CROSS EXAMINATION OF WITNESSES IN ARMENIAN CRIMINAL PROCEDURE AND IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

GUIDE

COUNCIL OF EUROPE
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GUIDE TO CROSS EXAMINATION OF WITNESSES IN ARMENIAN CRIMINAL PROCEDURE AND IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS.

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A. CONTENTS

LIST OF ABBREVIATIONS

Committee of Ministers	Committee of Ministers of the Council of Europe
Constitution	Constitution of the Republic of Armenia
Criminal Procedure Code	Criminal Procedure Code of the Republic of Armenia
European Convention	European Convention on Human Rights
European Court	European Court of Human Rights
former European Commission	former European Commission of Human Rights

EXECUTIVE SUMMARY

This Guide is concerned with the right to examine witnesses in the criminal process, the exercise of which is required by both Council of Europe standards and the Criminal Procedure Code of the Republic of Armenia.

Its particular focus is on situations in which an accused is unable to examine witnesses whose statement or testimony is the sole or decisive evidence on which her/his conviction is based or where the weight of this evidence is just significant and its admission could be such that it may have handicapped the defence.

Such situations have led to the finding of violations of Articles 6(1) and 6(3)(d) of the European Convention on Human Rights in eight cases concerning the Republic of Armenia as a result of the failure to comply with the requirements of what the European Court of Human Rights has termed "the Al-Khawaja test".

These rulings were adopted before the adoption of the new Criminal Procedure Code, which includes provisions seeking to comply with the requirements of that test.

The Guide first clarifies:

- the nature of the proceedings to which the *Al-Khawaja* test is applicable;
- how the concept of a witness is to be understood both in the case law of the European Court and the Criminal Procedure Code; and
- how to determine whether there has been compliance with the right to obtain the attendance of witnesses on behalf of an accused.

It then considers:

- the extent to which the European Court accepts that a person cannot be required to give testimony in court;
- the circumstances it has found restrictions on the manner or nature of the questioning to which a witness may be subjected;
- the different elements involved in applying the *Al-Khawaja* test as seen in the case law of the European Court; and
- certain of the provisions in the new Criminal Procedure Code intended to secure compliance with the requirements elaborated in that test.

The Guide then sets out the arrangements under the new Criminal Procedure Code for judicial deposition of testimony, the examination of minors and

"protected persons" and the use of video examination, which are also important for securing compliance with those requirements.

Thereafter, it reviews the extent to which measures adopted by other member States of the Council of Europe have been seen as satisfactorily fulfilling their obligation to execute judgments in which restrictions on the examination of witnesses against an accused had been found to give rise to violations of the European Convention.

The Guide concludes with a checklist of the steps seen as necessary for the purpose of having an effective and European Convention compliant implementation of the right to examine witnesses against an accused.

A. INTRODUCTION

1. This Guide is concerned with the right to examine witnesses in the criminal process, the exercise of which is required by both Council of Europe standards and the Criminal Procedure Code of the Republic of Armenia.

2. The principal, and most explicit, Council of Europe standard on the right to examine witnesses – which entails not just questioning them to elicit information but also to cross-examine them on statements made and testimony given – is Article 6(3)(d) of the European Convention on Human Rights ("the European Convention"), which provides that everyone charged with a criminal offence has the right:

> *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.*

3. However, as the European Court of Human Rights ("the European Court") has repeatedly made clear, this minimum right is a specific aspect of the right to a fair trial set forth in paragraph 1 of Article 6 and thus generally examines complaints about the inability to examine witnesses in the light of both these paragraphs.

4. Council of Europe standards regarding the right to examine witnesses in the criminal process also include Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe ("the Committee of Ministers") to member states concerning intimidation of witnesses and the rights

of the defence.[1] However, its content – insofar as relevant for present purposes – generally either reflects the case law of the European Court or is less exacting than it and it is thus not examined in this Guide.

5. The right to examine to witnesses is guaranteed by Article 67.4 of the Constitution of the Republic of Armenia ("the Constitution") in a broadly similar formulation to that in Article 6(3)(d) of the European Convention.[2]

6. This right is also specifically provided for in Article 43.1(10) of the Criminal Procedure Code of the Republic of Armenia ("the Criminal Procedure Code") adopted in 2021:

> *The Accused, in accordance with the procedure prescribed by this Code, shall be entitled to: … Cross-examine persons who testified against him or have such persons cross-examined, and have persons testifying for him invited and examined under the same conditions as persons who testified against him.*

and its exercise relies on a number of other provisions in it.[3]

7. The particular focus of the Guide is on situations in which an accused[4] is unable to examine witnesses whose statement or testimony is the sole or decisive evidence on which her/his conviction is based or where the weight of this evidence is just significant and its admission could be such that it may have handicapped the defence.

8. These situations were identified by the European Court in *Schatschaschwili v. Germany*,[5] in explaining its earlier ruling in *Al-Khawaja and Tahery v. United Kingdom*,[6] as relevant for the purpose of determining whether there has been compliance with the first part of the right in Article 6(3)(d)., i.e., what tends to be referred to as "the *Al-Khawaja* test".[7]

9. Particular problems in fulfilling the requirements of the *Al-Khawaja* test have been seen in eight cases concerning the Republic of Armenia that were decided before the adoption of the Criminal Procedure Code.

10. In those cases, there had been a conviction or the rejection of an ap-

1. Adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Ministers' Deputies.
2. "The right to examine or to have examined the persons that testify against him, and right to have persons testifying in his favour to be summoned and examined on the same conditions as persons that testified against him".
3. These are considered later in the Guide.
4. This term is used throughout but at the time the statement is made or testimony given, the person may only be a suspect or an accused person.
5. [GC], no. 9154/10, 15 December 2015.
6. [GC], no. 26766/05, 15 December 2011.
7. Sometimes reference is made in judgments of the European Court to just the "principles" for determining compliance with Article 6(3)(d) or, more recently, to the Al-Khawaja/Schatschaschwili principles (e.g., Chernika v. Ukraine, no. 5379/11, 12 March 2020, at paras. 41 and 46) but this study will just use the "the Al-Khawaja test".

peal against conviction following proceedings in which particular witnesses had not been examined but the courts concerned had placed some reliance on written statements previously given by them.

11. The inability of the accused in these cases to examine the witnesses concerned was a consequence of: inadequate attempts to secure their attendance;[8] the exercise of the right not to testify against a next of kin;[9] there being no opportunity to do this;[10] or the refusal to summon them[11]. In all these cases, the restriction on the ability of the applicants in these cases to examine these witnesses was considered to amount to a violation of Article 6(3)(d) taken together with Article 6(1) of the European Convention.[12]

12. The Guide reviews the different elements involved in applying the *Al-Khawaja* test as seen in the case law of the European Court and the various provisions in the Criminal Procedure Code intended to secure compliance with them.

13. However, before considering this case law and those provisions, it is essential to clarify the nature of the proceedings to which the *Al-Khawaja* test is applicable and to appreciate how the concept of a witness is understood both in the case law of the European Court and the Criminal Procedure Code.

14. Moreover, it is helpful to see how the European Court judges whether there has been compliance with the right to obtain the attendance of witnesses on behalf of an accused (i.e., the second part of Article 6(3)(d)), as this provides a useful context when determining whether certain elements in the *Al-Khawaja* test have been fulfilled.

15. Furthermore, it is also important to understand the extent to which the European Court accepts that a person cannot be required to give testimony in court and the circumstances in which the manner or nature of the questioning to which a witness may be subjected can or should be restricted to take account of her/his rights under the European Convention such as those relating to self-incrimination under Article 6(1) and the right to respect for private life under Article 8.

16. The Guide thus first reviews the nature of the proceedings for which the *Al-Khawaja* test will be applicable and the concept of witness.[13]

8. Gabrielyan v. Armenia, no. 8088/05, 10 April 2012; Ter-Sargsyan v. Armenia, no. 27866/10, 27 October 2016; Avetisyan v. Armenia, no. 13479/11, 10 November 2016; Manucharyan v. Armenia, no. 35688/11, 24 November 2016; and Dadayan v. Armenia, no. 14078/12, 6 September 2018
9. Asatryan v. Armenia, no. 3571/09, 27 April 2017.
10. Asatryan v. Armenia, no. 3571/09, 27 April 2017.
11. Chap Ltd. v. Armenia, no. 15485/09, 4 May 2017 and Avagyan v. Armenia, no. 1837/10, 22 November 2018.
12. The particular shortcomings leading to this outcome will be considered further in section F below.
13. As well as that of the former European Commission of Human Rights ("the former European Commission").

17. It then goes on to consider the approach taken the European Court it in establishing whether there has been compliance with the right to secure the attendance of witnesses on behalf of an accused.

18. This is followed by a review of the circumstances in which the European Court has found restrictions on the actual conduct of the examination of a witness against the accused before considering whether such restrictions or the complete absence of an examination will result in the basis for a conviction not fulfilling some or all of the requirements of the *Al-Khawaja* test and thus amounting to a violation of Article 6(1) and (3)(d) of the European Convention.

19. The Guide then sets out the arrangements under the Criminal Procedure Code for judicial deposition of testimony, the examination of minors and "protected persons" and the use of video examination.

20. Thereafter, it reviews the way in which the Committee of Ministers and the Council of Europe's Department for the Execution of Judgments of the European Court have assessed the extent to which measures adopted by member States have fulfilled their obligation under Article 46 of the European Convention to execute judgments finding that restrictions on the examination of witnesses against an accused had given rise to violations of Article 6(1) and (3)(d).

21. Finally, the Guide sets out a checklist of the steps seen as necessary for the purpose of having an effective and European Convention compliant implementation of the right to examine witnesses against an accused.

22. This Guide has been prepared by Jeremy McBride[14] and Davit Melkonyan[15] under the auspices of the Council of Europe's project Support for the execution by Armenia of judgments in respect of Article 6 of the European Convention on Human Rights", which is implemented by the Council of Europe and funded by the Human Rights Trust Fund and the Council of Europe Armenia Action Plan for 2019-2022.

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B. THE APPLICABILITY OF THE RIGHT

23. It should be recalled that the rights in Article 6(3) of the European Convention are only applicable where anyone is "charged with a criminal offence".

24. As a result, this provision is, of course, not applicable in proceedings that are civil[16] or administrative or disciplinary[17], nor to ones relating to confinement in a secure institution[18]. However, as regards the latter, it should be recalled that such proceedings can, having regard to the nature of the charge and the nature and severity of the penalty imposed, be regarded as "criminal for the purpose of the application of Article 6 as this concept is given an autonomous meaning by the European Court.[19]

25. Moreover, Article 6(3) has no applicability to criminally-related proceedings that do not themselves involve a trial, such as those concerned with extradition,[20] a provisional measure taken in the context of a criminal investigation that is primarily aimed at safeguarding claims which might later on be brought out by aggrieved third parties[21], the examination by prosecuting authorities of a criminal complaint lodged against someone,[22] the recovery of assets acquired through criminal conduct[23].

26. Furthermore, a suspect cannot invoke Article 6(3)(d) where s/he was not able to confront witnesses[24] or an agent provocateur[25] at a hearing by an investigating judge or was not even allowed to attend it[26].

27. However, the fact that there was a possibility prior to the trial for certain witnesses to be examined by or on behalf of an accused could be relevant for determining whether there was compliance with the requirements of the

16. Romeo v. Italy (dec.), no. 23357/94, 17 May 1995. Nonetheless, any restriction imposed on the right of a party to civil proceedings to call witnesses and to adduce other evidence in support of her/his case must be consistent with the requirements of a fair trial within the meaning of paragraph 1 of Article 6, including the principle of equality of arms; see, e.g., the finding of a violation of Article 6(1) on this basis in Khrabrova v. Russia, no. 18498/04, 2 October 2012.
17. Stamatiades v. Greece (dec.), no. 19937/92, 31 August 1984.
18. Nakach v. Netherlands (dec.), no. 5379/02, 6 January 2005.
19. See, e.g., Ezeh and Connors v. United Kingdom [GC], no. 39665/98, 9 October 2003. Cf. Zaloilo v. Netherlands (dec.), no. 60035/12, 12 June 2018, in which a limited term of cellular confinement that added nothing to the length of detention in a detention centre for aliens was not considered to be "criminal" and thus Article 6(3)(d) was held to be inapplicable to the proceedings leading to its imposition.
20. Parlanti v. Germany (dec.), no. 45097/04, 26 May 2005.
21. Dogmoch v. Germany (dec.), no. 26315/03, 18 September 2006.
22. Novotka v. Slovakia (dec.), no. 47244/99, 4 November 2003.
23. Walsh v. United Kingdom (dec.), no. 43384/05, 21 November 2006.
24. Tangorre v. France (dec.), no. 21798/93, 11 May 1994 and Owczarzak v. Po*land* (dec.), no. 27506/95, 3 December 1997.
25. Van Campen v. Belgium (dec.), no. 13107/87, 4 October 1989.
26. X. v. Federal Republic of Germany (dec.), no. 8414/78, 4 July 1979.

