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La CEDU su riconoscimento di sentenza straniera senza previo accertamento dell'equità del relativo processo
(CEDU, sez. I, sent. 20 ottobre 2022, ric. n. 20256/20)

La Corte Edu si pronuncia sul caso riguardante un cittadino israeliano rimasto paralizzato dopo essere stato operato in un ospedale di Lubiana dal ricorrente, noto neurochirurgo, ed il conseguente processo sia in Israele che in Slovenia.
La Corte ha ritenuto che, prima di riconoscere le sentenze israeliane che dichiaravano il ricorrente responsabile di gravi danni medici ed assegnavano al suo ex paziente più di 2 milioni di euro, i tribunali sloveni avrebbero dovuto debitamente accertarsi dell'equità del processo in Israele, accertamento non effettuato nel caso di specie. In particolare, i Giudici di Strasburgo hanno ritenuto sussistere problemi riguardanti la raccolta di prove (non erano stati ascoltati testimoni cruciali come il personale dell'ospedale ed un esperto di diritto sloveno e le loro dichiarazioni erano state escluse dal fascicolo). Di qui l'accertata violazione dell'art. 6 § 1 della Convenzione.

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

FIRST SECTION

CASE OF XXXXX v. SLOVENIA
(Application no. 20256/20)

JUDGMENT
STRASBOURG
20 October 2022

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 XXXXX v. Slovenia,

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

Krzysztof Wojtyczek, *Acting President,*
Marko Bošnjak,

Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Davor Derenčinović, *judges*,
and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 20256/20) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Vincenc Vinko XXXXX ("the applicant"), on 30 April 2020;

the decision to give notice of the complaints under Article 6 § 1 of the Convention concerning the Slovenian courts' recognition of Israeli district court judgments rendered in proceedings in which the applicant's witnesses had not been examined, his evidence and submissions had been excluded from the case file and the Israeli district court's documents had been served on his former representative, to the Slovenian Government ("the Government"), represented by their Agent, Mrs A. Vran, Senior State Attorney, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 20 September 2022,

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

INTRODUCTION

1. The case concerns recognition by the Slovenian courts of judgments issued by an Israeli district court in civil proceedings against the applicant.

THE FACTS

2. In May 1992 the applicant, an internationally renowned neurosurgeon, performed surgery on an Israeli citizen, E.M., at Ljubljana University Hospital. Following the surgery and/or postoperative care, E.M. was left severely disabled.

I. PROCEEDINGS IN ISRAEL

3. In May 1995 E.M.'s lawsuit, in which he sought damages for medical negligence from the applicant, was served on the latter during his visit to the State of Israel (hereinafter "Israel"). The proceedings were subsequently conducted before the Tel Aviv District Court (hereinafter "the Israeli district court"). The applicant submitted his defence statement, a medical opinion by neurosurgeon R., statements of eleven witnesses who worked at Ljubljana University Hospital and an opinion by a Slovenian legal expert who was to testify about the applicability of Slovenian law to the dispute. It seems that the applicant never appeared before the Israeli district court

himself but was represented in the proceedings by an Israeli lawyer (until he cancelled his representation – see paragraph 14 below).

4. Following an objection by the applicant, which had initially been upheld by the Israeli district court, the Israeli Supreme Court on 10 March 1998 decided that the suitable forum for deciding the case was the court in Israel. Subsequently, the applicant requested a summary dismissal of the action, arguing that the law applicable to the dispute originating in the surgery which had taken place in Slovenia was Slovenian law. He submitted that under Slovenian law an action could only be brought against the hospital and was in any event time-barred. This had been rejected by the Israeli district court. On appeal, the Israeli Supreme Court quashed that decision and ordered that the trial court examine both the evidence on the applicable law and that concerning liability.

5. On 1 January 1999 a trial started. At the beginning of the trial, the plaintiff's relatives and expert neurosurgeon N. testified before the Israeli district court. The applicant submitted an expert opinion by R., who was a neurosurgeon, statements by eleven witnesses, all of them employees at Ljubljana University Hospital, including doctors and nurses who had treated E., his own written statement and the opinion of an expert on Slovenian law. Expert R. testified in court on 6 July 1999, following which expert N. (for the plaintiff) submitted written comments. In the meantime, the applicant, via his representative, requested that a video examination, presumably by a Slovenian court, of his witnesses be accepted as evidence. He argued that the witnesses had declined to travel to Israel and that he likewise did not want to come and risk having another lawsuit served on him. He proposed that he too be examined in Slovenia. On 7 July 1999 the Israeli district court decided that the applicant and the witnesses would be examined by video link.

6. On 7 September 1999 the Slovenian Ministry of Justice explained in writing to the applicant that there was no bilateral agreement between Slovenia and Israel regarding legal assistance in civil matters, but that such assistance could be requested under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("the Hague Evidence Convention"). It also stated that neither the Hague Evidence Convention nor Slovenian legislation provided for the possibility of directly examining witnesses from a foreign country through a video link and explained that every State had its own laws regulating court proceedings, including those with a foreign element.

7. On 22 September 1999 the applicant declined to participate via video link and again requested that he and his witnesses be examined before a Slovenian court, in accordance with the Hague Evidence Convention. He pointed out that Israel and Slovenia had both signed the Hague Evidence Convention and that pursuant to Slovenian law witnesses would receive a court summons to appear. He repeated this request on 6 December 2000.

8. On 27 August 2001 the Israeli district court, after a hearing, rejected the applicant's request, finding that the decision to examine him and the witnesses via video link struck an adequate balance between the interests of the parties. This was upheld on 18 July 2002 by the Israeli Supreme Court, which held that the position could be reconsidered by the district court if there were practical obstacles to organising an examination via video link.

9. In the meantime, the Israeli district court decided to hear the witness concerning foreign law, but the applicant made an application to postpone this until the Supreme Court reached its decision (see paragraph 8 above), arguing that his witness on this issue would not come to court because of the difficult security situation in Israel.

10. The applicant made another (his fourth) request for his witnesses to be examined by a Slovenian court, claiming that it was practically impossible to hold the examination via video link. On 26 December 2002 the Israeli district court rejected this request, holding that it was technically possible to examine witnesses that way. The applicant then asked that his scheduled examination via video link be cancelled and for the court to decide how his witnesses would be examined.

11. On 6 February 2003 the Israeli district court upheld its decision of 26 December 2002, finding that the applicant's refusal to be examined via video link did not arise from the lack of practical possibility of conducting such an examination. The court then asked the applicant to reconsider his position and warned him that his main statement would otherwise have to be excluded from the case file. Since the applicant maintained his position, on 4 June 2003 the court excluded his main statement from the case file. Finding it impossible to examine witnesses via video link without the applicant's cooperation, it ordered that his witnesses be examined before the Slovenian courts pursuant to the procedure regulated by the Hague Evidence Convention. In this connection, it instructed the parties to contact a specific official at the Israeli Directorate of Courts, B.Z. As regards the witness on Slovenian law, the court decided that he would be examined in Israel once the security situation improved.

12. On 16 September 2003 the Israeli authorities submitted a request under the Hague Evidence Convention to the Slovenian authorities. On 23 January 2004 the Ljubljana District Court raised certain issues with respect to execution of the request for evidence-gathering, such as translation and interpretation of the witnesses' examination and related costs, the lack of possibility of cross-examining witnesses under Slovenian law (which was apparently requested by the Israeli district court or the plaintiff), and the participation of a foreign lawyer, which was not provided for by domestic law either. On 10 February 2004 the Ministry of Justice forwarded these concerns to the Israeli authorities with a request for a reply to the issues raised. The Israeli authorities subsequently urged the Slovenian Ministry of Justice to organise the witnesses' examination as soon as possible. On 12 July 2004 the latter replied that no answer had been received to its query of 10 February 2004. Several months later, the Ljubljana District Court considered that the matter was no longer pertinent and that the procedure under the Hague Evidence Convention had been terminated.

