, GS and WZ. Furthermore, JH's statements were not undermined by the findings of the psychologist who had assisted in his questioning.

22. In respect of witness PK, the trial court considered credible the statements which he had given during the investigation. When questioned at that stage he stated that JH had received drugs from the applicant and had been selling them to others. PK had also confirmed that JH had offered drugs to his friends. That evidence corroborated the relevant statements of JH. PK had also confirmed JH's statement that the applicant had proposed to manufacture drugs in PK's garage. During the trial, PK changed his version of events and denied that the applicant had supplied drugs to JH, but the trial court refused to accept his change of testimony as PK had offered no explanation for it.

23. KJ was a friend of JH and the applicant. The court found reliable the evidence she had given during the investigation, namely that she had bought drugs from JH, GS and WZ, and that she had offered and taken amphetamine with the applicant. The latter fact contradicted the applicant's assertion that he had had nothing to do with drugs. At the trial, KJ denied those statements. However, the trial court noted that she had not explained the reason for the change in her testimony and considered credible her original statements. Furthermore, KJ's testimony during the investigation was corroborated by JH's statements. KJ denied that the applicant had sold her drugs. However, the trial court did not find this evidence reliable, having regard to the consistent statements of JH and to the lack of a motive on the part of JH to incriminate the applicant and KJ.

24. The trial court considered credible the statements of GS that he had purchased drugs from JH. The latter confirmed that he had been selling drugs received from the applicant to other persons, including GS. GS was also buying drugs from the applicant and selling them to others as confirmed by the statements of JH and KJ. In view of those statements, the court rejected GS's subsequent denial at the trial that he had anything to do with drugs.

25. The applicant appealed. He argued that the trial court had breached criminal procedure by reading out the depositions of JH which had been made during the latter's questioning by the police. He also submitted that the trial court had relied on JH's statements although they had not been corroborated by other evidence in the case. The applicant lastly claimed that the court had erred in its establishment of the facts of the case.

26. On 17 April 2007 the Kraków Court of Appeal held a hearing and upheld the trial court's judgment for the most part. It amended it only to the extent that it deleted one count of selling drugs by the applicant to PK since JH had stated that he had not witnessed that particular transaction.

27. Otherwise, the Court of Appeal found that the trial court had correctly established the facts, basing itself on a comprehensive assessment of all the evidence. It had explained why it had considered JH's statements credible and why it had disregarded the applicant's evidence since he had limited himself to denying the charges against him. It stressed that the applicant had not put forward any rational arguments to contest the duly substantiated findings of the trial court.

28. The Court of Appeal noted that JH had described precisely various details concerning the purchase of drugs from the applicant, such as the type of drugs, price, quantity, dates of transactions, form of payment, etc. It underlined that JH's version of events, namely that he had been selling drugs received from the applicant and offering them to his friends, had been confirmed by PK and KJ during their questioning in the course of the investigation. The fact that PK, when heard at the trial, had changed his earlier version of events could not be considered credible as he had not given a plausible explanation for this change. PK had also confirmed JH's statement that the applicant had proposed to manufacture drugs in PK's garage but that proposal had been refused. The fact of JH's offering drugs to friends had also been confirmed by GS and WG during their questioning in the course of the investigation.

29. The Court of Appeal accepted the findings of the trial court that JH, being a close acquaintance of the applicant, GS, KJ, PK, SB, TK and RG, had objectively described the applicant's actions and that he had not been in conflict with the applicant. In his statements, JH had not concealed facts which incriminated him. He had consistently stated that GS, KJ, SB, RG and TK had purchased drugs from the applicant in his presence. He distinguished those situations from transactions at which he had not been present. The Court of Appeal also noted that before his questioning as a juvenile suspect, JH had been advised that he had the right to refuse to make statements.

