CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 73047/01
by Monika HAAS
against Germany

The European Court of Human Rights (Third Section), sitting on 17 November 2005 as a Chamber composed of

Mr B.M. ZUPANČIČ, *President*,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mrs R. JAEGER, *judges*,

and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 23 July 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant, Monika Haas, is a German national, who was born in 1948 and lives in Frankfurt/Main, Germany. She is represented before the Court by Mr Gerhard Strate and Mr Klaus-Ulrich Ventzke, two lawyers practising in Hamburg.

The respondent Government are represented by Mr K. Stoltenberg, *Ministerialdirigent,* and, subsequently, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

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

A. The circumstances of the case

1. Background to the case

In the early seventies, the Red Army Fraction (*Rote Armee Fraktion* - "RAF"), a left-wing extremist terrorist movement, was founded in Germany. Its members intended to destroy the public order of the Federal Republic of Germany by terrorist action, in particular murder, attacks with explosives and the taking of hostages, in order to bring about a radical change of German society. Following a series of attacks in 1972, several "RAF" members were arrested. Three founding members, Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe, were sentenced to life imprisonment in April 1977.

As early as 1975, the "RAF" had launched terrorist attacks for the liberation of detained members. In April 1975, hostages were taken at the German Embassy in Stockholm. In April 1977, the Federal Public Prosecutor (*Generalbundesanwalt*) Siegfried Buback was shot. In July 1977, an attempt to kidnap a member of the management of the *Dresdener Bank*, Jürgen Ponto, failed and he was shot. In August 1977, "RAF" members tried to attack the building of the Federal Public Prosecutor's Office.

On 5 September 1977 members of the "RAF" kidnapped Dr Hanns-Martin Schleyer, a German industrialist and President of the German Employers' Association, in Cologne; his driver and three policemen were killed immediately.

On 13 October 1977 four members of a "Special Command" ("PFLP-SC") of the Popular Front for the Liberation of Palestine ("PFLP") with headquarters first in Damascus and later in Lebanon, hijacked the Lufthansa aircraft *Landshut* on a flight from Palma de Mallorca to Frankfurt/Main. The hijackers threatened to kill their 82 hostages and to blow up the aircraft if their demands for the liberation of eleven "RAF" members detained in Germany and two "PFLP" members imprisoned in Turkey were not met. They forced the pilot to change destination and the plane subsequently landed in Rome, Cyprus, Bahrain, Dubai and Aden, where the leader of the hijackers shot the captain of the aircraft for alleged disobedience. The aircraft then left for Mogadishu, Somalia, on 17 October 1977. On 18 October 1977, shortly after midnight, the hostages were liberated by members of a special unit ("GSG 9") of the German Federal Border Police. Three of the hijackers were killed and the fourth, a woman, was seriously injured. The terrorists shot at two members of the "GSG 9" and seriously injured them. Two hostages were injured by a hijacker. All remaining hostages, who had been subjected to continued threats to their lives throughout the kidnapping, survived.

Following the failure of the hijacking, Mr Schleyer was killed by "RAF" members. The three "RAF" founding members detained in Stuttgart-Stammheim prison committed suicide in the morning of 18 October 1977.

In April 1992 the "RAF" announced in a written declaration that they would suspend the attacks on representatives of the State and the economy.

In 1996 the surviving fourth hijacker was convicted of, *inter alia*, murder, the taking of hostages, kidnapping, attack on air traffic and attempted murder. She was sentenced to twelve years' imprisonment.

2. The criminal proceedings against the applicant

a. Investigation proceedings

On 20 March 1992, the applicant was arrested by the German police following an arrest warrant issued by the Investigating Judge of the Federal Court of Justice on that same day. She was suspected, in connection with the 1977 hijacking of the Lufthansa aircraft *Landshut,* of having acted as an accomplice to an attack on air traffic and the taking of hostages. Furthermore, she was suspected of having aided and abetted the kidnapping of Mr Schleyer. The applicant was taken into detention on remand. She was released on 5 May 1992, when the arrest warrant was quashed. Following further investigations, the applicant was again arrested on 7 November 1994.

In the criminal proceedings against her, the applicant was assisted by several defence counsel.

