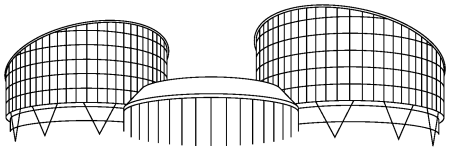

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF POLETAN AND AZIROVIK v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Applications nos. 26711/07, 32786/10 and 34278/10)

JUDGMENT

STRASBOURG

12 May 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision

In the case of Poletan and Azirovik v. the former Yugoslav Republic of Macedonia,

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

Ledi Bianku, *President,*
Mirjana Lazarova Trajkovska,
Paul Mahoney,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan,
Pauliine Koskelo, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 19 April 2016,

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

PROCEDURE

1. The case originated in three applications (nos. 26711/07, 32786/10 and 34278/10) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Macedonian nationals, Ms Stanislava Poletan ("the first applicant") and Mr Alija Azirovik ("the second applicant"), on 12 June 2007, as well as 7 and 16 June 2010 respectively.

2. The first applicant was represented by Mr D. Dangov and the second applicant by Mr F. Medarski, both lawyers practising in Skopje. The Macedonian Government ("the Government") were represented by their Agent, Mr K. Bogdanov.

3. The applicants alleged, in particular, that their trial had violated their rights under Articles 6 and 7 of the Convention.

4. On 4 September 2014 these complaints were communicated to the Government and the remaining parts of the applications were declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1968 and 1973 and live in Belgrade (the first applicant) and Skopje (the second applicant).

A. Background to the case

6. As established in the criminal proceedings described below, on 7 January 2007, during a search carried out by the Macedonian Customs at the Blace border crossing (between the respondent State and Kosovo[1]) 434.555 kg of cocaine were found hidden in rectangular packs submerged in hermetically sealed cans of acrylic paint. The cargo, which had been loaded onto a truck driven by the second applicant in Bar (Montenegro), was destined for Greece.

B. Criminal proceedings against the applicants

7. On 7 January 2007 the Criminal Investigations Bureau at the Ministry of the Interior ("the Bureau", *Одделение за криминалистичка техника*) carried out an expert examination in order to determine the quantity and quality of the substance found in the truck. On 11 January 2007 the Bureau carried out a further examination. Both reports (TD no. 1/2007 and TD no. 8/2007) established the gross weight of the substance, which was pure cocaine.

8. On 8 January 2007 the public prosecutor requested that an investigating judge from the Skopje Court of First Instance ("the trial court") open an investigation against the applicants on account of reasonable suspicion of trafficking 438.170 kg of cocaine. In the request it was stated that the drugs had been packed in 389 packages and stored in 68 cans containing acrylic paint.

9. On the same date, the investigating judge heard the second applicant (the first applicant could not be traced) in the presence of Mr D. Dangov, a lawyer of his own choosing (after 11 May 2007 the second applicant was represented by a different lawyer). On this occasion, the second applicant confirmed that he had known the first applicant for many years and that on 29 December 2006 she had contacted him regarding the transportation of acrylic paint from Bar to Greece. She had given him the telephone number of a certain N. (a forwarding agent) in Montenegro regarding the shipment. He had spoken to N. by telephone, but he had not met her. His truck had been searched at Kula border crossing (between Kosovo and Montenegro) and in the city of Pec, Kosovo, after which he had been escorted by police and customs to the border crossing with the respondent State. At around 5 pm. on 6 January 2007 he had arrived at Blace border crossing. The Macedonian customs officials had instructed him to leave the truck overnight and to return the next morning. He had complied with that

[1] All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

instruction. On 7 January 2007 the truck had been searched and drugs had been found. The second applicant denied knowing that he had been transporting drugs.

10. Later that day, the investigating judge opened an investigation and issued detention orders for a period of thirty days in respect of the applicants.

11. On 9 January 2007 the first applicant appointed Mr D. Dangov to represent her in the proceedings. On 11 January 2007 the investigating judge issued an international arrest warrant in respect of the first applicant. On 13 January 2007 she was arrested in Serbia and detained pending extradition in the respondent State.

12. On 9 May 2007 the first applicant's lawyer requested permission to inspect the case file. A handwritten note on his application indicated that "inspection of the case file (wa)s allowed". On 10 May 2007 the first applicant was incarcerated in Skopje detention facility. An official note drawn up by the investigating judge indicated that on that occasion she had been aware of the public prosecutor's application and the decision of the investigating judge to open an investigation.

13. On 11 May 2007 the investigating judge heard the first applicant in the presence of her lawyer. She stated that she would make a statement once she was able to consult the available evidence. On 16 May 2007 she was heard for the second time. In the presence of her representative, she confirmed that she had contacted the second applicant, who had agreed to transport the paint from Bar to Greece for 1,100 euros (EUR). She had also given him the contact details of N., the Montenegrin forwarding agent. The first applicant denied that she was aware that drugs had been planted in the cans.

14. On 28 May and 4 June 2007 the first applicant's lawyer requested permission to consult the case file, arguing that his previous requests had remained unanswered. On each application there was a handwritten note indicating that the requests had been granted.

15. On 21 June 2007 the public prosecutor lodged an indictment against the applicants on account of trafficking 486.705 kg of cocaine (*неовластен промет на наркотична дрога-кокаин*) packed in 432 packages found in 76 cans. The indictment relied on considerable verbal and material evidence, including the Bureau's expert reports (see paragraph 7 above).

16. On 26 June 2007 the first applicant's lawyer requested access to the case file. According to a note, which he duly signed, on 27 and 28 June 2007 he inspected the file for five hours.

17. On 2 July 2007 the first applicant objected to the indictment arguing, inter alia, that she had not been given the opportunity to consult the case file and prepare her defence. On 9 July 2007 a three-judge panel of the trial court dismissed the objection, holding that on 27 and 28 June 2007 the first applicant had inspected the case file.

18. On 10 July 2007 the first applicant's lawyer requested permission to copy some documents from the case file. According to a handwritten note on the application, his request had been allowed upon payment of the court fees. On 18 July 2007 the court allowed Mr Lj.M., a lawyer whom the first applicant's mother had in the meantime appointed to represent the first applicant, to consult the case file.

1. Proceedings before the trial court

19. At a hearing held on 7 August 2007, the trial court heard the first applicant, who reaffirmed the deposition she had made before the investigating judge (see paragraph 13 above). In addition, she stated that a certain J. (a Greek forename), from Athens, whose surname, residence and all other contact details were unknown to her, had owed her money and had offered to provide her instead with paint from Venezuela. In the second half of 2006 she had imported two containers of paint from Venezuela, the first being shipped to Rieka (Croatia) and the second to Thessaloniki, Greece. She denied having had any contract with the paint producer and exporter in Venezuela or with J. The latter had told her that a certain Sandrina, who allegedly worked with him, could assist her in her dealings with the exporter in Venezuela. J. also had given her the contact details of a buyer in Greece regarding paint from a third container (the subject of the proceedings) and the telephone numbers of N.V. and L.S. in Montenegro, whom she had called regarding the cargo concerned. (When contacting L.S., the first applicant had introduced herself by name as the owner of company M., saying that she was calling upon instructions from a certain Sandra). She reiterated that she had hired the second applicant to transport the paint from Bar to Greece, had handed over the necessary documentation to him, and had provided him with the contact details of N.V. and L.S. in Montenegro. She also confirmed that around that time she had talked with the second applicant many times on the telephone. Lastly, she denied that she had discussed any drugs-related matter with him or any other person.

