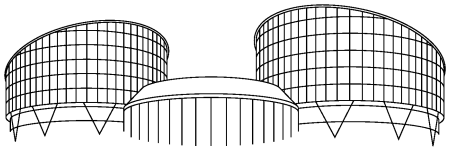

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LUČIĆ v. CROATIA

(Application no. 5699/11)

JUDGMENT

STRASBOURG

27 February 2014

FINAL

27/05/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lučić v. Croatia,

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

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 February 2014,

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

PROCEDURE

1. The case originated in an application (no. 5699/11) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Mirko Lučić ("the applicant"), on 24 December 2010.

2. The applicant was represented by Mr M. Umićević, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged that he had not had a fair trial in that he had not been given the opportunity to examine a witness against him, as required by Article 6 § § 1 and 3 (d) of the Convention.

4. On 5 March 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Zagreb.

6. On 3 May 1999, at around 8.00 p.m., J.N. lodged a criminal complaint with the Zagreb Police Department (*Policijska uprava Zagrebačka* – "the police") alleging that during the previous night the applicant had raped her. He had offered to drive her home from bar A., where she worked, but had then driven into the nearby woods and raped her in his car. She had then

asked him to drive her to a night-club, "S.", where he had dropped her off and left.

7. The applicant was arrested on the same evening and J.N. identified him as her rapist.

A. Investigation

8. During the night of 4 May 1999 J.N. was examined by a doctor who found no injuries on her body or genitals. The applicant was also taken to a doctor and the doctor found abrasions on his right upper arm and elbow and his right knee.

9. On 4 May 1999 the applicant was questioned by an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*). He admitted to having had sexual intercourse with J.N. in his car but argued that it had been consensual. He contended that the abrasions on his right arm and leg were the result of friction during the intercourse. After the questioning the applicant was released.

10. On 31 May and 17 June 1999 J.N.'s lawyer asked the Zagreb County State Attorney's Office (*Županijsko državno odvjetništvo u Zagrebu*) to request the investigating judge to have the applicant detained on the grounds that he had been trying to contact J.N., threatening her in order to make her withdraw her criminal complaint. She also argued that J.N. had sought psychiatric help and submitted medical reports in that connection.

11. On 18 June 1999 the Zagreb County State Attorney's Office asked the investigating judge of the Zagreb County Court to open an investigation in respect of the applicant on charges of rape and to order his detention on the basis of the information submitted by J.N.

12. The investigating judge opened the investigation on 6 July 1999 but refused to order the applicant's detention on the grounds that there was no reliable evidence suggesting that he might influence the witness or reoffend.

13. On 9 July 1999 J.N., in the presence of her lawyer, gave oral evidence at a hearing before the investigating judge. The applicant and his defence lawyer were not informed of the hearing and were not present during the questioning.

14. During the questioning, J.N. reiterated her previous allegation that the applicant had raped her.

15. On 13 July 1999 the Zagreb County State Attorney's Office lodged an appeal with a three-judge panel of the Zagreb County Court against the investigating judge's decision refusing the request for the applicant's detention.

16. The three-judge panel granted the application and on 16 July 1999 ordered the investigating judge to re-examine the request for detention.

17. On 27 August 1999 the investigating judge again dismissed the request for the applicant's detention on the grounds that there were no

relevant reasons for his remand in custody. The Zagreb County State Attorney's Office appealed, but on 2 September 1999 a three-judge panel upheld that decision.

18. In the course of the investigation the investigating judge heard several witnesses and commissioned medical reports.

19. On 24 September 1999 S.S., a colleague of J.N., testified before the investigating judge that she had been working with J.N. in bar A. on the day in issue and that when J.N. had wanted to go home, S.S. had asked the applicant to give her a lift. The next day, J.N. had told her that she had been raped by the applicant. S.S. had also seen the applicant later, and he had denied the rape accusation, stating that J.N. had had sex with him voluntarily. S.S. also stressed that she knew the applicant well and she had never heard of him attacking girls or doing anything of that kind.

20. An expert medical report of 10 November 1999 found that the reports on J.N.'s gynaecological and psychiatric examination showed no objective evidence of any injuries.

