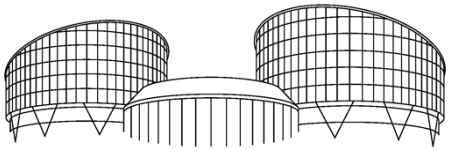

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GAGGL v. AUSTRIA

(Application no. 63950/19)

JUDGMENT

Art 34 • Locus standi • Applicant's conviction for the attempted murder of her husband • Albeit the victim of the crime, surviving husband, with legitimate interest in the circumstances in pursuing application in late wife's stead
Art 6 § 1 (criminal) • Fair hearing • Trial court's refusal of applicant's application to commission a third and decisive expert opinion concerning her mental state at the time of offence, despite two available expert opinions opposed on that factual issue, significantly impaired defence rights • Applicant deprived of opportunity to challenge decisive expert evidence effectively • Overall fairness of trial undermined

STRASBOURG

8 November 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 Gaggl v. Austria,

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

Tim Eicke*, President,*
Gabriele Kucsko-Stadlmayer*,*
Faris Vehabović*,*
Iulia Antoanella Motoc*,*
Armen Harutyunyan*,*
Pere Pastor Vilanova*,*
Jolien Schukking*, judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 63950/19) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Ms Hildegard Gaggl ("the applicant"), on 3 December 2019;

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

the decision to grant the application priority under Rule 41 of the Rules of Court;

the parties' observations;

Having deliberated in private on 11 October 2022,

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

INTRODUCTION

1. The present case concerns the applicant's complaints under Articles 5 and 6 of the Convention that the criminal trial against her and her conviction for the attempted murder of her husband was unfair and the detention resulting from it unlawful. In particular, she complained about not having been provided with the opportunity to understand the reasons on which the jury had based her conviction given that the conclusions of the two expert opinions on her mental state at the time of the offence were diametrically opposed and that the domestic courts dismissed her application to obtain a third and decisive expert opinion.

THE FACTS

2. The applicant was born in 1940 and died on 12 October 2021. Her husband, Mr Alois Gaggl, expressed his wish as next of kin to continue the proceedings before the Court in the applicant's stead, indicating that the continuation was both in the interest of his deceased wife and of him personally, in particular since, although he had been the victim of the criminal offence, he was still convinced that his wife had acted in a state of insanity.

The applicant was represented by Mr A. Todor-Kostic, a lawyer practising in Velden am Wörthersee.

3. The Government were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

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

I. THE INCIDENT OF 3 JANUARY 2018 AND THE INVESTIGATION THEREOF

5. In the early morning hours of 3 January 2018, the applicant repeatedly stabbed and attempted to kill her husband. On the same day, the Klagenfurt public prosecutor's office (*Staatsanwaltschaft*) initiated an investigation during which it was established, and not disputed by the applicant, that the then seventy-seven-year-old applicant had attempted to kill her then eighty-four-year-old husband, to whom she had been married for over fifty-two years. After having repeatedly stabbed him with two kitchen knives, she waited several hours for his death before contacting her niece (who later called the ambulance). Her husband suffered four stab wounds. The applicant testified that she had intended to first kill her husband and then to commit suicide, because she had wished for both of them, given their advanced age and state of health, to move to a nursing home, and her husband had not agreed. The investigation did not establish any other motive, and her husband described their marriage as very normal and consisting of a good relationship. He did not join the criminal proceedings as a private party and specifically renounced his right to compensation during the trial. He further renounced his right to refuse testimony against a family member and testified during the trial hearing in his wife's favour, stating that he was not upset with her for what she had done.

6. On 4 January 2018 the applicant was arrested and, on 31 January 2018, placed in provisional detention (*vorläufige Anhaltung*) in a public hospital for mental illnesses, in accordance with Article 429 of the Code of Criminal Procedure (hereinafter, "the CCP" – see paragraph 29 below).

7. On 5 January 2018 the public prosecutor's office ordered an expert opinion from Dr W., a specialist in psychiatry and neurology, to assess the applicant's soundness of mind and her dangerousness for the purposes of Article 21 §§ 1 and 2 of the Criminal Code (hereinafter, "the CC" – see paragraph 23 below). Dr W. submitted his expert opinion on 19 January 2018 and, at the request of the public prosecutor's office, supplemented it on 2 February 2018. He concluded that the applicant suffered from a delusional disorder and a mild cognitive impairment and that her ability to understand the wrongfulness of her actions (*Diskretionsfähigkeit*) had been suspended in relation to the alleged offence, in other words that she had no longer been

able to act in accordance with reality and to comprehend the punishable nature of her act, or to consider rational alternatives or an alternative course of action. He further held that her delusional disorder corresponded to the concept of mental illness within the meaning of Article 11 of the CC (see paragraph 22 below), and that she could not be held criminally responsible (*nicht zurechnungsfähig*) for her acts in the night of 3 January 2018.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

8. On 9 April 2018 the public prosecutor's office made an application to the Klagenfurt Regional Court (*Landesgericht*), in connection with the attempted murder of her husband, for the applicant's confinement in an institution for mentally ill offenders in accordance with Article 21 § 1 of the CC, which foresees confinement as a preventive measure for persons who have committed an offence but cannot be punished for the sole reason of having done so under the influence of a state of mind which excludes criminal responsibility resulting from a serious mental or emotional disorder (see paragraph 23 below), in conjunction with Article 429 § 1 of the CCP (see paragraph 29 below).

