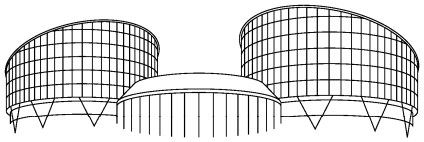

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF DIMOVIĆ AND OTHERS v. SERBIA

(Application no. 7203/12)

JUDGMENT

STRASBOURG

11 December 2018

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 Dimović and Others v. Serbia,

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

Vincent A. De Gaetano, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 20 November 2018,

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

PROCEDURE

1. The case originated in an application (no. 7203/12) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Serbian nationals, Mr Atila Dimović ("the first applicant"), Mr Marijano Dimović ("the second applicant") and Mr Tihomir Hajnal ("the third applicant"), on 11 November 2011.

2. The applicants were represented by Mr V. Juhas Đurić, a lawyer practising in Subotica. The Serbian Government ("the Government") were represented by their Agent, Ms N. Plavšić.

3. The applicants alleged that their conviction had been solely or mainly based on a statement of R.K, despite the fact that they had been unable to question him at any stage of the proceedings. They relied on Article 6 §§ 1 and 3 (d) of the Convention.

4. On 20 June 2017 the application was communicated to the Government.

5. On 15 September 2017, under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court, the President of the Section granted the European Roma Rights Centre leave to intervene as a third party in the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1985, 1988 and 1985, respectively. They live in Serbia.

7. On 26 and 27 March 2008 a brandy still, a kettle, two pieces of ham, a piece of bacon, a wheel and 10 litres of motor oil were stolen from the home of L.M. near Subotica. On 27 March 2008 L.M. reported that crime to the police. During the night of 27 to 28 March 2008 L.M. was brutally beaten up. The following items were stolen from his home that night: a combine-harvester radiator, a portable water hose, a tamburitza (a string instrument popular in Southern Europe), a Cardan joint, 60 euros (EUR) and a small amount of Serbian dinars (RSD).

8. On 28 March 2008 at about 1 a.m., following a tip-off from L.F., a patrol from Palić police station found an abandoned car about 5 km from L.M.'s home. Not far from the car, they found two pieces of ham, a piece of bacon, a combine-harvester radiator, a portable water hose and a tamburitza. They took those items to Palić police station. L.F. told the police that his neighbours, J.M. and Š.K., had seen four or five Roma men leaving the car. No further steps were taken at that stage since they were not aware that those items had been stolen from L.M. the day before.

9. On 28 March 2008 at about 2 p.m. the police found L.M. at his home. He was half-conscious. An investigating judge arrived at about 3 p.m. A police detective, at the request of the investigating judge, collected DNA evidence from a water jug on the kitchen table. Soon thereafter, he collected DNA evidence from the car mentioned above. He then went to Palić police station to photograph the items found near that car the previous night.

10. On 31 March 2008 the first applicant made a statement to the police. He stated that on the night of 27 to 28 March 2008 the second and third applicants and R.K. had beaten up L.M. and stolen from him a combine-harvester radiator, a portable water hose, a tamburitza and EUR 60. He also stated that he had stayed in the car because he had refused to participate in the robbery. He added that the car had broken down shortly after that and that they had been obliged to leave it and continue on foot.

11. On the same day, the police arrested R.K. In the presence of his counsel, V. Juhas Đurić, he denied any involvement in that robbery.

12. On 2 April 2008 R.K was taken to the investigating judge. In the presence of his counsel, he again denied any involvement in the crime in question.

13. On 3 April 2008 the public prosecutor requested that an investigation be opened into the robbery of L.M. against R.K., and against the second and third applicants, whose whereabouts were unknown at that time.

14. On 4 April 2008 R.K. was taken to the investigating judge again. In the presence of his counsel, he reiterated that he had not taken part in the robbery. This time, however, he incriminated the applicants. He stated that the three applicants in the present case had told him on 29 March 2008 that they had robbed L.M. They allegedly told him also that they had been obliged to abandon their car and some stolen items not far from L.M.'s home because of an accident. His counsel, V. Juhas Đurić, then withdrew from legally representing him owing to a conflict of interest (he intended to defend the second and third applicants if and when they were arrested).

