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EGMR Nr. 51277/99 - Urteil der 2. Kammer vom 28. Februar 2006 (Krasniki v. Tschechien)

Konfrontationsrecht (Verwertungsverbot hinsichtlich einer entscheidenden Verwertung unkonfrontierter Aussagen; anonyme Zeugen: Darlegungspflichten hinsichtlich bestehender Drohungen und Gewaltanwendungen gegenüber Zeugen im "Drogenmilieu"; unmögliche Kompensation); Recht auf ein faires Strafverfahren (Gesamtbetrachtung und Gesamtrecht); Wiederaufnahme eines Strafverfahrens nach einer Verletzung des Art. 6 EMRK als optimale Form der Wiedergutmachung; redaktioneller Hinweis.

Art. 6 Abs. 1 Satz 1, Abs. 3 lit. d EMRK; Art. 41 EMRK; Art. 2 Abs. 1 GG; Art. 20 Abs. 3 GG; § 96 StPO (analog); § 244 Abs. 3 Satz 2 StPO; § 261 StPO; § 359 Nr. 6 StPO

Leitsätze des Bearbeiters

1. Wird dem entscheidenden Zeugen eine anonyme Aussage zugestanden, um ihn vor Drohungen und vor Gewaltanwendungen zu schützen, die beim Drogenhandel üblicherweise gegenüber Zeugen zu befürchten seien, ist Art. 6 EMRK verletzt, wenn dieser Schutzbedarf nicht für den Einzelfall konkret dargelegt und damit gerechtfertigt wird. Es kommt in diesem Fall auch nicht darauf an, welche Maßnahmen die staatlichen Stellen zum Ausgleich der anonymen Zeugenaussage getroffen haben.

2. Wenn eine Verurteilung allein oder in entscheidendem Ausmaß auf Aussagen beruht, die von einer Person gemacht worden sind, hinsichtlich derer der Angeklagte weder während der Ermittlungsphase noch während des gerichtlichen Hauptverfahrens eine Gelegenheit hatte, sie zu prüfen oder prüfen zu lassen, sind die Verteidigungsrechte in einem Ausmaß beschränkt, das mit den von Art. 6 EMRK gewährten Garantien unvereinbar ist.

3. Angaben, die von anonymen Informanten gemacht worden sind, können unter Umständen dann verwertet werden, wenn die nationalen Behörden relevante und hinreichende Gründe für die Geheimhaltung ihrer Identität vorweisen. Die der Verteidigung hieraus erwachsenden Erschwernisse sind jedoch zur Wahrung der Art. 6 Abs. 1 und 3 lit. d EMRK hinreichend durch die von den Justizorganen angewendeten Verfahren auszugleichen. Bei der Prüfung, ob diese Verfahren einen hinreichenden Ausgleich darstellen, um die für die Verteidigung verursachten Erschwernisse auszugleichen, muss dem Ausmaß gebührendes Gewicht beigemessen werden, in welchem die anonymen Zeugenaussagen für die angegriffene Verurteilung entscheidend gewesen sind.

4. Wurde ein Beschwerdeführer trotz einer Verletzung seiner von Art. 6 EMRK garantierten Rechte verurteilt, sollte er soweit wie möglich in die Position versetzt werden, in der er sich ohne diese Verletzung befunden hätte. Die optimale Form der Wiedergutmachung ist prinzipiell ein neues Verfahren oder die Wiederaufnahme des früheren Prozesses, wenn der Beschwerdeführer dies beantragt.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE 1

8. The applicant was born in 1971 and lives in Skopje ("the former Yugoslav Republic of Macedonia"). 2

9. On 24 April 1997 the applicant was accused of having committed the offence of the unauthorised production and possession of narcotics and poisonous substances between January and April 1997, contrary to Article 187 § 1 of the Criminal Code as in force at the material time. 3

10. According to the Government, a witness using the fictitious name of "Jana Charvátová" was examined for the first time on 24 April 1997, having been contacted by the police in connection with their investigation into the applicant's criminal activities. The witness stated, inter alia, that "she want[ed] to testify because she kn[ew] what heroin c[ould] do 4

and that she want[ed] Teplice to be free of drug dealers" and that "for great fear for her own life she w[ould] testify provided that anonymity w[ould] be granted to her, because after the police had detained most of former dealers, the Yugoslavs threaten[ed] that if anybody w[ould] 'rat' on the dealers and they w[ould] find it, they w[ould] 'annihilate' him or her".

11. The applicant stated that the record of the interview in his criminal file was not a statement signed by the witness, but a so-called official record (úřední záznam) drawn up and signed by the police officer afterwards. He further maintained that it was not clear from that record whether "Jana Charvátová" had been examined or whether the report had been drawn up before or after the applicant was charged. He contended that such a record could not be used as evidence for the prosecution. 5

12. In the course of the pre-trial proceedings the applicant denied his guilt, stressing that he was a heroin addict and that the drugs found in his possession were for his own use only. "Jana Charvátová" and another witness, using the fictitious name of "Jan Novotný", were questioned by the Teplice District Investigation Office (okresní úrad vyšetrování) on 11 July 1997. The applicant's lawyer attended the interview, the applicant not being present. Witness "Jana Charvátová" said: 6

"... as for Hasan Krasniki, I am not familiar with his surname, I got in touch with him some time in the winter of last year ... my boyfriend, who is also a drug addict, sent me to see him. 7