20. On 8 August 2007 Mr Lj.M. requested a copy of certain material evidence, which was allowed on 9 August 2007.

21. At a hearing on 8 August 2007, the second applicant stated that at the meeting with the first applicant on 29 December 2006, they had agreed that he would transport the paint from Bar to Greece, for which he had been paid EUR 1,100. On 3 January 2007 he had arrived in Bar and had contacted N.V., the Montenegrin forwarding agent, and after the cargo had been loaded onto the truck, he had left for Pec, where the truck had been searched twice using police dogs. The truck had remained at the Pec customs terminal for two nights (the first night the second applicant had remained in the truck; the second night, he had stayed in a nearby hotel). The second applicant had arrived at Blace border crossing at 5 pm. on 6 January 2007 and the truck had remained at customs terminal overnight;

the second applicant had spent that night at home and had returned to the terminal at 9 am. next morning. On 7 January 2007 the truck had been searched and the cans had been examined in a special X-ray van.

22. At hearings on 13 and 14 September 2007 held in the presence of the applicants and their representatives, the trial court decided to hear oral evidence from O.B. and N.N., the experts employed in the Bureau who had drawn up the reports of 7 and 11 January 2007 (see paragraph 7 above). It also accepted a request from the public prosecutor that witnesses N.V. and L.S. (who worked at Bar Harbour) from Montenegro produce oral evidence at the next hearing fixed for 16 October 2007 or, if prevented, give evidence before a competent court in Bar (in the latter case, transcripts of their depositions would be read out at the trial). The applicants did not object. The trial court requested that the Ministry of Justice deliver a court summons to N.V. and L.S. for the hearing scheduled for 16 October 2007. It also attached a letter (*замолница*) requesting the competent court in Bar, Montenegro to examine the witnesses should they be prevented from attending the hearing of 16 October 2007. The letter contained 14 questions formulated by the trial judge which the court in Bar was asked to put to the witnesses. When there was no reply, the trial court reiterated its request in letters dated 2 and 10 October 2007 and sent to the Ministry of Justice.

23. On 10 October 2007 an investigating judge from the Podgorica District Court examined N.V. The relevant parts of the court record of her examination read as follows:

> "... I remember that around New Year's Eve 2007, L.S – who works at Bar Harbour – called in order to ask me to send a container to Belgrade for a friend of hers ... L.S. gave my telephone number to certain Sandra. Sandra called me and introduced herself as working for (the first applicant's) company. She asked me to prepare documentation so that the container would be transported to Greece, to Thessaloniki instead of to Belgrade ... I do not know [the applicants]. I did not see [the second applicant] when he arrived in Bar. I just sat in the office and spoke by telephone and I knew about him because he called to tell me that he would come to the office to provide some documentation for the goods, which he did not give to me, but to my colleague N.K. ..."

24. On 12 October 2007 the Montenegrin Ministry of Justice forwarded the transcript of N.V.'s statement to the Ministry of Justice of the respondent State.

25. On 15 October 2007 the investigating judge of Podgorica District Court examined L.S. The relevant parts of her statement (which was sent on the same day to the Ministry of Justice of the respondent State) read as follows:

> "... on 22 December 2006 I received a telephone call from N.P. (from Greece) ... in order to give him the contact details of a person working for a company, M.S., that handled containers ... I called N.[V.] and told her that a friend had asked me for information regarding this matter ... Half an hour after this discussion with N.[V.], I received a telephone call from certain Sandrina ... who told me that the container

belonged to her and that it should not go to Belgrade, but to Greece, so she needed a forwarding agent ... on 26 December 2006 I travelled to Bologna, Italy ... While I was in Bologna, I received a telephone call from a man who spoke English and who introduced himself as P. (a Greek name) ... telling me that the container which needed to be taken to Bar belonged to him ... on 3 January 2007 a man who introduced himself as Alija called me and said that he was a driver and that he had come in order to collect the goods in that container ... I called N.V. and told her that the driver had arrived. N.[V.] told me that the driver should go to the car park at Bar Harbour. When Alija called me, I told him what N.V. had said and gave him her number ... on 6 or 7 January 2006 P. called again and told me that the driver needed some documents ... I stress that I had nothing to do with the transportation or contents of that container, nor I could envisage what was inside. Later, I heard on the media that it concerned a shipment of paint and the documents that I saw referred to some paint ... I did not see or speak with [the applicants] ... I do not know if (the man called) Alija whom I mentioned as a driver in this story is [the second applicant] about whom you ask me ..."

26. Both witnesses gave their evidence under oath and were warned of the consequences of false testimony.

27. On 16 October 2007, in the presence of the applicants and their representatives, the court heard evidence from the experts O.B. and S.K., a superior expert in the Bureau who had also been involved in drawing up the expert reports (TD no. 1/07 and TD no. 8/07). The expert N.N. could not attend the hearing since she had gone on a business trip to France. Both experts were warned about legal consequences of false testimony. S.K. stated, *inter alia*, that:

"... the cocaine examined is pure cocaine ... the net weight ... was not established. ... after cocaine had been discovered, I went with my colleague O.B. to the Blace border crossing in order to carry out an initial examination so as to determine what was involved. The drugs were brought to our laboratory ... At Blace border crossing, (we) cut open the packages and took a small quantity ... which was sufficient to determine the nature of the substance ... that happened at the border crossing, where several packages were opened; that is a standard procedure ... In the laboratory, the packages were brought in, as far as I remember, in paper bags, but I'm not sure.

On 7 January 2007 ... the drugs were brought (into the laboratory) ... It was about 1 pm. ... On 8 January 2007 43 packages were brought into the laboratory. For a larger quantity of drugs, in principle, (we apply) the UNDCP recommendations ... In the present case, we examined the square root of the total number (of packages) which was in compliance with these recommendations. Of the additional 43 packages, we examined every third package because it concerned a smaller quantity compared to packages received on 7 January 2007 ... The laboratory is accredited by UNDP for drug analysis and is regarded as reliable. The laboratory is not accredited for ISSO standards. [The latter] is a formal issue and it concerns a long and expensive procedure, but [that] does not mean that in terms of technique, equipment and means of work, there are any shortcomings ...

The cocaine we analysed is the biggest quantity so far examined ... As provided for in the UNDCP recommendations, if (there are no more than) 10 packages, then all (the packages) are examined; if (there are) up to 100 packages, then every tenth package is examined; if (there are) more than 100 packages, the quantity to be analysed is the number calculated to be a square root of all the packages ..."

28. The expert O.B. stated, *inter alia*, that:

> "... When preparing the expert report, all packages had been analysed using colour tests; 20 packages, which were randomly selected from the total of 389 packages in accordance with the UNDCP recommendations, were analysed by means of ... (methods of analysis) ... The packages were brought into the laboratory for examination in 39 black plastic bags ... When we arrived at Blace border crossing, the packages were lined up at the roadside; they were covered with *polycolor*; we took samples for analysis from several packages ..."

29. The applicants objected to both the experts' statements and the expert reports, arguing that they had been drawn up by the Ministry of the Interior, the same body that had instituted the proceedings against them.

