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THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON EVIDENTIARY STANDARDS IN CRIMINAL PROCEEDINGS

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Contents

A. Introduction	3
B. Burden of proof.....	4
C. Standard of proof.....	6
D. Indirect evidence	10
E. Witness testimony from the preliminary investigation	15
F. Police evidence.....	22
G. Admissibility of evidence	23
H. Conclusion	25

A. Introduction

1. This study is concerned with the evidentiary standards that the European Court of Human Rights (“the European Court”) has established in its case law relating to the application of the European Convention on Human Rights (“the European Convention”) in criminal proceedings.
2. The study has been prepared at the request of the Council of Europe pursuant to the European Union – Council of Europe joint project “Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in Georgia in line with European standards”.
3. The specific terms of reference are to address the following issues:
 - What is the concept of hearsay and indirect evidence;
 - What are the standards of application of indirect evidences in court proceedings;
 - Under which circumstances witness testimony obtained during the preliminary investigation might be published at main hearing; What is the evidentiary value of such testimony; If defence party or witness is against publication of the testimony at main hearing or if witness does not appear
 - What are the evidentiary standards for conviction; Whether or not body of only indirect evidences is sufficient for the conviction; what the evidentiary value of police officer’s testimonies is, Whether or not only police testimonies are sufficient for convictions; what is the approach of European Court to the credibility of police statements.

and also to provide concrete recommendations on the application of evidentiary standards and admissibility of evidences in accordance to the case law of the European Court.

4. However, in considering these issues, it is important to bear in mind that the European Convention has no specific provision dealing with the issue of evidence in court proceedings. Furthermore, it should be borne in mind that the European Court considers that the rules of evidence are, in principle, a matter for each State to determine¹.
5. Nonetheless, the European Court will be concerned with the rules of evidence in a particular State, or the manner of their application, where they could affect the fairness of the proceedings as a whole and thus violate the right to a fair trial under Article 6(1) of the European Convention.

¹ See, e.g., *Garcia Ruiz v. Spain* [GC], no. 30544/96, 21 January 1999; “while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts” (para. 28).

6. The study deals first with the approach of the European Court to, respectively, the burden of proof and standard of proof in criminal proceedings. It then addresses the issue of hearsay and indirect evidence and the restrictions as to its use considered appropriate by the European Court. Thereafter, it examines the admissibility and evidentiary value of witness testimony obtained during the preliminary investigation. After that it reviews the approach taken by the European Court to convictions based on police testimony and concludes by examining the extent to which it considers that the manner in which certain evidence has been obtained would render any conviction based on it would not be fair for the purposes of Article 6(1) of the European Convention.
7. Particular recommendations for action that might be necessary to ensure that evidentiary standards and admissibility of evidences are in accordance with the case law of the European Court are italicised in the text.

B. Burden of proof

8. The starting point for the European Court as regards the burden of proof is the stipulation in Article 6(2) of the European Convention that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. As a result, it considers that this guarantee requires that the burden of proof be on the prosecution².
9. This is a general burden and it will not, however, preclude the use of presumptions and the drawing of inferences where this is warranted by the particular circumstances of the case.
10. Thus, for example, a presumption in respect of the commission of a customs offence might be based on the possession of prohibited goods³ and an inference of involvement in the false imprisonment of someone might be drawn from a failure of the accused to explain his presence in the house where the person concerned was being held notwithstanding the right to remain silent⁴.
11. There must, however, be no automatic reliance on any presumptions or inferences and the defendant must, therefore, be given an opportunity to rebut them through establishing a defence or providing some other exculpatory explanation for the circumstances concerned. Moreover, the circumstances must be such that they actually call for an explanation from the defendant which will only be satisfied where

² See, e.g., *Capeau v. Belgium*, no. 42914/98, 13 January 2005, at para. 25 and *Navalnyy and Ofitserov v. Russia*, no. 46632/14, 23 February 2016, at para. 105.

³ See *Pham Hoang v. France*, no. 13191/87, 25 September 1992. See also *Radio France v. France*, no. 53984/00, 30 March 2004.

⁴ See *John Murray v. United Kingdom* [GC], no. 18731/91, 8 February 1996. See also *O'Donnell v. United Kingdom*, no. 16667/10, 7 April 2015.

these establish a convincing prima facie case against him or her⁵. Furthermore, it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or give evidence him or herself⁶ and there must be adequate safeguards place to ensure that any adverse inferences do not go beyond what is permitted under Article 6⁷.

12. The fact that the burden of proof lies on the prosecution has been reinforced by the establishment by the European Court of the right not to contribute to incriminating oneself as inherent in the guarantee of the right to a fair trial in Article 6(1) of the European Convention⁸.
13. The prohibition on self-incrimination applies to any compulsion to speak that is either physical or legal in the sense of that a failure to do so can lead to the imposition of some form of sanction⁹. It applies to questioning at the investigation stage of proceedings, including through indirect means¹⁰, the giving of testimony at a trial¹¹ and also to testimony in non-criminal proceedings where the evidence obtained is subsequently used in criminal proceedings¹².
14. However, the prohibition on self-incrimination does not apply to minor interferences with physical integrity that are used to obtain material that exists independently of the will of a suspect, such as documents acquired pursuant to a warrant and the taking of breath, blood, DNA and urine samples¹³.
15. On the other hand, the prohibition on self-incrimination will be considered to have been violated where the degree of compulsion used to obtain such material involved is sufficient to constitute a violation of the prohibition on ill-treatment in Article 3 of the European Convention¹⁴.
16. *As the responsibility for establishing an accused's guilt must lie on the prosecution, any evidential presumptions must be rebuttable and it should not be possible to draw any inferences from an accused's failure to cooperate unless the situation in which he or she is found clearly calls for an explanation. Moreover, the obtaining from a*

⁵ See *Telfner v. Austria*, no. 33501/96, 20 March 2001 and *Falk v. Netherlands* (dec.), no. no. 66273/01, 19 October 2004.

⁶ A point reaffirmed in *O'Donnell v. United Kingdom*, no. 16667/10, 7 April 2015, at para. 49.

⁷ Of relevance in this connection will be weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. In a jury trial, the judge's direction to the jury on the issue of adverse inferences will be particularly important; see *O'Donnell v. United Kingdom*, no. 16667/10, 7 April 2015, at paras. 52-58.

⁸ *Funke v. France*, no. 10828/84, 25 February 1993, at para. 44.

⁹ See, e.g., *Heaney and McGuinness v. Ireland*, no. 34720/97, 21 December 2000 and *Shannon v. Ireland*, no. 6563/03, 4 October 2005.

¹⁰ *Allan v. United Kingdom*, no. 48539/99, 5 November 2002 (the use of a police informer placed in the suspect's cell).

¹¹ *Serves v. France*, no. 20225/92, 20 October 1997, at paras. 43-47.

¹² *Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996.

¹³ *Ibid*, at para. 69.

¹⁴ *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, at paras. 113-122.

suspect of material existing independently of his or her will should not involve means contrary to Article 3 of the European Convention.

C. Standard of proof

17. In line with its general approach that issues of evidence are primarily matters for national law, the European Court has not prescribed that any particular standard of proof – i.e., the threshold to be met by the prosecution in persuading the court as to the truth of its factual assertions - is required to support conviction.
18. However, there has been a recognition that the standard in criminal cases will be more exacting than in civil ones¹⁵.
19. Moreover, the European Court itself applies the standard of “beyond reasonable doubt” – a standard often used in criminal cases - in determining whether or not there has been a violation of a provision of the European Convention, while making it clear that its task is not to rule on criminal guilt or civil liability¹⁶.
20. At the same time, the European Court has also underlined that its task is not to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by domestic courts. It thus considers that it is the role of national courts to interpret and apply the relevant rules of procedural or substantive law and that they are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in a particular case¹⁷.
21. Nonetheless, in view of the guarantee of a fair trial in Article 6, the European Court will assess whether the conduct of a trial as a whole was fair and it is prepared to conclude that that has not been so where the approach to the evaluation of the evidence before the court can be regarded as having been arbitrary or capricious.
22. In determining whether or not the evaluation should be so regarded, the European Court will firstly examine whether particular forms of evidence have been treated with appropriate caution and care.

¹⁵ See, e.g., *Ringvold v. Norway*, no. 34964/97, 11 February 2003; “while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof” (para. 38).

¹⁶ See, e.g., *Nachova and Others v. Bulgaria* [GC], no. 43577/98, 6 July 2005; “The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights” (para. 147).

¹⁷ See, e.g., *Melnychuk v. Ukraine* (dec.), no. 28743/03, 5 July 2005.

23. Such care is considered by the European Court to be needed where the evidence was obtained in circumstances where the rights of the defence could not be secured to the extent normally required, such as where the defence cannot directly examine a vulnerable witness¹⁸.