I wish to correct the facts concerning the individual named Hasan Krasniki. As I have already said, I am not familiar with his surname. I know, or more precisely, I remember the forename: my boyfriend sent me to Pikes in Trnovany and told me to find a certain Hasan in order to get 0.5 grams of heroin. ... 8

As for Hasan, I was still buying narcotics ... from him ... last year. I do not remember seeing him since then. As for his description, I can say that he is about 170 cm tall, slim with short dark blond hair ... and I recall that he wore blue jeans and a dark jacket." 9

13. In reply to a question put by the applicant's lawyer, the witness said that she was giving evidence as an anonymous witness because she owed money for drugs. In reply to a question put by the investigating officer as to whether the persons to whom she owed money had ever threatened or beaten her, she replied that a Yugoslav to whom she had owed money for drugs had beaten her up and that there had been similar incidents. 10

14. She was shown a photograph album with ten photographs and was asked to examine them. She stated: 11

"... I do not know the name of the person in photograph no. 5 ... I was buying narcotics from him ... in Pikes in Trnovany some time after Christmas ...; he then moved to Pikes near the railway station. It was some time in winter when I last saw him." 12

15. In reply to a question put by the applicant's lawyer, "Jana Charvátová" said that "Hasan" from whom she had bought heroin around Christmas 1996 was not among the individuals in the photographs. In reply to the investigating officer's question as to whether she knew somebody called "Jura" or "Džura" and whether he was in any of the photographs, she answered: 13

"I am not familiar with the name "Jura", but rather Džuro. I have the impression that I was buying heroin from somebody like him; I'm sure I was buying heroin from him in Pikes in Trnovany; it was some time in winter, last year or this year, I do not know precisely. ... I think that must be him in photograph no. 1." 14

16. According to the applicant, the chronology of the examination of "Jana Charvátová" was as follows: the witness was asked about Hasan Krasniki and therefore she started to speak about a person called Hasan first. She described him and, after that, she was shown the photograph album and then incidentally mentioned that she knew most of the persons shown in the photographs including the applicant. The official record of the interview stated that "Jana Charvátová" was questioned about Hasan Krasniki, alias "Jura" or "Džuro", during the examination of 11 July 1997, and that she identified "Džuro" as being the individual in photograph number one. 15

17. Interviewed on the same day, witness "Jan Novotný" stated: 16

"I know quite a lot of Yugoslavs and I can definitely speak about the person concerned - I know him by his nickname Džuro. 17

I know that he was here about four years ago, then he left and reappeared some time at the beginning of this year. He was selling heroin for about three months in the Pikes gambling club in Trnovany; ... he moved to Pikes near the railway station for a while. I could buy 10 g of heroin altogether from him ... I last saw Džura three months ago, so some time in the second half of April or at the beginning of May ... As for his description, I can say that he was about 25 years old, some 170 cm tall, slim, with short dark blond hair. ..." 18

18. When presented with a photograph album, "Jan Novotný" stated: 19

"I clearly recognise the person in photograph number five: it is Džura from whom I was buying heroin in the Pikes gambling club in Teplice, in Masarykova Street and near the railway station from the beginning of this year to about April or the beginning of May." 20

19. The applicant's lawyer asked the witness why he was so afraid and why he wished to remain anonymous. The witness stated that Yugoslavs were a temperamental people, that they had threatened him when he had wanted to buy drugs from someone else and that he had been concerned about the safety of his family. To the lawyer's further question whether the person in photograph number five had ever threatened him, the witness replied in the negative. In reply to the lawyer's last question, "Jan Novotný" said more precisely that he had bought heroin from the man in photograph number five after the New Year, most recently around mid-April. 21

20. The police case file was sent to the Teplice District Prosecutor's Office (okresní státní zastupitelství), which on 12 September 1997 filed an indictment against the applicant with the Teplice District Court (okresní soud). The prosecutor charged the applicant with having distributed heroin in Teplice during the period between January 1997 and 23 April 1997, with having sold at least twenty packets each containing 0.5 grams of heroin to "Jan Novotný" and with having sold the same drug to "Jana Charvátová". The prosecutor suggested that the two anonymous witnesses as well as witnesses K. and S. give evidence at the trial and that the police records on the photograph-based recognition of the applicant be read out. 22

21. On 18 November 1997 the applicant's trial began in the District Court. The applicant entered a plea of not guilty. 23

22. The record of the hearing shows that, under Article 209 § 1 of the Code of Criminal Procedure ("the CCP"), the presiding judge heard the anonymous witness "Jan Novotný" outside the courtroom and out of sight of the applicant and his counsel, who were able to put questions to the witness through the presiding judge. The witness stated that the applicant was the person who had sold drugs to him and that he had bought heroin from the applicant some time in early 1997. In his testimony, the witness also stated that he was cured and was no longer addicted to any drug. In reply to several questions put by the applicant's lawyer, the witness stated that the applicant had sold drugs some time ago. He had then disappeared and had started selling them again in 1997. He also said that he had been buying drugs from the applicant during a one-month period in 1997 and that he had seen him selling heroin to other people during the first three months of 1997. He described the applicant as a man of about 175-180 cm in height, slim, with straight dark hair. He added that, unlike at present, he had not been good at recalling the colour of hair at that time. In reaction to the anonymous witness's testimony, the applicant claimed that it was not true. 24

