

## Slovenian courts' recognition of Israeli judgments against renowned neurosurgeon for operation in Ljubljana breached his rights

In today's **Chamber judgment**<sup>1</sup> in the case of [Dolenc v. Slovenia](#) (application no. 20256/20) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6 § 1 (right to a fair hearing)** of the European Convention on Human Rights.

The case concerned an Israeli citizen who had been left paralysed after being operated on by the applicant, a well-known neurosurgeon, in a Ljubljana hospital and the ensuing proceedings in both Israel and Slovenia.

The Court found in particular that, before recognising the Israeli judgments awarding the applicant's former patient more than 2 million euros, the Slovenian courts had failed to duly satisfy themselves that the trial in Israel had been fair.

There had in particular been issues concerning evidence-gathering. The court in Israel did not hear such crucial witnesses as the hospital staff and a Slovenian law expert, and excluded their statements from the case file.

### Principal facts

The applicant, Vincenc Vinko Dolenc, is a Slovenian national who was born in 1940 and lives in Ljubljana.

An Israeli citizen was left severely disabled after he had been operated on by Mr Dolenc in May 1992 at Ljubljana University Hospital.

The patient brought proceedings in Israel against Mr Dolenc seeking damages for medical negligence. Mr Dolenc was served with the lawsuit while on a visit to Israel in 1995. He was eventually found fully liable in 2005 for the damage caused to his former patient. The Tel Aviv District Court found in particular that he had been negligent for not ordering a CT scan in the early stages after the surgery when the patient had shown signs of difficulty in breathing and paralysis. He was ordered to pay approximately 2.3 million euros (EUR) in damages.

Mr Dolenc had refused to attend the trial in Israel or be examined via video link, insisting from the beginning that Slovenian law should apply in the dispute and that he and his witnesses be examined by the Slovenian courts via the Hague Evidence Convention procedure.

In 2003 the Israeli District Court had submitted a request under this procedure to the Slovenian authorities for the examination of witnesses. A year later, however, it had cancelled that request, citing the lack of progress in the proceedings and the claimant's right to a trial within a reasonable time.

In parallel, in April 2004, Mr Dolenc had cancelled the power of attorney of his Israeli legal representative.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

The Israeli District Court reached its decision on the basis of testimony from the plaintiff's brothers and expert opinions given by two neurosurgeons, one commissioned by the plaintiff and one by Mr Dolenc. Mr Dolenc's statement was excluded, as were statements by witnesses for the defence, specifically medical staff who had cared for the plaintiff at the Ljubljana hospital and a Slovenian legal expert. The district court considered that that situation had arisen owing to the conduct of Mr Dolenc, who had done everything he could to avoid the proceedings in Israel.

In 2011 the patient applied to have the Slovenian courts recognise the Israeli court decisions and in 2018 the Supreme Court found in his favour. A constitutional complaint by Mr Dolenc was subsequently rejected in 2019.

In those proceedings, the Slovenian courts reviewed Mr Dolenc's complaints that the guarantees of a fair trial had not been respected by the Israeli courts. They dismissed them essentially because they considered, on the one hand, that Mr Dolenc had been given sufficient opportunities to present the evidence and defend himself in Israel and, on the other hand, that he had effectively waived his right to defend himself after he had cancelled the power of attorney of his legal representative without appointing a new one. They also accepted the Israeli District court's justification for deciding to discontinue the Hague Evidence Convention procedure with regard to the witnesses.

## Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), Mr Dolenc alleged that the Slovenian courts should have refused to recognise the Israeli judgments because they had been rendered in unfair proceedings.

In particular, he had not been able to effectively participate in the trial in Israel; the only meaningful way to have had his and his witnesses evidence examined had been via the procedure under the Hague Evidence Convention, but that had been denied by the Israeli District Court; and not enough had been done to communicate the Israeli District Court's decisions to him after he had cancelled the power of attorney of his Israeli representative, resulting in him being unable to mount his defence.

The application was lodged with the European Court of Human Rights on 30 April 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Krzysztof **Wojtyczek** (Poland), *President*,  
Marko **Bošnjak** (Slovenia),  
Alena **Poláčková** (Slovakia),  
Erik **Wennerström** (Sweden),  
Raffaele **Sabato** (Italy),  
Lorraine **Schembri Orland** (Malta),  
Davor **Derenčinović** (Croatia),

and also Renata **Degener**, *Section Registrar*.

## Decision of the Court

Firstly, the Court noted that the Israeli judgments had been of paramount importance for Mr Dolenc, given the consequences for his reputation and the damages involved, amounting to over EUR 2 million. Before enforcing such a decision from a foreign court, the Slovenian authorities had therefore been under an obligation to conduct some measure of review, and in the present case in particular to be satisfied that the relevant proceedings had complied with the guarantees of a fair trial under the Convention.

As concerned the applicant's right to make his case before the Israeli District Court, the Court agreed with the Slovenian courts' finding that Mr Dolenc had been notified of the trial in Israel but had not provided sufficient reasons for his refusal to attend in person. The decision by the Israeli courts not to hear the applicant via the Hague Evidence Convention procedure had therefore been justified.

As regards the examination of witnesses, the Court considered it reasonable in the particular circumstances of the case that the evidence should be gathered in Slovenia using the procedure provided for under the Hague Evidence Convention. Moreover, the grounds on which the Slovenian courts relied had not justified the Israeli District Court's discontinuation of this procedure. Even though the applicant's right to a trial within a reasonable time had been an important consideration, there was no reason to believe that the Hague Convention procedure would have *per se* caused significant delays and the lack of progress cited had mostly been the result of insufficient efforts by the Israeli District Court to clarify to the Slovenian authorities issues concerning evidence-gathering.

Furthermore, as regards the possibility of examining witnesses by video-link, which had been offered to the applicant prior to the request under the Hague Evidence Convention, the Court noted that the Slovenian courts had made no mention of the practical and technical considerations, or of the legal basis, for examining the witnesses in that way.

Lastly, the Court referred to the Slovenian courts' observation that the rejection of the request to use the Hague Evidence Convention procedure could be considered "equal to rejecting the proposed evidence", but that the decision to hear the witnesses in Israel had nevertheless been justified because the applicant had waived his right to continue to participate in the proceedings after he had cancelled his Israeli lawyer's power of attorney.

The Court found, to the contrary, that the applicant had never explicitly waived his right to participation in the proceedings in Israel. Nor had there been anything in the case file to support the conclusion that the applicant had been apprised of any of the events in the proceedings in Israel following the cancellation of his Israeli lawyer's power of attorney. The fact that the applicant had not appointed a new lawyer did not mean that there was no requirement to conduct the proceedings in accordance with the fundamental principles of a fair trial.

Overall therefore, the Slovenian courts had failed to attach sufficient weight to the consequences that the non-examination of the witnesses (including the expert on Slovenian law) via the Hague Evidence Convention procedure and the ensuing exclusion of their statements had had for the applicant's right to present evidence. That right was a fundamental component of the principle of a fair hearing and the Slovenian courts should have satisfied themselves that it had been respected in the proceedings in Israel before recognising the Israeli judgments. There had accordingly been a violation of Article 6 § 1 of the Convention.

### Just satisfaction (Article 41)

The Court held that Slovenia was to pay the applicant 9,600 euros (EUR) in respect of non-pecuniary damage, and EUR 6,000 in respect of costs and expenses. It also held that the question of pecuniary damage was not ready for decision and reserved it for a later date.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.