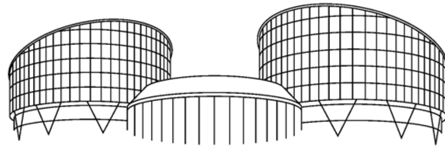

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF JANEVSKI v. NORTH MACEDONIA

(Application no. 30259/15)

JUDGMENT

STRASBOURG

19 November 2020

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Janevski v. North Macedonia,

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

Aleš Pejchal, *President,*
Tim Eicke,
Raffaele Sabato, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application (no. 30259/15) against the Republic of North Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Macedonian/citizen of the Republic of North Macedonia, Mr Janko Janevski ("the applicant"), on 16 June 2015;

the decision to give notice to the Government of North Macedonia ("the Government") of the complaint under Article 6 § 3 (d) of the Convention concerning the applicant's alleged inability to examine the witnesses against him;

the parties' observations;

the decision to reject the Government's objection to examination of the application by a Committee;

Having deliberated in private on 20 October 2020,

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

INTRODUCTION

1. The case concerns the alleged unfairness of criminal proceedings against the applicant on account of the courts' reliance on the testimony of four witnesses examined in the absence of the applicant and his lawyer.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant was born in 1976 and lives in Tetovo. The applicant was represented by Mr T. Dimov, a lawyer practising in Veles.

3. The Government were initially represented by their former Agent, Mr K. Bogdanov, who was succeeded by Ms D. Djonova.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Pre-trial proceedings

5. On an unspecified date an investigation was opened against the applicant before the Skopje Court of First Instance (*Основен суд Скопје* - “the trial court”) on suspicion of fraud.

6. Between 22 September and 1 October 2009 an investigating judge heard oral evidence from O.K., N.J., A.T. and B.C. Neither the applicant nor a public prosecutor were present. O.K.stated that the applicant had informed him of an ongoing selection procedure for employment posts in the police force and had told him that he had “connections” and could help him to find employment with the police. O.K. had paid the applicant 1,000 euros (EUR) “to cover expenses” and had given him some personal documents, which had subsequently been found in the applicant’s vehicle. N.J. stated that the applicant had told him that he was the chief of the Skopje police’s criminal forensic department (*крим техника*) and that he could help him secure employment in the police in exchange for EUR 3,000. They had signed a loan contract for that amount. N.J.’s documents had also been found in the applicant’s vehicle. A.T. stated that the applicant had offered him employment in the Ministry of the Interior. During a meeting with the applicant, he had given the applicant EUR 500 and 1,500 denars (MKD). B.C. stated that the applicant had told him that he could help him secure employment in the police force in exchange for EUR 2,000 – money which had been needed, according to B.C., for training and equipment for the police.

7. On 22 October 2009 the applicant gave a statement before the same investigating judge in Skopje Prison, where he was serving a prison sentence in relation to another crime. The applicant waived his right to a lawyer. He stated that at one time he had worked in the Ministry of Culture. He had met a certain A., who had worked in the Ministry of Defence. A. had told him that he had high-level connections and could secure employment for the applicant and other persons in exchange for money. The applicant confirmed that he had promised the victims that he would find them employment because he had been promised employment himself.

8. On 17 November 2009 the applicant was indicted before the trial court on charges of fraud. The prosecutor proposed that O.K., N.J., A.T. and B.C. be examined at the trial.

B. Proceedings before the trial court

9. At hearings held on 3 March and 4 June 2010, the trial court, sitting as a bench comprising one judge and two lay members, decided to hear evidence from the above four witnesses for reasons of procedural expediency. O.K., N.J., A.T. and B.C. maintained their pre-trial statements (see paragraph 6 above). They furthermore noted that the applicant was

serving a prison sentence. According to the court records, the applicant did not attend either hearing because he was not properly summoned to the former (the summons was sent to his address in Skopje, whereas he was at the time in question serving a prison sentence in Skopje Prison) and was not produced from Skopje Prison for the latter hearing. In the course of the proceedings, the two lay members were changed, but the presiding judge remained the same.

10. In July and November 2010, the court was informed in writing by the police that the applicant could not be found at his registered address. The trial court sent a summons to the applicant in Skopje Prison to appear at the next hearing.

11. Several hearings scheduled on dates between 6 December 2010 and 25 April 2012 were adjourned on account of the applicant's absence. The applicant's lawyer, who attended the hearings, confirmed that the applicant was serving a sentence in Skopje Prison and noted that he was scheduled to be released in July 2012. The trial court made several unsuccessful attempts to secure his attendance (a court summons and orders that the applicant was to be brought to the court by force (*приведен*) were sent to Skopje Prison).