23. The court then read out the witness statements of K. and S., an expert report and other written evidence. It adjourned the proceedings until 25 November 1997 with a view to summoning "Jana Charvátová". 25

24. Another hearing was held on 9 December 1997. It was recorded that the investigating authorities had reported by telephone that, at the time of the hearing, "Jana Charvátová" could not be found at her home. The proceedings were therefore adjourned until 14 January 1998. The police were instructed to conduct a search to find out whether the witness was staying at her home address. 26

25. According to the record of the hearing of 14 January 1998, the District Court read out the police reports of 9 and 17 December 1997 on the unknown whereabouts of "Jana Charvátová". In accordance with Article 211 § 2 (a) of the CCP, her witness statement from the pre-trial police records was read out. In reaction to the witness's testimony, the applicant claimed that he had not been in the Czech Republic at the relevant time. 27

26. In a judgment given on the same day, the court found the applicant guilty of the unauthorised production and possession of narcotics and poisonous substances, and sentenced him to two years' imprisonment, as well as expulsion from the Czech Republic for an unlimited period of time. It held that, from January 1996 to 23 April 1997, the applicant had been selling heroin in "small envelopes". He had sold at least twenty "envelopes" of heroin to "Jan 28

Novotný", and on a number of occasions during this time he had also sold heroin to "Jana Charvátová".

27. The applicant maintained that he had not been in the Czech Republic at the relevant time and that the drugs found in his possession had been for his personal use. 29

28. The District Court based its finding of guilt exclusively on the testimonies of the two anonymous witnesses. It stated that the confidentiality of their identities prior to their interview in order to safeguard their security was justified under Article 55 § 2 of the CCP, having regard to the seriousness of the offence at issue and the witnesses' fear of testifying in open court. 30

29. The District Court stated that anonymous witness "Jan Novotný" had stated that he had bought at least twenty "envelopes" of heroin from the applicant and that he had recognised the latter from photographs, both in the pre-trial proceedings and at trial, as the person who had been selling heroin not only to him, but also to other persons. 31

30. As regards "Jana Charvátová", the court referred to the police report stating that the witness could not be found at her place of residence and that the search for her had been unsuccessful. It mentioned that she had testified in the pre-trial proceedings in the presence of the applicant's lawyer and had said that she had been buying heroin from the applicant, whom she had recognised from photographs. 32

31. The court also had regard to a photocopy of the applicant's passport, finding that he had arrived in the Czech Republic on 17 March 1997 from Bulgaria. According to the expert psychiatric report, the applicant was, inter alia, a drug addict who should have been aware of the dangerousness of his criminal activity for society and could have controlled his conduct. An expert examination of the substance found on the applicant indicated that it was heroin. 33

32. The court, having assessed all the relevant evidence, held that the testimonies of the anonymous witnesses were trustworthy and consistent and that they incriminated the applicant. It also stated that the witness "Jan Novotný" had recognised the applicant in both the trial and pre-trial proceedings. It concluded that the evidence adduced by the applicant - the copy of his passport and a plane ticket showing that he was not in the Czech Republic for most of the period during which he was alleged to have committed the offence - was not sufficient to rebut the strength of the case against him. It seems that the court did not rely on the witness statements of K. and S. 34

33. On 2 February 1998 the applicant appealed, claiming that he had not committed any criminal offence and that the heroin found in his possession had been for his personal use only. He also challenged the District Court's reliance on the testimonies of the anonymous witnesses whose statements had been misused to his detriment. The applicant further complained of the failure of both the investigating authorities and the District Court to resolve material contradictions in the statements of the anonymous witnesses. 35

34. On 9 March 1998 the Ústí nad Labem Regional Court (krajský soud) dismissed the applicant's appeal, finding his objection to the use of anonymous testimony unsubstantiated. It noted that both anonymous witnesses had been interviewed in the pre-trial proceedings and that the statement of "Jana Charvátová" had been read out because she could not be located at her home address. The court further noted that witnesses K. and S. had refused to testify at trial. 36

35. The court found that, owing to the nature of the criminal activity, the witnesses had been recruited from among drug users and drug addicts, who were "much more vulnerable". It concluded that the concerns which the two anonymous witnesses had expressed to the investigating authorities had resulted in the correct procedural steps being taken, in accordance with Article 55 § 2 of the CCP, including the decision to interview them under fictitious names. 37

36. As regards the inconsistency in the witnesses' statements, the Regional Court stated that witness "Jana Charvátová" had recognised the applicant from the photographs as the person from whom she had bought heroin, but had not known his name. She had described a drug dealer whom she had known by the name "Hasan" and who had not corresponded to the description of the applicant. The court held that the testimony given by witness "Jan Novotný" had not been contradictory and that he had repeatedly described from whom, where and when he had bought heroin. He had usually seen the applicant in a smoke-filled gambling hall under subdued lighting and had not been concentrating on remembering details of the applicant's appearance, but rather on obtaining drugs. The court held that his inability to describe the correct hair colour "did not play an important role". It fully endorsed the District Court's findings of fact and law. 38

37. On 6 May 1998 the applicant lodged a constitutional appeal (ústavní stížnost), claiming a violation of his rights as 39

guaranteed by Article 6 § 3 (d) of the Convention. He alleged that there had been no legal basis for the use of the anonymous witness testimony and that the authorities had put the defence at a substantial disadvantage, contrary to the principle of equality of arms. He complained that his conviction had been based solely on the testimonies of anonymous witnesses.

