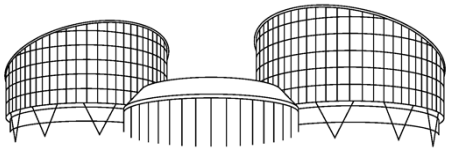

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BAJIĆ v. NORTH MACEDONIA

(Application no. 2833/13)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Non-communication of public prosecutor's written submission before the Supreme Court incompatible with adversarial proceedings and equality of arms requirements • Domestic judgments adequately reasoned • Essence of applicant's right to remain silence and privilege against self-incrimination not breached

STRASBOURG

10 June 2021

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

In the case of Bajić v. North Macedonia,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Jovan Ilievski,
Lado Chanturia,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 2833/13) 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 Serbian national, Mr Branko Bajić ("the applicant"), on 3 January 2013;

the decision to give notice to the Government of North Macedonia ("the Government") of the complaints concerning an alleged lack of reasons in the domestic courts' judgments, the non-communication of the public prosecutor's submission in the proceedings before the Supreme Court and an alleged breach of the privilege against self-incrimination, and to declare the remainder of the application inadmissible pursuant to Rule 54 § 1 of the Rules of Court;

the decision of the Government of the Republic of Serbia not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties' observations;

Having deliberated in private on 18 May 2021,

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

INTRODUCTION

1. The case concerns complaints under Article 6 § 1 of the Convention regarding the alleged unfairness of criminal proceedings against the applicant on account of an alleged lack of reasons in the domestic courts' judgments, the non-communication of the public prosecutor's submission in the proceedings before the Supreme Court and an alleged breach of the privilege against self-incrimination.

THE FACTS

2. The applicant was born in 1951 and lives in Belgrade.

3. The applicant was represented by Mr C. Winterhoff and Mr G. Schwendinger, lawyers practising in Hamburg. The Government were represented by their Agent, Ms D. Djonova.

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

A. Background to the case

5. The applicant was a shipbuilding engineer and an authorised inspector of German Lloyd (GL), a ship classification company which, under an agreement entered into in 2007 with the respondent State, was authorised to verify whether vessels on Lake Ohrid were fit to navigate. The applicant was appointed the authorised GL surveyor for carrying out inspections of boats and issuing certificates confirming their fitness to navigate. The *Ilinden* (hereinafter "the boat") was one of the vessels on Lake Ohrid that was subject to such an inspection.

6. On 5 September 2009 the boat capsized and sank, causing the death of fifteen Bulgarian tourists who were among fifty-four passengers on board. The tragic incident attracted domestic and international attention.

B. Criminal proceedings against the applicant

7. On 6 September 2009 an investigating judge opened an investigation against the captain of the boat on suspicion of a "serious offence against the safety and property of persons by operation of a means of transport".

8. During the investigation, the applicant was examined as a witness by the investigating judge. On that occasion, he submitted in evidence two reports dated 7 September 2009 (that is, two days after the accident occurred), regarding the inspections of the boat in 2008 and 2009. In those reports he wrote:

> "[The] *Captain* [has been] *informed that staying of passengers, during sailing, is allowed only in the closed salon, below upper deck."*

9. According to a subsequent court-commissioned technical expert report issued by the Faculty of Mechanical Engineering, the accident had come about as a result of a tear in a steel wire rope that was part of the steering system, thus causing a sudden change in the boat's navigation direction and its inclination to the right. The boat had subsequently inclined to the left, most probably on account of the panicked reaction of the thirty-four to thirty-six passengers who were on the open stern deck. According to the calculations and inspections regarding the stability of the boat, the experts concluded that if at least twelve passengers on that deck had moved to the port side of the boat, they would have increased the inclination resulting in an increase of the angle compared with the critical inclination angle of 16.6°. As a result, water had penetrated the boat, first through one

of the side windows that was open at the time of navigation, causing the boat to sink quickly. The technical report found that the number of passengers in the compartments below deck should have been limited to thirty-five.