12. On 5 July 2012 the trial court received a notification from the police that the applicant was available to appear (*достапен на органите за прогон*). A hearing scheduled for 10 September 2012 was adjourned owing to the absence of the applicant, who, according to the court records, had not been arrested. B.C., who was present, notified the court of the applicant's place of residence in Skopje.

13. The applicant was duly summoned to a hearing scheduled for 19 November 2012. However, he failed to appear for health reasons (evidenced by a medical certificate) and the hearing was adjourned. As his lawyer stated that he resided in Tetovo, the trial court ordered that the applicant be served a summons at both the Skopje and Tetovo addresses.

14. At a hearing held on 30 January 2013, the applicant requested an adjournment in order to be able to prepare his defence, as he had been serving a prison sentence in Skopje Prison and had not seen his lawyer.

15. At hearings held on 4 March and 15 April 2013 N.J. was present, but the applicant was absent. Both hearings were adjourned, as were the hearings scheduled for 31 May and 20 September 2013, notwithstanding the fact that the trial court had ordered the applicant to be detained (*приведен*). The hearing held on 7 October 2013 was again adjourned as the applicant was absent for health reasons.

16. At the next hearing, held on 4 November 2013, the applicant maintained his innocence and repeated his pre-trial statement. He requested that witnesses be examined at the trial – especially B.C., who (the applicant stated) knew that the applicant had been himself a victim of fraud. The applicant's lawyer also requested that witnesses be examined at the trial in relation to the applicant's allegation that a third person had promised them

employment in the Ministry of the Interior. The trial court refused that request, since they had already been examined. After consulting the parties, it decided to read out the statements that B.C., N.J., O.K. and A.T. had given at the pre-trial stage and during the trial proceedings (see paragraphs 6 and 9 above). Other written material was also admitted as evidence. In his closing arguments, the applicant complained that the trial court had not made sufficient efforts to clarify all relevant facts – particularly A.'s role in the events at issue. The defence argued that the witnesses had known that the applicant had been unemployed, that he had not been in any position of authority and that he had been only an intermediary who had been trying to help both the witnesses and himself to secure jobs.

17. On the same date, the trial court convicted the applicant as charged and sentenced him to one year and six months' imprisonment. It relied on the statements of B.C., N.J., O.K. and A.T. in determining that the applicant had misled them by promising them help with finding a job at the Ministry of the Interior in return for money. It also referred to the loan contract concluded between the applicant and N.J. and other material evidence, such as seizure records, that indicated that N.J. and O.K.'s documents (school certificates, ID documents and other certificates) had been found in the applicant's vehicle. The applicant's defence that A. had promised to help all of them find a job at the Ministry of the Interior was dismissed as unfounded, since he had failed to provide A.'s contact information so that he could be examined at the trial. In setting the applicant's sentence, the trial court took into account the fact that he had been previously convicted of the same type of criminal offence.

C. Proceedings before the Court of Appeal and the Supreme Court

18. The applicant lodged an appeal, asserting that he had not been given the opportunity to examine those witnesses whose statements had been admitted as evidence. He alleged that they would have confirmed that A. had been present during their meetings with him.

19. On 5 June 2014 the Skopje Court of Appeal (*Апелационен суд Скопје* – "the Court of Appeal") dismissed the applicant's appeal and upheld the lower court's findings. It furthermore noted that the applicant's allegations regarding A. were of no relevance to the case.

20. The applicant lodged an application with the Supreme Court for extraordinary review of the final judgment (*барање за вонредно преиспитување на правосилна пресуда*), submitting that his defence rights had been restricted with regard to the examination of the four witnesses.

21. On 2 December 2014 the Supreme Court dismissed the applicant's application. It noted that the witnesses' statements had been detailed and consistent and that no objections (*нема забелешки*) had been raised during

the trial regarding their statements; in any event, the consent of the defence had not been a statutory prerequisite for the admission of those statements as evidence. The court furthermore noted that the witnesses were not residents of Skopje and that several unsuccessful attempts had been made to summon them to appear at the trial. Any further attempts would have unnecessarily prolonged the proceedings, especially taking into account the fact that their statements corresponded with the material evidence. Referring to the Court's judgment in the case of *Solakov v. the former Yugoslav Republic of Macedonia* (no. 47023/99, ECHR 2001-X), the Supreme Court held that the applicant's defence rights had not been restricted to such an extent that he had not been afforded a fair trial, since those statements had not constituted the sole evidence against him. Lastly, the applicant had not presented any relevant arguments to cast doubt on the facts established by the trial court. The applicant's lawyer received a copy of that judgment on 24 February 2015.