21. On 14 February 2000 the investigating judge heard evidence from K.N., who stated that on the night in issue he had been working as a musician in the night-club "S." when J.N. had come in. She had bought a drink for the musicians and then he had taken her home. There had been nothing unusual about her; she had appeared normal and had not made any mention of rape.

22. Another witness, J.M., was questioned on 28 March 2000. She stated that on the morning after the event J.N. had come to a bar where she worked and told her that she had been raped the evening before. She had been very distressed and frightened. J.M. had told her to report the rape to a policeman who had been in a nearby bar.

23. A forensic report of 23 November 2000 found biological traces from J.N. on the applicant's underwear.

24. An expert medical report of 7 February 2001 found that the abrasions on the applicant's right upper arm could have resulted from finger nail scratches, while the injuries on his elbow and right knee could have been the result of a fall or friction.

B. Proceedings on indictment

25. On 19 February 2001 the Zagreb County State Attorney's Office indicted the applicant in the Zagreb County Court on charges of rape.

26. At a hearing on 19 March 2003 the applicant pleaded not guilty. J.N., although properly summoned, failed to appear.

27. On 29 April 2003 the Zagreb County Court instructed the police to take J.N. to the hearing, scheduled for 2 June 2003.

28. On 27 May 2003 J.N., through her lawyer, informed the Zagreb County Court that she was living abroad and asked that the hearing be

postponed until September 2003 when she would be in Croatia. The Zagreb County Court agreed to her request and scheduled a hearing for 22 September 2003.

29. At the hearing on 22 September 2003 J.N., although properly summoned, again failed to appear. Her lawyer, present at the hearing, informed the trial court that meanwhile she had not had any contact with J.N.

30. On 1 October 2003 the Zagreb County Court again ordered the police to take J.N. to a hearing scheduled for 4 November 2003.

31. However, that hearing was again adjourned because the police were unable to locate J.N. The only information available was that she had been living in Spain for the last four years.

32. On 19 December 2003 J.N.'s lawyer informed the trial court that she was no longer representing J.N.

33. On 19 March 2004 the Zagreb County Court requested the police to establish J.N.'s exact address, and the police informed it that the only information available was that she was living in Spain.

34. After several adjourned hearings, on 24 May 2005 a hearing was held at which the applicant pleaded not guilty. The Deputy State Attorney asked the trial court to admit in evidence the written record of J.N.'s oral statement given to the investigating judge. The defence opposed that request, arguing that given the gravity of charges against the applicant it was necessary to question J.N. at the hearing. The defence also stressed that she was a Croatian citizen and that her whereabouts in Spain could be established through the relevant police records and the appropriate diplomatic channels.

35. On 19 July 2005 the police informed the Zagreb County Court that from an interview with J.N.'s mother they had learned that J.N. was living in Madrid, Spain, and that she would be in Croatia for only a couple of days during the summer.

36. At a hearing on 20 October 2005 the trial court heard evidence from the witness K.N., who reiterated his statement given to the investigating judge (see paragraph 21 above). The Deputy State Attorney again requested the trial court to admit in evidence the record of J.N.'s oral statement to the investigating judge. The defence insisted that she should be questioned and provided an address in the Netherlands where she allegedly resided.

37. On 21 October 2005 the Zagreb County Court requested that J.N. be summoned to a hearing by means of international legal assistance in criminal matters through the authorities in the Netherlands.

38. On 24 February 2006 the Zagreb County Court was informed that the authorities in the Netherlands had not been able to serve the court summons on J.N.

39. At a hearing on 10 April 2006 the trial court heard evidence from the witness S.S., who reiterated her previous statement (see paragraph 19

above). The Deputy State Attorney requested that the record of J.N.'s oral evidence to the investigating judge, as well as the records of the statements of the witness J.M., who had never appeared before the trial court, and the witness K.N., be admitted in evidence without their questioning at the hearing. The defence agreed with regard to admitting the written statements of the other witnesses but insisted on that J.N. should be questioned at the hearing. The trial court agreed to the prosecution's request and admitted the written record of J.N.'s oral evidence given before the investigating judge as evidence.

40. On the same day, the Zagreb County Court found the applicant guilty on the charges of rape and sentenced him to one year's imprisonment.