30. As regards the lack of cross-examination of JH, the Court of Appeal stated:

“The allegation of the breach of procedure by the trial court is not sustainable. The appeal setting out the above allegation does not specify which provisions were breached; it would appear from the grounds of the appeal that it concerns Article 391 § 1 of the CCP, which the trial court relied on when reading out the statements of JH once it had been established that he was staying permanently (for a longer period of time) abroad and thus objectively it is impossible to hear him directly. There is no doubt in the circumstances of the case that the court made all possible procedural attempts to secure the presence of JH at the trial, and that the court took the decision to read out the statements of that witness after having established objectively and unequivocally that the precondition specified in Article 391 § 1 of the CCP had been met (his uninterrupted long stay abroad), and then only just before closing the trial. The defendant [the applicant] does not dispute that the circumstances specified in Article 391 § 1 of the CCP in respect of witness JH were correctly ascertained, admitting expressly that the witness went away and has lived abroad. In this procedural situation the trial court had the right to read out the statements of that witness, a minor, given at the time when he was questioned as a suspect (the fact that the trial court did not invoke § 2 of Article 391 of the CCP does not have any procedural significance for the justified use of the measure provided by Article 391 of the CCP in the circumstances of the case), being an exception to the principle of directness and the principle of oral proceedings – since the trial court assessed the admissibility of that evidence (reading out a witness’ statements), the circumstances in which it was obtained and the credibility of those statements by corroborating them with other evidence obtained in the case, as already explained. The parties and the defence had an opportunity to react directly to those statements [of witness JH]....”

31. On 22 June 2007 the applicant filed a cassation appeal with the Supreme Court. He stated that the trial court had read out JH’s depositions and by doing so had prevented the applicant from putting questions to that witness. He alleged a breach of his defence rights, invoking Articles 6, 7 and 391 § 1 of the CCP and Article 6 § 3 (d) of the Convention.

32. The applicant argued that the trial court and subsequently the Court of Appeal had based their verdict exclusively on JH’s evidence and had disregarded the evidence of KJ, GS and WZ as being contradictory to the former evidence. In respect of PK, the applicant argued that his statements given at the pre-trial investigation stage had to be carefully analysed since he could not confirm them at the hearing as he had been undergoing drug therapy.

33. The applicant claimed that the courts had not used all available means to secure the attendance of JH at the trial. Furthermore, JH had been treated leniently by the authorities as he had been allowed to leave the country despite his admission that he had been selling drugs. Lastly, the applicant informed the Supreme Court that JH had returned to Poland and that he could have been questioned in respect of the charges against the applicant.

34. On 24 June 2007 JH was arrested by the police for drunken driving in Poland. On 25 June 2007 he was questioned by the Zakopane District Prosecutor. On the same day the Zakopane District Court convicted him of drunken driving in summary proceedings and sentenced him to a suspended prison term and a fine. It also banned him from driving for one year. JH was further placed under the supervision of a court officer.

35. On 5 November 2007 the Supreme Court dismissed the applicant's cassation appeal as manifestly ill-founded. It held, in so far as relevant:

“When formulating them [arguments in the cassation appeal] the applicant completely disregarded Article 519 of the CCP, which entitles the parties to lodge a cassation appeal exclusively against the final judgment of the second-instance court. Nonetheless, in the present case the author of the cassation appeal repeated the same assertions which he had raised earlier in an ordinary appeal, making only such modifications which supposedly complied with the requirements specified in Article 523 § 1 of the CCP. The same circumstances, which had earlier served as the basis for an assertion that the trial court had made errors in respect of its factual findings, were now being used to formulate arguments of a procedural nature. However, the assessment of their content and the reasons for the cassation appeal leads to the conclusion that as a matter of fact the author intended again to attempt to undermine the credibility of particular sources of evidence and to challenge the factual findings made on that basis. However, in the light of the binding regulation such an attempt in cassation appeal proceedings cannot be effective. (...)

It cannot be overlooked that the arguments of the cassation appeal in the present case are in fact directed against the trial court's judgment. It was the trial court which assessed the credibility of particular sources of evidence and determined the quantity of drugs which had been trafficked; it was also the Nowy Sącz Regional Court which made use of the measure provided in Article 391 of the CCP in order to disclose statements made by the then minor JH (...)