9. At the request of the Regional Court, Dr W. submitted another expert opinion on 2 July 2018, confirming his diagnosis as set out in his first expert opinion (see paragraph 7 above). He considered the risk of the applicant committing another offence in the future to be very low under the treatment and care conditions at that time and deemed it possible to suspend the preventive measure by replacing it with less severe measures. He recommended a placement in a centre for psychosocial rehabilitation, with continued nursing and medical care, and continued medication and psychotherapy and psychiatric checks at least monthly.

10. On 19 July 2018 the Regional Court, sitting as an assize court, held a first oral hearing, questioning among others Dr W., who maintained his expert opinion in full. At the request of the jurors, who indicated that this expert opinion was not conclusive (*nicht nachvollziehbar*) to them, the court, after rehearing Dr W., ordered another expert opinion from a specialist in psychiatry to assess the applicant's soundness of mind at the time of the events. According to the court, Dr W. had not been able to show compellingly (*nicht zwingend darstellen können*) the extent to which the applicant's acts had resulted from her mental illness, a delusional disorder, that he had certified. For this reason, the jurors needed "a further basis for their decision" (*eine weitere Entscheidungsgrundlage*). It appears from the record of the trial hearing that the Regional Court postponed the continuation of the trial pending obtaining a supplementary expert opinion by another expert (*ergänzendes Sachverständigengutachten*).

11. On 6 September 2018 Dr H., also a specialist in psychiatry and neurology and possessing a *venia docendi* (authorisation to teach at a

university based on a postdoctoral lecturing qualification), submitted his expert opinion, concluding that the applicant suffered from a persistent delusional disorder and a depressive-anxious adjustment disorder. As regards Dr W.'s expert opinion, Dr H. considered that his diagnosis was "altogether quite conclusive" (*insgesamt gut nachvollziehbar*), and that his line of reasoning led to a deduction that was possible (*mögliche Schlussfolgerung*). However, in Dr H.'s opinion, the delusional disorder had been overemphasised by Dr W. In conclusion, Dr H. considered that there were no indications that the applicant had suffered from a mental disturbance within the meaning of Article 11 of the CC (see paragraph 22 below) during the time of the events; therefore, she could be held criminally responsible. In other words, the applicant had had the ability to understand the wrongfulness of her actions and to act in accordance with that understanding (*Dispositions- und Diskretionsfähigkeit*).

12. During the oral hearing of 18 October 2018, Dr H. was questioned and maintained his expert opinion in full. He considered that the diagnosis made by Dr W. was correct, that he himself had arrived at the same conclusion after his own analysis, and that the respective deductions made had differed in particular in their evaluations and related conclusions about the significance of the delusional disorder. Dr W., who had also been summoned, in turn stated that he agreed with Dr H.'s statements with regard to the diagnosis but maintained his own opinion with respect to the deductions made concerning the applicant's criminal liability.

13. The applicant subsequently made an application that a third and decisive expert opinion (*Obergutachten*) be obtained under Article 127 § 3 of the CCP (see paragraph 24 below), as she considered the two expert opinions to be contradictory. The public prosecutor's office concurred with her application, which was, however, dismissed by the Regional Court after further questioning of Dr H. The court found that the defence and the public prosecutor's office had failed to demonstrate that Dr H.'s expert opinion was inconsistent or deficient. The fact that the experts had ascertained the same facts but had arrived at different results only because of diverging scientific views did not necessarily imply that the expert opinions were deficient. Furthermore, under the second half-sentence of Article 127 § 3 of the CCP (see paragraph 24 below), the appointment of Dr H. had already constituted the appointment of a decisive expert, which is why the appointment of a further expert was excluded *ex lege*.

14. During the next and last oral hearing of 3 December 2018, both experts were present and in general maintained their respective assessments. The applicant again made an application for the commission of a third and decisive expert opinion, with the public prosecutor's office again concurring. The Regional Court once again dismissed the application, for the same reasons as those given in relation to the first such application (see paragraph 13 above).

15. The court then concluded the procedure for taking evidence and read out the questions to be answered by the jurors, which were, in so far as relevant, as follows:

> "(1) Main question:
>
> Did Hildegard GAGGL try to kill her husband in K. on 3 January 2018 ... by repeatedly stabbing him with two knives, each with a blade length of approximately 15 cm, in the neck, in the area of the heart under the left nipple, in the area under the left collarbone in the upper chest region and in the area of the anterior axillary fold on the left ribcage, thus inflicting four stab wounds?
>
> (2) Additional question (to be answered if the answer to the main question is affirmative):
>
> Was Hildegard GAGGL, at the time of the offence, incapable of understanding the wrongfulness of her actions or of acting in accordance with this understanding because of a mental disorder, a mental disability, a serious disturbance of consciousness or because of another serious psychological disorder equivalent to one of these conditions, namely a delusional disorder?"

