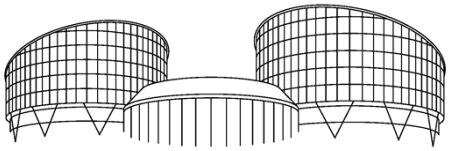

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ĆWIK v. POLAND

(Application no. 31454/10)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Proceedings rendered automatically unfair as a whole by admission of evidence obtained through ill-treatment of a third party by private individuals • No evidence of involvement or acquiescence of State actors • Treatment reaching necessary threshold of severity to fall within scope of Art 3 • Court case-law on use of evidence obtained as result of ill-treatment applicable to treatment inflicted by private individuals, irrespective of its classification

STRASBOURG

5 November 2020

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 Ćwik v. Poland,

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

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Aleš Pejchal,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Raffaele Sabato, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to:

the application (no. 31454/10) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a dual Polish and US national, Mr Grzegorz Ćwik ("the applicant"), on 13 May 2010;

the decision to give notice of the application to the Polish Government ("the Government");

the parties' observations;

Having deliberated in private on 10 March and 29 September 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. In the criminal proceedings against the applicant, the courts admitted in evidence statements of a third party obtained as a result of ill-treatment inflicted by private individuals. The applicant complained under Article 6 § 1 of the Convention that admission in evidence of those statements had violated his right to a fair trial.

THE FACTS

2. The applicant was born in 1968. He was represented by Mr L. Ilasz, a lawyer practising in Warsaw.

3. The Government were represented by their Agent, Ms J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.

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

5. On 3 April 1998, during a search carried out for the purposes of investigation no. VI Ds. 16/98 conducted by the Gdańsk Regional Prosecutor's Office into the abduction and assault of an individual named

K.G. the police secured an audio cassette. A transcript of the recording was made on 27 August 1998.

6. In October 2003 the Cracow Appellate Prosecutor's Office, on the basis of materials received from the authorities in the United States of America, initiated an investigation in respect of an international criminal group involved in drug-trafficking. In May and August 2006 charges against the applicant were severed from the investigation opened in October 2003.

7. On 31 August 2006 the prosecutor lodged a bill of indictment. The applicant was charged with three counts of trafficking or attempted trafficking of large amounts of cocaine into Poland. The prosecutor enumerated a number of items of evidence to be disclosed at the trial, including the transcript of the recording (see paragraph 5 above).

8. On 18 February 2008 the Cracow Regional Court convicted the applicant of:

(I) attempted trafficking of 3 kg of cocaine from Honduras to Poland in September 1995;

(II) trafficking of some 50 kg of cocaine from Colombia *via* Russia to Poland between the end of 1996 and summer of 1997; and

(III) trafficking of 20 kg of cocaine from the United States to Poland in May-June 1997.

9. The court held that in respect of offences II and III the applicant had been acting as part of an organised criminal group. It sentenced the applicant to a cumulative penalty of twelve years' imprisonment and a fine.

10. The trial court made the following findings of fact. M.W. and L.P., dual Polish and US citizens, had lived in the United States where they had been doing business together. From the mid-1990s they had got involved in the trafficking of cocaine to Poland. L.P. had been responsible for organising cocaine from a Colombian drug cartel and M.W. for its distribution. M.W. had supplied the cocaine to a gang, led by A.H.

11. With regard to the first charge, the trial court established that in 1995 L.P. had engaged the applicant and K.G. in the cocaine business. Their first joint venture had been a trip to Honduras in September 1995. L.P. had gone there first followed by the applicant, K.G. and J.L. (the applicant's sister and K.G.'s girlfriend). L.P. had received 3 kg of cocaine from the Colombian cartel. A next delivery for the applicant and K.G. had had to be made soon. However, the Honduran police had arrested L.P., K.G., J.L. and the applicant. They had spent seven months in detention. L.P. had organised their escape from detention, by bribing the guards. All of them had returned to the USA. Subsequently, they had been convicted by the Honduran courts of possession and trafficking in cocaine and sentenced to seventeen years and six months' imprisonment. The applicant, K.G. and J.L. had intended to smuggle the cocaine to Poland. After L.P.'s return to the USA, he and M.W. had had a disagreement over getting third parties (the applicant, K.G. and

J.L.) involved in the drug business. Nonetheless, they continued their activities in 1996 and 1997.

12. With regard to the second charge, the trial court established that a few months after their return from Honduras, between the end of 1996 and the summer of 1997, L.P. had become involved in drug business also with the applicant and K.G. They had wanted to recover losses made in connection with their arrest in Honduras. L.P. had been in direct contact mostly with the applicant, who had then passed the relevant information on to K.G. They had arranged that cocaine would be delivered by the cartel to a port in Colombia and then smuggled, with the assistance of some sailors, on board Russian ships bound for St Petersburg or Kaliningrad. There, K.G. had collected the cocaine and placed it in strongboxes. He had then smuggled it into Poland and sold it to the gang of "J", which operated in Tricity (*Trójmiasto*) in the Pomerania region. They had organised a number of deliveries using that route; that last one had been for 17 kg of cocaine. In total, some 50 kg of cocaine had been trafficked this way.

13. With regard to the third charge, the trial court established that the last transaction between L.P. and the applicant and K.G. had concerned 20 kg of cocaine in May-June 1997. L.P. had organised a delivery of a large amount (115 kg) of cocaine from Colombia to the USA. It had been collected by M.W. L.P. had then ordered M.W. to deliver 20 kg of cocaine from this delivery to the applicant. The applicant had subsequently shipped 20 kg of cocaine to Poland.

14. The applicant and K.G. had not paid L.P. for this shipment and the earlier shipment of 17 kg of cocaine. They had begun ordering cocaine directly from the Colombian cartel, excluding L.P. When L.P. had failed to pay the cartel for the above two deliveries, the cartel had ordered L.P.'s assassination. However, the cartel had hired a killer who happened to be an agent of the US Drug Enforcement Administration. L.P. had been arrested by the US authorities in November 1997.

15. M.W. had supplied the cocaine to A.H. and promised him that no one else in Poland would receive such high-quality cocaine. However, cocaine from the same source had begun to appear in the Pomerania region of Poland, since the applicant and K.G. had also organised its supply separately into the country (see paragraph 12 above).

16. L.P. had been released by the US authorities sometime in 1998. M.W. had informed him that A.H. had been annoyed with the second supply channel of cocaine to Pomerania. L.P. had stated that the applicant and K.G. had owed him money. He had instructed M.W. to ask A.H., the leader of the gang, to recover the cocaine from the applicant and K.G. Eventually, A.H. had ordered that the applicant and K.G. be kidnapped and assassinated.

17. The trial court established that K.G. had been abducted on 25 March 1998 in Gdynia by members of A.H.'s gang, but the applicant had managed to escape. K.G. had been taken to a house, where he had been put in

a basement and tortured to force him to disclose the location of the strongboxes containing the cocaine and money.

18. K.G. had had a pistol put to his head, had been pistol-whipped on his head, had had shots fired between his legs, had been kicked, and had had boiling water poured on him. Parts of this "interrogation", attended by M.W., A.H. and some of his associates, were recorded on an audio cassette on the orders of L.P. K.G. had at first resisted, but then he had indicated the location of the strongboxes in Gdańsk, Kaliningrad and St. Petersburg. A.H.'s associates had found 7 kg of cocaine and 150,000 United States dollars. Subsequently, K.G. had been transferred to a house in W. The police had liberated him from there, having received information from the owner of the house, and had secured the audio cassette.