13. It would appear that on 11 March 2004 E.M. (see the dispute on the facts considered in paragraphs 38 to 40 below) requested that the procedure under the Hague Evidence Convention be discontinued because of the difficulties encountered in the process, as demonstrated by the Slovenian Ministry of Justice's letter of 10 February 2004 and the delays.

14. On 19 April 2004 the applicant's representative informed the Israeli district court of the applicant's wish to not have a representative in the proceedings and his decision to cancel his power of attorney. The Israeli district court ordered that the former representative's office continue to be used for serving documents on the applicant and notifying him of any matters at its request. The applicant disputed in the proceedings before the Court that he had been informed of this and any subsequent Israeli court decisions in this matter.

15. The Israeli district court then requested B.Z. to inform it of the possibilities and expected time frame for the examination of witnesses that was to take place in Slovenia pursuant to the Hague Evidence Convention. No response was received.

16. At the hearing scheduled for 5 September 2004, nobody appeared for the applicant. On 21 September 2004 the Israeli district court cancelled its decision regarding the examination of witnesses in Slovenia. It noted that fifteen months had passed without any progress being made and nine years since the lawsuit had been filed. The court found that it was left with no other option but to conduct the evidence-taking procedure in Israel, where the applicant would be given an opportunity to present his evidence.

17. At the hearing on 7 November 2004, no one appeared on behalf of the applicant. He was then given several additional deadlines to submit his concluding statement. He disputed that he had ever been informed of these additional opportunities.

18. In the absence of any response from the applicant, the Israeli district court reached its decision on the basis of the evidence submitted, but excluded his witnesses' statements and the opinion of the Slovenian legal expert in line with Israeli law, finding that these witnesses had not been directly examined owing to the applicant's conduct.

19. On 9 June 2005 the applicant was found fully liable for the damage caused to E.M. The Israeli district court in its judgment set out the applicant's arguments, namely that Slovenian law should have applied to the dispute, that the opinion of expert E. was not valid, that he had performed the surgery in his capacity as an employee of the hospital, that he had acted with the requisite diligence and that the damage to E.M. had been unforeseeable and unavoidable, and that, in any event, it was the hospital which should bear liability for the actions of the medical team. The court further held that the applicant's written statement in lieu of his direct examination had been excluded from the case file. His witnesses' statements in lieu of direct examination had likewise been excluded pursuant to the Israeli rules of civil procedure and in view of the fact that E.M. had not waived his right to examine the witnesses. The Israeli district court held that the applicant had done everything he could to prevent the examination and had thereby prevented it from discerning the truth and E.M. from proving his own allegations.

20. As regards the applicant's liability for damages, the Israeli district court made the following findings (official English translation from the domestic case file):

> "...
>
> 20. ... The Defendant has an interest in relying on the rules of Slovenian law, in accordance to which he claims, liability for medical negligence towards patients does not rest on the doctor but on the hospital, and in any case, the claim is time-barred. The difficulty is that the foreign law is a factual question and the applicant seeking to apply foreign law must prove that law before the court by submitting evidence ... Because the opinion of the expert witness for Slovenian law for the Defendant was removed from the court file, neither the general rules of Slovenian law were proven nor was the specific rule for liability for medical negligence. In such circumstances, the court must apply the 'equality of laws' rule, on the basis of which it is necessary to refer to the Israeli law and apply it in these proceedings.
>
> ...

21. ... I will say at the outset that from the totality of the evidence before me, which was presented by the Claimant, and which the Defendant did not contest by evidence, it is clear that the Claimant expressly selected the Defendant to perform the surgery and after an offer was made and acceptance, a contract was concluded between the parties for the performance of the surgery.

...

22. ... I have not neglected the fact that the confirmation of the payment for the surgery was issued to the Claimant by the hospital and not by the Defendant personally. However, the confirmation of the hospital is in the amount of USD 20,000, while the Claimant paid USD 24,000, as a result of which there is a likelihood that the difference represented a profit for the Defendant for performing the surgery.

On the basis of all stated, I conclude that the Defendant is responsible for the operation, as well as for the care the claimant received before and after the surgery, even though, that care was actually predominantly provided by medical team members at the hospital.

...

23. In accordance with the Expert Medical Opinion of Dr. [E.] as well as of Prof. [R.], difficulties in Claimant's breathing and paralysis of all four limbs arose in the early stages after the surgery, which points to serious post-surgery complications. There is a disagreement about when these indicators were discovered - the opinion of Prof. [R.] is based on the report prepared by the doctor anaesthetist at the hospital after the patient was awakened after the surgery, while the opinion of Dr. [E.] rests on the information received by the Claimant's two brothers, which is also consistent with their testimony. The difficulty is that the anaesthetist's report was removed from the court file together with the statements of the medical team members and for this reason my decision cannot rest on that opinion. Despite this, the testimony of [the defendant's brothers] is reliable on its face, without internal contradictions, as a result of which I accept the allegations of Dr. [E.].

...

In accordance with the described situation in which the Claimant was found, the immediate medical assistance of the Defendant, as provided to the Claimant, was deficient in two elements as follows ...

24. ... First, [the] two medical experts actually confirmed that omitting a CT scan immediately when breathing difficulties and paralysis occurred, especially considering the fact that these two complications occurred concurrently, amounts to a serious mistake.

...

Prof. [R.], the medical expert for the Defendant, himself testified about the well-known exceptional importance of a CT scan after a surgery like that undergone by the Claimant;

...

25. Second, Dr. [E.] is of the opinion that the actual surgical interventions in the skull area which, from a neurological perspective, is extremely sensitive, itself required careful, constant observation at the department for intensive care, especially when the person that was operated has difficulties in breathing already after the surgery. Prof. [R.] is of the opinion that the

Claimant was not taken to the general intensive care department but was hospitalised at the intensive care unit at the neurosurgical department where he received the care he required.

As already explained above, it is clear that medical care received by the Claimant at the intensive care unit at the neurosurgical department was completely inadequate: the team of medical male nurses at the department considered breathing difficulties of the Claimant as a normal phase of recovery after the surgery and therefore did not pay sufficiently reasonable attention to its occurrence and did not call the duty doctor. Only the next day, after [one of the defendant's brothers'] intervention and on his demand, did they call a doctor immediately and the Claimant was moved to the general department for intensive care.

Causal Connection between errors of the Defendant and the injury of the Claimant

27. ... From all this, the most important point to make is that it is clear that vasospasm is a rare occurrence which can be diagnosed only after excluding more frequent complication of bleeding and edema, which is done by a CT scan. On this basis, Prof. [R.] is wrong in his diagnosis on the basis of which the injury of the Claimant is alleged to have occurred because of vasospasm, a conclusion reached on the basis of CT and MRI scans which were performed long time after the Claimant left the hospital.

28. In light of all said, I am sure there is a causal link between failure to perform the CT scan and the injury suffered by the Claimant because the CT scan was not performed. To clarify:

A CT scan is necessary, first of all, to diagnose a cause of neurological degradation of a patient's condition after cranial surgery when signs, such as difficulties in breathing and paralysis of limbs, occur. The Defendant did not perform a scan of the Claimant which without a doubt was clearly shown to have been necessary, and consequently, the Defendant caused the Claimant evident injury, concerning which it cannot be known with certainty if bleeding, edema or vasospasm occurred or if there was an injury of some nerve during the surgery that caused the paralysis of all four limbs of the Claimant. More than anything the evident injury is proven because it cannot be known if the Defendant could have prevented it and how.

Relativity of the doctrine of proven damage means that there was a transfer of the burden of proof from the Claimant onto the Defendant that the Defendant is not responsible for this damage ...

...

