



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

FOURTH SECTION

**CASE OF BIEŁAJ v. POLAND**

*(Application no. 43643/04)*

JUDGMENT

STRASBOURG

27 April 2010

**FINAL**

*22/11/2010*

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



**In the case of** Biełaj v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 30 March 2010,

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

## PROCEDURE

1. The case originated in an application (no. 43643/04) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Jurij Biełaj (“the applicant”), on 24 November 2004.

2. The applicant was represented by Mr Z. Pikuliński, a lawyer practising in Lublin. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had not received a fair trial, in violation of Article 6 §§ 1 and 3 (d) of the Convention.

4. On 11 October 2006 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1965 and lives in Kyiv.

6. The applicant was arrested on 30 August 1992 on suspicion of having committed armed robbery at the market place in Lublin on 29 August 1992. On the same date he was heard as a suspect in the presence of an interpreter.

On 31 August 1992 a police officer issued a decision to institute an investigation into the circumstances of the case. On the same day the applicant was charged with robbery and informed of the charges against him in the presence of an interpreter.

7. On 9 September 1992 the applicant lodged an appeal, in Russian, against the decision to remand him in custody. It was translated into Polish and dismissed by the Lublin Regional Court on 15 September 1992.

8. On 14 September 1992 the applicant asked for “the opportunity to see a legal-aid lawyer”. On 5 October 1992 the public prosecutor informed him that there was no legal basis for granting legal aid to suspects of foreign citizenship. On 30 September 1992 the applicant requested, in Polish, to be released. His request was dismissed on 12 October 1992.

9. On an unspecified date during the investigation L.S., the victim of the offence, was questioned by the police. He submitted a detailed description of the applicant's conduct during the material events.

10. The applicant was questioned during the investigation. He denied all the charges against him. He explained that L.S. had given him money and requested him to buy alcohol. Later on, L.S. wanted his money back. The latter exchange was seen by witnesses who had wrongly interpreted it as proof that he had previously exerted pressure with use of violence on L.S. in order to get money from him.

11. On 2 November 1992 the prosecutor appointed an interpreter for the purposes of the final examination of the case file by the applicant. On the same date the applicant read the case file in the interpreter's presence. On 6 November 1992 the investigation was closed. On 25 November 1992 a bill of indictment against the applicant was transmitted to the Lublin Regional Court. The applicant was charged with armed robbery. On 21 January 1993 the bill of indictment was remitted to the prosecuting authorities, the court having requested that it be translated into Russian. On 26 January 1993 the bill of indictment together with its translation was again submitted to the court. On 28 January 1993 the presiding judge ordered that the bill of indictment in Polish and Russian be served on the applicant.

12. On 10 February 1993 the presiding judge fixed the date of the first hearing in the case and appointed a legal-aid lawyer for the applicant. The first hearing was held on 5 May 1993 in the presence of the applicant, his legal-aid lawyer and the interpreter. During that hearing the applicant stated as follows: “I have learned Polish by reading books and watching TV. I have good linguistic abilities. I also speak some German and some English”.

13. In May 1993, L. S., the victim of the offence, who was also a Ukrainian national, living at that time in Ukraine, declared in writing that “he [did] not request that the prosecution be continued and [did] not intend to appear before the court in order to testify against the applicant”.

14. On 28 May 1993 the court held a second hearing in the case, in the presence of the applicant, his legal-aid lawyer and the interpreter. The court read out the testimony given by L.S. during the investigation, heard oral evidence from two other eyewitnesses to the incident, W.K. and M.C., who had also informed the police of it, and from two police officers who had arrested the applicant.

15. By a judgment of 31 May 1993 the Regional Court in Lublin found the applicant guilty as charged and sentenced him to five years' imprisonment. The judgment was delivered in the presence of the applicant, his legal-aid lawyer and the interpreter.

16. Following an appeal submitted by the applicant's legal-aid lawyer, on 8 October 1993 the Lublin Court of Appeal held an appeal hearing in the presence of that lawyer. The court read out the written declaration of the victim, referred to above (see paragraph 13) and noted that the first-instance court had entirely failed to address it and to examine whether it could have been relevant for the finding of the applicant's guilt. It further noted that the victim's wife, who had seen the alleged robbery, had not been questioned. Moreover, her two friends had also been present at the scene of the offence. The court further noted that another ground for appeal, namely that the applicant had been refused legal aid at the pre-trial stage of the proceedings, was ill-founded, as the applicant had not shown how it had influenced the outcome of the proceedings.

The appellate court quashed the first-instance judgment and remitted the case for re-examination to the Lublin Regional Court.

17. By a decision of 14 December 1993 the Lublin Regional Court remitted the case to the Lublin District Prosecution Office. The prosecution was ordered to pursue an investigation in order to rectify the shortcomings of the investigation which had been conducted hitherto. In particular, the court ordered the prosecution to question the victim again, and to question the victim's wife and her two friends who were present *tempore criminis* at the market place. The court further ordered the prosecuting authorities to confront the victim and his wife with eyewitnesses W.K. and M.C. This decision was translated into Russian. On 30 December 1993 the prosecuting authorities' appeal against this decision was dismissed.

18. Subsequently, on 25 January and 29 April 1994 the applicant's detention was extended. On 8 June 1994 the applicant was released on bail. All the relevant decisions were translated into Russian.

19. On 18 October 1994 the prosecutor appointed an interpreter in order to translate into Russian all evidence collected during the investigation conducted in 1994 (the witnesses' testimonies and the decision to terminate the investigation). On 28 October 1994 a new bill of indictment was submitted to the Lublin Regional Court together with its Russian translation. The prosecuting authorities relied on the evidence given by the two eyewitnesses, by two police officers, and on the evidence given by L.S.

during the first round of the investigation. They further noted that they had tried several times to contact L.S. and his wife with a view to questioning them, to no avail.

