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

THIRD SECTION

DECISION

Application no. 46836/18
Robert Henri ZEGERIUS
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 14 May 2024 as a Committee composed of:

Peeter Roosma*, President*,
Jolien Schukking,
Diana Kovatcheva*, judges*,
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 46836/18) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 27 September 2018 by Mr Robert Henri Zegerius ("the applicant"), a Dutch national born in 1958, who was detained in Veenhuizen at that time and was represented by Mr J. Boksem, a lawyer practising in Leeuwarden;

the decision to give notice of the complaint concerning Article 6 §§ 1 and 3 (d) of the Convention to the Dutch Government of the Kingdom of the Netherlands ("the Government"), represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The issue in this case is the inability of the applicant to effectively cross-examine a witness whose statement had been used in evidence in criminal proceedings against him.

2. The applicant was prosecuted together with four co-suspects for his involvement in a burglary preceded by violence and threat of violence and in attempted money laundering. At the time of the crime the applicant was detained. Witness N. (a fellow detainee of the applicant) made an

incriminating statement to the police about what the applicant had told him of his involvement in the burglary.

3. Witness N. was questioned during the proceedings at first instance by the investigating judge, in the presence of the applicant's counsel who was given the opportunity to cross-examine N., but he refused to answer any questions claiming that his girlfriend had been threatened.

4. The Regional Court established the following facts. The applicant was married to the late daughter of an elderly couple living in Amstelveen. On 18 February 2014, the couple was the victim of a burglary by a number of men. The couple was tied up in their house while the men took goods, including jewellery and art items, to an estimated value of around 800,000 euros (EUR). The couple then received letters with the message that the goods could be bought back for EUR 300,000. The court convicted the applicant of complicity in the offences charged and sentenced him to four years' imprisonment on 17 April 2015. The conviction was based on 16 items of evidence, including transcripts of tapped telephone conversations and covertly recorded conversations and statements made by a co-defendant. The court did not use the statement made by N. as evidence.

5. On appeal, the applicant did not submit a request to question N. but he indicated that he would endorse any request by co-defendants to examine witnesses. A co-defendant made a request to cross-examine N. which was granted by the Court of Appeal.

6. The investigating judge requested Interpol to start an investigation into the whereabouts of N. who had no registered address in the Netherlands and who had stated that after his release from detention he would return to Poland. No response was received from Interpol. The investigating judge also submitted a formal request to the Polish authorities for legal assistance to have N. heard as a witness, either via video link or in person. The Polish authorities reported that the execution of the request for legal assistance had proven impossible because the witness had not lived at the address previously known to the authorities for two years and that his current whereabouts were unknown. They added that it might be possible that N. was residing with his mother in Italy, however the Polish authorities did not have an address for him or his mother in Italy.

7. At a hearing held on 29 September 2016 at which the applicant's counsel was present, the Court of Appeal noted that N., while summoned as a witness, had not appeared in court. The court also took note of the efforts made by the investigating judge and asked the counsel of the co-defendant who had submitted the request for examining N. whether he wanted to maintain his request. The counsel responded that he would leave this decision to the court's discretion. The court held that as N. had not resided in the Netherlands since 6 February 2014, that no current address was known and that the Polish authorities had not been able to locate him either, it was no

longer likely that it would be possible to summon him as a witness within a reasonable time.

8. By judgment of 26 October 2016 the Court of Appeal, holding that he had been instrumental in the planning and organisation, found the applicant guilty as a co-perpetrator of a burglary preceded by violence and threat of violence. They acquitted him of the lesser offence of complicity in that crime and of complicity in attempted money laundering, and sentenced him to four years' imprisonment. The court based its conviction on 42 items of evidence, including tapped telephone conversations and covertly recorded conversations, forensic evidence collected at the crime scene, testimonies of the victims, statements of the co-suspects and the applicant and witnesses' statements. It also relied on the statement made by N. to the police. It considered that the tapped telephone conversations and covertly recorded conversations constituted "strong indications" of the applicant's involvement in this crime and that confirmation of these indications was found in two witness statements, including that of N.

9. On 3 April 2018 the Supreme Court dismissed the applicant's appeal on points of law, confirming the judgment of the Court of Appeal.

10. Relying on Article 6 of the Convention, the applicant complained that his trial was unfair, arguing that he had been unable to effectively cross-examine N., whose incriminating statement had been used by Court of Appeal as decisive evidence for his conviction, while there had been no counterbalancing factors to compensate the handicap of the defence.

THE COURT'S ASSESSMENT

Alleged violation of Article 6 of the Convention

11. The general principles concerning the right to examine witnesses have been summarised in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 118-47, ECHR 2011), *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-09, ECHR 2015), and *Keskin v. the Netherlands* (no. 2205/16, §§ 38-51, 19 January 2021).