Note: I have not overlooked the possibility that even if bleeding or edema were discovered this would not necessarily mean that it would have been possible to prevent the occurrence of the Claimant's damage, or the possibility that bleeding or edema would not be discovered, or that a treatment for vasospasm would have succeeded, should the Claimant have had it. All this is not sufficient to break the chain of causation between non-diagnoses and lack of care for the Claimant, to whom the damage was caused ...

29. Also in a situation where the *'res ipsa loquitur'* rule applies, as set out in Article 41 of the Act on Damages, the burden passes from the Claimant onto the Defendant to prove that the damage suffered by a patient because of a doctor could not have be [*sic*] prevented ...

...

Article 41 lays down three cumulative conditions: the claimant did not know and could not have known what conditions caused the damage; the damage was caused by means which were

under complete control of the defendant; and the facts are more consistent with the conclusion, that the defendant was negligent than with the conclusion that he operated with suitable diligence.

Sometime ago, a judgment was issued holding that in a surgical operation, it is very easy to confirm that the first two conditions are satisfied:

...

As already explained, the Defendant was negligent for not performing imaging scans which are usual after such a surgery, the third and the last condition of the applicable rule is also satisfied in this matter ...

From this, it can be concluded that the burden of proof that it was not possible to prevent damage to the Claimant is on the shoulders of the Defendant who failed to discharge his burden. In light of all mentioned I conclude there is a causal connection between the mistakes of the Defendant and the damage suffered by the Claimant as a result of which the Defendant is liable for this damage.

30. By proving the burden of liability resting on the Defendant for the damage suffered by the Claimant for medical negligence, it is not necessary to discuss alternative allegations of the Claimant for the tort of assault. It is worthwhile to mention that these allegations of the Claimant must be rejected since the Claimant presented these allegations in a merely cursory manner in his summation.

Conclusion

31. The Defendant is fully responsible for the liability for compensation for the Claimant's damages."

21. Referring to the applicant's "attempts to prevent the court from enforcing the law and justice", the Israeli district court ordered him to cover the costs of the proceedings and legal fees.

22. On 19 January 2006 E.M. was awarded compensation for pecuniary and non-pecuniary damage in an amount equivalent to approximately 2.3 million euros (EUR).

23. The Slovenian Government submitted a number of documents relating to attempts, sometimes successful, sometimes not, to serve certain court documents from Israel on the applicant in Slovenia, but there is nothing to suggest that they relate to the above-mentioned proceedings.

II. PROCEEDINGS IN SLOVENIA

24. On 29 June 2011 E.M. requested the Ljubljana District Court to recognise the above-mentioned judgments. The court allowed the request on 13 August 2012. The applicant lodged an objection and appeal, followed by a supplement to appeal lodged out of time, in which he complained that the proceedings in Israel had not been fair. He was not successful with these remedies. However, further to a constitutional complaint by him, the Constitutional Court on 3 March 2016 remitted the case to the Ljubljana District Court for reconsideration, essentially because it found the lower courts' reasoning concerning the Israeli district court's jurisdiction and the admissibility of uncertified translations to be inadequate. The Constitutional Court dismissed

the complaints concerning the alleged unfairness of the proceedings in Israel because the applicant had failed to raise them in the remedies before the lower courts in a timely manner.

25. On 12 September 2017 the Ljubljana District Court reconsidered the case, also taking account of the applicant's arguments concerning the alleged non-compliance of the Israeli judgments with Slovenian public policy in a substantive and procedural sense – a review which it was required to conduct by law (see paragraph 37 below). It dismissed E.M.'s recognition request, finding that there was a lack of reciprocity and a breach of the right to equality of arms related to the exceptionally high award for pecuniary damage. It dismissed the applicant's remaining arguments, including those concerning his alleged inability to have his evidence examined, the exclusion of evidence and statements, and the lack of a remedy in the proceedings in Israel. In this connection, the court held that the Convention formed part of public policy and had to be taken into account when recognising a foreign decision. It referred to the case of *Pellegrini v. Italy* (no. 30882/96, ECHR 2001-VIII) and observed that before recognising a decision issued in a jurisdiction not concerned by the Convention, the member States of the Convention were under an obligation to verify that the proceedings in which such a decision had been adopted had complied with the Convention. The court further held that the principle of adversarial proceedings was inherent in the right to a fair trial under Article 6 of the Convention.

26. In assessing whether the applicant's procedural rights had been respected in Israel, the court held that proceedings conducted under the common-law tradition (such as those in Israel) were different from proceedings in Slovenia but that that did not mean that they were *a priori* incompatible with the guarantees of a fair trial. It considered it crucial to determine whether, before excluding the evidence from the case file, the Israeli district court had reasonably done enough to secure the applicant's right to a fair trial. It further held that bad faith conduct aimed at avoiding the proceedings should not enjoy protection and that it was therefore necessary to also consider the applicant's actions in the Israeli proceedings.

27. The court went on to find as follows:

> "Because the Hague Evidence Convention does not have an exclusive nature, the Israeli district court cannot be criticised for not hearing the defendant pursuant to its provisions ... It does not appear from the Israeli district court's judgment that the defendant had put forward convincing arguments as to why he had not been able to come to Israel or submit himself to examination via video link [footnote: The fear of being served with yet another lawsuit could not be a convincing argument. The defendant, who had come to Israel on many occasions prior to the service of the lawsuit in question, did not cite a security risk in relation to his hearing in the Israeli proceedings (it is a well-known fact that there are certain security concerns regarding Israel)]. The Israeli district court therefore arrived at an entirely acceptable conclusion that the defendant, who had all along rejected the jurisdiction of the Israeli district court, simply did not want to be heard before the Israeli district court, which then led to the use of the procedural rule in question and the exclusion of his written statement from the [case] file. As regards the witnesses, the Israeli district court had followed the defendant's proposal and decided to examine them based on the rules set out in the Hague Evidence Convention (that is, via the requested court), but afterwards, when the defendant (following the cancellation of the power of attorney of his Israeli lawyer) had completely waived his participation in the proceedings,

this intention was abandoned and a decision was made to hear the witnesses in Israel. If this ... decision was to be considered on its own – in isolation from other acts of the court and the parties in the proceedings, one could even conclude that it was not compatible with the guarantees of a fair trial. To demand a witness to attend a hearing in a very remote country (security risk) would be unrealistic and would impose an excessive burden on the party also from a costs perspective. In such circumstances, the rejection of the request to conduct an examination via the requested court (pursuant to the Hague Evidence Convention) and insisting that a foreign witness come to court could be considered equal to rejecting the proposed evidence. However, since the decision to abandon the witnesses' examination via the requested court was a consequence of the defendant's conduct or omission (by not appointing a new lawyer and by ... being subsequently totally inactive in the proceedings in which he had previously actively been involved, the defendant implicitly waived his participation), and taking into account the less active role assumed by the court in the common-law system (questions are put to the witnesses by the parties or their lawyers during cross-examination, not by the court), this decision of the Israeli district court cannot be considered to be incompatible with the Convention right to a fair trial. The foregoing applies also to the Slovenian law expert, because ... in the common-law system, the question of the applicable foreign law is of a factual nature.

In the situation described (the defendant, without giving convincing reasons, declined the suggested means of oral examination and of his own will decided not to participate in the proceedings following the cancellation of the power of attorney), and taking into account the non-mandatory nature of the Hague Evidence Convention (the latter was meant to ease the examination of evidence from abroad, but did not require an obligatory evidentiary procedure via the requested court), this court is convinced that the Israeli district court was not required to conduct a hearing (of the defendant, the Slovenian law expert and witnesses) pursuant to the provisions of the Hague Evidence Convention. By excluding written evidence, which was a consequence of the Israeli procedural rules ... and not a form of penalising the defendant, his right to participate in the proceedings was not violated (an inherent part of this right is the right to defend oneself) since the defendant had previously implicitly waived that right. A violation of the Israeli procedural rules could and should have been raised in appeal proceedings."