10. On 8 April 2010 the public prosecutor indicted both the captain and the applicant on the charge of a "serious offence against the safety and property of persons by operation of a means of transport" (Article 300 § 4 in conjunction with Article 299 § 3 and § 1 of the Criminal Code – see paragraphs 29 and 30 below). The applicant was accused of having acted recklessly when inspecting the boat in 2007, 2008 and 2009 and having issued certificates for those years without ordering the captain to dismantle part of the fittings (benches and a sunshade) mounted on the boat's upper deck or limiting the number of authorised passengers to thirty-five instead of forty-three (the latter figure being the one specified in the certificates). Those certificates stated that the boat "had been duly surveyed" and that "the condition of the hull, machinery and equipment was satisfactory". They contained no other observations. The indictment relied, *inter alia*, on the two inspection reports submitted by the applicant when he had been questioned as a witness (see paragraph 8 above). However, in line with the provisions of domestic law, the oral statement that the applicant gave when he was questioned as a witness was sealed in a separate envelope and excluded from the case file.

11. The applicant did not attend the trial although he was duly summoned. Two court levels (upon the applicant's appeal) decided to try him *in absentia*. The applicant was represented by two local lawyers of his own choice.

12. On 5 July 2011 the Ohrid Court of First Instance found both the captain and the applicant guilty as charged and sentenced each of them to one year's imprisonment. The court established that, according to the boat's licence issued in 1989, it had been registered to transport forty-three passengers who should only have been carried in the saloons below the upper deck. That information had been valid at the time of the accident. During a technical check of the boat carried out by a local commission in 2003, the captain had been informed that the maximum number of passengers authorised on board was thirty-five (following some modifications that had been made to the compartments below the upper deck), and that they could not be carried on the open deck until the boat's stability, in view of the fittings (see paragraph 10 above), had been verified. It further established that the applicant had examined the boat's technical ability to sail in 2006 and had issued a certificate containing a note stating that "[passengers must only be carried] in closed saloons, below upper decks only. Staying of passengers on open decks, during sailing, is not permitted, until stability is checked for this condition of loading.". Relying on the court-commissioned expert report (see paragraph 9 above), the court

held that two factors had been crucial in relation to the accident: the boat's technical flaw and the fact that it had been overloaded with passengers who had not been positioned in the appropriate area of the boat as most of them had been seated on benches on the open deck, which had not been authorised as an area in which passengers could be carried during sailing. During the trial, the court heard oral evidence from an expert who had been involved in the drawing-up of the said expert report, who stated that nothing would have happened had the boat been carrying the equivalent weight of forty-three passengers, that is, eight more passengers than the authorised limit of thirty-five.

13. The applicant was convicted of having carried out the boat's inspections between 2007 and 2009 recklessly in that he had failed to order the captain to remove the benches and sunshades from the upper deck and to limit the authorised number of passengers to thirty-five. The court dismissed the applicant's arguments that there had been no negligence on his part in the performance of his duties, that the boat had been in good condition when he had issued the 2009 certificate, that any technical flaws after that date could not be attributed to him and that it had been the responsibility of the local port authority to monitor the number of passengers carried on boats. The court held that the applicant should have ordered the captain to remove the said equipment from the deck and that he should have withheld the 2007, 2008 and 2009 certificates until the captain had complied with that order. The applicant's reports regarding the 2008 and 2009 inspections (see paragraph 8 above) confirmed that he had known about the relevant part of the structure that needed to be removed. However, the ban on passengers being carried above deck contained in the reports, prepared two days after the accident, had been self-serving. Furthermore, the applicant had not specified that the authorised number of passengers was thirty-five.

14. The applicant appealed against that judgment, arguing, *inter alia*, that the relevant part of the fittings, which weighed 60 kg, had not in itself affected the stability of the boat; what had was the fact that the passengers were positioned on the benches of the open deck during the journey in question. Accordingly, he argued that the reasoning in the impugned judgment was incorrect, because the basis on which he had been found guilty (failing to order the removal of the benches) was not related to what had caused the boat to sink (the positioning of the passengers on the benches). It had not been the applicant's responsibility to consider how the benches placed on the open deck might be used during journeys. The same argument applied to the other grounds on which the trial court had based his conviction, namely his failure to reduce the number of passengers allowed on board. The expert evidence admitted at trial (oral evidence from the expert) confirmed that nothing would have happened had the boat been carrying a weight corresponding to the weight of forty-three passengers, that is, eight passengers more than what should have been the authorised limit of

thirty-five. In any event, the number of authorised passengers indicated on the certificates (forty-three) corresponded to the number of passengers specified in the boat's official records. Lastly, the applicant complained that the trial court had used and relied on his written reports of 7 September 2009 which he had produced in evidence while being examined as a witness (see paragraph 8 above).

15. On 28 February 2012 the Bitola Court of Appeal dismissed the applicant's appeal, finding no grounds to depart from the established facts or from the reasoning set out in the first-instance judgment.

