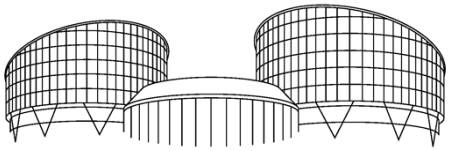

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

]

FIFTH SECTION

CASE OF ZIRNĪTE v. LATVIA

(Application no. 69019/11)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Examination of witnesses • Appellate court's refusal to call witness requested by defence and reversal of first-instance acquittal • Defence failure to use procedural opportunities and sufficiently substantiate need for repeated examination of witness • Reasons given by appeal court when refusing to summons witness sufficient in the circumstances • Witness testimony not decisive for conviction • Reversal of acquittal not based on a reassessment of the credibility of this witness testimony or a new interpretation of her evidence • Dismissal of request to summon witness not undermining overall fairness of proceedings

STRASBOURG

11 June 2020

FINAL

11/09/2020

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

In the case of Zirnīte v. Latvia,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
André Potocki,
Mārtiņš Mits,
Lado Chanturia,
Anja Seibert-Fohr, *judges,*
and Victor Soloveytchik, *Deputy Section Registrar,*

Having deliberated in private on 24 March 2020,

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

PROCEDURE

1. The case originated in an application (no. 69019/11) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Ilona Zirnīte ("the applicant"), on 7 November 2011.

2. The applicant was represented by Mr S. Vārpiņš, a lawyer practising in Riga. The Latvian Government ("the Government") were represented by their Agent, Ms K. Līce.

3. The applicant alleged, in particular, that the appellate court's refusal to examine the witness who the applicant claimed was the principal witness in the case and the resulting prohibition to rely on that witness' pre-trial testimony had violated her right to a fair trial, guaranteed under Article 6 of the Convention. She further submitted that the criminal penalty of confiscation of her legally acquired property had disproportionately infringed her right of property, in breach of Article 1 of Protocol No. 1.

4. On 13 February 2013 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1977 and lives in Riga.

A. The background

6. The applicant was the sole owner of a limited-liability company, SIA Raiņa bulvāra nams, whose only asset was an apartment building located in

the centre of Riga. In 2005 the applicant and M.R. were negotiating a sale of that apartment building, to be effected via the sale of the company.

7. In September 2005 the applicant sought a short-term loan of 210,000 euros (EUR) from a bank in order to purchase a property in France. The bank agreed to lend the money to SIA Raiņa bulvāra nams instead. The loan agreement between the bank and SIA Raiņa bulvāra nams was concluded on 28 September 2005 and was conditional on the conclusion of an escrow agreement concerning the sale of the company.

8. On 3 October 2005 an additional audit of SIA Raiņa bulvāra nams was carried out on M.R.'s request in the light of the loan. According to the Government and the position M.R. maintained before the domestic courts, in view of the loan the purchase price was increased from EUR 5,200,000 to EUR 5,400,000. The applicant maintained that the purchase price had always been set at EUR 5,400,000.

9. In the evening of 3 October 2005 the applicant, acting as the representative of SIA Raiņa bulvāra nams, requested the bank to transfer EUR 208,000 from the account of SIA Raiņa bulvāra nams to her private bank account. At that time the company's account contained no funds. The applicant did not inform the auditors or M.R. of the request for the bank transfer.

10. On 4 October 2005 the escrow agreement was concluded. Immediately afterwards SIA Raiņa bulvāra nams was sold to M.R. and the purchase price of EUR 5,400,000 was transferred to the escrow account. Thereupon, on the basis of the loan agreement of 28 September 2005, the bank transferred EUR 210,000 to SIA Raiņa bulvāra nams. As soon as the money reached the company's account, the bank, on the basis of the applicant's request of 3 October 2005, transferred EUR 208,000 to her private account. The applicant used that money to purchase a Deutsche Bank banker's cheque, which she later used to purchase a property in France.

11. On 17 October 2005 the formalities relating to the sale of the company were completed and the purchase price – minus the money the company owed to the bank – was transferred to the applicant's private bank account.

B. Civil proceedings

12. On 22 February 2006 SIA Raiņa bulvāra nams brought civil proceedings against the applicant, seeking that she repay the company the sum of EUR 208,000, that is the money that had been transferred to the applicant's private account on 4 October 2005. The applicant submitted a counterclaim for EUR 210,000 asserting that on 17 October 2005 SIA Raiņa bulvāra nams' loan to the bank had been repaid from her funds. The case was examined before three levels of jurisdiction, and by a final decision of 11 June 2008 the claim against the applicant was upheld and her

counterclaim was dismissed. The applicant was ordered to repay the company the equivalent of EUR 208,000 in Latvian lati (LVL) and to compensate the company for its costs and expenses. The applicant has complied with this ruling.