The issue of the correctness of admitting and relying on JH's statements was also subject to ordinary review by the second-instance court. The Court of Appeal could not infringe Article 391 of the CCP since it did not make use of the measure provided in it. Even now the appellant has not substantiated [his contention] that the restrictions on the opportunity to release depositions or statements by persons listed in that provisions were breached. (...) However, the digressions as to the possibility of taking evidence from JH, and the conducting of evidentiary proceedings with the participation of the defendant [the applicant] at the current stage of the proceedings, at a time when the case has finally been determined and no breach of the law (still less a manifest breach – Article 523 § 1 of the CCP) has been substantiated, do not fit within the framework of the model of cassation appeal proceedings. The repeated reliance on all those circumstances additionally reinforces the conclusion that the arguments presented in the cassation appeal constituted nothing but an attempt to circumvent the obligation stemming from Article 519 of the CCP, which stipulates that a second-instance judgment shall be the subject of a cassation appeal.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Article 390 § 1 of the 1997 Code of Criminal Procedure (“the CCP”) provides:

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

37. Article 391 of the CCP reads as follows:

“1. If a witness has without good reason refused to testify, or has given testimony different from the previous one, or has stated that he does not remember certain details, or if he is abroad, or a summons cannot be served on him, or if he has not appeared as a result of obstacles that could not be removed or if the president of the court has declined to summon him pursuant to Article 333§2 [i.e. because upon the lodging of the bill of indictment the prosecution has asked that the records of his testimony be read out at trial], and also when a witness has died, the records of his previous statements may be read out, [regardless of whether they] have been made in the investigation or before the court in the case in question or in another case or in any other procedure provided for by the law.

2. In the circumstances referred to in paragraph 1, and also in the case specified in Article 182 § 3, the records of evidence that a witness has given when heard as an accused may also be read out.”

THE LAW

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

38. The applicant complained under Article 6 § 3 (d) of the Convention that his defence rights had been unduly curtailed as he could not cross-examine JH. He argued that JH’s statements had been the main evidence against him. The applicant contended that the trial court should have adjourned the proceedings until it could hear JH. Furthermore, the trial court had known JH’s address in the USA but had not taken any action to secure his presence. The applicant asserted that about a month before the date of the hearing before the Court of Appeal JH had been deported from the USA to Poland but the Court of Appeal had failed to hear him.

Article 6 §§ 1 and 3 (d) reads as follows:

“1. “In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

A. Admissibility

39. The Government argued that the applicant had not exhausted all remedies provided for by Polish law as he had failed to lodge a constitutional complaint. The applicant could have challenged the compatibility of Article 391 of the CCP which regulated the issue of reading out at the trial the statements made by a witness in the course of the investigation with Articles 2, 42 § 2 and 45 § 1 of the Constitution.

40. The applicant disagreed and argued that he had exhausted all relevant remedies.

41. The Court considers that in the circumstances of the present case the alleged breach of the applicant’s right to a fair trial cannot be said to have originated from the direct application of Article 391 of the CCP. Rather, it resulted from the manner in which this and other provisions of the CCP were interpreted and applied by the courts in the applicant’s case. However, the established jurisprudence of the Constitutional Court indicated that constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision were excluded from its jurisdiction (see *Długolecki v. Poland*, no. 23806/03, § 25, 24 February 2009; and *R.R. v. Poland*, no. 27617/04, § 116, 26 May 2011). Furthermore, in the case of *Kachan v. Poland* (no. 11300/03, § 28-29, 3 November 2009), which concerned an analogous issue under the Convention, the Court examined and rejected a similar objection filed by the Government.

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

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

B. Merits

1. The applicant’s submissions

44. The applicant maintained that his right to a fair hearing and the rights of the defence had not been respected. He had been deprived of the opportunity to question the witness JH at any stage of the proceedings. JH’s evidence had been the sole evidence against him. It was all the more important to ensure that he had an opportunity to question JH since at the

time of his questioning JH had been a minor and according to the psychologist's report there had been inconsistencies in his testimony. Furthermore, it transpired from the minutes of the trial that other witnesses had had no knowledge of the alleged sale of drugs by the applicant.