On 16 May 1995, the General Public Prosecutor at the Federal Court of Justice preferred the indictment against the applicant, charging her, in connection with the *Landshut* hijacking, of having acted as an accomplice of acts of kidnapping, attack on air traffic, extortion, murder and attempted murder, and, in connection with the kidnapping of Mr Schleyer, of having aided and abetted kidnapping, extortion and homicide.

b. Proceedings before the Frankfurt/Main Court of Appeal

On 16 November 1998, the Frankfurt/Main Court of Appeal, following numerous hearings between 9 May 1996 and 16 November 1998, convicted the applicant of having aided and abetted an attack on air traffic, the taking of hostages, extortionate kidnapping and attempted murder on two counts in connection with the *Landshut* hijacking. As regards the kidnapping of Mr Schleyer, the Court of Appeal found that the applicant's intent to aid and abet this offence had not been proved. She was sentenced to five years' imprisonment.

In its long and detailed decision, the Court of Appeal, having regard to the applicant's personal background, noted in particular that the applicant had sympathised with the "RAF" and had participated in shooting trainings

in one of the military training camps of the "PFLP" in Aden, South Yemen. The applicant had confirmed that she was known as "Amal" there, had married a leading "PFLP" member under Yemenite law and had lived there between 1976 and 1980, together with their son, born in 1967, and their daughter, born on 17 July 1977.

The Court of Appeal found that on 25 September 1977 two "RAF" members, witnesses Mr B. and Ms M., had taken a flight to Baghdad to meet members of the "PFLP-SC" in order to prepare the *Landshut* hijacking. They had accepted the offer of the "PFLP-SC" to support their terrorist activities for the liberation of "RAF" members by hijacking a German aircraft. The leader of the "PFLP-SC" had then instructed the applicant and Said S., a "PFLP" member, to bring the weapons and the explosives needed for the hijacking to Palma de Mallorca. The applicant had received the weapons and the explosives in Algiers on 7 October 1977 or shortly before. On 7 October 1977, she had taken a plane, together with Said S. and her daughter, to Palma de Mallorca, transporting the weapons and the explosives in her cabin baggage. She had then handed over the material to a Palestinian called Jamal.

The Court of Appeal based its findings as to the applicant's participation in the offences essentially on the evidence given by Said S.

The court observed that Said S. could not be questioned at the trial, as he was serving a prison sentence in Beirut. The Lebanese authorities had refused to transfer him to Germany for the purposes of the proceedings, even though the Investigating Judge at the Federal Court of Justice had given the assurance of safe conduct (*sicheres Geleit*).

The Court of Appeal therefore relied on the depositions of the witnesses Mr W. and Mr S., officers of the Federal Office of Criminal Investigations. They had been present together with an interpreter when Said S. had been questioned by the Lebanese police on 5, 6 and 10 March 1997 in the course of preliminary investigations of the German prosecution authorities against himself and the applicant's husband.

According to Mr W. and Mr S., Said S. had initially denied having participated in the *Landshut* hijacking or having any knowledge thereof, as well as having been engaged in any other terrorist acts of the "PFLP". On his first day of questioning, Said S. had been very nervous and had given the impression that he was not telling the truth. During the second questioning, he had asked for some days of reflection. At his third interrogation, Said S., who had appeared relieved and calm, had announced that he would tell the full truth. He had admitted that he had been a member of the "PFLP" since 1975. Furthermore, he had stated that in 1977, two weeks before the *Landshut* hijacking, the leader of the "PFLP-SC" had instructed him to travel to Algeria together with a West German woman called "Amal" in order to transport weapons from Algiers to Palma de Mallorca. In Algiers, "Amal" had received weapons and explosives, hidden

in a radio and in candy boxes. These weapons had been destined for hijacking an aircraft. About one week before the *Landshut* hijacking, he had travelled with "Amal", accompanied by her daughter, from Algiers to Palma de Mallorca with an Iranian passport issued to "Kamal Sarvati". "Amal" had transported the weapons in her cabin baggage. In Mallorca she had handed this material over to a Palestinian called "Jamal". They returned by plane to Baghdad via Paris the following day.