Al-Khawaja test where this did not occur at the trial itself and some reliance was placed on statements made during the pre-trial proceedings.

28. Also, in addition to being applicable to any proceedings before the court in which a person is actually being tried (and thus could be convicted),[27] the obligation arising under Article 6(3)(d), taken together with Article 6(1), will arise where any examination of witnesses for the purposes of those proceedings takes place in a foreign court.[28] As a result restrictions on them being confronted by, or on behalf of, the accused, or the complete absence of such a confrontation, will be relevant when applying the *Al-Khawaja* test in the event of a conviction being based on the statements made in the foreign court.

29. Similarly, there would be a need to ensure compliance with the requirements of the *Al-Khawaja* test where reliance is placed on any statements taken by police in a country other than the one in which the trial occurs.[29]

30. Furthermore, any use of statements in appellate proceedings of statements obtained at the pre-trial stage without the accused having had the opportunity, either at the time these were or at some later stage of the proceedings, to challenge and question the witnesses concerned would also be situations in which the *Al-Khawaja* test should be applied.[30]

31. Under the Criminal Procedure Code, the right to cross-examine is assured not only at the trial stage of proceedings but also at the pre-trial stage[31] where the special procedure for questioning can be invoked,[32] as well as in the course of appellate review[33].

27. Including offences of a minor character; see Borisova v. Bulgaria, no. 56891/00, 21 December 2006 and Marčan v. Croatia, no. 40820/12, 10 July 2014.
28. See X., Y. and Z. v. Austria (dec.), no. 5049/71, 5 February 1973, V. Federal Republic of Germany (dec.), no. 11853/85, 13 July 1987 and Nemet v. Sweden (dec.), no. 17168/90, 7 October 1991.
29. As happened in H.K. v. Netherlands (dec.), no. 20341/92, 6 January 1993.
30. This was not seen to be the situation in Einarsson v. Iceland (dec.), no. 22596/93, 5 April 1995 but it did arise in Finkensieper v. Netherlands (Rep.), no. 19525/92, 17 May 1995. Although no violation of Article 6(1) and (3)(d) was found to have occurred in the latter case, this ruling was before the elaboration of the Schatschaschwili test and there was a dissent by three members of the former European Commission..
31. Article 326.3.
32. Article 327, which is considered further at paras 206-223.
33. Article 365.

C. THE CONCEPT OF A WITNESS

32. The European Court has repeatedly emphasised that "witness" was a term to be given an autonomous interpretation so that restrictions in national law as to its understanding will not determine whether there has been fulfilment of the requirements under article 6(3)(d) of the European Convention.[34]

33. As far as the European Court is concerned, a witness will be any person whose statements are read out at the trial and those statements were in fact before the court and were taken into account by it, regardless of whether s/he actually gave any testimony in the course of the proceedings before it.[35] Thus, the crucial issue for treating someone as a witness – however, s/he might be designated under the relevant procedural law – is whether that person's statement serves to a material degree as the basis for a conviction as this is then to be regarded as constituting evidence for the prosecution to which the guarantees provided by Article 6(1) and (3)(d) of the European Convention apply.[36]

34. Moreover, there is no relevance for this purpose in the fact that certain prosecution witnesses have been joined to criminal proceedings as "civil parties" with a view to recovering compensation from the accused in the event of a finding of guilt.[37]

35. As a result, the following have been regarded by the European Court

34. See, e.g., Kostovski v. Netherlands [P], no. 11454/85, 20 November 1989, at para. 40, Windisch v. Austria, no. 12489/86, 27 September 1990, at para. 23 and Damir Sibgatullin v. Russia, no. 1413/05, 24 April 2012, at para. 45.
35. Ibid.
36. Kaste and Mathisen v. Norway, no. 18885/04, 9 November 2006, at para. 53. See also Arlewin v. Sweden (dec.), no. 32814/11, 2 February 2016, in which the prosecutor had requested that a television programme in which anonymous persons made statements relating to the prosecutor had requested that the programme be shown during the trial but had not called any of those persons as witnesses. The request was granted and the programme was played to the court during the trial for the judges to evaluate as evidence. It did not appear from the case-file that the prosecutor during the trial had specifically referred to or invoked any of the statements made by these individuals in the programme. Although the European Court considered that, in these circumstances, it was questionable whether the anonymous persons might be considered sufficiently connected to the proceedings to be regarded as "witnesses" within the meaning of Article 6 § 3 (d), it did proceed on the assumption that they could be so considered.
37. See, e.g., Kamasinski v. Austria, no. 9783/82, 19 December 1989, C.G. v. Switzerland (dec.), no. 18568/91, 1 December 1993 and Dmitrijevs v. Latvia (dec.), no. 62390/00, 23 May 2006. However, a lack of neutrality on the part of a court-appointed expert could give rise to a violation of Article 6(1); Bönisch v. Austria, no. 8658/79, 6 May 1985.

as witnesses: an accomplice;[38] a co-accused;[39] experts;[40] suspects;[41] victims;[42] attesting witnesses;[43] police officers;[44] and anyone else whose statements were taken down by the police or an investigating judge and then used in evidence[45].

36. The Criminal Procedure Code views the witness[46], the victim[47], the accused[48] and the expert[49] as independent entities involved in criminal proceedings. Therefore, in order to ensure the exercise of the right provided for in Article 6(3)(d) of the European Convention, the accused must be given the opportunity to cross-examine them where reliance could be placed on any statements made by them when convicting her/him or when upholding her/his conviction on appeal.

37. In *Avagyan v. Armenia*,[50] the European Court had found a violation of Article 6(1) and 6(3)(d) of the European Convention where the applicant's application to cross-examine several experts had been rejected by the trial court, which nonetheless based its conclusion that he was guilty of intentional evidence on the opinions of those experts that had been read out at the trial.

38. In order to exclude the possibility of such a violation in future, the Criminal Procedure Code provides that in the event that a party requests examination of an expert's findings, that evidence may not be used without questioning that expert.[51] This means that the opinion of an expert cannot be used to support a guilty verdict where an accused wants to question her/him regarding that opinion but the court is unable to secure her/his presence at the relevant proceedings for this purpose.

39. Moreover, in applying Article 6(3(d), no distinction will be made by the European Court between a recorded deposition by a witness or the result of

38. Sacramati v. Italy (dec.), no. 23369/94, 6 September 1994 and Damir Sibgatullin v. Russia, no. 1413/05, 24 April 2012.
39. I. v. Switzerland (dec.), no. 13972/88, 31 May 1991 and Trofimov v. Russia, no. 1111/02, 4 December 2008
40. Bönisch v. Austria, no. 8658/79, 6 May 1985 and Doorson v. Netherlands, no. 20524/92, 26 March 1996.
41. I.T.L.H. v. Finland (dec.), no. 22183/93, 18 October 1995
42. Vladimir Romanov v. Russia, no. 41461/02, 24 July 2008 and Nevzlin v. Russia, no. 26679/08, 18 January 2022.
43. Murtazaliyeva v. Russia [GC], no. 36658/05, 18 December 2018; "Attesting witnesses are invited by an investigator to act as neutral observers of an investigative measure. They are not considered to be witnesses for the prosecution or the defence, since, unlike material witnesses, they have no knowledge of the case and they do not testify about the circumstances of the case or a defendant's guilt or innocence" (para. 136).
44. Ürek and Ürek v. Turkey, no. 74845/12, 30 July 2019.
45. Slobodan v. Netherlands (dec.), no. 29838/96, 15 January 1997.
46. Article 57.
47. Article 6.26.
48. Article 6.22.
49. Article 59.
50. no. 1837/10, 22 November 2018.
51. Article 332.3.

an identity parade on the one hand and the result of a face-to-face confrontation on the other since these are all capable of furnishing evidence against an accused in a criminal trial.[52]

40. Furthermore, this provision is also applicable to documentary evidence[53] and original documents and computer files relevant to the criminal accusations against an accused[54]. Indeed, the finding of a violation of Article 6(1) and 6(3)(d) in *Chap Ltd v. Armenia*[55] rested partly on the inability of the applicant company to challenge the veracity of the information provided by a person who had not made any statements against but which information constituted evidence in the proceedings against it.

41. Similarly, under the Criminal Procedure Code, testimony covers both information provided by an accused, witness or victim in writing or orally while performing a relevant probative action[56] and information provided by an arrested person, accused, witness or victim in writing or orally and properly recorded during an examination, confrontation or on-site verification[57]. As a result, an accused should also be given the opportunity to ask questions in connection with such testimonies reflected in the investigative records.

42. In addition, the Criminal Procedure Code stipulates that a document drawn up by an employee of the criminal prosecution body may not be used if the accused has not had the opportunity to question the official who obtained it or drew it up.[58]

52. Vanfuli v. Russia, no. 24885/05, 3 November 2011, at para. 110.
53. Perna v. Italy [GC], no. 48898/99, 6 May 2003, at paras. 25-32.
54. Georgios Papageorgiou v. Greece, no. 59506/00,
55. no. 15485/09, 4 May 2017.
56. Articles 88-90.
57. Article 6.51.
58. Article 331.4 and 5.

D. OBTAINING ATTENDANCE AND EXAMINATION

43. The original approach of the European Court to the application of the right of an accused to seek the attendance and examination of witnesses on her/his behalf was to focus on whether s/he had substantiated her/his request to call a particular witness by referring to the relevance of that individual's testimony for "the establishment of the truth" and on whether any refusal to call that witness undermined the overall fairness of the proceedings.[59]

44. It has since clarified its approach through formulating a three-pronged test to determine whether there has been a violation of this first aspect of the right in Article 6(3)(d).[60]

45. Under this approach, it is thus necessary to consider:

1. Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation?
2. Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial?
3. Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

Sufficiently reasoned and relevant

46. As regards the first prong, the European Court has indicated that the focus should be on not only motions of the defence to call witnesses capable of influencing the outcome of a trial, but also other witnesses who can reasonably be expected to strengthen the position of the defence, with the strength of reasoning depending upon the circumstances of the case.

47. In many cases, this is likely to involve elaborating in concrete terms as to how a witness's testimony could reasonably be expected to strengthen the case for the defence.[61]

48. However, an application for a witness to testify in support of an accused's alibi[62] or to cast doubt on the credibility of the evidence adduced by

59. Perna v. Italy [GC], no. 488898/99, 6 May 2003.
60. Murtazaliyeva v. Russia [GC], no. 36658/05, 18 December 2018.
61. As was found not to have been provided in, e.g., Murtazaliyeva v. Russia, Madatov v. Azerbaijan (dec.), no. 29656/07, 5 March 2019, Sigurður Einarsson and Others v. Iceland, no. 39757/15, 4 June 2019 and Nevzlin v. Russia, no. 26679/08, 18 January 2022.
62. As in Bregvadze v. Georgia, no. 49284/09, 17 January 2019 and Bosak and Others v. Croatia, no. 40429/14, 6 June 2019.

the prosecution[63] should be seen as sufficiently reasoned and relevant to the subject matter of the accusation

49. Moreover, there will be some cases where the relevance of a defence witness's testimony is so apparent that even scant reasoning should be regarded as sufficient.[64]

50. At the same, an actual request for a witness to attend and be examined will need to have been made if Article 6(3)(d) is to be invoked.[65]

51. It can also be expected of her/him that s/he provides relevant details about the identity of the witnesses concerned[66] and how to contact them[67] where s/he has these. In addition, the defence may be expected to show why it could not have made its own enquiries as to the identity of a witness it wanted to be examined.[68]

52. Proposed testimony by a witness is unlikely to be regarded as relevant to the subject matter of an accusation if it relates to evidence that would be inadmissible[69] and to conduct after the commission of the alleged offence[70] or that would be given by someone who was only present when the accused was arrested rather than when s/he was supposed to have committed the alleged offence[71].

53. Equally proposed testimony by a witness whose attendance is sought by an accused would not be seen to be of assistance if it: only concerns a historically proven fact and is therefore common knowledge;[72] would cover the same aspects of the case which had already been covered by the press articles admitted as evidence at the accused's request;[73] or could not add anything to anything already testified by witnesses already heard[74].