28. E.M. lodged an appeal, to which the applicant responded. On 5 March 2018 the Supreme Court found in favour of E.M. It observed that an appeal against the recognition of a foreign decision based on public policy was only justified when the effects of such recognition would be contrary to the fundamental principles of Slovenian legal and social order. It endorsed the first-instance court's finding that the applicant had been provided with a reasonable opportunity to participate and adduce evidence in the proceedings in Israel. It held that the applicant could have appealed against the impugned decisions of the Israeli district court, which had been served on him via the designated Israeli lawyer. It reviewed the findings of the Israeli district court concerning the applicant's liability and held that under Slovenian law the relationship between patient and doctor was also of a contractual nature. Referring to the findings of the Israeli district court that the plaintiff had signed a contract directly with the applicant, the Supreme Court found

that the latter's objection to his direct liability was unfounded. Moreover, the Supreme Court disagreed with the Ljubljana District Court on the issue of reciprocity and considered that the principle of equality of arms could not have been breached since the applicant had been provided with an opportunity to participate in the proceedings. In this connection, it found as follows:

> "... A party to the proceedings can by means of different actions ... affect the result of the proceedings. One of these options is also to decide not to participate in the proceedings and thereby accept that the court would base its decision on the evidence submitted by the opposing party or that the court would rely on its rules regarding evidence-taking. The mere fact that the Israeli district court, referring to Israeli case-law ... based its assessment of pecuniary damage on the actuarial calculation, even though the plaintiff had not provided proof of loss of income and maintenance costs, does not amount to a breach of the equal protection of rights in the proceedings. The defendant had an opportunity to oppose that approach but waived his right to do so, ultimately by not lodging an appeal against the judgment on damages. [Footnote: The defendant did not object to [E.M.'s] argument that he did not appeal against the judgment on damages, nor did he allege that there were justified reasons for him not to use the available remedies ... "

29. The applicant lodged a constitutional complaint in which he disputed, *inter alia*, that he had waived his right to participate in the Israeli proceedings. He had not been afforded a fair trial in Israel because the Israeli district court had not ensured that he and his witnesses be heard by the requested court in Slovenia pursuant to the Hague Evidence Convention and because his evidence had not subsequently been considered by the Israeli district court. Referring to the letter of the Ministry of Justice, he alleged that the examination of him and the witnesses via video link had not been possible and that, in any event, such an examination could have not been done without the involvement of the authorities. In his view, the domestic courts had been bound by the Convention to refuse the recognition of the Israeli judgments. Furthermore, the applicant complained that the proceedings in Israel had been unfair because the lawyer authorised to receive his mail had been his former lawyer, who had not tried to serve the Israeli judgment on him, resulting in him being unable to appeal against it. He also complained about the Supreme Court's reversal of the first-instance court's decision, alleging that he had been unable to respond to the relevant issues. The applicant also pointed to the serious consequences of the impugned judgments, resulting in his obligation to pay about EUR 2.6 million to E.M.

30. On 28 October 2019 the Constitutional Court, by five votes to two, decided not to accept the applicant's constitutional complaint for consideration in a reasoned decision. As regards his complaint relating to his failure to be examined by the Israeli district court, the court found as follows:

> "Not only in common-law systems, but also in continental legal systems, the parties are responsible for gathering procedural material ... This applies in particular when the party proposes his own examination as evidence. In such cases, it is clearly not excessive to require the party to respond to the summons and provide his witness statement, when he has no justified reason for his absence. In view of the foregoing, the assessment of the alleged violation of Article 22 of the Constitution [Equal Protection of Rights] in this part cannot be affected by

the applicant's allegations concerning the failure to be heard via videoconference or by the requested court."

31. As regards the witnesses' failure to be examined by the Israeli district court, the Constitutional Court likewise considered that the applicant's opportunity to give evidence had not been disproportionately restricted, based on the following circumstances considered by the lower courts:

"... (1) The Israeli district court first ordered that the witnesses be examined pursuant to the Hague Evidence Convention, that is, by the requested (Slovenian) court. (2) This decision was cancelled fifteen months after it had been adopted and nine years after the start of the court proceedings, at the hearing at which [the court] considered the plaintiff's request to discontinue the procedure under the Hague Evidence Convention, which was not attended by the complainant (neither by him alone nor by his lawyer, because he had cancelled his power of attorney and, despite the court's request, did not appoint a new one). (3) The Israeli district court substantiated this decision (besides referring to the complainant's inactivity) with the following constitutionally acceptable reasons: that, pursuant to the letter of the Ministry of Justice, [and] thus because of the practical obstacles and due to the passage of time, the production of evidence by the requested [court] would no longer be reasonable ... [I]t is clear that [the Israeli district court] gave the complainant sufficient realistic opportunities to ensure the presentation of evidence in his favour. As pointed out by the first-instance court, the Israeli district court was not required to do everything to ensure that the applicant had an opportunity to present his case before the court. The complainant's right to present his view in the proceedings is not without limits, but is limited by the right of the opposing party to effective judicial protection, of which the right to trial within a reasonable time forms an essential part ... It does not appear [from the letter of the Ministry of Justice of 10 February 2004] that the plaintiff in the request for international legal assistance set out unreasonable, from the perspective of Slovenian public policy, unacceptable conditions (by requesting to cross-examine the witnesses in English via his representative)."

32. In the Constitutional Court's opinion, the Israeli district court could not be criticised for ultimately deciding that the examination of witnesses should take place in Israel. It observed that the Slovenian court had had difficulties complying with the request for international legal assistance regarding the cross-examination of witnesses. However, under Slovenian law the Slovenian court could only refuse a request for international assistance if it was contrary to public policy. In the Constitutional Court's view, the rule that the witnesses had to be examined separately was not a fundamental principle of Slovenian procedural law and the request for a cross-examination of witnesses could thus not be considered to be incompatible with Slovenian public policy. As regards the exclusion of written statements, the Constitutional Court observed that this was a logical consequence of the fact that the plaintiff had had no opportunity to cross-examine them and that the exclusion had been meant to secure the plaintiff's right to adversarial proceedings.

33. As regards the service of the decisions, the Constitutional Court found it important that the applicant had known about the proceedings before the Israeli district court and had had an

opportunity to appoint a representative, including one for serving court documents on him if he had so wished. In the Constitutional Court's view, the Israeli district court had had justified reasons for not serving the court documents at a foreign address and had rightly assumed that by serving them via his former lawyer the applicant would have had reasonable opportunities to continue participating in the proceedings. The Constitutional Court went on to find as follows:

> "Since the service [of the documents] on the representative (for accepting documents) is valid and since it is considered that once it is carried out [the document] is served on the party ... and because the plaintiff submitted a decision confirming the finality and enforceability of the Israeli judgments, the [lower] court did not breach its duty to give reasons by not explicitly addressing the applicant's allegations that the representative had not served the [Israeli] judgments on him ... The applicant also does not allege (and has not alleged in the proceedings before the [lower] court) that after learning of the impugned judgments he lodged an appeal in Israel unsuccessfully."

34. The Constitutional Court, referring to *Pellegrini* (cited above), concluded that the domestic courts' review of the Israeli judgments had complied with the requirements under the Convention. Lastly, it found that the applicant had been able to give his view relating to the Supreme Court's decision on appeal during the earlier proceedings, as well as in his response to E.M.'s appeal.

RELEVANT LEGAL FRAMEWORK

I. CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS ("HAGUE SERVICE CONVENTION")

35. The Hague Service Convention entered in force with respect to Israel on 13 October 1972 and with respect to Slovenia on 1 June 2001. It provides a framework and procedure for transmitting judicial or extrajudicial documents relating to civil or commercial matters for service from one Contracting Party to another.

II. CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS ("HAGUE EVIDENCE CONVENTION")

36. The Hague Evidence Convention entered into force with respect to Israel on 17 September 1979 and with respect to Slovenia on 17 November 2000. The relevant parts provide as follows:

Article 1

> "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
>
> ...