24. Care will also be necessary where indirect evidence is relied upon¹⁹ and where there are reasons to be concerned about the authenticity or reliability of particular evidence put before the court²⁰.

¹⁸ See, e.g., *S N v. Sweden*, no. 34209/96, 2 July 2002; “53. ... In its judgment of 6 May 1996 the Court of Appeal noted that the questioning of children during pre-trial investigations must meet high standards with regard to procedure and content. The court took into account the fact that some of the information given by M. had been vague and uncertain and lacking in detail. The court also had regard to the leading nature of some of the questions put to him during the police interviews. In these circumstances, the Court is satisfied that the necessary care was applied in the evaluation of M.’s statements. 54. Having regard to the foregoing, the Court considers that the criminal proceedings against the applicant, taken as a whole, cannot be regarded as unfair”. See also the discussion at paras. 51-85 below.

¹⁹ See paras. 30-50 below.

²⁰ See, e.g., *Sakit Zahidov v. Azerbaijan*, 51164/07, 12 November 2015; “52. In these circumstances, the Court will examine firstly the quality of the physical evidence, including whether the circumstances in which it was obtained casts doubt on its reliability or accuracy and secondly, whether the applicant was given the opportunity to challenge its authenticity and oppose its use in the domestic proceedings (see *Bykov*, cited above, § 90; *Lisica v. Croatia*, no. [20100/06](#), §§ 51-54, 25 February 2010; and *Jannatov v. Azerbaijan*, no. [32132/07](#), § 74, 31 July 2014). 53. As regards the first question, the Court observes at the outset that it is undisputed by the parties that the search of the applicant was not carried out immediately following his arrest at 7 p.m. on 23 June 2006. It took place at 7.20 p.m. on 23 June 2006 at the NDMIA, nowhere near his place of arrest. In this connection, the Court notes that it has already found in a case against Azerbaijan that the police’s failure to conduct a search immediately following an arrest without good reason raises legitimate concerns about the possible “planting” of evidence (see *Layijov v. Azerbaijan*, no. [22062/07](#), § 69, 10 April 2014). The Court considers that these findings are also relevant to the present case. In fact, the time lapse of around twenty minutes between the arrest and search raises legitimate concerns about the possible “planting” of the evidence, because the applicant was completely under the control of the police during that time. Moreover, there is nothing to suggest that there were any special circumstances rendering it impossible to carry out a search immediately after the applicant’s arrest. The Court further observes that the domestic courts failed to examine a copy of the video-recording of the search despite the applicant’s explicit request in this regard (see paragraphs 31-32 above). Furthermore, the Government also failed to provide a copy to the Court when specifically requested to do so. 54. The Court also cannot overlook the fact that the applicant’s arrest was not immediately documented by the police. In particular, although it is undisputed by the parties that he was arrested by the police at 7 p.m. on 23 June 2006, an official record of the arrest was not drawn up until 10.55 p.m. on 23 June 2006 (see paragraph 14 above). Moreover, it appears that the applicant was not represented by a lawyer during his arrest and the search at the NDMIA. 55. Having regard to the above, the Court considers that the quality of the physical evidence on which the domestic courts’ guilty verdict was based is questionable because the manner in which it was obtained casts doubt on its reliability. 56. As to the second question, the Court observes that the applicant raised the matter of the authenticity of the physical evidence and its use against him before all the domestic courts. However, it was not properly considered by them as their judgments were silent on this point. 57. In this connection, the Court observes that, despite the applicant’s specific complaints, the domestic courts remained silent about the use of the evidence obtained from the search of 23 June 2006. In particular, they failed to examine why a search of the applicant had not been immediately conducted at the place of his arrest and whether the search had been conducted in compliance with the procedural requirements (see *Layijov*, cited above, § 74). The domestic courts contented themselves with noting that the applicant’s assertion that the evidence had been planted was defensive in nature and was not confirmed in the proceedings without examining the applicant’s above-mentioned specific complaints. The Court therefore cannot but conclude that the applicant was not given the opportunity to raise this issue as his complaints in this respect were not considered by the domestic courts without any reason being given. 58. In view of the fact that the physical evidence found on the applicant’s person was the main evidence on which his final criminal conviction was based, the Court considers that the foregoing considerations are sufficient to enable it to conclude that the manner in which the physical evidence used at trial against the

25. Furthermore, in addition to determining the fairness of a trial by reference to whether or not certain forms of evidence have been treated appropriately, the European Court will also reach a conclusion on this issue through its assessment as to whether or not the reasoning in support of a conviction can be regarded as adequate.
26. Thus, it will certainly conclude that a trial has been unfair where the outcome is manifestly unreasonable²¹.
27. In addition, the European Court will consider that the trial leading to a conviction is not fair where there has been a failure to explain the reasons for not allowing testimony to be given by certain witnesses whom the defence submitted could provide exculpatory evidence²², where no explanation has been given for a conviction based on the same evidence that had previously led to the accused's acquittal²³, where the

applicant was obtained, and the domestic courts' failure to address his objections and justified arguments regarding the authenticity of that evidence and its use against him, rendered the proceedings as a whole unfair (see Layijov, cited above, § 76)".

²¹ See, e.g., *Navalnyy and Ofitserov v. Russia*, 46632/14, 23 February 2016; "114. It may be derived from X's statements at the applicants' trial that he concluded the contract with VLK because he was under the impression that he was obliged to do so by the first applicant because he had associated him with the Governor's team. However, the trial court also found that the first applicant had no mandate to compel X to choose VLK as a commercial partner and had not made any false representations to the contrary. Accordingly, even if X's assertions were true and he had indeed entered into an unprofitable transaction for the wrong reasons, no causal link was established between the applicants' conduct and Kirovles' losses, if any. Moreover, the losses of Kirovles were not established on the basis of VLK's commission, inter alia, but were found to constitute the total amount payable for the timber under the contract. 115. As such, the courts found the second applicant guilty of acts indistinguishable from regular commercial middleman activities, and the first applicant for fostering them. The Court considers that in the present case the questions of interpretation and application of national law go beyond a regular assessment of the applicants' individual criminal responsibility or the establishment of *corpus delicti*, matters which are primarily within the domestic courts' domain. It is confronted with a situation where the acts described as criminal fell entirely outside the scope of the provision under which the applicants were convicted and were not concordant with its intended aim. In other words, the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial. 116. The foregoing findings demonstrate that the domestic courts have failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and may be taken as suggesting that they did not even care about appearances".

²² See, e.g., *Vidal v. Belgium*, no. 1351/86, 22 April 1992; "32. ... Mr Vidal requested the Brussels Court of Appeal, the court to which the case had been remitted, to call four persons who had been detained at Namur Prison at the time of the alleged offences, Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin, as defence witnesses. This request appeared on page 26 of his counsel's submissions of 19 November 1985. On pages 3-4 and 21-23 his counsel explained in some detail why the evidence of Mr Scohy appeared to him to be likely to fill in certain deficiencies in the investigation (see paragraph 19 above). He did not specify what purposes would be served by the calling of Mr Bodart, Mr Dauphin and Mr Dausin as witnesses, but given the context it could scarcely be doubted that he wished them to be questioned about the rumours Mr Scohy had spoken of to Mr Derriks on 29 August 1983 ... 34. The applicant had originally been acquitted after several witnesses had been heard. When the appellate judges substituted a conviction, they had no fresh evidence; apart from the oral statements of the two defendants (at Liège) or the sole remaining defendant (at Brussels), they based their decision entirely on the documents in the case-file. Moreover, the Brussels Court of Appeal gave no reasons for its rejection, which was merely implicit, of the submissions requesting it to call Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin as witnesses. To be sure, it is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence, but the complete silence of the judgment of 11 December 1985 on the point in question is not consistent with the concept of a fair trial which is the basis of Article "

²³ See, e.g., *Salov v. Ukraine*, no. no. 5518/01, 6 September 2005: "the Court considers that the applicant did not have the benefit of fair proceedings in so far as the domestic courts gave no reasoned answer as to why the Kuybyshevsky District Court of Donetsk had originally found no evidence to convict the applicant of the

judgment convicting someone has simply failed to address exculpatory evidence and deficiencies in evidence that is incriminating²⁴ and where the assessment of the evidence is clearly deficient²⁵.

28. All such situations are exceptional and in the vast majority of cases the European Court will not call into question the fairness of a conviction.

29. *Nonetheless, it is essential that courts demonstrate in their rulings that there has been a proper evaluation of all the evidence submitted in a case, involving due care with evidence whose nature or source might be potentially problematic and the giving of sufficient reasons for all conclusions reached.*

offences with which he was charged and remitted the case for additional investigation on 7 March 2000 and yet, on 6 July 2000, found the applicant guilty of interfering with voters' rights" (para. 92).