16. In accordance with Article 321 of the CCP (see paragraph 25 below), the court provided the jurors with written instructions on legal issues (*Rechtsbelehrung*). The applicant submitted that she had not received a copy thereof. The Government stated that she had had unrestricted access to the case file at all stages of the proceedings and was therefore able to find out about the directions on legal issues, as they had been attached to the transcript of the trial hearing in accordance with Article 321 of the CCP (see paragraph 25 below).

17. After secret deliberations, the eight jury members answered the main question with eight votes in favour, and the additional question with eight votes against. It appears from the Governments' submissions (see paragraph 46 below) that the jury stated in a short note (*Niederschrift*) the considerations on the basis of which they answered the questions put to them in accordance with Article 331 § 3 of the CCP (see paragraph 26 below). The Regional Court convicted the applicant of attempted murder and sentenced her to twelve years' imprisonment.

III. JUDICIAL REVIEW PROCEEDINGS

18. Both the applicant and the public prosecutor's office (in support of the applicant) lodged a plea of nullity (*Nichtigkeitsbeschwerde*) with the Supreme Court (*Oberster Gerichtshof*), citing as the main reason the fact that the Regional Court had unlawfully dismissed their application for the appointment of a third and decisive expert.

19. An opinion (*croquis*) of the Attorney General (*Generalprokuratur*) of 7 March 2019 recommended rejecting the pleas of nullity. It considered that Dr H. had been appointed in accordance with the first sentence of Article 127 § 3 of the CCP (see paragraph 24 below). Consequently, for a third expert to

be appointed, it would have been necessary to identify a deficiency in the second expert's findings. Such a deficiency had not, however, been identified and, therefore, the Regional Court had correctly dismissed the applications of the applicant and the public prosecutor's office to appoint a third and decisive expert.

20. On 21 May 2019 the Supreme Court dismissed the plea of nullity and referred the case to the Graz Court of Appeal (*Oberlandesgericht*) for a decision on the appeals (*Berufungen*). As regards ordering a third and decisive expert opinion, the Supreme Court considered that Dr H. had been appointed in accordance with the first sentence of Article 127 § 3 of the CCP (see paragraph 24 below) because the first expert opinion provided by Dr W. had been found to be deficient by the first-instance court, even after a procedure to remedy the deficiencies had been carried out. Furthermore, in his expert opinion (as discussed at the trial hearing on 18 October 2018 and essentially upheld on 3 December 2018 on the basis of more extensive information for the assessment being available – see paragraphs 12 and 14 above), Dr H. had concluded that the delusional disorder – diagnosed in concurrence with Dr W. – had not resulted in the applicant not being able to understand the wrongfulness of her actions and to act in accordance with that understanding at the time of committing the offence. The Supreme Court held that an application to obtain another expert opinion would thus only have a chance of success if it pointed out a deficiency in the expert opinion of Dr H., who had been consulted in the context of eliminating the deficiencies in Dr W.'s opinion. As those deficiencies were not substantiated in the application, the Supreme Court considered that it ultimately amounted to a "fishing expedition" (*Erkundungsbeweisführung*), which it held to be inadmissible.

21. On 10 July 2019 the Graz Court of Appeal dismissed the appeals by both the applicant and the public prosecutor's office against the sentence, essentially on the grounds that the punishment imposed by the first-instance court was proportionate to the seriousness of the crime and the perpetrator's fault and thus did not require any adjustment. It therefore confirmed the punishment of twelve years' imprisonment.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CRIMINAL CODE

22. Article 11 of the CC concerns the issue of incapacity in relation to criminal responsibility and reads, in so far as relevant, as follows:

> "A person who, at the time of the offence, is incapable of recognising the wrongfulness of his or her act or of acting on the basis of such recognition because of mental illness, mental disability, profound disturbance of consciousness or another serious mental disorder equivalent to one of these conditions, does not act culpably."

23. Confinement in an institution for mentally ill offenders as a preventive measure is dealt with in Article 21 of the CC, the relevant parts of which read as follows:

> "(1) If a person commits an offence punishable with a term of imprisonment exceeding one year, and if the person cannot be punished for the sole reason that he or she committed the offence under the influence of a state of mind that excludes responsibility (Article 11) resulting from a serious mental or emotional disorder, the court shall order his or her confinement in an institution for mentally ill offenders, if in view of his or her mental state and condition, and the nature of the offence it is to be feared that he or she will otherwise, under the influence of the mental or emotional disorder, commit a criminal offence with serious consequences.
>
> (2) If such a fear exists, an order for confinement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking responsibility, commits an offence punishable by a term of imprisonment exceeding one year under the influence of his or her severe mental or emotional disorder. In such a case the confinement shall be ordered at the same time as the sentence is passed."