20. On 27 June 1995 the Lublin Regional Court summoned the applicant, the victim and his wife to a hearing to be held before that court. All summons were sent through the intermediary of the Ministry of Justice, by way of international judicial assistance. At a hearing fixed for 23 October 1995 the applicant was present together with his legal-aid lawyer and the interpreter. The victim and his wife failed to attend the hearing. The court did not obtain any confirmation as to whether they had been properly summoned by the Ukrainian authorities. As both parties to the proceedings requested that the victim be heard before the court, it adjourned the hearing until 15 April 1996. The victim and his wife, though properly summoned, failed to attend that hearing. The court adjourned the hearing until 10 June 1996.

21. On that date, again faced with the absence of the victim and his wife, both parties to the proceedings requested that the victim and his wife be questioned by way of international judicial assistance by a court in Łuck in Ukraine. The Lublin Regional Court allowed their request, adjourned the hearing and requested the City Court in Łuck for assistance in obtaining the testimony of the victim and his wife. In its request the court also emphasised that the applicant and his legal-aid lawyer should be informed by the City Court in Łuck of the date when the victim and his wife would be questioned before that court. It further indicated the addresses of the applicant and his defence counsel for the purpose of sending them summons for questioning. The applicant did not contest the list of questions put to L.S. and did not indicate that any further questions should be asked in order to elucidate the circumstances of the case.

A list of questions to be put to the witnesses was appended to the request, which was subsequently translated into Russian and sent to the Ukrainian authorities through the Ministry of Justice.

22. On 20 February 1997 the victim testified before the City Court in Łuck. The record of the hearing indicates that the Ukrainian court had not summoned either the applicant or his legal-aid lawyer to that session. The victim upheld his initial statement, made during the investigation, that the applicant had robbed him (see paragraph 9 above). He further stated that he had withdrawn his previous incriminating statements (see paragraph 13 above) at the applicant's wife's request. He further clarified by way of explanation that "he did not want to ruin his relationship with the couple". The City Court in Łuck did not question other persons requested by the Lublin Regional Court. The testimony of the victim was later forwarded to the Polish authorities and translated into Polish.

23. On 18 November 1997 the Lublin Regional Court stayed the proceedings and requested the Ukrainian authorities to proceed with the

examination of the case. On 25 August 1998 the Ukrainian authorities refused to continue the prosecution. On 19 October 1999 the Lublin Regional Court resumed the proceedings.

24. The subsequent hearing was held on 23 February 2000 in the presence of the applicant, his legal-aid lawyer and the interpreter. The parties again requested that the victim be examined at the hearing. The court adjourned the hearing and decided to summon once again the victim and his wife. The witnesses, duly summoned, failed to attend the subsequent hearings, held on 9 May and 15 June 2000. W.K. attended the hearing on 9 May and was questioned.

On the latter date, the parties did not object to the victim's testimony being read out from the investigation file. The court closed the hearings, having regard to the fact that all attempts to obtain direct evidence from the victim and his wife before that court had failed.

25. By a judgment of 16 June 2000 the Lublin Regional Court found the applicant guilty as charged and sentenced him to three years' imprisonment and a fine.

The court established that on 29 June 1992 the applicant and the victim, who did not know each other, had been selling merchandise at the market-place in Lublin. The written grounds of the judgment, in so far as relevant, read as follows:

After trading hours had ended, when L.S. and the women who accompanied him were walking out of the market place, the accused came up and demanded that he give him PLZ 500,000. L. S. refused saying that he did not have that amount of money (L.S. testimony, pp. 15-17, 484-486). In reaction, the accused put a knife first to the victim's neck and then to his stomach and told him that he would beat up him and his wife up. As the accused was under the influence of alcohol and behaved in a vulgar and aggressive manner, his threats made L.S. fear for his and his wife's life. He gave PLZ 140,000 to him (testimony of L.S., page 16, of W.K., page 14, of M.C., page 13).

Later on that evening L.S. and his wife went to the train station and saw the accused there.

L.S. and a man named W. decided [then] to try to take the money from [the accused]. They approached him and started to talk to him. The discussion ended with [the accused's refusal] and a scuffle; [the accused] hit L.S. in the face. That incident was observed, from the very beginning, by M.C. and W.K. [also present at the train station] who decided to inform the police. After their intervention two uniformed police officers arrived. Seeing them, the accused started to run away. He was apprehended after a while. He behaved aggressively and tried to get away. The police officers handcuffed him and took him to the police station (testimony of W.K., p. 14, 182-183, 321; M. C., p.13, 184; J.S., p. 45, 157; A.M., pp. 44, 156).

The accused denied that he had committed the offence [...] He explained that [on the material date] after selling spare parts, he had been drinking alcohol at the market place with other traders (p. 19, 27-28 153-154, 374). He had met L.S. there and had had a quarrel with him; however, he had stated that they had not been involved in a scuffle and denied that he had threatened him at knifepoint; he had only insulted him

(pp. 27-28, 153-154, 185). He also stated that he had proposed that they had a drink to smooth things over (...) L.S. had not wanted to go for a drink but had given him money of his own free will for the purchase of alcohol. Some time later, at the train station, L.S. along with another man had demanded his money back, saying that if he refused things would turn bad for the accused (pp. 154, 541). This demand had so annoyed the accused that he had caught L.S.'s shirt and shaken him violently, but, as he stated, he had had no intention of getting into a fight. (p. 154). ...

The court refused to consider the explanations given by the accused as credible as they were incompatible with L.S.'s deposition made during the investigation. ... After the accused had been apprehended, L.S. had recognised him as the person who had attacked him and had identified some of the banknotes which he had had with him.

It is true that on 10 June 1993 L.S. made a written statement that all charges against the accused were erroneous and were caused by a succession of misunderstandings and that the accused had neither threatened the victim nor his wife, nor used a knife against L.S. (pp. 230). However, when questioned before the Łuck Court, that witness had convincingly explained the motives which had prompted him to make this declaration, saying that he had made it at the request of the accused's wife and his colleagues as he had not wanted to jeopardise his relationship with the couple (p. 486). On the same occasion he made a deposition which had fully confirmed his deposition made on 30 August 1992 (pp. 484-485, 540-541). [L.S.] admitted that the accused had threatened him and his wife and that he had been using some sort of instrument at that time, but did not remember whether it had indeed been a knife. He emphasised that he had given money to the applicant under threat.