Regarding the use in evidence of Said S.'s statements, the Court of Appeal considered that, on the basis of the clear and concurring statements of witnesses W. and S. and the letters rogatory issued by the General Public Prosecutor, it was established that Said S. had been informed by the Lebanese police officers about his rights as an accused under German law, namely to remain silent and to request the taking of specific evidence for his defence. The Court of Appeal further found that no unlawful means had been used to obtain Said S.'s statements. According to witnesses W. and S., the Lebanese authorities had no interest of their own in these investigations, and there had been nothing to suggest that Said S. had been ill-treated or threatened or that promises had been made. Moreover, there was no indication that the statements made by Said S. had been the result of leading questions.

Recalling that a cautious approach was required in assessing statements of a witness who had not been heard at the trial and to whom the parties to the proceedings could not put any questions, the Court of Appeal found that Said S.'s statements as to "Amal's", i.e. the applicant's, participation in the hijacking were credible. In this respect, the Court of Appeal took into account that the witnesses W. and S. had given an account of Said. S.'s demeanour during the interrogations under letters rogatory and had been able to put questions to him, and that Said S. was not an anonymous witness.

Furthermore, the Court of Appeal found that witness Said S., when heard again under letters rogatory by the Beirut Regional Court in the course of this trial on 27 October 1997, had confirmed having travelled from Algier to Palma de Mallorca in October 1977 together with a German woman. He had, however, denied that they had transported any weapons. The court considered that the records of his questioning could be read out at the trial as the witness, who was still serving a prison sentence in Lebanon, was out of reach. The fact that the public prosecutor, the applicant and her defence counsel had had no opportunity to attend the questioning did not exclude the use in evidence of Said S.'s statements. According to the Court of Appeal, the foreign procedural rules had to be observed in the first place, which in the instant case did not require the presence of the parties to the present proceedings at the questioning. In its letters rogatory, the Court of Appeal had informed the Beirut Regional Court that under German law, the parties to the proceedings were entitled to attend such a questioning and had invited

it to notify it of the date of the questioning, should such presence be possible under Lebanese law. Nevertheless, bearing in mind the limitations on the rights of the defence, the Court of Appeal decided not to consider these statements as evidence which could stand on its own. It noted, however, that Said S. had no reason wrongfully to incriminate both himself and the applicant.

The Court of Appeal argued that the discrepancies between Said S.'s statements at this hearing as opposed to his submission at his hearing in March 1997 had occurred because the Lebanese court had not sufficiently confronted the applicant with his earlier statements. This was attributable to the fact that the parties to the proceedings had not been allowed to attend this questioning. However, a further hearing of Said S. under letters rogatory, as requested by the applicant, or further investigations to obtain evidence as to the circumstances in which Said S.'s statements had been made were not called for. Only Said S.'s hearing in person at the trial would have been suitable to rebut the evidence already obtained at that stage.

Furthermore, the Court of Appeal found that other important evidence confirmed Said S.'s statements.

Thus witness P., a high-ranking official of the German Intelligence Service, had indicated that already on 22 November 1977 the Intelligence Service had been notified by an informer that three persons using the names "Kamal Sarvati", "Cornelia Christina Trubendorffer" and "Nicole", born on 17 July 1977 (the date of birth of the applicant's daughter), had travelled from Algiers to Palma de Mallorca on 7 October 1977. The two adults were associated with terrorist organisations. P. had refused to disclose the identity of the informer or the documents concerned. The Court of Appeal noted that its requests addressed to the Intelligence Service and the Federal Ministry for the Interior for disclosure of these sources and documents had been refused for good reasons, namely, the necessity to protect life and limb of persons who were not within German jurisdiction. It accepted the authorities' argument that notably the applicant's husband, a former leading member of the "PFLP" whom the applicant had kept informed about the proceedings against her, was still capable of organising assassinations of or acts of revenge against witnesses incriminating the applicant.

Moreover, witness G., a high-ranking official of the Federal Office for Criminal Investigations, had stated that in 1980 a reliable informer had identified the applicant as "Amal" on photographs. Another informer had notified the Federal Office for Criminal Investigations that a woman called "Amal" had travelled with a "PFLP" member and a baby from Algiers to Palma de Mallorca, and had also known the false names and the numbers and origin of the passports used by them. Subsequent investigations had shown that the passport carried by "Amal", issued to "Cornelia Vermaesen, born Trubendorffer", had been stolen in the Netherlands and that the

passport used by Said S. was a fake of the same type as the passports later used by the hijackers. The informer in question had identified the applicant on photographs as "Amal" and as the person transporting the weapons and explosives. Witness G. had stated that he was not entitled to disclose the identity of the informers. The Court of Appeal's requests to the Office for Criminal Investigations and the Federal Ministry for the Interior for disclosure of the identity of its informers equally remained unsuccessful. Both authorities invoked the need to protect live and limb of their informers for the same reasons as those given with respect to the informer whose statements were reported by witness P.