THE LAW

II. I. ALLEGED VIOLATION OF ARTICLE 6 § 3 (D) OF THE CONVENTION

22. The applicant complained that he was not able to examine B.C., N.J., O.K. and A.T. at the trial, contrary to Article 6 § 3 (d) of the Convention, which reads as follows:

> "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

23. The Government did not raise any objection regarding the admissibility of the application.

24. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible

B. Merits

1. The parties' submissions

25. The applicant maintained that his defence rights had been violated owing to the admission of B.C., N.J., O.K. and A.T.'s statements as

evidence, despite the defence's insistence that they be examined during the trial. Those statements, given in the absence of the applicant or his lawyer, had served as the sole basis for his conviction. The applicant disputed the Government's allegations that he had been unavailable to appear before the court. Given that he had been serving a prison sentence he could have been contacted by the authorities and brought to the court at any moment. He also dismissed as unfounded any alleged difficulties related to the witnesses' place of residence, noting that their place of residence had been located only 140 kilometres away from Skopje, where the trial had taken place.

26. The Government argued that the domestic courts had had good reason for admitting the witnesses' statements as evidence. They had made all reasonable efforts to enable the applicant to confront and examine them at the trial. However, the applicant had been unreachable by the authorities, even after his release from prison. The domestic courts had decided to admit their statements as evidence given that they had resided in a different town and had appeared at the trial on several occasions, albeit not during the hearings at which the applicant had been present. The statements of the four witnesses had been consistent and the applicant's conviction had been based on other material evidence. The applicant had been provided with an opportunity to present his defence at the trial. The witnesses' pre-trial statements had been given before an investigating judge and they had been warned that giving false testimony constituted a criminal offence. The applicant's previous criminal record, which had comprised several convictions for fraud committed in similar circumstances, had been taken into account in the determination of his sentence.

2. The Court's assessment

27. The relevant principles developed by the Court's case-law regarding complaints about an infringement of the defence's rights on account of evidence provided by absent witnesses are set out in the case of *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 111–31, ECHR 2015), and reiterated in the case of *Seton v. the United Kingdom* (no. 55287/10, §§ 61–70, 31 March 2016).

28. In the present case, the Court must examine, firstly, whether there are good reasons for the witnesses' non-attendance at the trial; secondly, whether the evidence of those witnesses constituted the sole or decisive basis for the applicant's conviction; and thirdly, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of untested witness evidence at the trial. A review of counterbalancing factors is also required in cases where it finds it unclear whether the evidence in question was sole or decisive but is nevertheless satisfied that it carries significant weight and that its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair

would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry (see *Ellis, Simms and Martin v. the United Kingdom*, nos. 46099/06 and 46699/06 (dec.), §§ 76-78, 10 April 2012; *Seton*, cited above, § 59).

(a) Whether there was a good reason for the non-attendance of a witness at the trial

29. The Court notes that all four witnesses gave their pre-trial statements to an investigation judge in September and October 2019. There is no indication that the applicant, who was at the material time serving a prison sentence for another crime, was informed of their examination, notwithstanding the fact that investigation had already been opened against him. After the public prosecutor had indicted the applicant (on 17 November 2009), the witnesses appeared before the trial court at the hearings held on 3 March and 4 June 2010. According to the trial court, it was necessary that they be examined, notwithstanding the applicant's absence, in the interests of procedural efficiency. In that connection, the Court notes that those hearings were apparently the first hearings scheduled before the trial court since the proceedings had started. There is nothing to indicate that there had been any prior adjournments, let alone any delays for which the applicant was responsible. At the hearings, the witnesses maintained the statements that they had given to the investigating judge. The applicant (and his lawyer) did not attend either hearing for reasons attributable solely to the authorities (an improperly delivered summons or failure to bring the applicant from prison, see paragraph 9 above).

30. Between March 2010 and September 2012 the trial court was unable to secure the applicant's attendance at the trial, notwithstanding the fact that he was detained in Skopje Prison (albeit not continuously) until July 2012 (see paragraphs 9-11 above). The Court cannot find any discernible reason for the authorities' failure to secure the applicant's attendance at the trial during that period. Several subsequent hearings scheduled for dates prior to November 2013 were also postponed owing to his absence for various reasons, some of which the trial court accepted as justified (see paragraphs 12-14 above).

31. On 4 November 2013, when the applicant eventually participated in person in the trial, the court refused a request lodged by him for the witnesses to be examined on the grounds that they had already been examined at the pre-trial stage and during the trial (see paragraph 14 above). In the Court's opinion, that cannot be regarded as constituting a good reason for the non-attendance of the witnesses, who had previously been examined in the applicant's absence. Similar considerations apply to the grounds referred to by the trial court and the Supreme Court for admitting untested witness evidence (see paragraphs 8 and 19 above). Whereas the "reasonable

time" requirement (encompassing "procedural efficiency") is an important aspect of the right to a fair trial which domestic courts should meet when conducting proceedings, it cannot be applied at the expense of the defendant's defence rights, of which the minimum rights listed in Article 6 § 3(d) are specific aspects. This is particularly the case when a defendant, as in the present case, cannot be held solely responsible, as explained in the preceding paragraph above, for lengthy adjournments during a trial.