38. On 3 March 1999 the Constitutional Court (Ústavní soud) dismissed the applicant's appeal as unsubstantiated. It held that statements by anonymous witnesses could only be used in evidence if the principle of subsidiarity was observed, namely if there were no other means of ensuring the safety of a witness and any limitation on the rights of the defence had been minimised. The court recognised that there was a conflict between, on the one hand, the constitutional right to defend oneself and, on the other hand, the need to protect the health and life of witnesses. It held that this conflict could be resolved only on the basis of the principle of proportionality. 40

39. The Constitutional Court did not accept the applicant's allegation that the anonymous witness procedure had been misused to his detriment. It held that, to the extent that defence rights might have been interfered with through the use of statements of anonymous witnesses, it was necessary to consider the extent and seriousness of the interference in the light of the specific circumstances of the case. It found that, according to official police records, the two anonymous witnesses had been interviewed in the presence of the applicant's lawyer, who had had the opportunity to question them. The court concluded that, having regard to the photograph-based recognition of the applicant before the pre-trial authorities, as well as before the trial court, no doubt could be cast on the legality and fairness of the proceedings. It held that any disadvantages under which the defence might have operated did not give rise to a question of unconstitutionality, as it was the content of the witnesses' evidence rather than their identity that was relevant, notwithstanding the fact that the courts had not provided sufficient reasons for having adopted the procedure laid down in Articles 55 and 209 of the CCP. 41

40. On 18 April 2005 the Minister of Justice lodged a complaint in the applicant's favour, alleging a breach of law (stížnost pro porušení zákona). He based his complaint on the following grounds: 42

- "... [the courts] did not sufficiently offer the necessary guarantees to ensure a fair trial as [the applicant's] lawyer could not see both anonymous witnesses during their interviews in order to learn their identity, 43

- the prosecuting authorities did not examine the question whether it was necessary to conceal the identity of the witnesses, 44

- before the decision to conceal the identity of the witnesses was taken, the defence was never given an opportunity to raise objections concerning their credibility or the justification of the alleged threats against them which might justify their anonymity, 45

- the courts did not specify ... that they knew the true identity of both witnesses and found that the accused represented a serious threat to the life and liberty of both anonymous witnesses, 46

- [the applicant's] lawyer could not verify the credibility of the anonymous witnesses and their statements, and the courts did not do so either, 47

- inadequate conditions during the identification of the accused from photographs deprived the witnesses of their credibility, and 48

- the conviction of the accused was based exclusively on the statements of the anonymous witnesses." 49

41. In a decision of 31 May 2005 the Supreme Court (Nejvyšší soud) dismissed the complaint, relying on and sharing the legal opinions of the Constitutional Court. It added that Article 55 § 2 of the CCP did not provide for the right of counsel to see anonymous witnesses and to be informed of their identity. The Minister's two specific arguments in this connection had therefore been submitted contra legem. 50

II. RELEVANT DOMESTIC LAW 51

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III. RELEVANT CASE-LAW OF THE CONSTITUTIONAL COURT 53

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IV. DOCUMENTS OF THE COUNCIL OF EUROPE

1. Appendix to Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence

49. The Appendix to Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe, concerning the intimidation of witnesses and the rights of the defence, includes the following passage:

"...11. Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that:

- the life or freedom of the person involved is seriously threatened or, in the case of an undercover agent, his/her potential to work in the future is seriously threatened; and

- the evidence is likely to be significant and the person appears to be credible.

12. Where appropriate, further measures should be available to protect witnesses giving evidence, including preventing the identification of the witness by the defence, for example by using screens, disguising the face or distorting the voice.

13. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.

14. Where appropriate, special programmes, such as witness protection programmes, should be set up and made available to witnesses who need protection. The main objective of these programmes should be to safeguard the life and personal security of witnesses, their relatives and other persons close to them.

15. Witness protection programmes should offer various methods of protection; this may include giving witnesses and their relatives and other persons close to them a change of identity, relocation, assistance in obtaining new jobs, providing them with bodyguards and other physical protection.

16. Given the prominent role that collaborators of justice play in the fight against organised crime, they should be given adequate consideration, including the possibility of benefiting from measures provided by witness protection programmes. Where necessary, such programmes may also include specific arrangements such as special penitentiary regimes for collaborators of justice serving a prison sentence."

2. Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights

50. Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers of the Council of Europe on 19 January 2000, provides as follows:

"... Having regard to the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (restitutio in integrum);

Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve restitutio in integrum, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's

judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving restitutio in integrum;

I. Invites, in the light of these considerations, the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitutio in integrum; 73

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: 74

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and 75

(ii) the judgment of the Court leads to the conclusion that 76

(a) the impugned domestic decision is on the merits contrary to the Convention, or 77

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of." 78

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (d) OF THE CONVENTION 79

51. The applicant complained that his conviction had been based exclusively on anonymous witness testimony. He also complained that the judicial proceedings had not adequately guaranteed the necessary safeguards to ensure a fair trial as his counsel had been denied the opportunity either to see the anonymous witnesses during their testimonies or to learn their identities. He alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention, which provides as follows: 80