30. The hearing continued on 17 October 2007 when "an employee from the court archives department entered (the court room)" and handed the trial judge the transcripts of the statements N.V. and L.S. had given before the Podgorica District Court (see paragraphs 23 and 25 above), translated into Macedonian. The trial judge noted that N.V. and L.S. had been prevented from attending the scheduled hearing due to "other obligations" and "a trip to Italy" respectively. Therefore, she proceeded to read out the witnesses' statements. She also ordered that the Bureau supplement the expert reports TD 1/2007 and TD 8/2007 with information regarding the drug's net weight (*дополнување на вештачењето*).

31. On 2 November 2007, outside the hearing (*вон рочиште*), the trial court ordered the Bureau to draw up a fresh expert report regarding the quality and quantity of the substance found in the cans. The order was communicated to the parties.

32. On 9 November 2007 S.K. and O.B., the experts employed by the Bureau, drew up a fresh expert report (no. 1399/07), the relevant parts of which read as follows:

> "In order to determine the nature of the substance and in accordance with the recommendations of ENFSI (European Network of Forensic Sciences Institutes) and UNDCP (United Nations Drug Control Program) regarding the analysis of multiple samples, 27 randomly-chosen packages ... were analysed ... out of the total number of packages (432) ...
>
> The net weight of the material taken from the analysed packages was 27.30 kilos ...
>
> On the basis of the analysis made, it is confirmed that the analysed material taken from the packages was cocaine. This confirms the earlier findings ... specified in the expert reports nos.1/07 and 8/07 of 7 and 11 January 2007, respectively.
>
> The total net weight of seized packages (432) was established (on the basis of ENFSI recommendations) by means of a mathematical and statistical methodology ... On the basis of the calculations done, it is concluded that the total net weight of the substance (found) in the packages was 436.879 kg ± 2.324 kg."

33. Expert report no. 1399/07 was presented at a hearing dated 15 November 2007 in the presence of the applicants and their

representatives. Evidence from the experts S.K. and O.B. was also heard. S.K. stated, inter alia, that:

> "... [the Bureau] is the only accredited and reliable laboratory in the Republic of Macedonia competent to analyse seized drugs. We are authorised by UNDCP and we apply its recommendations ... Since 1997, when we started work, the central laboratory in Vienna has never voiced any complaints about our analyses ...
>
> In the present case, which concerned more than 100 packages, namely 432, after we had determined the square root of 432, which is 20.78, we analysed 21 packages, which were chosen at random. I stress that these 21 packages were analysed fully using all the methods specified in the recommendations. That does not mean that some of the packages were not analysed at all. Regarding expert reports nos.1/07 and 8/07, all 432 packages were analysed using so-called speedy methods in order to determine the substance. Then, certain packages that were randomly chosen and were fully analysed using all methods ...
>
> Asked by the judge whether in the preparation of the expert report commissioned by the court the expert had received any instructions from anyone, including their superior, she replied:
>
> 'I drew up the expert report commissioned by the court, as well as the earlier reports, in good faith and according to my best knowledge. [The Bureau] operates within the Ministry of the Interior, but it is independent in its work. In my career, no superior has ever influenced any expert examination nor would I accept anything of that kind ...'"

34. O.B. concurred with S.K. The applicants did not object to the expert report and the experts' statements but they complained that a prosecuting body, such as the Ministry of the Interior was in this case, could not carry out an expert examination of the substance, which anyway should have been examined in its entirety (the results could not be based on an analysis carried out on randomly chosen samples). The applicants contested S.K.'s argument that the Bureau was independent and was the only accredited laboratory for such an examination. In this connection they requested that the court commission an alternative expert report by an independent expert body, national or foreign.

35. As to the applicants' objections regarding the expert evidence, the trial court stated:

> "... [The applicants'] request for an alternative expert examination of the quality and quantity of seized packages by an independent institution is not allowed since the expert evidence adduced by the court was produced by the Ministry of the Interior; in accordance with the Criminal Proceedings Act, an expert report may be drawn up by a State body; in more complex cases, such as the present one, such expert examination is entrusted, in principle, to a State body. Expert report no. 1399/07 of 9 November 2007 was drawn up by [the Bureau] on the basis of a prior court order.
>
> The request ... for a complete analysis of all seized packages is refused since ... some of the packages had been handed over to the experts (for examination), as provided for in the UNDCP and ENFSI recommendations ..."

36. On 16 November 2007 the trial court accepted the applicants' request for an on-site inspection of the (27) packages (kept in a special

department of the trial court) examined by the Bureau's experts and the subject matter of expert report no. 1399/07. The inspection was carried out in the presence of the applicants and their representatives. As indicated in the court record of that date, there were three paper bags. In each bag there were nine packages containing white powder (*бела прашкаста материја*). Since "some packages ... were of dimmer and (others) of brighter white colour (*со нијанси на потемна и посветла боја*)", the applicants' representatives argued that "the drugs were not of the same quality, that is to say of the same pureness."

37. At a hearing dated 27 November 2007, the parties presented their concluding remarks. The public prosecutor specified the indicted offence, accusing the applicants of having participated, as a group, in the unauthorised transportation of 434.555 kg of cocaine. The applicants' lawyers reiterated that the expert evidence had been produced by the Bureau, which had operated within the Ministry of the Interior, as a prosecuting body and that the third expert report that had been commissioned by the court had been of no relevance since it had been produced by the same experts who had been involved in the earlier expert examinations. They also complained that the expert evidence admitted had been inconsistent regarding the quantity of drugs seized (see paragraphs 8 and 15 above) and the type of paint in which the packages had been submerged (see paragraph 28 above). Furthermore, according to this evidence, the substance found had been pure cocaine, which, according to them, was impossible. They also contested that the statements of the witnesses (N.V. and L.S.) examined in Montenegro had been obtained in violation of their defence rights.

38. On 30 November 2007 the trial court delivered a judgment in which it found the applicants guilty of drug trafficking, an offence punishable under Article 215(2) in conjunction with sub-paragraph 1 of the Criminal Code (see paragraph 53 below) and sentenced them to 14 years and six months' imprisonment. The operative part of the judgment read as follows:

> "... on an unspecified date before the end of December 2006, [the applicants] (acting) as a group (*како повеќе лица*), were participants in the unauthorised transportation of a shipment of narcotic drugs – cocaine (*неовластено пренесување на наркотична дрога-кокаин*). After [the first applicant] had contacted persons of unknown identity who intended to transport drugs from Venezuela, (she) had agreed with them to transfer the drugs to the Republic of Greece ... on 29 December 2006 (she) contacted [the second applicant] in order to arrange with him the transport of the drugs from [Montenegro] to [Greece] ... paid him EUR 1,100 [and provided him with the necessary supporting documentation]. On 2 January 2007 [the second applicant] drove a truck ... to [Montenegro]. On 4 January 2007, 882 plastic cans of acrylic paint were loaded onto [the truck]. Cocaine was planted in some of them ... [He] drove through Kosovo towards the Republic of Macedonia and the Republic of Greece ... At around 5 p.m. on 6 January 2007 he arrived at the Blace border crossing (on the Macedonia-Kosovo border). On the morning of 7 January 2007, during a routine inspection by Customs, which continued on 8 January 2007, 432 packages of cocaine

were discovered in 76 cans containing acrylic paint. The total weight of the drugs was 434.555 kg."