19. A medical examination had established, *inter alia*, that K.G. had had the following injuries: an abrasion on the skin of the neck, an abrasion on the right wrist, first- and second-degree burns on the upper left hand, burns on the left side of the chest, scratches on the left ear, pains in the lumbar area, burns in the area of the left of the groin, haematomata on the left buttock and left thigh, and first- and second-degree burns on the upper side of the left foot.

20. During the investigation, the applicant had pleaded not guilty and had refused to testify. At the trial he had also pleaded not guilty. With respect to the first charge, he had stated that he had gone on holiday to Honduras and had not known why he had been arrested there. He had refused to answer questions from the prosecutor and the court.

21. In respect of the applicant's guilt, the trial court primarily relied on evidence given by L.P. and M.W., who had agreed to cooperate with the authorities and had testified at the trial. The court noted that their evidence together with other material, in particular the transcript of the "interrogation" of K.G. and the judgments given in drug-trafficking cases against the applicant and certain other persons by the courts of Honduras, formed a comprehensive, logical and coherent whole, which supported the findings of fact made by the court and, consequently, of the applicant's guilt.

22. The court analysed in detail the issue of credibility of L.P. and M.W. The credibility of their evidence, given firstly in the investigation and then at the trial, had been supported by the fact that they had revealed numerous offences committed by them over a period of many years, such as trafficking in significant amounts of cocaine to Poland, illegal money transfers and trafficking in cars from the USA to Poland. They had mostly incriminated themselves through their detailed evidence; their evidence had not been focused on the applicant. The court underlined that L.P. and M.W.'s cooperation with the authorities had exposed them and their families to a risk of reprisals from criminal groups. It noted certain discrepancies between the evidence of L.P. and M.W., but observed that this

had been obviously due to K.G.'s having been involved in the cocaine business with L.P. and not with M.W. In addition, given the extent and detailed nature of statements of both L.P. and M.W., certain discrepancies in their evidence did not undermine their credibility with regard to offences imputed to the applicant.

23. The trial court noted that the transcript containing excerpts from K.G.'s "interrogation" was an important item of evidence confirming the credibility of L.P. and M.W. with regard to K.G.'s and the applicant's involvement in the cocaine business, as well as confirming the applicant's guilt in respect of all three offences. K.G. had confirmed in his recorded utterances L.P.'s evidence that the latter had proposed to the applicant and K.G. to organise the smuggling of cocaine from Honduras to Poland (offence no. I). Another declaration of K.G. had confirmed the evidence of L.P. and partly that of M.W. that L.P., while cooperating with the applicant and K.G., had trafficked cocaine by sea to Russia, where K.G. had collected it from sailors and trafficked into Poland (offence no. II). Furthermore, K.G. had confirmed L.P.'s evidence concerning the trafficking of 20 kg of cocaine from the US to Poland (offence no. III).

24. The court noted that in respect of the second and third offences, K.G. had not mentioned the applicant's involvement in the respective offences. However, it observed, having regard to credible evidence of L.P. and M.W. in respect of those charges, that K.G. had intended to protect the applicant. The trial court referred to K.G.'s abduction and ill-treatment as "settling of accounts between gangsters".

25. The trial court also noted that the kidnapping and torture of K.G had been the subject of a separate investigation in which, *inter alia*, the audio cassette had been secured by the police. A bill of indictment had been lodged with the Gdynia District Court against four people. At the material time the proceedings against two of the accused (the two others had died) had been pending before the first-instance court. When testifying before the authorities in those proceedings, K.G. had not revealed the background of the kidnapping and his involvement in drug trafficking.

26. K.G. had not given evidence in the proceedings against the applicant. At the hearing held on 17 January 2008 the prosecutor had informed the trial court that it would be impossible to hear evidence from K.G. The latter and J.L. had been sought in vain for a number of years under an arrest warrant. For this reason, the prosecutor had applied to have the court read out the statements given by K.G. and J.L. in the terminated criminal proceedings in Sweden. The trial court had allowed the prosecutor's application, having regard to the circumstances indicated above.

27. The applicant lodged an appeal against the trial court's judgment. He submitted, *inter alia*, that the trial court had breached Article 7 of the Code of Criminal Procedure ("the CCP") in finding the evidence of L.P. and

M.W. credible. He underlined that these two witnesses had concluded an agreement with the US authorities and that their motivation was to diminish their own responsibility at the expense of the applicant. The applicant further contested the use by the trial court of the transcript of K.G.'s "interrogation" in making its findings of fact. In his view, the admission of this evidence had violated Article 171 § 7 of the CCP. He argued that it had been unacceptable for the trial court to attempt to corroborate the evidence of L.P. and M.W. by the transcript of K.G.'s "interrogation" during which the latter had been tortured. The declarations of K.G. had been forced by torture and, as such, they had no probative value. They could not constitute evidence because they had been obtained through coercion or in conditions excluding free expression. The applicant also alleged that the trial court had erroneously established that he had acted in an organised criminal group.

28. At the hearing before the Court of Appeal, the applicant further alleged that the trial court had violated certain provisions of the CCP by having read out the statements of K.G. and J.L. given in the criminal proceedings before a Swedish court. He submitted that K.G. and J.L. had had the right to refuse to give evidence given that they were close family of the applicant (brother-in-law and sister respectively).

29. In its judgment of 8 October 2008, the Cracow Court of Appeal amended the contested judgment only in one aspect. It agreed with the applicant that the trial court had failed to establish that the applicant had acted as part of an organised criminal group. It therefore amended the legal qualification of the second and third count of drug trafficking and reduced the prison sentence to eleven years.

30. The Court of Appeal rejected as unfounded the remaining arguments of the applicant. It found that the trial court had not breached Article 7 of the CCP by the allegedly erroneous assessment of evidence of the key witnesses, L.P. and M.W. The trial court, in its view, had correctly considered their evidence credible and convincingly indicated the reasons for such an assessment.

31. The Court of Appeal noted that the transcript of K.G.'s statements confirmed the evidence of L.P. and M.W. in respect of the second count of drug trafficking.

32. With regard to the applicant's argument contesting the admission in evidence of K.G.'s statements, the Court of Appeal held as follows:

> "The appellant is not right in contesting the Regional Court's decision to admit as procedurally valid evidence an audio cassette including utterances of K.G. recorded while he was being tortured ... He also incorrectly qualifies this objection as a breach of Article 7 of the CCP, whereas in reality he is not concerned with the erroneous assessment of this evidence, but with generally admitting it into evidence, since it should have been excluded in accordance with Article 171 § 7 of the CCP; accordingly, a breach of that provision should have been indicated. The appellant wrongly considers that 'this had been questioning without respect for any form prescribed by law', and thus the utterances of K.G. being questioned could not

constitute evidence since they had been made under duress. This reasoning implicitly assumes that the above-mentioned provision also applied to private persons, and not only to the authorities conducting the proceedings. The appeal did not put forward any arguments in support of this assertion, but at the appellate hearing the defence referred to the term 'statements', used in this provision as supporting the contention that this provision covered also the utterances of a person undergoing a kind of 'interrogation' in conditions of duress applied by a private person. ... This reasoning is incorrect. Firstly, the said provision applies exclusively to the authorities conducting proceedings, as is indicated by its close connection to the preceding paragraphs [of the same provision], which undoubtedly concern questioning conducted by the competent authorities. Secondly, the mere use of the term 'statements' (*oświadczenia*) cannot constitute a basis for such a conclusion, since despite the assertion that the CCP uses this term when referring to private declarations (outside of the proceedings), the same term is used, *inter alia*, in Articles 116 and 453 § 2 of the CCP with regard to declarations made by the parties to a trial. Accordingly, the term 'statement' belongs to procedural terminology, and it is not a term used for pronouncements made by a person subjected to coercion by private persons.