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ... 81

3. Everyone charged with a criminal offence has the following minimum rights: ... 82

(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; ..." 83

A. Arguments before the Court 84

1. The Government 85

52. The Government submitted that the use of anonymous witnesses had to be sufficiently justified by the circumstances of a particular case. In the present case, the need to grant anonymity to the witnesses had arisen as early as 24 April 1997 when a person, addicted to heroin at that time and later examined under the name "Jana Charvátová", had clearly declared that she had been ready to testify provided she was granted anonymity. Both witnesses "Jana Charvátová" and "Jan Novotný" had insisted on maintaining their anonymity during their interviews on 11 July 1997, when they had expressed their fears of suffering reprisals at the hands of drug dealers and the risk of personal injury. Since drug dealing had been involved and dealers frequently use threats or actual violence against persons who testify against them, the witnesses' fears could not be considered groundless, even if the applicant had maintained that he had not threatened them. The Government pointed out that the need to obtain testimony from a specific person as evidence in criminal proceedings had been recognised by the Court as a relevant ground for allowing the witness's anonymity (Doorson v. the Netherlands, judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, § 71), while at the same time protecting the witness against the possibility of reprisal by the applicant. In the Government's view, the situation of witnesses Y.15 and Y.16 in the Doorson case was similar to the situation of the present anonymous witnesses. The fact that the drug dealer had not assaulted "Jana Charvátová" because she had testified against him, but because she had owed money for the drugs, was not a reason for assessing the potential threat as being any less serious. 86

53. They further noted that the applicant's lawyer had been present at the witnesses' interviews. He had not challenged the reasons for granting them anonymity, nor had he raised any objection with the prosecutor under Article 167 of the CCP. Moreover, the trial court had taken note of the contents of the sealed envelopes containing the witnesses' particulars and had marked them with its official stamp. 87

54. The Government acknowledged that sufficient account had to be taken of the defence's position whenever anonymous witnesses were used. They disputed the applicant's objection that neither he nor his lawyer could see the witnesses and had not known their real identities and, therefore, had been unable to verify their credibility. In fact, the applicant's lawyer could, to a certain extent, directly observe the behaviour of the witnesses during the proceedings. Once the examination had been completed, he had had an opportunity to comment on the witnesses' statements and to question them directly, being in the same room as the witnesses who had been separated from him by a moveable partition. Moreover, he had heard the manner in which the witnesses had responded to questions. Accordingly, even if he could not see them, he could assess what the witnesses had been saying and the manner in which they had testified. He could also register the witnesses' emotions. Thus, he could draw his own conclusion as to their credibility, basing himself on his direct, although partially limited, perception of their behaviour and replies. Moreover, he could raise objections during the proceedings. 88

55. The Government asserted that once the prosecutor had submitted the indictment to the trial court, the trial judge had reviewed the indictment from the perspective of whether it provided reliable grounds for further proceedings, having in particular examined whether the pre-trial proceedings had been conducted in a lawful manner. He had also addressed the question of the seriousness and substantiation of the reasons for the granting of anonymity to the witnesses. He had become acquainted with the contents of the sealed envelopes, in which the confidential information about the witnesses had been placed, including their real names, home and work addresses and whereabouts, in order to assess whether the accused or his community or environment of drug dealers might have retaliated against the witnesses. In view of the specific circumstances of the case, the judge arrived at the same conclusion as the investigating officer and prosecutor in the pre-trial proceedings. 89

56. The Government further maintained that there had been no other reliable method of effectively protecting the witnesses at that time. 90

57. They noted that Czech law did not place an obligation on the judge to inform the parties explicitly that he knew the real identity of the anonymous witnesses. In the present case, the trial court had examined "Jan Novotný" outside the courtroom in the absence of the parties. During this hearing, he had also been questioned about his confidential personal details, i.e. about his true first name and surname, place of residence, his current whereabouts and workplace, family status and background, his relationship to the applicant, and also whether or not he had continued to take narcotics, whether he had been undergoing anti-drug treatment and if so where. The presiding judge had informed the parties about the content of the witness statement without, however, disclosing the confidential information. The applicant and his lawyer had used the opportunity to comment on it and to question the witness through the intermediary of the court. 91

58. The Government contended that the trial court had made it clear to the defence that it had known the true identity of the witnesses. The trial judge had recorded the content of "Jan Novotný"'s statements and made it clear that the anonymous witness had been advised of his rights and duties. He had been examined in accordance with the relevant provision of the CCP. The record had contained the information that the trial court had known the true identity of the anonymous witnesses. Moreover, the applicant's lawyer had not objected to this fact or expressed any doubts about it. In the Government's view, the applicant and his lawyer had been sufficiently informed that the trial judge had known the true identity of the anonymous witnesses. The trial court, in its judgment finding the applicant guilty, had addressed the issues of the witnesses' credibility and the reliability of their testimonies. 92

59. As to the evidence of "Jana Charvátová", the Government noted that her statement from the pre-trial proceedings had been read out. They noted that the applicant's lawyer, having known that this witness could not be found, had not objected to this procedure. 93

60. The Government conceded that no other evidence had been adduced to prove, technically, that the applicant had sold narcotics at a given place and time and that he had been convicted almost exclusively on the basis of the testimony of the two anonymous witnesses. They acknowledged, in the light of the Court's case-law, that a conviction should not be based either solely or to a decisive extent on statements of anonymous witnesses. However, this case differed from the anonymous witness cases in which the Court had found a breach of Article 6 § 3 (d) of the Convention. In those cases, the Court had found that other fairness principles had been violated. Moreover, unlike in those cases, the anonymous witness "Jan Novotný" had been heard at the preliminary stage of the criminal 94

proceedings and later on at the trial.