II. CODE OF CRIMINAL PROCEDURE

24. Article 127 of the CCP, concerning expert opinions, reads, in so far as relevant, as follows:

> "(2) Experts shall give their findings and expert opinion *lege artis* and according to the best of their knowledge and conscience. They shall obey summonses from the public prosecutor's office and the court, and answer questions during trials, questionings and reconstructions of the criminal act.
>
> (3) If the findings are inconclusive or the expert opinion is contradictory or otherwise deficient, or if the statements of two experts on the facts observed by them or the conclusions drawn from their observations are significantly contradictory, and the concerns cannot be resolved through questioning, a further expert shall be commissioned. In the event that it concerns the examination of psychological conditions and developments, an expert opinion shall be obtained by an expert with an authorisation to teach at a domestic or foreign university."

In the practice of the domestic courts, an expert opinion requested under Article 127 § 3 of the CCP is often referred to as a decisive expert opinion (*Obergutachten*).

25. Article 321 of the CCP deals with instructions on legal issues (*Rechtsbelehrung*) and reads as follows:

> "(1) After consultation with the other members of the jury court, the presiding judge shall draw up the instructions on legal issues to be given to the jurors. The document shall be signed by the presiding judge and attached to the record of the main hearing.
>
> (2) The instructions on legal issues shall contain – separately for each question – a statement of the legal characteristics of the offence to which the main or contingent question is directed, as well as an explanation of the legal terms in the individual questions, and shall clarify the relationship of the individual questions to each other as well as the consequences of an affirmative or negative answer to each question."

26. The obligation to state in a short note (*Niederschrift*) the considerations on the basis of which the jurors have answered the questions put to them is detailed in Article 331 § 3 of the CCP, and reads as follows:

> "(3) After the voting has ended, the foreman shall state in a short note, separately for each question, the considerations which the majority of the jurors have taken into account in answering that question. The notes shall be drawn up in agreement with the jurors and signed by the foreman."

27. In accordance with Article 332 § 6 of the CCP, the notes detailing the jurors' considerations as regards their answers to the questions put to them and referred to in Article 331 § 3 (see paragraph 26 above) shall be attached to the record of the main hearing. They must not be referred to in the verdict, in accordance with Article 342 of the CCP.

28. Article 344 of the CCP concerns legal remedies against verdicts of jury trials, which are pleas of nullity (to the Supreme Court) and appeals (against the sentence to the Court of Appeal).

29. Article 429 of the CCP concerns the procedure for the confinement of mentally ill criminal offenders in an institution under Article 21 § 1 of the CC (see paragraph 23 above) and reads, in so far as relevant, as follows:

> "(1) If there are sufficient grounds for finding that the requirements of Article 21 § 1 of the Criminal Code are met, the public prosecutor's office shall lodge an application for confinement in an institution for mentally ill criminal offenders ...
>
> ...
>
> (4) ... if the person concerned cannot remain at liberty without danger to himself or herself, or to others, or if medical observation is required, his or her temporary detention in an institution for mentally ill criminal offenders or admission to a public hospital for mental illnesses shall be ordered ..."

III. DOMESTIC PRACTICE

30. According to the Supreme Court's case-law relating to Article 127 § 3 of the CCP (see paragraph 24 above), in the event of diverging expert opinions, not only with regard to the methodological approach, but also to the deductions made from the findings, the trial court is obliged to eliminate the contradictions by questioning the experts and, in the event that the attempt to remedy deficiencies is unsuccessful, obtain a further expert opinion (see decision 11Os198/08i, 24 March 2009).

31. In addition, when requesting the involvement of a third expert, it is necessary to explain the points on which the information provided by the two experts has significantly differed, and to explain that a procedure to remedy the deficiencies has been unsuccessful (see decision 14Os19/19d, 9 April 2019).

32. However, this does not apply if the second expert opinion has already been obtained because of a deficiency in the first expert opinion resulting from the vagueness of the findings or from an inconsistency or other causes

– which deficiency cannot be remedied by attempting the relevant procedure to do so (which must be carried out beforehand) – and no deficiency in the findings or the expert opinion of the second expert has been shown (see decision 12Os29/19k, 27 June 2019)

THE LAW

I. PRELIMINARY QUESTION OF *LOCUS STANDI*

33. Mr Alois Gaggl, the late applicant's husband and legal heir expressed his wish to continue the proceedings before the Court in the applicant's stead (see paragraph 2 above). He submitted that he had a personal interest of his own that the proceedings before the Court be continued, in particular since he himself had been involved in the criminal offence and was still convinced that his wife had been in a state of insanity.

34. The Government did not dispute the standing of the applicant's husband to pursue the application in her stead.

35. The Court notes that in various cases in which an applicant has died in the course of the Convention proceedings, it has taken into account the statements of the applicant's heirs or of close family members expressing the wish to pursue the proceedings before the Court (see, among other authorities, *Jėčius v. Lithuania*, no. 34578/97, § 41, ECHR 2000-IX; *Pisarkiewicz v. Poland*, no. 18967/02, §§ 30-33, 22 January 2008; and *Ergezen v. Turkey*, no. 73359/10, §§ 27-30, 8 April 2014). The Court has accepted that the next of kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see, for instance, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014). It is not only material interests which the successor of a deceased applicant may pursue by his or her wish to maintain the application. Human rights cases before the Court generally also have a moral dimension and persons near to an applicant may thus have a legitimate interest in ensuring that justice is done, even after the applicant's death (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII). In view of the above and having regard to the circumstances of the present case, in particular also the fact that although being the victim of the crime, Mr Alois Gaggl did not join the criminal proceedings at issue as a private party and specifically renounced his rights to compensation and to refuse testimony and instead testified in his wife's favour (see paragraph 5 above), the Court accepts that he has a legitimate interest in pursuing the application in his late wife's stead. However, for reasons of convenience, the text of this judgment will continue to refer to Ms Hildegard Gaggl as "the applicant" (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 1, ECHR 1999 VI).