39. The judgment, which runs to fifty-five pages, was based on the following evidence: the applicants' statements; statements from four witnesses for the second applicant (including his wife and father, who confirmed that he had spent the night 6 January 2007 at home and had returned the next morning to Blace customs terminal); statements from three customs officials who searched the truck at the customs terminal; the statements given by the experts S.K. and O.B.; the statements of witnesses L.S. and N.V. who were questioned by the investigating judge of the Podgorica District Court; and a considerable amount of material evidence, including expert reports nos. 1/07, 8/07 and 1399/07, and a detailed list of calls made from the applicants' mobile phones.

40. In addition to the facts indicated above (see paragraph 6 above), the trial court also established that the second applicant had arrived in Bar on 3 January 2007; that he had called N.V. regarding the shipment; that on 4 January 2007 the cans had been loaded onto his truck and he had left for Kosovo; that he had spent the night of 4 January in the truck at Pec customs terminal; that on 5 January 2007 the truck had been searched (using police dogs) at that terminal; that on the night of 5 January the truck had remained at the terminal and the second applicant had spent the night in a hotel; that he had returned to the terminal on 6 January; and that at 2 pm. that day he had left, escorted by Kosovo customs, for the Blace border crossing, where he had arrived at around 5 pm. on 6 January 2007. The truck had remained at the customs terminal overnight and the second applicant had spent the night at home. At 8.45 am. on 7 January 2007 he had come back to the terminal, where the truck had been searched and drugs had been found with the assistance of an X-ray van. On the basis of a detailed list of telephone calls, the court established that there had been intense communication between the applicants between 20 December 2006 and 10 January 2007 (the first applicant had called the second applicant 124 times, and he had called her 28 times), and that they had telephoned N.V. and L.S. Furthermore, the Greek company specified in the freight documentation as the recipient of the paint did not exist according to Greek official records.

41. The court referred to the expert reports and considered the experts' statements (see paragraphs 33 and 34 above) on the basis of which it established the relevant facts regarding the quality and quantity of the drugs found. It further reiterated the reasons for which it had refused the applicants' requests for an alternative expert examination (see paragraph 35 above).

42. The trial court presented an outline of the statements made by L.S. and N.V. and stated, inter alia, that:

"... The court fully accepts the statements of witnesses N.V. and L.S.... The statements of these witnesses were obtained on the basis of a request (addressed to the

Montenegro's authorities) (*по пат на замолница*) issued after a prior decision made on record at the trial. The parties and [the applicants'] representatives had no comment (about that decision) [nor] had they voiced any objection when these statements were read at the trial. They did not make any suggestions regarding these statements ..."

43. As to the second applicant, the trial court stated, *inter alia*, that:

"... The court assessed [the second applicant's] defence that he had not entered into an agreement with [the first applicant] to transport drugs ..., but rather that the agreement concerned the transportation of acrylic paint ... that drugs had never been mentioned in their discussions, that the freight documents referred only to acrylic paint ... that during the transport, he had spoken about 5 times by telephone with [the first applicant]. The court did not accept the defence of the accused since it was contrary to his actions and the admitted evidence in support of the indictment ... [The second applicant] does not deny that by having transported the paint, he also transported the cocaine ... The court cannot accept [his] defence that he did not know that there was cocaine in the cans because it is not supported by any evidence and it is contrary to his actions – he transported the drugs from Bar to the Macedonian border and (contrary) to admitted evidence – cocaine found in the cans, which was noted in the certificate of temporary seized objects ... signed by [the second applicant] who did not contest the signature and the confiscation of the cocaine at any stage of the proceedings ..."

2. Proceedings before the Skopje Court of Appeal

44. The applicants appealed against the trial court's judgment. They reiterated that the experts had not been independent (given that the Bureau had operated within the Central Police Forces Unit) and in this respect they referred to the Court's judgment in the *Stoimenov* case (see *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, 5 April 2007). The first applicant further alleged that the trial court had refused her request for an alternative expert examination, notwithstanding that the Forensic Institute (*Институт за Судска Медицина* was also authorised to conduct such an analysis, that the trial court had not explained the discrepancy between the gross and net weight of the drugs found, and that the court had accepted that the packages containing the drugs had been submerged in acrylic paint, which contradicted the experts' findings regarding the type of the paint involved (see paragraph 28 above). She also complained that she had not been allowed to consult the case file during the investigation, which had affected her ability effectively to prepare her defence. Furthermore, her defence rights had been unjustifiably restricted since she had not been given the opportunity to attend the examination of witnesses L.S. and N.V. before Podgorica District Court. In this respect she alleged that she had not been informed of the questions put to these witnesses by the trial court. The second applicant complained that there had been no evidence that he had concluded an agreement (with the first applicant) and, in particular, that he had known that he was transporting drugs. In the absence of any evidence

confirming his intention to transport drugs, no criminal liability could be attributed to him.

45. On 18 April 2008 the Skopje Court of Appeal held a public session at which, in presence of the applicants and their representatives, it dismissed the appeals and upheld the trial court's judgment. As to the first applicant's complaint concerning the requests she had made in the pre-trial proceedings to consult the case file, the court stated:

> "... On 11 May 2007 [the first applicant], in the presence of her lawyer, was informed about the charges against her ... (and) that she was not obliged to answer the questions and present her defence, but she stated that she would give a statement in any case after the available evidence had been presented to her ... On 16 May 2007 she gave a statement in the presence of her representative; the questioning continued on 18 May 2007. [On both the occasions] on which she gave a statement before the investigating judge, she had had the time and the facilities to prepare her defence and the possibility of communicating with her legal representative ...
>
> Under section 126 of the Criminal Proceedings Act, the accused is entitled to consult the case file and ... the evidence after being questioned. In the present case ... it is clear that the trial court did not violate the accused's right of defence ...
>
> ... regarding the alleged violation of section 126 of the Criminal Proceedings Act ... it is evident that after the investigating judge had questioned [the first applicant] ... [she] gave a detailed statement which was duly noted in the court record and which she had read and signed ...
>
> ... The lawyer requested and was given access to the file before he objected to the indictment ... Moreover, the trial court established all the relevant facts at the trial ... "

46. As regards the expert evidence, the court established that all the expert reports admitted as evidence had confirmed that the substance found in the cans had been cocaine; in the statement of 15 November 2007, S.K. had confirmed that all 432 packages had been examined using so-called "speedy methods" and randomly-chosen packages had then been fully analysed; the quantity of the drugs had been established on the basis of ENFSI recommendations. The court further dismissed the applicants' complaints about the alleged lack of independence of the experts, finding that the expert examination (no. 1399/07) had been ordered by the court, that the expert findings had not been called into doubt, and that they had been confirmed at the hearing by the experts, who had been warned about the consequences of false testimony. Lastly, the court held that a copy of expert report no. 1399/07 had been served on the applicants and they had been provided with a reasonable opportunity to challenge it.

47. As regards the witness evidence produced by L.S. and N.V. in Montenegro, the court held that they had been heard in response to the request by the trial court made at the hearing dated 14 September 2007; the applicants and their representatives, who had attended that hearing, had not objected, nor had they sought to attend the questioning of these witnesses; the witnesses' statements had been read out at the trial and the applicants

had not objected to them. The court concluded that this evidence had therefore been accordingly lawfully obtained.