41. On 7 June 2006 the applicant lodged an appeal with the Supreme Court (*Vrhovni sud Republike Hrvatske*) against the first-instance judgment, complaining that the Zagreb County Court had failed to secure the presence and examination of J.N. at the trial.

42. On 13 December 2007 the Supreme Court quashed the first-instance judgment and ordered a retrial. The Supreme Court found that the Zagreb County Court had failed to take all reasonable steps to secure the presence of J.N. at the trial even though her evidence was decisive for the case.

43. During the retrial, on 27 February 2008 the Zagreb County Court requested that J.N.'s whereabouts in Spain be established through contacting the Spanish national authorities by means of international legal assistance in criminal matters.

44. On 21 April 2008 the police informed the Zagreb County Court that they had obtained J.N.'s address in Spain from her parents, and the trial court summoned J.N. from that address.

45. On 25 September 2008 the Zagreb County Court received information from the Spanish authorities in respect of J.N.'s exact address and telephone number in Spain.

46. A hearing scheduled for 29 October 2008 was adjourned because J.N. failed to appear. There was, at the time, no information on whether she had received the court summons.

47. Another hearing was held on 18 December 2008 at which the trial court found that J.N. had been properly summoned both to that hearing and to the hearing of 29 October 2008.

48. At the hearing the applicant pleaded not guilty to the charges of rape and the trial court again questioned the witness K.N., who reiterated his previous statements. The Deputy State Attorney asked for all the witness statements to be admitted in evidence without the questioning of the witnesses. The defence agreed to this save for the evidence of J.N., insisting that she should be cross-examined at the trial and pointing out that the defence had been denied the opportunity to question her when she had given her statement to the investigating judge. The trial court accepted the Deputy State Attorney's proposal and admitted the written record of J.N.'s oral

statement to the investigating judge as evidence. However, it adjourned the hearing in order to question another witness on behalf of the defence, I.P.

49. At a hearing held on 21 January 2009 the Zagreb County Court noted that I.P. had died and concluded the trial. On the same day it found the applicant guilty of the charges of rape and sentenced him to one year's imprisonment. The trial court relied on the statement given by J.N. and held that it had been corroborated with other evidence. In particular, it noted:

> "It follows from the statements given by witnesses S.S. and [J.M.], and the evidence provided by the forensic expert and other medical evidence concerning the victim, that the relevant (so-called control) facts, important for the assessment of contradictory statements of the accused and the victim, support the statement given by the victim."

50. On 16 February 2009 the applicant lodged an appeal with the Supreme Court complaining that the first-instance court had failed to take all reasonable steps to secure the presence of J.N. at the trial and that her evidence had been crucial for his case.

51. On 5 May 2009 the Supreme Court dismissed the applicant's appeal and upheld the first-instance judgment. The relevant part of the Supreme Court's judgment reads:

> "As can be seen from the case file, after the investigation had been opened on 15 June 1999 ... the victim J.N. was questioned as a witness on 9 July 1999 ... The accused had been legally represented ever since 4 May 1999 ... and the defence counsel did not ask to be present during the questioning of this witness, within the meaning of Article 198 § 4 of the Code of Criminal Procedure, nor did any circumstances at the time suggest that she might be absent from the hearing. Following the investigation, and after the accused had been indicted [in the Zagreb County Court], the victim's representative informed the court that '... the victim is at the moment working abroad and therefore she is unable to appear at the trial, so she has asked if the hearing can be adjourned until September 2003, when she will be in Croatia ...' ... The victim failed to appear at the hearing of 22 September 2003, although she had been properly summoned ... After that, on 24 November 2003, the Sesvete Police Station informed the court that the they had learned from the victim's father that she '[had] been living in Spain for about four years and he [didn't] know when she [would] return.' ... On 1 July 2004 the court was again informed that she '... work[ed] in Spain' ... Following the Sesvete Police Station's further investigations into J.N.'s whereabouts, on 15 July 2005 the court was informed that she lived in Madrid, Spain, 'with her husband' ... However, after her exact address in Spain had been established, as this court had requested in its earlier decision, the court summoned the victim twice to a hearing ... Although she was properly summoned, she failed to appear and did not give any reason for her absence.
>
> Thus, the victim J.N. was questioned during the investigation as required by law, after which it appears she did not want to appear at the hearing, although she did not give reasons for her absence. Since she lived abroad the trial court had no way of securing her presence at the hearing and therefore it rightly decided, under Article 331 § 1(1) of the Code of Criminal Procedure, to read out the written record of her oral statement."