15. Later that day, the investigating judge opened an investigation into the robbery of L.M. against R.K and against the second and third applicants.

16. On 7 April 2008 the third applicant was arrested. The next day he was taken to the investigating judge. In the presence of his counsel, he denied any involvement and added that R.K. had lied in his statement of 4 April 2008.

17. On 18 April 2008 a number of witnesses, including the first applicant, were questioned by the investigating judge. The first applicant retracted his statement of 31 March 2008, maintaining that it had been extracted under threats of violence from police officers. He further stated that R.K. had lied in his statement of 4 April 2008.

18. On 22 April 2008 the public prosecutor requested that the investigation into the robbery of L.M. be extended so as to include also the first applicant.

19. On 12 May 2008 the second applicant was arrested. On 20 May 2008 he was taken to the investigating judge. In the presence of his counsel, he denied the charges. Since he was not fluent in Serbian, he made his statement in Hungarian.

20. On 20 May 2008 L.M. gave evidence to the investigating judge. He said, *inter alia*, that on 27 March 2008 he had seen a group of Roma men in front of his home running away with a wheel he owned; one of them had had black hair with blonde highlights, had been short and around 30 years old (it would appear from a subsequent statement of L.M. that this was in fact R.K. – see paragraph 27 below).

21. On 26 May 2008 R.K. gave evidence to the investigating judge again. He retracted his statement of 4 April 2008, claiming that he had lied.

22. On 11 June 2008 the investigating judge extended the investigation into the robbery of L.M. so as to also include the first applicant.

23. On 8 July 2008 experts established that the DNA evidence collected from the water jug found in L.M.'s kitchen matched the DNA profile of L.M. and that the DNA evidence collected from the car found in the vicinity of L.M.'s home matched the DNA profile of the third applicant.

24. On 10 July 2008 the public prosecutor issued an indictment against the applicants and R.K. for robbery allegedly committed on the night of 27 to 28 March 2008 (count 1) and for burglary allegedly committed on 26 and 27 March 2008 (count 2).

25. On 5 September 2008 R.K. was transferred to the Special Prison Hospital in Belgrade. On 15 October 2008 he was diagnosed with advanced stomach cancer. One week later he was operated on and put on morphine. In the meantime, the start of the trial had had to be adjourned.

26. On 28 October 2008, in order to prevent further delays in the case against the other accused, the public prosecutor requested that R.K.'s case be severed and that he be tried separately. She amended the indictment accordingly.

27. The trial against the applicants started on 17 November 2008. They pleaded not guilty to both charges. The trial court then heard the victim, L.M., who said that on the night of 27 to 28 March 2008 four Roma men had attacked him at his home. He could not remember their faces. Having been shown a photo of R.K., L.M. stated that this was most likely the man with blonde highlights who had stolen his wheel on 27 March 2008 (see paragraph 20 above). He added that the tamburitza, the combine-harvester radiator and the portable water hose, which had been found by the police on 28 March 2008 at about 1 a.m., had belonged to him.

28. On 21 November 2008 the trial court held that R.K. was not able to effectively participate in the criminal proceedings due to his health. It therefore ordered his immediate release.

29. On 2 December 2008 the first applicant applied to the trial court to present evidence as soon as possible because he had some important information concerning it. However, at the next hearing, held on 23 January 2009, he invoked his right to remain silent.

30. On 23 January 2009 the trial court heard evidence from seven witnesses.

31. D.R., the police detective in charge of this case, said that he had collected DNA evidence from a water jug on the kitchen table in L.M's home and from an abandoned car found not far from there. He had tried to take also fingerprints from the crime scene, but this had been impossible.

32. U.Đ. confirmed his earlier statement according to which in March 2008 he had heard two young men on a local bus plotting to steal a violin from the home of a musician that same night. They had spoken Serbian without an accent. One man had got off at Aurometal and the other on Dubrovačka Street in Palić. The witness decided to follow the latter until an abandoned house in Marka Oreškovića Street in Palić, which had been occupied by Roma people. He later went to the police and reported the incident. The witness stated at the hearing that he was 50-60% certain that the second applicant had been the one who had got off the bus at Aurometal (the witness had been able to observe him from the bus for about thirty seconds); the third applicant could have been the other one, but the witness was not sure because he had seen him only from behind.