32. The Court reiterates that whereas the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see *Schatschaschwili*, cited above, § 113).

(b) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

33. The Supreme Court held that the witnesses' statements were not the sole evidence on which the applicant's conviction had been based (see paragraph 21 above). Having regard to the admitted evidence on which the applicant's conviction rested (see paragraph 15 above), the Court finds no grounds to conclude otherwise. It does not find it necessary to reach a definitive finding as to whether the evidence provided by the four witnesses was "decisive", as in any case it is satisfied that their statements carried significant weight. In this connection it observes that the trial court relied on these statements in holding that the applicant [had] "misled" the witnesses (see paragraph 17 above). Accordingly, the admission of those statements as evidence might well have handicapped the applicant's defence.

(c) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

34. The Court notes that there were several counterbalancing factors to compensate for the handicaps under which the applicant's defence laboured as a result of the admission of untested witness evidence. Firstly, the availability of other corroborative material evidence found in the applicant's vehicle (namely the loan contract and the personal documents of some of the witnesses) supporting the untested witness statements; secondly, the fact that those statements were coherent and consistent with each other (see *Schatschaschwili,* cited above, § 128); thirdly, the fact that the applicant had the opportunity to present his own version of events and to cast doubt on the credibility of the witnesses (see *Schatschaschwili,* cited above, § 131). As can be seen from the case file, the applicant did not allege any incoherence or inconsistency in the witnesses' testimony (contrast *Trampevski v. the former Yugoslav Republic of Macedonia*, no. 4570/07, § 48, 10 July 2012),

but rather submitted that he also had been promised employment by the above-mentioned A. The Court of Appeal held that the allegations regarding A.'s role in events had had no bearing on the applicant's conviction (see paragraph 19 above).

35. On the other hand, the Court cannot but note that only one of the members of the ultimate formation of the trial bench (the presiding judge) that rendered the judgment was a member of the court that actually heard the witnesses' evidence and was, therefore, able to evaluate that evidence (and the witnesses' demeanour). In this regard the Court observes that the two lay members of the trial bench were changed during the proceedings (see paragraph 8 above). It has not been argued before the Court that the lay members had no role in deciding on the applicant's guilt or innocence. In such circumstances, the applicant was not able to test or assess the witnesses' evidence, nor were two - that is to say, the majority - of the members of the ultimate trial bench.

36. Given those circumstances, the Court considers that the constraints affecting the applicant's exercise of his defence rights were irreconcilable with the fair trial guarantees. Accordingly, there has been a violation of Article 6 § 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage for the alleged loss of profit suffered during his imprisonment related to his conviction in the impugned proceedings. He also claimed EUR 30,000 in respect of non-pecuniary damage for mental suffering caused by the "unlawful and unjustified imprisonment".

39. The Government contested these claims as unsubstantiated and excessive. Furthermore, they stated that there was no causal link between the violation alleged and the damage claimed.

40. The Court notes that the applicant's claims under this head were submitted in relation to his imprisonment and that they did not concern the violation found. In this connection, it considers that the basis for an award of just satisfaction in the present case must be the fact that the applicant was denied the opportunity to examine the witnesses under Article 6 § 3 (d) of the Convention. It cannot speculate as to what the outcome of the impugned

proceedings would have been had there been no violation on this ground. It therefore finds no causal link between the damage claimed and its finding of a violation of Article 6. Accordingly, the Court makes no award under this head (see *Trampevski*, cited above, § 57).

B. Costs and expenses

41. The applicant also claimed a total amount of EUR 6,880, of which EUR 3,890 concerned costs and expenses incurred before the domestic courts and EUR 2,990 costs and expenses incurred before the Court. These figures comprised lawyer's fees calculated according to the rate scale of the Macedonian Bar. The applicant submitted an itemised list of costs.

42. The Government contested these claims as unsubstantiated and excessive. They furthermore stated that it had not been necessary to incur the costs claimed.

43. 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 (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). Having regard to the available material and the above criteria, the Court finds that only the sum of EUR 720, relating to lawyer's fees, was expended with a view to seeking before the national courts to prevent the violation found by the Court (see, *Trampevski*, cited above, § 60). Furthermore, the Court considers it reasonable to award the sum of EUR 1,000 for the proceedings before it. It therefore considers that the applicant is entitled to be reimbursed a total of EUR 1,720, plus any tax that may be chargeable to him thereon.

C. Default interest

44. 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 § 3(d) of the Convention;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months, EUR 1,720 (one thousand seven hundred and twenty euros), plus any

tax that may be chargeable to him, in respect of costs and expenses, to be converted into national the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 19 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Aleš Pejchal
Deputy Registrar	President