The court considers that L.S.'s statements were credible and is of the view that his declaration of 10 June 1993 had been made as a result of pressure exerted on him by the family and friends of the accused. The testimony of that witness is clear, consistent and coherent. (...) It should be emphasised that before the incident L.S. had never met the accused. He did not therefore have any grounds on which to make a false accusation against the accused because he had held a grudge against him.

L.S. recognised the accused immediately after his apprehension by the police; he also identified some banknotes which the accused had on him as the same which the accused had previously taken from him. He tried to describe the material events in an objective manner, without over-dramatising or distorting them. It is also of relevance for the assessment of his credibility that the police were informed of the incident by objective by-standers.

The defence, in its final oral submissions to the court, disregarded these factors relating to L.S.'s credibility. The defence lawyer focused on the fact that L.S. had not been questioned by the trial court and on the procedural shortcoming committed by the Łuck Court in that it had failed to summon the applicant and his lawyer to the questioning before that court. Defence counsel stressed the level of education and post held by the accused which, in his view, indicated that he could not have committed the offence at issue.

The court went on to explain the grounds why it did not consider that the applicant's denial of having committed the offence was credible. It went on to say:

The court considers that it is of paramount importance that testimony given by the victim has been confirmed by depositions made by the eyewitnesses to the incident, M.C. and W.K. W.K. was standing at the market place just 1 – 1.5 metres away from the victim (p. 183) and he saw the incident clearly. He confirmed the fact that the accused had put a knife to the victim's throat and demanded money from him, threatening him with murder and that he would rape his wife. W.K. saw the victim give PLZ 140,000 to the accused (p. 14).

When W.K. was questioned at the hearing held at the previous trial (p. 182), he had stated categorically and unequivocally: "I did not have the slightest doubt as to who the perpetrator was and now, looking at the accused, I don't have any doubt that it was him who had committed the offence in the circumstances which I have described" (p. 182).

When that witness [W.K.] was heard again, at the hearing of 9 May 2000, he did not, due to the lapse of time, remember the exact details of the incident; however, he confirmed his earlier deposition.

Witness M.C. also confirmed the version of events given by the victim. Questioned immediately after the incident, he had stated that the accused had threatened the victim at knifepoint and with murdering him and raping his wife, and had demanded PLZ 500,000 from him. L.S. had given him PLZ 140,000 and Jurij Biełaj took the money (p. 13). When [that witness] was questioned at the hearing held on 28 May 1993, he had confirmed the veracity of his earlier deposition, even though he did not remember on that occasion whether it had been the accused who had subsequently been apprehended by the police at the train station (pp. 183-184).

When the trial in the present case was conducted again, attempts to serve the summons on that witness [M.C.] so that he could be questioned again failed.

It should be stressed that it was as a result of the intervention of M.C. and W.K. that the accused was apprehended by the police. Neither knew the accused or the victim before; hence they could not have had any reasons for falsely accusing him.

Neither the accused nor his lawyer made any concrete objections as to the veracity of the depositions made by these two witnesses.

The court concluded that the evidence in the case, seen as a whole, allowed the conclusion that the applicant was guilty as charged.

26. On 28 September 2000 the applicant's legal-aid lawyer lodged an appeal against this judgment. He submitted that the court had based its finding of guilt on testimony given by the victim L.S., despite the fact that he had never been heard by the Polish court and the Łuck court had failed to summon the applicant and his lawyer to the questioning. It had also failed to question L.S.'s wife. This rendered the conviction unsafe.

27. A hearing before the appellate court was held on 9 November 2000 in the presence of the applicant and his lawyer. The court upheld the first-instance judgment. It stressed, *inter alia*, that the Lublin Regional Court had expressly requested the Ukrainian authorities to summon them to that hearing (see paragraph 20 above). The first-instance court could not be

held responsible for the Ukrainian authorities' failure to summon the applicant and his lawyer for the questioning of witnesses before the Łuck City Court, as requested. Moreover, the Lublin Regional Court had afterwards summoned both L.S. and his wife to the hearings to be held on 9 May and 15 July 2000, to no avail. Furthermore, the applicant's lawyer had acquiesced to the prosecutor's request that the depositions of witnesses who had not been questioned during the trial be read out from the file.

28. On 10 January 2001 the applicant's legal-aid lawyer lodged a cassation appeal with the Supreme Court. It was argued that the hearing before the appellate court was unfair in that the applicant had not been assisted by an interpreter. He further repeated the arguments submitted in his appeal against the first-instance judgment.

The appeal itself, a subsequent order by which it was accepted for examination, and the prosecutor's response, were translated into Russian.

29. On 3 April 2003 the Supreme Court held the cassation hearing in the presence of the applicant's legal-aid lawyer. It quashed the judgment of 9 November 2000 and remitted the case for re-examination to that court. It observed that the absence of an interpreter at the hearing held on 9 November 2000 constituted a serious procedural shortcoming and limited the applicant's procedural rights. It further noted that the remaining arguments submitted by the applicant were merely a re-statement of the grounds of appeal which had already been examined by the appellate court.

30. On 17 July 2003 the Lublin Court of Appeal held a hearing in the case in the presence of the applicant, his legal-aid lawyer and an interpreter. On 24 July 2003 the court delivered its judgment in the presence of an interpreter. It upheld the first-instance judgment. The court stated that the failure of the Łuck City Court to comply with the terms of the international judicial assistance request could not, by itself, justify the discontinuation of the criminal proceedings against the applicant. Nor should it have prevented the Lublin Regional Court from reading out L.S.'s deposition before that court. The applicant had been aware of the questions to be put to L.S. before the Łuck City Court. He had not contested them and had not requested that they be supplemented by any other questions. Under Article 343 § 1 of the Code of Criminal Procedure, the parties had a right to participate in the taking of evidence carried out by a judge or court other than the one examining the merits of a case, but their participation was by no means mandatory. The first-instance court had repeatedly taken steps with a view to examining both L.S. and his wife in the applicant's presence, in conformity with the recommendations formulated by the Lublin Court of Appeal on 8 October 1993. However, as all these efforts had failed, that court was justified in considering that it had been ultimately impossible to have this evidence taken before that court in adversarial proceedings.