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent, the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent, it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels."

III. SLOVENIAN PRIVATE INTERNATIONAL LAW AND PROCEDURE ACT

37. The Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku*, Official Gazette no. 56/99, with relevant amendments) provides that in certain situations, the Slovenian court may of its own motion refuse an application for recognition of a foreign decision. The provisions relevant in this regard read as follows:

Section 96

"(1) The Slovenian court shall refuse recognition of a foreign decision if, upon objection by the person against whom [the decision] has been rendered, it finds that owing to irregularities in the proceedings, [the person concerned] had no opportunity to participate in them.

(2) In particular, it is considered that a person against whom a foreign judicial decision has been rendered did not have the opportunity to participate in the proceedings if the summons, statement of claim or order commencing the proceedings were not served on him personally or if such personal service was not even attempted, unless the person began pleading the substantive issues of the case in the proceedings taking place at first instance.

Section 97

(1) A foreign judicial decision shall not be recognised if a court or other authority of the Republic of Slovenia has exclusive jurisdiction over the matter in question.

...

Section 98

(1) Upon objection by the person against whom a foreign decision has been rendered, the court shall refuse recognition of [the decision] if the jurisdiction of a foreign court was based exclusively on any of the following circumstances:

1) the citizenship of the plaintiff;

2) the property of the defendant in the country in which the decision was issued;

3) service of the statement of claim or other document instituting the proceedings on the defendant personally.

(2) Upon objection by the person against whom a foreign decision has been rendered, the court shall also refuse recognition of [the decision] where the court rendering [it] failed to observe the agreement on the jurisdiction of the courts of the Republic of Slovenia.

Section 100

A foreign judicial decision shall not be recognised if the effect of its recognition would be contrary to the public policy of the Republic of Slovenia.

Section 101

(1) A foreign judicial decision shall not be recognised if no reciprocity exists ... ”

THE LAW

I. PRELIMINARY ISSUE CONCERNING THE ESTABLISHMENT OF THE FACTS

38. The parties disagreed as to who, in the proceedings in Israel, had submitted the request to discontinue the procedure under the Hague Evidence Convention on 11 March 2004 (see paragraph 13 above). The Government submitted that it had been the applicant and not E.M. who had made such a request. They relied on the English translation of the Israeli judgment, admitting that it was not entirely consistent with the Slovenian translation. They also pointed out that the issue regarding this translation had only been raised in the proceedings before the Court. Moreover, the Government were of the opinion that, be that as it may, the Israeli district court’s decision not to continue the procedure under the Hague Evidence Convention had in any event been justified by appropriate reasons.

39. The applicant, referring to the original Hebrew version of the Israeli judgments and the Slovenian translation, pointed out that in the English translation there was an obvious error when a reference was made to the defendant making a request to discontinue the procedure under the Hague Evidence Convention. It had been E.M. and not him who had made such a request.

40. The Court notes that this question was not debated in the domestic proceedings and only came up after the applicant objected to the statement of facts submitted by the Government in the proceedings before the Court. The Ljubljana District Court and, more importantly, the Constitutional Court referred to the plaintiff (that is, E.M.) as the person who had made the request to discontinue the procedure under the Hague Evidence Convention (see paragraph 31 above). Their decisions do not in any way imply that the applicant had withdrawn his request for the witnesses to be examined under the said Convention. In view of this, other documents in

the case file and the background of the case, the Court finds it established that it was not the applicant who withdrew his request for the witnesses to be examined in Slovenia.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

41. The applicant complained that the Slovenian courts had infringed his right to a fair hearing under Article 6 § 1 of the Convention by recognising the Israeli judgments, which he alleged had been rendered in unfair proceedings. The relevant parts of that provision read as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

42. The Government raised an objection of non-exhaustion of domestic remedies. They argued that the applicant had failed to raise the arguments concerning the alleged unfairness of the proceedings in Israel in his objection and appeal in the initial round of the proceedings in Slovenia. He had raised this argument for the first time in a supplement to his appeal (see paragraph 24 above), which had been lodged outside the time-limit for appeal. Furthermore, after the remittal of the case by the Constitutional Court, the applicant had failed to raise the respective argument in his response to the appeal lodged by E.M. (see paragraph 28 above). The Government pointed out that owing to the applicant's omission to raise the complaints in his earlier remedies, the Constitutional Court's assessment had been limited to the issues which had been examined by the lower courts of their own motion.

43. The applicant argued that E.M. had not submitted a proper application for recognition of the Israeli judgments until after the remittal of the case by the Constitutional Court. The applicant could not therefore have been expected to raise substantive objections beforehand. He further maintained that in his response to E.M.'s appeal he had addressed the issues raised therein and that to expect him to speculate on the Supreme Court's position would have amounted to an excessive requirement. Furthermore, he had raised the issue of the unfair trial in Israel when the case was being re-examined by the domestic courts, and the latter had in any event been required to examine this question of their own motion.

44. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among many other authorities, *Remli v. France*, 23 April 1996, § 33, *Reports of Judgments and Decisions* 1996-II, and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). It must be applied with some degree of flexibility and without excessive formalism. At the same time, it normally requires that the complaints intended to be made subsequently at the international level should have been aired before the appropriate national courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Vučković and Others v. Serbia* [GC], no. 17153/11, § 72, 25 March 2014, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

45. The Court notes that, after the remittal of the case by the Constitutional Court, the applicant argued before the Ljubljana District Court that the recognition of the Israeli judgment amounted to a violation of his right to a fair trial because the Israeli district court had failed to ensure his effective participation in the proceedings (see paragraphs 25 to 27 above). Following the unfavourable decision by the Supreme Court, the applicant in his constitutional complaint raised the same complaints as those subsequently raised before the Court. The Constitutional Court itself did not dismiss the applicant's complaints for lack of exhaustion of domestic remedies but on the grounds that, in its opinion, the impugned decisions of the lower courts complied with the constitutional provisions relied on and the applicant's Convention rights (see paragraphs 29 to 34 above). It should moreover be noted that the domestic courts were indisputably required by domestic law to examine, even in the absence of any objection by the applicant, whether the Israeli judgments complied with Slovenian public policy, which included an assessment as to whether they had been rendered in proceedings conforming to Article 6 of the Convention. At all three levels of jurisdiction (see paragraphs 25 to 34 above), the domestic courts conducted such and assessment, albeit allegedly deficiently.

46. Having regard to the foregoing, the Court is satisfied that the domestic courts were afforded an opportunity of preventing or putting right the alleged violation of Article 6 § 1 of the Convention before the applicant's allegations were submitted to the Court (see, among other authorities, *Karaman v. Germany*, no. 17103/10, § 50, 27 February 2014). It follows that the Government's preliminary objection on the grounds of non-exhaustion cannot be accepted.

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

B. Merits

1. The parties' submissions

(a) The applicant

48. The applicant complained that the Slovenian courts had infringed his right to a fair hearing under Article 6 § 1 of the Convention by recognising the Israeli judgments, which he alleged had been rendered in unfair proceedings. He pointed out that the proceedings in Israel had been conducted in a country in which he had had no one to trust and in a language he did not understand. He had since the beginning of the proceedings disputed the Israeli district court's jurisdiction in the matter but had been prepared to be examined by way of the procedure under the Hague Evidence Convention, which had meant in Slovenia, pursuant to the Slovenian rules and in the Slovenian language. This was the only way he had been prepared to give his defence orally; he had not been informed that he could submit a concluding written statement (see paragraph 17 above). The procedure under the Hague Evidence Convention would have also been the only way to ensure the witnesses' cooperation as he had had no way to make them go to Israel or participate in the proceedings via video link.