The Court of Appeal noted that the statements made by Said S. and the evidence supplied by anonymous informers were further corroborated by the results of investigations into the passenger lists of the flights from Algiers to Palma de Mallorca on 7 October and from Palma de Mallorca to Paris-Orly on 8 October 1977. These lists contained references to the false names used by Said S., the applicant and her daughter. The Court of Appeal equally took into account evidence of the applicant's and Said S.'s stay at a hotel in Palma de Mallorca. It had regard to bills bearing the names "Vermaesen" and "Kamal", and to explanations given by the managing director of the hotel who had indicated that one of his employees had remembered that a man with an Arab name accompanied by a European woman and a small child had stayed at the hotel at the relevant time.

As far as the number and types of weapons and explosives used were concerned, the Court of Appeal had heard several witnesses and had regard to photographs contained in the file, showing *inter alia* the radio serving as a hiding place for the weapons, which had been found in the aircraft.

Moreover, the Court of Appeal took into account the applicant's own statement that Said S. had been a member of the "PFLP" and had been on Mallorca some days prior to the *Landshut* hijacking together with the surviving hijacker.

As to the applicant's defence, the Court of Appeal found that there was nothing to show that she had not left Aden at the relevant time, in particular that her young child had been seriously ill. Furthermore, witness B., the "RAF" member who had met "PFLP" members in Baghdad at the end of September and in the beginning of October 1977, had stated that he had seen the applicant in Baghdad. The Court of Appeal, in concluding that B.'s depositions were credible, had notably regard to the consistency of his statements, the detailed account of his meeting with the applicant and the fact that as a former "RAF" member, he did not have reasons to incriminate the applicant wrongfully. The statements made by Ms S. and Ms M., two "RAF" members, and by the applicant's son to the effect that they had not seen the applicant leaving Aden and being in Baghdad did not refute B.'s depositions.

In the Court of Appeal's view, the applicant had strong motives to participate in the hijacking, especially since her husband had played a leading role in organising it. Moreover, since 1974 she had assisted, as a "RAF" sympathiser, the eleven "RAF" members detained in Germany.

c. Proceedings before the Federal Court of Justice

On 11 February 2000, the Federal Court of Justice, following an oral hearing, dismissed the applicant's appeal on points of law. It noted that the Court of Appeal had found the applicant's participation in the offences in question to be established by the statements made by Said S. in the course of his interrogation by the Lebanese police in the presence of German police officers. Said S. had confirmed in substance these depositions when he was questioned under letters rogatory by the Beirut Regional Court. His statements had been confirmed by numerous other items of evidence, such as material obtained from informers, passenger lists and hotel bills, as well as statements made by the former "RAF" member B.

As regards the applicant's complaint about the use in evidence of the oral testimony of witnesses P. and G., the Federal Court of Justice found that there was no breach of Article 6 §§ 1 and 3 (d) of the Convention due to the fact that the informers themselves could not be questioned. It considered that the Court of Appeal had correctly taken a cautious approach in assessing this evidence and had merely considered it as corroborating the statements of witness Said S. and other items of evidence.

Moreover, referring to the case-law of the European Court of Human Rights (in particular *van Mechelen v. the Netherlands*, judgment of 23 April 1997), the Federal Court of Justice considered that, unlike the said case, the present case did not concern statements made by anonymous police officers. The informers who had remained anonymous were obviously persons operating abroad in cooperation with the German authorities to combat international terrorism. These persons and their families were particularly exposed to the risk of acts of revenge by terrorist organisations and would be generally endangered if identified. In any event, their depositions had not been the basis for the applicant's conviction, but merely corroborating evidence. The Court of Appeal's cautious approach in assessing the evidence obtained from anonymous informers had counterbalanced the limitations on the rights of the defence. In particular, the Court of Appeal had not only examined whether the authorities' refusal to disclose the informers' identities had been arbitrary or obviously erroneous, but had also reached the conclusion that in substance the authorities' decisions had been reasonable and convincing.