²⁴ See, e.g., *Gradinar v. Moldova*, no. 7170/02, no. 2 April 2008; "111. The Court notes that a number of findings of the Chişinău Regional Court were not contradicted by the findings of the higher courts and that, accordingly, they must be considered as established facts ... These included the fact that G. and the other accused were arrested and detained on the basis of a fabricated administrative offence, during which period of detention they were questioned and made self-incriminating statements in the absence of any procedural safeguards ... There was no response to the finding that G. had unlawfully been shown the video recording of D.C.'s statement at the crime scene ... in order to obtain consistent statements by all the accused. 112. The Court further notes that the higher courts did not deal with the finding of the lower court that G. and the other co-accused had an alibi for the presumed time of the crime ..., and that a number of serious procedural violations made unreliable most of the expert reports ... 113. The higher courts also relied on the many witness statements in G.'s case. However, the Court observes that no comment was made on the finding by the lower court that some of those statements were fabricated by the police ... 114. The Court concludes that while accepting as "decisive evidence" ... the self-incriminating statements made by the accused, the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed time of the murder. The Court could not find any explanation for such omission in the courts' decisions and neither did the Government provide any clarification in this respect. 115. In the light of the above observations and taking into account the proceedings as a whole, the Court considers that the domestic courts failed to give sufficient reasons for convicting G. and thus did not satisfy the requirements of fairness as required by Article 6 of the Convention";.

²⁵ See, e.g., *Lazu v. Republic of Moldova*, no. 46182/08, 5 July 2016; "37. The first-instance court acquitted the applicant because it did not trust the witnesses after hearing them in person. In re-examining the case, the Chişinău Court of Appeal disagreed with the first-instance court as to the trustworthiness of the witness statements without ever hearing those witnesses. As a result it found the applicant guilty as charged. 38. Firstly, the Court notes that the Chişinău Court of Appeal breached the provisions of Article 436 of the Code of Criminal Procedure ... and failed to observe the instructions of the Supreme Court of Justice ... to rule on the merits of the case after a fresh examination of the evidence, and did not provide any reasons for doing so (*Găitănanu v. Romania*, no. [26082/05](#), §§ 33-35, 26 June 2012). 39. Secondly, in doing so the Chişinău Court of Appeal did not provide any reasons whatsoever as to why it had come to a conclusion different from that of the first-instance court. It simply referred to a summary of the witness testimony without addressing the discrepancies within and between individual witness statements (contrast with *Schatschaschwili v. Germany* [GC], no. [9154/10](#), § 150, ECHR 2015). 40. Lastly, having regard to what was at stake for the applicant, the Court is not convinced that the issues to be determined by the Court of Appeal when convicting and sentencing the applicant – and, in doing so, overturning his acquittal by the first-instance court – could, as a matter of fair trial, have been properly examined without a direct assessment of the evidence given by the prosecution witnesses. The Court considers that those who have the responsibility for deciding the guilt or innocence of an accused ought, in principle, to be able to hear witnesses in person and assess their trustworthiness. The assessment of the trustworthiness of a witness is a complex task which usually cannot be achieved by a mere reading of his or her recorded words. Of course, there are cases when it is impossible to hear a witness in person at the trial because, for example, he or she has died, or in order to protect the right of the witness not to incriminate himself or herself (see *Craxi v. Italy* (no. 1), no. [34896/97](#), § 86, 5 December 2002, and *Dan v. Moldova*, no. [8999/07](#), § 33, 5 July 2011). However, that does not appear to have been the case here".

D. Indirect evidence

30. The term “indirect evidence” is generally understood to refer to circumstantial and hearsay evidence. The former covers evidence of a fact that is not actually in issue in the proceedings but is legally relevant to the fact that is in issue whereas the latter is evidence of a fact not actually perceived by a witness with his or her own senses, namely, what someone else has been heard to say.
31. The European Court has not adopted its own definition of indirect evidence but has both referred to its use in the proceedings that are the subject of applications to it and used it itself in determining some of them.
32. It is clear from the case law of the European Court that it sees no fundamental objection from the perspective of the European Convention to the use of indirect evidence.
33. However, the European Court is concerned that the use of such evidence should be closely scrutinised and – where relevant – that this be compatible with the requirements governing the cross-examination of witnesses²⁶. The latter requirements have evolved in recent years and so earlier rulings, notably of the former European Commission of Human Rights (“the European Commission”), in which the indirect evidence considered unproblematic consisted of the records of previous judicial examinations of witnesses should thus not be relied upon²⁷.
34. Certainly convictions that have been based to some extent on hearsay and circumstantial evidence have not, on that account, been regarded as rendering them unfair for the purposes of Article 6(1) of the European Convention²⁸.
35. In addition, the weight of circumstantial evidence may be an important consideration in concluding that an explanation was called for and thus justifying the drawing of an adverse inference from the accused’s silence²⁹.

²⁶ As to which, see the following section.

²⁷ E.g., *X v. Federal Republic of Germany* (dec.), no. 8414/78, 4 July 1979, *Hayward v. Sweden* (dec.), no. 14106/88, 6 December 1991 and *V v. Netherlands* (dec.), no. 17107/90, 1 July 1992.

²⁸ Circumstantial evidence in the following cases: *A v. Federal Republic of Germany* (dec.), no. 12127/86, 15 October 1987, *M v. Sweden* (dec.), no. 16668/90, 11 October 1990, *Carlsson v. Sweden* (dec.), no., 15328/89, 6 September 1991, *V v. Finland* (dec.), no. 18607/91, 10 January 1992, *Tani v. Finland* (dec.), no. 20593/92, 12 October 1994, *L J v. Finland* (dec.), no. 21221/93, 28 June 1995, *Tarantino v. Germany* (dec.), no. 25493/94, 18 October 1995, *Arrabal v. Spain* (dec.), no. 25787/94, 15 January 1996, *H M A v. Spain* (dec.), no. 25399/94, 9 April 1996, *Lihtavuo v. Finland* (dec.), no. 26324/95, 9 April 1997, *Laukkanen v. Finland* (dec.), no. 48910/99, 21 May 2002, *Thomas v. United Kingdom* (dec.), no. 19354/02, 10 May 2005, *Andandonskiy v. Russia*, no. 24015/02, 28 September 2006, *Slyusarev v. Russia* (dec.), no. 60333/00, 9 November 2006, *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, *Český and Kotík v. Czech Republic* (dec.), no. 76800/01, 7 April 2009, *Jukubczyk v. Poland*, no. 17354/04, 10 May 2011, *Trifontsov v. Russia* (dec.), no. 12025/02, 9 October 2012, *Lawless v. United Kingdom* (dec.), no. 44324/11, 16 October 2012, *Sellick and Sellick v. United Kingdom* (dec.), no. 18743/06, 16 October 2012, *Pesukic v. Switzerland*, no. 25088/07, 6 December 2012 and *Haxhia v. Albania*, no. 29861/03, 8 October 2013 and hearsay in these ones: *X v. Austria* (dec.), no. 4428/90, 1 June 1972, *S v. Germany* (dec.), no. 8945/80, 13 December 1983 *MA and B S v. Norway* (dec.), no. 29185/95, 22 October 1997, *Wester v. Sweden* (dec.), no. 31076/96, 14 January 1998, *Agga v. Greece* (dec.), 37439/97, 24 November 1998 and *Baybasin v. Germany* (dec.), no. 36892/05, 3 February 2009.

36. There have also been instances in which the use of circumstantial evidence has been the basis for a conviction but this had to be sufficient in the eyes of the law to establish the guilt of the accused and the evidence had to have been produced in the presence of the accused at a public hearing with a view to adversarial argument³⁰.
37. Where circumstantial evidence is used, it will be important to show that the causal relationship and the consequences have been properly assessed³¹. Moreover, it should be unambiguous³² and substantial³³.
38. Moreover, the fact a court in convicting someone had taken a “selective and grossly inconsistent approach to the assessment of the circumstantial evidence” has been considered by the European Court to have contributed to vitiating the proceedings and to justifying the reopening of a final judgment to enable the correction of a miscarriage of criminal justice³⁴.
39. Furthermore, a significant consideration for the European Court in reaching the conclusion that particular proceedings were fair was the fact that hearsay evidence had either not been relied upon in the court’s reasoning despite it having been admitted³⁵ or had not been crucial for the verdict³⁶.

²⁹ As in *O’Donnell v. United Kingdom*, no. 16667/10, 7 April 2015, at paras. 52 and 58.