16. The applicant lodged an appeal against that judgment before the Supreme Court, reiterating the arguments raised in his previous appeal. He further maintained that the captain had known that passengers could not be carried on the open deck. The boat's 1989 registration licence, as well as the inspections of 2003 and 2006, specified that passengers (the maximum number being set at forty-three) could only be carried in the compartments below the upper deck. Inspections carried out in 2003 and 2006 had expressly banned passengers who were being carried during navigation from accessing and using the open deck benches until the stability of the boat had been checked. He further argued that in the absence of any modifications to the boat, that ban had still been applicable at the time of the accident. Moreover, there had been no statutory provision requiring the applicant to reiterate the ban specified in the 2006 certificate in the 2007, 2008 and 2009 certificates.

17. The applicant's appeal on points of law was communicated to the State public prosecutor, who submitted observations in reply, asking the Supreme Court to dismiss the appeal. According to the applicant, those observations were not forwarded to him.

18. On 5 June 2012 the Supreme Court, noting the public prosecutor's written reply, dismissed the applicant's appeal. It found that the applicant's omissions identified by the lower courts signified that he had acted recklessly in the performance of his duty, namely in carrying out the technical supervision of the boat. That judgment was notified to the applicant's lawyers on 3 July 2012.

RELEVANT DOMESTIC LAW

A. Criminal Procedure Act

19. Section 80(1) of the Criminal Procedure Act (*Закон за кривичната постапка – пречистен текст*, Official Gazette no. 15/2005), as in force at the material time, provided that when a court decision could not be based on a statement given by the accused, a witness or an expert, then the investigating judge – as of right or at the parties' behest – would adopt a decision to remove the record of such statement from the case file forthwith,

or at the latest when the investigation is finalised, i.e. when the investigating judge consented to an indictment without conducting an investigation in respect of a particular defendant. Section 80(2) provided that after this decision had entered into force, the extracted record had to be sealed under separate cover and kept by the investigating judge separately from the other documents without the possibility for them to either be reviewed or used in the proceedings.

20. Pursuant to section 241 of the Act, a witness could not be obliged to answer certain questions if it was likely that by doing so, the witness would expose himself or herself to criminal prosecution.

21. Pursuant to section 365(1) of the Act, the trial court had to give a decision on the basis of the facts and evidence admitted at trial. Pursuant to section 365(2) of the Act, the court was obliged to carefully evaluate each item of evidence individually and also in relation to all the other evidence and, on the basis of such an evaluation, to draw a conclusion as to whether a certain fact had been proven or not.

22. Section 374(6) provided that in the reasoning of the judgment, the court had to state the reasons for every part of the assessment, especially the facts it considered as proven or unproven, the evidence on which those facts had been established, the reasons why certain proposals by the parties had not been accepted, the reasons by which it had been guided when resolving the legal issues and the circumstances taken into account when sentencing.

23. Section 418 provided that criminal proceedings may be reopened *inter alia* if the final judgment was based on a false statement or if it was caused by a criminal offence by a judicial official, if a new fact or new evidence is adduced or called before the court which may prove the convicted person's innocence or militate for the reduction of his sentence, if a person was tried for the same offence several times and if the European Court of Human Rights has given a final judgment finding a violation of human rights or fundamental freedoms.

24. Section 419(1) provided that the request for reopening could be submitted by the parties to the proceedings or the defendant's lawyer. Pursuant to section 420(1) the first-instance court decided upon the request for reopening.

25. Under section 424 if the convicted was tried *in absentia* the criminal proceedings could be reopened if an opportunity has arisen for trial in his presence, providing that the convicted person or his lawyer submitted a request for reopening of the proceedings within a year from the day of becoming aware on the judgment convicting him *in absentia*.

26. Pursuant to section 440(6), the court deciding an appeal on points of law had to give a copy of the appeal, together with other documents, to the prosecutor who could, within fifteen days from the notification of the appeal, submit observations in reply. Neither this section nor any other

provision of domestic law explicitly provides for communication to the defence of the prosecutor's observations in reply.

27. Pursuant to sections 441 and 434(1) of the Act, if the court established that an appeal on points of law was well founded, it had to adopt a judgment in accordance with the nature of the violation and reverse the decision that had entered into effect, or it had to completely or partially nullify the decisions of the first-instance and the higher court, or the decision of the higher court only, and remit the case to be adjudicated again or to be tried by the first-instance or the higher court; or the court had to limit itself only to the establishment of any violations of law.