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

36. The applicant complained that she was criminally convicted on the basis of two contradictory expert opinions and that the domestic courts should thus have granted her application to obtain a third expert opinion and that she was not in a position to understand the reasons why the jury had followed one expert opinion but not the other, rendering her trial unfair. She also maintained that jury trials in Austria are incompatible *per se* with the Convention. Lastly, she complained that, in its decision on her plea of nullity, the Supreme Court had reproduced the opinion given by the Attorney General almost verbatim, arguing that this demonstrated that the Supreme Court was biased. The applicant relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Admissibility

37. The Court will examine each complaint raised under Article 6 § 1 of the Convention separately.

38. First, as regards the applicant's contention that jury trials in Austria are incompatible *per se* with the Convention, the Court observes that several Council of Europe member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. The jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture; variations may concern the number of jurors, the qualifications they require, the way in which they are appointed and whether or not any forms of appeal lie against their decisions (see *Taxquet v. Belgium* [GC], no. 926/05, §§ 43-60, ECHR 2010). This is just one example among others of the variety of legal systems existing in Europe, and it is not the Court's task to standardise them. A State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention (see *Taxquet*, cited above, § 83, and *Achour v. France* [GC], no. 67335/01, § 51, ECHR 2006-IV). Furthermore, in cases arising from individual petitions, the Court's task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they affected the applicant gave rise to a violation of the Convention (see, among many other authorities, *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X).

39. The Court has thus already held that the institution of the lay jury as such cannot be called into question. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their

judicial systems are in compliance with the requirements of Article 6 of the Convention. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair (see *Taxquet*, cited above, § 84, with further references).

40. It follows that the applicant's complaint about the alleged non-compliance of jury trials in Austria with the Convention *per se* is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

41. The Court will now turn to the applicant's complaint that, in its decision on her plea of nullity, the Supreme Court was not impartial and independent as it had followed almost verbatim the opinion given by the Attorney General. The Court refers to its well-established case-law regarding the requirements of independence and impartiality of tribunals (see, among other authorities, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 218-234, 1 December 2020, and *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I). It notes that the applicant merely alleged that the Supreme Court had not formed its own opinion of her case, but did not produce any evidence in this respect. In the absence of other elements, the mere fact that the Supreme Court has agreed with and endorsed the position of the Attorney General cannot be seen as proof of bias; the applicant has therefore failed to demonstrate that her plea of nullity had not been duly considered by an independent and impartial tribunal. Consequently, this complaint is unsubstantiated and must be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

42. Lastly, as regards the applicant's complaint that her conviction was based on two contradictory expert opinions and that a third expert opinion should thus have been obtained and that the judgment lacked reasons as to why the jury had followed one expert opinion but not the other, rendering her trial unfair, the Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

43. The applicant maintained that her criminal trial had been unfair, as there had been two expert opinions which, although both confirming the same diagnosis attesting to the fact that she suffered from a delusional disorder, had

however come to diametrically opposite conclusions as to whether she could be held criminally liable at the time of the events. Consequently, there was insufficient evidence to resolve the factual questions which were essential to the lay jurors' decision. The domestic courts were thus under an obligation, under the first sentence of Article 127 § 3 of the CCP (see paragraph 24 above) to obtain a third expert opinion. However, in the present case, the domestic courts had interpreted the above-mentioned domestic law provision to the applicant's detriment, while at the same time impairing the rights of the defence by taking the position that the public prosecutor's office and defence counsel had not made sufficient objections to the expert opinion of Dr H., and that it had thus been correct for the domestic court to follow Dr H.'s view, without engaging a senior expert.

44. The applicant further submitted that that situation was aggravated by the domestic system of jury trials. She reiterated that she had not been given a copy of the written instructions on legal issues, as prepared by the professional judges for the lay jurors (see paragraph 16 above). Furthermore, lay jurors were not obliged to give reasons for their verdict. The applicant insisted that she had therefore not been in a position to understand the reasons for her conviction. In her view, neither of the two expert opinions had been shown to have been deficient, and consequently, a third and decisive expert opinion should have been ordered by the domestic courts.

(b) The Government

45. The Government argued that the second expert had been appointed in accordance with Article 127 § 3 of the CCP (see paragraph 24 above) after the attempt to remedy the deficient first expert opinion had failed. No objections having been raised in this regard, the domestic courts only had to ensure equality of arms with regard to the expert opinion prepared by Dr H. The Government contended that the applicant had had sufficient opportunity to challenge Dr H.'s expert opinion. Most importantly, she had had the opportunity to request a procedure to remedy any deficiencies in respect of the second expert opinion and, subsequently, to request the appointment of a third expert in the event that the second expert opinion was deficient or inconsistent. While she had indeed availed herself of that opportunity, she had failed to demonstrate such a deficiency in the second expert opinion.