³⁰ See, e.g., *Alberti v. Italy* (dec.), no. 12013/86, 10 March 1989; “in the absence of direct evidence, the trial judges established that the order to execute Mr. J. had been given by the applicant. To reach this conclusion, they relied on a whole body of indirect evidence, such as the existence of a single plausible motive, namely revenge; the absence of people with an interest in killing Mr. J. apart from members of the criminal organisation he had helped to uncover; the fact that it was impossible for the applicant’s accomplices who were not in prison to have known that Mr. J. had collaborated with the police; and the fact that the applicant was the only person, among those arrested to have had the necessary authority to order the murder and the possibility of conveying his orders outside the prison”. See also *M A v. Austria* (dec.), no. 23228/94, 11 May 1994 in which a conviction was based “mainly on circumstantial evidence, in particular on the fact that shoes found near the scene of the crime were identified as being his, as well as jeans likewise found with blood stains which according to medical tests could clearly be linked both to the victim and the applicant” and this was not contested. The European Court also did not seem perturbed at the possibility of a conviction being founded only on circumstantial evidence in *Lisica v. Croatia*, no. 20100/06, 25 February 2010, when it stated that: “Answering the question whether the circumstantial evidence in the specific circumstances of the present case sufficed for the conviction would be the prerogative of the domestic courts” (para. 59).

³¹ As was considered to have occurred in *H M A v. Spain* (dec.), no. 25399/94, 9 April 1996.

³² *Mambro and Fioravanti v. Italy* (dec.), no. 33995/96, 9 September 1998; “Nevertheless, two further judgments (the Bologna Assize Court of Appeal judgment of 16 May 1994 and the Court of Cassation judgment of 23 November 1995) held that the evidence gathered was convincing as to the applicant’s guilt in planting the bomb. In particular the Bologna Assize Court of Appeal, in the judgment delivered on 16 May 1994, stated that the circumstantial evidence as a whole, and in particular its four main elements (the statements made by X, the telephone call made by L.C., the lack of a convincing alibi and the motive for the killing of Y), were unambiguous and proved beyond any reasonable doubt that the applicants were guilty of the massacre of 2 August 1980”.

³³ *Český and Kotík v. Czech Republic* (dec.), no. 76800/01, 7 April 2009; “The Court finds that having regard to the quantity and quality of the indirect evidence adduced by the prosecution, it does not appear that the first instance court’s conclusion on the strength of the prosecution case was in any way arbitrary”.

³⁴ See *Lenskaya v. Russia*, no. 28730/03, 29 January 2009, at paras. 37-41.

³⁵ As in *Hedstrom Axelsson v. Sweden* (dec.), no. 66976/01, 6 September 2005.

³⁶ See *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008, at para. 218. However, of more significance for the conclusion that the trial in this case was not fair was the court’s refusal to admit written testimonies and statements collected by the defence in which they retracted written statements to the prosecution - claiming

40. In any event, hearsay evidence should be regarded as having less weight than first-hand testimony given under oath³⁷.
41. It has also emphasised the importance of a careful assessment having been made of any hearsay evidence relied upon³⁸. Indeed, where there has been no such assessment of hearsay evidence that has been relied upon, the European Court has found the proceedings to have been unfair³⁹.
42. The European Court has also recognised that the fact that the hearsay evidence is provided by a police officer may be grounds for doubting its reliability. However, that does not mean that a court is thereby precluded from concluding that it is nonetheless credible. Indeed, such an assessment is not likely to be considered arbitrary or capricious where it is reasoned and the defendant has had the opportunity of challenging the officer's testimony through cross-examining him and calling witnesses with a view to undermining the officer's credibility⁴⁰.
43. Nonetheless, where a conviction is based decisively on hearsay – in the form of reports by a police officer to the trial court of what witnesses who did not appear had said – the European Court has found that there has been a violation of Article 6(1) taken together with Article 6(3)(d)⁴¹. Such a conclusion is unavoidable in view of the further development of the case law concerning the inability to cross-examine absent witnesses⁴².
44. However, national rules that exclude its use will not be objectionable if they do not result in any unfairness to an accused person. Such unfairness could, for example, be precluded by the ability of the defence both to call the third party as a witness and to

that they had falsely accused in them and that they had been given under pressure – but which had already been admitted as evidence.

³⁷ See, e.g., *Pichugin v. Russia*, no. 38623/03, 23 October 2012; “198. Many witnesses were questioned at the applicant's trial. However, only three of them made statements implicating the applicant: his co-defendant Mr P. and prosecution witnesses Mr K. and Mr S. All other witnesses did not know who had hired the killers and did not give any testimony against the applicant. Mr K. was the only witness who testified that he had discussed with the applicant the details of the murders of Mr Kl., Ms Ks. and Mr and Mrs G. and the reward promised for their committal. 199. Mr K.'s statements were corroborated by hearsay testimony from Mr P. and Mr S., who stated that they had learnt about the applicant's involvement in the attempted murders of Mr Kl. and Ms Ks. from Mr G. They also testified that Mr G. was afraid of being killed by the applicant. In the circumstances of the present case (see paragraph 196 above) it is difficult to assess what weight was attached by the jury to Mr P.'s and Mr S.'s corroborative testimony. It is however worth noting that Mr P. and Mr S. were both hearsay witnesses whose second-hand testimony must have carried less weight than statements by Mr K. made from his personal knowledge”.

³⁸ See *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005, *Dzelili v. Germany* (dec.), no. 15065/05, 29 September 2009 and *Baybasin v. Germany* (dec.), no. 36892/05, 3 February 2009.

³⁹ See *Vetrenko v. Moldova*, no. 36552/02, 18 May 2010 (“the investigators and the courts did not question T. again in this respect during her interview on 5 June 1997 to dispel any doubts, but simply preferred to rely on S. P.'s hearsay evidence, to the detriment of that provided by the original witness” (para. 57)) and *Ajdarić v. Croatia*, no. 20883/09, 13 December 2011 (in which discrepancies of a witness giving hearsay evidence were not addressed).

⁴⁰ As in *Tsonyo Tsonev v. Bulgaria (No. 3)*, no. 21124/04, 16 October 2012, at paras. 42-45.

⁴¹ See *Delta v. France*, no. 11444/85, 19 December 1990

⁴² As to which, see the following section.

adduce other original evidence⁴³, the consideration of the witness's written statement which had not raised doubts as to the defendant's guilt⁴⁴, the fact that the evidence could be regarded as irrelevant⁴⁵. Moreover, the exclusion of hearsay evidence is considered justified by the European Court on account of the difficulty of assessing its credibility⁴⁶. Nonetheless, the assessment that the evidence is actually hearsay must be well-founded⁴⁷.

45. It should be noted that the use of indirect evidence – such as hearsay from a police informer - to support an initial remand in custody has not been seen as problematic but there would be a need for this to be corroborated for any pre-trial detention to be continued for a significant period⁴⁸.
46. Circumstantial evidence has also been considered an acceptable basis for imposing preventive measures, such as the confiscation of property considered to have been obtained through unlawful activities⁴⁹. In so doing, emphasis has been placed on the need for such evidence to be established objectively and to be clearly distinguished from mere suspicions or subjective speculation.
47. Moreover, the complexity of a case involving indirect evidence may be able to provide some justification for the length of the proceedings⁵⁰ but this will not always be sufficient to prevent a finding of a violation of the requirement in Article 6(1) for a criminal charge to be determined within a reasonable time⁵¹
48. The existence of indirect evidence has been used by the European Court in connection with its finding of violations of the European Convention⁵². It has also emphasised the

⁴³ As in *Blastland v. United Kingdom* (dec.), no. 12045/86, 7 May 1987

⁴⁴ See, e.g., *X v. Moldova* (dec.), no. 37507/02, 5 January 2010; “In such circumstances, and given that the proceedings had already lasted for almost four years, the courts’ decision not to hear one additional witness who was unavailable at the relevant time and who could only provide hearsay evidence obtained from the alleged real criminal (the latter not having come forward and thus presumably not willing to confirm having told anything to M) does not disclose a procedural violation of such an importance as to undermine the fairness of the proceedings as a whole”.

⁴⁵ As in *S E K v. Switzerland* (dec.), no. 18959/91, 11 January 1995 and *M K v. Austria* (dec.), no. 28867/95, 2 July 1997.

⁴⁶ See *Thomas v. United Kingdom* (dec.), no. 19354/02, 10 May 2005.

⁴⁷ See, e.g., *Breabin v. Moldova*, no. 12544/08, 7 April 2009; the Prosecutor’s Office had dismissed certain witnesses’ testimonies on the ground that they were hearsay evidence, namely, that their knowledge of the complainant’s alleged ill-treatment were based on his account of events to them but, in fact they had actually declared that they had seen signs of beatings on his face.

⁴⁸ See, e.g., *Labita v. Italy* [GC], no. 26772/95, 6 April 2000, at paras. 156-161 and *Ereren v. Germany*, no. 67522/09, 6 November 2014, at para. 59.

⁴⁹ See, e.g., *M v. Italy* (dec.), no. 12386/86, 15 April 1991, *Raimondo v. Italy*, no. 12954/87, 22 February 1994 and *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001.

⁵⁰ See, e.g., *Chodecki v. Poland* (dec.), no. 49929/99, 9 October 2003; “The Court notes that the case discloses a relatively high level of complexity, since it was based on circumstantial evidence”.