12. In the present case the request to cross-examine the witness was granted by the Court of Appeal, however the witness could not be located. The Court of Appeal admitted in evidence the witness statement made to the police. To examine whether the proceedings considered as a whole were compatible with Article 6, the case-law provides a three-step approach, as set out below.

1. Whether there was a good reason for the non-attendance of the witness at trial

13. As to whether the Court of Appeal did everything reasonable to secure the presence of N. (see *Schatschaschwili,* cited above, § 119), the Court notes

that a request by the applicant's co-defendant to cross-examine N. was granted by the appeal court. It further notes that despite a request for legal assistance to the Polish authorities, it had not been possible to locate him. When it became clear that N. could not be examined as a witness within a reasonable time, the Court of Appeal decided to no longer summon him. Although the applicant could have objected that decision, he did not do so. It follows from the casefile that in his pleadings before the Court of Appeal the applicant did not raise the issue that he had not been able to cross-examine N. nor that the court should have made more effort to locate N. and secure his presence at trial.

14. The Court considers that the decision to not pursue the possibility of the witness being in Italy with his mother because of a lack of concrete information is in line with the principle *impossibilium nulla est obligatio,* and does not lead to the failing of the domestic authorities in their positive obligation to make every effort that could reasonably be expected to them to guarantee the defence the opportunity to question N. (compare *Tseber v. the Czech Republic*, no. 46203/08, §§ 50-51, 22 November 2012).

15. Accordingly, there was a good reason, from the trial court's perspective, for the non-attendance of N. at the trial and as a result for admitting as evidence the statement he had made to the police at the pre-trial stage.

2. Whether the evidence of the absent witnesses was "sole or decisive"

16. The statement made by N. was not the sole evidence for the applicant's conviction. The Court further notes that the Court of Appeal explicitly held that the statement of N. did not constitute decisive evidence for its guilty verdict. The Court of Appeal elaborated on that finding by holding that the tapped telephone conversations and covertly recorded conversations were the starting point of the determination of the applicant's guilt and that it found confirmation of that guilt in the statement made by the applicant's co-defendant as well as the statement made by N. The court held that N.'s statement was sufficiently anchored in the statement of the co-defendant and in other items of evidence used and was not of decisive importance for the opinion of the court that a substantiation could be made.

17. The above finding of the appellate court is neither arbitrary nor manifestly unreasonable. The Court therefore accepts the Court of Appeal's finding that the applicant's conviction was not based solely nor decisively on the statement of N. Nevertheless, noting that his statement was not of insignificant weight, the Court will now determine whether there were

sufficient factors counterbalancing any handicaps that the admission of that evidence might have entailed for the defence.

3. Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

18. With respect to the approach to the untested evidence, the presence of the other incriminating evidence and procedural measures taken, the Court notes that the Court of Appeal assessed the statement of N. thoroughly and cautiously. Regarding its credibility, the court noted that N. had nothing to do with this case and had no personal interest nor ulterior motive in making this statement. N. had made his statement before any arrests were made in this case, hence he could have had no knowledge of the case file at the moment his statement was made. Nor was there any evidence to suggest that he was in contact with any of the co-defendants. His statement contained details that were later confirmed in the investigation. These details corresponded in full with the statement made by the co-defendant and the covertly recorded conversations.

19. The Court of Appeal was satisfied, after careful examination, that the statements of the co-defendant were reliable. It then described what could be inferred from this co-defendant's statements about the applicant's role in the burglary.

20. The applicant was afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses. Moreover, the applicant knew the identity of N. and thus could investigate any motives he might have had for lying, and could contest his credibility effectively albeit to a lesser extent than in a direct confrontation (*ibid.*, § 131). However, during the proceedings at the Court of Appeal the applicant did not raise any arguments with regard to the credibility of N.'s statement.

21. In making an assessment of the overall fairness of the trial, having regard to the foregoing considerations – the weight of N.'s statement in the applicant's conviction, the Court of Appeal's approach to assessing that statement, the availability and strength of further incriminating evidence – the Court finds that the counterbalancing factors were sufficient in compensating the handicaps under which the defence laboured (see *N.K. v. Germany*, no. 59549/12, § 62, 26 July 2018).

22. In these circumstances, the Court finds that it cannot be said that the criminal proceedings against the applicant, when considered as a whole, were rendered unfair by the admission in evidence of the statement of N.

23. In the light of the foregoing the Court concludes that the applicant's complaint is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 6 June 2024.

Olga Chernishova Deputy Registrar	Peeter Roosma President