THE FACTS

1

The applicant, Mr Mihail Sorin Sapunarescu, is a Romanian national who was born in 1968 and lived in Bucharest, Romania. When lodging his application he was detained in Butzbach, Germany.

2

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

3

The applicant, who described himself as a "Jewish Christian", was working as an informer for the Romanian Intelligence Service and the U.S. Drug Enforcement Administration (DEA).

4

On 17 July 2001 the applicant was arrested in Frankfurt a. M. in the presence of "VP 1", an informer working for the Hessian Office of Criminal Investigation who had pretended wanting to buy ecstasy tablets. The applicant was taken into detention on remand on suspicion of having trafficked in drugs.

5

On 9 July 2002 the trial on charges of drug trafficking was opened against the applicant and two co-defendants.

6

The informer "VP 1" could not be heard as a witness in person as the Hessian Ministry for the Interior had made a declaration refusing the informer permission to testify in court (Sperrerklärung). The Ministry had argued that it was necessary to keep secret the identity of the informer in order to protect his life and limb as the applicant had threatened the informer with reprisals if something went wrong in the course of the drug deal.

7

Therefore, the statements "VP 1" had made to the Hessian Office of Criminal Investigation were read out in the hearing. "VP 1" submitted that he had travelled to Romania twice, not on the police's instruction, but merely in order to visit his friend "X". In Romania he had met various persons, acquaintances of "X", who had proposed to sell drugs to him. He did not wish to disclose the identity of "X" for fear of reprisals by the organizers of the drug deal. In Frankfurt a. M. he had then met the applicant who had offered him 115,000 ecstasy tablets which had been delivered by the applicant's two accomplices the next day.

8

On 11 July 2002 the applicant's lawyer requested the court to interrogate the informer "VP 1" or to have him interrogated as to the identity and address of "X". He wished to question "X" as a witness in order to prove that "VP 1" had willingly and illegally provoked the drug deal in Romania on the instructions of the German police. The Regional Court dismissed the applicant's motion, arguing that it was not necessary to investigate the identity of "X". However, a catalogue of other questions were submitted to the police officer

S., who was supervising "VP 1", by the court on the applicant's request and the answers given by "VP 1" were subsequently read out in court.

9

On 30 July 2002 the Frankfurt a. M. Regional Court convicted the applicant of joint drug trafficking and sentenced him to five years and three months' imprisonment. It based its findings of fact on the applicant's confession and that of his two co-defendants as well as on the evidence given by two eye-witnesses, the informer "VP 1" and another informer (who had also been refused permission to testify in court) whose statements had been read out in the hearing. It found that, despite the caution necessary when a witness could not be questioned personally in court and his statements were merely read out, the informers had to be considered as credible. In assessing their credibility, the court took into account the oral statements made by the police officer S. supervising them. S. had stated, in particular, that he knew "VP 1" already for a long time, had checked the trustworthiness of his statements on several occasions and had also observed him on one occasion when he met the applicant in Germany.

10

In its judgment, the Frankfurt a. M. Regional Court dismissed a further motion of the applicant to have "X" questioned. Because of the declaration made by the Hessian Ministry for the Interior refusing "VP 1" permission to testify, the court had been unable to question him. Both the questioning of "VP 1" on the identity of "X" and that of "X" would lead to the disclosure of the identity of "VP 1", which would be detrimental to the welfare of the Federal Republic or the Land Hesse.

11

In fixing the applicant's sentence, the Frankfurt a. M. Regional Court took into consideration as a mitigating factor that the drug deal had been monitored by the police from the outset so that it was not very likely that the drugs could ever be circulated.

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On 7 March 2003 (decision served on 18 March 2003) the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded.

13

On 15 April 2003 the applicant lodged a complaint with the Federal Constitutional Court. He argued that his rights under Articles 1 and 2 of the Basic Law, read in conjunction with the rule of law, which enshrined the rights protected by Article 6 § 3 (d) of the Convention, were violated by the decision of the Federal Court of Justice. He argued that the Regional Court's refusal to have the informer "VP 1" and "X" questioned violated his right to have witnesses against him examined and restricted his defence rights. The illegal provocation of the drugs deal by "VP 1" on instructions of the German police, which would have been proved on examination of these witnesses, would at least have led to a significant reduction of his sentence.