⁵¹ See, e.g., *Lisiak v. Poland*, no. 37443/97, 5 November 2002; “The Court therefore accepts that the applicant’s case was certainly of more than average complexity. That, however, cannot justify the total, significant length of the trial. Nor can the fact that the court needed to establish the facts of the case on the basis of circumstantial evidence be seen as a factor absolving it from its principal obligation to determine the charges against the applicant within a “reasonable time”” (para. 42).

⁵² See, e.g., *Çakıcı v. Turkey*, no. 23657/94, 8 July 1999 (“The Court finds on this basis that there is sufficient circumstantial evidence, based on concrete elements, on which it may be concluded beyond reasonable doubt that Ahmet Çakıcı died following his apprehension and detention by the security forces”), *Timurtaş v. Turkey*,

hearsay nature of the evidence relied upon by national courts when questioning their assessment of events material to whether or not there was a violation⁵³. Furthermore, circumstantial evidence adduced by a respondent State will not overcome other, unambiguous evidence to the contrary⁵⁴.

49. At the same time, the European Court – in finding that no violation of the European Convention had been established - has also used the fact that the only evidence adduced before it was hearsay⁵⁵ or that other indirect evidence was incomplete, inconsistent and on some points, even contradictory⁵⁶, insufficient⁵⁷ or untested⁵⁸.

50. *There may be cases in which a conviction can be founded solely upon circumstantial evidence but this would not be appropriate where the only evidence is hearsay. In any event, a very cautious approach is always required whenever account is taken of either form of indirect evidence in determining a criminal charge.*

no. 23531/94, 13 June 2000 (“Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee’s fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody ... In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead” (paras. 82-83)) and *Merabishvili v. Georgia*, no. 72508/13, 14 June 2016 (“All those particular circumstances of the case lead the Court to find, from the standpoint of an objective trier of fact that the applicant’s account of the incident should be agreed to be factual with as high a degree of certainty as possible (for examples of the application of a similar standard of evidence – drawing highly probable inferences from circumstantial evidence only – for the purposes of scrutiny under Article 18 of the Convention” (para. 105)). The ruling in the latter case has been referred to the Grand Chamber.

⁵³ See, e.g., *Stefanou v. Greece*, no. 2954/07, 22 April 2010 (“the witness P.P. whose testimony appeared to be crucial in the national courts’ assessment was nothing but hearsay” (para. 48) and *Rujov v. Azerbaijan*, no. 4508/06, 26 July 2011 (“their statements appeared to be hearsay evidence, as the police officers did not claim to have any first-hand knowledge of the matter and stated that they had “heard” this information from some local residents whom they did not identify. In essence, the police officers’ statements, taken alone and uncorroborated by other evidence, appear to have been nothing more than a rumour; in such circumstances, the Court is concerned that these statements were not subjected to any degree of scrutiny by the domestic courts” (para. 52).

⁵⁴ See, e.g., *Dowsett v. United Kingdom*, no. 39482/98, 24 June 2003; “There is therefore unambiguous evidence showing that the letter concerned had not been disclosed by the eve of the appeal hearing and only indirect, circumstantial evidence that the prosecution might have changed its mind at the last moment. The Court is not persuaded therefore that the Government have shown that this letter, relevant to the applicant’s defence, was made available to his counsel in time for use at the appeal” (para. 47). See also *Sudarkov v. Russia*, no. 3130/03, 10 July 2008; “The Court finds it peculiar that the Government preferred to submit circumstantial evidence instead of extracts from the logs, which could have corroborated the Government’s assertion” (para. 75).

⁵⁵ See, e.g., *Tepe v. Turkey*, no. 27244/95, 9 May 2003, at para. 163, *Trymbach v. Ukraine*, no. 44385/02, 12 January 2012, at para. 42, *Bozdemir and Yeşilmen v. Turkey*, no. 33860/03, 9 July 2013, at para. 55 and *Hassan v. United Kingdom* [GC], no. 29750/09, 16 September 2014, at para. 51.

⁵⁶ See, e.g., *Tekdag v. Turkey*, no. 27699/95, 15 January 2004, at para. 66.

⁵⁷ *Kisimir v. Turkey*, no. 27306/95, 31 May 2005 and *Medvedev v. Russia* (dec.), no. 26428/03, 9 September 2010.

⁵⁸ See, e.g., *Issa v. Turkey*, no. 31821/96, 16 November 2004 (“the Court cannot attach any decisive importance to the video footage since this is untested and at most circumstantial evidence”, para. 79), *Osmanoğlu v. Turkey*, no. 48804/99, 24 January 2008, at para. 52 and *Kyriacou Tsiakkourmas and Others v. Turkey*, no. 13320/02, 2 June 2015, at para. 181.

E. Witness testimony from the preliminary investigation

51. There are some circumstances in which it can be possible to adduce at a trial the testimony of a witness that was given during the pre-trial investigation at a trial. However, it is important to appreciate that these circumstances are exceptions to the general approach under the European Convention.

52. This approach is set out in Article 6(3), namely, in its stipulation that

Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

53. A “witness” for this purpose is a term covering anyone whose statement is taken into account by a court trying someone⁵⁹, including any co-accused⁶⁰ and experts⁶¹

54. As a consequence, all witnesses should normally be produced in the accused’s presence with a view to adversarial argument so that he or she has an adequate and proper opportunity to challenge and question them, either when they make their statements or at a later stage of the proceedings⁶².

55. The right of an accused person to have witnesses against him or her subject to cross-examination on their testimony is thus understood by the European Court to be a crucial feature of an adversarial trial. Moreover, in enabling the evidence against someone to be tested, this right contributes to ensuring that the burden of proof lies on the prosecution.

56. Although the possibility of cross-examination should thus generally exist whenever witnesses for the prosecution are heard at either the trial or the appellate stage of criminal proceedings, the ability to confront witnesses during the pre-trial stage of proceedings might also be regarded as having fulfilled the requirements of Article 6(3)(d) in the event of a particular witness being unable or excused from giving evidence at the trial⁶³. Much will depend on the manner in which the confrontation is conducted.

⁵⁹ A term given an autonomous interpretation by the European Court,; see *Windisch v. Austria*, no. 12489/86, 27 September 1990, at para. 23.

⁶⁰ See, e.g., *Cardot v. France*, no. 11069/84, 19 March 1991, at para. 35, *Lucà v. Italy*, no. 33354/96, 27 February 2001, at para. 41 and *Rudnichenko v. Ukraine*, no. 2775/07, 11 July 2013, at para. 105.

⁶¹ See, e.g., *Bönisch v. Austria*, no. 8658/79, 6 May 1985, at paras. 31-32, *Brandstetter v. Austria*, no. 11170/84, 28 August 1991, at paras. 42-45, *Balsyte-Lideikiene v. Lithuania*, no. 72596/01, 4 November 2008, at para. 63 and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013, at para. 711.

⁶² *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011, para. 118 and *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, at para. 103.

⁶³ See, e.g., *Vozikhov v. Russia*, no. 5953/02, 26 April 2007, para. 55 and *A G v. Sweden* (dec.), no. 315/09, 10 January 2012. See also *S N v. Sweden*, no. 34209/96, 2 July 2002 and *B v. Finland*, no. 17122/02, 24 April 2007, in which no violations of Article 6(1) and (3) (d) were found where the defence had been afforded, but turned down, a possibility to have questions put to child complainants.

57. It should also be noted that the questioning of a witness during the investigation stage has more recently been described by the European Court as

[a]nother important safeguard countering the handicaps under which the defence labours as a result of the admission of untested witness evidence at the trial⁶⁴

rather than as fulfilling the requirements of Article 6(3)(d). It remains to be seen whether this has any substantive consequences.

58. *A confrontation with a witness should be organised during the investigation stage where he or she is vulnerable or there is any reason to doubt that he or she might not be able to attend the trial.*

59. However, while an earlier confrontation is not generally required⁶⁵, it should be borne in mind that one could actually be essential in those cases where an expert is gathering material from others for a report⁶⁶

60. Any cross-examination must (normally) be before the judge deciding the case but exceptions can be made where there is a slight change in its composition⁶⁷ but also where the defendant has put questions to witnesses against him during the pre-trial proceedings or in the determination of an appeal⁶⁸.

61. The right to cross-examination may be waived but this must be established in an unequivocal manner and must not be contrary to any public interest⁶⁹. However, such a waiver will be considered to exist where a witness is afraid because of fear generated by acts of the accused or someone acting for him or her⁷⁰.

⁶⁴ *Schatschaschwili v. Germany*, at para. 130.

⁶⁵ See, e.g., *Ferrari-Bravo v. Italy* (dec.), no. 9627/81, 14 March 1984 and *Schertenlieb v. Switzerland* (dec.), no. 8339/78, 12 July 1979. However, see also *D v. Finland*, no. 30542/04, 7 July 2009 in which the European Court criticised the failure to inform the applicant adequately, in a clear and precise manner, that he would not be afforded another opportunity to have questions put to the child he was accused of having sexually assaulted.