33. M.P., a police officer, stated that on 14 March 2008, following the tip-off from U.Đ., he had gone to the house in Marka Oreškovića Street and found

the applicants, R.K. and some other Roma people there. On 28 March 2008 at about 1 p.m. he had decided to visit L.M. to inform him that some of the items stolen from him the day before had actually been found. L.M. had been injured, but had managed to tell the witness that three or four Roma men had attacked him during the night and had stolen from him a tamburitza, among other things. The witness had instantly remembered the incident of 14 March 2008 concerning a plot to steal a musical instrument. He had then gone to check the car found not far from there the previous night. He had established that the car had belonged to either the second or third applicant. Lastly, the witness added that all three accused had been known to the police.

34. O.S., one of the experts who examined the DNA evidence collected from L.M.'s home and from the car found in the vicinity of L.M.'s home, explained his report of 8 July 2008 according to which the material matched the DNA profiles of L.M. and the third applicant (see paragraph 23 above).

35. P.E. stated that he had helped Officer M.P. to find L.M.'s home the day after L.M. had been beaten up and robbed.

36. J.M. and Š.K. confirmed their earlier statements according to which they had seen four or five Roma men leaving a car beside the road during the night of 27 to 28 March 2008. J.M. and his neighbour, L.F., had then found two pieces of ham, a piece of bacon, a tamburitza, a combine-harvester radiator and a water hose about 50 m from the car. They had called the police.

37. On 23 January 2009 the public prosecutor applied to the court to have the statements that R.K. had made to the investigating judge read out at the trial. The defence objected, arguing that R.K. could only be heard as a witness as his case had been severed. The trial court dismissed the application. On 26 January 2009 the defence applied to have two social workers give evidence so as to confirm that the second applicant did not speak Serbian without an accent (unlike the person whom U.Đ. had heard plotting to steal a violin (see paragraph 32 above)). The trial court also dismissed that application.

38. On 19 February 2009 R.K. died.

39. On 30 March 2009 the following additional documents were read out at the trial: the criminal file no. 119/08 concerning the severed case of R.K.; judicial records according to which the first applicant had three prior convictions, the second applicant had no prior convictions, the third applicant had two prior convictions, and, lastly, R.K. had nine prior convictions; and a police report of 14 March 2008 (see, in this regard, the witness statements of U.Đ. and M.P. in paragraphs 32 and 33 above) stating that the persons seen by U.Đ. earlier that day had been probably the first and the third applicants (rather than the second and the third applicants, as stated by U.Đ. on 23 January 2009). The trial court declared inadmissible the statements of the first applicant made before the opening of an investigation against him. In his closing argument, defence counsel argued that the statement of R.K. of 4 April 2008 was not reliable as it had not been made under oath and had been retracted on 26 May 2008.

40. On the same day, the trial court rendered a judgment. On the basis of the statement of R.K. made on 4 April 2008 and the other evidence set out above, it convicted the applicants of burglary and robbery. The first and third applicants were sentenced to eight and a half years' imprisonment. In view of the fact that he had no prior convictions, the second applicant was sentenced to five and a half years' imprisonment.

41. In their appeal, the applicants argued, *inter alia*, that the statement of R.K. of 4 April 2008 ought not to have been admitted because they had not been able to test that evidence by means of cross-examination.

42. On 9 March 2010 the Novi Sad Court of Appeal (*Apelacioni sud*) upheld the judgment of 30 March 2009. It acknowledged that the statement of R.K. made on 4 April 2008 had been the sole evidence against the first applicant and that the only corroborative evidence against the second and third applicants had been the statement of U.Đ. made at the trial on 23 January 2009 and the DNA evidence belonging to the third applicant found in a car abandoned in the vicinity of the crime scene. The court held that its admission was still lawful. It relied, in this regard, on Article 337 § 1 of the Code of Criminal Procedure as well as the fact that R.K. had made the statement in question in the presence of his counsel, V. Juhas Đurić, who had shortly thereafter become counsel for the applicants.