49. In the applicant's view, the Israeli district court had failed to explain why the procedure under the Hague Evidence Convention, which was specifically aimed at assisting the

examination of foreign witnesses, could not have been used to hear him. As regards the witnesses, the Israeli district court, which had clearly accepted the Hague Evidence Convention procedure as an appropriate way to hear the witnesses, had unjustifiably cancelled the request made under this instrument. Referring to the Ministry of Justice's letter of 10 February 2004 and the lack of response to it from the Israeli authorities, the applicant pointed out that he should have not been held responsible for the failed attempt to examine the witnesses in Slovenia.

50. The applicant next submitted that his statement had been excluded because he had refused to participate at the trial via video link. However, his witnesses' statements had been excluded because they had not appeared at the trial in Israel after the procedure under the Hague Evidence Convention had been discontinued. He repeated in this connection that it had not been his fault that the latter procedure had been discontinued and argued that the exclusion of his and the witnesses' statements had been a radical and disproportionate measure. In this connection, he disputed the comparison between the Slovenian and Israeli procedural rules, submitting that in Slovenia the witnesses could have been compelled to appear and the party would not have been made to bear the consequences of the witnesses' lack of cooperation.

51. The applicant argued that the Israeli district court had also acted contrary to his right to a fair trial by appointing his former lawyer, whom he had no longer trusted, as the agent for serving court documents on him, and by not serving any documents, not even the decision to appoint the aforementioned agent, on him directly. He also alleged that he had received no communication from the Israeli district court afterwards, not even the impugned judgments, of which he had only become aware when the request for recognition had been made, that is, after they had become final and enforceable.

52. Lastly, the applicant submitted that under Slovenian law he could not have been held liable for the damage incurred by E.M. Instead, a claim would have had to be brought against the hospital. There had been nothing preventing E.M. from instituting proceedings in Slovenia where the surgery had taken place.

(b) The Government

53. In the Government's view, the domestic courts had conducted an appropriate review of the Israeli judgments. They could have only relied on the applicant's submissions and the description of the events as set out in the Israeli judgments. As regards the Hague Evidence Convention, the Government pointed out that it did not have a compulsory character. In other words, Israel had not been required to examine evidence by seeking assistance from a Slovenian court. Relying on the findings of the domestic courts, the Government argued that the applicant had been given sufficient opportunities to defend himself and present evidence in Israel. He had refused to participate at the trial via video link and appoint a lawyer without any justified reason. The Government also argued that it did not appear from the Israeli judgments that the applicant had been asked to compel the witnesses to testify via video link or to come to Israel and that he had likewise not argued that this had been the case.

54. The Government maintained that E.M.'s rights should also be accorded sufficient importance. The exclusion of the applicant's statement and evidence based on the fact that that evidence could have not been tested by E.M. had been acceptable since it had only taken place after the applicant

had been presented with reasonable chances to participate in the proceedings. As regards the service of the Israeli district court's decisions on the applicant's former lawyer, the Government submitted that in the domestic proceedings the applicant had not demonstrated that the Israeli judgments had not been served on him.

2. The Court's assessment

(a) Level of review required by the domestic courts

(i) Relevant case-law of the Court

55. The Court has dealt with complaints relating to the recognition or enforcement of decisions rendered by foreign courts on a few occasions. Most notably, in *Drozd and Janousek v. France and Spain* (26 June 1992, Series A no. 240), concerning the enforcement in France of a prison sentence given by a court in Andorra (which was not a member State of the Convention at the material time), the Court held in the criminal-law context, with respect to Article 5 § 1, as follows (ibid., § 110):

"... As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 ... of the Convention ... The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (see, *mutatis mutandis*, the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 45, para. 113)."

56. In a subsequent case, *Pellegrini v. Italy* (no. 30882/96, ECHR 2001-VIII), relating to the granting of *exequatur* for a decision given by the ecclesiastical courts declaring a marriage null and void, the Court described its task as one of verifying whether the Italian courts, before authorising enforcement of the aforementioned decision, duly satisfied themselves that the relevant proceedings in the Vatican fulfilled the guarantees of Article 6. The Court explained that such a review was especially necessary where the implications of a declaration of enforceability were of paramount importance for the parties (ibid., § 40). It went on to find a violation of Article 6 as the domestic courts had not attached importance to, *inter alia*, the applicant's lack of opportunity to examine the evidence against her in the proceedings in the Vatican (ibid., §§ 41-47).

57. In the decision in the case of *Saccoccia v. Austria* ((dec.), no. 69917/01, 5 July 2007), where the applicant complained that the proceedings before the United States courts had not complied with the requirements of a fair trial and that the Austrian court had not duly examined this issue before enforcing the forfeiture order (via *exequatur* proceedings), the Court referred to the principles relating to different levels of review stated in the two aforementioned judgments (see paragraphs 55 and 56 above). It did not find it necessary to decide in the abstract which level of review was required from a Convention point of view in the case under consideration, since, in any event, domestic law had required the Austrian courts to satisfy themselves that the decision to be enforced was given in proceedings complying with the requirements of Article 6. The Austrian courts found no indication that the United States courts had failed to comply with such

requirements. The Court, having regard to the Vienna Court of Appeal's detailed examination of the issues raised by the applicant, considered its review sufficient for the purposes of Article 6. It rejected the complaint as manifestly ill-founded.

58. In a more recent case, *Avotiņš v. Latvia* ([GC], no. 17502/07, 23 May 2016), the Court reiterated that a court examining a request for recognition and enforcement of a foreign judgment could not grant the request without first conducting some measure of review of that judgment in the light of the guarantees of a fair hearing, noting that the intensity of that review could vary depending on the nature of the case (ibid., § 98). In that particular case, the enforcement in Latvia of a judgment delivered in Cyprus took place in accordance with the Brussels I Regulation. The Court, which found no violation of Article 6, examined whether the presumption of equivalent protection related to the legal system of the European Union ("EU") applied and, after finding that it did, ascertained whether the protection of the Convention rights could be considered to have been manifestly deficient (ibid., §§ 101-25).

(ii) Level of review by the domestic courts required in the present case

59. The above-mentioned case-law indicates that before enforcing a foreign decision the domestic courts are obliged to conduct some measure of review. While initially, in the case of *Drozd and Janousek* concerning Article 5, there seems to be a suggestion that such a review could be limited to the question of a flagrant denial of justice, *Pellegrini* clarified that in the context of Article 6 the review might need to extend to the compliance of the foreign proceedings with the guarantees of this provision, especially where the implications of a declaration of enforceability were of paramount importance for the parties. In two subsequent cases, the Court dealt with somehow particular situations. *Saccoccia* concerned a situation where the foreign proceedings leading to the decision to be enforced had in any event been assessed from the perspective of their compliance with Article 6 by the domestic courts. That made it unnecessary for the Court to take any stand as regards the level of review required by the Convention. *Avotiņš*, on the other hand, concerned enforcement of a decision which was adopted in one of the member States of the EU and subject to EU law concerning recognition of decisions. The lower intensity of review applied in that case was thus related to that particular feature (presumption of equivalent protection).

60. As to the present case, the Court notes that the Israeli judgments had caused serious financial and reputational damage for the applicant, finding him directly and exclusively liable for the serious damage to E.M.'s health which allegedly resulted from the medical care provided to him at Ljubljana University Hospital. The applicant was liable to pay to E.M. over EUR 2 million in damages. These judgments could therefore be deemed to be of paramount importance to the applicant (see *Pellegrini*, cited above, § 40). Moreover, the Slovenian courts themselves interpreted domestic law as requiring them to review whether the judgments to be recognised had been given in proceedings complying with the guarantees of a fair trial (see paragraphs 25, 26 and 34 above). The Court, having regard to the foregoing and noting that it has not been argued that a presumption of equivalent protection should apply in the present case, sees no reasons to depart from the approach set out in *Pellegrini* (cited above). It should thus assess whether, before recognising the Israeli judgments, the national authorities duly satisfied themselves that the relevant proceedings in Israel fulfilled the guarantees of Article 6 § 1.