C. Criminal proceedings

1. Pre-trial and first-instance proceedings

13. On 1 March 2006 criminal proceedings were instituted concerning the above-mentioned chain of transactions. The applicant, M.R. and other witnesses gave statements on numerous occasions. On 7 July 2006 the police organised a pre-trial confrontation between the applicant and M.R.

14. On 16 April 2007 the applicant was charged with large-scale misappropriation of funds and on 29 October 2007 also with large-scale money laundering.

15. On 5 November 2007 the investigator imposed a restriction against the title to two immovable properties belonging to the applicant, effectively seizing them (*uzlika arestu*). One of those properties was a manor called Bramberģes pils.

16. The Riga Regional Court, examining the case as a first-instance court, heard evidence from the applicant and eleven witnesses, including M.R., who was cross-examined by the applicant's lawyer. It also heard evidence from V.R. – M.R's husband – who had participated in all the negotiations concerning the purchase of SIA Raiņa bulvāra nams. Both V.R. and M.R. acted as the representatives of SIA Raiņa bulvāra nams which had the status of a victim in the proceedings (hereafter "the victim company"). The Riga Regional Court observed that M.R.'s and V.R.'s testimony was identical. In particular, they had both testified that the purchase price of the victim company had been raised from EUR 5.2 million to EUR 5.4 million to take into account the loan the victim company was taking from the bank. M.R. had not been happy about the fact that the loan was being taken but could not have prevented it as at that time the applicant had still been the sole owner of the victim company. The loaned money would have remained part of the victim company's assets and could have been used for renovations. In view of the loan, they had carried out an additional audit of the victim company but neither they, nor the auditors, had been informed of the 3 October 2005 request to transfer the loaned money to the applicant.

17. Both the applicant and the Government asserted that the Riga Regional Court also read out M.R.'s pre-trial statements. This fact is not reflected in the minutes of the hearing or confirmed by any other material in the case. The applicant maintained that this omission was due to a clerical error. As to the cross-examination, while the applicant's lawyer did put questions to M.R., minutes of the hearing do not suggest that he confronted her about the statements made during the pre-trial proceedings.

18. On 19 August 2009 the Riga Regional Court acquitted the applicant of both charges. While it considered that the factual basis of the charges had been established, it was unable to make a finding on the *mens rea* required for the conviction. In particular, the applicant had acted on the advice of a bank employee and it could not be established beyond reasonable doubt that she had intended to misappropriate the funds.

19. The prosecutor and the victim company lodged an appeal.

2. Appeal proceedings

20. The Criminal Chamber of the Supreme Court, acting as an appellate court, examined the case in an oral hearing. The applicant, her lawyer, and two representatives of the victim company (V.R. and a lawyer) were present throughout the proceedings. V.R. was examined by the appellate court and was also cross-examined by the applicant's representative. The applicant did not make use of her right to give a further statement but she did respond to the court's questions. According to the minutes of the hearing, the appellate court then proceeded to review the relevant case material, including the testimony given by M.R. and other witnesses before the first-instance courts; M.R.'s request to the police and its addenda; and the minutes of the pre-trial confrontation between M.R. and the applicant. The Government maintained that the appellate court also reviewed M.R.'s pre-trial statements; however, this assertion finds no support in the case-file.

21. According to the applicant's submissions, which are contested by the Government, during his closing arguments the applicant's lawyer had been prevented from relying on M.R.'s pre-trial statements, as they had not been reviewed by the court. The minutes of the hearing show that following a question by the court the applicant's lawyer requested the court to reopen the court investigation stage of the hearing on the grounds that he had referred to evidence that had not been reviewed. He also requested a recess to prepare his request in writing. Following the recess he submitted a written request to call three witnesses, including M.R. He indicated that he had referred to M.R.'s pre-trial statements, which had not been reviewed by the court but were part of the criminal case file. It was necessary to refer to those statements as the victim company had relied on them in its appeal. In response, the victim company's lawyer withdrew the relevant part of its appeal. Responding to the appellate court's question, the applicant's lawyer stated that he had cross-examined those witnesses before the first-instance court. As to the necessity of a repeated examination, he submitted that during the pre-trial investigation M.R. had testified that she had not needed the loan of EUR 200,000.