⁶⁶ See *Mantovanelli v. France*, no. 21497/93, 18 March 1997, at paras. 35-36 and *Cottin v. Belgium*, no. 48386/99, 2 June 2005, at paras. 32-33 (both civil cases).

⁶⁷ See, e.g., *Graviano v. Italy*, no. 10075/02, 10 February 2005, at paras. 38-40.

⁶⁸ See, as regards both points, *Kashlev v. Estonia*, no. 22574/08, 26 April 2016, at para. 47.

⁶⁹ Such a waiver was established to have occurred in, e.g., *Andandonskiy v. Russia*, no. 24015/02, 28 September 2006, at paras. 53-54; *Vozikhov v. Russia*, no. 5953/02, 26 April 2007, para. 57, *Khametshin v. Russia*, no. 18487/03, 4 March 2010, at paras. 38-43 and *Zdravko Petrov v. Bulgaria*, no. 20024/04, 23 June 2011, at para. 38 but not, e.g., in *Craxi v. Italy*, no. 34896/97, 5 December 2002, at paras. 92-95, *A S v. Finland*, no. 40156/07, 28 September 2010, at paras. 70-74 and *Rudnichenko v. Ukraine*, no. 2775/07, 11 July 2013, at para. 108.

⁷⁰ See, e.g., *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011; “When a witness’s fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant. To allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. No court could be expected to allow the integrity of its proceedings to be subverted in this way. Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 § 3 (d). The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval” (para. 123).

62. It is possible that a defendant who opts for an accelerated trial procedure might be regarded as having waived his right to cross-examination⁷¹. However, the case in which this has been suggested was not one where the evidence of the witness concerned was decisive and it had still been possible to challenge the content of the statements in the hearings concerned. It is, therefore, doubtful that a waiver could be regarded as having been impliedly given where the statement of the witness concerned was of greater significance.
63. *Reliance on the possibility of an accused waiving the right to cross-examine a witness should not be readily presumed. An accused should thus always be specifically asked whether he or she wishes to examine a particular witness unless it can be shown that he or she is responsible for having generated fear of testifying in the person concerned.*
64. The European Court does not consider that the right of cross-examination is absolute. It is, therefore, ready to accept that a trial will not necessarily be unfair where certain restrictions have been imposed on the manner in which the questioning takes place in cases where witnesses are particularly vulnerable⁷².
65. It is also possible that some restriction might be imposed on the line of questioning put to an alleged victim of a sexual assault⁷³.

⁷¹ See *Panarisi v. Italy*, no. 46794/99, 10 April 2007, at para. 110.

⁷² See, e.g., *Accardi and Others v. Italy* (dec.), no. 30598/02, 20 January 2005; “The Court observes that, in the instant case, X and Y were questioned before the Florence investigating judge at the hearing of 16 October 1998. The applicants and their lawyers were able to follow the questioning in a separate room via a two-way mirror. They were thus able to hear the questions and replies and observe the children’s demeanour. The applicants contended that they were not permitted to intervene on that occasion and to request that X and Y elucidate specific points. However, this assertion contradicts that made by the Florence Court of Appeal in its judgment of 28 September 2000, stating that the applicants’ lawyers had the opportunity of asking the children any question they felt was necessary to their defence, through the intermediary of the investigating judge. The Court notes that the applicants and their representatives made no attempt to avail themselves of that opportunity. At the hearing of 16 October 1998, they omitted to raise any objections regarding the procedure adopted by the investigating judge or to say what questions they wished to ask X and Y. In the view of the Court, this could be interpreted as implicit agreement with the way in which the questioning was conducted. In addition, the authorities made a video recording of this stage in the investigation procedure, which the trial courts were able to study. The courts therefore had the opportunity to observe the conduct of X and Y under questioning, and the defendants were able to submit their comments in that regard. In the light of these considerations, the Court cannot subscribe to the applicants’ view that a further hearing of the alleged victims of the offences was necessary in order to safeguard the rights of the defence. In the circumstances, the Court considers that the steps taken by the domestic authorities were sufficient to allow the applicants an opportunity to challenge the statements and the credibility of X and Y during the criminal proceedings. Cf. the finding of a violation of Article 6(1) and (3)(d) in *Bocos-Cuesta v. Netherlands*, no. 54789/00, 10 November 2005 when such a procedure was not used.

⁷³ This issue was in *Oyston v. United Kingdom* (dec.), no. 42011/98, 22 January 2002 but in *Y v. Slovenia*, no. 41107/10, 28 May 2015 the Court considered that “it was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant’s personal integrity was adequately protected at the trial. In its opinion, the sensitivity of the situation in which the applicant was questioned directly, in detail and at length by the man she accused of sexually assaulting her, required the presiding judge to oversee the form and content of X’s questions and comments and, if necessary, to intervene. Indeed, the record of the hearing indicates that the presiding judge prohibited X from asking certain questions which were of no relevance to the case. However, the Court takes the view that X’s offensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction. Considering the otherwise wide scope of cross-examination afforded to X, in the Court’s opinion

66. Although an accused person should normally be present when witnesses are being cross-examined, he or she may be excluded from the court room so that the witness concerned may give an unreserved statement⁷⁴. However, it will then be important that the defence counsel can remain to examine the witness.
67. However, an accused person should not be prevented from questioning a witness about factors that might question his or her credibility⁷⁵.
68. However, in determining whether a conviction based on the testimony of an absent witness – that is one who has ever been examined by the defendant at any stage of the proceedings - is fair, the European Court has developed a three part test, namely,
- was there was a good reason for the non-attendance of the witness;
 - was the evidence of that absent witness the sole or decisive basis for the conviction or, if not, was its weight significant or its admission such that it may have handicapped the defence; and

curtailing his personal remarks would not have unduly restricted his defence rights. Yet such an intervention would have mitigated what was clearly a distressing experience for the applicant” (para. 109).

⁷⁴ See, e.g., *X v. Denmark* (dec.), no. 8395/78, 16 December 1981 and *Kurup v. Denmark* (dec.), no. 11219/84, 10 July 1985.

⁷⁵ See, e.g., *Pichugin v. Russia*, no. 38623/03, 23 October 2012; “207. The Court has previously found a violation of Article 6 § 1 in a case where the information that the key prosecution witness was a long-standing police informant who had received a considerable monetary reward, police protection and immunity from prosecution in exchange for testifying against the applicants was withheld by the prosecution from the defence and the jury. The Court found that as a result of that concealment the defence had been deprived of an opportunity through cross-examination to seriously undermine the credibility of the key witness (see *Rowe and Davis v. the United Kingdom* [GC], no. [28901/95](#), §§ 62-67, ECHR 2000-II). 208. In another case the Court has found that it is essential that the defence be able to demonstrate that the witness is prejudiced, hostile or unreliable. It has held that inculpatory evidence against the accused may well be “designedly untruthful or simply erroneous” and that it is important that the defence should possess information permitting it, through cross-examination, to test the author’s reliability or cast doubt on his credibility (see *Kostovski v. the Netherlands*, 20 November 1989, § 42, Series A no. 166. 209. The Court considers that, given the importance of the evidence given by Mr K., it was essential that his credibility should be open to testing by cross-examination. 210. The Court observes that the presiding judge dismissed all questions concerning Mr K.’s criminal record, the reasons for not giving testimony inculcating the applicant during his first questionings in 1999 and his motivation for starting to give such evidence in 2003, as well as concerning possible pressure on him from the prosecuting authorities (see paragraphs 56, 63 and 64 above). It notes that it was the jury’s task to determine what weight, if any, should be attached to Mr K.’s statement against the applicant. In order to perform that task they needed to be aware of all relevant circumstances affecting the statement’s accuracy and credibility, including any incentive Mr K. might have had to misrepresent the facts. It was therefore important for the defence to discuss the above issues in the presence of the jury in order to test Mr K.’s reliability and credibility. The Court is concerned about the presiding judge’s statement that counsel for the applicant “were not allowed to cast doubts on witness statements” (see paragraph 56 above) and that the jury “[did not] need not know [Mr K.’s] motivation for giving testimony [against the applicant]” (see paragraph 64 above). 211. Having regard to the fact that the applicant was not allowed to question Mr K. about the factors that might undermine the credibility of his testimony, which was decisive evidence against the applicant, the Court finds that the applicant’s defence rights were significantly restricted. 212. The Court concludes that as a result of Mr K.’s refusal, supported by the presiding judge, to reply to certain questions about the circumstances in which the imputed offences had been committed, and the prohibition, imposed by the presiding judge, against questioning Mr K. about certain factors that might undermine his credibility, the applicant’s defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention. In these circumstances, the applicant cannot be said to have received a fair trial”.