63. As in, e.g., Popov v. Russia, no. 26853/04, 13 July 2006 and Polyakov v. Russia, no. 77018/01, 29 January 2009.
64. As in Salogub v. Ukraine (dec.), no. 21971/10, 10 December 2019, which concerned a request to examine someone present during the drawing up of the administrative-offence report.
65. This was not demonstrated to have occurred in, e.g., Albert and Le Compte v. Belgium [P], no. 7299/75, 10 February 1983 Dorokhov v. Russia, no. 66802/01, 14 February 2008 and Sharkunov and Mezentsev v. Russia (dec.), no. 75330/01, 2 July 2009. Where such a request was not made, it is not possible subsequently to complain that it had not been possible to cross-examine a particular witness because s/he had not been called by the prosecution; Fagan v. United Kingdom (dec.), no. 12508/86, 6 March 1987 and M.H. v. United Kingdom (dec.), no. 28572/95, 17 January 1997.
66. Sacramati v. Italy (dec.), no. 23369/94, 6 September 1994.
67. X. v. Federal Republic of Germany (dec.), no. 4078/69, 14 July 1970.
68. Foster v. United Kingdom (dec.), no. 24725/94, 11 January 1995.
69. Harutyunyan v. Armenia (dec.), no. 36549/03, 5 July 2005/.
70. Gorgievski v. "the former Yugoslav Republic of Macedonia", no. 18002/02, 16 July 2009 (demanding a bribe)
71. Salduz v. Turkey (dec.), no. 36391/02, 28 March 2006.
72. D.I. v. Germany (dec.), no. 26551/95, 26 June 1996.
73. Sokolowski v. Poland (dec.), no. 759551/01, 1 June 2004.
74. Rönkä v. Finland (dec.), no. 30541/96, 4 March 1998.

Determination by the court

54. For the purpose of the second prong of the test, it is expected that the relevant court should scrutinise carefully the relevant issues where the defence advances a sufficiently reasoned request to examine a certain witness. Moreover, any such assessment will entail consideration of the circumstances of the case, with the reasoning of the court being commensurate - i.e. adequate in terms of scope and level of detail - with the reasons advanced by the defence.

55. In particular, where strong and weighty arguments are advanced by the defence, there will need to corresponding close scrutiny of them by the court and convincing reasoning for any refusal of a request to examine a witness.[75] On the other hand, a less elaborate response will be considered appropriate where the request of the defence was limited and vague.[76]

56. On the other hand, the dismissal of a request in a procedurally flawed manner will not be acceptable.[77] Nor will such a refusal where the reasoning is contradictory and gratuitous[78] or where there is no supporting reasoning at all[79].

Impact of refusal

57. The third prong of the test puts emphasis on the impact of any refusal to examine a witness on the overall fairness of the proceedings and thus requires having regard to the development of the proceedings as a whole and not an isolated consideration of one particular aspect or one particular incident. This reflects the general approach now being adopted by the European Court to the application of Article 6.

58. In explaining this emphasis, the European Court underlined that, while the conclusions under the first two steps of its test would generally be strongly indicative as to whether the proceedings were fair, it could not be excluded

75. See, e.g., Bosak and Others v. Croatia, no. 40429/14, 6 June 2019 (in which a refusal to hear witnesses in support of the accused's claim that he did not commit the offence was based on the existence of other contrary evidence that had already been heard by the court) and Salogub v. Ukraine (dec.), no. 21971/10, 10 December 2019 (in which the court had considered the accused's guilt to have been established by his written statement in the administrative-offence report and which he had not contested).
76. As in Sigurður Einarsson and Others v. Iceland, no. 39757/15, 4 June 2019.
77. Bregvadze v. Georgia, no. 49284/09, 17 January 2019.
78. As in Khodorkovskiy and Lebedev v. Russia (No. 2), no. 51111/07, 14 January 2020.
79. Vidal v. Belgium, no. 12351/86, 22 April 1992, in which there was complete silence in the judgment on the point in question. However, in Dorokhov v. Russia, no. 66802/01, 14 February 2008 , where the testimony of the witnesses concerned would most likely not have led to the accused's acquittal because his conviction was supported by a solid evidentiary base, the European Court - distinguishing Vidal v. Belgium - did not find a violation of Article 6(3)(d) taken in conjunction with Article 6(1) as the implicit refusal of the court to call witnesses for the defence was not be considered to have affected the overall fairness of the trial.

that in certain, exceptional, cases considerations of fairness might warrant the opposite conclusion.

59. When assessing fairness, the European Court is likely to consider factors such as whether the accused has had the assistance of lawyers, the ability to conduct her/his defence effectively and could confront and examine witnesses testifying against her/him, comment without hindrance on the incriminating evidence, adduce evidence considered relevant and present her/his account of the events to the court, as well as the existence of a considerable body of evidence against her/him.[80]

60. However, the inability of the accused to seek the attendance and examination of a potential witness because s/he is not aware of her/his existence as a result of the non-disclosure of evidence by the prosecution would be inconsistent with the principle of equality of arms and thus a violation of Article 6(1).[81]

E. CONDUCT OF A WITNESS'S EXAMINATION

61. It is well-established in the case law of the European Court that, before an accused can be convicted, all evidence against her/him should normally be produced in her/his presence at a public hearing with a view to adversarial argument.[82]

62. The extent to which it would still be compatible with Article 6(3)(d) for a conviction to be based on statements to the police, investigating judge prosecutor without this occurring is addressed in the following section.

63. Such a situation will generally arise where the witness concerned does not attend any such hearing at all.

64. However, it can also result where, notwithstanding the actual attendance of a witness at a hearing, the circumstances or manner in which the examination of her/him takes place is subject to restrictions that render it nu-

80. As regards the latter, see the preceding footnote.
81. See J.L., G.M.R. and A.K.P. v. United Kingdom (dec.), no. 29522/95, 9 April 1997, in which the existence of such witnesses had been known to the prosecution but not relied on by it as their evidence would not be helpful to the prosecution itself. This defect of the original trial was found by the European Court to have been remedied by the subsequent procedure before the appeal court. Cf. Wotherspoon v. United Kingdom (dec.), no. 22112/93, 12 April 1996, in which a claim that there had been a refusal of access to certain statements by prosecution witnesses was found not to have been substantiated.
82. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, at para. 103.

gatory. It is, therefore, necessary to consider when restrictions on the circumstances or manner in which an examination takes place will have that result.

65. The right to examine prosecution witnesses does not necessarily mean that there cannot be some restrictions on the circumstances or the manner in which this can be exercised. Such restrictions will not mean that there has not been any examination of the witnesses concerned for the purpose of Article 6(3)(d).

Delay

66. Thus, it is possible that by the time a particular set of proceedings have come to trial, the witness will not remember everything that will be relevant, particularly as regards matters that could be helpful to the defence.

67. However, it does not seem that this will mean that they have not been examined, especially if it was still possible to question them about the relevant events and to put inconsistencies to them.[83] Of course, a failure by the court to consider factors that may affect the reliability of the evidence given by such witnesses may lead to the conclusion by the European Court that the judgment in the case was not adequately reasoned and thus amounted to a violation of Article 6(1).[84]

Time constraints

68. There does not seem to have been any instance in which it has been alleged before the European Court that the time allowed for the examination of prosecution witnesses was insufficient to deal with the issues relevant for the purpose of the defence.

69. However, although this was an issue raised in connection with the examination of defence witnesses in one case, it was considered that the applicant had not shown that the time devoted to hearing them had been insufficient.[85] Nonetheless, an undue curtailment of questioning of a prosecution witness could well lead to the conclusion that s/he had not really been examined at all since an accused must be given an adequate and proper opportunity to challenge and question a witness against her/him.

83. See F.K. v. Austria (dec.), no. 16925/90, 11 May 1994 and Papon v. France (No. 2), (dec.), no. 54210/00, 15 November 2001. Both cases concerned defence witnesses but the same view would undoubtedly be taken of the difficulties of recall affecting witnesses for the prosecution.
84. See, e.g., Gradinar v. Moldova, no. 7170/02, 8 April 2008 and Adjarić v. Croatia, no. 20883/09, 13 December 2011.
85. A.-J. v. France (dec.), no. 11794/85, 2 May 1988

Line of questioning

70. The imposition of restrictions on the line of questioning that can be pursued when examining a prosecution witness undoubtedly has the potential to lead to the conclusion that the defence was not really able to examine her/him at all.

71. However, that was not the conclusion where courts have prevented the defence from asking questions that were not relevant[86] or were "insinuating, suggestive, irrelevant and/or unnecessarily harmful"[87].

72. In addition, the European Court has not considered objectionable a restriction on the ability to question a complainer in cases involving alleged sexual offences as to her/his sexual history and character except where the court concerned considers this to be relevant and probative.[88]

73. Equally the limits of what could be tolerated for the purpose of enabling the accused to mount an effective defence was considered to have been exceeded where the accused, in questioning the alleged victim of sexual assault, made offensive insinuations about her the applicant and the failure of the court to intervene contributed to a finding that the right to respect for her private life had been violated.[89] As the European Court underlined, cross-examination should not be used as a means of intimidating or humiliating witnesses.[90]

74. On the other hand, the gratuitous permission given by a judge to a prosecution witness to refuse to answer questions put by the defence relating to the circumstances in which the imputed offences had been committed, together with the judge's prohibition on questioning the witness about certain factors that might have undermined his credibility amounted to an excessive restriction on the cross-examination that could be undertaken.[91]

75. The only restrictions on the line of questioning in the Criminal Procedure Code relate to the posing of leading questions and of questions that are not related to the proceedings. Such questions may be removed by the Presiding Judge upon a motion by a Party or upon her/his initiative.[92] However, the restriction on the posing of leading questions is only applicable to the direct questioning of a witness and leading questions are expressly allowed.[93]

86. Higgins v. United Kingdom (dec.), no. 17120/90, 3 December 1990 and Van Hoffen v. Liechtenstein, no. 5010/04, 27 July 2006.
87. De Kok v. Netherlands (dec.), no. 30059/96, 26 February 1997
88. Oyston v. United Kingdom (dec.), no. 42011/98, 22 January 2002 and Judge v. United Kingdom (dec.), no. 35863/10, 8 February 2011.
89. Y. v. Slovenia, no. 41107/10, 28 May 2015.
90. Ibid, at para. 108.
91. Pichugin v. Russia, no. 38623/03, 23 October 2012.
92. Article 326.4.
93. Article 326.5

Judicial interventions

76. It is also recognised by the European Court that it would be possible for the effectiveness of a cross-examination of a prosecution witness to be undermined as a result of the nature and frequency of interventions by a judge.[94]

Refusal to answer

77. In some cases, cross-examination may also be rendered nugatory where the refusal of a prosecution witness to answer questions put by the defence is for reasons regarded as admissible, such as on account of fear of reprisals, it being too painful or of it leading to self-incrimination.[95]

78. However, that will obviously depend on the significance of the particular refusal for issues being addressed by the defence in the examination.

Restrictions on the accused

79. A restriction on direct questioning of a prosecution witness by the accused personally has not been seen as problematic where the witness was a co-accused[96] or another suspect separately prosecuted[97] or has a justified ground for being granted anonymity[98] or in cases involving sexual assault[99] where this was undertaken by her/his lawyer or by the judge.[100]

80. However, the grant of anonymity in some circumstances may result in an accused facing considerable difficulties in challenging the reliability and credibility of the prosecution witnesses' testimonies because the range of admissible questions was limited so as to exclude, for example, all issues related to a prior relationship with the accused.[101]

81. Moreover, it is also accepted by the European Court that, even if the

94. This was an issue raised in the application considered in C.G. v. United Kingdom, no. 43373/98, 19 December 2001. However, the European Court did not find that the judicial interventions in that case, although excessive and undesirable, had rendered the trial proceedings as a whole unfair.
95. Pichugin v. Russia, no. 38623/03, 23 October 2012, at para. 203.
96. Dankovsky v. Germany (dec.), no. 36689/97, 29 June 2000; the restriction was seen as serving the general interest of the proper conduct of the trial.
97. El Khoury v. Germany, no. 8824/09, 9 July 2015.
98. Doorson v. Netherlands, no. 20524/92, 26 March 1996; Sarkizov and Others v. Bulgaria, no. 37981/06, 17 April 2012; and Pesukic v. Switzerland, no. 25088/07, 6 December 2012.
99. See, e.g., S.N. v. Sweden, no. 34209/96, 2 July 2002; Accardi and Others v. Italy (dec.), no. 30598/02, 20 January 2005; Bocos-Cuesta v. Netherlands, no. 54789/00, 10 November 2005; B.. v. Finland, no. 17122/02, 24 April 2007; and. Aigner v. Austria, no. 28328/03, 10 May 2012.
100. The latter cases were ones where the questioning was at the pre-trial stage and so reliance at the trial on the statements given by the victims meant that the considerations dealt with in the following section would be applicable, although the pre-trial examination would be a counterbalancing factor.
101. Doorson v. Netherlands, no. 20524/92, 26 March 1996.

restrictions are not so grave, it could lead to a handicap for the defence.[102]

82. In both situations there would then be a need to ensure that the requirements of the *Al-Khawaja* test discussed in the following section are fulfilled.