61. They added that it was for the national courts to assess the evidence and that, in its case-law, the Court had repeatedly emphasised that the production of evidence primarily depended upon the domestic law and that, in principle, it was for the domestic courts to assess the facts collected by them and the weight of the evidence presented by the parties (they referred, mutatis mutandis, to Edwards v. the United Kingdom, judgment of 16 December 1992, Series A no. 247-B). 95

62. The Government concluded that the applicant's rights as guaranteed by Article 6 §§ 1 and 3(d) of the Convention had been respected. 96

2. The applicant 97

63. The applicant maintained that a mere request for anonymity did not mean that the police were dispensed from examining whether the witness could have been afforded other means of protection. The refusal of the witness, "Jana Charvátová", to testify under her true name did not constitute a sufficient reason for granting her anonymity. Whilst it was true that at the material time there had been no legal provision providing for other means of protection, the applicant considered that at least some basic physical protection of theoretically endangered witnesses could have been provided by the police. 98

64. The applicant criticised the Government's view of the witnesses' answers to the questions put by his lawyer in respect of their alleged fears. In his view, the authorities should have made greater efforts to assess the threat of reprisals against the witnesses and determine whether he had been in a position to carry out such threats. 99

65. The applicant further objected to the Government's allegation that he "had viewed himself as a low-level drug dealer". In fact, he had pleaded not guilty throughout the criminal proceedings. He maintained that the references to the seriousness of the criminal activity with which he had been charged and the Regional Court's remark about the vulnerability of drug addicts did not amount to adequate reasoning. 100

66. With reference to Recommendation No. R(97) 13, the applicant pointed out that the Committee of Ministers had outlined specific procedures to be followed when deciding on the grant of anonymity to witnesses, including the requirement that a witness's request for anonymity should be submitted to the judicial authority by a prosecutor and should be served on the defendant or his lawyer. 101

67. The applicant did not object to the way in which testimony had been taken from the witnesses. He acknowledged that his lawyer had been in the same room as the witnesses during the pre-trial proceedings and had heard and questioned them directly. He did not dispute the fact that the sealed envelopes containing the personal data of witnesses "Jana Charvátová" and "Jan Novotný" had been attached to his criminal file. The envelopes had visibly been opened on their upper edges, which had been sealed by translucent adhesive tape. There had been two round stamps of the court across the tape on the left edge and two signatures over the stamps. However, in comparison with the signatures on various documents in the file, it seemed that the signature on the court stamps was not that of the judge. No dates were marked on the envelopes and no record of the opening of the envelopes was attached. 102

68. The applicant observed that, on page 74 of the case file, there were handwritten instructions to the court clerk, whereby the trial judge had requested the clerk to summon "Jan Novotný", who had been detained in the same prison as the applicant, as the judge had requested the clerk to inform the prison authorities that the applicant and the witness had to be escorted separately for security reasons and kept apart. The applicant argued in this context that neither he nor his lawyer had been aware of the fact, or informed by the trial judge that "Jan Novotný" had been imprisoned, prosecuted or sentenced. They did not know how the judge had assessed his credibility in view of this fact. The same instruction requested the clerk to serve "Jana Charvátová" with the usual summons informing her that her presence at trial was necessary and that her identity would be kept secret. 103

69. In the light of these circumstances, the applicant argued that nothing in the court file explicitly indicated that it was the judge himself who had opened the envelopes and had verified their contents in full. The applicant maintained that the trial judge had not made any enquiries about the personal background of either anonymous witness when addressing the seriousness and substantiation of the reasons for granting them anonymity, pursuant to Article 314c § 1 of the CCP. Nor was there any record indicating that the judge had become acquainted with the contents of the sealed envelopes as early as during that review. According to the applicant, the Government could not allege that the envelopes contained more details on the witnesses' relationship to him, unless they had had access to them. 104

Moreover, the record of the hearing of 18 November 1997 did not indicate that the judge had examined "Jan Novotný" with regard to his personal particulars and background. It did not even imply that the applicant and his lawyer had been sufficiently informed about the fact that the trial judge had known the identity of the anonymous witnesses.

70. Regarding the standards for verifying the witnesses' credibility, the applicant referred to Constitutional Court decision IV. ÚS 37/01, and argued that the District Court had not applied Article 209 § 2 of the CCP. He added that the trial court had been obliged to verify the credibility of the witnesses of its own motion, despite the passivity of his lawyer on this point. He did not dispute that the assessment of evidence was primarily a matter for regulation by the national authorities. However, he stated that the discrepancies in the testimonies of "Jana Charvátová" and "Jan Novotný", including the defective identification and recognition procedure, showed that the verification of their credibility by the authorities had been inadequate. 105

71. He observed that, on page 4 of its judgment, the trial court had stated that it had considered the statements of "Jana Charvátová" and "Jan Novotný" to be true, as they had precisely described the circumstances of the purchase of narcotics and were mutually supportive and linked. According to the applicant, the trial judge had never taken into account the fact that "Jan Novotný" had been prosecuted or sentenced at the time, nor had he informed the applicant's lawyer of this. The judge had not indicated how he had assessed the credibility of "Jana Charvátová" in light of the fact that she had failed to attend the trial and, later on, had not been available at her home address for unknown reasons. In addition, the District Court's judgment did not contain any indication that the judge had known more than merely the names and addresses of both witnesses. 106