52. On 21 July 2009 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), reiterating his previous complaints.

53. On 7 July 2010 the Constitutional Court dismissed the applicant's constitutional complaint as ill-founded, endorsing the reasoning of the lower courts. The decision of the Constitutional Court was served on the applicant's representative on 19 July 2010.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

1. Constitution

54. The relevant provision of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010) reads as follows:

Article 29

"In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.

In case of any criminal charge brought against him, the suspect, defendant or accused shall have the following rights ...

- to question witnesses for the prosecution or to have them questioned and to have witnesses for the defence questioned under the same conditions as witnesses for the prosecution ..."

2. Criminal Code

55. The relevant provision of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997) provides:

Article 188

"(1) Whoever forces another person into sexual intercourse or another sexual act of a similar nature by using force or threatening that he or she will directly attack [the person's] life or body or the life or body of a person close to her shall be sentenced to imprisonment for a term of one to ten years."

3. Code of Criminal Procedure

56. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 63/2002, 62/2003 and 115/2006) provided:

Article 198

" ...

(4) The prosecutor, the defendant or the defence counsel may be present at the questioning of a witness [during the investigation], when it is probable that the witness will not appear at the trial, if the investigating judge considers it expedient or if one of the parties so requests. The victim may be present during the questioning of a witness only when it is probable that the witness will not appear at the trial.

(5) The investigating judge shall take the necessary measures to inform the prosecutor, defence counsel, the victim or the defendant about the time and place of any investigative action which they may attend, except where postponement [of the action] may pose a risk. If the defendant is represented, the investigating judge shall inform only his lawyer.

... "

Article 243

"(1) If a properly summoned witness fails to appear without justified reason, ..., he or she may be brought before the court and fined up to 20,000 Croatian kunas.

... "

Article 331

"(1) A written record of the oral statement of a witness ... may be read out following a decision of the [trial] panel in the following circumstances:

1) if the person is deceased, is mentally ill or untraceable, or if it is impossible or difficult for him or her to appear at the trial on account of old age, illness or other important reasons,

2) if a witness or a medical expert refuses to testify at the hearing without a legally valid reason,

... "

Article 333

"After the questioning of a witness or an expert witness or reading out the records and other submission, the president of the trial panel shall ask the parties and the victim whether they want to note something."

57. The relevant provisions of the amended Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012) provide:

Article 502

"...

(2) The relevant provisions concerning the reopening of criminal proceedings shall be applicable in the case of a request for revision of any final court decision in connection with a final judgment of the European Court of Human Rights in which a violation of the rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms has been found in respect of the defendant.

(3) A request for the reopening of proceedings in connection with a final judgment of the European Court of Human Rights may be lodged within a thirty-day time-limit starting from the date on which the judgment of the European Court of Human Rights becomes final."

Article 574

"...

(2) If prior to the entry into force of this Code a decision has been adopted against which a legal remedy is allowed pursuant to the provisions of the legislation relevant to the proceedings [in which the decision was adopted] ..., the provisions of that legislation shall be applicable [to the proceedings in respect of the remedy], unless otherwise provided under this Code.

(3) Articles 497-508 of this Code shall be accordingly applicable to requests for the reopening of criminal proceedings made under the Code of Criminal Procedure (Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 62/2003, and 115/2006)."

B. Relevant practice

58. In its judgment no. I Kž-37/09-6 of 9 September 2009 the Supreme Court dealt with the problem of admitting in evidence the written record of an oral statement by a witness who had been questioned at the pre-trial stage without the defence being provided with the opportunity to be present during the questioning. The Supreme Court noted, in particular:

"The issue in this case is not whether it was impossible to 'bring the victim to Croatia', nor is it a problem of the direct questioning of the victim N.M. before the 'Croatian criminal court' – but the issue is in the fact that the victim N.M. was twice heard as a witness through international legal assistance in criminal matters by the Subotica Municipal Court [in Serbia] without informing the defendant D.B. or his defence counsel M.U. that such action (questioning of the victim) was being taken.