28. Under section 449(1)6 of the new Criminal Proceedings Act (*Закон за кривичната постапка*, Official Gazette no. 150/2010), a case may be reopened if the European Court of Human Rights has given a final judgment finding a violation of human rights or fundamental freedoms.

B. Criminal Code

29. Under Article 299 § 1 of the Criminal Code (*Кривичен законик*, Official Gazette no. 37/96 with subsequent amendments), a person entrusted with the supervision of a means of transportation who, by unscrupulous performance of his duty, endangers human life and limb, is liable to a term of imprisonment of between six months and five years. Article 299 § 3 provides that whoever commits the offence referred to in paragraph 1 negligently will be fined or sentenced to a term of imprisonment of up to three years.

30. Article 300 § 4 of the Criminal Code provides that, if the offence referred to in Article 299 § 3 results in the death of one or more persons, the perpetrator will be sentenced to a term of imprisonment of one to five years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicant complained that the criminal proceedings against him had been unfair on account of a lack of reasons in the domestic courts' judgments, the non-communication of the public prosecutor's submission in the proceedings before the Supreme Court and a breach of his privilege against self-incrimination, contrary to his rights under Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

1. The Government's first non-exhaustion objection

32. The Government argued that the applicant had failed to exhaust domestic remedies in that he had not properly complained about the alleged lack of respect for his privilege against self-incrimination in his appeal against the first-instance judgment.

33. The applicant contested that objection.

34. The Court reiterates the relevant Convention principles, as summarised in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

35. The Court observes that the applicant clearly stated in his appeal that, under section 80 of the Criminal Procedure Act, the trial court had been obliged to remove from the case file the two technical reports he had submitted when examined as a witness, to put them in a sealed envelope and return them to the investigating judge (see paragraph 19 above). The applicant also clearly stated that the trial court had been wrong to base its judgment on those two reports.

36. In the light of the foregoing, the Court considers that the applicant raised in substance the argument as to a violation of the privilege against self-incrimination. It follows that the Government's objection of non-exhaustion of domestic remedies should be dismissed.

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

2. The Government's second non-exhaustion objection

38. In their additional written observations and comments on the applicant's just satisfaction claim, the Government for the first time raised an objection as to admissibility, alleging that he should have requested a reopening of the proceedings, as an effective remedy for dealing with the substance of his complaints of a violation of Article 6 of the Convention.

39. The Court, leaving aside the question whether the Government may be estopped from raising their non-exhaustion objection in additional written comments instead of doing it in their observations on the admissibility and merits of the case (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 52, 15 December 2016), reiterates that applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly initiate themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

40. The Court would refer to its extensive case-law to the effect that an application for a retrial or similar extraordinary remedies cannot, as a general rule, be taken into account for the purposes of applying Article 35 § 1 of the Convention (see *Tucka v the United Kingdom (no. 1)* (dec.), no. 34586/10, 18 January 2011).

41. In the present case, the request for reopening of the criminal proceedings, referred to by the Government, could have been submitted under specific circumstances and conditions provided for by the domestic law (see paragraphs 23-25 above) that do not seem to apply to the applicant's case. While it is true that he did not attend the trial himself (see paragraphs 11 and 25 above), he was aware of the criminal proceedings against him and was represented by two lawyers of his own choice that used all effective remedies throughout the proceedings. The Court accordingly concludes that the applicant was not required to request a reopening of the criminal proceedings before lodging his application. It follows that this objection must be rejected.

B. Merits

1. Alleged lack of reasoning in judgments

(a) The parties' submissions

42. The applicant maintained that the impugned domestic court judgments had lacked sufficient and adequate reasoning on his criminal responsibility for the accident or on the degree of his guilt. He further argued that the domestic courts had provided no explanation as to integral elements of the crime of which he had been convicted, including the scope of his obligations and the causal link between the alleged violation of such obligations and the accident, including the death of the passengers.

43. In particular, the applicant submitted that the circumstances had demanded a heightened standard of reasoning as to his responsibility. Although there was incriminating evidence against other port authority employees, nobody else had been indicted in connection with the failure to issue a ban on navigation or to order the removal of the benches from the boat's upper deck. The reasons given for the alleged duty to order the removal of the extension on that deck had been inconsistent and there was a lack of reasoning as to the source of the obligation to reduce the approved number of passengers and its causal link to the accident.

44. The Government maintained that the impugned judgments were sufficiently reasoned and had addressed all relevant factual and procedural issues and that they contained sufficient reasons for engaging the applicant's criminal responsibility in respect of the offence of which he had been convicted.