22. After having deliberated in chambers, the appellate court dismissed the request to reopen the court investigation stage. It noted that it had no doubts about the completeness of the examination of those witnesses before the first-instance court with respect to the circumstances that were relevant

to the case. This was shown by, *inter alia*, the failure of the parties to the proceedings to request the examination of the pre-trial statements of those witnesses – a step they had had the right to take after having received the victim company's appeal. Furthermore, the victim company's lawyer had withdrawn its appeal in so far as it referred to testimony that had not been reviewed by the first-instance court, and the appellate court had no grounds to extend the scope of the appeal.

23. On 26 November 2010 the Criminal Chamber of the Supreme Court delivered a judgment whereby it quashed the judgment of the first-instance court and found the applicant guilty on both charges. The Criminal Chamber of the Supreme Court took into account, in particular, that M.R., V.R., the victim's lawyer and two bank employees had consistently testified that the purchase price of the company had been raised from EUR 5.2 million to EUR 5.4 million on the understanding that after the completion of the sale there would be EUR 210,000 in the company's bank account. That had been confirmed by several documents in the case file. Thus, the appellate court dismissed the applicant's assertions that the price had always been set at EUR 5.4 million and that it had been she who had covered the company's loan to the bank. The appellate court also noted that both during the confrontation in the pre-trial proceedings and during the appeal hearing the applicant had acknowledged that she had failed to inform M.R. of the money transfer from the victim company's account to her private account. With respect to *mens rea*, the appellate court inferred an intent on the part of the applicant to misappropriate the funds from certain aspects of her conduct (such as filing the request to transfer the money from the victim company's account to her private account at such a moment that ensured it would be effected when she no longer represented the company; requesting the transfer in contravention of the conditions of the loan agreement between the bank and the victim company; and failing to inform either M.R. or the auditor of the request). Finally, the applicant was found guilty of money laundering on the basis of the fact that she had used the misappropriated funds to purchase the Deutsche Bank cheque, which she later used to purchase a property in France.

24. After finding that there were no mitigating or extenuating circumstances, the Supreme Court decided to impose a suspended prison term of six years. The Supreme Court also ordered the confiscation of the applicant's property, providing the following reasoning:

> "Taking into consideration that reparation has been made for the damage [and] that two minor children are under I. Zirnīte's care, the Criminal Chamber of the Supreme Court finds that a partial confiscation of property should be applied to I. Zirnīte, by confiscating the property over which a restriction was registered [*uzlikts arests*] in the course of the criminal proceedings".

25. The operative part of the judgment specified that the property to be confiscated was the manor Bramberģes pils.

26. On 10 May 2011 the Senate of the Supreme Court adopted the final decision, dismissing an appeal on points of law by the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General provisions

27. The relevant provisions of the Constitution, the General Part of the Criminal Law and the Criminal Procedure Law have been summarised in *Markus v. Latvia* (no. 17483/10, §§ 31-36 and §§ 39-40, 11 June 2020).

B. Specific Part of the Criminal Law

28. Section 179 of the Criminal Law provides for criminal liability for misappropriation of funds. At the time when it was applied to the applicant it was worded as follows:

> "(1) For unlawfully acquiring or squandering property, if committed by a person to whom such property has been entrusted or in whose charge it has been placed (misappropriation), –
>
> the punishment shall be deprivation of liberty for up to five years, detention, confiscation of property, community service, or a fine of up to fifty times the minimum wage.
>
> ...
>
> (3) For misappropriation, if committed on a large scale ..., –
>
> the punishment shall be deprivation of liberty for six to fifteen years, with confiscation of property."

29. Section 195 of the Criminal Law provides for criminal liability for money laundering. At the time when it was applied to the applicant it was worded as follows:

> "(1) For legalising criminally acquired financial resources or other property, –
>
> the punishment shall be deprivation of liberty for up to three years or a fine of up to a hundred times the minimum wage, with or without confiscation of property.
>
> ...
>
> (3) For actions referred to in subsections 1 or 2 of this section, if they have been committed on a large scale ..., –
>
> the punishment shall be deprivation of liberty for five to twelve years, with confiscation of property, and with or without police supervision for a period of up to three years."

C. Criminal Procedure Law

30. Section 549 of the Criminal Procedure Law provides that an appeal against a judgment of the first-instance court may be lodged both on factual and on legal grounds. Section 562(1) limits the appellate court's review to

the scope of the appeal, except in situations when the appellate court calls into question the first-instance court's findings on guilt or aggravating circumstances. Sections 562(4) and 565(3)(2) of the Criminal Procedure Law give the appellate court the competence to convict a person who has been acquitted by the first-instance court if the acquittal has been appealed by the prosecutor or, in certain cases, by the victim.