... [T]he Supreme Court, as the court of appeal, considers that in such circumstances the accused D.B. did not have an effective opportunity to challenge the witness statement, which was decisive evidence for his conviction, and therefore the Supreme Court concludes that he did not have a fair trial as required under Article 6 § 3 (d) of the Convention as regards his right to have a central witness (the victim M.M.) questioned and his right to be present during her questioning irrespective of whether he wished to exercise that right or not."

III. RELEVANT INTERNATIONAL MATERIAL

A. The Council of the European Union Framework Decision

59. Framework Decision of 15 March 2001 of the Council of the European Union on the standing of victims in criminal proceedings (2001/220/JHA) provided as follows:

Article 2 – Respect and recognition

"2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances."

Article 3 – Hearings, and provision of evidence

"Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings."

Article 8 – Right to protection

"4. Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles."

B. Directive of the European Parliament and of the Council

60. Directive of 25 October 2012 of the European Parliament and of the Council (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA provides as follows:

"(66) This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it seeks to promote the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial."

Article 20 – Right to protection of victims during criminal investigations

"Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

...

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;"

Article 22 – Individual assessment of victims to identify specific protection needs

"1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation ...

4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subject to an individual assessment as provided for in paragraph 1 of this Article."

Article 23 – Right to protection of victims with specific protection needs during criminal proceedings

"1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

(a) interviews with the victim being carried out in premises designed or adapted for that purpose;

(b) interviews with the victim being carried out by or through professionals trained for that purpose;

(c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;

(d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public."

THE LAW

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

61. The applicant complained that he had not had an opportunity to examine J.N. and that his conviction had been based to a decisive extent on her evidence. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, reads as follows:

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

1. The parties' arguments

62. The Government submitted that according to the date indicated by the Court's stamp on the application form, the applicant had submitted his application on 30 March 2011. Since the decision of the Constitutional Court had been served on the applicant's representative on 19 July 2010, it followed that the applicant had lodged his application with the Court outside the six-month time-limit. In the Government's view, given that the applicant was represented by a qualified lawyer, no other correspondence with the Court should be taken into account in calculating the six-month time-limit.

63. The applicant argued that he had submitted his first letter to the Court on 24 December 2010, complaining about the lack of fairness of the criminal proceedings at issue. On 26 January 2011 he had been invited by the Court to submit an application form by 23 March 2011 and he had duly complied with that instruction. He therefore considered that he had complied with the six-month time-limit.

2. The Court's assessment

64. The Court reiterates that it may only deal with an application if it is lodged with the Court within the six-month time-limit. The purpose of the six-month rule is to promote legal certainty and to ensure that cases raising issues under the Convention are dealt with within a reasonable time, as well as to protect the authorities and other persons concerned from being under

any uncertainty for an extended period of time. Finally, it should ensure that the facts of the case are ascertained as promptly as possible, before the chance to do so fades away, making a fair examination of the question at issue next to impossible (see *Kelly v. the United Kingdom*, no. 10626/83, Commission decision of 7 May 1985, DR 42, p. 205, and *Baybora and Others v. Cyprus* (dec.), no. 77116/01, 22 October 2002).

65. As regards the date when the application was lodged with the Court, the Court observes that the Rules of Court relevant at the time when the applicant brought his complaints before the Court provided that the date of introduction of the application was as a general rule considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application (former Rule 47 § 5). The date of introduction was accordingly considered to be the date on which the first letter was written by the applicant or, where there was an undue delay between this date and the date on which the letter was posted, the Court could have decided that the date of posting should be considered to be the date of introduction (see *Arslan v. Turkey* (dec.), no. 36747/02, ECHR 2002-X; *Calleja v. Malta* (dec.), no. 75274/01, 18 March 2004; *Gaspari v. Slovenia*, no. 21055/03, § 35, 21 July 2009; and *Andrushko v. Russia*, no. 4260/04, § 32, 14 October 2010).