(b) The Court's assessment

(i) General principles

45. The Court reiterates that according to its established case-law, reflecting a principle linked to the proper administration of justice, Article 6 § 1 of the Convention obliges domestic courts to indicate with sufficient clarity the grounds on which they base their decisions (see, among other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 91, ECHR 2010, and *Nikolay Genov v. Bulgaria*, no. 7202/09, § 27, 13 July 2017). The Court further observes that although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288). Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons given for the lower court's decision (see *Stepanyan v. Armenia*, no. 45081/04, § 35, 27 October 2009).

46. The Court observes that the relevant general principles concerning the reasoning of judicial decisions in criminal proceedings have been summarised in *Moreira Ferreira v. Portugal (no. 2)* ([GC], no. 19867/12, §§ 83-84, 11 July 2017), and *Lobzhanidze and Peradze v. Georgia* (nos. 21447/11 and 35839/11, §§ 65-66, 27 February 2020).

(ii) Application of these principles to the present case

47. In the light of the Court's case-law concerning the reasoning of judicial decisions, the domestic courts were obliged to provide a specific and explicit reply only to those arguments which would have been decisive for the outcome of the proceedings.

48. In the present case, the Court notes that the trial court established that the applicant had acted recklessly in terms of technical supervision and had failed to comply with the relevant domestic provisions. It further established that, although the applicant had been aware of the damage that might have occurred, he had issued three certificates stating that the boat was fit to sail. He failed to reduce the number of authorised passengers on board and to order the captain to remove part of a fittings from the stern deck of the boat. The trial court also established that regardless of the annotation by the applicant in the first certificate he issued for the boat in 2006 (see paragraph 12 above) and the insight he had into the whole documentation for the boat, the boat's stability was never checked and for the next three years he issued certificates for the boat's ability to navigate without any annotations as to its stability or the extension of the stern deck. The trial court's judgment was based on ample evidence, including an expert opinion which noted the lack of significant attention as regards the testing of the condition of the steel ropes that were part of the steering system. The report further noted that the malfunctions identified in the steering system were indicative of poor maintenance, as well as of a

deficient inspection and testing of the system. Lastly, the trial court established that the applicant, who had been aware of the modifications to the compartments below the upper deck, should also have limited the number of passengers to thirty-five in line with the spatial capabilities of the boat below the upper deck, being the only area where passengers could be carried.

49. The Court of Appeal and the Supreme Court, respectively, accepted the facts as established by the trial court. While it is true that the courts did not address in detail the applicant's arguments that it had not been his duty to require the removal of benches from the deck and that he had not been obliged to reiterate again the requirement that the passengers should not be on the deck, the text of the judgments made it clear that they had examined these arguments and dismissed them, finding that the applicant had not acted with the care he owed to verify compliance with key safety requirements.

Therefore, the Court rejects the applicant's argument to the effect that the domestic courts' judgments lacked reasons as to his criminal responsibility and the causal link between the alleged omissions on his part and the reasons for the accident.

50. In the light of all the material in its possession, the Court is satisfied that the factual and legal reasons for the domestic courts' judgments were set out at length.

51. Accordingly, there has been no violation of Article 6 of the Convention in this respect.

2. Alleged lack of equality of arms as regards the non-communication of the public prosecutor's submission before the Supreme Court

(a) The parties' submissions

52. The applicant reiterated that the observations of the prosecutor submitted in reply to his appeal on points of law before the Supreme Court had never been brought to the attention of the defence and the applicant had not been able to acquaint himself with their content.

53. The Government submitted that the applicant had benefited from the right to adversarial proceedings. The fact that a unilateral submission by the prosecutor to the Supreme Court for its consideration was never forwarded to the applicant did not, in the Government's view, seem to raise a significant issue in the context of the right to a fair trial as a whole. The impugned submission was merely a reply to the applicant's submission to the Supreme Court, in which the prosecution essentially confirmed its previously stated position by requesting that the Supreme Court uphold the second-instance judgment. Nor was the applicant legally entitled to submit a reply to the prosecutor's observations, so the impugned submission would have been purely informative, without any relevance for the way in which

the proceedings were conducted or their outcome. If such right to a reply existed, it would have resulted in unreasonably lengthy proceedings. Lastly, the Government argued that nothing had prevented the applicant from finding out (through his lawyers) whether any submission had been filed by his opponent or from asking to be provided with a copy of the document in question.