72. The applicant stated that, apart from the testimony of the two anonymous witnesses, no other direct evidence against him had ever been adduced before the investigating authorities or the courts. 107

73. The applicant challenged the Government's argument that, in cases where the Court had found violations of the Convention on the grounds that applicants had been convicted to a decisive degree on the basis of anonymous witness testimony, it had at the same time always found a breach of other principles. In fact, the authorities in his case had also made other errors which aggravated the unfairness of the proceedings. In any event, it was absolutely prohibited to convict the accused solely on the basis of anonymous witness testimony. 108

74. Finally, with regard to the Government's references to the Doorson v. the Netherlands judgment, the applicant maintained that there was a qualitative difference between the present case and that of Doorson as to the authenticity of the grounds for finding that there was a real possibility of reprisals by an applicant (Doorson v. the Netherlands, cited above, § 28). The claims of "Jana Charvátová" that she should be examined anonymously had led to an agreement with the police, but no such request had been recorded in the "Jan Novotný" case. In any event, the applicant disputed the relevance of the witnesses' allegations of 11 July 1997 as the police had not granted anonymity before those interviews took place. 109

B. The Court's assessment 110

75. The Court reiterates that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts to decide whether it is necessary or advisable to hear a witness (see S.N. v. Sweden, no. 34209/96, § 44, ECHR 2002-V, with further references to Bricmont v. Belgium, judgment of 7 July 1989, Series A no. 158, p. 31, § 89). Furthermore, 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, paragraphs 1 and 3 (d) of Article 6 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 Lüdi v. Switzerland, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). 111

76. The Court has stated in Doorson v. the Netherlands (cited above, p. 470, § 69) and Van Mechelen and Others v. the Netherlands (judgment of 23 April 1997, Reports 1997-III, p. 711, § 52) that the use of statements made by anonymous witnesses to found a conviction is not in all circumstances incompatible with the Convention. However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with unusual difficulties. Accordingly, the Court has recognised that in such cases Article 6 § 1, taken together with Article 6 § 3 (d), require that the handicaps under which the defence operates should be sufficiently counterbalanced by the procedures followed by the judicial authorities. With this in mind, an applicant should not be prevented from testing the anonymous witness's reliability (see also Kostowski v. the Netherlands, judgment of 20 November 1989, Series A no. 166, p. 20, § 42). In addition, no conviction should be based either solely or to a decisive extent on anonymous statements (see Van Mechelen and Others, cited above, p. 712, §§ 54-55). 112

77. In paragraph 76 of its Doorson judgment, the Court further held that evidence obtained from witnesses under conditions in which the rights of the defence could not be secured to the extent normally required by the Convention should be treated with extreme care. 113

78. The Court has also had regard to its rulings, in a series of cases concerning reliance on witness testimony which was not adduced before the trial court, that Article 6 § 3 (d) of the Convention only required the possibility of cross-examining such witnesses in situations where this testimony played a main or decisive role in securing the conviction (see Delta v. France, judgment of 19 December 1990, Series A no. 191-A, § 37; Asch v. Austria, judgment of 26 April 1991, Series A no. 203, § 28; Artner v. Austria, judgment of 28 August 1992, Series A no. 242-A, §§ 22-24; Saïdi v. France, judgment of 20 September 1993, Series A no. 261-C, § 44). 114

79. In its admissibility decision in the case of Kok v. the Netherlands (no. 43149/98, ECHR 2000-VI), the Court indicated that, when assessing whether the procedures followed in the questioning of an anonymous witness had been sufficient to counterbalance the difficulties caused to the defence, due weight had to be given to the extent to which the anonymous testimony had been decisive in convicting the applicant. If this testimony was not in any respect decisive, the defence was handicapped to a much lesser degree. 115

80. In examining whether the use of anonymous testimony could reasonably be considered justified in the circumstances of the present case, the Court observes that the witness "Jana Charvátová" stated before the investigating officer that she was giving evidence as an anonymous witness because she owed money for drugs, and that a "Yugoslav" to whom she had owed money for drugs had beaten her up and that there had been similar incidents (see paragraph 13 above). Interviewed on the same day, witness "Jan Novotný" stated that the "Yugoslavs" were temperamental people, that they had threatened him when he wanted to buy narcotics from someone else and that he had been concerned about the safety of his family. However, he said that he had never been threatened by the man in photograph number five, whom he recognised as the applicant (see paragraph 19). 116

81. The Court notes that the investigating officer apparently took into account the nature of the environment of drug dealers who, as the Government said, frequently use threats or actual violence against drug addicts and other persons who testify against them. They could thus fear reprisals at the hands of drug dealers and risk personal injury. However, it cannot be established from the records taken during the witnesses' interviews of 11 July 1997 or from the reports of the trial (see paragraphs 22-25 above) how the investigating officer and the trial judge assessed the reasonableness of the personal fear of the witnesses, vis-à-vis the applicant, either when they were questioned by police or when "Jan Novotný" was examined at the trial. 117

82. Neither did the Regional Court carry out such an examination into the seriousness and substantiation of the reasons for granting anonymity to the witnesses when it approved the judgment of the District Court which had decided to use the statements of the anonymous witnesses in evidence against the applicant (see paragraphs 34-35 above). In this respect, referring to the grounds of the complaint against a breach of law lodged by the Minister of Justice in the applicant's favour (see paragraph 40 above), the Court is not convinced by the Government's contradictory argument. 118