66. The Court observes that the applicant clearly described the circumstances of his case and formulated his complaint in his letter dispatched on 24 December 2010. The application form dated 22 March 2011 (bearing the Court's stamp of 30 March 2011) referred to by the Government merely reproduced his original submissions. Against this background, in view of the Rules of Court and the case-law relevant at the time when the applicant brought his complaints before the Court, it considers that the application was introduced by the applicant on 24 December 2010 and it therefore accepts that date as the date of introduction of his application (see *Peruško v. Croatia*, no. 36998/09, §§ 36 and 37, 15 January 2013).

67. Since the final domestic court decision, namely the decision of the Constitutional Court of 7 July 2010, was served on the applicant's representative on 19 July 2010 it follows that the application was lodged with the Court within the six-month time-limit. Thus the Government's objection must be rejected.

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

B. Merits

1. The parties' arguments

69. The applicant contended that he had not had an adequate and effective opportunity to question and challenge the witness statement of J.N. He pointed out that this case had not involved the issue of protection of victims of sexual abuse since J.N. had never invoked that argument but had merely failed to appear at the trial without providing any reason at all, although she had been properly summoned by the trial court. Moreover, he had not been given the opportunity to question J.N. when she had given her statement at the pre-trial stage of the proceedings since he had never been informed of her questioning. The applicant also pointed out that during the trial he had actively attempted to suggest various ways of securing J.N.'s presence at the trial but to no avail. The trial court had never fined J.N. for failure to comply with the court summons, nor had it ever attempted to reach J.N. by telephone although it had had her number. This had resulted in the incorrect application of Article 331 of the Code of Criminal Procedure, which could not apply where a witness had received a court summons but had failed to appear without any reason. In the applicant's view, the failure to provide him with an opportunity to question and challenge the incriminating statement of J.N. without any objective and justified reason, had caused him such disadvantage that the proceedings as a whole had fallen short of the requirements of a fair trial.

70. The Government submitted that the criminal proceedings against the applicant, viewed as a whole, had been fair. In particular, he had been represented by a lawyer throughout the proceedings; he had had every opportunity to argue his case and to submit his evidence; he had had an opportunity to challenge the victim's statement; and the trial court had sufficiently reasoned its judgment when convicting him. As regards the questioning of J.N, the Government, referring to European Union Council Framework Decision no. 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, pointed out that she had given her statement when lodging the criminal complaint on 3 May 1999 and before the investigating judge on 9 July 1999. It had therefore been normal that she, as a victim of sexual abuse, had not wanted to go through the whole stressful experience again by testifying at the trial. The trial court, even prompted by the instruction of the Supreme Court, had attempted to reach J.N. by various means but to no avail, and therefore it had correctly applied Article 331 of the Code of Criminal Procedure in admitting her written statement as evidence. The applicant could at that point have raised an objection as to the veracity of her evidence but he had failed to do so. The Government also considered that J.N.'s statement had been decisive but not the sole evidence against the applicant, and that there had been sufficient counterbalancing factors to secure his rights in the proceedings. In

particular, the domestic courts at all levels of jurisdiction, including the Constitutional Court, had duly examined all the applicant's complaints and had provided reasons when dismissing his arguments.

2. The Court's assessment

(a) General principles

71. The Court reiterates 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 that provision which must be taken into account in any assessment of the fairness of proceedings. For this reason, the Court considers it appropriate to examine the complaints under the two provisions taken together (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and *Aigner v. Austria*, no. 28328/03, § 33, 10 May 2012).

72. Article 6 § 3 (d) of the Convention enshrines the principle that before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 51, *Reports* 1997-III, and *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II).

73. The principles to be applied when a witness does not attend a public trial, set out in the *Al-Khawaja and Tahery* judgment (cited above, §§ 119-147), may be summarised as follows (see *Štefančič v. Slovenia*, no. 18027/05, § 37, 25 October 2012):

(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 corroborative 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.

(b) Application of these principles to the present case

74. The preliminary question for the Court to examine in the present case is whether there was a good reason for admitting J.N.'s statement in evidence without having her questioned at the trial (see *Rudnichenko v. Ukraine*, no. 2775/07, § 104, 11 July 2013). In this respect the Court notes at the outset that it is hard to discern the exact reason why J.N. failed to appear at the trial although she was properly summoned at least on two occasions (see paragraph 47 above).