31. Sections 560(1) and 560(2) of the Criminal Procedure Law provide that persons who are neither parties to the proceedings nor their representatives may be summoned to an appeal hearing if such a request has been made in the appeal and the persons concerned have not been examined before the first-instance court. The appellate court may, on its own initiative, summon persons who have been examined by the first-instance court if it has reasonable doubts about the completeness of their evidence given before the first-instance court or about the potential guilt of the accused.

D. Practice of the Constitutional Court

32. On 21 April 2010 on the basis of a constitutional complaint lodged by Mr D. Markus, the Constitutional Court instituted proceedings concerning the compatibility of the ancillary punishment of property confiscation with the right of property (case no. 2010-31-01). Mr Markus challenged the Criminal Law provision that imposed that punishment for the crime of bribery. While the Constitutional Court found that there were "serious deficiencies" in the legal regulation for imposing and enforcing the punishment, as well as divergences in its application, it considered that those issues could not be resolved by reviewing the specific provision of the Specific Part of the Criminal Law in isolation. Instead, the confiscation punishment had to be assessed by analysing the provisions of the General Part of the Criminal Law. Since the applicant had not challenged the pertinent legal provisions, the Constitutional Court by its decision of 6 January 2011 discontinued the proceedings (for more details on the Constitutional Court's reasoning see *Markus v. Latvia*, cited above, §§ 15-23). Following this judgment the relevant legislation was notably altered, particularly by the 13 December 2012 amendments to the Criminal Law that took effect on 1 April 2013.

33. On 8 April 2015 the Constitutional Court delivered a judgment on the amended regulation of the ancillary punishment of property confiscation in a case that had been instituted on the basis of a constitutional complaint lodged by R.K. (case no. 2014-34-01). R.K. had challenged the constitutionality of section 36(2)(1) and section 42 of the Criminal Law, as well as the section of the Specific Part of the Criminal Law that imposed the confiscation punishment for the crime of fraud. The Constitutional Court examined the merits of the complaint and found that the challenged legal provisions, as formulated following the amendments, were compatible with

the right of property (for a summary of the Constitutional Court's reasoning see *Markus v. Latvia*, cited above, §§ 41-42).

34. The applicant submitted two decisions of the Constitutional Court, which, according to her, showed that the Constitutional Court did not examine complaints about the severity of a criminal punishment. By its decision of 12 December 2008 the Constitutional Court had refused to institute proceedings on the basis of an application by H.I. whereby he had challenged solely the provision of the Specific Part of the Criminal Law that provided for criminal liability for conducting illegal activities with financial instruments. On 7 January 2009 the Constitutional Court had refused to institute proceedings on the basis of a repeated application by H.I. concerning the same legal provision. In his applications H.I. had complained of the weight of the sanction for the particular crime prosecuted, as well as of the fact that the sanction for conducting illegal activities with financial instruments was heavier than for other criminal offences.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

35. Relying on Article 6 §§ 1 and 3 (d) the applicant complained that the appellate court, which had convicted her following an acquittal by the first-instance court, had not examined M.R. – who the applicant claimed was the principal witness in the case – and had thereby prevented her lawyer from relying on M.R.'s pre-trial statements. Article 6 of the Convention, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

36. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

38. The applicant argued that her rights had been violated by the dismissal of the request to summon M.R. before the appellate court, which had prevented her lawyer from referring to M.R.'s pre-trial statements. According to the applicant, M.R. had been the principal witness and the applicant's conviction had depended on her testimony. In particular, the purchase agreement had been concluded with M.R. and it had been M.R. who had lodged a complaint with the police.

39. The applicant submitted that her defence strategy before the appellate court had been based on the discrepancies between M.R.'s pre-trial statements and those given before the court of first instance. Nonetheless, the appellate court had prohibited her lawyer from referring to M.R.'s pre-trial statements on the grounds that they had not been reviewed. The applicant contended that the prohibition was based on an alleged failure to review this evidence before the first-instance court; however, in reality the first-instance court had examined the pre-trial statements but this fact had not been reflected in the procedural record due to a clerical error. Having realised this omission, her lawyer had requested that M.R. be summoned for a repeated examination but that request had been dismissed. According to the applicant, it would have been acceptable not to re-examine M.R. before the appellate court if her pre-trial and first-instance court statements had been fully reflected in the case material. As the appellate court had prevented her lawyer from relying on M.R.'s pre-trial statements, owing to an error made by the first-instance court, it should have allowed the request to summon the witness.