45. The applicant referred to Article 390 § 1 of the CCP which stipulated that the accused had the right to be present during the taking of evidence in the case and argued that this right was one of the fundamental guarantees for the accused. Article 391 § 1 of the CCP provided that a witness' stay abroad, without specifying its duration, was a sufficient reason permitting the court to refer to the earlier statements of such witness. According to commentators, any obstacle to hearing a witness on account of his stay abroad should be real and should exist for a relatively significant period of time. A temporary stay abroad could not justify the reading out of a witness' earlier depositions. In the applicant's case, JH had temporarily remained abroad and returned to Poland in the spring of 2007. He had been heard by a court in respect of another set of proceedings. However, he had not been heard as a witness in the proceedings against the applicant.

2. The Government's submissions

46. The Government argued that the proceedings in the applicant's case had been fair. The courts had taken all necessary measures to ensure JH's presence at the hearing. The trial court had been informed that he would not return earlier than the summer of 2008 and therefore further adjournment of the proceedings would have been unjustified. It would mean keeping the accused in suspense for one and a half years. With regard to international judicial assistance, the Government submitted that the applicant had not formulated any concrete doubts with regard to JH's testimony and had not specified any discrepancies in it. Hence, international judicial assistance in the applicant's case was unnecessary from the legal point of view.

47. The applicant erroneously alleged that at the time when his appeal was pending JH had been heard by the Nowy Sącz District Court. That court could not hear JH due to the fact that he was in the USA and it had subsequently decided not to institute proceedings against him. With regard to the criminal proceedings against JH, the Government submitted that he had been sentenced for drunken driving on one occasion, namely by the Zakopane District Court's judgment of 25 June 2007, and thus had been present in Poland at that time. The said judgment had been given after the Court of Appeal had delivered its judgment in the case.

48. The Government produced a reply from the National Headquarters of the Border Guard as regards the crossing of the border by JH in the period between 1 March 2006 and 30 November 2007. According to that document, JH had left Poland on 15 March 2006 on a plane bound for Chicago. The Border Guard did not possess any information about JH's

return to Poland during the relevant period. It did not possess a complete register of all the persons crossing the Polish border.

49. The Government argued that the reading out of JH's depositions had resulted from the objective impossibility of hearing him as a witness and had been based on a specific provision of the law. The admission of those statements in evidence had been necessary and had not impaired the rights of the defence. The reading out of the depositions did not exempt the court from the obligation to consider the credibility of the evidence. In accordance with Article 7 of the CCP the courts decide on the basis of their own conviction, and their decision shall be founded upon evidence taken and assessed in the exercise of their own discretion. In circumstances where a witness cannot be heard directly, the assessment of his statements should be particularly careful and meticulous.

50. Neither the applicant nor his counsel had contested the evidence or requested that it be supplemented. The applicant had not requested an additional hearing of JH, although his statements constituted grounds for formulating part of the charges against the applicant. Additionally, the applicant had been given an adequate and proper opportunity to challenge those depositions, including after JH's statements had been read out by the court. However, the applicant had exclusively contested their admission in evidence and had not raised any allegations with respect to their content.

51. In the Government's view, the trial court had very carefully indicated the reasons demonstrating why it had considered JH's depositions credible and had rejected the credibility of the opposing evidence. The trial court's assessment of the evidence had been logical and coherent. It had been subjected to the Court of Appeal's review. The Court of Appeal had upheld the lower court's findings. Additionally, the Supreme Court had not detected any shortcomings which could have warranted the quashing of the Court of Appeal's judgment.

52. The Government emphasised that JH's statements had not been the only evidence in support of the charges against the applicant. The facts relating to the applicant's criminal activity had been established on the basis of the statements of the defendants GS, KJ, WZ as well as of the witnesses PK and WG.