48. As to the second applicant's complaint that he had not known that he was transporting drugs, the court stated:

> "... such an allegation is contrary to the established facts based on admitted evidence concerning the actions taken by [the second applicant] and his criminal liability ... the court does not accept [his] allegations because on the basis of all evidence admitted at the trial, [the trial] court correctly established the relevant facts concerning the actions taken by [the second applicant] ... (these) allegations were assessed by [the trial] court ... (which) gave reasonable grounds why it did not give credence to them ... it was established beyond any doubt that drugs – cocaine – had been found in some paint-cans transported by the vehicle driven by [the second applicant]."

49. The court further noted that:

> "... the large quantity of drugs, the way they were procured and transported, and the actions taken by the accused, suggest that the cocaine was transported for the purpose of selling it and not for any other purpose ...
>
> On the basis of the admitted evidence, the analysis and assessment thereof, (and) the accused's behaviour before they reached agreement concerning the shipment, the fact that they communicated between themselves, during the shipment, that is to say before, during and after the crime ... it can be concluded that the accused knew and were aware of their actions, including the crime that they had committed ... In this connection, according to this court, there is no logical economic reason to import acrylic paint from Venezuela, given the fact that transport costs from Venezuela to the (final) destination ... would be higher than its value. It can be inferred from this that the accused knew that it was about the transportation of drugs and not of acrylic paint. Having also in mind the intensity of contacts between the accused, and the contacts with the witnesses L.S. and N.V. in Bar, ... together with the fact that [the first applicant] provided [the second applicant] with written documentation ... issued by her company M., stipulating that the cargo should be transported to the Republic of Greece to company S. – which, on the basis of the available evidence, does not exist – it becomes clear that [the applicants] knew and were aware of their unlawful actions and the crime committed ..."

3. Proceedings before the Supreme Court

50. The applicants lodged requests before the Supreme Court for extraordinary review of the final judgment (*барање за вонредно преиспитување на правосилна пресуда*). They reiterated the allegations of violation of their defence rights, in particular, concerning the expert evidence, examination of witnesses L.S. and N.V. and lack of reasoning. In this latter context the second applicant reiterated that there had been no evidence showing that he had known that he was transporting drugs hidden in hermetically closed cans. His telephone contacts with the first applicant and N.V. and the court's conclusion regarding the economic rationale for importing paint from Venezuela were not conclusive given the fact that he was the driver whom the first applicant had engaged to transport the paint from Bar to Greece. The first applicant complained that it had not been

established (or indicated in the operative part of the trial court's judgment) that the drugs had been transported for the purpose of selling them. She also complained that her defence rights had been violated in the investigation.

51. On 20 October 2009 the Supreme Court upheld the established facts and dismissed the applicants' requests for the same reasons given by the Skopje Court of Appeal. In this connection it stated, inter alia, that:

> "On the basis of all admitted evidence, the intensity of telephone contacts between the accused, as well as contacts with witnesses L.S. and N.V., the accused's behaviour before they reached agreement concerning the shipment, the intensive and multiple contacts between themselves during the shipment, when the crime had been committed and after it had been discovered, the trial court correctly concluded that the accused knew and were aware of their actions regarding the unlawful transport of drugs."

52. The Supreme Court further added:

> "... As to the allegations raised in the requests that the expression "for the purpose of selling (*заради продажба*)" is missing from the operative part of the trial court's judgment, the court considers that (this omission) does not render it defective, since that can be presumed (*произлегува*) in view of the actions undertaken by [the applicants] when committing the criminal offence ... From the description of [the applicants'] actions there is no doubt that drugs were transported for the purpose of selling and that such a large quantity of drugs, namely pure cocaine, cannot be for [the applicants'] personal use. Even more, it endangers the life and health of millions of people on the planet."

II. RELEVANT DOMESTIC LAW

A. Criminal Proceedings Act of 2005 (Official Gazette. no. 15/2005, consolidated version)

53. The relevant provisions of the Criminal Proceedings Act of 2005 read as follows:

Section 69

> "A lawyer has the right to consult the case file and other available evidence once the prosecution authorities have requested criminal proceedings and after certain investigative measures have been taken by an investigating judge."

Section 126

> "The accused has the right to consult the case file and other available evidence after he is questioned."

Section 256

> "(1) An expert examination may be requested by means of a written order from the body which is carrying out the procedure. The order shall specify the reasons for which the examination is required and the person appointed to perform it.

(2) If a special institution exists or if the examination can be carried out by a State body, the examination, especially in more complex cases, shall as a rule be entrusted to that institution or body. The institution or body shall appoint one or more experts to carry out the expert examination ...

(4) If there is no expert (on the list of permanent experts) for a particular type of examination, the court can appoint an expert outside the list."

Section 260

"(2) In the case of the expert analysis of a substance, the expert shall, if possible, be given part of that substance, and the remainder must be secured in sufficient quantity for any additional analyses."

Section 265

"An opinion must be obtained from other experts if the expert opinion which has already been delivered contains inconsistencies or deficiencies or if there are reasonable doubts as to its accuracy and these cannot be eliminated by further questioning of the experts who gave the opinion."

Section 351

"(1) If a fact is to be established on the basis of a personal observation by an individual, the latter shall be questioned at a hearing. Such examination cannot be replaced by the reading of a statement from that person ...

(2) ... (the adjudicating panel) can decide to read out a transcript of the witness's statement ... if:

(i) the person concerned has died or is mentally ill, or cannot be found, or if his attendance cannot be secured or is considerably impaired due to age, illness or any other relevant reasons.

...

5. In the record of a hearing, the court shall state the reasons for reading out a transcript (of the witness's statement) and whether the witness ... took an oath."

Section 418 § 1 (7)

"(1) Final criminal proceedings may be reopened if:

...

7) the European Court of Human Rights has given a final judgment finding a violation of the human rights or freedoms (section 449 (6) of the Criminal Proceedings Act of 2010)."

B. Criminal Code of 1996

54. The relevant provision of the Criminal Code of reads as follows:

Unauthorised production and release for trade of narcotics, psychotropic substances and precursors

Article 215

"(1) A person who without authorisation produces, processes, sells or offers for sale or who, for the purpose of selling, buys, keeps or transports, or mediates in the selling or buying of, or in some other way releases for trade, without authorisation, narcotics, psychotropic substances and precursors, shall be punished with imprisonment of between one and ten years.

(2) If the crime from sub-paragraph 1 was committed by several persons, or if the perpetrator of this crime organised a network of resellers or mediators, the offender shall be punished with imprisonment of at least five years ..."

THE LAW

I. JOINDER OF THE APPLICATIONS

55. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their similar legal background.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

56. The first applicant complains under Articles 6 and 13 of the Convention that she was not allowed to consult the case file during the investigation, which affected her ability to prepare her defence. The Court considers that this complaint should be analysed only under Article 6 of the Convention. She further complains under Article 6 § 1 and 3(d) that her defence rights were restricted regarding the examination of witnesses L.S. and N.V. in Montenegro.

57. Both applicants complain under Article 6 about the refusal of the domestic courts to allow an alternative expert examination by an independent institution. In this connection they allege that the Bureau was biased since it operated within the Ministry of the Interior, the body which set in motion the criminal proceedings against them.