40. With respect to the alleged discrepancies in M.R.'s testimony, the applicant noted that at the pre-trial stage of the proceedings M.R. had stated that she had not needed the loan of EUR 200,000. According to the applicant, M.R.'s pre-trial statements confirmed that the applicant had informed M.R. of the fact that the loan was being taken on behalf of the victim company and that M.R. had not objected to it.

(b) The Government

41. The Government disagreed that M.R. had been the main witness or that her testimony had been decisive for the applicant's conviction. Instead, they contended that the applicant had been convicted on the basis of convincing, coherent and mutually concordant evidence given by several persons and contained in corresponding documents.

42. The Government also considered that the applicant had been given sufficient opportunity to get acquainted with and challenge the statements of M.R. Firstly, during the pre-trial proceedings she had taken part in a

face-to-face confrontation with M.R. Secondly, M.R. had been examined by the first-instance court and cross-examined by the applicant's lawyer, and, according to the Government, her pre-trial statements had been reviewed by the first-instance court. Thirdly, the Government contended that also the appellate court had examined all the statements given during the pre-trial and first-instance proceedings. The applicant's lawyer had requested the recall of M.R. and two other witnesses only during his closing arguments, that is, after the parties had already agreed that the court investigation stage could be completed. The lawyer had admitted his own omission in that regard and, additionally, had failed to specify why M.R. and the other two witnesses should be examined anew.

43. The Government disagreed with the applicant's assertion that the appellate court had concluded that M.R.'s statements had not been examined before the first-instance court. They further submitted that also the appellate court itself had examined M.R.'s pre-trial statements. Additionally, the Government maintained that the minutes of the appellate court hearing contained no indication that the applicant's lawyer would have been prevented from referring to M.R.'s statements, as they had been transcribed during the first-instance court proceedings. The lawyer had also not raised an allegation of such a prohibition in the appeal on points of law.

44. Overall, considering the procedural stage at which the request to summon M.R. had been made and the fact that the defence lawyer had failed to observe the rules governing the admission of evidence, and had also failed to adequately substantiate how summoning the witness could have assisted the defence strategy, the appellate court's refusal to summon M.R. had not been arbitrary.

2. The Court's assessment

(a) General principles

45. The Court notes that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 100-101, ECHR 2015). Furthermore, the admissibility of evidence is primarily a matter for regulation by national law and the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 139, 18 December 2018).

46. The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic

legal order and of the role of the appellate court therein (see *Botten v. Norway*, 19 February 1996, § 39, *Reports of Judgments and Decisions* 1996-I). Where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person either by the accused who claims that he has not committed the act alleged to constitute a criminal offence, or by the witness who testified during the proceedings and to whose statements it wishes to give a new interpretation (see *Kashlev v. Estonia*, no. 22574/08, § 38, 26 April 2016, and *Ovidiu Cristian Stoica v. Romania*, no. 55116/12, § 41, 24 April 2018).

47. The Court's case-law draws a distinction between situations in which an appeal court which reversed an acquittal without itself hearing the oral evidence on which the acquittal was based actually proceeded to a fresh evaluation of the facts, and situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/or its application to the established facts, even if it also had jurisdiction in respect of the facts. If the direct assessment of the evidence is deemed necessary, the appeal court is under the duty to take positive measures to this effect (see *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, §§ 36-68, 16 July 2019).

48. With respect to the defendants' rights to call witnesses, the Court has held that, as a general rule, it is for the domestic courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce and whether it is appropriate to call a particular witness. Furthermore, it is not sufficient for defendants to complain that they have not been allowed to question certain witnesses; they must, in addition, support the request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see *Murtazaliyeva*, cited above, § 140). It has to be shown that the testimony can reasonably be expected to strengthen the position of the defence. The stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts if they refuse the defence's request to examine a witness (ibid., §§ 144 and 166). Finally, the Court has to determine whether the domestic court's decision not to examine a witness undermined the overall fairness of the proceedings (ibid., §§ 141 and 158).

(b) Application of the principles to the present case

49. The Court observes that the applicant's complaint concerns the appellate court's refusal to call one particular witness after her lawyer had been prevented from referring to the pre-trial testimony of that witness. According to the applicant, this had resulted in her lawyer's inability to expose the contradictions within that witness' pre-trial and trial statements.

The applicant maintained that her defence position before the appellate court had been based on these alleged contradictions.