75. As to the Government's reliance on the protection of victims of sexual abuse (see paragraph 70 above), the Court reiterates that it has already recognised the special features of criminal proceedings concerning sexual offences, which are often conceived as an ordeal by the victim. It

accepts that in such cases certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence (see, amongst many others, *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V, *Zdravko Petrov v. Bulgaria*, no. 20024/04, § 35, 23 June 2011). However, this does not mean that such measures, particularly the non-attendance of a witness to give evidence at the trial, are applicable automatically to all criminal proceedings concerning sexual offences. There must be relevant reasons adduced by the domestic authorities for applying such measures (see *P.S. v. Germany*, no. 33900/96, § 28, 20 December 2001) and, as regards the possibility of excusing a witness from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable (see *Al-Khawaja and Tahery*, cited above, § 125).

76. The Court observes that it is true that at the initial stages of the proceedings J.N. alleged that the applicant had threatened her and asked for him to be detained, but the domestic authorities did not find those allegations sufficiently solid to order his detention (see paragraphs 10 and 17 above). During the further course of the proceedings, although she was legally represented and communicating with her lawyer (see paragraph 28 above), and thus aware that she was required to appear at the hearing to give evidence, J.N. never informed the domestic courts that she was frightened of the applicant or that she was unwilling to testify for some other reason (contrast, *Zdravko Petrov*, § 37, and *Aigner*, cited above, §§ 13 and 39).

77. In any event, the Court notes that the domestic courts never relied on or applied any special measures allowing J.N. not to appear at the trial nor have the Government in their observations showed that the application of such measures was the reason for J.N.'s non-attendance (contrast *Vronchenko v. Estonia*, no. 59632/09, § 58, 18 July 2013). There is therefore no reason for the Court to examine this aspect any further (see *Tseber v. the Czech Republic*, no. 46203/08, § 47, 22 November 2012).

78. Instead, the reason relied on by the domestic authorities for admitting J.N.'s written statement in evidence without having her questioned at the trial was that in no way the trial court was able to secure her presence. Thereby they relied on Article 331 § 1(1) of the Code of Criminal Procedure providing for such a possibility (see paragraphs 51 and 56 above).

79. In this respect the Court notes that the impossibility of locating a witness may, under certain conditions, justify the admission of the witness statement in evidence although the defence had no opportunity to question him or her (see *Tseber*, cited above, § 48). However, the domestic authorities must take positive steps to enable the accused to examine or have examined witnesses against him (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 78, Series A no. 146); which means that they

should actively search for the witnesses (see *Rachdad v. France*, no. 71846/01, § 24, 13 November 2003). The Court therefore must satisfy itself that the domestic authorities did everything which was reasonable to secure the presence of the witness. In other words, the Court must establish whether the absence of the witness is imputable to the domestic authorities (see *Tseber*, cited above, § 48).

80. The Court notes in the case at issue that the domestic authorities took reasonable efforts to summon J.N. at all her addresses available to them. They several times ordered the police to search for J.N.'s whereabouts and to establish her exact address (see paragraphs 27, 30, 33 and 35 above), and attempted to summon her at the addresses abroad by using the means of international legal assistance (see paragraphs 37 and 43 above). It is true, as the applicant suggested, that the domestic courts never fined J.N. for not appearing at the trial (see Article 243 of the Code of Criminal Procedure, paragraph 56 above); nor did they contact her by telephone, although they had been provided with her telephone number (see paragraph 45 above), but there is no evidence that any of these measures would actually be effective in practice. Thus, in view of the domestic courts repeated attempts to summon J.N. at the trial and the fact that the domestic courts, including the Supreme Court, duly reviewed these efforts (see paragraph 51 above), the Court considers that the domestic authorities took reasonable measures to secure her presence (compare *Tseber*, cited above, §§ 51-52).

81. However, J.N.'s description of the events constituted decisive evidence on which the courts' findings were based as the other witnesses heard by the Zagreb County Court were not eyewitnesses and gave evidence either on what J.N. had told them or as to their perception of J.N. after the commission of the alleged offence. Moreover, the Supreme Court itself held that J.N.'s evidence was decisive for the case (see paragraph 42 above). The Court must, therefore, examine whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention in respect of the evidence given by J.N. In doing so, the Court will examine whether there were sufficient procedural safeguards and other factors capable of counterbalancing the fact that the defence could not question J.N. at the trial.