46. As regards the applicant's complaint concerning the lack of reasons in judgments given in jury trials, the Government submitted that there are sufficient procedural guarantees in place to ensure Convention compliance. They referred to the questions put to the lay jurors and the related written instructions on legal issues (see paragraphs 15-16 above), which were attached to the transcript of the trial hearing, as prescribed by law (see paragraph 25 above), and were thus accessible to the applicant. Furthermore, the two expert opinions and the differences between them were extensively addressed during the trial hearings, and the courts had explained the reasons

for which the application for a third and decisive expert opinion had been dismissed. Given that Dr H.'s expert opinion had been the only one without deficiencies in the present case, it should have been clear to the applicant that the jurors would concur with his conclusions regarding her criminal liability. Moreover, the notes detailing the jurors' considerations were clear, leaving no room for doubt as to their reasoning, and had been accessible to the applicant (see Articles 331 § 3 and 332 § 6 of the CCP, quoted in paragraphs 26-27 above). While the Government provided the Court with a copy of these notes, they also insisted that they be kept confidential and excluded from the general access to the file.

2. The Court's assessment

(a) General principles established in the Court's case-law

(i) Fairness of criminal proceedings and taking of expert evidence

47. The Court reiterates that the right to a fair trial under Article 6 § 1 of the Convention is an unqualified right. What constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Taxquet*, cited above, § 84; *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, 13 September 2016). Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see *Beuze v. Belgium* [GC], no. 71409/10, § 121, 9 November 2018).

48. In accordance with the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 140, ECHR 2005-IV; see also *Bulut v. Austria*, 22 February 1996, *Reports of Judgments and Decisions* 1996-II, p. 359, § 47). Furthermore, the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise

be established by law and is enshrined in the maxim "nullum judicium sine lege". It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms. The primary purpose of procedural rules is to protect the defendant against any abuse of authority, and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 102, ECHR 2000-VII).

49. The Court reiterates that the appointment of experts is relevant in assessing whether the principle of equality of arms has been complied with. The mere fact that the experts in question are employed by one of the parties does not suffice to render the proceedings unfair. Although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion. In ascertaining the experts' procedural position and their role in the proceedings, one must not lose sight of the fact that the opinion given by any court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07 and 2 others, § 94, 12 May 2016, and *Shulepova v. Russia*, no. 34449/03, § 62, 11 December 2008). Furthermore, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it (see *Hodžić v. Croatia*, no. 28932/14, § 61, 4 April 2019, and *H. v. France*, 24 October 1989, §§ 60 and 61, Series A no. 162-A). Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 718 and 721, 25 July 2013, and *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 196, 26 July 2011).

50. Similarly, under Article 6 of the Convention, it is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not. The general rule is that the domestic judge has a wide discretion in choosing amongst conflicting expert opinions and picking one which he or she deems consistent and credible. However, the rules on admissibility of evidence may sometimes run counter to the principles of equality of arms and adversarial proceedings, or affect the fairness of the proceedings otherwise (see, for example, *Tamminen v. Finland*, no. 40847/98, §§ 39-41, 15 June 2004). In the context of expert evidence, the rules on its admissibility must not deprive the defence of the

opportunity to challenge it effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (see *Matytsina v. Russia*, no. 58428/10, § 169, 27 March 2014, and *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, §§ 38 et seq., 5 April 2007). In addition, while no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, among other authorities, *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (see *Gäfgen v. Germany* [GC], no. 22978/05, § 164, ECHR 2010).

(ii) Jury trials

51. The Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict (see *Taxquet*, cited above, § 90). The absence of reasons in a judgment, owing to the fact that the applicant's guilt has been determined by a lay jury, is not in itself contrary to the Convention (see *Lhermitte v. Belgium* [GC], no. 34238/09, § 66, 29 November 2016).

52. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (see *Taxquet*, cited above, § 90). In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see *Suominen v. Finland*, no. 37801/97, § 37, 1 July 2003; *Tatishvili v. Russia*, no. 1509/02, § 58, ECHR 2007-I; *Taxquet*, cited above; and *Lhermitte*, cited above, § 67).

53. The Court further reiterates that in the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions (see *Taxquet*, cited above, § 92). In these circumstances, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his or her conviction. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based and sufficiently offsetting

the fact that no reasons are given for the jury's answers. Lastly, regard must be had to any avenues of appeal open to the accused (see *Lhermitte*, cited above, § 68, with further references).

54. Seeing that compliance with the requirements of a fair trial must be assessed on the basis of the proceedings as a whole and in the specific context of the legal system concerned, the Court's task in reviewing the absence of a reasoned verdict is to determine whether, in the light of all the circumstances of the case, the proceedings afforded sufficient safeguards against arbitrariness and made it possible for the accused to understand why he or she was found guilty (see *Taxquet*, cited above, § 93).