This evidence was obtained lawfully, since the police secured it on the location where K.G. had been deprived of liberty, and its content reflected an objectively occurring past event, outside of the proceedings. The recording, and the utterances of K.G., were not obtained for the purposes of the proceedings; had this been the case, they would have had to have been considered inadmissible, because such an act would be aimed at circumventing the law, that is to say Article 171 § 7 of the CCP itself. In consequence, the said evidence should be treated exactly the same as recorded utterances of a victim of assault, which point to a perpetrator. Such evidence would certainly not raise any doubts, while, in essence these two situations are not different in the examined context. Accordingly, utterances obtained as a result of coercion, recorded on an audio cassette, [and] obtained by a private person outside of the proceedings and not for the proceedings' purposes can constitute evidence and be subjected to assessment as other evidence obtained in a case."

33. The Court of Appeal held that the allegation of a breach of the CCP in relation to the reading out of the statements of K.G. and J.L. was unfounded. It noted that in the case where a witness had been hiding, like in the present case, the trial court could not have notified him of his right not to testify.

34. The applicant lodged a cassation appeal with the Supreme Court. He argued that the Court of Appeal had breached Articles 171 §§ 5 and 7 of the CCP by restricting the scope of exclusionary rule to acts undertaken by the authorities in the course of those proceedings. This approach had resulted in the acceptance of declarations made by K.G. while being tortured. The applicant argued that Article 171 §§ 5 and 7 of the CCP should have been applied to all situations in which statements under duress had been obtained, either by the authorities in the course of the proceedings or by third parties outside of the proceedings.

35. He further argued that the aim of the exclusionary rule at issue was to discount evidence which, if admitted, carried a high risk of false factual findings being made. The risk of such evidence being false stemmed from the fact that it had been forced. The applicant noted that the reason to

exclude such statements lay in the lack of a real possibility to determine to what extent the relevant statement had been spontaneous and to what extent they had been made under coercion. He saw no reason to exclude a witness statement made under coercion emanating from the State authority, while considering admissible a witness statement obtained by criminals as a result of torture. The applicant underlined the paucity of K.G.'s utterances recorded on the audio cassette that had been referred to by the trial court in making factual findings. He argued that in the situation of a long exposure to considerable pain and violence, random utterances of K.G. could not constitute evidence of what had been said by him while being tortured.

36. In a decision of 26 November 2009 the Supreme Court dismissed the cassation appeal as manifestly ill-founded. This decision did not contain written grounds.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Constitution

37. The relevant provisions of the Constitution read as follows:

Article 30

"The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

Article 40

"No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited."

Article 45 § 1

"1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court."

B. Code of Criminal Procedure

38. Article 7 of the Code of Criminal Procedure provides as follows:

"The authorities conducting the proceedings shall make their decisions on the basis of their own conviction, which shall be founded upon all evidence taken and assessed freely, with due consideration to the principles of sound reasoning, knowledge and personal experience."

39. Article 171 of the CCP in its relevant part provides as follows:

"Part V. Evidence
Chapter 19. General Provisions

...

Article 171 § 1. The person being questioned shall be granted the opportunity to express himself or herself freely within the framework designated for the purpose of the action at issue, and only afterwards may questions be put to him or her with a view to completing, elucidating, or verifying the statement presented.

...

§ 5. It shall be inadmissible:

1) to influence the statement of the examined person through coercion or unlawful threat,

2) to apply hypnosis or chemical or technical means affecting the psychological processes of the examined person or aimed at influencing unconscious reactions of his body in connection with the examination."

§ 7. Explanations of the accused, testimony or statements given or made under conditions precluding their free expression [by the person concerned], or obtained against the prohibitions specified in § 5, cannot constitute evidence."

II. INTERNATIONAL LAW AND PRACTICE

A. International Covenant on Civil and Political Rights, adopted on 16 December 1966, 999 UNTS 171 ("ICCPR")

40. The relevant provisions of the ICCPR read as follows:

Article 7

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 14 § 1

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ..."

B. United Nations Human Rights Committee (CCPR), General Comment No. 20 on Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992

41. In the General Comment No. 20 on Article 7 the Human Rights Committee stated, in so far as relevant:

"2. The aim of the provisions of Article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of

the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. ...

12. It is important for the discouragement of violations under Article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

C. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature on 10 December 1984, came into force on 26 June 1987, 1465 UNTS 85 ("UNCAT") (hereinafter "the Convention against Torture")

42. The relevant provisions of the Convention against Torture provide as follows:

Article 1

"1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

Article 15

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Article 16

"1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. The applicant complained under Article 6 § 1 of the Convention that his right to a fair trial had been violated. He submitted that the courts should not have admitted into evidence the recording of K.G.'s statements obtained from him as a result of torture inflicted by members of a criminal gang. The violation was aggravated by the trial court's failure to summon K.G. to enable him to comment on the recording.

44. Article 6 § 1 of the Convention, in its relevant part, reads as follows:

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

A. Admissibility

45. 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 applicant's submissions

46. The applicant averred that K.G.'s declarations had been inadmissible as evidence under Article 171 § 7 of the CCP. In his view, the courts had incorrectly interpreted this provision by holding that it had been applicable exclusively to evidence obtained through coercion applied by a public official. The applicant submitted that it had been irrelevant whether the coercion was applied by a State agent or private individual because any statements extorted in this manner precluded free expression. A tortured person would be willing to say anything to avoid further pressure. The applicant submitted that in the present case this could be proven by the paucity of information given by K.G. under torture.

47. Random sentences of K.G. recorded on an audio cassette should not have constituted a proof of what had been said because K.G. had been subjected to torture. There had been no possibility for the courts to carry out a proper assessment of those declarations and there had been a strong risk that they had been false.

48. The applicant submitted that the trial court had not summoned K.G. to the trial. As a result, K.G. could not have invoked his procedural right not to testify in the case on account of his family link to the applicant (brother-in-law). In consequence, the trial court had wrongly applied Article 391 § 1 of the CCP and disclosed evidence from K.G.'s interrogation by the gangsters. Under Polish law and supported by legal

commentary, a court could refer to a previous testimony given by the person exercising the right to refuse to testify if such a person remained abroad despite the court's having properly summoned that person to the trial. The applicant claimed that at the relevant time K.G. had resided in Sweden, but the trial court had failed to summon him to appear. In the applicant's view, this pointed to the defective nature of the evidence collected by the trial court.

49. With regard to the statements of L.P. and M.W., the applicant submitted that their evidence had been unreliable for several reasons. The major part of their statements had originated from hearsay. The applicant averred that L.P. had been the main source of evidence; however, the trial court had verified his testimony by referring to statements made by M.W. despite the fact that the latter had got his information only from L.P. In consequence, the assessment of L.P.'s evidence had been defective and should have been discounted by the Court of Appeal.

50. The applicant further claimed that there had been no evidence confirming the statements of L.P. and M.W., which had contained inconsistencies. For this reason, their importance should have been considerably limited. He also disagreed with the domestic courts that the evidence of K.G. had been ancillary. This evidence had been cited several times in the bill of indictment and in the reasoning of the trial and appellate courts.

2. The Government's submissions

51. The Government submitted that the issues of admission and assessment of evidence had been within the exclusive competence of the domestic courts. The Court, on the other hand, was competent to examine whether the applicant's trial as a whole had been fair. The following aspects were relevant for the examination of fairness: the observance of the defence rights, the quality of evidence and its influence on the outcome of the proceedings.