14

On 14 August 2003 the Federal Constitutional Court refused to admit the applicant's constitutional complaint. It held that the complaint had no prospects of success as it was ill-founded.

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The Federal Constitutional Court found that the applicant's right to a fair trial in accordance with the rule of law under Articles 2 § 1 and 20 § 3 of the Basic Law had not been violated in the proceedings at issue. It argued that in cases in which a witness was refused permission to testify the defendant's rights could adequately be protected by submitting questions to the witness in writing which the latter had to answer in an adequate manner. In so far as the responses to the questions could not lead to the disclosure of the witness's identity, a court was not authorised generally to refuse the defendant or his defence counsel questioning the witness in this way.

16

However, the Federal Constitutional Court found that in the present case the rejection of the motion to take evidence was justified. The witness "VP 1", when interrogated by the police, had already stated that he would not disclose the identity of "X". Due to the refusal to give the witness permission to testify the Regional Court had no means to force him, if necessary by the imposition of a fine or by arrest for disobedience to a court order pursuant to section 70 of the Code of Criminal Procedure, to disclose what he knew. In practice, a renewed police interrogation of the informer would therefore not have caused him to make further statements as to the identity of "X".

COMPLAINTS

17

1. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he had not been allowed to examine or have examined "VP 1", the main witness for the prosecution, and the witness "X".

18

2. Relying on Articles 5 and 6 §§ 1 and 3 (a) of the Convention, the applicant claimed that he had not been informed promptly and in a language he understood of the reasons for his arrest, had not been able to contact a lawyer in due course, had not received a translation of the indictment to Romanian until the second day of his trial and had been detained and convicted despite his innocence on the basis of fabricated evidence.

19

Invoking Articles 5 § 3 and 6 § 1 of the Convention, the applicant further argued that the length of his detention on remand and of the pre-trial investigation proceedings had been excessive.

20

Moreover, the applicant complained under Article 8 of the Convention that he had not been allowed to contact to his family after his arrest and that the publicity of his trial had jeopardised his life and that of his family.

21

Invoking Article 14 of the Convention, the applicant claimed in particular that the German police had fabricated the charges leading to his detention and punishment due to their anti-Semitic convictions.

THE LAW

22

A. Complaint under Article 6 of the Convention

23

The applicant claimed that the criminal proceedings against him had been unfair and had unduly restricted his defence rights because he neither had the opportunity to examine the main witness against him, "VP 1", nor to have another witness, "X", questioned. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, insofar as relevant, provide:

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

25

3. Everyone charged with a criminal offence has the following minimum rights: ...

26

(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; ..."

27

The applicant submitted that due to the fact that "VP 1", who had been the main witness for the prosecution, had not been summoned to testify in person and could not be fully questioned, his possibilities to defend himself and, in particular, to demonstrate the lack of credibility of that witness had been irreversibly restricted. The illegal provocation and organisation of the drug deal by "VP 1" on instructions of the German police, which would have been proved on examination of "VP 1" or of "X", a friend of "VP 1", had been a decisive element for his conviction and for the fixing of his sentence.

28

The Court, examining the applicant's complaint under Article 6 §§ 1 and 3 (d) taken together, reiterates that the taking of evidence is governed primarily by the rules of domestic law and that the Court's task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, inter alia, Van Mechelen and Others v. the Netherlands, judgment of 23 April 1997, Reports of Judgments and Decisions 1997-III, p. 711, § 50; A.M. v. Italy, no. 37019/97, § 24, ECHR 1999-IX).