In so far as the applicant relied on lack of legal aid during the investigation held in 1992 and 1993, the Court of Appeal noted that it was

only after the 1998 Code had entered into force that a grant of legal aid to a foreign citizen became possible. In any event, after the entry into force of that Code the case-law of the Supreme Court had already affirmed that lack of legal aid at the pre-trial stage of proceedings could serve as a basis for quashing a judgment only when it had not been subsequently rectified by a grant of legal aid at the judicial stage of the proceedings.

31. On 25 November 2003 the applicant's defence counsel lodged a cassation appeal against this judgment, essentially reiterating his previous arguments.

32. On 23 September 2004 the Supreme Court held a hearing in the presence of the applicant's legal-aid lawyer. It pronounced its decision to dismiss the cassation appeal as manifestly ill-founded at an open court session. Subsequently, the judge rapporteur orally presented the main reasons justifying that decision.

## II. RELEVANT DOMESTIC LAW

33. Until 1 January 1998 the Code of Criminal Procedure of 1969 (“the 1969 Code”) governed the conduct of criminal proceedings. It was replaced by a code adopted in 1998 (“the 1998 Code”).

34. Under Article 6 of the Transitional Provisions to the 1998 Code, that Code was applicable to proceedings which had been instituted before its entry into force.

Article 4 § 1 of the 1969 Code provided:

“Judges shall rule on the basis of their conviction deriving from evidence obtained and founded on their free assessment of evidence [and they shall] draw on knowledge and life experience.”

Article 337 provided, in its relevant part:

“1. If a witness has without 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 on the ground of irremovable obstacles or if the president of the court has declined to summon him pursuant to Article 296 § 2 [because upon the lodging of the bill of indictment the prosecution has asked that the records of his testimony be read out at trial], 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, the records of evidence that a witness has given when heard as an accused may also be read out.”

Article 316 § 3 of the 1998 Code reads as follows:

“If there is a risk that the witness cannot be heard at the hearing, a party or the prosecutor or other body conducting proceedings may submit a request to have the witness heard by a court.”

35. Article 389 of the Code reads:

“§ 1. If the accused refuses to give his explanations to the court or if his explanations are manifestly different from his or her previous ones, or if he declares that he or she does not remember certain circumstances, the minutes of the explanations given previously during the investigation or at the trial stage in the same or another criminal case can be read out [by the court] in their relevant parts.

§ 2. After the minutes have been read out, the president shall request the accused to take a position in respect of their content and the contradictions between them and his or her later explanations.”

36. Article 391 of the 1998 Code provides 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 [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 [...] the records of evidence that a witness has given when heard as an accused may also be read out.”

37. Article 393 of the Code provides that the following documents can be read out at a trial: minutes of an on-the-spot examination and post-mortem, search and retaining of objects for evidentiary purposes; opinions given by experts and institutions, criminal records and all official documents submitted to the file during the investigation and trial. Notes concerning measures in respect of which official minutes should have been prepared cannot be so read out. A request that a criminal offence has been committed can be read out; however, it can serve only as proof of who submitted this request, when and in respect of what offence.

38. Article 585 of the Code governs the provision of international judicial assistance. It provides, in so far as relevant:

“The measures necessary in criminal proceedings may be conducted by way of judicial assistance, particularly the following:

1) service of documents on persons abroad or on agencies having their headquarters abroad,

2) taking depositions from persons as accused, witnesses, or experts ...”

39. According to Article 587:

“The official records of inspections, examinations of persons as accused persons, witnesses or experts, or records of other evidentiary measures prepared upon a request from a Polish court or State prosecutor, by the courts or State prosecutors of foreign

countries or by agencies acting under their supervision, may be read aloud at the hearing according to the principles prescribed in Articles 389, 391 and 393. This may be done provided that the manner of carrying these measures does not conflict with the principles of the legal order of the Republic of Poland.”

### *Cassation proceedings*

40. Under the 1998 Code a party to criminal proceedings can lodge a cassation appeal with the Supreme Court against a final judgment of the appellate court which has terminated the proceedings. The cassation appeal has to be drafted and signed by a lawyer.

41. A cassation appeal can be lodged only on the grounds referred to in Article 439 of the Code. These grounds include certain procedural shortcomings which justify the quashing of a first-instance decision, regardless of whether they are invoked by the party challenging such a decision (for example, wrong composition of the court, lack of legal assistance in cases where such assistance was compulsory, violation of the rules governing jurisdiction of criminal courts, certain breaches of defence rights). A cassation appeal can also be lodged on the ground of a flagrant breach of law if such a breach negatively affected the judicial decision under appeal.

42. Article 530 of the Code provides that the court which gave the decision appealed against is competent to decide whether the formal requirements for a cassation appeal are satisfied, and to refuse to accept the appeal if this is not the case. If the appeal is admissible, it is forwarded to the Supreme Court.

43. Pursuant to Article 535 of the Code, as amended on 20 July 2000 to take effect from 1 September 2000, the Supreme Court shall consider a cassation appeal against a judgment at a hearing. However, it is open to the Supreme Court to dismiss such an appeal at a session held *in camera* if it considers that it is manifestly ill-founded.