83. Nonetheless, it may be justified to remove a disruptive accused from the courtroom and thus prevent her/him from – but not her/his lawyer - being present when witnesses are being examined.[103]

84. Under the Criminal Procedure Code for an accused to be removed from the courtroom following a failure to comply with the requirements of a reprimand addressed to her/him to manifest proper behavior or to comply with the instructions of the authorised person during the performance of a certain procedural action or during a court session.[104]

85. On the first and second occasions of such a sanction being imposed, the proceedings shall be postponed.[105] However, if the ground for removing the accused from the courtroom is present subsequently, the court shall remove her/him from the courtroom and continue the court session.[106]

86. Where an accused has been removed from the courtroom, the court must provide her/him with an opportunity to make a closing argument and a closing statement and also in the case of an accused kept under custody - with an opportunity to participate in the session of the publicising the verdict or judgment.[107]

Interpretation

87. Furthermore, it is possible that the quality of the interpretation provided will be regarded as having imposed an unjustified restriction on the ability to question witnesses[108]

Changes in the court's composition

88. Any examination or cross-examination of a witness must (normally) be before the judge deciding the case. This principle of immediacy is seen by the European Court as an important safeguard where observations by the court on the credibility of a witness can have important consequences for an

102. Šmajgl v. Slovenia, no. 29187/10, 4 October 2016.
103. Ensslin, Baader & Raspe v Federal Republic of Germany, (dec.), no. 7572/76, 8 July 1978, Ananyev v. Russia, no. 20292/04, 30 July 2009, Idalov v. Russia [GC], no. 5826/03, 22 May 2012 and Karpyuk and Others v. Ukraine, no. 30582/04, 6 October 2015
104. Articles 142 and 144.1.
105. Article 144.4.
106. Ibid.
107. Article 144.5.
108. This was raised but not established in Kamasinski v. Austria, no. 9783/82, 19 December 1989.

accused. As a result, in the event of a change in the composition of the court, there may be a need for an important witness to be heard again.

89. However, this will not be required where there is only a slight change in the court's composition, the credibility of the witness has not been called into question, the minutes of the session at which the witness was examined are available, the conviction was not based only on that witness's evidence and there was no suggestion of the change being made to affect the outcome or for some other improper purpose.[109]

90. Under the Criminal Procedure Code, the proceedings must start anew where a judge has been replaced after her/his participation has become impossible, except in cases where a Reserve Judge has been appointed on account of the examination of the charges requiring an exceptionally long time.[110] In the latter situation, the principle of immediacy will still be respected as a Reserve Judge is obliged to be present in the courtroom during the trial examination.[111]

109. P.K. v. Finland (dec.), no. 37442/97, 9 July 2002; Graviano v. Italy, no. 10075/02, 10 February 2005; Cutean v. Romania, no. 53150/12, 21 April 2009; and Škaro v. Croatia, no. 6962/13, 6 December 2016. Cf. Beraru v. Romania, no. 40107/04, 16 March 2014, in which the availability of transcripts of the hearings concerned was considered not to be sufficient to compensate for the lack of immediacy in the proceedings in which a conviction was based solely on evidence not directly heard by one of the two judges in the case.
110. Article 269.1 and 2.
111. Article 32.3.

F. EFFECT OF ABSENCE OF OR LIMITATIONS ON EXAMINATION

91. The use as evidence of statements obtained at the stage of a police inquiry and judicial investigation will not be inconsistent with Article (3)(d) where the rights of the defence are respected.

92. This means that the possibility of examining witnesses for the prosecution should generally exist whenever they are heard at either the trial or the appellate stage of criminal proceedings.

93. However, the ability to challenge and question such 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 trial.[112]

94. Indeed, while an earlier confrontation is not generally required, it should be borne in mind that one could actually be essential in those cases where it is foreseeable that a later one will not be possible or where an expert is gathering material from others for a report.[113]

95. This possibility exists under the Criminal Procedure Code through the special procedure for questioning.[114]

96. However, the European Court recognises that there are situations where the absence of such an opportunity will not lead to a violation of Article 6(1) and (3)(d). This will be either where there was a waiver of the opportunity to challenge and question the witness or the use of the testimony is considered to comply with the requirements of the *Al-Khawaja* test.

97. In addition to the testimony given through the special procedure for questioning, the Criminal Procedure Code allows for the publicising of testimony given during pre-trial proceedings where the victim or witness has unlawfully refused to testify before the court, the person concerned is dead or has lost his communication ability, and there was no reasonable need for depositing the testimony of the given person on the ground of a severe illness during the pre-trial proceedings.[115] There is, however, no possibility to use the pre-trial testimony of a victim or witness whose unreachability means that her/his presence cannot be secured at the trial or in an appeal and his

112. Vozhigov v. Russia, no. 5953/02, 26 April 2007 and B. v. Finland, no. 17122/02, 24 April 2007.
113. See, e.g., Ferrari-Bravo v. Italy (dec.), no. 9627/81, 14 March 1984, D. v. Finland, no. 30542/04, 7 July 2009, Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, Dimitrov and Momin v. Bulgaria, no. 35132/08, 7 June 2018 and Mantovanelli v. France, no. 21497/93, 18 March 1997.
114. Article 327, discussed further at paras 237-244.
115. Article 330.1(3)-(5).

testimony was not deposited during pre-trail proceeding.

98. It should also 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 ones.[116]

99. This is authorized under the Criminal Procedure Code where there is an essential inconsistency between the in-court testimony and previously given testimony of the person concerned.[117]

Waiver

100. The right to examine may be waived but this must be established in an unequivocal manner and must not be contrary to any public interest.[118]

101. It is well-established that a person can waive, of her/his own free will, either expressly or tacitly, the entitlement to any of the guarantees of a fair trial, including that under Article 6(3)(d). However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance.[119]

102. Although a waiver need not be explicit, it must be voluntary and constitute a knowing and intelligent relinquishment of a right.

103. Thus, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Moreover, the waiver must not run counter to any important public interest.

104. There will be considered, for example, to have been a waiver consistent with these requirements where an accused, who consented to the reading out of a prosecution witness's pre-trial statements and not insisting on her request that he be heard in court, was assisted by two lawyers and was explicitly asked by the presiding judge whether she was prepared to rest her case in the absence of the witness, a course of action she did not object to. In this respect, it was also significant that the accused could still comment on those statements and did not advance any substantive objections to their content.[120]

105. Moreover, an accused was considered to have waived her right to

116. X. v. Germany (dec.), no. 8414/78, 4 July 1979 and Ninn-Hansen v. Denmark (dec.), 28972/95, 18 May 1999.
117. Article 330.1(2).
118. Zdravko Petrov v. Bulgaria, no. 20024/04, 23 June 2011 and Rudnichenko v. Ukraine, no. 2775/07, 11 July 2013.
119. Murtazaliyeva v. Russia [GC], no. 36658/05, 18 December 2018, at paras. 117-118.
120. Ibid, at para. 127. On the other hand, apparent consent to the reading out of statements by absent witness was not considered in Gabrielyan v. Armenia, no. 8088/05, 10 April 2012 to be sufficient for it to be concluded that the applicant had waived his right to examine them.

cross-examine two witnesses when the trial judge read out their statements in her presence and that of her representative, with neither raising any objection nor later seeking in the proceedings to have questions put to these witnesses.[121]

106. In addition, a waiver will be considered to exist where the witness whose statements were read out was afraid because of fear generated by acts of the accused or someone acting for her/him.[122]

107. On the other hand, a statement by an accused that he did not want to hear any more witnesses after certain ones had been heard was not to be regarded as a waiver of his right to examine four children whom he had clearly and repeatedly requested the courts to allow him to question.[123] Nor was an accused understood to have waived of his own free will, either expressly or tacitly, his right to put questions to a witness by having consent to the viewing of the video-recording of a statement made by that witness.[124]

108. Furthermore, there was not considered to have been a waiver where neither the accused nor his lawyer were asked whether they agreed to the reading out of statements of a witness but the court had merely mentioned that his absence was for a good reason and had proceeded to the reading of them.[125]

109. It is also possible that an accused who opts for an accelerated trial procedure might be regarded as having waived his right to cross-examination.[126]

110. 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.

The *Al-Khawaja* test

111. In determining whether a conviction based on the testimony of an absent witness – that is one who has ever been examined by the accused 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;

121. Poletan and Azirovik v. "the former Yugoslav Republic of Macedonia", no. 26711/07, 12 May 2016, at para. 87.
122. Al-Khawaja and Tahery v. United Kingdom [GC], no. 26766/05, 15 December 2011.
123. Bocos-Cuesta v. Netherlands, no. 54789/00, 10 November 2005, at para. 66. See also, to similar effect, Yevgeniy Ivanov v. Russia, no. 27100/03, 25 April 2013.
124. A.S. v. Finland, no. 40156/07, 28 September 2010.
125. Vladimir Romanov v. Russia, no. 41461/02, 24 July 2008.
126. Panarisi v. Italy, no. 46794/99, 10 April 2007.

- was the evidence of that absent witness the sole or decisive basis for the conviction or, if not, was its weight significant and its admission such that it may have handicapped the defence; and
- were there sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured.[127]

112. In its clarification of the *Al-Khawaja* test in *Schatschaschwili v. Germany*,[128] the European Court underlined that all three steps of the test were interrelated and, taken together, would serve to establish whether the criminal proceedings in issue have, as a whole, been fair.

113. Normally, the three steps should be examined in the order set out above but the European Court has recognised that they could be examined in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings.[129] This will be considered further after elaborating what is involved in each of the steps.

114. The Criminal Procedure Code aims to give effect to the *Al-Khawaja* test through the circumstances in which it allows the publicizing of pre-trial testimony[130] and by providing that the:

> *In the absence of sufficient counterbalancing factors, the conviction of the Accused may not be solely or predominantly based on the testimony of a person whom the Accused in question or his Defence Counsel or a representative had no opportunity of cross-examination.*[131]

Reasons for absence

115. The reasons recognised by the European Court as justifying the fact that a witness does not attend the proceedings - despite the importance of the accused being able to examine, or have examined, him or her - have been: death; fear; vulnerability illness; and unreachability.

116. In addition, there are some other reasons where a refusal to testify can be justified and the grant of anonymity to a witness – which can have an adverse impact on the ability to subject her/him to examination that is comparable to being absent – can sometimes be appropriate.

117. However, it is not enough to assert the existence of such reasons as it is also essential that they be subjected to careful scrutiny to ensure that

127. Al-Khawaja and Tahery v. United Kingdom [GC], no. 26766/05, 15 December 2011 and Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015.
128. At paras. 100-131.
129. *Ibid.*, at para. 118.
130. Article 330.1(3)-(5).
131. Article 22.7.

they are actually warranted in the particular circumstances of the case. It is important, therefore that there not only be proper consideration by the court concerned as to whether any justified reason genuinely exists but that this is evident from its ruling on this issue.

Death

118. In general, it will not be possible to call into question the death of a witness before the relevant hearing as anything other than a justified reason for the inability to examine her/him.[132] Nonetheless, a witness's death will not be regarded as a good reason where the attempt to introduce his statement did not occur at the initial trial when he was still alive and could have been examined but at a retrial occurring after his death.[133] On the other hand, a witness's death will be seen as a good reason where neither the investigator nor the prosecutor knew that the victim's condition was so serious that she might be unable to attend the trial[134] or where he only became seriously ill just before the beginning of the trial and died shortly afterwards[135]. In neither of those situations would it have been possible to organise a confrontation between the witness and the accused prior to the trial.

Fear

119. Fear which is attributable to threats made by the accused or those acting on her/his behalf is, as has been seen, a basis for considering that there has been a waiver of the right to examine the witness concerned.[136]

120. It is also recognised that fear of death or injury of another person or of financial loss are also relevant considerations in determining whether a witness should not be required to give oral evidence.

121. However, it is not possible for any subjective fear of the witness to suffice. The court is expected to conduct appropriate enquiries to determine, firstly, whether there are objective grounds for that fear, and, secondly, whether those objective grounds are supported by evidence.

122. Thus, there may be good reason to fear reprisals where a witness had been pursued by the accused and others after fleeing the scene of a killing,[137] Moreover, where the trial judge relied on evidence from both the witness and a police officer, the European Court accepted that it had justifiably been concluded that the witness had a genuine fear of giving oral evidence and was not prepared to do so even if special measures - such as testifying behind a

132. See, e.g., Ferrantelli v. and Santangelo v. Italy, no. 19874/92, 7 August 1996 and Mika v. Sweden (dec.), no. 31243/06, 27 January 2009.
133. Dimović v. Serbia, no. 24463/11, 28 June 2016.
134. Dimitrov and Momin v. Bulgaria, no. 35123/08, 7 June 2018
135. Dimović and Others v. Serbia, no. 7203/12, 11 December 2018
136. Al-Khawaja and Tahery [GC], no. 26766/05, 15 December 2011, at para. 122.
137. Šmajgl v. Slovenia, no. 29187/10, 4 October 2016.

screen - were introduced in the trial proceedings.[138]

123. However, it will not be enough just to accept a written statement from the witness that it would be stressful for her to be in the presence of the accused,[139] let alone failing to carry out any examination of the reasons for the witness's fear[140].