52. With regard to the defence rights, the Government maintained that they had been fully respected. The applicant had had an opportunity to challenge the admissibility of the impugned evidence and oppose its use before the Court of Appeal and the Supreme Court. The Court of Appeal had held that the admission of the recording had been lawful. It had found that K.G.'s utterances had been recorded on an audio cassette by private individuals, outside the scope of the proceedings and not for the purpose of those proceedings and, thus, could be assessed in the same way as other items of evidence. In addition, the Government submitted that there had been a strong public interest in prosecuting large-scale drugs crimes such as those committed by the applicant.

53. The Government underlined that Article 171 § 7 of the CCP solely applied to the investigative and judicial authorities and was applicable to

statements given in the course of proceedings and for the purposes of those proceedings. Accordingly, statements obtained indirectly – for example by the questioning of a witness by private person outside of the proceedings – did not fall within that provision. It was not prohibited under Polish law to use in evidence statements obtained as a result of a private person's activity. That interpretation had been confirmed in the domestic case-law and legal commentary.

54. In so far as the quality of evidence was concerned, the Government submitted that the recording of K.G.'s utterances had been obtained by the police in the course of a search on 3 April 1998 for the purposes of the investigation into his abduction and torture. The recording had thus been made several years before the proceedings against the applicant had been initiated. Furthermore, the statements had not been recorded for the purposes of the proceedings, but for the private, criminal purposes of the group of individuals. Thus, the authorities had not been in any way involved in the production of the impugned evidence. The recording had been admitted into evidence since it had been impossible to question K.G. in the proceedings as he had been in hiding for several years and the police had been unable to apprehend him.

55. With regard to the influence of the evidence on the proceedings, the Government maintained that the utterances of K.G. had been only of a supplementary character and not decisive for the finding of the applicant's guilt. They pointed out that the trial court's findings in respect of the facts and of the applicant's guilt had been mostly based on the evidence of L.P. and M.W. The recording had confirmed the already established facts and the credibility of L.P. and M.W.'s statements only. In addition, the trial court had relied on other items of evidence such as the case file of the Honduran judicial authorities. The trial court had found that the above evidence had been coherent and had formed a consequent whole. The Court of Appeal had not found any shortcomings in the trial court's assessment of evidence.

56. The Government further submitted that the fairness of the trial had not been undermined by the fact that K.G. could not have been examined by the court. At the hearing of 17 January 2008 the prosecutor had informed the court and the defendant that K.G. had remained in hiding despite an arrest warrant issued and thorough search activities having been carried out over a period of several years. For this reason it had not been possible to summon K.G. before the court.

57. The Government emphasised that the present case differed significantly from the case of *Gäfgen v. Germany* (no. 22978/05, ECHR 2010) and other similar cases where statements had been obtained as a result of treatment contrary to Article 3 of the Convention. In contrast to *Gäfgen*, in the present case the violence had been used by private individuals, and not towards the applicant but a third person. It was necessary to differentiate between cases where unlawful means to obtain evidence had been used by

the authorities and cases where unlawful acts had been carried by private individuals.

58. The Government concluded that the applicant had benefited from a fair hearing.

3. The Court's assessment

(a) General principles

59. The Court notes that although the application raises issues under Article 6 § 1 of the Convention, the principles developed under Article 3 are highly relevant for the examination of the applicant's complaint under Article 6 § 1.

(i) with regard to Article 3

60. The Court reiterates that the prohibition of torture and inhuman or degrading treatment or punishment is a fundamental value in democratic societies (see, among many other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 87, ECHR 2010, and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 195, ECHR 2012). It is also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention (see *Bouyid v. Belgium* [GC], no. 23380/09, §§ 81 and 89-90, ECHR 2015). The prohibition in question is absolute, for no derogation from it is permissible even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime, irrespective of the conduct of the person concerned (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 158, 15 December 2016 and cases cited therein).

61. In its examination of whether a person has been "subjected to ... treatment" that is "inhuman or degrading" within the meaning of Article 3, the Court's general approach has been to emphasise that the treatment must attain a minimum level of severity if it is to fall within the scope of this provision. The assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Muršić v. Croatia* [GC], no. 7334/13, § 97, 20 October 2016; *Paposhvili v. Belgium* [GC], no. 41738/10, § 174, 13 December 2016; *Khlaifia and Others*, cited above, § 159; and *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 116, 25 June 2019).

62. Subjecting a person to ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of those characteristics, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of

fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. It may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others (see *Bouyid*, cited above, § 87, with further references).

63. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals (see, among other authorities, *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI, and *O'Keeffe v. Ireland* [GC], no. 35810/09, § 144, ECHR 2014 (extracts)). These measures should provide effective protection and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see, among other authorities, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). However, the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 of the Convention has been inflicted through the involvement of State agents and cases where violence was inflicted by private individuals (see *Beganović v. Croatia*, no. 46423/06, § 69, 25 June 2009).

64. Furthermore, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII). Such a positive obligation cannot be considered to be limited solely to cases of ill-treatment by State agents (see *M.C. v. Bulgaria*, no. 39272/98, § 151, ECHR 2003-XII; *Šečić v. Croatia*, no. 40116/02, § 53, 31 May 2007; and *Beganović*, cited above, § 66).

65. The State's positive obligation to protect people from prohibited ill-treatment administered by private individuals has been found to arise in a number of cases provided that the Court has established that a given ill-treatment attained the minimum level of severity. This obligation has been recognised, *inter alia*, in the following "private" contexts: a stepfather beating a child with a cane (see *A. v. UK*, cited above, §§ 22-24); neglect and abuse suffered by children at the hands of their parents (see *Z and Others*, cited above, § 74) or their stepfather (see *E. and Others v. the United Kingdom*, no. 33218/96, § 89, 26 November 2002); rape (see, among other authorities, *M.C. v. Bulgaria*, cited above, § 148, and *S.Z. v. Bulgaria*, no. 29263/12, § 41, 3 March 2015); violent assault on worshipers (see *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 102, 3 May 2007); acts of domestic violence

and threatening conduct (see, among other authorities, *Opuz v. Turkey*, no. 33401/02, § 161, ECHR 2009, and *Volodina v. Russia*, no. 41261/17, §§ 74-75, 9 July 2019); sectarian violence towards schoolchildren and their parents (see *P.F. and E.F. v. the United Kingdom* (dec.), no. 28326/09, 23 November 2010, § 38); serious assaults on individuals (see, for example, *Beganović*, cited above, § 66; *Denis Vasilyev v. Russia*, no. 32704/04, § 95, 17 December 2009; *Dimitar Shopov v. Bulgaria*, no. 17253/07, § 49, 16 April 2013; and *Irina Smirnova v. Ukraine*, no. 1870/05, § 73, 13 October 2016); attack on a Hare Krishna member (see *Milanović v. Serbia*, no. 44614/07, § 87, 14 December 2010); sterilisation of Roma woman without informed consent (see *V.C. v. Slovakia,* no. 18968/07, § 119, ECHR 2011 (extracts); sexual abuse of children by a teacher in primary school (see *O'Keeffe*, cited above, § 153); homophobic violence (see *Identoba and Others v. Georgia*, no. 73235/12, § 71, 12 May 2015); and a child's ill-treatment by teachers of a nursery school (see *V.K. v. Russia*, no. 68059/13, § 172, 7 March 2017).

66. The above-mentioned cases confirm that the prohibition of ill-treatment laid down in Article 3 protects every person irrespective of the fact whether such ill-treatment is administered by a public official or a private individual, provided that a given form of ill-treatment has attained the minimum level of severity required under this provision (on the latter point, see the case-law cited in paragraphs 61-62 above). The Court has recently confirmed the applicability of the threshold of severity test to ill-treatment inflicted by private individuals (see *Virgiliu Tănase*, cited above, § 121).