43. In their constitutional appeal, the applicants invoked, *inter alia*, the right to a fair trial. In this connection, they submitted that the statement of R.K. of 4 April 2008 ought not to have been admitted as they had not been able to test that evidence by means of a cross-examination. They added that it was irrelevant that V. Juhas Đurić, their then counsel, had been present when R.K. had made the impugned statement because he had become their counsel only after that date. In their opinion, it had been crucial that they had not been able to examine or have examined R.K. either on 4 April 2008 or later. They relied in this connection on *Lucà v. Italy* (no. 33354/96, ECHR 2001-II).

44. On 29 September 2011 the Constitutional Court rejected the case. It relied, like the second-instance court, on the relevant domestic provision in accordance with which statements made by co-accused to an investigating judge could be admitted as evidence if they had died in the meantime. It concluded that the applicants' complaint about the fairness of their trial was, in substance, of a fourth-instance nature and therefore inadmissible.

45. The applicants have served their prison sentences.

II. RELEVANT DOMESTIC LAW

46. The Code of Criminal Procedure 2001 (*Zakonik o krivičnom postupku*, Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02 and Official Gazette of the Republic of Serbia nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09, 76/10) was in force until 2013. Article 337 § 1 of the

Code provided, *inter alia*, that statements made by co-accused and witnesses to an investigating judge could be read out at trial, and hence admitted as evidence, if the persons concerned had died in the meantime or were unable to appear before the court owing to ill-health. In accordance with Articles 91 § 1 and 250 of that Code, a co-accused is entitled to seek a confrontation with the other co-accused during the investigation stage. Lastly, Article 132a of that Code, which entered into force on 11 September 2009, introduced the possibility of video recording of the questioning of witnesses and co-accused at the investigation stage.

47. In accordance with Article 485 of the Code of Criminal Procedure 2011 (*Zakonik o krivičnom postupku*, Official Gazette of the Republic of Serbia nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14), the reopening of a criminal trial may be sought where the Constitutional Court of Serbia or the European Court of Human Rights has found that the convicted person's rights have been breached in the trial. The time-limit is three months from the date of delivery of the decision finding such a breach. In addition, if that person is later acquitted, he or she may seek damages from the State in respect of pecuniary and/or non-pecuniary loss, a public announcement of his or her acquittal, and reinstatement to his or her job (see Articles 583-95 of that Code).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

48. Article 6 §§ 1 and 3 (d) of the Convention read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

49. The Government did not raise any admissibility objections. Since the application is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, it must be declared admissible.

B. Merits

50. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicants complained of the fairness of their trial. In particular, they alleged that their conviction had been solely or mainly based on a statement of R.K., whom they had been unable to question. At the same time, the counterbalancing measures taken had been insufficient to allow a fair and proper assessment of the reliability of the untested evidence.

51. The Government maintained that the trial court had not regarded the impugned statement of R.K. as the sole or decisive evidence against the applicants. In particular, the trial court had also taken into consideration the following evidence: the statements of L.M., who had first described and then recognised one of the perpetrators; the DNA evidence found in a car abandoned in the vicinity of the crime scene; the statements of J.M. and Š.K., according to which they had seen four or five Roma men leaving the car at issue; a statement of U.Đ. according to which he had heard two men plotting to steal a violin from a musician's home on the night of 14 March 2008; and a statement of M.P. corroborating the statement of U.Đ. The present case had therefore to be distinguished from *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, § 154, ECHR 2011) and *Dimović v. Serbia* (no. 24463/11, § 43, 28 June 2016). The Government also pointed out that domestic law provided that statements made before the trial by a co-accused could be admitted as evidence under certain conditions. They further emphasised that the impugned statement of R.K. had been made to the investigating judge, and not to the police, unlike in *Al-Khawaja and Tahery* (cited above, § 3). The applicants also had had the opportunity to give their own version of the events and to challenge the credibility of R.K. Lastly, the Government maintained that once an investigation had been opened against the applicants, they had been entitled to seek a confrontation with R.K. in accordance with the relevant domestic law set out in paragraph 46 above. However, they had failed to do so.