83. In the light of these circumstances, the Court is not satisfied that the interest of the witnesses in remaining anonymous could justify limiting the rights of the applicant to such an extent (see, mutatis mutandis, Visser v. the Netherlands, no. 26668/95, § 48, 14 February 2002). 119

84. In addition, the Court observes that the District Court based the applicant's conviction solely or at least to a decisive extent on the anonymous testimonies. Yet the Court notes that the decision of the Regional Court upholding the first-instance judgment was not based on any new evidence from identified sources. 120

85. In the light of the above conclusion, the Court does not find it necessary to examine further whether the procedures introduced by the judicial authorities could have sufficiently counterbalanced the difficulties faced by the defence as a result of the anonymity of the witnesses (see, mutatis mutandis, Visser v. the Netherlands, cited above, § 51, with further references to Kok v. the Netherlands, cited above). 121

86. The Court thus concludes that the proceedings as a whole were unfair. There has, therefore, been a violation of Article 6 §§ 1 and 3 (d) of the Convention. 122

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 123

87. Article 41 of the Convention provides: 124

"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." 125

A. Damage 126

88. In respect of pecuniary damage, the applicant claimed an amount of 68,050 Czech korunas (2,700 euros (EUR)), which he calculated as the total minimum wage in the Czech Republic for the period of twenty-five months he had spent in detention, from 24 April 1997 to 28 May 1999. He further claimed EUR 60,000, comprising EUR 2,000 for each month in which he was deprived of his liberty, EUR 2,500 for the stigmatisation caused by his conviction as a drug dealer, and EUR 5,000 for the distress and anxiety connected to the unfairness of the criminal proceedings. 127

89. The Government first referred to the Court's case-law according to which, in the event of a violation of Article 6 § 1 of the Convention, the applicant should, as far as possible, be put in the position that he would have been in had the requirements not been disregarded. They further referred to Law no. 83/2004 which, having come into force on 1 April 2004, had amended the Constitutional Court Act in that it had introduced a possibility for applicants who had been successful in proceedings before the Court to request, in criminal matters, the reopening of the proceedings before the Constitutional Court on the basis of the original constitutional appeal. The Government submitted that the Court should take into account this development in Czech legislation, which was in line with Recommendation No. R (2000) 2 of the Committee of Ministers. 128

90. In respect of pecuniary damage, the Government noted that there was no causal link between the alleged violation of the Convention and the damage claimed by the applicant. As regards non-pecuniary damage, the finding of a violation would constitute in itself sufficient just satisfaction. 129

91. In the present case, the Court has found a violation of Article 6 §§ 1 and 3 (d) of the Convention in so far as the Czech authorities based the applicant's conviction solely on the anonymous testimonies. However, it cannot speculate as to whether the outcome of proceedings would have been different if no violation of the Convention had taken place (see Van Mechelen and Others v. the Netherlands (Article 50), judgment of 30 October 1997, Reports 1997-VII, p. 2432, § 18). 130

92. The Court does not consider it appropriate to compensate the applicant for the alleged pecuniary losses, no causal link having been established between the violation found and the negative effects the applicant's conviction allegedly had on his professional activities. Moreover, in so far as the applicant claimed just satisfaction on account of his detention, the Court observes that it has not found the deprivation of liberty in question to have been in breach of the Convention. Consequently, no just satisfaction can be awarded on that basis. 131

93. As regards the claim for non-pecuniary damage, the Court considers that its finding of a violation constitutes sufficient just satisfaction in the circumstances of the present case. However, it recalls that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position that he would have been in had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, if requested (see Öcalan v. Turkey [GC], no. 46221/99, § 210 in fine, ECHR 2005-, judgment of 12 May 2005). 132

94. It notes, in this connection, Law no. 83/2004, amending the Constitutional Court Act and giving the possibility to anyone who has been involved in domestic criminal proceedings and is successful in proceedings before an international judicial authority, which finds that his or her human rights or fundamental freedoms guaranteed by an international treaty have been violated by a public authority, may file a request for the reopening of the proceedings previously brought in the Constitutional Court. 133

B. Costs and expenses 134

95. The applicant requested reimbursement of the costs and expenses incurred in the preparation and presentation of his case before the Court. He claimed EUR 3,825 for 25.5 hours of work (EUR 150 per hour) by his lawyer, together with any value-added tax that may be chargeable. 135

96. The Government considered that the applicant's claims were unreasonable and that he had failed to show that he would have incurred and paid the costs and expenses that he claimed. 136

97. The Court observes that, according to its established case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek to prevent or rectify a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, among other authorities, Krcmár and Others v. the Czech Republic, no. 35376/97, § 52, 3 March 2000). The Court further reiterates that in assessing the reasonableness of the sums claimed in respect of costs and expenses, it does not regard itself as bound by domestic scales and practices, although it may derive some assistance from them (ibid.). 137

98. In the present case, regard being had to the information in its possession and to the above-mentioned criteria, the Court finds it reasonable and equitable to award EUR 2,500 to the applicant under this head. 138

C. Default interest 139

99. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points. 140

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention 141

[**Redaktioneller Hinweis:** Vgl. zur jüngeren Rechtsprechung auch EGMR, Haas v. Deutschland, HRRS 2006 Nr. 63, demnächst übersetzt in der JR 2006 mit Anmerkung Gaede.]