## THE LAW

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

44. The applicant complained that his trial had been unfair in that he had been unable to examine two witnesses whose statements had served as the basis for his conviction. Given that the requirements of paragraph 3 (d) represent specific aspects of the right to a fair hearing guaranteed by Article 6 § 1, the Court will examine the applicant's complaints in the light

of the two texts taken in combination (see, among many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I, pp. 31-32, § 62; *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 49; *W.S. v. Poland*, no. 21508/02, § 39, 19 June 2007). The relevant parts of Article 6 §§ 1 and 3 (d) provide 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**

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

#### **B. The parties' submissions**

46. The Government contested the applicant's argument. They submitted that the Lublin Regional Court, during the second round of judicial proceedings, had made several attempts to hear the victim and his wife in the courtroom in the presence of the applicant and his lawyer. For that purpose, international summonses had been sent by the court, through the Ministry of Justice. As these attempts had proved unsuccessful, at a hearing held on 10 June 1996 both parties to the proceedings had expressed their consent to have the victim and his wife questioned by way of international judicial assistance (see paragraph 21 above). The Lublin Regional Court had prepared a relevant request, in which it clearly indicated that both the applicant and his lawyer should be summoned for questioning before a Ukrainian court. The applicant's and his lawyer's addresses had been included in that request. In addition, the request also contained a list of questions to be put to the witnesses. It was open to the applicant and his lawyer to add further questions to that list.

47. Subsequently the Ukrainian court charged with questioning the witnesses had failed to summon the applicant and his lawyer for the hearing at which it questioned the victim, L.S. The Polish authorities could not be held responsible for the failure of the Łuck District Court to comply with the terms of the request made by the Lublin Regional Court. While it was true that the applicant had not been able to examine the victim of the alleged offence before the court dealing with the merits of the case, this procedural shortcoming could not give rise to the liability of the Polish State under the Convention.

48. The Government further argued that the Lublin Regional Court had based the applicant's conviction on various pieces of evidence, including the testimony of two eyewitnesses, W.K. and M.C. Both those witnesses had been questioned in the applicant's and his lawyer's presence. The victim's testimony had therefore not been the only evidence on which the court had relied. The victim, when he had been heard before the Łuck City Court, had confirmed his description of the material events made during the pre-trial stage of the proceedings. The victim had further explained that the declaration which he had sent to the Lublin Regional Court in May 1993, to the effect that the applicant had not committed any offence against him (see paragraph 13 above) had not been true and that he had only made it because he had been asked to do so by the applicant's wife and friends and because he had not wished to jeopardise his relations with the applicant.

49. They further averred that the circumstances of the present case should be seen in the light of the Court's judgment in the case of *Gossa v. Poland* (no. 47986/99, 9 January 2007), where the Court had held that it was acceptable for national courts to have regard to the statements of a witness unavailable for questioning, in particular where they could consider those statements to be corroborated by other evidence before them (see paragraph 61 of that judgment). This had been exactly the situation which had obtained in the present case: despite all efforts of the Polish courts the victim could not be heard personally in the presence of the applicant and his lawyer.

50. The Government concluded that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention in the instant case.

51. The applicant submitted that under the applicable provisions of the Polish law of criminal procedure it had been open to the appellate court to question L.S. The applicant had expressly asked for that in his cassation appeal, dated 21 November 2003. The applicant averred that the Government's arguments were unfounded, in particular in the light of the Court's judgment in *Craxi v. Italy* (no. 1), no. 34896/97, 5 December 2002 where the Court stressed the importance of procedural safeguards concerning the use of evidence in the judicial stage of criminal proceedings.

52. The applicant submitted that while the courts had based his conviction also on statements made by eyewitnesses W.K. and M.C., they

had overlooked the fact that this evidence was unreliable, in particular in so far as the statements concerned the alleged use of a knife against the victim. Moreover, given that the Ukrainian authorities had refused to conduct a prosecution against the applicant, finding no grounds on which to do so, his criminal conviction could not be considered safe.

### **C. The Court's assessment**

#### *1. Applicable principles*

53. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others*, cited above, p. 711, § 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67).

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

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

*Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

56. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court reiterates that paragraph 1 of Article 6, taken together with paragraph 3, requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII; and *W.S. v. Poland*, no. 21508/02, § 61, 19 June 2007). However, *impossibilium nulla est obligatio*; provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution, the appropriateness of which it is not for the European Court to determine (see, in particular, *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005; *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005; and *Makuszewski v. Poland*, no. 35556/05, § 40, 13 January 2009; *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 28).

Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should, however, be treated with extreme care (see *Visser v. the Netherlands*, no. 26668/95, § 44, 14 February 2002; and *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V).

## *2. Application of the above principles to the facts of the case*

57. In the present case the Lublin Regional Court convicted the applicant of the armed robbery of L.S. committed on 29 August 1992 in Lublin. It is not in dispute that L.S., the victim of the offence, was questioned by the police during the investigation and made an incriminating statement describing the applicant's conduct. Nor is it in dispute that subsequently, in May 1993, L.S. declared in writing that he did not intend to appear before the court in order to testify against the applicant. The Court cannot but note that the victim made it clear early on in the proceedings that he did not wish to be questioned again.

The Lublin Regional Court, when subsequently convicting the applicant by a judgment of 31 May 1993, relied, *inter alia*, on the deposition made by the victim during the investigation. However, this judgment was later quashed by the appellate court, *inter alia* on the ground that the applicant had not had an opportunity to question that witness before the first-instance court. Subsequently, the investigation was conducted again by the prosecuting authorities, which noted, in the second bill of indictment submitted to the Lublin Regional Court on 28 October 1994, that the summons to testify, repeatedly sent to the victim and his wife, had proved unsuccessful (see paragraph 20 above).

58. During the judicial proceedings which were afterwards conducted anew, the Lublin Regional Court summoned the victim and his wife to testify; however, they again failed to comply with the summonses on two occasions (see paragraph 20 above). On 10 June 1996 that court, having regard to that failure, requested, by way of international judicial assistance, that they be summoned and questioned by the court in Łuck where they lived. In that request the court expressly asked for the applicant and his lawyer to be informed and summoned to a relevant session to be held before the Łuck court. However, the Łuck court ultimately failed to inform the applicant and his lawyer about the hearing. It questioned the victim, but in the applicant's and his lawyer's absence.