(b) The Court's assessment

(i) General principles

54. The Court reiterates that the concept of a fair trial, of which the right to adversarial proceedings is one aspect, implies the right of the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (see *Grozdanoski v. the former Yugoslav Republic of Macedonia*, no. 21510/03, § 36, 31 May 2007, and *Naumoski v. the former Yugoslav Republic of Macedonia*, no. 25248/05, § 25, 27 November 2012).

55. The Court further observes that the relevant principles on equality of arms as regards the failure to communicate a submission to the defendant in criminal proceedings have been summarised in *Zahirović v. Croatia* (no. 58590/11, §§ 42-43, 25 April 2013).

(ii) Application of those principles to the present case

56. In the present case, the Court notes that the Supreme Court had full jurisdiction to decide the applicant's case, as it examined the merits of his request for an extraordinary review of a final judgment. It had, accordingly, the option of remitting the case for a new decision by the lower courts or quashing the impugned decision and taking a new decision itself.

57. The Court further observes that the public prosecutor filed a submission in reply to the applicant's appeal, suggesting that it should be dismissed as unfounded, and that the submission was never communicated to the applicant. In this regard, the Court notes that the domestic law is silent on the issue of communication to the defence of the prosecutor's observations in reply to an appeal on points of law (see paragraph 26 above) despite the fact that the principle of equality of arms mandates that the defence must be given a possibility to acquaint itself with their contents and decide whether to submit further observations in reply (see paragraph 55 above). While it is true that the domestic law did not prevent the Supreme Court from communicating the prosecutor's submissions to the applicant and affording him an opportunity to reply, the absence of an express provision obliging it to do so undoubtedly contributed to the situation complained of.

58. Accordingly, the Court considers that as a result of the absence of an express provision in domestic law requiring that the defence must be given

the opportunity to reply to the prosecutor's submissions and the practice of the Supreme Court applied in the present case not to communicate the prosecutor's submissions to the applicant, the proceedings before the Supreme Court were handled in a manner which was incompatible with the requirements of adversarial proceedings (see *Zahirovic,* cited above, § 42). The need to avoid lengthy proceedings can in no way justify depriving the applicant of the possibility to have knowledge of and comment on the prosecutor's observations, should he so wish.

59. As to the Government's argument that only one of the prosecution's submissions had not been communicated to the defence, and that therefore there had been no "serious flaw" in the fairness of the proceedings as a whole, the Court would reiterate that since the observations in question sought to influence the Supreme Court's decision by calling for the appeal to be dismissed, and in view of the nature of the issues to be decided by the Supreme Court, it does not need to determine whether the failure to communicate the relevant document caused the applicant any prejudice; the existence of a violation is conceivable even in the absence of prejudice (see *Zahirović*, cited above, § 48). As emphasised several times already, it is for the applicant to judge whether or not a document calls for a comment on his part (ibid.). The onus was therefore on the Supreme Court to afford the applicant an opportunity to take cognisance of the written observations of the prosecution prior to its decision (ibid.).

60. The foregoing is sufficient for the Court to conclude that there has been a violation of Article 6 § 1 of the Convention in this respect.

3. Privilege against self-incrimination and the right to remain silent

(a) The parties' submissions

61. The applicant submitted that the subsequent use of the written reports he had produced during the investigation against the captain, when he had been questioned as a witness (see paragraph 8 above), at least in so far as they were viewed as proof that the applicant had been aware of the modifications made on the boat's stern deck and used as material evidence against him, had rendered the proceedings unfair and had violated his right not to incriminate himself.

62. In his additional observations, the applicant submitted that he had not considered that his rights as a witness had been violated, but he contested the use of the written reports, which the authorities had obtained solely through his active involvement at the stage when he had still been a witness, and not an accused. He argued that, under domestic law, witnesses in principle had a duty to make a statement and, unlike the accused, they did not have the right to remain silent. The applicant submitted that he would not have disclosed the reports, which had not been publicly accessible, had he known that he would subsequently become an accused in those criminal

proceedings. The authorities would otherwise not have received those reports so easily, but would have had to obtain them in accordance with the applicable procedural rules. He lastly argued that the right to remain silent could be exercised in relation to both oral statements and written reports.

63. The Government maintained that the use of the applicant's written reports had not violated his privilege against self-incrimination, given the nature of the reports and their importance, and the exclusion of the applicant's oral witness statements from the trial's list of evidence.