50. Despite the Government's allegation to the contrary, the Court considers that the documents before it support the applicant's assertion that the appellate court had prevented her lawyer from referring to M.R.'s pre-trial statements on the grounds that this evidence had not been reviewed (see paragraph 21 above). At the same time, the Court finds that in spite of the purported importance of those contradictions the defence did not use all available procedural opportunities for drawing the domestic court's attention to the alleged discrepancies in M.R.'s statements. In particular, there is no indication that the defence requested M.R. to be summoned to the appeal hearing prior to its closing arguments or that at any stage of the proceedings they requested the allegedly contradictory pre-trial statements to be read out. No such request was made even after referencing this evidence was prevented by the court (compare *Vilches Coronado and Others v. Spain*, no. 55517/14, §§ 38-42, 13 March 2018, and *Kashlev*, cited above, §§ 46-47, where also several procedural opportunities were not availed of).

51. Furthermore, the documents submitted before the Court do not demonstrate that the applicant's lawyer explained to the appellate court with sufficient clarity why the repeated examination of M.R. was necessary and how it could strengthen the position of the defence. In particular, the pre-trial statement the applicant's lawyer referred to in his request was not at odds with the testimony that M.R. had given before the first-instance court (compare paragraphs 16 and 21 above). The fact that the applicant had informed M.R. that she was taking the loan out on behalf of the victim company was not contested in the criminal proceedings. Instead, it was her failure, *inter alia*, to inform M.R. of the subsequent transfer of that money to her private account that led to her conviction (see paragraph 23 above). Accordingly, in view of the limited arguments advanced by the defence, the Court considers that the reasons given by the appellate court when refusing to summon M.R. were sufficient in the circumstances of the case (see *Murtazaliyeva*, cited above, §§ 160-66, and §§ 169-74; see also, *a contrario*, *Vidal v. Belgium*, 22 April 1992, §§ 34-35, Series A no. 235-B).

52. In assessing the overall fairness of the proceedings, the Court draws attention to the scope of the review by the appellate court. The first-instance court had established the *actus reus* of the crime but had acquitted the applicant because it could not establish beyond reasonable doubt that she had intended to misappropriate the funds. Having reassessed the evidence, the appellate court concluded that an intent on the part of the applicant could be inferred from her actions (see paragraph 23 above). Accordingly, it was the assessment of the existence of intent that was crucial for the applicant's conviction by the appellate court.

53. In that respect the Court notes that, even though M.R. was directly affected by the actions that led to the applicant's conviction, it cannot be

concluded that her testimony was decisive for that conviction. All the findings that were important for the determination of the applicant's guilt (such as the increase in the price of the victim company from EUR 5.2 to 5.4 million in view of the loaned money that was to remain in the account; the last-moment request to transfer the loaned money to the applicant's private account; and the failure to inform the auditor company or M.R. of the transfer request) were all also based on testimony given by other witnesses, documentary evidence and even the applicant's own admissions (see paragraph 23 above).

54. Hence, the reversal of the applicant's acquittal was not based on a reassessment of the credibility of M.R.'s testimony or a new interpretation of her evidence (contrast *Ovidiu Cristian Stoica*, cited above, §§ 44-45 and *Manoli v. the Republic of Moldova*, no. 56875/11, §§ 27-32, 28 February 2017; as well as *Lorefice v. Italy*, no. 63446/13, §§ 38-46, 29 June 2017; *Lazu v. the Republic of Moldova*, no. 46182/08, §§ 36-39, 5 July 2016; *Flueraş v. Romania*, no. 17520/04, §§ 56-59, 9 April 2013; *Găitănaru v. Romania*, no. 26082/05, §§ 31-33, 26 June 2012; and *Destrehem v. France*, no. 56651/00, § 42-45, 18 May 2004). Accordingly, the Court concludes that the appeal court could, as a matter of fair trial, properly examine the issues to be determined without directly hearing M.R.

55. Finally, in view of the fact that the applicant's conviction was based on the reassessment of her intent, it is important to note that the applicant herself was examined by the appellate court. Thus, the judges ultimately deciding the case were able to carry out a direct assessment of the evidence given by her in person and were in a position to assess her trustworthiness (compare *Vilches Coronado and Others*, cited above, §§ 43-44; and contrast *Ghincea v. Romania*, no. 36676/06, §§ 41-49, 9 January 2018; *Văduva v. Romania*, no. 27781/06, §§ 41-49, 25 February 2014; and *Botten*, cited above, §§ 52-53).

56. Hence, in view of the defence's failure to use various procedural opportunities and to sufficiently substantiate the need for a repeated examination of M.R., the scope of the appellate court's review, the role of M.R.'s testimony in the applicant's conviction, and the lack of a reinterpretation of her evidence, the Court considers that the appellate court's dismissal of the request to summon M.R. to the appeal hearing did not undermine the overall fairness of the criminal proceedings.