58. Lastly, the second applicant complains that the domestic courts did not establish and failed to provide any reasoning to demonstrate that he knew of the presence of the drugs in the cans. In this connection he alleges that, contrary to Article 6 § 2 of the Convention, they shifted onto him the burden to prove that he was not aware that he was transporting drugs. Article 6 §§ 1, 2 and 3 ((b) and (d) of the Convention, in so far as relevant, reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

...

(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. Alleged lack of reasoning and violation of the principle of the presumption of innocence regarding the second applicant

1. Admissibility

59. The Government did not raise any objection to the admissibility of this complaint.

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

2. Merits

(a) The parties' submissions

61. The second applicant maintained that no evidence had been presented to show that he had known of the presence of the drugs. The wording used in the trial court's judgment (see paragraph 43 above) had clearly shown that the court had shifted onto him the burden to prove that he had not known that there had been drugs in the cans. He argued that the prosecution had failed to prove the crime of which he was accused "beyond reasonable doubt" and that the courts had incorrectly applied the principle *in dubio pro reo*.

62. The Government submitted that the second applicant had been convicted because, together with others, he had transported drugs for the purpose of selling them. The evidence supporting the second applicant's guilt and criminal liability had been irrefutable (*апсолутно неспорни и несоборливи)*. On the basis of such evidence and the circumstances of the case, the domestic courts had established and provided sufficient reasoning in their judgments to show that the second applicant had known and been aware of the unlawful actions that he had taken (*знаел и бил свесен за противправно преземените дејствија*).

(b) The Court's consideration

63. The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 is one of the elements of a fair criminal trial that is required by paragraph 1. It will accordingly consider the second applicant's complaint from the standpoint of these two provisions taken together (see *Janosevic v. Sweden*, no. 34619/97, § 96, ECHR 2002-VII).

64. It reaffirms that it is for the Court to ascertain that the proceedings considered as a whole were fair, which in the case of criminal proceedings includes the observance of the presumption of innocence. Article 6 § 2 requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused (see *Lavents v. Latvia*, no. 58442/00, § 125, 28 November 2002). Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence (see *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001).

65. Turning to the present case, the Court observes the following facts as undisputed: the first applicant engaged the second applicant to transport paint from Bar to Greece; the second applicant was to carry out the transportation by truck, for which he was paid (by the first applicant) EUR 1,100; he called N.V. (the Montenegrin forwarding agent), whose telephone number was given to him by the first applicant, to discuss formalities regarding the cargo (no mention in those discussions was made of any drug-related matter); the second applicant drove the truck at the material time from Montenegro to the Blace border crossing, where the drugs were discovered in some cans containing paint; the expert examination confirmed that the drug found was cocaine. The second applicant admitted these facts and they were corroborated by other evidence. In addition, the detailed lists of calls admitted at the trial confirmed that the applicants had exchanged considerable number of telephone calls between them (see paragraph 40 above). The domestic courts relied in their judgments on the telephone communication between the applicants before and during the shipment (see paragraphs 49 and 51 above).

66. The Court reiterates that its role in this matter is essentially subsidiary to that of the domestic authorities which are better placed than the Court to assess the credibility of evidence with a view to establishing the facts (see *Gorgievski v. the former Yugoslav Republic of Macedonia*, no. 18002/02, § 53, 16 July 2009). In the circumstances of the case, it sees no reason to depart from the assessment made by the domestic courts. There is nothing that would cast doubt on their conclusion regarding the second applicant's knowledge of the presence of the drugs in the cans.

67. Accordingly, there has been no violation of Article 6 §§ 1 and 2 of the Convention.

B. The first applicant's right to consult the case file

1. The parties' submissions

68. The Government submitted that until 16 May 2007 (see paragraph 13 above) there had been no request for inspection of the case file by either the first applicant or her representative. That implied that they had been acquainted with the available evidence. All subsequent requests in this respect had been granted, as confirmed by the handwritten notes on each application. There was no other way of informing an interested party that access to a case file had been granted, and it was an established practice of which the first applicant's representative, as an experienced lawyer, must have been aware. In any event, the first applicant had been granted access to the case file before the trial.

69. The first applicant maintained that she had not been allowed to consult the case file during the investigation, notwithstanding her requests on 9 and 28 May, and again on 4 June 2007. She had consulted the case file for the first time on 27 and 28 June 2007, which had post-dated the indictment. Her inability to inspect the case file during the investigation had deprived her of the opportunity adequately to prepare her defence.

2. The Court's assessment

70. 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 Article 6 §§ 1 and 3 taken together (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 59, ECHR 2000-II).

71. According to the Court's case-law, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6, especially paragraph 3, may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Duško Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 10718/05, § 41, 24 April 2014; *Lisica v. Croatia*, no. 20100/06, § 47, 25 February 2010; and *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008).

72. Unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant

documents, are important guarantees of a fair trial in criminal proceedings (see *Moiseyev v. Russia*, no. 62936/00, § 217, 9 October 2008).

73. Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (see *Öcalan v. Turkey* [GC], no. 46221/99, § 140, ECHR 2005-IV).

74. Turning to the present case, the Court notes that the investigation against the applicants was opened on 8 January 2007. On 9 January 2007 the first applicant appointed Mr D. Dangov to represent her in the proceedings. On 13 January 2007 she was arrested in Serbia. On 10 May 2007 she was extradited in the respondent State, detained in the Skopje detention facility and acquainted with both the prosecutor's application for an investigation and the investigating judge's decision in this respect (see paragraph 12 above).

75. During the investigation, the first applicant's lawyer made several requests to consult the criminal file and obtain copies of the available evidence. The first request seeking access to the case file was submitted on 9 May 2007 (see paragraph 12 above). No explanation was provided as to why such a request had not been made earlier, given the lawyer's rights in this respect (see section 69 of the Criminal Proceedings Act, paragraph 52 above). Similar requests were made on 28 May and 4 June 2007 (see paragraph 14 above). There was a handwritten note on each application stating that permission to consult the case file had been granted. According to the Government, that was established practice and lawyers were not informed in any other particular way that a request for access to a criminal file had been granted (see paragraph 70 above). Be that as it may, the Court observes that the first applicant's lawyer did not inspect the case file before 27 June 2007 (see paragraph 17 above), which was six days after the bill of indictment had been submitted to the trial court (see paragraph 15 above). That fact alone, however, does not in itself imply that the first applicant had been denied the right to challenge effectively the factual and legal basis of the charges against her specified in the indictment (see paragraph 17 above). Further access to the case file was granted on 18 July 2007 (see paragraph 18 above).

76. Accordingly, the first applicant's lawyers obtained permission to consult the case file, and did so before 7 August 2007, the date on which the trial court held the first hearing (see paragraph 19 above). The Court was not presented with any convincing argument that any difficulties which her lawyers may have encountered in gaining access to the court file during the investigation had affected their ability to organise the first applicant's defence in an appropriate way and without any restriction on their ability to put all relevant defence arguments before the trial court. In this connection

it was not alleged that the file contained material that she would not be able to examine within the time available (see, in contrast, *Öcalan* [GC], cited above, § 142).

77. In such circumstances, the Court endorses the reasons adduced by the domestic courts (see paragraph 45 above) and finds that the first applicant's right to consult the case file in the pre-trial proceedings was respected to a degree which satisfies the guarantees of a fair trial under Article 6 of the Convention.

78. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Examination of witnesses L.S. and N.V.