124. Finally, before a witness can be excused from testifying on grounds of fear, the European Court considers that the relevant court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.[141]

Vulnerability

125. It is well-established that a child may not be expected to give evidence at a trial in order to protect her/his well-being, particularly where s/he is an alleged victim of sexual abuse and as a confrontation then could prove to be a traumatic experience for her/him.[142] This might equally be true of adult victims of sexual assault and domestic violence.[143]

126. However, it would be appropriate for the court's decision not to expect someone to testify at the trial on grounds of vulnerability to be based on evidence, such as that of a psychologist. Thus, the expert opinions of a psychiatrist and a psychologist were regarded as a sufficient basis for concluding that it would not be psychologically safe for boys who were alleged to be victims of a sexual assault to take part in further pre-trial investigative actions or to be cross-examined at the trial.[144]

Illness

127. The absence from the proceedings on the grounds of the witness's ill-health will need to be supported by evidence if it is to be regarded as justified, whether through a medical certificate[145] or testing ordered by the court.[146]

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138. Al-Khawaja and Tahery v. United Kingdom [GC], no. 26766/05, 15 December 2011, at para. 159.
139. Štulíř v. Czech Republic, no. 36705/12, 12 January 2017.
140. Krasniki v. Czech Republic, no. 51277/99, 28 February 2006.
141. Al-Khawaja and Tahery v. United Kingdom [GC], no. 26766/05, 15 December 2011, at para. 125.
142. P.S. v. Germany, no. 33900/96, 20 December 2001; Rosin v. Estonia, no. 26540/08, 19 December 2013; Kiba and Others v. Russia (dec.), no. 38047/08, 17 April 2018; and B. Ż. v. Poland (dec.), no. 6386/17, 31 August 2021.
143. Štulíř v. Czech Republic, no. 36705/12, 12 January 2017, at para. 60 and Dimitrov and Momin v. Bulgaria, no. 35123/08, 7 June 2018, at para. 58.
144. T.K. v. Lithuania, no. 14000/12, 12 June 2018. See, to similar effect, D.T. v. Netherlands (dec.), no. 25307/10, 2 April 2013 and Vronchenko v. Estonia, no. 59632/09, 18 July 2013.
145. Bobeş v. Romania, no. 29572/05, 9 July 2013 and Chukayev v. Russia, no. 36814/06, 5 November 2015.
146. As was proposed in Schatschaschwili v. Germany 26766/05, 15 December 2011 when a claim of post-traumatic stress disorder was considered by the German courts not to have been substantiated.

128. Thus, there will be no such justification for non-attendance where there was no proof that the witnesses were seriously ill[147] or where the relevant court took no step to establish whether a witness's health problems were such as to prevent him from appearing before it[148].

129. Moreover, there will also be a need to establish that an illness was an impediment to testifying throughout the duration of the relevant proceedings.[149]

Unreachability

130. In order to be able to consider that a witness is unreachable, the court concerned will have to have actively searched for her/him, with the help of the domestic authorities, including the police, but it has not been possible to ensure that s/he is present and examined.

131. Thus, the European Court will not consider that there is a good reason for the absence of a witness or witnesses where:

- there was no explanation for the non-attendance of a witness despite him being detained in prison and so under the exclusive control of the State;[150]
- there was simply a refusal to summon them;[151]
- it was just accepted that she could not be located;[152]
- she was available and no difficulty in summoning her existed;[153]
- no efforts were made to summon him;[154]
- there was no investigation of a claim of extreme poverty preventing him travelling to the court;[155]
- the justifications for the witnesses' unavailability were based only on the statements of their relatives without any serious attempt having been made by the police to locate them;[156]
- there was no follow-up attempt to secure their attendance after learning that the witnesses would just be absent for a short time[157] or after receiving information from the accused as to a witness's where-

147. Avaz Zeynalov v. Azerbaijan, no. 37816/12, 22 April 2021.
148. Efendiyev v. Azerbaijan, no. 27304/07, 18 December 2014.
149. As was not the case in Zadumov v. Russia, no. 2257/12,12 December 2017.
150. Fikret Karahan v. Turkey, no. 53848/07, 16 March 2021.
151. Chap Ltd. v. Armenia, no. 15485/09, 4 May 2017; Daştan v. Turkey, no. 37272/08, 10 October 2017; and Avagyan v. Armenia, no. 1837/10, 22 November 2018.
152. T.K. v. Lithuania, no. 14000/12, 12 June 2018.
153. Blokhin v. Russia [GC], no. 47152/06, 23 March 2016
154. Paić v. Croatia, no. 47082/12, 29 March 2016 and Bátěk and Others v. Czech Republic, no. 54146/09, 12 January 2017.
155. Sitnevskiy and Chaykovskiy v. Ukraine, no. 48016/06, 10 November 2016.
156. Gabrielyan v. Armenia, no. 8088/05, 10 April 2012; Avetisyan v. Armenia, no. 13479/11, 10 November 2016; and Manucharyan v. Armenia, no. 35688/11, 24 November 2016.
157. Palchik v. Ukraine, no. 16980/06, 2 March 2017.

abouts;[158]

- there was no attempt to establish the witness's location by resorting to international legal assistance mechanisms;[159]
- the witness did not attend the hearing only because the summons had not been properly served on him;[160] and
- there was no exercise of powers to compel attendance.[161]

132. Furthermore, the law will be regarded as inadequate for the purpose of Article 6(3)(d) if there is no basis in it for compelling the attendance of a witness in proceedings against an accused.[162]

133. The constraints of professional life will not in themselves be regarded by the European Court as sufficient to justify an absence from criminal proceedings in which the police officers were involved in their capacity as witnesses.[163]

134. Furthermore, where the police authorities claim to be unsuccessful in their attempts to secure the attendance of witnesses, it is essential that the review of the reasons advanced is neither superficial nor uncritical. In particular, the European Court has underlined the need for the relevant court to go into the specific circumstances of the situation of each witness and to examine whether any alternative means of securing their giving evidence in person would have been possible and sufficient.[164]

135. However, the European Court will consider there to be a good reason for the non-attendance of a witness where the accused does not share information about her/his whereabouts after extensive efforts by the court to establish this had been unsuccessful.[165]

136. Absence abroad will not excuse the failure to make all reasonable efforts to secure the attendance of a witness for the purpose of examination by or on behalf of the accused.

137. Thus, where the witness is abroad, the court will normally be expected to have resorted to international legal assistance in order to secure her/his attendance in the proceedings, whether through a hearing abroad, video-proceedings or attendance at the court itself.

158. Boyets v. Ukraine, no. 20963/08, 30 January 2018; Asani v. "the former Yugoslav Republic of Macedonia", no. 27962/10, 1 February 2018 and Chernika v. Ukraine, no. 53791/11, 12 March 2020.
159. Gabrielyan v. Armenia, no. 8088/05, 10 April 2012.
160. Puljić v. Croatia, no. 46663/15, 8 October 2020.
161. Seton v. United Kingdom, no. 55287/10, 31 March 2016.
162. Mild and Virtanen v. Finland, no. 39481/98, 26 July 2005.
163. Ürek and Ürek v. Turkey, no. 74845/12, 30 July 2019 and Zelić v. Croatia, no. 35375/15, 10 December 2020.
164. Nechto v. Russia, no. 24893/05, 24 January 2012.
165. Gryb v. Ukraine, no. 65078/10, 14 December 2017

138. Simply not knowing the witness's address[166] or not trying to locate her/him[167] will not be regarded by the European Court as a sufficient excuse for failing to have resort to this possibility where it exists.[168] It will also not consider there to be a good reason for the non-attendance of a witness where the failure of the court concerned to make use of the possibility of international legal assistance is not even explained.[169]

139. The European Court will similarly conclude that there was no good reason for the attendance of witnesses abroad where the relevant court readily accepted declarations by them that they were unable to attend the trial due to lack of financial means, family or work, without it having even considered the possibility of reimbursing the costs of their travel and subsistence,[170] as well as where no inquiries were made as to whether those who were in prison abroad could be transferred to the country in which the trial was being held at a later stage in the proceedings[171].

140. However, where international legal assistance is pursued, it is recognised by the European Court that the efficacy of this is dependent upon the cooperation of the foreign courts and, in the absence of this, there is nothing more that can be expected of the court seeking the examination of the witnesses concerned.[172]

141. Where the residence of witnesses outside the country is unknown but the court has email address for them, attempting to contact them through using this may be seen as a sufficient step to ensure their appearance.[173]

142. Moreover, there may be a need for the accused to accept some constraints as to how the attendance of witnesses abroad is actually effected.[174]

143. Furthermore, a good reason for the non-attendance of a witness will be

166. Ben Moumen v. Italy, no. 3977/13, 23 June 2016.
167. Manucharyan v. Armenia, no. 35688/11, 24 November 2016.
168. Ben Moumen v. Italy, no. 3977/13, 23 June 2016.
169. Rastoder v. Slovenia, no. 50142/13, 28 November 2017.
170. Ter-Sargsyan v. Armenia, no. 27866/10, 27 October 2016.
171. Dadayan v. Armenia, no. 14078/12, 6 September 2018.
172. Thus, in Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015 the Latvian courts accepted the witnesses' refusal to testify on the basis of the medical certificates they had submitted and there is nothing to indicate that the trial court would have been likely to obtain a hearing of the witnesses, within a reasonable time, following bilateral negotiations with the Republic of Latvia at the political level. Similarly, see Berg v. Austria (dec.), no. 11216/15, 1 September 2020, in which the court had summoned three witnesses by letters rogatory addressed to the United States and Hong Kong authorities, but the witnesses had not appeared at the trial, with two of them having expressly refused to testify before the court.
173. See Berg v. Austria (dec.), no. 11216/15, 1 September 2020. In the event, neither responded nor appeared at the trial.
174. See Berg v. Austria (dec.), no. 11216/15, 1 September 2020, in which the domestic courts had proposed to the accused that two of the witnesses abroad be questioned via video conference., but he had explicitly objected to this course of action. The European Court thus concluded that the domestic courts complied with their duty actively to attempt to ensure the witnesses' appearance at trial.

regarded by the European Court to exist where he was considered a fugitive and was being tried *in absentia*.[175]

144. The European Court has, however, made it clear that the absence of a good reason for the non-attendance of a prosecution witness cannot of itself be conclusive of a trial's unfairness. Rather the lack of a good reason will be 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).[176]

145. The Criminal Procedure Code requires victims and witnesses to appear upon invitation of the body conducting proceedings,[177] with the provision relating to witnesses specifically referring to them doing so on the day and at time mentioned in the summoning notice. There is a corresponding obligation for the body conducting the proceedings to notify of a procedural action and a court session those persons who have the right or obligation to participate therein.[178]

146. Similarly, experts are required to appear when invited by the body conducting proceedings.[179]

147. The means of notification provided in the Criminal Procedure Code are: paper or electronic notice; announcing it at the proceedings or the ongoing court session with participation of the addressee of the notice and at the same time making a note about it in the relevant protocol; or in any other way with the consent of the addressee.[180]

148. Written notices must normally be delivered no later than two days prior to the date of the procedural action or the court session concerned. However, if the procedural action or the court session is not planned or cannot be postponed, then a written notice may be delivered on the day of appearing or immediately before appearing, specifying in it the reason for late delivery of the written notice.[181]

149. Paper notices must be delivered either directly or by mail at the address of the person being notified. However, if that person is being notified for the first time, the notice must be delivered at the address of her/his permanent residence or registration or, if it is unknown, at the address of her/his work, education, or service.[182]

150. Paper notices must be handed over to the addressee in person and, in

175. Dodoja v. Croatia, no. 53587/17, 24 June 2021.
176. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, at para. 113.
177. Articles 50.3(1) and 58.2(1).
178. Article 149.1.
179. Article 60.2(6).
180. Article 149.2. A person kept under custody is to be notified through the administration of the respective place; Article 149.4.
181. Article 151.1.
182. Article 151.2.

her/his temporary absence, to one of the adult family members living with her/him or to the condominium employee.[183] If it is sent to the addressee's place of work, study or service, the notice must be delivered to the competent employee of the administration of the relevant institution.[184] The recipient is required to deliver it to the addressee. Paper notices to persons residing in other country may also be sent through the diplomatic missions of the Republic of Armenia or in any other manner prescribed by an international treaty.[185]

151. In the section for signing the paper notice, the recipient must indicate her/his name, surname and the time of receipt, confirming this with her/his signature, and should indicate her/his relationship with the addressee if this is not her/him. The part of the paper notice separated for signature must be returned to the authority conducting the proceedings.[186]