67. This is also borne out by the Court's approach in expulsion cases where it was accepted, owing to the absolute character of the right guaranteed, that Article 3 applied not only to the danger emanating from State authorities but also where the danger emanates from persons or groups of persons who are not public officials (non-State actors) (see *H.L.R. v. France*, 29 April 1997, §§ 39-40, *Reports* 1997-III, concerning the risk from drug traffickers; *NA. v. the United Kingdom*, no. 25904/07, § 110 and 141, 17 July 2008, concerning the risk from the Tamil Tigers; *F.H. v. Sweden*, no. 32621/06, §§ 102-103, 20 January 2009, concerning the risk from Shi'a militia groups; *R.D. v. France*, no. 34648/14, §§ 43 and 45, 16 June 2016, concerning the risk from the family; and *J.K. and Others v. Sweden* [GC], no. 59166/12, § 80 and 121, 23 August 2016, concerning the risk from al-Qaeda or other private groups).

68. The Court reiterates that Article 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. Neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of

compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice (see *Gäfgen*, cited above, § 176).

69. In this connection, the Court further notes that the United Nations Human Rights Committee, in its General Comment No. 20 of 10 March 1992 concerning prohibition of torture and cruel treatment or punishment found that it was the duty of the State party to afford everyone protection against acts prohibited by article 7 of the ICCPR, including by people acting in a private capacity (see paragraph 41 above).

(ii) with regard to Article 6 § 1

70. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV; *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007; and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017).

71. It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX).

72. In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited

above, §§ 35 and 37, and *Jalloh v. Germany* [GC], no. 54810/00, § 96, ECHR 2006-IX). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, *Khan*, cited above, §§ 35 and 37).

73. The Court, however, reiterates that particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003; *Jalloh*, cited above, §§ 99 and 104; *Göçmen v. Turkey*, no. 72000/01, §§ 73-74, 17 October 2006; *Harutyunyan v. Armenia*, no. 36549/03, § 63, ECHR 2007-III; and *Gäfgen*, cited above, § 165).

74. In its judgment in *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 264, ECHR 2012 (extracts), the Court explained the reasons for the prohibition on torture evidence in the Convention system and international law. It observed:

> "International law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence. There are powerful legal and moral reasons why it has done so.
>
> It is true, ..., that one of the reasons for the prohibition is that States must stand firm against torture by excluding the evidence it produces. Indeed, as the Court found in *Jalloh*, cited above, § 105, admitting evidence obtained by torture would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe.
>
> There are, however, further and equally compelling reasons for the exclusion of torture evidence. As Lord Bingham observed in *A and others no. 2*, § 52, torture evidence is excluded because it is "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice." The Court agrees with these reasons: it has already found that statements obtained in violation of Article 3 are intrinsically unreliable (*Söylemez v. Turkey*, no. 46661/99, § 122, 21 September 2006). Indeed, experience has all too often shown that the victim of torture will say anything – true or not – as the shortest method of freeing himself from the torment of torture.
>
> More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."

75. Thus, the Court has held in the context of cases concerning ill-treatment by public officials that the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 into evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair. This is irrespective of the probative value of

the statements and irrespective of whether their use was decisive in securing the defendant's conviction (see *Gäfgen*, cited above, § 166 and the cases referred to therein; *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, § 117, 25 June 2013; *Cēsnieks v. Latvia*, no. 9278/06, §§ 65-66, 11 February 2014; *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 254 *in fine*, 13 September 2016; and *Kormev v. Bulgaria*, no. 39014/12, § 81, 5 October 2017).

76. This also holds true for the use of real evidence obtained as a direct result of acts of torture (see *Gäfgen*, cited above, § 173); the admission of such evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is to say that it had an impact on his or her conviction or sentence (ibid., § 178).

77. These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (see *Harutyunyan*, cited above, § 64; *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 202 *in fine*, 26 July 2011; *Othman (Abu Qatada)*, cited above, §§ 263 and 265, ECHR 2012; *El Haski v. Belgium*, no. 649/08, § 87, 25 September 2012; and *Urazbayev v. Russia*, no. 13128/06, § 61, 8 October 2019).

(b) Application of the above principles to the case

78. In the present case, the applicant claimed that the criminal proceedings against him had been unfair on the grounds that the court had admitted into evidence the information extracted from K.G., a third party, that had been obtained as a result of the ill-treatment to which K.G. had been subjected by private individuals, members of a gang.

79. The Court notes that a particular set of facts in the present case is different from those in a series of cases which led it to formulate the rule that the admission of statements, obtained as a result of torture or of other ill-treatment in breach of Article 3, into evidence in criminal proceedings rendered the proceedings as a whole unfair (see paragraphs 74-75 and 77 above). A common thread of all those cases was the involvement of State agents in obtaining impugned statements from the accused or from a third party.

80. The question before the Court, which has not arisen before, is whether the above-mentioned rule may be applicable to the instant case in which information was obtained from a third party as a result of ill-treatment inflicted by private individuals, even where there was no evidence of involvement or acquiescence of State actors.

81. In considering this question, the Court would first need to determine whether the information obtained from K.G. against his will could be

regarded as having been obtained as result of ill-treatment prohibited by Article 3.

82. The Court notes that the treatment meted out to K.G. by members of A.H.'s gang and the injuries suffered by him were set out in the trial court's judgment (see paragraph 19 above). When referring to K.G.'s treatment, the domestic courts repeatedly spoke of "torture" or "assault" (see paragraphs 5, 17, 25 and 32 above).

83. While noting this position of the domestic courts, the Court does not find it necessary to determine whether the treatment to which K.G. was subjected may be qualified as torture within the meaning of Article 3.

84. In any event, the material that is available to the Court, in particular the trial court's judgment, leaves no doubt that the treatment inflicted on K.G. attained the necessary threshold of severity to fall within the scope of Article 3 of the Convention (see *Jalloh*, cited above, § 106). Accordingly, the Court finds that the information extracted from K.G. was obtained as a result of ill-treatment administered by private individuals (see paragraph 18 above) and that the State's positive obligation arising under Article 3 is applicable to this ill-treatment (see the case-law referred to in paragraphs 65-67).

85. With regard to the applicant's complaint under Article 6 § 1, the Court notes that the transcript of recorded utterances of K.G. was relied on by the prosecution in the trial of the applicant. The trial court admitted the impugned transcript in evidence and referred to it in making the factual findings and determining the applicant's guilt (see paragraphs 21 and 23 above).

86. In his appeal and cassation appeal, the applicant challenged the use in evidence of the impugned transcript of K.G.'s recorded utterances since they had been forced by torture and, as such, had no probative value (see paragraphs 27 and 34-35 above). The Cracow Court of Appeal dismissed the challenge, noting, *inter alia*, that Article 171 §§ 5 and 7 of the CCP, which prohibited the use in evidence of any statements obtained as a result of coercion, applied exclusively to the authorities conducting the proceedings and did not concern the actions of private individuals. It further noted that the impugned evidence had been obtained lawfully by the police and not for the purposes of the proceedings against the applicant.

87. However, the Court notes that the Court of Appeal did not address the applicant's argument raised in substance under Article 3 that the impugned recording had been obtained as a result of ill-treatment suffered at the hands of private individuals and the related question of the unreliability of such evidence.