(b) Assessment of the compliance of the domestic review with Article 6 § 1

61. The crux of the applicant's grievance lies in his alleged inability to participate effectively in the trial in Israel, which, in his view, had not been accorded sufficient importance by the Slovenian courts. In particular, he alleged that the only meaningful way to have his evidence examined had been via the procedure under the Hague Evidence Convention, but that this had been denied to him by the Israeli district court. He also alleged that not enough had been done to communicate the Israeli district court's decisions to him after he had cancelled the power of attorney of his Israeli representative, resulting in him being unable to mount his defence. The applicant submitted that because of these procedural flaws, which had, in his view, rendered the proceedings in Israel unfair, the Slovenian courts should have refused to recognise the Israeli judgments.

62. The Court notes that the domestic authorities reviewed the applicant's grievance in view of the guarantees of a fair trial but dismissed them essentially because they considered, one the one hand, that the unfavourable outcome of the Israeli proceedings based almost exclusively on the evidence given by the plaintiff had been the consequence of the applicant's waiver to defend himself in person or by a legal representative, and, on the other hand, that the applicant had been given sufficient opportunities to present the evidence and defend himself in Israel. In this connection, the Court is mindful of its fundamentally subsidiary role in the supervisory mechanism established by the Convention, whereby the Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 250, 1 December 2020). However, the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and it falls ultimately on the latter to determine whether the domestic decisions produce consequences that are consistent with the principles of the Convention (see, *mutatis mutandis*, *Guðmundur Andri Ástráðsson*, cited above, and *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 191, ECHR 2006-V). It is in this context that the Court should in the present case examine whether, in reviewing the Israeli judgments, the Slovenian courts applied standards which were in conformity with the principles embodied in Article 6 § 1 of the Convention.

63. The Court takes note of the applicant's complaint that because the Israeli district court had refused to examine him and his witnesses by way of the procedure under the Hague Evidence Convention, he was unable to effectively defend himself. The Slovenian courts dismissed this complaint, finding that the applicant had not put forward any justified reasons for not attending the trial in Israel (see paragraphs 27 and 30 above), and that, given his inactivity and the lack of progress with the letter of request, the Israeli district court had not been required to examine the witnesses in this way (see paragraphs 27 and 31 above).

64. The Court notes that fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention are the adversarial principle and the principle of equality of arms, which are closely linked. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent or opponents (see, for example, *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 56, ECHR 2004-III). A difference of

treatment in respect of the hearing of the parties' witnesses may be such as to infringe these principles (see *Ankerl v. Switzerland*, 23 October 1996, § 38, *Reports* 1996-V).

65. As regards the applicant's right to be heard by the Israeli district court, the Court agrees with the Slovenian courts' finding that the applicant did not provide sufficient reasons for his refusal to attend in person the trial in Israel of which he had been notified. The decision not to hear the applicant via the Hague Evidence Convention procedure could therefore be considered justified (see paragraphs 5, 27 and 30 above).

66. As regards the applicant's witnesses, he informed the Israeli district court that they had declined to travel to Israel and that the Hague Evidence Convention procedure would have allowed them to be summoned to appear for examination before a Slovenian court (see paragraphs 5 and 7 above). The Court notes in this connection that the dispute before the Israeli district court concerned events which had taken place in Slovenia, namely surgery on and post-operative treatment of E.M., and that the defendant and the majority of witnesses (members of the medical team) who could testify about the treatment and the circumstances thereof were from Slovenia. In these particular circumstances, it would seem reasonable that the evidence be gathered in Slovenia using the procedure provided for in the Hague Evidence Convention. This appears to have been the only formalised way available to the Israeli district court to collect evidence in Slovenia. The Israeli district court itself agreed to submit the request under the Hague Evidence Convention to the Slovenian authorities, but a year later cancelled this decision at the request of E.M. (see paragraphs 12, 13 and 16 above).

67. The Slovenian courts when reviewing the Israeli judgments accepted that the Israeli district court's decision to discontinue the Hague Evidence Convention procedure was justified. The Constitutional Court referred in this connection to E.M.'s right to a trial within a reasonable time (see paragraph 31 above). However, the Court notes that while the prompt conduct of the proceedings is of great importance, it does not justify disregarding such a fundamental principle as the right to adversarial proceedings. In fact, Article 6 § 1 is intended above all to secure the interests of the parties and those of the proper administration of justice (see *Nideröst-Huber v. Switzerland*, 18 February 1997, § 30, *Reports* 1997-I). The Court also observes that there is no reason to believe that the Hague Evidence Convention procedure would have *per se* caused significant delays (see Article 9 cited in paragraph 36 above) and sees no basis for the conclusion that the applicant delayed the process. As a matter of fact, he made a request for the examination of evidence in Slovenia on 1 January 1999. He explicitly relied on the Hague Evidence Convention on 22 September 1999. On 6 December 2000, after the Hague Evidence Convention had entered into force with respect to Slovenia, he repeated his request (see paragraphs 7 and 36 above). The Israeli district court did not deal with this request until 27 August 2001 and contacted the Slovenian authorities in this regard on 16 September 2003 (see paragraphs 5 to 12 above). Significant delays had therefore already occurred at this stage of the proceedings, and they could not be attributed to the applicant. There is also no indication that the applicant was required to take any steps with respect to the Ministry of Justice's letter of 10 February 2004 (see paragraph 12 above and paragraph 68 below). In view of the foregoing, the Court finds that while E.M.'s right to a trial within a reasonable time was undoubtedly an important consideration, it was to be secured by the Israeli district court and could not, without

further relevant considerations, justify the discontinuation of the procedure which was important for the applicant's right to present evidence.

68. The Constitutional Court also accepted the Israeli district court's argument that the discontinuation of the Hague Evidence Convention procedure was justified owing to the lack of progress or "practical obstacles" (see paragraph 31 above). The Court notes that it was the Israeli authorities and not the applicant who failed to respond to the Ministry of Justice's letter of 10 February 2004 regarding certain issues pertinent to the execution of the request (see paragraph 12 above). There seems to be some suggestion in the Constitutional Court's decision that the Slovenian authority executing the letter of request had made demands which had not been compliant with the provisions of the Hague Evidence Convention (see paragraph 32 above). However, this could have been clarified in the communication between the two States and no justification as to why this had not at least been attempted was provided in the Israeli judgments. It is worth noting in this regard that the Israeli district court had requested the official in charge of the matter at the Directorate of Courts to inform it of the progress of the Hague Evidence Convention procedure in the applicant's case. Despite receiving no reply, it went on to decide to cancel the request for assistance under the Hague Evidence Convention (see paragraphs 15 and 16 above). The lack of progress, which was cited by the Israeli district court and accepted by the Slovenian Constitutional Court as justification for this decision, therefore appears to have been a result of the Israeli authorities' insufficient efforts rather than an unsurmountable obstacle.

69. In view of the above consideration, the Court finds that the grounds on which the Constitutional Court relied were unable to justify the discontinuation of the Hague Evidence Convention procedure by the Israeli district court.

70. Regarding other possibilities for the applicant to obtain the examination of his witnesses, the Court observes that prior to submitting a request for the examination of witnesses by means of the Hague Evidence Convention procedure, the Israeli district court had decided that the witnesses would be examined via video link, to which the applicant had objected (see paragraphs 5, 7, 8, 10 and 11 above). The Court notes in this connection that the gathering of evidence could not take place in a legal vacuum. In the present case, no efforts were made by the Slovenian courts reviewing the Israeli judgments to discern what the modalities of witness examination by video link had been. No mention is made in the decisions of the Slovenian courts of practical and technical considerations, and, more importantly, of the legal basis for such direct taking of evidence in Slovenia (in this connection, see the letter of the Ministry of Justice of 7 September 1999, mentioned in paragraph 6 above) and of appropriate legal and language-related safeguards. The Slovenian courts also did not properly address, let alone refute, the applicant's argument concerning the lack of opportunity for him to summon the witnesses to appear via video link.