According to the Federal Court of Justice, the applicant's complaint that the Court of Appeal had examined witness B. on oath was well-founded. In this respect, it noted that there was no indication in the trial record or in the reasoning of the judgment that the Court of Appeal had considered that,

on account of his possible participation in the offences concerned, Mr B. should not have been administered an oath (Section 60 no. 2 of the Code of Criminal Procedure; see 'Relevant domestic law and practice' below). However, this procedural flaw was irrelevant for the outcome of the proceedings. In its detailed assessment of the evidence, in particular of B.'s credibility, the Court of Appeal had not mentioned that B. had been administered an oath. Therefore, it could be excluded that the Court of Appeal had found the witness more credible due to the fact that he had made his statements on oath.

d. Proceedings before the Federal Constitutional Court

On 3 April 2000, the applicant lodged a complaint with the Federal Constitutional Court, alleging that the criminal proceedings against her, in particular the taking and assessment of the key evidence for the prosecution, had been unfair.

On 25 July 2000, the Frankfurt/Main Court of Appeal ordered that the remainder of the applicant's prison sentence be suspended on probation. It found that the applicant, having regard to the length of her detention on remand, had already served half of her prison sentence. It fixed a probationary period of three years.

On 20 December 2000, a panel of three judges of the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

The Federal Constitutional Court found that the examination of the complaint was not necessary for the protection of the applicant's constitutional rights. The impugned decisions could not be objected to from a constitutional point of view, although the application of the procedural rules resulting in the applicant's conviction might be seen as close to the borderline of what could be accepted under the Constitution. There was no indication of arbitrariness.

Referring to its own case-law, to the case-law of the European Court of Human Rights and to decisions of the Federal Court of Justice, the Federal Constitutional Court recalled that statements obtained from informers who had not been heard at the trial were, as a rule, not sufficient for a judge to reach a final conclusion as to the truth of this information. That information had to be corroborated by other important aspects and indices. The trial court had to be particularly cautious where, as in the present case, informers of police authorities or intelligence services could not be heard in court for the sole reason that the authorities concerned had refused to disclose their identity or to authorize their officers testifying in court to give evidence in this respect.

The Federal Constitutional Court found that in the present case there was an accumulation of hearsay evidence which did not directly relate to the facts to be established, but consisted of circumstantial evidence pointing to such facts. However, the trial court's assessment and evaluation of evidence had not been confined to the depositions of the police officers W. and S. concerning the highly incriminating statements made by the accomplice Said S. and to information obtained from police and intelligence service informers operating abroad, as presented by the witnesses P. and G. Further important circumstantial evidence was the testimony of witness B. His statements showed that the applicant's assertion that she had not been in Baghdad at the relevant time was wrong, thereby confirming the depositions made by Said S.

Therefore, the Federal Court of Justice's view that the criminal proceedings against the applicant, taken as a whole, had not been unfair within the meaning of Article 6 §§ 1 and 3 (d) of the Convention, was unobjectionable, at least from a constitutional point of view.

The decision was served on 22 February 2001.

B. Relevant domestic law and practice

1. Examination of witnesses and reading out of records

Pursuant to the provisions of the Code of Criminal Procedure, a witness shall be examined in person at the main hearing if the proof of a fact in issue is based on that person's observation. In principle, the witness's examination may not be replaced by reading out the record of a previous examination or by reading out a written statement (Section 250 of the said Code). According to the constant case-law of the Federal Court of Justice, Section 250 permits the hearing of witnesses giving hearsay evidence. In particular, it is possible to hear a police officer on evidence obtained from an informer whose attendance at the hearing cannot be secured.

As an exception to the above-mentioned principle, the examination of a witness or co-accused may be replaced by reading out the written record of his previous examination by a judge. This is permitted if there are insurmountable impediments preventing the witness or co-accused from attending the main hearing for a long or indefinite period of time (Section 251 no. 2 of the said Code).

Pursuant to Section 60 no. 2 of the said Code, it is prohibited to administer an oath to a witness who is suspected of having participated in the offence which was the subject-matter of his hearing.