57. There has accordingly been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

58. The applicant complained that the criminal sanction of confiscation in respect of her manor violated Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

59. The Government contested that argument.

Non-exhaustion of domestic remedies

1. The Government

60. Amongst other inadmissibility grounds, the Government argued that the applicant had not exhausted the available domestic remedies, by omitting to bring a complaint before the Constitutional Court. In the Government's view, the applicant had complained of the disproportionate nature of the punishment of property confiscation, which was provided for in sections 179(3) and 195(3) of the Criminal Law. Where an applicant relied on a provision of Latvian law as being contrary to the Convention, the proceedings first had to be brought before the Constitutional Court. Even if the Constitutional Court found a legal provision to be compatible with the Constitution, it could still give it a different interpretation, thereby remedying the situation. The applicant had failed to provide feasible arguments as to why proceedings before the Constitutional Court would not have been accessible to her.

61. While the Government conceded that the Constitutional Court exercised judicial self-restraint in the area of penal policy, they pointed to the Constitutional Court's decision of 6 January 2011 in case no. 2010-31-01 (see paragraph 32 above) in which the Constitutional Court had concluded that it did have the competence to assess whether or not the legislator had evidently overstepped the limits of its discretion.

2. The applicant

62. The applicant submitted that a complaint with the Constitutional Court had not been a remedy available to her. A constitutional complaint could not serve as an effective remedy if the alleged violation resulted only from the erroneous application or interpretation of a legal provision, which was not unconstitutional in its content. A constitutional complaint could only be lodged against a statutory provision and not against a judicial decision as such. Domestic legal practice showed that the Constitutional Court did not examine cases where the legal dispute could be resolved by a reasonable interpretation of legal norms and their judicious application. According to the applicant, a constitutional complaint could only be

submitted if the unconstitutional statutory provisions left no discretion to State institutions and obliged them to act in a way that would violate a person's fundamental rights.

63. While in the present case the legal regulation had been deficient, the domestic law could and should have been applied in a manner that would render the interference with the applicant's right of property proportionate. In particular, even though the punishment of property confiscation had been compulsory, section 42(3) of the Criminal Law had allowed for partial confiscation and had also required the courts to assess the value of the property that was to be confiscated. Thus, the court could have ordered the confiscation of a part of the applicant's property. Instead, the confiscation had been imposed on the entirety of the manor Bramberģes pils. Besides, neither the prosecution nor the courts had ever assessed the actual value of the manor and weighed the necessity of its confiscation. Accordingly, Latvian law had not compelled the courts to violate the applicant's right of property. Therefore, challenging the statutory provisions could not be deemed as an effective domestic remedy.

64. The applicant further submitted that the Government had provided no examples to establish the effectiveness of that remedy. The Constitutional Court had consistently held that the proportionality of a criminal sanction was a matter of penal policy which it could not reassess, and such complaints had always been either declared inadmissible or rejected, including in case no. 2010-31-01 (see paragraphs 32 and 34). With respect to the Constitutional Court's judgment of 8 April 2015 in case no. 2014-34-01, where the punishment of property confiscation was found to be compatible with the right of property (see paragraph 33 above), the applicant contended that it reaffirmed the Constitutional Court's stance that determining sanctions for criminal offences was a political issue that lay within the legislator's competence.

65. When addressing the merits of her complaint the applicant submitted that sections 170(3) and 195(3) of the Criminal Law, on which the confiscation of her property had been based, had provided for a compulsory application of that punishment. The law had not limited the extent of the property that could be confiscated and had not defined what property was not to be subject to confiscation. The law had not even set out an obligation to assess the value of the property to be confiscated or to ensure that that value was proportionate to the harm caused by the criminal offence. Having pointed to the deficiencies in the domestic regulation identified by the Constitutional Court in the *Markus* case (see paragraph 32 above) and a research report cited in its judgment, the applicant noted that the compulsory punishment of property confiscation had prevented the application of the principle of individualisation of the penalty. Where the strict conditions for applying a lesser sanction than the one provided for in law were not met, the courts were deprived of the possibility of assessing the particular situation and deciding whether the property confiscation had a

legitimate aim and was proportionate. The law on the basis of which her rights had been restricted had been deficient and had not complied with the quality of law requirements. The lack of clarity of the law had allowed the State authorities to decide on the confiscation of her property in a manner that was incompatible with Article 1 of Protocol No. 1.