- were there sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured⁷⁶?

69. A good reason for the non-attendance will be provided by the death of the witness⁷⁷, fear by the witness which is attributable to threats or other actions of the defendant or those acting on his or her behalf and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial (including fear of death or injury of another person or of financial loss).

70. In order for fear to be acceptable as a good reason for non-attendance, the trial court must have conducted “appropriate enquiries to determine, firstly, whether or not there are objective grounds for that fear, and, secondly, whether those objective grounds are supported by evidence”⁷⁸. Furthermore,

[b]efore a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable⁷⁹.

71. In addition, a good reason for the non-attendance of a witness will be afforded by the trial court having made all reasonable efforts within the existing legal framework to secure the attendance of a witness, particularly where the witness is in another country and bilateral negotiations with that country were unlikely to lead to a hearing of the witness within a reasonable time⁸⁰.

72. The European Court has, however, made it clear that the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of a trial’s unfairness but that

the lack of a good reason for a prosecution witness’s absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d)⁸¹.

73. The testimony of the absent witness will be the “sole” evidence against an accused where it is the only evidence against him or her and it will “decisive” if it is evidence of such significance or importance as is likely to be determinative of the outcome of the case⁸². In assessing the latter, there will be a need to consider the strength of the other evidence relied upon to support the conviction. Thus, the European Court has indicated that

⁷⁶ *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011, at paras. 119-125, 119, 126-147 and 147 and *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, at paras. 105-109 and 116.

⁷⁷ As, e.g., in *Ferrantelli v. and Santangelo v. Italy*, no. 19874/92, 7 August 1996 and *Mika v. Sweden* (dec.), no. 31243/06, 27 January 2009.

⁷⁸ *Al-Khawaja and Tahery v. United Kingdom*, at para. 124.

⁷⁹ *Al-Khawaja and Tahery v. United Kingdom*, at para. 125.

⁸⁰ As was the situation in *Schatschaschwili v. Germany*; see paras. 132-140.

⁸¹ *Schatschaschwili v. Germany*, at para. 113.

⁸² *Al-Khawaja and Tahery v. United Kingdom*, at para. 131 and *Schatschaschwili v. Germany*, at para. 123.

[w]here the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive⁸³.

74. Of course, it recognises the difficulty for a trial court in determining

whether evidence would be decisive without having the advantage of examining and weighing in the balance the totality of evidence that has been adduced in the course of the trial⁸⁴

75. This is undoubtedly why the European Court has widened the need for counterbalancing factors to include situations where the weight of the evidence concerned is just “significant” or its admission could be such that it may have handicapped the defence⁸⁵.

76. *It would, therefore, be appropriate to work throughout a trial on the assumption that any eventual conviction could be based at least to some significant extent on the testimony of any absent witness that might be taken into account or that consideration of that testimony creates particular difficulties for the defence in rebutting it. With such a working assumption steps should then also be taken to ensure that there are suitable counterbalancing factors in place in case this is what actually transpires.*

77. The counterbalancing factors required by the European Court are ones that will permit a fair and proper assessment of the reliability of that evidence.

78. At a minimum, this means that the untested evidence of an absent witness must be approached with caution, the courts must show that they are aware that it carries less weight and detailed reasoning is required as to why it is considered reliable, while having regard also to the other evidence available.

79. Additional safeguards identified by the European Court include:

- a. the showing at the trial hearing of a video recording of the absent witness’s questioning at the investigation stage in order to allow the court, prosecution and defence to observe the witness’s demeanour under questioning and to form their own impression of his or her reliability;
- b. the availability at the trial of corroborative evidence supporting the untested witness statement (such as statements made at the trial by persons to whom the absent witness reported the events immediately after their occurrence, further factual evidence secured in respect of the offence, including forensic evidence, expert opinions on a victim’s injuries or credibility and strong similarities between the absent witness’s description of the alleged offence committed against him or her and the description, given by another witness with whom there was no evidence of collusion, of a comparable offence committed by the

⁸³ *Ibid.*

⁸⁴ *Al-Khawaja and Tahery v. United Kingdom*, at para. 133.

⁸⁵ See *Schatschaschwili v. Germany*, at para. 116.

same defendant, particularly where that witness's reliability is tested by cross-examination);

- c. the possibility offered to the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial;
- d. the giving to the accused or defence counsel an opportunity to question the witness during the investigation stage particularly where the investigating authorities have already taken the view at the investigation stage that a witness will not be heard at the trial or there is a risk of the witness not being available to give testimony at the trial; and
- e. the defendant is afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses⁸⁶.

80. It should be kept in mind that the extent of the counterbalancing factors necessary in order for a trial in a particular case to be considered fair will always depend on the weight of the evidence of the absent witness. Thus, the more important that evidence, the more weight the counterbalancing factors will have to carry.

81. *An indication should be given in any judgment as to the weight given to the testimony of any absent witness as this is a matter which the European Court will consider when evaluating the adequacy of any counterbalancing factors in the case concerned.*

82. *Moreover, it is not enough that the court had regard to what was necessary by way of ensuring that adequate safeguards existed. It will also be essential that it can demonstrate that such regard actually occurred and what were its reasons for considering the particular safeguards relied upon to be adequate.*

83. It should not, however, be too readily assumed that particular safeguards, not least given that the judges of the European Court can themselves be quite divided as the effectiveness of those being relied upon⁸⁷.

84. It should be borne in mind that it is not considered unfair to use statements made by witnesses before a trial when evaluating the evidence that they later give in court since those witnesses will not be absent ones⁸⁸.

85. *There should, of course, never be a complete bar on witnesses being cross-examined in particular criminal proceedings*⁸⁹.

⁸⁶ *Schatschaschwili v. Germany*, at paras. 125-131.

⁸⁷ In *Schatschaschwili v. Germany* 9 judges considered the factors insufficient to ensure a fair trial but 8 thought that they were sufficient for this purpose.

⁸⁸ See, e.g., *X v. Germany* (dec.), no. 8414/78, 4 July 1979 and *Ninn-Hansen v. Denmark* (dec.), 28972/95, 18 May 1999.

⁸⁹ As occurred in *Vaturi v. France*, no. 75699/01, 13 April 2006.

F. Police evidence

86. The European Court has not sought to elaborate any explicit standards regarding evidence given by police officers. In principle, therefore, the approach required for evaluating the potential for a conviction to be based on it, whether in part or decisively, should not be any different from that required for any other source.
87. Nonetheless, certain cases in which the testimony of police officers was material to a conviction do indicate number of considerations to be taken into account when seeking to rely upon it.
88. Thus, it should be borne in mind that the European Court has expressed the need for the introduction of hearsay in testimony by police officers to be handled with caution⁹⁰ and has found convictions based decisively on such hearsay to be unfair⁹¹.
89. Furthermore, it has underlined the need for courts to take seriously suggestions that real evidence introduced by police may have been planted⁹² or fabricated⁹³.
90. Moreover, the European Court has emphasised the importance of courts being prepared to question the reliability and quality of evidence that has been obtained improperly⁹⁴.
91. In addition, the European Court will also find the reasoning in support of a conviction inadequate where there is no explanation as to why witness statements of police officers are considered more objective than those of an accused, particularly where there was no attempt to summon witnesses who were unconnected with the police.
92. Also, the European Court considers that evidence obtained through a police undercover operation should not be admitted where it has been obtained through incitement and requires any plausible or arguable allegation to that effect to have been properly examined and determined, with the burden of proof that there was no incitement falling on the prosecution⁹⁵.
93. However, the European Court has not considered that a trial was rendered unfair where the court had taken into account testimony from a police officer in which he had stated his belief that the accused belonged to an unlawful organisation – the offence with which he was charged – and that this belief was based on confidential

⁹⁰ See para. 42 above.

⁹¹ See para. 43 above.

⁹² See fn. 20 above.

⁹³ See fn. 24 above.

⁹⁴ See, e.g., *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11, 15 October 2015, at paras. 84-87, *Huseynli and Others v. Azerbaijan*, no. 67360/11, 11 February 2016, at paras.121-124 and *Ibrahimov and Others v. Azerbaijan*, no. 69234/11, 11 February 2016, at paras. 104-106,

⁹⁵ See, e.g., *Ramanauskas v. Lithuania* [GC], no. 74420/01, 5 February 2008, at paras. 55-61 and *Lagutin and Others v. Russia*, no. 6228/09, 24 April 2014, at paras. 118-120

information available to him, of an oral and written nature, from police and civilian sources that were not disclosed to the accused⁹⁶.

94. In reaching this conclusion, the European Court emphasised that the police officer's testimony was not the sole or decisive basis for the accused's conviction. In addition, it underlined that caution had been exercised with regard to the privilege claimed for the undisclosed sources, that a number of counter-balancing measures had been adopted⁹⁷ and that there were strong counterbalancing factors in the statutory provisions governing belief evidence⁹⁸.