152. The person being notified is obliged to accept a paper notice but, if s/he refuses to do so, s/he must mark so in the dedicated signature section of the written notice and return the written notice to the body conducting proceedings.[187]

153. Electronic notices must be sent to the official e-mail address of the person being notified.[188]

154. The addressees of notices are considered to have been duly notified in the following circumstances:

- the paper notice was received by the addressee in person;
- the paper notice was received at the address specified by addressee;
- the recipient of the paper notice has confirmed in writing the fact of delivering it to addressee;
- the paper notice was returned to the authority conducting the proceedings with a note on the refusal of the addressee to accept it, if the person delivering the notice is not involved in the proceedings;
- there is an electronic acknowledgment of receipt of the electronic notice sent to the official e-mail of the addressee;
- the addressee has confirmed the fact of receiving the notice by signing the protocol of the proceedings;
- the fact of notification was affirmed by a voice recording in the court session; or
- the notice was sent in writing and in manner explicitly suggested by

183. Article 151.3.
184. Ibid.
185. Article 151.5.
186. Article 151.4.
187. Article 152.
188. Article 151.7.

the addressee.[189]

155. The person summoned with due notice shall be obliged to appear at the place of the proceedings or at the court session at the appointed time or to inform the body conducting the proceedings in advance about the reasons for not attending.[190]

156. Written notices addressed to victims and witnesses must specify that, in case of appearing to the procedural action without a lawyer, the procedural action concerned shall not be subject to postponement on the ground of demanding a lawyer.[191] In addition, all written notices must have attached to them the list of rights and obligations arising from the addressee's particular status in the proceedings concerned where so invited for the first time.[192]

157. In case of experts, victims or witnesses maliciously evading their duty to appear before the body conducting the proceedings, that body is authorised to make a decision on the forced summoning of them in order to ensure their presence.[193]

158. A person may not be kept under custody for a time longer than the duration required for the fulfilment of the obligation for which s/he was brought compulsorily, but in any case no longer than for 12 hours. Moreover, if it is no longer necessary to detain the person concerned or if the specified maximum period has expired, s/he must be promptly released.[194]

159. In addition, there is provision for experts, victims and witnesses to receive compensation for the costs incurred by them during the relevant proceedings.[195]

Justifications for a refusal to testify

160. It is also admissible for persons to be allowed to refuse to testify because of their family relationship with the accused[196] or to compel them to do so where they invoke their privilege against self-incrimination.[197] However, the privilege against self-incrimination should only be relied upon in respect of the refusal to answer specific questions.[198]

189. Article 153.1.
190. Article 153.2.
191. Article 150.4.
192. Article 150.3.
193. Article 145.1.
194. Article 145.4.
195. Articles 60.1(6), 50.2(24) and 58.1(9) respectively.
196. Unterpertinger v. Austria, no. 9120/80, 24 November 1986 and Asch v. Austria, no. 12398/86, 26 April 1991.
197. Vidgen v. Netherlands, no. 29353/06, 10 July 2012 (in which a witness invoked this privilege in refusing to allow statements given to a police officer to be tested or challenged by or on behalf of the accused). See also Oddone and Pecci v. San Marino, no. 26581/17, 17 October 2019.
198. Serves v. France, no. 20225/92, 20 October 1997.

161. Article 65 of the Constitution provides that:

> *No one shall be obliged to testify about himself, his spouse, or his close relatives, if it can be reasonably presumed that it may subsequently be used against him or them. The law may stipulate other cases of exemption from the duty to testify.*

162. The right of victims and witnesses not to testify to the detriment of themselves or of their spouses or close relatives is also secured in the Criminal Procedure Code.[199] The only other exemption in it from the duty to testify concerns the defence counsel.[200]

Anonymity

163. Similar to the need for good reason for absence, there is also a requirement for the grant of anonymity to a witness to be justified if this prevents effective examination or just imposes a handicap on the defence.

164. This can be justified by the witness fear of the accused, concerns for her/his safety and the risk of pressure being put on her/him,[201] as well as preserving the anonymity of an undercover agent for operational reasons[202].

165. Nonetheless, there is a need for sufficient information to be adduced to demonstrate that there was a need to grant the witness anonymity[203] and to demonstrate that the claimed risks were actually assessed[204].

Relevance of statements for the conviction

166. The testimony of the absent witness will be the "sole" evidence against an accused where it is the only evidence against her/him and it will be "decisive" if it is evidence of such significance or importance as is likely to be determinative of the outcome of the case. In assessing the latter, there will be a need to consider the strength of the other evidence relied upon to support the conviction.[205]

167. In determining whether the evidence of an absent witness is to be regarded as either "sole" or "decisive" in character, the European Court starts by examining the weight given to it by the relevant court. However, any position

199. Articles 50.2(3) and 58.1(3).
200. Article 49.2(2).
201. Scholer v. Germany, no. 14212/10, 18 December 2014; Ivannikov v. Russia, no. 36040/07, 25 October 2016; and Asani v. "the former Yugoslav Republic of Macedonia", no. 27962/10, 1 February 2018.
202. Bátěk and Others v. Czech Republic, no. 54146/09, 12 January 2017 and van Wesenbeeck v. Belgium, no. 67496/10, 23 May 2017.
203. Süleyman v. Turkey, no. 59453/10, 17 November 2020.
204. Van Mechelen and Others v. Netherlands, no. 21363/93, 23 April 1997.
205. Al-Khawaja and Tahery v. United Kingdom [GC], no. 26766/05, 15 December 2011 and Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015.

on this expressed by the relevant court will not be conclusive as the European Court will make its own assessment, having regard to the strength of any additional incriminating evidence available.

168. The mere fact that there are other evidences in a case does not mean that a particular statement by a witness cannot be the sole basis for the conviction in it as that statement may be the only thing that actually links the accused with the commission of the offence concerned.

169. Evidence will be seen as decisive where it bears the main burden of proof, which is subject to assessment in the context of the probative value of other evidence. This concept is evaluated in conjunction with the "beyond reasonable doubt" criterion. Thus, where evidence not secured by cross-examination is conditionally excluded from the list of evidence, and the aggregate of all other evidence is not sufficient to rule out the reasonable possibility of the person's innocence, the evidence not secured by cross-examination will be the decisive basis for a conviction.

170. An instance of the evidence having the "sole" character would be where the national courts' findings of guilt were based on the absent witness's description of the events and the only other witness heard by the court was the former wife of the accused, who had supported his version of events.[206]

171. Similarly, the sole basis for the conviction of an accused for having disobeyed a police officer was considered to be that officer's description of the events concerned since no other witnesses gave evidence before the court and no further evidence was obtained by means of an objective method.[207]

172. The evidence of eyewitnesses has, however, been regarded as decisive where the only other evidence available was either hearsay evidence or merely circumstantial technical and other evidence which was not conclusive.[208]

173. Such a view was also taken of new evidence introduced during a retrial, which was sufficiently important to make a difference between the accused's acquittal and their conviction,[209] and also of the testimony of a witness on which the trial court had relied in order to determine the motive behind the attempted murder[210].

174. Sometimes, the European Court leaves unresolved the issue of whether particular evidence was the sole basis for a conviction, preferring to find that

206. Paić v. Croatia, no. 47082/12, 29 March 2016.
207. Petrović v. Croatia, no. 63093/16, 10 December 2020. The evidence provided by the absent witness in Chap Ltd. v. Armenia, no. 15485/09, 4 May 2017 was also the only evidence against the applicant.
208. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015; Ter-Sargsyan v. Armenia, no. 27866/10, 27 October 2016; and Manucharyan v. Armenia, no. 35688/11, 24 November 2016.
209. Dimović v. Serbia, no. 24463/11, 28 June 2016.
210. Nevzlin v. Russia, no. 26679/08, 18 January 2022.

the relevant statements were, if not the sole, then at least the decisive evidence against the accused.[211]

175. Of course, it is important to recognise the difficulty for a trial court in determining whether evidence would be decisive – and thus allowing it to be admitted where was no possibility of the accused examining the witness concerned - without having the advantage of examining and weighing in the balance the totality of evidence that has been adduced in the course of the trial.[212]

176. 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" and its admission could be such that it may have handicapped the defence.[213]

177. On the other hand, there will certainly be situations where the evidence of an absent witness is clearly neither the sole nor the decisive basis for the conviction of an accused. where there was extensive written evidence, which he was given the opportunity to challenge, and during the trial over twenty witnesses were heard, whom he examined and cross-examined.[214]

178. It is desirable for a court to give an indication in its judgment as to the weight which it gave to the statement of any absent witness, as well as why it considered that evidence to be reliable, as these will be matters which the European Court will consider when evaluating the adequacy of any counterbalancing factors in the case concerned.[215]

179. Where the statements of absent witnesses are nether decisive nor carried significant weight for a conviction, the European Court does not con-

211. E.g., Ürek and Ürek v. Turkey, no. 74845/12, 30 July 2019 (where all the evidence used by a court for concluding that the accused had committed the offences with which they were charged came from the police officers who had arrested them); Daştan v. Turkey, no. 37272/08, 10 October 2017 (where a conviction rested solely on the incriminatory statements of two witnesses and the credibility of those statements was not supplemented by other evidence); and Bakir v. Turkey, no. 2257/11, 13 October 2020 (where a conviction for speeches that had allegedly been made was based on the testimony of an absent witness).
212. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, at para. 116.
213. See, e.g., Asatryan v. Armenia, no. 3571/09, 27 April 2017 (in which the European Court considered it unclear whether the evidence of the absent witnesses used to reinforce the applicant's alleged motive for the offence was sole or decisive but was nevertheless satisfied that it carried significant weight and that its admission might have handicapped the defence); Garbuz v. Ukraine, no. 72681/10, 19 February 2019 (in which the European Court was prepared to assume that the evidence of an absent witness carried significant weight and that its admission may have handicapped the applicant's defence); Tău v. Romania, no. 56280/07, 23 July 2019 (in which it found that, while a witness's statement may not have been the sole or decisive evidence on which the conviction was based, it clearly carried significant weight in the establishment of guilt); and Dodoja v. Croatia, no. 53587/17, 24 June 2021 (in which the statement of a witness about the frequency of the involvement in drug transactions of an accused who had confessed to only one instance was considered to have carried significant weight so that its admission may have handicapped the defence to an important degree).
214. Arlewin v. Sweden (dec.), no. 32814/11, 2 February 2016.
215. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, at paras. 123 and 126.

sider it necessary to review the existence of counterbalancing factors. This is because, given the limited impact of those untested statements, their admission would not be seen as not able to undermine the overall fairness of the proceedings concerned.[216]

Existence of counterbalancing factors

180. Where a conviction is to an extent based on the evidence of an absent witness in any of the ways discussed above, the European Court will then be concerned to establish whether there are sufficient counterbalancing factors in place, including measures that will permit a fair and proper assessment of the reliability of that evidence to take place.

181. The requirement for sufficient counterbalancing factors applies equally where a conviction is similarly based on the testimony of an anonymous witness to overcome the difficulties encountered by the defence.[217]

182. The object of this is to ensure that such a conviction is only permitted where that evidence is sufficiently reliable given its importance in the case.

183. 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.[218]

184. Additional safeguards identified by the European Court include:

- 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;
- 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 same accused, particularly where that witness's reliability is tested by

216. Sitnevskiy and Chaykovskiy v. Ukraine, no. 48016/06, 10 November 2016, at para. 125.
217. See, e.g., Ivannikov v. Russia, no. 36040/07, 25 October 2016 and Süleyman v. Turkey, no. 59453/10, 17 November 2020.
218. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, at para. 126.

cross-examination);

- 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;
- 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
- the accused 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 witnesses.[219]

185. However, a mere opportunity to challenge and rebut an absent witness's statement will not, of itself, be regarded as a sufficient counterbalancing factor to compensate for the handicap for the defence created by the witness's absence.[220]

186. On the other hand, the rights of the defence will be seen as respected where an adversarial hearing at the investigation stage is organized in order to pre-empt any risk that a crucial witness might not be available to give testimony at the trial and this hearing is video-recorded.[221]

187. Indeed, the Criminal Procedure Code provides that, pursuant to the recommendation of a psychologist, a minor victim or witness should not be questioned where there is a need for protection the lawful interests of her/him and the defence party has had the opportunity during the pre-trial proceeding to ask questions of her/him.[222]

188. Nonetheless, the witness must actually be questioned as opposed to just giving their opinions.[223]

189. Furthermore, an opportunity to examine a witness at the pre-trial stage of the proceedings will not be considered by the European Court to be an appropriate substitute for her/his examination in court where the accused was not assisted by a lawyer or where the confrontation was conducted by someone other than a judge.[224]

219. Ibid. at paras. 127-131.
220. Trampevski v. "the former Yugoslav Republic of Macedonia", no. 4570/07, 10 July 2012; Riahi v. Belgium, no. 64500/10, 14 June 2016; and Keskin v. the Netherlands, no. 2205/16, 19 January 2021.
221. As in Chmura v. Poland, no. 18475/05, 3 April 2012, in which such a hearing was organised having regard to the difficulties in tracking down the witness, who was a foreign national, and the importance of his testimony for the case.
222. Article 329.3.
223. As in T.K. v. Lithuania, no. 14000/12, 12 June 2018.
224. Melnikov v. Russia, no. 23610/03, 14 January 2010; Vanfuli v. Russia, no. 24885/05, 3 November 2011; and Karpenko v. Russia, no. 5605/04, 13 March 2012.