2. Rights to be present at a hearing

The public prosecutor, the defendant and defence counsel have the right to be present at the examination of a witness by a judge outside the main hearing (Section 168c § 2 of the Code of Criminal Procedure). A defendant who is detained and is represented by counsel is only entitled to be present at hearings of witnesses conducted at the court of the place where he is in custody (Section 168c § 4 of the said Code).

COMPLAINTS

The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that the criminal proceedings against her, leading to her conviction by the Frankfurt/Main Court of Appeal, which was upheld by the Federal Court of Justice and the Federal Constitutional Court, had been unfair because of the way in which evidence had been taken and assessed.

She submitted in particular that her conviction had essentially been based on hearsay evidence. The defence had thus not been able to question the key witnesses for the prosecution and to call witnesses for her defence. She notably complained about the use in evidence of the depositions of two officers of the Federal Office of Criminal Investigations, Mr W. and Mr S., concerning statements made by witness Said S. She further objected to the questioning of said witness under letters rogatory in Lebanon in the absence of the parties to the proceedings, the record of this hearing having been read out at the trial. Furthermore, the domestic courts had used in evidence statements made by undisclosed police and intelligence service informers, as reported by witnesses G. and P., without counterbalancing the resultant handicaps for the defence.

THE LAW

The applicant claimed that the criminal proceedings against her had been unfair because her conviction was essentially based on hearsay evidence and she did not, therefore, have the opportunity to examine witnesses against her directly. She invoked Article 6 §§ 1 and 3 (d) of the Convention, which, insofar as relevant, provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:

...

(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. Submissions of the parties

1. The Government

The Government took the view that the proceedings in the domestic courts had not been unfair. They stressed that the applicant's conviction had not only been based upon the statements made by Said S., as reported at the trial hearing by witnesses S. and W., and upon the evidence obtained from anonymous informers, as reported by witnesses G. and P. There had been numerous further items of evidence to support Said S.'s submissions and the Court of Appeal's finding that the applicant had committed the crimes she was accused of, and to the use of which the applicant had not objected. Such items of evidence were in particular passenger lists of airlines, bills of the hotel in Palma de Mallorca and explanations of the managing director of the hotel, as well as the statement of witness B. that the applicant had left Aden at the relevant time. Furthermore, the applicant had not denied that she was known as "Amal" in Yemen and that Said S. had been a member of the "PFLP" and had stayed on Mallorca some days prior to the *Landshut* hijacking.

As to the evidence obtained from witness Said S., the Government stressed that the Lebanese authorities had refused to comply with the Court of Appeal's request to transfer that witness to Germany so that he could be heard in person. The Court of Appeal had also attempted in vain to provide defence counsel an opportunity to attend the witness's hearing in Lebanon. This restriction in the applicant's defence rights had been counterbalanced by the possibility to examine the further items of evidence supporting Said S.'s statements.

As regards the depositions made by witnesses P. and G. concerning submissions of their anonymous informers, the Government pointed out that the Intelligence Service and the Federal Ministry for the Interior had not disclosed the identity of these informers or submitted the documents concerned. They had, however, given convincing reasons for not having done so. The information obtained from these anonymous sources had only served to confirm the findings emanating from other items of evidence.

2. The applicant

The applicant contested this view. She argued that there had been no substantial items of evidence other than the hearsay evidence provided by the witnesses S., W., G. and P., to support the Court of Appeal's findings of fact. In particular, the passenger lists of airlines and hotel bills did not disclose any link to her and were of questionable evidential value. Her defence rights had notably been infringed because neither she nor her counsel had an opportunity to question Said S. or at least get a personal impression of him at any stage of the proceedings. The witness had incriminated her only on one of several occasions on which he was heard, and merely following leading questions by the investigators. The Court of Appeal itself considered the lack of consistency in Said S.'s statements to be caused by the fact that the parties to the proceedings had not been allowed to attend his questioning. The Court of Appeal should therefore at least have granted her motion to obtain evidence as to the circumstances in which Said S.'s statements had been made.

The applicant further argued that the statements made by witnesses G. and P. concerning evidence obtained from anonymous informers had been decisive for establishing that the person called "Amal" and using a passport issued to a certain Ms Vermaessen had in fact been her. She had neither had an opportunity to examine the credibility of these informers nor to examine the evidential value of the documents concerned.