59. The Court agrees that it would have been preferable for the victim and his wife to have been heard in the applicant's and his lawyer's presence. However, it notes that they persistently failed to comply with the summonses, both during the investigation stage and during the judicial proceedings before the Polish courts. It has not been shown or argued that the summonses had not been properly served on them.

The Court considers that, in view of the repeated but unsuccessful efforts to secure their presence before the Lublin Regional Court, that court cannot be criticised for its subsequent decision to have recourse to the assistance of the court in Łuck where the victim lived. The Regional Court prepared a list of questions to be put to L.S. and his wife to be questioned before the Ukrainian court. The applicant was aware of these questions and did not contest them. It was open to him to request the Regional Court to add further questions to that list but he did not avail himself of that opportunity.

The Court further observes that even after the Lublin Court of Appeal had obtained L.S. and his wife's depositions made before the Łuck court, it made two further unsuccessful attempts to secure the latter's presence at hearings which were held on 9 May and 15 June 2000. The Court is therefore satisfied that the domestic courts made every reasonable effort to obtain their attendance at the trial (compare and contrast, *Pello v. Estonia*, no. 11423/03, § 34, 12 April 2007; *Trofimov v. Russia*, no. 1111/02, § 35-36, 4 December 2008).

60. Moreover, the Court notes the Government's argument that at a hearing held on 10 June 1996 the applicant gave his consent to the questioning of L.S.'s and his wife by way of international judicial assistance. It observes that subsequently it was open to the applicant to object to the reading out of L.S.'s statements, obtained in that way, at the hearing. However, at the hearing of 15 June 2000 neither the applicant nor his lawyer objected to L.S.'s testimony, including the testimony obtained by the Łuck District Court, being read out in the courtroom.

61. The Court further notes that the Lublin Regional Court when assessing L.S.'s testimony took into consideration factors which were of relevance when it came to assessing his credibility, the veracity of his

depositions and the weight to be given to them. The Regional Court noted that L.S. had not known the applicant before the incident and that therefore he could not have had any personal motives to make a false accusation against him. In this connection, the Court also observes that the domestic court had regard to the declaration made in May 1993 by which L.S. had requested that the prosecution be discontinued. The Lublin Regional Court assessed the motives which could have prompted L.S. to make such a declaration. It was of the view that this declaration had been made under pressure from the applicant's family and that it could not therefore be considered as rendering his later submissions as to the applicant's guilt unreliable.

Furthermore, the courts had regard to the fact that both the deposition made by L.S. during the investigation and his testimony before the Łuck City Court were consistent and pointed to the applicant's guilt.

The Court is therefore satisfied that the domestic courts assessed L.S.'s statements with the particular care required in the circumstances of the case (*Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 62, ECHR 2001-X; Visser, cited above, § 44).

62. In any event, the Court notes that the statements made by the victim, L.S., had not been the only evidence of the offence concerned (compare and contrast, *Demski v. Poland*, no. 22695/03, § 41, 4 November 2008). Other witnesses were heard by the courts. The Court considers that it is of cardinal importance for the assessment of the case that the applicant's conviction was not based solely or to a decisive degree on the statements of L.S. and his wife who ultimately proved to be unavailable.

The Court attaches particular significance to the fact that two eyewitnesses to the incident, W.K. and M.C., were also questioned and that the applicant was able to challenge their testimony during the judicial proceedings. They had both witnessed the incident at first hand and described it in detail in their depositions made both during the investigations and later in their testimony before the courts. W. K., a witness for the prosecution, was questioned at the first trial, and also later during the retrial, and the applicant was able to challenge his testimony. Furthermore, when the case was later re-heard by the Lublin Regional Court, that court made proper use of the incriminating testimony given previously by M.C. at the first hearing. The Regional Court noted that while M.C. was not available for the renewed questioning, the evidence the eyewitnesses had given was consistent and clearly pointed to the applicant's guilt. The court also had at its disposal the testimony of two police officers to whom these witnesses had reported the incident on 29 August 1992.

63. Hence, the courts had regard to other and, as regards the two eyewitnesses, compelling evidence on which to base the applicant's conviction (see paragraph 25 above).

64. Having regard to the proceedings as a whole, the Court considers that the lack of opportunity to examine the victim and his wife at the hearing before the Lublin Regional Court did not, in the circumstances of the case and particular regard being had to the persistent, even though ultimately unsuccessful, efforts of the Polish courts to ensure that L.S. and his wife were heard, infringe the rights of the defence to such an extent that it constituted a breach of paragraphs 1 and 3 (d) of Article 6, taken together (see, *mutatis mutandis*, *Artner v. Austria*, cited above, pp. 10-11, §§ 22-24). The Court cannot, therefore, find that the applicant's trial as a whole was unfair.

65. There has therefore been no violation of this provision.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

66. Further, under Article 6 of the Convention, the applicant complained about the length of the criminal proceedings against him.

67. However, the Court observes that the proceedings ended on 23 September 2004. On 17 September 2004 the Act of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act") came into force. After the termination of the trial, the applicant could have, during the three years after the entry into force of that Act, brought a civil action under Article 417 of the Civil Code read together with section 16 of the above-mentioned Act (as to the effectiveness of the latter remedy if less than three years have elapsed between the date of the final decision and the entry into force of the 2004 Act, see *Krasuski v. Poland*, judgment of 14 June 2005, no. 61444/00, § 72, ECHR 2005-V (extracts), and *Ratajczyk v. Poland*; (dec.), 11215/02, 31 May 2005, *a contrario*). The applicant failed to avail himself of that compensatory remedy.

68. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

## III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (a) OF THE CONVENTION

69. The applicant further complained, invoking Article 6 § 3 (a) and (c) of the Convention, that he had been deprived of adequate facilities for the preparation of his defence in that he had neither obtained the assistance of a legal-aid lawyer during the investigation conducted in 1992 and 1993 nor an interpreter during the proceedings, and in particular during the hearing held on 9 November 2000 before the Lublin Court of Appeal.