88. The Court has already established that K.G.'s utterances were recorded while he was subjected to ill-treatment to which Article 3 is applicable (see paragraph 84 above). It reiterates that the use in criminal proceedings of evidence obtained as a result of a person's treatment in

breach of Article 3 – irrespective of whether that treatment is classified as torture, inhuman or degrading treatment – made the proceedings as a whole automatically unfair, in breach of Article 6. This is irrespective of the probative value of the evidence and irrespective of whether its use was decisive in securing the defendant's conviction (see *Gäfgen*, cited above, §§ 166 and 173 and the cases referred to therein; and the case-law referred in paragraphs 74-75 and 77 above).

89. The Court considers that the above-mentioned principle is equally applicable to the admission of evidence obtained from a third party as a result of ill-treatment proscribed by Article 3 when such ill-treatment was inflicted by private individuals, irrespective of the classification of that treatment.

90. In the present case, the Court of Appeal accepted the use in evidence of the information extracted from K.G. that had been obtained, as concluded above by the Court, in breach of the absolute prohibition of ill-treatment guaranteed in Article 3. By doing so, the Court of Appeal failed to take into account the implications of its decision from the point of the view of the applicant's right to a fair trial under Article 6 § 1 of the Convention. The Supreme Court dismissed the applicant's cassation appeal as manifestly ill-founded and did not provide any reasons for its decision.

91. In consequence, the Court finds that the admission of the impugned transcript into evidence in the criminal proceedings against the applicant rendered the proceedings as a whole unfair, in breach of Article 6 § 1.

92. The Court considers that the foregoing conclusion makes it unnecessary to examine the applicant's complaints relating to the failure to summon K.G. to the hearing.

93. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicant left it to the Court to decide the amount of just satisfaction to be awarded should the Court find his claim meritorious. In this connection, he submitted that his damage had been due to physical and psychological pain and suffering related to his incarceration as well as pecuniary damage. The applicant maintained that he had been involved in

the construction business in the United States and claimed that his annual damage in lost profit was at least 1,000,000 Polish zlotys (PLN). He thus claimed PLN 8,000,000 in lost profit having regard to the number of years spent in prison up to the date of his having made his claim.

96. The Government submitted that the applicant's claim of PLN 8,000,000 in respect of pecuniary damage was exorbitant and groundless. Furthermore, the Government noted that the applicant had not submitted a precise claim in respect of non-pecuniary damage. Having regard to the fact that the applicant had failed to comply with the requirements of Rule 60 §§ 1-2 of the Rules of Court, the Government invited the Court to reject the applicant's claims in whole.

97. The Court does not discern any causal link between the violation found and the pecuniary damage alleged with regard to the purported lost profit; it therefore rejects this claim. With regard to the claim in respect of non-pecuniary damage, the Court notes that the applicant did not specify the amount sought under this head. However, he explicitly requested to be awarded just satisfaction for psychological pain and suffering, the amount of which he left to the Court's discretion. In these circumstances, the Court considers it appropriate to award the applicant EUR 8,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

98. The applicant made no claim for the costs and expenses involved in the proceedings. Accordingly, there is no call to award him any sum on that account.

C. Default interest

99. 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,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, by five votes to two,
   (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 8,000 (eight thousand

euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into 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*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ksenija Turković
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges K. Wojtyczek and A. Pejchal is annexed to this judgment.

K.T.U
A.C.

JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK AND PEJCHAL

1. We respectfully disagree with our colleagues because we consider that Article 6 has not been violated in the instant case.

I. THE LEGAL FRAMEWORK

2. The Convention for the Protection of Human Rights and Fundamental Freedoms cannot be applied in a legal vacuum but has to be construed and applied in the context of other sources of law, which include, *inter alia*, relevant international treaties between the High Contracting Parties, customary international law and universally recognised general principles of law (see the sources of international law listed in Article 39, paragraph 1 (a) to (c), of the Statute of the International Court of Justice (ICJ)). The interpretation should also duly take into account – in particular – judicial decisions of international and national courts and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (see Article 39, paragraph 1 (d), of the ICJ Statute). Relevant sources may further include legally binding resolutions of international organisations as well as instruments of soft law, starting with the Universal Declaration of Human Rights, which is explicitly mentioned in the Preamble to the Convention.

We further note that the Preamble to the Convention refers to "a common understanding and observance of the Human Rights" and also to "European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law". On the one hand, legal principles common to the High Contracting Parties (*ius commune europaeum*) are an important source to be taken into account in the interpretation and application of the Convention. On the other hand, the references to the "common understanding of the Human Rights" and to the "common heritage of political traditions, ideals, freedom and the rule of law" constitute the legal basis for inferring the directive that the Convention should be interpreted in a way which protects national constitutional and – more broadly – legal identities (compare the concurring opinion of Judge Wojtyczek appended to the judgment in the case of *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020).

3. Without attempting to present all external rules that are potentially relevant for the interpretation of the Convention, we note briefly that the prohibition of torture is a rule of customary international law regarded as ius cogens (see International Court of Justice, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of

20 July 2012, § 99; International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Anto Furundzija (Trial Judgement), (IT-95-17/1-T), 10 December 1998, §§ 144 and 153-57; and Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 60, ECHR 2001 XI).

4. The prohibition of torture is also enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention against Torture"), rightly cited in the judgment among the relevant sources of law (see paragraph 42), Article 1, paragraph 1, of which defines torture as follows (emphasis added):

> "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted **by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.** It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Therefore the exclusionary rule in Article 15 of that convention applies to any statement which is established to have been made as a result of torture inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

The drafters of the Convention against Torture deliberately adopted a definition of torture that was limited to ill-treatment by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity, because such ill-treatment is fundamentally different from that inflicted by private parties without any kind of instigation or consent or acquiescence by public officials. A breach of the law is always much more serious when committed by public officials because it erodes the State and corrodes the rule of law. In our view, the prohibition of torture as a customary rule of international law does not go beyond the scope of the prohibition set forth in the Convention against Torture.

It is worth noting that the Extraordinary Chambers in the Courts of Cambodia, in an important case revealing the difficulties arising from Article 15 of the Convention against Torture, expressed the following view concerning the interpretation of this provision:

> "... it is a mechanism to prevent the use of statements made by an accused or by others under torture as evidence of the truthfulness of admissions or other matters asserted in the statement, because in such circumstances this evidence is intrinsically unreliable. The Chamber considers that information contained within a torture-tainted

> statement may be used to establish facts other than the truth of the statement, but only for the purpose of determining what action resulted based on the fact that a statement was made. The reliability of the information contained in the tainted evidence is not implicated if it its use is limited in this way." (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Decision of 5 February 2016 on Evidence Obtained Through Torture, Case 002/19-09-2007/ECCC/TC, § 75)."

5. The interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms should take into account any relevant universally recognised general principles of law. We note in this context that universal standards of criminal justice have been codified in the Rome Statute of the International Criminal Court. Article 69, paragraph 7, of this instrument is couched in the following terms:

> "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> (a) The violation casts substantial doubt on the reliability of the evidence; or
>
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

The wording of this provision does not contain an absolute rule excluding any evidence obtained by means of a violation of this Statute or internationally recognised human rights, but instead formulates rather vague guidelines ("substantial doubt on the reliability", "serious damage to the integrity") for an *a casu ad casum* appreciation, leaving very wide discretion to the International Criminal Court.

6. While discussing the normative context, as relevant for the interpretation of Article 6 of the Convention, we would like to note here two further points in connection with general principles which guide the argumentation and structure of the reasoning in the instant case.