95. *Such a situation is clearly unusual and the basis on which no violation of Article 6(1) was found to have occurred in many respects reinforces the need seen in the case law for courts not to accept the testimony of the police in an uncritical manner and to be alert to the possibility that there are factors that render it unreliable or even inadmissible.*

G. Admissibility of evidence

96. No rules as to admissibility of evidence are prescribed in the European Convention and the European Court thus regards this issue as primarily one for regulation under national law⁹⁹. Its concern is rather with the question of whether the proceedings as a whole, including the way in which the evidence was obtained, can be regarded as fair¹⁰⁰.

⁹⁶ *Donohoe v. Ireland*, no. 19165/08, 12 December 2013, at para. 93.

⁹⁷ Namely, a review by the court of the documentary material upon which the police officer's sources were based in order to assess the adequacy and reliability of his belief, the confirmation after this review that there was nothing in what it had reviewed that could or might assist the accused in his defence and that, if there had been, then its response would have been different, the express exclusion by the court from its consideration any information it had reviewed when it was weighing the police officer's evidence in the light of the proceedings as a whole and the court's further confirmation that it would not convict the accused on the basis of the police officer's evidence alone and that it required his evidence to be corroborated and supported by other evidence. In addition, in advance of taking its intended procedural steps, the court had informed the accused and his co-accused of its intentions as regards its procedures and it afforded them an opportunity to make detailed submissions, which they did; *ibid*, para. 88.

⁹⁸ Namely, the provision of belief evidence involved a complex intelligence gathering and analytical exercise which had to be done by high-ranking police officers who were generally ones officers with significant relevant; the fact that the evidence was not admitted as an assertion of fact but as the belief or opinion of an expert and so was not, conclusive but just one piece of admissible evidence to be considered by the trial court having regard to all the other admissible evidence; and the fact that the possibility of cross-examining the police officer on his evidence had not been entirely eliminated since he could be challenged on all matters collateral and accessory to the content of the privileged information (i.e., the nature of the sources), the analytical approach and process, any personal dealings with the informants and his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained. The European Court emphasised in relation to such cross-examination that the police officer's responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. It saw this possibility of testing the witness as distinguishing the case from those where the evidence of absent/anonymous witnesses is admitted and where the cross-examination of these witnesses is hindered or not possible at all. It also noted that there had been no such cross-examination by the accused but this had only been for reasons such as the wish to avoid any risk of unwittingly strengthening the prosecution's case against him; paras. 90-92.

⁹⁹ *Schenk v. Switzerland*, no. 10862/84, 12 July 1988, at para. 46.

¹⁰⁰ *Ibid*.

97. Certainly, the mere fact that evidence has been obtained illegally will not lead to the proceedings as being unfair¹⁰¹.
98. As a result, proceedings will not be so regarded by the European Court where evidence on which a conviction was based had been obtained in breach of the rights guaranteed by Article 8 on account of the means used not having been “in accordance with the law” as required by paragraph 2 of that provision¹⁰².
99. Rather, the concern in such instances will be whether the rights of the defence have been respected and the strength of the evidence, especially where there are no doubts as to its authenticity¹⁰³.
100. Nonetheless, the European Court does expect any use of unlawful methods to obtain evidence to be condemned as a preliminary matter¹⁰⁴.
101. Furthermore, the use of evidence obtained contrary to the privilege against self-incrimination will render a trial unfair¹⁰⁵, as will the use of confession obtained without the assistance of a lawyer¹⁰⁶. Neither should thus be admitted.

¹⁰¹ See, e.g., *Parris v. Cyprus* (dec.), 56354/00, 4 July 2002 (an illegal post mortem).

¹⁰² See, e.g. *Schenk v. Switzerland* (recording telephone conversation), *Khan v. United Kingdom*, no. 35394/97, 12 May 2000 (covert listening device), *Perry v. United Kingdom* (dec.), 63737/00, 26 September 2002 (video surveillance) and *Lee Davies v. Belgium*, no. 18704/05, 28 July 2009 (illegal search).

¹⁰³ In *Schenk v. Switzerland* there was corroborating evidence and in *Khan v. United Kingdom*, *Perry v. United Kingdom* and *Lee Davies v. Belgium* there was ample opportunity to challenge both the authenticity and the use of the evidence concerned. However, in *Lisica v. Croatia*, no. 20100/06, 25 February 2010, the European Court held that: “60. ... In the present case the search of the VW Golf vehicle carried out by the police on 24 May 2000 as well as the entry of the police into the first applicant's vehicle on 26 May 2000, both without the applicants or their counsel being present or even informed of these acts and without a search warrant for the search of the BMW on 26 May 2000, produced an important piece of evidence. The Court stresses that it was the only evidence which established direct links with the first applicant's vehicle and the Golf II vehicle driven by the robbers, while all other evidence had circumstantial quality. However, the circumstances in which it was obtained cannot eliminate all doubt as to its reliability and affected the quality of the evidence in question. 61. Viewed in light of all the above-mentioned principles, the foregoing considerations are sufficient to enable the Court to conclude that the manner in which this evidence was used in the proceedings against the applicant had an effect on the proceedings as a whole and caused them to fall short of the requirements of a fair trial. 62. There has accordingly been a violation of Article 6 § 1 of the Convention”.

¹⁰⁴ See, e.g., *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003; “Turkish legislation does not appear to attach to confessions obtained during questioning but denied in court any consequences that are decisive for the prospects of the defence ... Although it is not its task to examine in the abstract the issue of the admissibility of evidence in criminal law, the Court finds it regrettable that ... the National Security Court did not determine that issue before going on to examine the merits of the case. Such a preliminary investigation would clearly have given the national courts an opportunity to condemn any unlawful methods used to obtain evidence for the prosecution” (para. 91).

¹⁰⁵ See, e.g., *Allan v. United Kingdom*, 48539/99, 5 November 2002, at para. 52 and *Aleksandr Zaichenko v. Russia*, 39660/02, 18 February 2010, at paras. 57-60.

¹⁰⁶ See, e.g., *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, at para. 62 and *Dvorski v. Croatia* [GC], 25703/11, 20 October 2015, at para. 111. However, the admissibility of other statements that are prejudicial to the defence where there has been some delay in obtaining access to legal assistance might not render a trial unfair where the investigation of a terrorist incident is involved; see *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016, at paras. 280-294 and 298-311.

102. Similarly, it will be unfair for a conviction to be founded upon evidence obtained through the incitement to commit an offence¹⁰⁷ and there should also be an adequate investigation into allegations that it has been so obtained¹⁰⁸.
103. Moreover all evidence obtained by torture must be inadmissible¹⁰⁹ regardless of against whom such torture has been used¹¹⁰ or in which country where that torture actually occurred¹¹¹
104. In addition, evidence obtained through the use of inhuman and degrading treatment will in certain circumstances also be regarded as rendering a trial unfair¹¹² but this will not be so if that evidence does not actually have a bearing on the outcome of the proceedings against the defendant, that is, an impact on his or her conviction or sentence¹¹³.
105. *A court must always make – and be shown to have been made – a thorough assessment as to whether or not the means by which particular evidence has been obtained would render unfair its use in the trial which it is conducting.*

H. Conclusion

106. Although the European Convention does not contain any specific provision relating to evidential standards, the case law of the European Court has clearly established that there are various ones that must be observed in order to ensure that any trial can be regarded as fair and thus compatible with Article 6(1). In general, no type of evidence is excluded but that of an indirect kind needs to be handled with great care, witness testimony during the preliminary investigation may be considered

¹⁰⁷ See, e.g., *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008, at para. 73

¹⁰⁸ See, e.g., *Lagutin and Others v. Russia*, 6228/09, 24 April 2014, at paras. 121-123. See also para. 92 above.

¹⁰⁹ *Harutyunyan v. Armenia*, 36549/03, 28 June 2007, at para. 66.

¹¹⁰ *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012, at para. 282.

¹¹¹ *El Haski v. Belgium*, no. 649/08, 25 September 2012, at para. 85.

¹¹² As in *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006; “107. ... the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant’s conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in securing the applicant’s conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation. 108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair”.

¹¹³ As in *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010; “the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant’s conviction and sentence” (para. 187). Cf. *Turbylev v. Russia*, 4722/09, 6 October 2015; “the domestic courts’ use in evidence of the statement of the applicant’s surrender and confession obtained as a result of his ill-treatment in violation of Article 3 and in the absence of access to a lawyer has rendered the applicant’s trial unfair” (para. 97).

but should not carry significant weight in any conviction, the evidence of police officers should not be considered especially compelling on account of their status and the means by which certain evidence is obtained may render its use unfair. Above all, the burden of proof should be on the prosecution and any ruling to convict needs to demonstrate a proper evaluation of all the evidence submitted to the court.