55. It can be inferred from the Court's case-law that it should be possible to ascertain from a combined examination of the indictment and the questions to the jury which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the questions concerning the accused in the affirmative, in order to be able to: distinguish between the co-defendants; understand why a particular charge had been brought rather than another; determine why the jury had concluded that certain co-defendants bore less responsibility, thus receiving a lesser sentence; and discern why aggravating factors had been taken into account. In other words, the questions must be both precise and geared to each individual (see *Lhermitte*, cited above, §§ 69-72, with further references).

(b) Application of the above principles to the present case

56. The Court notes at the outset that the applicant did not dispute having committed the offence that she had been accused of (see paragraph 5 above). Her complaint that her trial had not been accompanied by sufficient safeguards to permit her to understand the reasons for the verdict is thus closely linked to the question whether she had been in a mental state that excluded her criminal liability at the time of the offence, and therefore also to her application to commission a third and decisive expert opinion on her mental state at that time in order to produce further evidence.

57. The first expert opinion requested by the public prosecutor's office from Dr W. concluded that the applicant could not be held criminally responsible for her acts in the night of 3 January 2018 (see paragraph 7 above). The trial court, however, considered that Dr W. had not conclusively shown the extent to which her acts resulted from her mental illness (see paragraph 10 above) and ordered a second expert opinion to be obtained, supplementary to the first expert opinion. The second expert, Dr H., concurred with the diagnosis as regards the applicant's mental illness but disagreed in respect of her mental state at the time of the events by concluding that she could be held criminally responsible (see paragraph 11 above). After questioning both experts and thereby undertaking the required procedure to remedy the contradictions in question, both the defence and the public prosecutor's office made an application for a third and decisive expert

opinion under Article 127 § 3 of the CCP (see paragraphs 13 and 24 above); however, this application was dismissed by the trial court on the grounds that the parties had failed to demonstrate that Dr H.'s expert opinion was inconsistent or deficient (see paragraphs 13-14 above). The Supreme Court upheld that reasoning by considering that the first expert opinion was deficient, and that it had not been shown that the second expert opinion was also deficient (see paragraph 20 above).

58. Whilst the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it (see paragraph 49 above), the Court emphasises, as regards the present case, that domestic legislation prescribes the commissioning of further expert opinions under certain circumstances as provided for in Article 127 § 3 of the CCP (see paragraph 24 above): if the findings are inconclusive or the expert opinion is contradictory or otherwise deficient, and an attempt to remedy the deficiency through questioning of the expert cannot resolve the concerns, a further expert opinion has to be obtained; the same applies if the statements of two experts present significantly contradictory findings or conclusions and an attempt to remedy the deficiencies by questioning the experts does not succeed in resolving the concerns (see also paragraph 30 above).

59. The Government insisted that the first expert opinion had been deficient, while the second had not, and that there had thus been no obligation to obtain a third expert opinion (see paragraphs 45-46 above). The applicant disagreed, arguing that neither expert opinion had had any deficiencies but that they had reached significantly contradictory conclusions, and that therefore a third and decisive expert opinion was required (see paragraphs 43-44 above). It is normally not the Court's role under Article 6 of the Convention to determine whether a particular expert report available to the domestic judge was reliable or not (see paragraph 50 above). Nor does it deal with alleged errors of law or fact committed by the domestic courts unless and in so far as they may have infringed rights and freedoms protected by the Convention, for instance where, in exceptional cases, such errors may be said to constitute "unfairness" incompatible with Article 6 of the Convention (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83 (a), 11 July 2017, with further references). In the applicant's case, however, the Court is not persuaded, for the reasons set out below, that the requirements of a fair trial were respected.

60. The Court observes that both experts concurred in their diagnosis of the applicant's mental illness but came to different conclusions regarding the impact thereof on her mental state at the time of the commission of the offence. In this context, it should be pointed out that in his expert opinion, Dr H. specifically stated that Dr W.'s diagnosis was *conclusive* (*nachvollziehbar*), and that Dr W.'s line of reasoning led to a deduction that was *possible* (see paragraph 11 above). In other words, unlike the trial court

(see paragraph 10 above), the second expert, who was appointed on the latter's request, did not point out or otherwise identify any deficiency in the first expert's opinion. In the view of the second expert, the different deductions were based on a different evaluation of the applicant's mental illness with respect to her actions. This appears to be the first indication that in fact, the first expert report was not deficient but only reflected a different, possible opinion.

61. In this context, the Court further observes that the Regional Court merely noted that Dr W. had not been able to show "compellingly" the extent to which the applicant's acts had resulted from her mental illness (see paragraph 10 above) without indicating any further the alleged deficiency. Most importantly, however, it appears clearly from the record of the trial hearing of 19 July 2018 that the Regional Court did not originally intend to consider the second expert opinion as constituting the decisive expert opinion, as it postponed the continuation of the trial pending obtaining a supplementary expert opinion as "further basis for their decision" (see paragraph 10 above). In other words, the Regional Court based its reasoning on its wish to receive an additional expert opinion, not the decisive expert opinion for the purposes of Article 127 § 3 of the CCP. The Government's argument that the applicant (and the public prosecutor's office) had not objected to the commissioning of this second expert opinion (see paragraph 45 above) is therefore unconvincing in so far as the applicant (and the public prosecutor's office) could reasonably have regarded the second expert report to be obtained as just that – an additional report, but not the decisive report. It can therefore also be left open whether the applicant indeed had any legal remedies at her disposal to object to a potential commissioning of a decisive expert opinion at that stage of the proceedings.