71. As to the applicant's opportunity to adduce and examine evidence at the trial in Israel, it is noted that the Israeli district court accepted that the examination of the medical staff in Israel was associated with difficulties as it, on the one hand, opted from the start for examination via video link (see paragraph 5 above), and, on the other hand, accepted that the expert on Slovenian law should only be examined after the security situation in Israel improved (see paragraph 11 above). The Ljubljana District Court referred to the burden that the examination of the applicant's witnesses in Israel would present for them and the applicant in terms of costs and security risk

and found that, consequently, the rejection of the request to use the Hague Evidence Convention procedure could be considered "equal to rejecting the proposed evidence". The Ljubljana District Court went on to find that the decision to hear the witnesses in Israel was nevertheless justified because the applicant had waived his right to continue to participate in the proceedings after he had cancelled the power of attorney of his then representative and had not appointed a new one (see paragraph 27 above).

72. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial. However, a waiver of that right must be established in an unequivocal manner and must not run counter to any important public interest (see, among many authorities, *Golubović v. Croatia*, no. 43947/10, § 38, 27 November 2012, and *Gladkiy v. Russia*, no. 3242/03, § 106, 21 December 2010). It notes that in the present case the applicant never explicitly waived his right to participation in the proceedings in Israel. While he refused to come to the trial in Israel, he insisted from the beginning of the proceedings that he and his witnesses be examined by the Slovenian court via the Hague Evidence Convention procedure and, as found in paragraph 40 above, he never withdrew this request. The Ljubljana District Court in fact acknowledged that the applicant had been active in the proceedings in Israel until he had cancelled the power of attorney of his then representative (see paragraph 27 above). It seems that the Slovenian courts considered that from that point onwards he had implicitly waived his right to participate in the proceedings in Israel by not appointing a new representative and by being "totally inactive" (see paragraphs 27 and 28 above).

73. The Court notes in this connection that after the applicant had cancelled the power of attorney given to his Israeli lawyer, the Israeli district court appointed an agent for the service of court decisions but there is nothing in the case file supporting the conclusion that the applicant was subsequently apprised of any of the events in the proceedings in Israel. It is true that the applicant did not appoint a new lawyer – a finding to which the Constitutional Court referred in dismissing his constitutional complaint (see paragraphs 31 and 33 above), however this did not mean that the Israeli district court did not need to conduct the proceedings in accordance with the fundamental principles of a fair trial. The Court reiterates in this connection that when the parties demonstrate a certain lack of diligence, the consequences attributed to their behaviour by the domestic courts must be commensurate with the gravity of their failings and take heed of the overarching principle of a fair hearing (see *Schmidt v. Latvia*, no. 22493/05, § 95, 27 April 2017, and *Ažđajić v. Slovenia*, no. 71872/12, § 71, 8 October 2015).

74. The Court observes that following the applicant's cancellation of the power of attorney of his lawyer, the Israeli district court decided not to proceed with the Hague Evidence Convention procedure and to call on the applicant to present his evidence in court in Israel, as well as submit his concluding statement. The applicant did not appear at any of the hearings, nor did any of his witnesses, and did not submit any further statement. As a result of this, the case was decided on the basis of the allegations made by the plaintiff and the evidence put forward by him, which essentially consisted of his brothers' testimony and the opinion of expert E. (see paragraph 20 above). The Court finds it important to note that, given the nature of the claim brought against the applicant, which by the Israeli district court's own findings concerned the care which had been predominately provided

by other members of the medical team at Ljubljana University Hospital (see paragraph 20 above), the examination of the medical staff was crucial for establishing the facts and thus to the outcome of the proceedings. It further notes that the only evidence presented on behalf of the applicant at the trial in Israel was the opinion of expert R. However, while this opinion could have been important, it carried limited weight in the absence of the supporting report of the Slovenian anaesthetist, which was removed from the case file together with all other statements of the members of the medical team (see paragraph 20 above). Moreover, the Israeli district court never examined the Slovenian law expert even though his examination would be important for the assessment of the applicant's argument that the Slovenian law should have applied to the case and that accordingly the claim had expired, and, in the alternative, that the hospital should be held responsible for any medical malpractice. In fact, the Israeli district court did not even intend to examine the Slovenian law expert via the Hague Convention procedure, holding at one point that he would be examined in Israel after the security situation improved. The failure to examine him meant that the Israeli district court without any further consideration applied Israeli law, which was unfavourable to the applicant (see paragraph 20 above).

75. The Slovenian courts did not give due regard to the above aspects of the case. In their decisions, they did not attach sufficient weight to the consequences that the non-examination of the witnesses (including the expert on Slovenian law) via the Hague Evidence Convention procedure and the ensuing exclusion of their statements had for the applicant's right to present evidence. This right is a fundamental component of the principle of a fair hearing and the Slovenian courts should have satisfied themselves that it had been respected in the proceedings in Israel before recognising the Israeli judgments.

76. In view of the foregoing, the Court finds that the Slovenian courts, by failing to duly satisfy themselves, before recognising the Israeli judgments, that the trial in Israel had been fair, breached their duty under Article 6 § 1 of the Convention. There has therefore been a violation of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

1. Pecuniary damage

78. The applicant submitted that as a result of the recognition of the Israeli judgments by the Slovenian courts E.M. had instituted several sets of enforcement proceedings directed against his various assets (his bank accounts, pension and immovable and movable property). He had so far allegedly lost about 300,000 euros (EUR). He argued that he could not obtain precise information from the Slovenian authorities as regards the sums taken from his pension instalments and that,

in any event, the pecuniary damage should be considered to amount to the total sum of obligations arising from the recognised Israeli judgments together with associated interest, costs and taxes, which, according to the Government's calculations, amounted to at least EUR 3.4 million.

79. The Government argued that there was no causal link between the alleged violations and the alleged pecuniary damage, that the applicant could not be entitled to possible future pecuniary damage which had not yet been sustained, and that his claim regarding pecuniary damage sustained was not supported by any evidence.

80. Having regard to the lack of information concerning the amount the applicant has so far been made to pay in the enforcement proceedings related to the recognition of the Israeli judgments and the possibilities open to him under domestic law to obtain discontinuation of the enforcement of the remaining sums related to that recognition, the Court considers that the question of the application of Article 41 in respect of pecuniary damage is not ready for decision. It is therefore necessary to reserve the matter, due regard being had to the possibility of an agreement between the respondent State and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

2. Non-pecuniary damage

81. The applicant claimed EUR 500,000 in respect of non-pecuniary damage.

82. The Government submitted that the Court should determine this issue in line with its practice.

83. The Court considers that the applicant undoubtedly suffered distress and frustration in view of the recognition and the consequent enforcement of the Israeli judgments. However, it considers the amount claimed by him excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 9,600 in respect of non-pecuniary damage.

B. Costs and expenses

84. The applicant also claimed EUR 16,900 for the costs and expenses incurred before the domestic courts and EUR 4,500 for those incurred before the Court.

85. The Government disputed that these costs had been incurred.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 for the costs and expenses of the domestic proceedings and EUR 4,500 for the costs and expenses of the proceedings before the Court, incurred up to the adoption of the present judgment, which in total amount to EUR 6,000, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that the question of the application of Article 41 of the Convention in respect of pecuniary damage is not ready for decision and accordingly:

(a) *reserves* the said question;

(b) *invites* the parties to submit, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

(c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix the same if need be;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 9,600 (nine thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction in respect of non-pecuniary damage and costs and expenses incurred up to the adoption of this judgment.

Done in English, and notified in writing on 20 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar Acting

Krzysztof Wojtyczek
President