B. The Court's assessment

1. Applicable principles

As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (see, among many other authorities, *Windisch v. Austria*, judgment of 27 September 1990, Series A no. 186, p. 9, § 23; *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 20, § 43).

The Court recalls that the term "witness" in Article 6 § 3 (d) has an autonomous meaning in the Convention system. Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in or outside court or by a co-accused, it constitutes evidence to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see, *inter alia*, *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166, pp. 19-20, § 40; *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25; *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II).

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 is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, *inter alia*, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 50; *A.M. v. Italy*, no. 37019/97, § 24, ECHR 1999-IX; *Sadak and Others v. Turkey (No. 1)*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 63, ECHR 2001-VIII).

All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a rule, these rights require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage of the proceedings (see, amongst others, *Solakov v. the Former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X; *P.S. v. Germany*, no. 33900/96, § 21, 20 December 2001). Where 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 are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see, among many others, *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, § 44; *Lucà*, cited above, § 40; *Sadak,* cited above, § 65; *Solakov*, cited above, § 57; *Calabrò v. Italy and Germany* (dec.), no. 59895/00, ECHR 2002-V).

With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court recalls 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, in particular, *Sadak,* cited above, § 67). However, *impossibilium nulla est obligatio*; provided that the authorities cannot be accused of a lack of diligence in their efforts to award the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see, in particular, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21; *Ubach Mortes v. Andorra* (dec.), no. 46253/99, ECHR 2000-V; *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005). 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; *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V).

The defendant's conviction may, in any event, not solely be based on the statements of such a witness (see, in particular, *Mayali*, cited above, § 32).

As regards, in particular, the use in evidence of statements made by anonymous witnesses the Court recalls that the principle of a fair trial also requires that in appropriate cases the interests of the defence are balanced against the interests of testifying witnesses or victims, notably their life and liberty as guaranteed by Article 8 of the Convention (see, *inter alia*, *Van Mechelen*, cited above, p. 711, § 53; *Kok v. the Netherlands* (dec.), no. 43149/98, ECHR 2000-VI). The national authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses (see, in particular, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, pp. 470-471, § 71; *Visser*, cited above, § 47). If the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Article 6 §§ 1 and 3 (d) therefore requires that the handicaps under which the defence labours are sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Doorson*, cited above, p. 471, § 72; *Van Mechelen and Others*, cited above, p. 712, § 54). In assessing whether these procedures were sufficient to counterbalance the difficulties caused to the defence, due weight must be given to the extent to which the anonymous testimony was decisive for the conviction of the applicant (see *Kok*, cited above).

2. Application of the above principles

The Court notes that in convicting the applicant, the domestic courts relied notably on the depositions of Said S., as reported by witnesses Mr W. and Mr S. and as laid down in the report of his further hearing in Lebanon. Furthermore, they used in evidence statements of anonymous informers, as reported by witnesses G. and P. At no stage of the proceedings the applicant or her counsel had been confronted with Said S. or the anonymous informers.

The Court observes that the German authorities and courts made considerable efforts to obtain oral testimony from Said S., who was serving a prison sentence in Lebanon at the relevant time. They had not only unsuccessfully sought permission from the Lebanese authorities to have the witness transferred to Germany in order to be questioned in the Frankfurt/Main Court of Appeal and had offered safe conduct. When lodging its motion to the Beirut Regional Court to question the applicant under letters rogatory, the Court of Appeal had asked that court to allow the parties to the applicant's proceedings to attend Said S.'s questioning; a right to attend had, however, not been prescribed by Lebanese law. Thereby, the German courts used the means at their disposal under domestic law to secure the presence of the witness concerned and cannot be accused of a lack of diligence engaging their responsibility under the Convention.

In particular, the domestic courts, contrary to the applicant's view, had not been negligent by dismissing her motion to obtain further evidence as to the circumstances in which Said S.'s statements had been made. They had thoroughly examined witnesses Mr W. and Mr S. on that issue. It would clearly have been preferable for Said S. to have been heard in person, but his unavailability could not as such block the prosecution.