190. Moreover, the fairness of the confrontation may also be affected by the accused's limited knowledge of the case file since this may mean that issues of assistance to the defence could not be explored when questioning the witness concerned.[225]

191. Also, the hearing of witnesses by the courts of their places of residence is not regarded by the European Court as capable of operating as a procedural safeguard in the absence of good reasons for the non-attendance of absent witnesses and when the trial court had recourse to it without considering alternative measures for obtaining evidence from the absent witnesses.[226]

192. In making its assessment of the overall fairness of the trial, the European Court will – in addition to considering the reasons for the witness's absence - have regard to the available counterbalancing factors, viewed in their entirety in the light of its finding as to the particular significance of the evidence of the absent witness for the conviction in the case concerned.

193. In some cases, the European Court has found that there were no counterbalancing factors at all.[227]

194. However, where such measures do exist, it is also important to assess their actual effectiveness as their mere existence will not necessarily mean that they are sufficient to permit a fair and proper assessment of the reliability of the untested evidence.

195. Certainly, this has not been the view taken of additional incriminating evidence and the assessment in a careful manner of the credibility of absent witnesses and the reliability of their statements given that they were made by the only eyewitnesses to the offence of which an accused was convicted.[228]

196. On the other hand, where the evidence of an absent witness is not the sole or decisive basis for the conviction, such a careful assessment of its cred-

225. Chernika v. Ukraine, no. 53781/11, 12 March 2020, at paras. 70-71.Cf. Chmura v. Poland, no. 18475/05, 3 April 2012, in which a refusal of access to the case file was not considered to have prejudiced the rights of the defence as the applicant and his lawyer had sufficient information enabling them to subject the witness's credibility to scrutiny and cast doubt on the truth of his depositions.
226. Faysal Pamuk v. Turkey, no. 430/13, 18 January 2022
227. E.g., Blokhin v. Russia [GC], no. 47152/06, 23 March 2016; Ter-Sargsyan v. Armenia, no. 27866/10, 27 October 2016; Manucharyan v. Armenia, no. 35688/11, 24 November 2016 (some additional incriminating evidence against the applicant did not by itself undermine the applicant's defence that it had been his deceased brother who had committed the murder in the case); Asatryan v. Armenia, no. 3571/09, 27 April 2017; Chap Ltd. v. Armenia, no. 15485/09, 4 May 2017; Syarkevich v. Russia, no. 10216/06, 28 November 2017; T.K. v. Lithuania, no. 14000/12, 12 June 2018 (there was only indirect support for the statements of the absent witnesses, namely, testimony as to what the witnesses present court were told by the absent ones); and Avaz Zeynalov v. Azerbaijan, no. 37816/12, 22 April 2021.
228. Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015, at para. 163. See to similar effect Paić v. Croatia, no. 47082/12, 29 March 2016; and Oddone and Pecci v. San Marino, no. 26581/17, 17 October 2019.

ibility and reliability is likely to be sufficient.[229]

197. However, importance will be attached both to lack of caution in approaching the evidence of an absent witness[230] and to shortcomings in the way the court handled the case in concluding that there were not sufficient counterbalancing factors.[231]

198. Moreover, doubts about the reliability of other, supposedly incriminating evidence may undermine its usefulness as a counterbalancing factor.[232]

199. Particular weight is likely to be attached to the effectiveness as a counterbalancing factor of an opportunity to confront the absent witness during the investigative stage of the proceedings.[233]

200. In the case of an anonymous witness, adequate counterbalancing factors were seen to exist where the court carried out an assessment of evidence provided by him and compared its content with the statements made by another witness, the judge who conducted the questioning was able to observe the witness's demeanour and to form a clearer impression of his credibility. Moreover, the applicant had had the opportunity to give his own version of the events, had the witnesses testified on his behalf and to cast doubt on the credibility of the anonymous witness whose identity had been known to him, and to cross-examine a witness who had given hearsay evidence against him during the criminal investigation and recanted it during the trial. In addition, The applicant and his counsel were provided with an opportunity to put additional questions to the witness and the counsel had availed herself of it.[234]

201. However, the mere possibility of putting written questions to an anonymous witness has not been regarded as a sufficient procedural safeguard to counterbalance the constraints with which the accused were confronted in

229. E.g., Seton v. United Kingdom, no. 55287/10, 31 March 2016 (although the existence of other "overwhelming" evidence was also significant); Simon Price v. United Kingdom, no. 15602/07, 15 September 2016; Rastoder v. Slovenia, no. 50142/13, 28 November 2017; Demir v. Germany (dec.), no. 67976/11, 7 May 2018; Berg v. Austria (dec.), no. 11216/15, 1 September 2020; and Guidi and Others v. San Marino, no. 59052/19, 8 April 2021.
230. E.g., Daştan v. Turkey, no. 37272/08, 10 October 2017; Dadayan v. Armenia, no. 14078/12, 6 September 2018; and Kartsivadze v. Georgia, no. 30680/09, 12 December 2019.
231. E.g., Dimović v. Serbia, no. 24463/11, 28 June 2016 (in which the court did make any serious attempt to collect further evidence in order to establish crucial facts for the determination of the applicants' criminal responsibility and did nothing to investigate claims that the witness's statement must have been given while he was under the influence of alcohol).
232. E.g., Sitnevskiy and Chaykovskiy v. Ukraine, no. 48016/06, 10 November 2016 (in which the trial court relied on the statements of absent witnesses as grounds for dismissing the co-accused's retraction of their pre-trial statements and at the same time used those confessions to corroborate untested witness statements. As a result, the European Court concluded that the availability and strength of other incriminating evidence, in view of its "circular" nature, was not a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured).
233. E.g., Štulíř v. Czech Republic, no. 36705/12, 12 January 2017 Štulíř v. Czech Republic, no. 36705/12, 12 January 2017; and Palchik v. Ukraine, no. 16980/06, 2 March 2017.
234. Ivannikov v. Russia, no. 36040/07, 25 October 2016. See to similar effect the rulings in Bátěk and Others v. Czech Republic, no. 54146/09, 12 January 2017 and van Wesenbeeck v. Belgium, no. 67496/10, 23 May 2017.

the exercise of their defence rights.[235]

202. Furthermore, the observations by judges as to an anonymous witnesses' credibility and reliability will not, in themselves, be sufficient to remedy the inability of an accused to be confronted with and to put questions to the witness in person.[236]

203. Moreover, even where the questioning of an anonymous witness who was also absent was video-recorded so that his demeanour could be observed, that could not be a sufficient counterbalancing factor where there was no questioning by the court concerned that tested his credibility and reliability.[237]

204. Furthermore, given the importance attached by the European Court to the reasoning of a court which has relied upon the statement of an absent witness, it will never be enough the court had regard to what was necessary by way of ensuring that adequate safeguards existed. It will also be essential that this reasoning actually demonstrates that such regard actually occurred and why the particular safeguards relied upon were considered to be adequate.

205. In addition, the particular circumstances of a case are always crucial for the assessment by the European Court as to the adequacy of particular safeguards in ensuring the overall fairness of a conviction. As a result, there is a need to ensure that all the elements of a case have been taken into account when reflecting on whether certain safeguards will be sufficient to ensure the overall fairness of a conviction that relies to an extent on statements from an absent witness.

235. Asani v. "the former Yugoslav Republic of Macedonia", no. 27962/10, 1 February 2018.
236. Bakir v. Turkey, no. 2257/11, 13 October 2020.
237. Süleyman v. Turkey, no. 59453/10, 17 November 2020.

G. JUDICIAL DEPOSITION OF TESTIMONY UNDER THE CRIMINAL PROCEDURE CODE

206. Chapter 41 of the Criminal Procedure Code provides for the possibility of judicial deposition of testimony at the pre-trial stage with the view to enabling an accused to exercise the right of cross-examining witnesses and thereby enabling this testimony to be used later in the process of proof at the trial or on appeal.

207. Judicial deposition of testimony can take place where there is a reasonable assumption on the lack of opportunity to appear for the trial examination or on the lawful failure to give testimony during the trial examination.[238]

208. An objective reason for the assumption in the first case would be where, e.g., the permanent residence abroad of the person means that s/he is unlikely to remain in the Republic of Armenia, there was a risk of a deterioration in her/his health condition which would prevent her/him from testifying at a later stage in the proceedings or s/he would be too afraid to give testimony at that stage or doing so would be detrimental to her/his well-being.

209. Similarly, an objective reason for the assumption in the second case would be where, e.g., the person might at a later stage invoke the right not to testify about close relatives.

210. As there are no restrictions on those to whom the judicial deposition procedure is applicable, it is possible to use it to depose the testimony of an accused, victims and witnesses, including any who may be minors.

211. Applications for a judicial deposition of testimony can be submitted by both investigators and the private participants in the proceedings (i.e., the accused, her/his legal representative, the defence counsel, the victim, the property respondent, and the legal representative and the authorised representative of the victim and of the property respondent).[239]

212. Such an application must be substantiated, i.e., it must contain the rationale for its necessity, as well as information on the participants in the proceedings whose participation is necessary for the deposition.[240] Moreover, a person applying for judicial deposition of testimony must attach to the motion all the materials at her/his disposal that will enable the participants of deposition to properly exercise their right to cross-examination.[241]

238. Article 306.
239. Ibid.
240. Article 307.1.
241. Article 307.2.

213. The "rationale for the necessity" of the deposition must include arguments that there is a reasonable assumption that the person will not appear at the trial or will lawfully refuse to testify during it.

214. An application for deposition of testimony should be rejected by the court if it has not been substantiated or if the substantiation thereof has not been convincing.[242] However, setting too high a standard for substantiation could devalue the system. A fair balance of public and private interests would be best achieved through rejecting motions that are: not substantiated at all; present arguments that do not seem to confirm the assumption that the person will not appear at the trial or will lawfully refuse to testify during it; or the arguments violate someone's fundamental rights.

215. An application that has been rejected can be resubmitted and allowed if new essential arguments have been brought to substantiate the deposition.[243]

216. Where an application for deposition of testimony is granted, the court's decision must indicate the participant of the proceedings that submitted the application, the names of persons invited to testify and participate in the deposition, as well as the place, year, month, day and time of deposition.[244] It should also schedule the deposition of testimony within a reasonable time, but not later than 10 days.[245] However, when deciding on the date of deposition, the court must take into consideration the time necessary for the participants in the proceedings to become prepared for performing cross-examination.[246] At the same time, given that the importance of ensuring that the testimony is properly administered and was given without any outside influence, it will be advisable to avoid any unnecessary delay in organizing the deposition.

217. The decision to perform deposition of testimony must be immediately sent to the person who made the application, as well as to such participants in the proceedings whose participation in the deposition is necessary. In addition, the materials attached to the motion must be sent to these participants.[247]

218. The taking of a deposition must respect certain safeguards of importance for an accused.

219. Thus, although the failure by a duly notified participant in the proceedings to appear will not be an obstacle for performing a deposition, the hearing must be postponed if a duly notified defence attorney fails to appear in

242. Article 307.3.
243. Article 307.4.
244. Article 308.1.
245. Article 308.2.
246. Article 308.3.
247. Article 308.4.

the court session "once".[248]

220. Secondly, the court is required to ensure observance of the procedure of questioning stipulated by the Criminal Procedure Code, as well as the exercise of the right to cross-examination during the deposition of testimony. In addition, the court can ask clarifying questions to the participants in deposition proceedings, as well as questions related to guaranteeing the fundamental rights of private participants in the proceedings.[249] However, the court cannot ask the person being examined any questions regarding the factual circumstances of the case.

221. Thirdly, a protocol on the deposition of testimony must be composed, to which the electronic medium with audio-visual recording protocol of the court session has to be attached. This protocol must be signed by the participants in the deposition and the presiding judge must approve it with his seal.[250]

222. Finally, given the importance attached by the European Court to the availability at the trial of a video-recording of the examination of a witness during the preliminary investigation,[251] it is provided the the deposited testimony may not serve as a basis for a judgment, unless the audio-visual recording thereof is examined in its relevant part in the court[252].