(b) The Court's assessment

(i) General principles

64. The Court has held that the right to remain silent and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 of the Convention. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 38, 18 February 2010). The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III). In order to determine whether a particular set of proceedings has destroyed the very substance of the right not to contribute to one's own incrimination, the Court must examine the nature and degree of the coercion, if any, the existence of appropriate guarantees in the procedure and the use made of the material thus obtained (see *Schmid-Laffer v. Switzerland*, no. 41269/08, § 38, 16 June 2015).

65. It is important to stress that the privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but, as noted above, against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of any compulsion used to obtain the evidence (see *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 54-55, ECHR 2000-XII; *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 55, ECHR 2007-III; and *Bykov v. Russia* [GC], no. 4378/02, § 92, 10 March 2009). The Court, through its case-law, has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence (see, for example, *Saunders v. the United Kingdom*,

17 December 1996, *Reports of Judgments and Decisions* 1996-VI, and *Brusco v. France*, no. 1466/07, 14 October 2010) or is sanctioned for refusing to testify (see, for example, *Heaney and McGuinness*, cited above, and *Weh v. Austria*, no. 38544/97, 8 April 2004). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (see, for example, *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX; *Magee v. the United Kingdom*, no. 28135/95, ECHR 2000-VI; and *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (see *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX).

66. Any testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution's case, for example to contradict or cast doubt on other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating (see *Saunders*, cited above, § 69).

67. However, the right not to incriminate oneself is not absolute (see *Heaney and McGuinness*, § 47; *Weh*, § 46; and *O'Halloran and Francis*, § 53, all cited above). The degree of compulsion applied will be incompatible with Article 6 where it destroys the very essence of the privilege against self-incrimination (see *John Murray v. the United Kingdom*, 8 February 1996, § 49, *Reports* 1996-I). However, not all direct compulsion will destroy the very essence of the privilege against self-incrimination and thus lead to a violation of Article 6 (see *O'Halloran and Francis*, cited above, § 53). What is crucial in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial (see *Saunders*, cited above, § 71).

68. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see *Aleksandr Zaichenko*, cited above, § 39).

(ii) Application of those principles to the present case

69. The Court notes at the outset that the applicant's oral statement, given as a witness in the case, had been sealed and never used in the ensuing criminal proceedings against him (see paragraph 10 above). Nor did the domestic courts refer to it in their judgments. For the same reason, the said

oral statement and the record of the applicant's first questioning by the investigating judge were not part of the case file submitted to the Court.

70. The Court further observes that the domestic courts did use as evidence, among many other documents, the two written reports that the applicant had produced of his own motion on 7 September 2009 while making his witness statement in the case (see paragraph 8 above). In this respect, in the absence at the material time of a provision in domestic law regulating the use of documents produced by a witness who is later convicted in the same criminal proceedings (as was the applicant in this case), and bearing in mind that the applicant complained about the authorities' use of evidence obtained during his active involvement at the stage when he had still been merely a witness in the proceedings, the Court's task is to examine the nature and degree of compulsion, if any, the existence of procedural safeguards, and the use to which any material so obtained is put (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 269, 13 September 2016; *Jalloh,* cited above, § 101).

71. The Court takes into consideration that the applicant did not object to being questioned as a witness, that he had been provided with the procedural guarantees prescribed by law (see paragraphs 19 and 20 above) and that there had been no intent by the domestic authorities, nor any signs of compulsion in the methods of the investigating judge, to make him produce evidence and incriminate himself. In line with the applicant's submissions (see paragraph 62 above), and as provided by domestic law, he was not obliged to answer certain questions, or in that regard, to provide evidence, if it was likely that by doing so he would expose himself to criminal prosecution, which in turn provided him with the possibility of remaining silent.

72. The Court notes in this connection that the applicant was not particularly vulnerable and that he had the opportunity to challenge the authenticity and the admissibility of the impugned evidence and oppose its use. The Court further observes that there is no evidence that the domestic authorities had ever requested the applicant to produce new reports or any evidence that would help them in the investigation or lead to his indictment. On the contrary, he was required to give an oral statement in order to provide information relevant to the case, but it was later sealed and never used in the subsequent criminal proceedings. The disputed reports, drafted by the applicant only after the accident, referred to the boat inspections he had performed in 2008 and 2009. That being so, the Court can only assume that those reports should have been produced at the time when the technical inspection of the boat had been conducted, together with the certificates for its ability to navigate, and should therefore have been part of the boat's files. Those two reports contained a warning by the applicant directed at the captain of the boat that passengers should only be carried in the saloons

below the upper deck, even though no such warning had ever been included in the certificates which the applicant issued in 2008 and 2009. It is furthermore important to note, as maintained by the Government, that the two reports, as documents regulating an important issue of public safety, could have been obtained by the competent authorities from sources other than the applicant, even if by means of a compulsory court order.