The Court further notes that the domestic courts had been aware that they merely disposed of hearsay evidence of Said S.'s questioning as an accused – that is, a witness in the autonomous meaning given to that term under the Convention – as reported by the officers of the Federal Office of Criminal Investigations, Mr W. and Mr S. The courts had assessed Said S.'s statements cautiously, taking thoroughly into consideration the circumstances of his questioning. With respect to his hearing under letters rogatory, the courts, having regard to the restrictions on the rights of the defence, decided not to consider these statements as evidence which could stand on its own. Consequently, the courts have treated the evidence in question with the extreme care required.

The Court observes that the domestic courts based the applicant's conviction to an appreciable extent on Said S.'s statements when questioned as an accused. However, these had by far not been the only evidence relied on. The courts also had regard to several further items of evidence. These included notably the findings that the applicant had been a sympathiser of the "RAF", had participated in shooting trainings of the "PFLP" and had been known as "Amal" when living in Yemen. She had married a leading "PFLP" member, and their daughter was born on the same date as the baby who had travelled with the two persons transporting the weapons to Mallorca at the relevant time. Furthermore, the courts had regard to passenger lists of the flights to and from Palma de Mallorca, bills of a hotel there and explanations given by the hotel's managing director at the relevant time. The courts also had regard to the applicant's confirmation that Said S. had been a member of the "PFLP" and had been on Mallorca some days prior to the *Landshut* hijacking.

The Court notes that the German courts also considered Said S.'s statements to be corroborated by evidence obtained from several anonymous informers, who had identified the applicant as "Amal" and as the person who had transported the weapons for the *Landshut* hijacking. The domestic courts had tried on several occasions to obtain disclosure of the identity of these informers. This had been refused by the Federal Ministry for the Interior, the Intelligence Service and the Federal Office for Criminal Investigations on the ground that it was still necessary to protect their informers, who were operating outside Germany. The Court observes that the applicant was charged with having aided and abetted very serious offences, which were committed by two terrorist organisations operating together. Moreover, the applicant had kept in contact with her husband,

a leading "PFLP" member who was still considered capable of organising acts of revenge. Given that the informers in question, who were no police officers, were abroad, where German authorities could only protect them to a very limited extent, the Court is satisfied that the domestic authorities have adduced relevant and sufficient reasons to keep secret the witnesses' identities.

As regards the procedure followed by the national courts to counterbalance the handicaps under which the defence laboured in this respect, the Court notes that the defence was awarded the opportunity to question witnesses P. and G. in court. The Court is aware that due to the non-disclosure of the informers' identities, the defence lacked information permitting it to test their reliability or cast doubts on their credibility. Furthermore, the Court of Appeal itself was precluded from forming their own impression on the informers' reliability. However, given that the evidence obtained from anonymous informers had not been decisive for the applicant's conviction and had been corroborated by the above-mentioned further items of evidence (other than Said S.'s statements), the Court takes the view that the rights of the defence were sufficiently respected.

The Court further observes that the domestic courts had used in evidence the statements of witness B., a former "RAF" member who had possibly participated in the offences the applicant was charged with. B. had been administered an oath contrary to Section 60 no. 2 of the Code of Criminal Procedure (see 'Relevant domestic law and practice' above). However, the Court of Appeal, which did not mention the taking of the oath in assessing B.'s credibility, apparently had not considered B.'s statements to be more credible due to the oath. In these circumstances, the use in evidence of his depositions, which, furthermore, had not been decisive in establishing the applicant's guilt, cannot be considered as curtailing the rights of the defence contrary to Article 6 §§ 1 and 3 (d).

Having regard to the proceedings as a whole, and considering the alleged shortcomings together, as required by Article 6 §§ 1 and 3 (d) (see, in particular, *Doorson*, cited above, p. 474, § 83), the Court observes that there has been an accumulation of hearsay evidence in the proceedings against the applicant. Various witnesses had introduced into the main hearing the statements of witnesses whom the applicant, for different reasons, had no opportunity to examine or have examined. However, the domestic courts made considerable efforts to obtain oral testimony notably from Said S. and assessed his depositions, as well as those obtained from the anonymous informers and B., very carefully. Given that the applicant's conviction had also been based on several further items of evidence, the Court finds that the rights of the defence had not been restricted to an extent incompatible with the guarantees of Article 6 §§ 1 and 3 (d).

The Court cannot, therefore, find that the applicant's trial as a whole had been unfair.

It follows that the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Mark VILLIGER
Deputy Registrar

Boštjan M. ZUPANČIČ
President