82. In this respect the Court firstly observes that neither the applicant nor his lawyer examined J.N. during the investigation. The Court notes that according to Article 198 § 4 of the Code of Criminal Procedure the parties to the proceedings may be present at the questioning of a witness during the investigation when it is probable that the witness will not appear at the trial, or if the investigating judge considers it expedient or if one of the parties so requests (see paragraphs 51 and 56 above). The Court also notes that the further paragraph of the same Article provides that the investigating judge is obliged to inform the parties of the place and time of the hearing (see paragraph 56 above).

83. In the present case there was no indication during the investigation that J.N. would not appear at the trial. Furthermore, as to the Supreme Court's reliance on the fact that the applicant did not request to be present during J.N.'s questioning, the Court notes that there is no evidence showing that the investigating judge informed the applicant or his lawyer of the time and place of J.N.'s questioning. In these circumstances, and having in mind that throughout the proceedings the applicant insisted on J.N.'s questioning, the Court does not consider that the applicant waived his right to question the witness (see, among many others, *Gabrielyan v. Armenia*, no. 8088/05, § 85, 10 April 2012).

84. Accordingly, the Court finds that neither the applicant nor his lawyer were given an opportunity to confront and question J.N. or to have her orally examined in the applicant's presence at any stage of the proceedings (see *Nechto v. Russia*, no. 24893/05, § 125, 24 January 2012; and *Vronchenko*, cited above, § 65; and contrast *Chmura v. Poland*, no. 18475/05, § 56, 3 April 2012; *Gani v. Spain*, no. 61800/08, § 48, 19 February 2013; and *Aigner*, cited above, § 41).

85. The Court further notes that the domestic courts, in their assessment of evidence, should have given the necessary weight to the fact that J.N.'s statement was admitted into evidence without hearing her directly and should have approached such evidence with a particular caution (see *Al-Khawaja and Tahery*, cited above, § 157; and *Sievert v. Germany*, no. 29881/07, § 64, 19 July 2012).

86. The domestic courts found that J.N. had had no reason to fabricate evidence and that her description of the relevant events was coherent and thus considered her statement fully credible. However, the Court observes that the corroborating evidence to J.N's statement was not conclusive. The first instance court heard witnesses who could only provide evidence of a circumstantial nature in respect of the rape allegedly committed. One of those witnesses, J.M., testified in favour of the reliability of J.N.'s evidence (see paragraph 22 above) and one witness, K.N., testified in the applicant's favour (see paragraphs 21, 36 and 48 above). Similarly, witness S.S. was not able to provide any conclusive evidence as she had been approached only after the alleged incident by J.N., alleging that the applicant had raped her, and the applicant, denying such allegations (see paragraph 19 above). Furthermore, a medical report, commissioned by the domestic courts showed that the applicant had injuries on his hand and legs which could, but not necessarily had to, match J.N.'s version of events. The reports on J.N.'s gynaecological and psychiatric examination showed no objective evidence of any injuries (see paragraphs 8, 20 and 24 above).

87. The Court therefore considers that, although the domestic courts did provide some reasons for accepting J.N.'s statement (see paragraph 49 above) and although they allowed the applicant an opportunity to comment on the evidence adduced, the decisive nature of that evidence, in the absence

of any strong and clear corroborative evidence in the case, meant the domestic courts were unable to conduct a fair and proper assessment of the reliability of J.N.'s evidence without her questioning at the trial (compare *Al-Khawaja and Tahery*, cited above, §§ 164-165).

88. In view of the fairness of the proceedings as a whole, the Court concludes that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of J.N.'s statement. It therefore finds that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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."

A. Damage

90. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

91. The Government considered the applicant's claim excessive, unfounded and unsubstantiated.

92. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

93. The applicant also claimed 90,625 Croatian kunas (HRK) for the costs and expenses incurred before the domestic courts and those incurred before the Court.

94. The Government considered the applicant's claim unfounded and unsubstantiated.

95. 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. 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 10,200 covering costs under all heads.

C. Default interest

96. 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 a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the 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 Croatian kuna at the rate applicable at the date of settlement:
      (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,200 (ten thousand two hundred euros), plus any tax that may be chargeable to the applicant, 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President