Firstly, the Court in its case-law has constantly reaffirmed that States are free to legislate on evidence in judicial proceedings. It has expressed in particular the following views in this respect: "While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law" (see Schenk v. Switzerland, 12 July 1988, § 46, Series A no. 140; see also Heglas v. the Czech Republic, no. 5935/02, § 84-85, 1 March 2007, and Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports of Judgments and Decisions 1998-IV); and "[i]t is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not" (see Khan v. the United Kingdom, no. 35394/97, § 34, ECHR 2000-V).

Under this logic, the power of the States to legislate freely in matters of evidence is the rule and any restrictions inferred from the Convention are an exception. It is the exception which requires justification, not the opposite.

Secondly, the modern criminal trial in continental Europe is based upon the principle of free assessment of evidence. This principle was seen as a major step in the development of the rule of law and human rights protection in criminal procedure (on this development see for instance W. Frisch, "Beweiswürdigung und richterliche Überzeugung", Zeitschrift für Internationale Strafrechtsdogmatik, vol. 11 (2016), No.10, pp. 708-14; compare also P.J.A. Ritter von Feurerbach, Betrachtugen über das Geschwornen-Gericht, Landshut 1813, pp. 132-35). Free assessment of evidence is the rule and any exception to this requires a particularly strong justification. Free assessment of evidence is closely connected with the principle of free admission of evidence. In principle, all available evidence has to be accepted and then freely assessed unless there are particularly strong reasons to exclude certain types of evidence. Facultas probationum non est angustanda. Unjustified exclusion of available evidence, while protecting one party, may entail unfairness of the trial for other parties and especially the alleged victims.

We would like to add that legal rules regulating the assessment of evidence reflect distrust in the courts. The principles of free admission and free assessment of evidence presuppose minimum trust in the integrity of the judges. They could be established only with the growing confidence of the public in the judicial system (see W. Frisch, op. cit., p. 709).

It is important to note that the principles of free admission and free assessment of evidence are applicable in the proceedings before the European Court of Human Rights (see for instance: Ireland v. the United Kingdom, 18 January 1978, § 210, Series A no. 25; Janowiec and Others v. Russia [GC], nos. 55508/07 and 29520/09, § 208, ECHR 2013; Merabishvili v. Georgia [GC], no. 72508/13, § 315, 28 November 2017; and S.F. and Others v. Bulgaria, no. 8138/16, § 72, 7 December 2017). We are aware, nonetheless, that the two principles are not universally accepted and are called into question in certain regions of the world (see, for instance, the Inter-American Commission on Human Rights, Report on the Situation of Human Rights in the Republic of Nicaragua, 1981, Chapter IV, § 14). In our view, however, the criticism of these principles is not sufficiently supported by empirical evidence gathered by the sociology of law.

For the two reasons explained above, the burden of argumentation shifts onto those who try to justify a legal rule excluding certain types of evidence.

7. We further agree with the following view quoted in paragraph 74 of the judgment (taken from *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 264, ECHR 2012, extracts):

> "More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."

Indeed, State organs while detecting, prosecuting and punishing crimes should strictly observe the law and, especially, respect human rights. In particular, the quest for the truth in criminal matters can never justify ill-treatment of any person, let alone torture.

II. THE CIRCUMSTANCES OF THE CASE

8. We agree with the finding that K.G. was subjected by private parties to ill-treatment contrary to Article 3 of the Convention (see paragraph 85). We note in this context that the present case illustrates not only the barbarity of the organised criminal groups but also their mode of operation. Threats of ill-treatment and actual ill-treatment are used not only as a tool against non-members but are also an essential instrument of power within the group, ensuring strict obedience to the bosses. Within such groups, the division between victims and perpetrators blurs rapidly as most of the members sooner or later become victims of ill-treatment inflicted by other members.

The majority rightly point to the obligation to protect individuals against ill-treatment enshrined in Article 3 of the Convention (see paragraph 63). Under both Article 2 and Article 3, the High Contracting Parties have an obligation to protect effectively the life and physical integrity of persons in relations between private parties. We would like to add that the only method of protecting persons involved in organised crime against ill-treatment by other fellow members of the same criminal group consists in effective measures aimed at the full dismantlement of such groups through detection, prosecution and punishment of crimes, in strict observance of the rule of law.

9. We note that in the instant case, K.G., a member of an organised criminal group was subjected to ill-treatment by private persons belonging to the same organised criminal group whose boss wanted to extort certain information from him. The scene of the ill-treatment was taped. There is no evidence suggesting that public bodies instigated or consented or acquiesced to ill-treatment. There is no evidence suggesting that the extraction of information through ill-treatment was carried out with the direct or indirect

intent of using the recording in any proceedings before public bodies. The tape was seized by the domestic authorities in conformity with domestic law. The prosecuting authorities obtained by legal methods a certain item of evidence and the domestic courts could not ignore it under the domestic law. The domestic courts admitted the tape in evidence and analysed the events which were recorded. They carefully distinguished the utterances of K.G. from any witness statements. Therefore the evidence thus admitted does not consist in witness statements obtained by ill-treatment but is a tape which documents a situation in which K.G., while being ill-treated, passed certain information to other members of the gang concerning the criminal activities he had carried out together with the applicant. The events recorded on the tape really did happen and did not involve State agents. The extremely brutal settling of scores within the criminal group is part of the relevant factual circumstances of the criminal case and it would be difficult not to take it into consideration (compare the decision of the Extraordinary Chambers in the Courts of Cambodia, cited above, §§ 80-87).

We further underline that the admission of the tape in question in evidence cannot be equated with acquiescence within the meaning of Article 1 § 1 of the Convention against Torture. Even assuming hypothetically that acquiescence to torture could be expressed ex post facto, no reasonable person could perceive either this admission in evidence or other State organs' acts as an indication that the perpetrators of the ill-treatment of K.G. might expect to be treated more clemently, let alone that the authorities would refrain from prosecuting them. Moreover, there are no reasons to consider – generally speaking – that the respondent State, despite having reasonable grounds to believe that acts of torture are carried out by private persons, fails to prevent, investigate, prosecute and punish such acts of ill-treatment and therefore gives a general acquiescence to it (on this general question see M. Nowak, M. Birk, G. Monina (eds), United Nations Convention against Torture and Its Optional Protocol: A Commentary, 2nd edn., Oxford University Press, Oxford, 2019, p. 62).

10. In the instant case, the tape in question was not decisive for the conviction. It only corroborated the information stemming from other evidential sources. The domestic courts took into account its specific nature and assessed its evidential value. Had it been excluded, there are strong reasons to consider that the outcome of the criminal proceedings against the applicant would nevertheless have been the same.

III. WHETHER EXCLUSIONARY RULES SHOULD BE EXTENDED TO EVIDENCE OBTAINED FROM A THIRD PARTY AS A RESULT OF ILL-TREATMENT BY PRIVATE INDIVIDUALS

11. In paragraph 90 the majority state the following:

> "The Court considers that the above-mentioned principle is equally applicable to the admission of evidence obtained from a third party as a result of ill-treatment proscribed by Article 3 when such ill-treatment was inflicted by private individuals, irrespective of the classification of that treatment."

The majority's main argument relies therefore on analogy. They consider that for purposes of establishing exclusionary rules, ill-treatment by a private party is similar to ill-treatment by a State agent.