29

The Court further recalls that all evidence, including testimonies by witnesses, must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence (see, amongst others, Lucà v. Italy, no. 33354/96, § 39, ECHR 2001-II; Solakov v. the Former Yugoslav Republic of Macedonia, no. 47023/99, § 57, ECHR 2001-X; P.S. v. Germany, no. 33900/96, § 21, 20 December 2001). The national authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses (see, in particular, Doorson v. the Netherlands, judgment of 26 March 1996, Reports 1996-II, pp. 470-471, § 71; Visser v. the Netherlands, no. 26668/95, § 47, 14 February 2002). If the anonymity of prosecution witnesses is maintained, Article 6 §§ 1 and 3 (d) requires that the handicaps under which the defence labours are sufficiently counterbalanced by the procedures followed by the judicial authorities (see Van Mechelen and Others, cited above, p. 712, § 54; Haas v. Germany (dec.), no. 73047/01, 17 November

2005). Moreover, evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care (see Visser, cited above, § 44; S.N. v. Sweden, no. 34209/96, § 53, ECHR 2002-V). Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see, among many others, Saïdi v. France, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, § 44; Solakov, cited above, § 57; Calabrò v. Italy and Germany (dec.), no. 59895/00, ECHR 2002-V).

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Turning to the facts of the present case, the Court observes that due to the Hessian Ministry for the Interior's refusal to give "VP 1" permission to testify in court, at no point in time the applicant or his defence counsel were afforded an opportunity to cross-examine the anonymous main witness for the prosecution in person. By substantiating that the witness's physical integrity was endangered due to the applicant's threats against him, the authorities, however, adduced relevant and sufficient reasons to keep secret the identity of the informer "VP 1".

31

The handicaps under which the defence laboured because of that were partly counterbalanced by the Regional Court in that a catalogue of questions was submitted to the police officer supervising "VP 1" by the court on the applicant's request and the answers given by "VP 1" were subsequently read out in court. It is true that the Regional Court refused to submit to the informer "VP 1" a further question concerning the identity of "X", and consequently also made the summoning of "X" impossible, not least because, due to the prohibition for "VP 1" to testify in court, it had no means to force him to disclose the identity of "X". The Court finds that Regional Court convincingly argued that the questioning of "X" would lead to the disclosure of the identity of "VP 1" which, as found above, could be kept secret in order to protect his physical integrity. Nonetheless, the failure to further question "VP 1" entailed a certain restriction of the applicant's defence rights.

32

Having regard to all the evidence available to the domestic courts, the Court, however, finds that the applicant's conviction cannot be considered to have been based to a decisive extent on the depositions of "VP 1". It is true that "VP 1" was the main witness for the prosecution and that there was only one more eye-witness, another informer who had been refused permission to testify in court. The Court observes, though, that the applicant himself made a confession in court. Moreover, the domestic court's findings of fact had been based on the statements of his two co-defendants, who had, for their part, confessed to the offence. The Court concedes that the question whether and if so, to what extent, the drug deal had been provoked by the police informer "VP 1", which must be considered a decisive factor for the fixing of a sentence corresponding to a defendant's guilt, could not be answered by these confessions, but merely by examining "VP 1". However, the Court observes in this respect that the Regional Court did not only expressly treat the evidence given by "VP 1" cautiously, being aware of the restricted possibilities to check the trustworthiness of witness statements which could merely be read out in court. In order to assess the informer's credibility as much as possible, including his statement that he did not provoke the drug deal, the Regional Court also questioned the police officer supervising him in person. In addition to that, the Regional Court took into consideration as a mitigating factor that the drug deal, although not provoked, had been observed by the police from the outset.

33

Having regard to the way in which evidence was taken in the proceedings as a whole, the Court therefore finds that the rights of the defence had not been restricted to an extent incompatible with the guarantees of Article 6 §§ 1 and 3 (d). It cannot, therefore, find that the applicant's trial as a whole had been unfair.

34

It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

35

B. Remainder of the applicant's complaints

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As regards the remainder of the applicant's complaints, the Court observes that, irrespective of possible further remedies available, the applicant in any event failed to address these matters in his constitutional complaint with the Federal Constitutional Court.

37

It follows that this part of the application must be dismissed for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court by a majority

38

Declares the application inadmissible.
[**Redaktioneller Hinweis:** Zur Zeugensperrung und der - gesamten - Rechtsprechung des EGMR auch gerade zum Beleg von Tatprovokationen vgl. vertiefend Gaede JR 2006, 292 ff. und ders. StV 2006, 599 ff.]