73. Finally, the applicant's conviction was not based on the information obtained during his questioning as a witness. While it is true that the domestic courts took into consideration the two reports he had produced on that occasion, the Court notes that in reality they were of little relevance for his conviction, particularly because, contrary to his submissions (see paragraph 61 above), the interim certificate he had issued after the boat inspection in 2006 proved that he had already been aware of the modifications (in view of the fittings) made to the open stern deck (see paragraph 12 above), as it was the first time he established that carrying passengers on the open decks is not permitted until the boat's stability was verified. Additionally, the applicant was not indicted immediately after his questioning, but at a later stage, when the investigating judge had finalised the investigation against the captain.

74. In the light of the foregoing, the Court is satisfied that, notwithstanding that the two written reports produced at the stage when the applicant had still been a witness were later used as part of the evidence in the criminal proceedings against him, the essence of his right to remain silent and his privilege against self-incrimination have not been breached.

75. Accordingly, there has been no violation of Article 6 § 1 of the Convention in this respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed 55,982.34 euros (EUR) in respect of pecuniary damage owing to a loss of profit he had allegedly suffered by being prevented from working. In support he submitted documents regarding his temporary reduction in working time and salary adjustments. The applicant also claimed compensation for non-pecuniary damage, but left the decision about the amount to the Court's discretion.

78. The Government contested the claims. They maintained that the finding of a violation would be sufficient just satisfaction in the circumstances. Should the Court decide to award the applicant compensation in respect of non-pecuniary damage, the amount should be determined on an equitable basis, having regard to the standards established in its case-law, the circumstances of the case and the aim of just satisfaction. Lastly, the Government maintained that if requested, the most appropriate form of redress for violation(s) of Article 6 of the Convention would be a reopening of the proceedings.

79. As regards the applicant's claim for compensation in respect of pecuniary damage, he has not established the necessary causal link between the violation found and the pecuniary damage sought. In particular, it cannot speculate as to what the outcome of the criminal proceedings would have been had the violation of Article 6 § 1 of the Convention not occurred (see, for example, *Mitrinovski v. the former Yugoslav Republic of Macedonia*, no. 6899/12, § 56, 30 April 2015). The Court therefore rejects this claim.

80. On the other hand, making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

81. The applicant claimed EUR 42,105.12 for the costs and expenses he had been ordered to cover for the domestic criminal proceedings, and which he does not appear to have paid yet, but in his submission there is an enforceable claim against him in this respect. He further requested that the Court order the Government not to enforce those costs against him. The applicant did not seek any costs or expenses incurred in the proceedings before the Court.

82. The Government contested this claim, arguing that there was no causal link between the alleged Convention violations and the amounts claimed. The Government further argued that this claim was groundless and excessive (taking in consideration that the costs of the domestic proceedings were chargeable also against the other defendant based on the so-called "solidarity" principle), as well as premature since the most appropriate form of redress for violation(s) of Article 6 of the Convention would be a reopening of the proceedings, if requested.

83. 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). Regard being had to the documents in its possession and to its case-law as to the costs and expenses claimed in respect of the domestic proceedings, the Court notes that such costs were not incurred in

order to seek through the domestic legal order prevention and redress of the particular violation found by the Court, namely the Supreme Court's failure to provide the applicant with a possibility to comment on the prosecutor's observations submitted to it (see *Milošević v. the former Yugoslav Republic of Macedonia*, no. 15056/02, § 34, 20 April 2006). It therefore rejects the applicant's claim under this head.

C. Default interest

84. 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 complaints under Article 6 § 1 of the Convention, concerning a lack of reasons in the domestic courts' judgments, the non-communication of the public prosecutor's submission in the proceedings before the Supreme Court and a breach of the privilege against self-incrimination, admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle of equality of arms resulting from the failure to communicate to the applicant the public prosecutor's submission before the Supreme Court;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the alleged lack of sufficient reasons in the domestic courts' judgments and the alleged breach of the privilege against self-incrimination;

4. *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, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national 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;

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

Done in English, and notified in writing on 10 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik
Registrar

Síofra O'Leary
President