Analogy is an argument that is particularly difficult to handle in judicial discourse. The argument based on analogy requires one, in particular, to show convincingly that a certain situation under consideration and not belonging to the scope of application of a legal rule or principle is similar to situations belonging to the scope of application of the legal rule or principle in question. It is not sufficient to say that a certain legal principle is equally applicable to certain situations, it is essential to explain why a certain legal principle is equally applicable to certain situations (on argument based on analogy see for instance: J.H. Farrar, A.M. Dugdale, Introduction to Legal Method, Sweet and Maxwell, London 1990, pp. 87-88; B. Brożek, "Analogical Arguments" in G. Bongiovanni et al. (eds), Handbook of Legal Reasoning and Argumentation, Springer Nature 2018). A failure to explain the similarity undermines completely the reasoning per analogiam. This flaw becomes even more problematic when analogy is relied upon to extend exceptions to a rule, because in principle exceptiones non sunt extendendae.

12. The exclusionary rule which disqualifies evidence obtained through ill-treatment by public bodies is based on two major arguments both closely linked to the dangers of abuse of public power by State organs. We would like to underline in this context that private parties do not have the capacity to abuse public power and breaches of law committed by them do not have the same corrosive force for the rule of law.

The first argument may be summarised as follows: torture evidence is excluded to protect the integrity of the trial. State bodies by way of ill-treatment may easily force confessions or other desired statements and thus manipulate the criminal procedure by fabricating false or inaccurate evidence. Any criminal trial in which such evidence is used obviously becomes unfair. The procedural unfairness stems from this possibility of manipulating the procedure by introducing to it false or inaccurate evidence.

In the case of evidence which was created without any form of participation of public bodies, the risk that such bodies will manipulate the procedure does not exist. Accepting such evidence, which pre-exists any action of State agents in connection with the criminal case under consideration, neither gives any unfair advantage nor causes any unfair disadvantage to any party.

The second argument may be stated briefly as follows: torture evidence is excluded to protect the rule of law itself. If evidence obtained by ill-treatment had to be accepted there may be a strong temptation for the law-enforcement agencies to ill-treat someone in order to influence the trial and secure conviction. The possible use of evidence at the trial stage is an incitement to ill-treatment. The law-enforcement officer may have the feeling that the ill-treatment has been rewarded by a conviction. The exclusionary rule eliminates this risk by discouraging ill-treatment (compare Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, § 12). There is a clear causal link between the exclusionary rule and the behaviour of the law-enforcement agents. The exclusionary rule is an important guarantee that law-enforcement agencies will obey the law. The extension of the exclusionary rule to evidence created with the use of ill-treatment by private persons does not reinforce the protection against ill-treatment. Its impact on potential perpetrators is null. The acceptance of evidence like that in question in the instant case does not encourage torture by private parties. It certainly does not substitute force for the rule of law.

In our view, the two arguments which justify the rule which disqualifies evidence obtained through ill-treatment by public bodies do not apply to evidence obtained through ill-treatment by private parties. The exclusionary rule stated and relied on by the majority would require justification relying on different arguments.

A third argument usually invoked to justify an exclusionary rule which disqualifies evidence obtained through ill-treatment by public bodies is linked with the right of the accused to remain silent and not incriminate himself (see for instance Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, paragraph 41). Accordingly, the admission in evidence of self-incriminating statements obtained by ill-treatment of the accused violates these rights.

We note in this context that the tape created during the ill-treatment of K.G. was used in the trial of another person, namely the applicant. Had it

been the trial of K.G., then the whole issue would look different and reasons to exclude the utterances in question would prevail. In any event, protection against self-incrimination does not justify per se a general exclusionary rule disqualifying evidence obtained through ill-treatment of one person, if this evidence is to be used in proceedings against another person.

To sum up this part of the opinion: we note that the majority extended the scope of exceptions to the principles of free admission and free assessment of evidence while failing to provide any arguments to explain the similarity between ill-treatment by private parties and ill-treatment by State agents. We have just explained above why we consider that the two situations are fundamentally different. We do not exclude that there might have been arguments to support the assertion that the similarities are stronger than the fundamental differences we identify. Yet, the majority simply decided not to engage in this debate. The result is a reasoning based upon abusive reference to analogy.

13. In paragraph 90, quoted partly above, the majority have established a new general legal rule which they apply to the present case. This rule may be restated in the following way: the use in criminal proceedings of evidence obtained as a result of a person's treatment in breach of Article 3 – irrespective of whether that treatment is classified as torture, inhuman or degrading treatment – inflicted by private individuals makes the proceedings as a whole automatically unfair, in breach of Article 6.

As argued above, this general exclusionary rule does not reinforce the protection against ill-treatment and may not only entail the unfairness of the criminal proceedings but may also result in substantively unjust judgments. In our view, imposing such a general exclusionary rule upon the criminal justice systems of the High Contracting Parties is not justified under the Convention and the issue of admissibility of the type of evidence under consideration requires rather an a casu ad casum approach (compare the decision of 5 February 2016, Extraordinary Chambers in the Courts of Cambodia, § 88).

Interestingly, the new general rule restated above is expressed in the part of the reasoning entitled (b) "Application of the above principles to the case" (a heading suggesting that this part of the reasoning explains the subsumption and formulates the conclusion of the legal syllogism) and not in the part of the reasoning entitled "(a) General principles" (which states the major premise of the legal syllogism). General principles have a much stronger value than considerations concerning a specific case. It is not clear why the majority did not wish to state the new rule among other general principles and thus confer to it unequivocal prominence but decided instead

to downgrade the rule under consideration to the "application part" as if they were somewhat hesitant as to its validity and legitimacy.

14. In the instant case, the evidence created through ill-treatment was used in criminal proceedings to the disadvantage of the accused. The transcripts of the recording, although not transmitted to the Court, were referred to in the proceedings before this Court, which took this element into consideration in order to establish that K.G. had been subjected to ill-treatment contrary to Article 3 of the Convention (see paragraphs 83 and 84 with references to the domestic courts' judgments which have been summarised in paragraphs 17, 19, 25 and 32).

There may be cases in which such evidence could be relevant to help the defence of an accused in criminal trials before domestic courts. What should be done if the evidence to be excluded is decisive – not for establishing the very fact of ill-treatment but for undermining the prosecution case by enabling the defence to establish certain other relevant factual elements (compare the decision of Extraordinary Chambers in the Courts of Cambodia, cited above)?

15. With the development of technology, there is a growing tendency in criminal proceedings to attempt to introduce evidence created by private parties. We agree with the view expressed by some scholars and legal practitioners that courts should display the utmost diligence when considering any evidence created by private parties, including evidence put forward by the alleged victims. In such situations, there may also be a temptation to manipulate the course of the proceedings. Any private taping of utterances, even those apparently free from coercion, requires utmost caution from the courts which should consider, inter alia, whether such evidence was created for the purpose of bringing it before the courts. We reiterate here that the evidence in question in the instant case was not created with the aim of using it in any proceedings before public bodies.

IV. CONCLUSION

16. In our view, as stated above, there are no sufficient grounds to impose under the Convention a general exclusionary rule applying to all evidence obtained though ill-treatment by private persons. The admission of evidence in question in the instant case did not render the criminal proceedings against the applicant unfair when seen as a whole. The judicial decisions taken by the domestic court remain within the boundaries of public power as defined by the Convention provisions.

The rule of law begins with reliance upon the strength of legal argument and with the quality of judicial reasoning. The European Court of Human Rights, as the highest judicial body in Europe, bears a special responsibility for promoting the highest standards in this domain.

The instant judgment decides an important legal question. A question of this nature would deserve full legal reasoning carefully weighing all pros and cons. We regret that the majority decided to evade the most fundamental issues and limited the core of the reasoning to a bare statement of analogy. The reasoning therefore substitutes judicial fiat for the rule of law. Instead of a landmark judgment we end up with a mere illustration of how difficult it is to use, and how easy it is to misuse, analogy in judicial discourse.