3. *The Court's assessment*

53. In the recent judgment of the Grand Chamber in the case of *Al-Khawaja and Tahery v. the United Kingdom* (nos. 26766/05 and 22228/06, § 118, 15 December 2011), the Court partly modified its earlier jurisprudence on hearsay evidence. It recalled that the guarantees in paragraphs 3 of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court underlined that its primary concern under Article 6 § 1 is to evaluate the

overall fairness of the criminal proceedings (see, also *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 victims that crime is properly prosecuted (see, *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010-...) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II). Furthermore, 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 references therein).

Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II; *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X).

54. There are two requirements which follow from the above general principle. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule"; see *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 119).

55. 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. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 147).

56. The Court will first examine whether there was a good reason for the non-attendance of witness JH. It notes that the trial court made all reasonable efforts to secure JH's attendance at the trial. On three occasions the trial court requested police assistance in the service of the summons and in establishing his whereabouts (see paragraphs 14-16 above). When those efforts failed and the trial court was informed by the police that the date of JH's return from the USA remained unknown, it decided to read out his statements at the last trial hearing held on 15 November 2006. The Court notes that the trial court's decision to have recourse to JH's depositions was based on Article 391 §§ 1 and 2 of the CCP which authorised such a course of action in the case of a witness' prolonged stay abroad. It considers that such a decision was legitimate in the circumstances of the case. The Court of Appeal observed that the applicant had admitted that JH had gone abroad and that it had been objectively impossible for the trial court to hear him. The Court does not subscribe to the applicant's argument that the trial court should have adjourned the hearing until such time as it could hear JH. The Court also considers that the trial court cannot be blamed for having failed to request international judicial assistance since it has not been established that the court knew JH's address in the USA.

57. The applicant alleged that JH returned to Poland on an unspecified date in the spring of 2007 and could have been heard by the Court of Appeal. He raised this argument for the first time in his cassation appeal filed on 22 June 2007; however the Supreme Court rejected it as irrelevant at that late stage of the proceedings. The Court notes that the hearing before the Court of Appeal was held on 17 April 2007 and it appears that the applicant did not argue before that court that JH had returned to Poland and should have been heard. It transpires from the documents produced by the Government that JH was arrested in Poland for drunken driving on 24 June 2007. It can be assumed that he must have returned to Poland before that date; however it has not been established that JH was present in the country at the time of the hearing before the Court of Appeal. In particular, the Court finds no support for the applicant's assertion that JH had been deported from the USA to Poland before 17 April 2007.

58. Next, the Court will examine whether the applicant's conviction was based solely or to a decisive degree on the depositions made by JH. In view of the findings of the trial and the appellate courts (see paragraphs 21-24 and 28), it observes that the untested statements of JH were not the sole or decisive evidence for the outcome of the case against the applicant (see, *Gossa v. Poland*, no. 47986/99, § 63, 9 January 2007; *Bielaj v. Poland*, no. 43643/04, § 62, 27 April 2010; and *Jakubczyk v. Poland*, no. 17354/04, §§ 48-49, 10 May 2011).

59. The trial court found that JH's statements related to the drug-trafficking charges against the applicant were confirmed by ample other evidence in the present case, in particular the depositions made by PK, KJ and GS during their questioning in the course of the investigation. It is true that those witnesses (co-accused) changed their testimony when they were heard at the trial. However, the trial court rejected their new evidence and explained why their change of testimony was not credible. The assessment of evidence and its credibility is in the domain of the domestic courts and the Court, which is far removed from the trial, should not gainsay their evaluation (see, *mutatis mutandis*, *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 154).

60. The Court of Appeal was confronted with the applicant's allegation that his conviction had been based on the uncorroborated statements of JH. However, it rejected those arguments save in respect of one minor factual detail concerning the sale of drugs by the applicant to PK which did not affect the safety of the applicant's conviction or of the sentence. The Court of Appeal stated that the depositions of JH were unambiguously confirmed by the evidence of PK and KJ.