52. The European Roma Rights Centre, in its third-party submissions of 16 October 2017, submitted that there was institutional anti-Gypsyism in Serbia in general and in its criminal justice system in particular. They relied on a number of reports as well as surveys on the attitude of public officials towards discrimination in Serbia. The third party concluded that the Roma had for centuries been victims of racist stereotypes portraying them as

criminals and that States had a positive obligation to ensure that their criminal justice systems were not contaminated by such stereotypes.

53. The Court notes that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses. It is also noted in this regard that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Al-Khawaja and Tahery*, cited above, § 118, and the authorities cited therein).

54. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him or her must normally be produced in his or her presence at a public hearing with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a 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 or she makes his or her statements or at a later stage (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 103-05, ECHR 2015). The general principles regarding absent witnesses have been restated in *Seton v. the United Kingdom* (no. 55287/10, §§ 58-59, 31 March 2016):

> "58. 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.

59. Those principles have been further clarified in *Schatschaschwili v. Germany*, 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."

55. It should be noted at the outset that the above principles apply to the present case although it does not concern a statement made by a witness in the strict sense, but by a co-accused. In *Lucà* (cited above, § 41) the Court held that the term "witness" had an autonomous meaning:

" ... where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply ..."

In addition, the fact that under domestic law statements made before the trial by a co-accused may be admitted as evidence if he or she has died in the meantime (see paragraph 46 above) cannot deprive the accused of his or her right under Article 6 § 3 (d) of the Convention to examine or have examined in adversarial proceedings any material evidence against them (*Lucà*, cited above, § 42).

56. Turning to the Al-Khawaja test described above, it is self-evident that there was a valid reason for the non-attendance of R.K. at the trial. In *Al-Khawaja and Tahery* (cited above, § 121), the Court held:

> "It is plain that, where a witness has died, in order for his or her evidence to be taken into account, it will be necessary to adduce his or her witness statement ..."

In this connection, the present case should be distinguished from *Dimović* (cited above, §§ 41-42). Unlike in the present case, in *Dimović*, the impugned witness had been available for questioning during the first trial and had died only before the retrial. Therefore, the Court concluded in that case that the inability of the defence to examine the impugned evidence by personally confronting the witness as required by the Convention had been due primarily to the lack of diligence on the part of domestic courts. In the present case, the co-accused fell seriously ill before the beginning of the trial and died shortly afterwards.

57. As regards the second step of the Al-Khawaja test, the Government pointed out that the trial court in the present case had not relied only on the impugned statement of R.K., but also on other evidence. However, the appeals court held that the statement at issue had been the sole evidence against the first applicant and that the only corroborative evidence against the second applicant and the third applicant had been the statement of U.Đ. made at the trial on 23 January 2009 and the DNA evidence belonging to the third applicant found in a car abandoned in the vicinity of the crime scene (see paragraph 42 above). The Court, like the appeals court, considers the other pieces of evidence on which the trial court relied to be irrelevant for the determination of the criminal charges against the present applicants. Indeed, the person recognised by L.M. as one of the perpetrators was R.K., who is not the applicant in the present case (see paragraph 27 above). The witnesses J.M. and Š.K. only stated that they had seen four or five Roma men leaving a car abandoned in the vicinity of the crime scene, without providing any details (see paragraph 36 above). Lastly, the statement of M.P. merely demonstrated that the applicants and R.K. had known each other and that they had met on 14 March 2008 (see paragraph 33 above).

58. Turning now to the evidence on which the appeals court relied, other than the impugned statement of R.K., the Court notes that U.Đ. said that on 14 March 2008 he had heard two men on a local bus plotting to steal a violin from the home of a musician. He was 50-60% certain that the second applicant had been one of them. Secondly, whilst he said that the two men

had spoken Serbian without accent, it would appear from the case file that the second applicant was not fluent in Serbian (he made his statement to the investigating judge in Hungarian – see paragraph 19 above). At the trial, the defence applied to have two social workers examined so as to prove that fact, but the trial court dismissed that application. Thirdly, a police report of 14 March 2008 stated that one of the persons seen by U.Đ. earlier that day had been probably the first applicant and not the second applicant (according to that report, the other person had probably been the third applicant). Lastly, even assuming that the second applicant had indeed been on that bus, plotting to steal a violin from the home of a musician on the night of 14 to 15 March 2008, it is not clear how this would prove that he stole a tamburitza and a number of other items from the home of L.M., who was not a musician, about two weeks later. As to the DNA evidence belonging to the third applicant found in a car 5 km from L.M.'s home, the Court agrees that this is weighty evidence against the third applicant in view of the fact that a number of items stolen from L.M. had also been found not far from that car.