62. Moreover, the Court notes that the public prosecutor's office did not either appear to have regarded the first expert opinion as deficient, as it twice concurred with the applicant's application to commission a third and decisive expert opinion and also raised the dismissal of the application to obtain a third and decisive expert opinion in its own plea of nullity to the Supreme Court (see paragraphs 13-14 and 18 above).

63. In the instant case the Court notes moreover an element of surprise or ambiguity in that the Regional Court first ordered a supplementary expert opinion (see paragraph 10 above) and confronted both experts, leading the defence (and even the prosecution) to believe that if the differences in the experts' conclusions could not be reconciled, the parties would still have an opportunity to request a third and decisive expert opinion. However when the defence (and the prosecution) applied for such an expert opinion, the Regional Court held that the parties had failed to demonstrate a deficiency in the second expert's opinion, that the latter already was the decisive expert opinion, and that the commissioning of a further expert opinion was excluded *ex lege* (see paragraph 13 above). The Court further observes that by

expecting an accused to demonstrate the deficiency of an expert opinion, the domestic courts appear to set a rather high threshold for the accused to produce evidence (compare *Khodorkovskiy and Lebedev*, cited above, § 731, where the Court held that it may be hard to challenge an expert report without the assistance of another expert in the relevant field, and *Hodžić*, cited above, § 74).

64. In this context, while the trial court had considered Dr W.'s expert opinion not conclusive (see paragraph 10 above) but Dr H.'s expert opinion had not identified any deficiency of his colleague's opinion (see paragraph 60 above), the Court finds it striking that the application of Article 127 § 3 of the CCP (see paragraph 24 above) to the instant case by the Regional Court, assuming a "deficiency" of Dr W.'s opinion (see paragraph 20 above), does not appear to have been based on any previous domestic case-law (see the later Supreme Court judgment cited in paragraph 32 above). The applicant could therefore also not have been able to foresee that her application to commission a third and decisive expert opinion would be rejected on that basis, and the Government's argument relying on the case-law of the Supreme Court subsequent to the present case (see paragraph 45 above *in fine*) is therefore not convincing.

65. As the outcome of the proceedings depended solely on the factual question of the applicant's mental state at the time of the offence, it follows that the applicant was deprived of any further means of defence when the Regional Court's position became clear. In other words, she was deprived of the opportunity to challenge the evidence effectively, as her application to commission a third and decisive expert opinion had been rejected (compare *Matytsina*, cited above, § 169, and *Stoimenov*, cited above, §§ 38 et seq.). Although formally the applicant was in the same position as the prosecution whose application for a third and decisive expert opinion had also been rejected, the Court nonetheless considers that the impact of that rejection significantly impaired the applicant's rights of defence, thereby undermining the overall fairness of the trial against her within the meaning of the Convention.

(i) *66. Regarding the applicant's complaint that the judgment lacked reasons as to why the jury had followed one expert opinion but not the other, the Court reiterates that the Convention does not require jurors to give reasons for their decisions (see paragraph*

51 above). In the Court's view the main issue in the present case lies in the unforeseeable application of Article 127 § 3 of the CCP by the domestic courts rather than in the specific features of the jury trial. It is therefore not necessary to address the remaining questions raised by the parties, namely the short notes on the jurors' considerations (see paragraph 46 above for the Government's argument in this respect) and the alleged lack of a copy of the

instructions on legal issues for the jury (see paragraphs 16 and 44 above for the applicant's remaining grievance).

67. The foregoing considerations are sufficient to conclude that there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

68. The applicant complained that the detention resulting from the criminal trial against her had not been lawful, as it had not been justified under Article 5 § 1 (a) of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court"

69. The Court reiterates its well-established case-law according to which Article 5 § 1 (a) of the Convention permits "the lawful detention of a person after conviction by a competent court". The word "conviction" has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue" of the "conviction". In short, there must be a sufficient causal connection between the two (see, among many authorities, *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 123-125, ECHR 2013, with further references). In the instant case, the Court notes that the applicant's detention had been ordered as a penalty by the domestic courts following her conviction on account of having been found guilty of attempted murder, an offence laid down in domestic legislation. It follows that the applicant's complaint in this respect is unsubstantiated and must be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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."

71. The applicant did not submit any claims for just satisfaction. Consequently, the Court is not called upon to make any award in this respect.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that Mr Alois Gaggl, the applicant's widower and heir, has standing to continue the present proceedings in the applicant's stead;

2. *Declares* the applicant's complaint that she did not have a fair trial in that her application for a third and decisive expert opinion was refused and she was unable to understand the reasons for the jury's verdict admissible and the remainder of the application inadmissible;

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

Done in English, and notified in writing on 8 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Tim Eicke
Deputy Registrar	President