70. The Court reiterates that Article 6 § 3 (c) may be relevant at the stage of the preliminary investigation in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. The manner in which Article 6 § 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, and *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, § 62).

71. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (*Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Dembukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.

72. The Grand Chamber has recently stressed that in order for the right to a fair trial to remain sufficiently practical and effective Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36291/02, § 55, 27 November 2008; *Plonka v. Poland*, no. 20310/02, § 35, 31 March 2009).

73. In the present case, in so far as the applicant complains that he did not obtain the assistance of a legal-aid lawyer during the investigation held in 1993, the Court notes that on 14 September 1992 the applicant asked to see a legal-aid lawyer. On 5 October 1992 the public prosecutor informed him that under the 1969 Code there was no legal basis for granting legal aid to suspects of foreign citizenship. On 26 January 1993 the investigation was terminated and the bill of indictment was submitted to the Lublin Regional Court. By a decision of 10 February 1993 that court appointed a legal-aid lawyer for the applicant for the purposes of the judicial stage of the proceedings and he was legally represented from then on.

Subsequently, on 31 May 1993 the Regional Court found the applicant guilty as charged and sentenced him to five years' imprisonment. Following the applicant's appeal, on 8 October 1993 the Lublin Court of Appeal quashed that judgment and remitted the case for re-examination by the first-instance court. On 14 December 1993 that court remitted the case to

the Lublin District Prosecution Office, finding serious procedural shortcomings in the investigation. However, that court noted that it had not been shown that the lack of legal aid had had any bearing on the outcome of the proceedings. The prosecuting authorities were ordered to rectify the perceived shortcomings and the investigation was conducted again.

In so far as the applicant complains about the absence of an interpreter during the hearing held on 9 November 2000 before the Lublin Court of Appeal, the Court notes that the Supreme Court subsequently allowed the applicant's appeal, in which he had raised this complaint and quashed the contested judgment. The hearing before the appellate court was held again on 17 July 2003, in the presence of the applicant, his lawyer and an interpreter. This procedural shortcoming, criticised by the Supreme Court, had thereby been rectified.

The Court is of the view that, as the judgments given following the investigation which had allegedly been unfair ceased to exist, the applicant cannot claim to be a victim of any violation of his defence rights (see *Stręciwilk v. Poland* (dec.). no. 32723/96, 19 September 2000). In any event, it has not been shown or argued that before the applicant had been granted assistance by a legal aid lawyer, he had made any admissions or statements which would have amounted to admission of guilt or otherwise irreversibly affected his defence rights and subsequently served as a basis of his criminal conviction, either when he was convicted for the first time, or, after that judgment had been quashed and the case was examined again by the Lublin Regional Court.

74. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4.

75. The applicant alleged that he did not enjoy the assistance of an interpreter during the proceedings against him.

The Government submitted that the applicant had declared early on that he understood Polish well. However, he had in any event been granted the assistance of an interpreter who assisted him at all stages of the proceedings.

The Court notes that the interpreter had been present when the applicant had been questioned as a suspect for the first time, when he was informed of the criminal charges against him and during all hearings before the first-instance court. All important documents had been translated into Russian, including two bills of indictment against him, all decisions against which an appeal had been available and records of testimonies of witnesses speaking Polish. It further notes that the applicant had stated that he had a good understanding of Polish. Moreover, in the judicial stage of the proceedings he was represented by a legal-aid lawyer. The Court is of the view that it cannot therefore be said that the applicant experienced any linguistic difficulty in following the course of the proceedings.

76. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4.

77. Finally, the applicant alleged that the Supreme Court's dismissal of his cassation appeal without providing grounds for this decision constituted a breach of Article 6 of the Convention.

78. The Government submitted that the fairness of proceedings held by the Supreme Court in the context of a cassation appeal had been examined by the Court in the case of *Walczak v. Poland* (dec.), no. 77395/01, 7 May 2002. The Court had declared the case inadmissible, finding that the proceedings complied with the requirements of Article 6 of the Convention. In the present case no circumstances had obtained which would justify a different conclusion. Moreover, in the present case, after the hearing had been held by the Supreme Court on 23 September 2004, the presiding judge had publicly pronounced its decision dismissing the applicant's cassation appeal and the judge rapporteur orally explained the reasons of that decision, in the presence of the applicant's lawyer. Hence, the applicant had been duly informed of the reasons why his appeal had not been successful.

79. The applicant submitted that the proceedings before the Supreme Court had been unfair.

80. The Court notes that the applicant's cassation appeal was examined on its merits by a panel composed of three judges of the Supreme Court during a public hearing. The hearing was attended by the applicant's lawyer who was requested to address the court and he availed himself of this opportunity. After the court had given its judgment, the judge rapporteur gave an oral explanation of the most important grounds of the decision for dismissing the applicant's appeal.

In these circumstances, and having regard also to the fact that the Court has already examined similar complaints concerning the examination of cassation appeals in criminal proceedings by the Supreme Court and declared them manifestly ill-founded (*Walczak v. Poland*, referred to above, and *Makuszewski v. Poland*, no. 35556/05, § 53, 13 January 2009; *mutatis mutandis*), the Court is of the view that the proceedings were not tainted with any procedural shortcomings which would have rendered them unfair.

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

## FOR THESE REASONS, THE COURT

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

2. *Holds* by four votes to three 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 27 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Nicolas Bratza  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Mijović, David Thór Björgvinsson and Hirvelä is annexed to this judgment.

N.B.  
F.A.

JOINT PARTLY DISSENTING OPINION OF JUDGES  
MIJOVIĆ, DAVID THÓR BJÖRGVINSSON AND HIRVELÄ

1. We agree with the majority's finding that the complaint as to the length of the proceedings must be rejected for non-exhaustion of domestic remedies (see paragraphs 66 – 68 of the judgment). We also agree that the complaint under Article 6 §§ 1 and 3 (a), as to the alleged lack of facilities for the preparation of the applicant's defence, is manifestly ill-founded (see paragraphs 69 – 81 of the judgment).