1. The parties' submissions

79. The Government maintained that the domestic authorities had made a reasonable effort to secure the attendance of L.S. and N.V. at the trial. The interests of justice required that they were heard, but their statements had constituted neither the sole nor decisive evidence for the first applicant's conviction. The first applicant had not objected to the reading out of their statements, nor had she requested that they be personally questioned at the trial or specified any particular circumstances which they should have elucidated. Lastly, the first applicant had been able to present her version of events before the investigating judge and at the trial.

80. The first applicant submitted that at the hearing on 14 September 2007 (see paragraph 22 above), the trial court had decided to summon these witnesses to a hearing on 16 October 2007 and only if prevented from attending would they have been examined by the competent court in Bar, Montenegro. The court had neither asked her whether she would like to attend the hearing in Montenegro nor had she been informed of the exact time and place of the questioning. Lastly, she argued that the questions allegedly formulated by the trial judge had not been communicated to her at any stage of the proceedings.

2. The Court's consideration

81. The Court reiterates that all 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, Article 6 §§ 1 and 3 (d) 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 *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 707, 25 July 2013).

82. In *Al-Khawaja and Tahery v. the United Kingdom*, cited above, §§ 119-147, the Grand Chamber clarified the principles to be applied when a witness does not attend a public trial. These principles may be summarised as follows:

(i) the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

(ii) typical reasons for non-attendance are, like in the case of Al-Khawaja and Tahery (cited above), the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend trial;

(iii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iv) the admission as evidence of statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings;

(v) according to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(vi) in this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive;

(vii) however, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(viii) in particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent

witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

83. Those principles have been further clarified in the *Schatschaschwili* case (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 111-131, ECHR 2015 cited above, §§ 111-131, in which the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see *Seton v. the United Kingdom*, no. 55287/10, §§ 58 and 59, 31 March 2016).

84. Turning to the instant case, the Court notes that both N.V. and L.S. were Montenegrin nationals who were involved in dispatching the cargo from Bar. N.V. was a forwarding agent and L.S. worked at Bar Harbour. At the hearing on 13 and 14 September 2007, the trial judge accepted the prosecution's request and ordered that they be questioned at the next hearing which was to be held before the trial court on 16 October 2007. In the alternative, if they were prevented from attending the hearing, they were ordered to produce oral evidence before the competent court in Bar. In the latter case, transcripts of their statements would be read out at the trial. The Court observes that the applicants and their representatives did not object to the trial court's decision, which contained alternative orders as to the examination of these witnesses. They neither expressed any intention to attend the witnesses' questioning were it to take place in Montenegro, nor

did they propose any questions that they would have liked to be put to these witnesses (see paragraph 22 above).

85. The trial court had recourse on three occasions to international legal assistance through the Ministry of Justice. Therefore, it cannot be argued that it did not make reasonable efforts to secure the attendance of these witnesses (see *Lučić v. Croatia*, no. 5699/11, § 80, 27 February 2014, and in contrast, *Rudnichenko v. Ukraine*, no. 2775/07, §§ 106 and 107, 11 July 2013). Furthermore, it was not argued that the trial court had had any other reasonable means within its jurisdiction, on the territory of the respondent State, to secure the attendance at the trial of N.V. and L.S., who were Montenegrin nationals residing in their home country. The requests submitted by means of international legal assistance were accompanied by a list of questions, formulated by the trial court, that were to be put to the witnesses through the competent Montenegrin court. This list was apparently not communicated to the applicants.

86. Since they were unable to attend the hearing scheduled for 16 October 2007 before the trial court (see paragraph 30 above), N.V. and L.S. gave oral evidence, on 10 and 15 October 2007 respectively (they took an oath and were warned about the consequences of false testimony, see paragraph 26 above), before the investigating judge of Podgorica District Court as the competent court (see paragraphs 23 and 25 above).

87. At the hearing of 17 October 2007, the trial judge read out the witnesses' statements in the presence of the first applicant and her representative. They neither raised any objection (see paragraphs 30 and 47 above) nor did they seek later in the proceedings to have questions put to these witnesses. The Court thus considers that, in substance, the applicants may be considered to have waived their right to cross-examine the witnesses N.V. and L.S.

88. In any event, the Court notes that the trial court admitted these statements and listed them amongst the other evidence to which it referred in its judgment of 30 November 2007 (see paragraph 39 above). It is not in doubt that these statements did not constitute the only item of evidence on which the trial court relied in its judgment. The Court therefore needs to determine whether the evidence produced by these witnesses was "decisive" for the first applicant's conviction (as to the meaning of "sole" and "decisive" in the context, see *Schatschaschwili*, cited above, § 123 and *Al-Khawaja and Tahery*, cited above, § 131). Since the domestic courts did not indicate their position on this issue, it must make its own assessment of the weight of the evidence given by these witnesses having regard to the strength of the additional incriminating evidence available (see *Schatschaschwili*, cited above, § 143).

89. In this connection the Court observes that both witnesses denied that they had met the first applicant. Similarly, they could not say whether they had spoken to her on the phone (see paragraphs 23 and 25 above). The first

applicant confirmed that this had occurred (see paragraph 19 above). Furthermore, that fact was also corroborated by the detailed list of telephone calls on their phones (see paragraph 40 above). Whilst the trial court reproduced their statements in its judgment (see paragraph 42 above), it did not rely on them in order to establish any issue of fact relevant for the first applicant's guilt – or otherwise – of the offence of which she was later convicted. In such circumstances the Court is satisfied that this evidence was not decisive as regards the first applicant's conviction.

90. Against this background, it is the Court's view that the fact that the trial court read out the statements given by the witnesses N.V. and L.S. before the investigating judge of the Podgorica District Court, rather than questioning them in person at the trial, neither violated the first applicant's defence rights nor did it deprive her of a fair trial.

91. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

D. The expert evidence

1. The parties' submissions

92. The Government confirmed that the three expert reports admitted as evidence had been drawn up by the Bureau. However, the expert report of 9 November 2007 had been commissioned by the court and it had to be regarded as independent and objective, irrespective of the fact that it had been prepared by the Ministry of the Interior. The Bureau had been the only institution in the State accredited to carry out such examinations and had used well-known methods of analysis. The applicants had not challenged the finding (confirmed in all three reports) that the substance in question had been pure cocaine. The expert report commissioned by the court also specified the drug's net weight. The applicants' requests for an alternative expert examination had not been warranted by any concrete or serious deficiency regarding the quality of the expert evidence. Lastly, the applicants had had the opportunity to question the experts, who had given their statements under oath and had been warned about the consequences of false testimony.

93. The applicants reiterated that the Bureau had operated within the Ministry of the Interior, the body that had instigated the proceedings against them. They alleged that its expert examinations had therefore been biased and an independent examination should have been carried out in order to ascertain whether the seized cans had contained cocaine. Such an analysis could have been made by foreign experts or by the Institute of Chemistry, which was apparently qualified to conduct such an analysis. Furthermore, they submitted that all three reports, including the report commissioned by

the trial court, had been prepared by the same experts. Their conclusions had been based on examinations carried out on randomly chosen samples which had represented only 10% of the substance found.

