



## Migrant smuggler's conviction, based on witness statements not examined at trial, was unfair

In today's Chamber judgment<sup>1</sup> in the case of [Al Alo v. Slovakia](#) (application no. 32084/19) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6 §§ 1 and 3 (d) (right to a fair trial/right to obtain attendance and examination of witnesses) of the European Convention on Human Rights.**

The case concerned a Syrian national's complaint that his trial and conviction on charges of migrant smuggling had been unfair.

An important part of the evidence against him had come from the migrants he had aided, who had been questioned only at the pre-trial stage of the proceedings. These witnesses had later been expelled from Slovakia and thus absent from the applicant's trial. At the time the applicant had been without legal counsel and had not attended their pre-trial questioning.

The Court found that the applicant had been deprived of the possibility to examine or have examined witnesses whose evidence had carried significant weight in his conviction, without sufficient justification. In particular, although the migrants' absence from the country had in principle been valid grounds for admitting in trial evidence of their pre-trial testimony, on the facts there had not been good enough reasons for their non-attendance at the applicant's trial as the authorities had been provided with their addresses and identity documents and they had failed to make use of means of securing the witnesses' appearance remotely.

Nor had there been sufficient factors to counterbalance such a disadvantage to the defence. The fact that the applicant had chosen not to attend the migrants' pre-trial questioning could by no means be accepted as implicitly constituting a complete waiver of his right to examine or have examined the witnesses against him. The authorities should have made sure that the applicant, who had made it clear from the outset that he had difficulties understanding legal matters, had been aware of the consequences of not exercising his rights.

Accordingly, the proceedings against him as a whole had not been fair.

### Principal facts

The applicant, Jamal Al Alo, is a Syrian national who was born in 1981 and is serving a term of imprisonment in Dubnica nad Váhom Prison (Slovakia).

On 28 January 2017 the applicant was charged with colluding with others to smuggle migrants. Two police officers, who had had the applicant under surveillance in Bratislava, had seen him with two suspected migrants entering a taxi that drove off towards Slovakia's border with Austria. The officers intercepted the car and detained the migrants.

Both the applicant and the migrants were questioned. The applicant submitted that he had considered them acquaintances of his father and had merely provided them with accommodation

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).

and transportation. The migrants maintained, however, that the applicant had arranged for their transfer to Germany as part of a deal arranged and paid for previously.

The applicant, who was not represented by a lawyer at this stage, did not attend the interviews of the migrants. Nor did anyone on his behalf.

The applicant was found guilty as charged on 11 May 2017 and sentenced to five years' imprisonment.

The applicant appealed to the Bratislava Regional Court, arguing that there had been a violation of his defence rights, in particular because his conviction had essentially been based on the testimony of witnesses, the two migrants, who had not been heard by the trial court. He also provided the appeal court with addresses in Romania and Denmark for the two migrants and copies of their asylum seekers' identity documents in those countries.

The Regional Court dismissed his appeal in August 2017. The court, acknowledging that the evidence given by the two migrants at the pre-trial stage had been pivotal, ruled that its admission during the applicant's trial had been justified under national law because the migrants were to be considered "unreachable", having in the meantime been expelled from Slovakia. Furthermore, the applicant had been notified of the witnesses' pre-trial questioning, but he had freely chosen not to attend. Given those circumstances, the proceedings were considered to have been adversarial.

The Supreme Court endorsed the lower courts' findings in March 2018.

## Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (c) and (d) (right to a fair trial/right to legal assistance of own choosing/right to obtain attendance and examination of witnesses), the applicant complained that he had not been provided with legal assistance at the early stages of the proceedings against him and that his conviction had been essentially based on the pre-trial statements of two witnesses, whom he had been unable to examine at trial.

The application was lodged with the European Court of Human Rights on 17 January 2020.

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

Marko **Bošnjak** (Slovenia), *President*,

Péter **Paczolay** (Hungary),

Alena **Poláčková** (Slovakia),

Erik **Wennerström** (Sweden),

Raffaele **Sabato** (Italy),

Lorraine **Schembri Orland** (Malta),

Ioannis **Ktistakis** (Greece),

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

## Decision of the Court

### [Article 6 §§ 1 and 3 \(c\) and \(d\)](#)

The Court referred to the principles to be applied when a witness did not attend a public trial, which it had clarified in 2015 in its Grand Chamber judgment in the case of [Schatschaschwili v. Germany](#). Notably, the Court had to examine: whether there was a good reason for the non-attendance of the witness at trial; whether the evidence of the absent witness was "sole or decisive"; and whether there were sufficient "counterbalancing factors" permitting a fair and proper assessment of the reliability of the evidence in question.

As to the first principle, the Court concluded that there had been no good reason for accepting the pre-trial statements given by the migrant witnesses in lieu of their actually attending the trial and being examined in person. Even though the authorities had been provided with the witnesses' addresses and identity documents, they had taken no steps to enable the applicant to examine or have examined the witnesses against him at his trial. There had been a specific way of securing their appearance via remote means under the Convention on Mutual Assistance in Criminal Matters between the member States of the European Union, to which all the States involved in the applicant's case were signatories.

As concerns the second principle, the evidence, given by the migrant witnesses, considered "pivotal" by the courts on appeal, had at the very least carried significant weight capable of handicapping the defence.

Lastly, regarding the third principle, the domestic courts considered, and the Government argued, that the right to an adversarial trial had been respected because the applicant had been informed of the migrants' pre-trial questioning but had decided of his own free will not to attend it. In effect, they considered that he had waived his rights.

The Court, however, found that the applicant's choice could by no means be accepted as implicitly constituting a complete waiver of his right to examine or have examined the witnesses against him. Any instructions regarding the migrants' questioning had simply been given to him via the first pages of the pre-printed forms on which his pre-trial statements had been transcribed. Furthermore, he had not been provided with any individualised advice as to the consequences of not exercising his rights.

Such inaction on the part of the authorities had been aggravated by the fact that it had to have been clear to them that the migrants would most likely later be unavailable to attend the applicant's trial and by the fact that the applicant had told them during his initial questioning that he had difficulties understanding legal matters.

On that basis, even if the applicant's choice had constituted a waiver of his rights, it had not been attended by the minimum safeguards.

The Court concluded that the applicant had been deprived of the possibility to examine or have examined witnesses whose evidence had carried significant weight in his conviction, without sufficient justification or counterbalancing factors. Accordingly, the proceedings against him had as whole been unfair, in violation of Article 6 §§ 1 and 3 (d).

In view of that finding, the Court considered it unnecessary to examine separately the merits of the complaint lodged by the applicant under Article 6 § 3 (c).

#### [Article 41 \(just satisfaction\)](#)

The Court held that Slovakia was to pay the applicant 5,200 euros (EUR) in respect of non-pecuniary damage and EUR 1,038 in respect of costs and expenses.

*The judgment is available only in English.*

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#### **Press contacts**

[echrpess@echr.coe.int](mailto:echrpess@echr.coe.int) | tel.: +33 3 90 21 42 08

Tracey Turner-Tretz (tel : + 33 3 88 41 35 30)

Denis Lambert (tel : + 33 3 90 21 41 09)

Inci Ertekin (tel : + 33 3 90 21 55 30)

Neil Connolly (tel : + 33 3 90 21 48 05)

Jane Swift (tel : + 33 3 88 41 29 04)

**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.