59. Consequently, the Court finds that the statement of R.K. of 4 April 2008 was not "decisive" in respect of the third applicant, but that it was "decisive" in respect of the other two applicants.

60. As to the third step of the Al-Khawaja test, the Court observes that R.K. fell seriously ill after the pre-trial investigation had been ended and an indictment had been issued (see paragraphs 24-25 above). The investigating authorities therefore cannot be reproached for not carrying out a confrontation between him and the applicants during the investigation stage. At that moment, it was simply not foreseeable that R.K. would not attend a subsequent trial (contrast *Schatschaschwili*, cited above, §§ 158-60, and *Vronchenko v. Estonia*, no. 59632/09, § 61, 18 July 2013). For the same reason, the applicants cannot be reproached for not seeking a confrontation with R.K. during that stage, although they were entitled to do so under domestic law (see paragraph 46 above).

61. The fact that the impugned statement of R.K. was taken in the presence and under the supervision of the investigating judge cannot in itself be regarded as a substitute for the applicants' right to examine him (see *Tseber v. the Czech Republic*, no. 46203/08, § 62, 22 November 2012), but it constituted one of the procedural safeguards of the right of a fair trial (see *Štulíř v. the Czech Republic*, no. 36705/12, § 69, 12 January 2017).

62. The Court has earlier held that an additional safeguard in this context might be to show at the trial a video recording of the absent witness's questioning at the investigation stage so as to allow the court, prosecution and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability (see *Schatschaschwili*, cited above, § 127, and the authorities cited therein). However, when R.K. made his impugned statement, domestic law did not provide for the possibility of

video recording of the questioning of witnesses and co-accused at the investigation stage (see paragraph 46 above).

63. Lastly, the Court notes that in the national courts' judgments there is no indication that they approached the reliability of the statement of R.K. made on 4 April 2008 with any specific caution (contrast *Sievert v. Germany*, no. 29881/07, § 65, 19 July 2012, and *Brzuszczyński v. Poland*, no. 23789/09, §§ 85-86 and 89, 17 September 2013). Notably, the national courts did not take into consideration the fact that the statement in question had later been retracted (see paragraph 21 above). Neither is there any indication that the national courts were aware that a statement of an absent witness, such as R.K., carried less weight (see, in this regard, *Paić v. Croatia*, no. 47082/12, § 43, 29 March 2016; *Dimović*, cited above, § 44; and *Manucharyan v. Armenia*, no. 35688/11, § 58, 24 November 2016).

64. The foregoing considerations are sufficient to enable the Court to conclude that there has been no breach of Article 6 § 1 of the Convention read in conjunction with Article 6 § 3 (d) in respect of the third applicant and that there has been a breach of that Article in respect of the first applicant and the second applicant.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

66. As no violation has been found in respect of the third applicant, just satisfaction need only be considered in respect of the other two applicants.

A. Damage

67. The applicants claimed 6,000 euros (EUR) each in respect of non-pecuniary damage.

68. The Government maintained that the claim was excessive.

69. The Court considers that the applicants must have suffered distress and anxiety on account of the violations found. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards them EUR 2,400 each in respect of non-pecuniary damage.

B. Costs and expenses

70. The applicants also claimed approximately EUR 12,200 for the costs and expenses incurred before the domestic courts and around EUR 1,100 for those incurred before the Court.

71. The Government maintained that the claim was unsubstantiated.

72. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,100 covering costs under all heads.

C. Default interest

73. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention read in conjunction with Article 6 § 3 (d) in respect of the third applicant;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention read in conjunction with Article 6 § 3 (d) in respect of the first applicant and the second applicant;

4. *Holds*

   (a) that the respondent State is to pay the first applicant and the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,400 (two thousand four hundred euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 8,100 (eight thousand one hundred euros) in total, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 11 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President