2. The Court's consideration

94. The Court reiterates that the appointment of experts is relevant in assessing whether the principle of equality of arms has been complied with. The mere fact that the experts in question are employed by one of the parties does not suffice to render the proceedings unfair. Although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion. In ascertaining the experts' procedural position and their role in the proceedings, one must not lose sight of the fact that the opinion given by any court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence (see *Shulepova v. Russia*, no. 34449/03, § 62, 11 December 2008).

95. Furthermore, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial. The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, for instance on the grounds that the court considers their evidence unlikely to assist in ascertaining the truth (see *Khodorkovskiy and Lebedev*, cited above, §§ 718 and 721, and *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 196, 26 July 2011).

96. In the instant case, the Court notes that on 7 and 11 January 2007 the Bureau drew up two expert reports (TD no. 1/07 and TD no. 8/07) concerning the quality and gross weight of the substance found in the second applicant's truck. The reports were prepared by O.B. and S.K., experts employed in the Bureau. Both reports confirmed that the substance found was pure cocaine (see paragraph 7 above). These reports were drawn up by the Ministry of the Interior of its own motion and their transmission to the public prosecutor set in motion the criminal proceedings against the applicants (see paragraph 15 above).

97. At the trial, on 2 November 2007, the trial court ordered, under section 256 of the Criminal Proceedings Act (see paragraph 52 above), the Bureau to carry out a fresh expert examination of the quality and quantity of the substance found. On 9 November 2007 O.B. and S.K., the same experts

who had been involved in previous reports produced by the Bureau, drew up report no. 1399/07, which confirmed the earlier finding that the substance found was pure cocaine. In addition, it determined the drug's net weight in accordance with recommendations of the ENFSI and UNDCP (see paragraphs 32 and 35 above). All three reports were communicated to the applicants (see paragraphs 15-17 and 46 above).

98. It is not in dispute that the Bureau operated within the Ministry of the Interior, which set in motion the criminal proceedings against the applicants. The Court admits that the fact that the experts were members of the police – who owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution – may have given rise to apprehension on the part of the applicants. Such apprehension may have a certain importance, but is not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified (see *Zarb v. Malta* (dec.), no. 16631/04, 27 September 2005).

99. In the Court's opinion, the fact that an expert is a member of the police does not in itself justify the apprehension that he will be unable to act with proper neutrality. To hold otherwise would in many cases impose unacceptable limits on the courts' ability to obtain expert advice from members of the police (see *Emmanuello v. Italy*, 35791/97, 31 August 1999).

100. The Court observes that the experts were called upon to assist the court in determining the quality and quantity of the drugs, the *corpus delicti* of the offence. The subject of their examination was accordingly not related in any way to their employer (see, in contrast, *Shulepova*, cited above, § 65, and *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, §§ 47-55, 5 July 2007).

101. Furthermore, the Court attaches particular attention to the fact that the experts O.B. and S.K. produced oral evidence at two hearings held before the trial court (see, in contrast, *Duško Ivanovski*, cited above, § 56, and *Stoimenov*, cited above, §§ 48-53). They gave evidence under oath (see paragraph 27 above) and pledged that they had carried out their mandate "in good faith and according to (their) best knowledge". Furthermore, they expressly denied that they had received any instructions from anyone, including their employer. Lastly, they confirmed that the Bureau had been authorised to conduct drug analyses and had enjoyed a good reputation as a reliable institution (see paragraph 33 above). The applicants and their lawyers, who attended the hearing (see paragraphs 27, 33 and 34 above), had the opportunity to see and hear the experts giving evidence in court and to question them in order to reveal any possible conflicts of interests, insufficiency of materials at their disposal, or flaws in the methods of examination. The applicants had made no remarks as to the veracity of the account given by the experts or their reliability (see paragraph 34 above).

They also failed to produce any evidence that the experts in question had performed their duties in a way which was not impartial and objective.

102. Furthermore, whereas they challenged the methodology that the experts had used to determine the quantity and pureness of the substance, they did not contest the experts' finding that the substance in question was cocaine (see paragraphs 34, 36, 37, 44 and 50 above, and in contrast, *Stoimenov*, cited above, §§ 38 and 42). In such circumstances, the Court is prepared to concede that the trial court's refusal of the applicants' request for an alternative expert examination by a foreign or national expert or institution, which they failed to name (see paragraphs 34 and 37 above), was within that court's discretion to decide.

103. In view of the foregoing, the Court does not consider that the appointment of members of the Bureau as experts violated the principle of equality of arms or rendered the proceedings unfair.

104. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

105. The applicants complained that their conviction was contrary to Article 7 of the Convention since "the purpose of selling" was not specified in the operative part of the trial court's judgment, nor was it established during the proceedings. Article 7 reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

106. The Government contested that argument. The case concerned the transportation of cocaine by several persons. It was not possible to draw the inference that such a large quantity of cocaine had been transported for personal use by the applicants. On the contrary, all the evidence implied that it had been intended for trade purposes (*наменета за пуштање во промет*), most probably for sale. That the final destination of drugs had been in a foreign State in which the applicants were not resident supported such a conclusion. According to the Government, the Supreme Court had provided sufficient reasoning showing that there had been a more than reasonable suspicion that the drugs had been intended for sale.

107. The applicants reiterated that Article 215 of the Criminal Code sets out several requirements, including the "purpose of selling" (*намерата за продажба*), which must be present cumulatively in order for criminal liability to be attributed to an offender. Such an element cannot be presumed, but must be established in the operative part of the judgment.

B. The Court's consideration

108. The Court reiterates that the guarantee enshrined in Article 7 – which is an essential element of the rule of law – occupies a prominent place in the Convention system of protection. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, 20 October 2015).

109. The Court also reiterates that, in principle, it is not its task to take the place of the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary (see *Kononov v. Latvia* [GC], no. 36376/04, § 189, ECHR 2010).

110. That being so, the Court nevertheless reiterates that its powers of review must be greater when a Convention right, Article 7 in the present case, requires the existence of a legal basis for a conviction and sentence. The Court must satisfy itself that the result reached by the domestic courts was compatible with Article 7 of the Convention (see *Vasiliauskas*, cited above, § 161).

111. Turning to the present case, the Court notes that the operative part of the trial court's judgment did not contain any reference to the finding that the drugs were being transported for "the purpose of selling" (see paragraph 38 above). The Supreme Court acknowledged, however, that in its judgment of 20 October 2009, it did not consider that "omission" to have constituted a flaw of such significance as to require that judgment to be quashed (see paragraph 51 above) because "the purpose of selling", as a constituent element of the crime punishable under Article 215 of the Criminal Code, "(could) be presumed in view of the actions undertaken [by the applicants] (and) ... (the) large quantity of pure cocaine (which) cannot be for [the applicants'] personal use" (see paragraph 51 above). This judgment followed the reasoning of the Skopje Court of Appeal in its judgment of 18 April 2008 (see paragraph 49 above). The Court does not consider that

the domestic courts, which freely evaluated the evidence before them, were not allowed to draw such common-sense inferences from the established facts. In such circumstances, the Court is satisfied that the act constituted a criminal offence at the time when it was committed.

112. It follows that this 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,

1. *Decides* to join the applications;

2. *Declares* the second applicant's complaint concerning the alleged lack of reasoning and violation of the principle of the presumption of innocence admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been no violation of Article 6 §§ 1 and 2 of the Convention in respect of the second applicant.

Done in English, and notified in writing on 12 May 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ledi Bianku
President