61. Furthermore, the Court is satisfied that the domestic courts scrutinised JH's statements rigorously (see paragraphs 19, 22-24 and 28-29 above). They took into consideration various factors which were of relevance when it came to assessing their credibility, including the fact that JH had been a minor at the time of questioning, and the weight to be attached to those statements (see *Gossa*, § 62; *Bielaj*, § 61; *Jakubczyk v. Poland*, § 50 *in fine*, all cited above). The domestic courts also had regard to the report drawn up by the psychologist who had assisted during JH's questioning and concluded that her findings did not cast doubt on the credibility of JH's depositions (see paragraphs 8 and 21 above).

62. The Court further notes that at the trial and the appellate hearing the applicant limited himself to pleading not guilty and refrained from testifying. He did not question the reliability of JH's statements at the hearing and challenged only the reliance of the trial and the appellate courts on the untested evidence of this witness (compare and contrast, *Jakubczyk*, § 50, cited above).

63. Having regard to the foregoing, and viewing the fairness of the proceedings as a whole, the Court considers that the lack of opportunity to examine JH at the hearing did not, in the circumstances of the case, infringe the rights of the defence to such an extent that it constituted a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention. In reaching this conclusion due weight has been given to the above finding that JH's testimony was not decisive for the conviction of the applicant. The applicant's trial as a whole was thus not unfair.

64. Accordingly, there has been no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

Done in English, and notified in writing on 17 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge De Gaetano is annexed to this judgment.

D.T.B.
T.L.E.

SEPARATE OPINION OF JUDGE DE GAETANO

1. I voted with the majority in this case because I am satisfied that, taking the proceedings as a whole, there was no unfairness in breach of Article 6. The prosecution did all that was reasonable in the circumstances to trace JH so that he could give evidence *viva voce* at the trial. All the evidence was carefully examined both by the trial court and by the Court of Appeal. JH's statements made to the police were not the only evidence incriminating the applicant. More critically, the applicant did not seek to challenge JH's statements (§§ 20, 62).

2. However I would not have relied to the same extent as the judgment does on the Grand Chamber judgment of *Al-Khawaja and Tahery* (see §§ 53 *et seq.* of the instant case). The judgment in *Al-Khawaja and Tahery* seems to revolve to some extent around a very specific statutory definition of what is "hearsay evidence", a definition that has replaced the previous peculiar common-law definition (or definitions) (see, for example, the Privy Council decision in *Subramaniam v. The Public Prosecutor* [1956] WLR 965 at 970); and this seems to be so notwithstanding what is stated by the Grand Chamber at § 126. Even among common-law jurisdictions there is divergence as to what hearsay evidence exactly encompasses – compare and contrast s. 114(1) of the [English] Criminal Justice Act 2003 with s. 59(1) of the New South Wales Evidence Act 1995. Moreover the Grand Chamber also had before it a plethora of procedural safeguards (under the Police and Criminal Evidence Act 1984, the Criminal Justice Act 1988 and the Criminal Justice Act 2003 among others) to counterbalance the possible prejudice of hearsay evidence or evidence which cannot be directly tested in open court, which are not necessarily found in other jurisdictions. Finally, as was correctly hinted by the third-party intervenor in *Al-Khawaja and Tahery* (§ 114 of that judgment), the question of the admissibility or otherwise of hearsay evidence is not necessarily bound up with the principle of confrontation, which is what Art. 6(3)(d) is all about.

3. In the instant case it is not readily appreciated why JH's statements should be regarded as hearsay evidence, as suggested in § 53, instead of merely unsworn documentary evidence. While it is true that the admissibility of evidence is primarily a matter for regulation by national law and by the domestic courts (*Van Mechelen and Others v. The Netherlands* 23 April 1997, no. 21363/93, § 50; *Doorson v. The Netherlands* 26 March 1996, no. 20524/92, § 67), it is also true that well established procedural rules which in essence enshrine the minimum right guaranteed in Art. 6(3)(d) should not be lightly abandoned or, worse, whittled down to the point where that minimum right becomes illusory.