2. However, we disagree with the majority in finding that there has been no violation of Article 6 §§ 1 and 3 (d) in spite of the fact that the applicant was unable to examine two witnesses whose statements, among other evidence, had served as the basis for his conviction.

3. The majority's finding of no violation of Article 6 §§ 1 and 3 (d) rests mainly on two grounds: firstly, that the applicant's conviction was not based solely or to a decisive degree on the statements of L.S. (the victim) and his wife and, secondly, that there were other eyewitnesses to the incident and that the applicant was able to challenge their testimony during the judicial proceedings (see § 62 of the judgment). According to the majority view, the domestic courts also assessed L.S.'s statements with the particular care required in the circumstances of the case (see paragraph 61 of the judgment).

4. The Court has repeatedly stated that, as a matter of principle, all the evidence which serves as a basis for an accused person's conviction must be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. Furthermore, as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, cited above, p. 711, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

5. We shall now examine more closely the reasons advanced by the majority.

6. First, the finding that the conviction was not “based solely or to a decisive degree” on the impugned statements. By way of a preliminary remark we respectfully submit that this cannot serve as the only and final test in the present case, nor, indeed, in similar cases.

7. It is true that in many cases the Court has found a violation where statements, which the accused had not had an opportunity to challenge in the domestic court, have been the sole or decisive evidence (see for example *Van Mechelen and Others*, cited above, § 63; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*,

no. 33354/96, § 40, 27 February 2001). However, it would not be correct to draw from these cases the conclusion that it is only where the impugned evidence is the sole or decisive evidence that there will be a breach of Article 6 §§ 1 and 3 (d). This understanding is confirmed in other cases where the Court has found a breach although the evidence was not considered the sole evidence or the decisive evidence. Thus, in *Lüdi v. Switzerland* (cited above, § 47) the Court emphasised that even though it was not the sole evidence the impugned statements “played a part in establishing the facts which led to the conviction” and on that account found a breach of Article 6 §§ 1 and 3 (d).

8. On the basis of the foregoing we believe that it is sufficient to show that the impugned evidence (statements) played an important part in establishing the facts which led to the applicant's conviction. Assessing the circumstances of the present case in the light of that consideration, the following factors are relevant:

a. First, we refer to the extracts from the judgment of the Lublin Regional Court of 16 June 2000 cited in paragraph 25 of the judgment. The first paragraph of the extracts is only based on L.S.'s testimony, as can be seen from the references thereto. The second would also seem to be based on L.S.'s testimony although it is not referred to directly.

b. More importantly, as transpires from paragraph 13 of the judgment, L.S. declared in writing, in May 1993, that “he [did] not request that the prosecution be continued and [did] not intend to appear before the court in order to testify against the applicant”, as all charges, as explained further in paragraph 6 of the extracts from the Lublin Regional Court's judgment, against the accused “were erroneous and were caused by a succession of misunderstandings and that the accused had neither threatened the victim nor his wife, nor used a knife against ...”. However, as stated in the same paragraph the Lublin Regional Court held that, when questioned before the Łuck City Court, L.S. had “convincingly explained the motives which had prompted him to make this declaration, saying that he had made it at the request of the accused's wife and his colleagues as he had not wanted to jeopardise his relationship with the couple ...”. On the same occasion, as further stated, he made a deposition which fully confirmed his deposition made on 30 August 1992 ... and admitted “that the accused had threatened him and his wife and that he had been using some sort of instrument at that time, but did not remember whether it had indeed been a knife. He emphasised that he had given money to the applicant under threat.”

We believe that this latter point is very important. After the original withdrawal (see paragraph 13 of the judgment) it would have been very difficult, if not impossible, for the prosecution to continue the criminal proceedings against the applicant on the basis of the witness statements alone. Thus, we are of the opinion that L.S.'s decision to retract before the Łuck City Court his earlier withdrawal was indeed decisive for the

continuation of the criminal case against the applicant, and ultimately for his conviction. However, the applicant did not have the opportunity to examine L.S. and his wife in court.

Thus, there is no doubt that the statements made by L.S. and his wife both as regards his explanations for the earlier withdrawal and his account of the facts played a significant role, if not a decisive one, in establishing the facts of the case and ultimately in convicting the applicant.

9. Secondly, as noted above the majority takes account of the fact that there were two other eyewitnesses to the incident and that the applicant was able to challenge their testimony during the judicial proceedings (see paragraph 62 of the judgment). However, as can be seen from the same paragraph the applicant only had the opportunity to question witness W.K. before the Regional Court since witness M.C. was unavailable. Thus, the only evidence used as a basis for the applicant's conviction and which he had an opportunity to challenge before the Lublin Regional Court were the statements made by witness W.K.

10. In paragraph 59 of its judgment the majority emphasises that the Lublin Regional Court made repeated but unsuccessful efforts to secure the presence of L.S. and his wife. For that reason that court could not be criticised for its subsequent decision to have recourse to the assistance of the court in Łuck where the victim lived. The majority notes that the Lublin Regional Court had prepared a list of questions to be put to L.S. and his wife for the purposes of their questioning before the Ukrainian court. Furthermore, the applicant was aware of these questions and did not contest them. The majority further observes that it had also been open to the applicant to request the Lublin Regional Court to add further questions to that list but he did not avail himself of that opportunity. We submit, without casting any doubt on the seriousness of the attempts made by the Lublin Regional Court to overcome the procedural difficulties stemming from L.S. and his wife's failure to appear before it, that the steps taken by that court ultimately turned out to be partly unsuccessful and partly inadequate and they cannot as such compensate for the applicant's real lack of opportunity to question L.S. and his wife before the Lublin Regional Court.

11. All in all, even though the statements of L.S. and his wife were not the only evidence in the case they were, in our view, obviously the most important piece of evidence, if not the decisive evidence. We therefore find that the lack of opportunity to examine them at the hearing before the Lublin Regional Court did in fact infringe the rights of the defence to the extent that there has been a violation of Article 6 §§ 1 and 3 (d).