3. The Court's assessment

66. The Court reiterates that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights and that States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems (see *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 115-16, ECHR 2015). Where there are doubts as to a domestic remedy's effectiveness and prospects of success, the remedy in question must be attempted (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 99, 20 March 2018). On the other hand, when it is clear from the outset that the remedy is not effective, the pursuit of it will have consequences for the calculation of the six-month rule (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 86, ECHR 2014 (extracts), and *Sapeyan v. Armenia*, no. 35738/03, § 21, 13 January 2009).

67. The Court reiterates that in Latvia a constitutional complaint can only be lodged against a legal provision that infringes the applicant's human rights and not against a judicial or an administrative decision as such. Therefore, recourse to the Constitutional Court can only be had in a situation in which the alleged violation of the Convention resulted from the application of a legal provision which is called into question as being contrary to the Constitution. Such a legal provision must constitute the direct legal basis for the individual decision in respect of which the violation is alleged. Thus, a constitutional complaint cannot serve as an effective remedy if the alleged violation resulted only from the erroneous application or interpretation of a legal provision, the content of which is not unconstitutional (see, among many others, *Larionovs and Tess v. Latvia* (dec.), nos. 45520/04 and 19363/05, § 148, 25 November 2014).

68. In the present case, the Government contended that the alleged violation emanated directly from the legal provisions that had been applied to the applicant. In contrast, the applicant in her reply to the non-exhaustion plea submitted that these provisions had allowed for an interpretation that would have been compatible with the right of property. In other words, she submitted that it had been the interpretation and application of those legal provisions that had led to the alleged breach of her rights.

69. The Court considers that the question of whether an alleged breach emanates from a potentially unconstitutional legal provision or from its interpretation and application does not always lend itself to a clear distinction. Furthermore, this question relates directly to the scope of the

Constitutional Court's competence – a matter that only the Constitutional Court itself has the jurisdiction to determine. Accordingly, where it is arguable that the individual decision, in respect of which the violation is alleged, was based on an unconstitutional legal provision, the Constitutional Court should be given an opportunity to address the matter.

70. With respect to the present case, the Court observes that the applicant in her submissions pointed to numerous deficiencies, which she herself attributed to the domestic regulation (see paragraph 65 above). In view of the applicant's claim that it was the lack of quality of the law that had led to the breach of her right of property, the Court finds that her grievance did not only concern the interpretation and application of the legal provisions, the content of which she had regarded as constitutional. Accordingly, the applicant's arguments concerning the "quality of law" did fall within the competence of the Constitutional Court.

71. The aforementioned is confirmed by the Constitutional Court's decision of 6 January 2011 in case no. 2010-03-01 in which it analysed the punishment of property confiscation and pointed to a great number of deficiencies in the domestic regulation (see paragraph 32 above). While the Constitutional Court terminated those proceedings owing to the manner in which the complaint had been formulated, it indicated that the constitutionality of the confiscation punishment ought to be assessed by analysing the provisions of the General Part of the Criminal Law. The Court considers that that decision, which was taken four months before the completion of the applicant's case, sufficiently indicated what kind of constitutional complaint ought to be brought in order to protect the right of property with respect to the punishment of property confiscation. The Court also notes that exactly that kind of challenge was brought before the Constitutional Court in case no. 2014-43-01 in which a judgment on the merits was delivered on 8 April 2015. The fact that the Constitutional Court found no violation in that case has no bearing on the effectiveness of that domestic remedy with respect to the applicant's case as, by that time, the domestic regulation had already been significantly altered (see paragraphs 27 and 32-33 above).

72. Accordingly, the Court dismisses the applicant's contention that in the specific circumstances of her case a complaint with the Constitutional Court was not a remedy available to her. A mere possibility that the domestic law could have been interpreted in compliance with the Convention does not absolve the applicant from the obligation to bring the proceedings before the Constitutional Court. Furthermore, had the applicant brought a constitutional complaint and had she been successful, she could have requested the criminal proceedings against her to be reopened and a new ruling to be made. In the renewed examination of the case the domestic courts would have been bound by the findings of the Constitutional Court (see *Larionovs and Tess v. Latvia* (dec.), nos. 45520/04 and 19363/05, § 166, 25 November 2014). Thus, as a result of the reopening of the

criminal proceedings the alleged violation of the right of property could have been suitably redressed.

73. The applicant's complaint under Article 1 of Protocol No.1 must be therefore rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. The applicant also raised other complaints pertaining to the criminal proceedings against her. She relied on Article 6 § 1, Article 6 § 2, and Article 6 § 3 (c) of the Convention and Article 2 § 1 of Protocol No. 7 to the Convention.

75. Having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. This part of the application must therefore be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the failure to hear a witness by the appeal court admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 11 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Deputy Registrar	Síofra O'Leary President