223. The requirements for allowing the deposition of testimony are consistent with the good reasons recognised by the European Court for the absence of a witness from the proceedings at which an accused is convicted or her/his conviction is upheld.[253] However, reliance on such testimony as the basis for a conviction will only be consistent with the requirements of Article 6(3)(d) of the European Convention if there are also sufficient counterbalancing factors for the inability of the defence to examine the witness at the later stage of the proceedings. [254]

248. Article 309.2; i.e., there will be no postponement following any further failures to appear by the defence counsel.
249. Article 309.3.
250. Article 309.4.
251. See para.184 above.
252. Article 22.8.
253. See paras. 115-117.
254. See paras. 180-205.

H. SPECIAL ARRANGEMENTS FOR EXAMINATION UNDER THE CRIMINAL PROCEDURE CODE

224. In general, the Criminal Procedure Code requires that each person to be examined in court appear in person and testify directly before the court. Such an examination procedure is aimed to ensure the immediate and complete understanding of the examined person's testimony, first of all by the court, as well as by other participants in the trial. [255]

225. However, the Criminal Procedure Code also includes some special arrangements regarding the examination of minors[256] and protected persons, as well as for the use of examination by means of video.

Minors

226. In the first place, there are some special arrangements for the examination of victims or witnesses who are minors.

227. Thus, the legal representative of a minor victim or witness may participate in her/his questioning and, upon the motion of a party or upon the court's own initiative, the questioning must be performed with the participation of a psychologist.[257]

228. Moreover, before starting to question a victim or witness who is under the age of 16, the presiding judge must explain to her/him the importance of giving truthful and complete testimony for the fair conduct of the proceedings. However, the presiding judge must not warn her/him about the liability prescribed for refusing to give testimony or for giving false testimony.[258]

229. Finally, at the end of the questioning, the legal representative can, with the permission of the presiding judge, pose questions to a minor victim or witness.[259]

230. None of these arrangements should adversely affect the ability of the defence to examine such a witness.

255. Article 326.
256. A person under 18; Article 6(53).
257. Article 329.1 and 2.
258. Article 329.4.
259. Article 329.5.

Protected persons

231. Secondly, the Criminal Procedure Code authorizes the use of special arrangements for the questioning of a "protected person", i.e., someone for whom there is a real danger that threatens their life, health, or lawful interests in connection with the conduct of the proceedings.[260]

232. Thus, the questioning of a protected person in court - without disclosing information about her/his identity - may be done by using a pseudonym and it may also be performed by using technical means of video communication (video conferencing).[261]

233. Moreover, if necessary, the questioning may be performed in conditions that preclude recognition of such person's identity. In particular, a mask, makeup, a device changing the voice of the protected person and protection means not contradicting the law may be used for that purpose.[262]

234. In addition, it is permissible for the questioning of the protected person to be performed outside the plain view of the other participants in the proceedings, using audio-visual and other technical means (a curtain, a protective screen, or a membrane) and with the participation of a limited circle of the participants in the proceedings, accompanied by a warning for the preservation of confidentiality.[263]

235. However, these restrictions are qualified by a requirement for the court, in order to ensure the exercise of the right to defence of the accused person or the fairness of the proceedings, to provide a party with such real data about the questioned person, the discovery of which cannot threaten the security of that person or the person close to him.[264] This requirement applies only upon the motion of the party concerned.

236. Whether the special arrangements for the questioning of a protected person will lead to her/him being an anonymous witness will depend upon the extent of the restrictions imposed in a particular case. In the event of that being the effect of the restrictions imposed, any reliance on the testimony of the protected person as the basis for a conviction will only be consistent with the requirements of Article 6(3)(d) of the European Convention if there are also sufficient counterbalancing factors for the constraints on the ability of the defence to examine her/him.[265]

260. Articles 73 and 74.
261. Article 83.1.
262. Article 83.2.
263. Article 83.3.
264. Article 328.2.
265. See paras. 180-205.

Video examination

237. Thirdly, there is also provision for the possibility of examination in court using video communication means (by video) in certain exceptional cases[266]. Given their exceptional nature, the court must first have taken all possible and necessary measures to bring the person under examination to court, proceeding to the special examination procedure only when it is impossible to conduct a general examination.

238. Examination by video is possible only when:

- the state of health of the person concerned deprives her/him of the possibility of appearing in court;
- the person is outside the Republic of Armenia and her/his presence in court is impossible notwithstanding that all necessary and sufficient measures to ensure her/his presence have been taken;
- the person's appearance in court can threaten her/his security or jeopardize the credibility of her/his testimony (such as where this could endanger her/his physical safety or lead to her/him feeling constrained by the presence there of certain persons and so not give credible testimony); and
- there is a need to protect legitimate interests of a minor victim or witness (which could be required, e.g., in a case of serious or particularly serious sexual abuse of a child or of, domestic violence, where examination in court could give rise to a serious trauma for the minor and have a negative impact on her/his further development and integration into society).

239. A decision on the application of a special examination procedure may be made by the court either on its own initiative or upon the motion of a party.

240. During video examination, it should be ensured that the parties to the proceedings and the person elsewhere who testifies can clearly see and hear each other.[267] This condition is necessary to ensure that the participants of the examination are able to effectively exercise their procedural rights and that the court examining the case and later higher judiciaries are able to clearly understand the process and content of the examination.

241. Video examination at the location of the examined person shall be carried out by a person determined by the court[268]. The presence of the person determined by court at the location of the examination is necessary first of all to confirm the identity of the examined person, and then to ensure the smooth and standard course of the examination. Therefore, such a status

266. Article 327.
267. Article 327.2.
268. Article 327.3.

should be reserved by the court to a person who will be able to ensure standard course of the examination.

242. Before starting the video examination, the presiding judge is required to announce: (a) the day and time of the examination, as well as information on the proceedings within which the examination is conducted; (b) location of the examined person, if disclosure of that information cannot threaten her/his security; (c) the name, surname, patronymic and status of the examined person; (d) name and surname of the competent person carrying out the examination; and (e) the technical means used during the examination.[269]

243. After finishing the examination, the presiding judge is required to ask the parties if they have any objections to the procedure and course of examination.[270]

244. As the accused defendant may exercise her/his right of cross-examination during video examination[271]and the record of the examination may also be examined in higher courts, such as the Court of Appeal and the Court of Cassation, there is a special procedural safeguard, namely, mandatory recording of the examination. Furthermore, the electronic medium of the video examination must be attached to the minutes of the court hearing[272], thereby allowing judges of higher courts to directly comprehend the testimony of the examined person.

I. FULFILLING THE EXECUTION OBLIGATION

245. There have been a significant number of cases in which the European Court has found that situations in which the accused were unable to examine witnesses whose statement or testimony was the sole or decisive evidence on which her/his conviction is based or where the weight of this evidence was just significant so that it may have handicapped the defence amounted to a violation of Article 6(1) and (3)(d) of the European Convention.

246. Where such a violation occurs, the respondent State concerned is then required by Article 46 to execute the judgment concerned, which can involve the adoption of individual and general measures. The former are intended to remedy the specific situation of the victim of the violation whereas the latter are meant to deal with the more general circumstances underpinning the violation, such as the legislation applicable, administrative and judicial

269. Article 327.4.
270. Article 327.5.
271. Article 326.3.
272. Article 327.6.

practices and the capacity of those involved in the sort of decision-making that can be inconsistent with the requirements of the European Convention. The present section is concerned with the general measures that have been adopted or envisaged pursuant to the obligation to execute judgments finding a violation of Article 6(1) and (3)(d).

247. These general measures vary from case to case, reflecting the different circumstances that have given rise to the violation.

248. Where the violation is considered to have been an isolated case resulting from a wrongful application of the law, the only general measure involved has been the translation and dissemination of the relevant judgment to the courts concerned.[273]

249. In many cases, there has been or is proposed the undertaking of awareness-raising measures with respect to the requirements of the European Court's case law in this area, generally going beyond the translation and dissemination of the relevant judgment.

250. Sometimes, this has been the only measure proposed but often it accompanies the adoption of legislative amendments.

251. In a case where there was no possibility of calling and examining witnesses in connection with certain minor offences for which there was an expedited procedure, there was an extension of the guarantee in the Criminal Procedure Code to proceedings dealing with those offences.[274]

252. Following a finding of a violation of Article 6(1) and (3)(d) as a result of the accused not being able to examine key witnesses, whose statements were of decisive importance for their convictions, the Criminal Procedure Code in one country was amended so as to forbid courts from basing a conviction solely or decisively on a statement given by witnesses during criminal investigations, unless the accused and/or their lawyers were given an opportunity to be present and examine the witnesses.[275]

253. In a similar case, where there was also a failure to take into account counterbalancing elements capable of offsetting the difficulties caused to the defence as a result of the admission of the evidence of absent witnesses, the Criminal Procedure Code was amended so as to subject the admission as evidence of pre-trial statements of absent witnesses to stricter conditions,

273. Kovac v. Croatia, no. 503/05, 12 October 2007. Sufficient safeguards were seen to exist in the existing legal framework. For the resolution of the Committee of Ministers, see: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-105970%22]}. Similarly, Melich and Beck v. Czech Republic, no, 35450/04, 24 October 2008 (https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22004-6444%22]}).
274. Borisova v. Bulgaria, no. 56891/00, 21 December 2006. See the action report detailing these measures at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2012)921E%22]}.
275. Lučić v. Croatia, no. 5699/11, 27 February 2014. For the action plan, see: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)382E%22]}.

namely, that there be specific reasoning about the inability of absent witnesses to attend trial and the removal of residence abroad as a ground for non-attendance.[276]

254. In another case, in which there had been a failure to grant the accused the opportunity to put questions to the victim on whose video-recorded testimony given during the pre-trial proceedings the convictions had mainly been based, the Criminal Procedure Code was amended so that a court could only allow the submission of testimony given by a minor in pre-trial procedure as evidence on specified occasions and provided that both the testimony was video-recorded and the accused's lawyer had had the opportunity to pose questions to the witness in pre-trial procedure about the facts relating to the subject of proof.[277]

255. In a case concerning a conviction based on the statement of an anonymous witness, whom neither the accused nor the trial court had questioned at any stage in the proceedings, this had resulted from the non-application of safeguards in the Criminal Procedure Code. Nonetheless, a range of additional measures were adopted in execution of the judgment, involving practical arrangements, the adoption of a new regulation, case law development and judicial training.[278]

256. Where the violation stemmed from failing to secure the appearance of witnesses, there has, for example, been an amendment to the Criminal Procedure Code introducing more detailed rules concerning the coercive summoning of witnesses who without any legitimate reason have failed to appear or refuse to appear before court, as well as the adoption of rules on the modalities of imposition of fines for non-appearance and in respect of the refusal of a witness to testify.[279]

257. There are, of course, a significant number of cases – mostly more recent ones - for which an action plan is still awaited or for which there has not yet been an assessment by the Committee of Ministers of steps already taken

276. *Panagis v. Greece*, no. 72165/13, 5 November 2020. For the action report, see https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)1200E%22]}.
277. Vronchenko v. Estonia, no. 59632/09, 18 July 2013. For the action report, see: 24 April 2007. similar reform in respect of the judgment in W. v. Finland, no. 14151/02, For the Resolution of the Committee of Ministers, see: https://hudoc.exec.coe.int/eng?i=001-108103.
278. Balta and Demir v. Turkey, no. 48628/12, 23 June 2015. Thus, the Audio/Visual Information System (SEGBIS) was introduced to take statements of any parties as well as witnesses by a public prosecutor, judge or courts outside the local/regional jurisdiction of the court or the public prosecutor's office, providing also for the opportunity of interrogating anonymous witnesses by enabling changes of the witnesses' voice and appearance. In addition, the "Regulation on the Use of the Audio/Visual Information System in Criminal Procedure" of 2011 established the conditions of recording and storing statements. Moreover, the Constitutional Court, as well as the Court of Cassation developed further their response to the judgment in their case-law and training sessions for judges were organised. For the action plan, see: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2016)820E%22]}.
279. Caka v. Albania, no. 44023/02, 8 December 2009. See the action report detailing the amendments at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2017)1130E%22]}.

with a view to execution of the relevant judgments.

258. Of the latter cases, one is of particular interest as the European Court has already assessed the overall situation with the general measures and found that the problem under consideration was not structural, that there were robust procedural guarantees against further similar violations and that more such guarantees were introduced in 2016. The additional provision reflected in law the already existing practice that the statements of the absent witness could be read out if it was not possible to establish her/his whereabouts, but also provided a robust legal guarantee that this would now be possible only if the accused had an opportunity to challenge this evidence during the previous stages of the proceedings.[280]

J. CHECKLIST

259. In the light of the case law of the European Court, the following steps seem to be necessary for the purpose of having an effective and European Convention compliant implementation of the right to examine witnesses against an accused:

- **a.** The provision of a power to compel the attendance of witnesses (along with sanctions sufficient to deter non-compliance) for examination by, or on behalf, of the person accused of an offence, either in the course of the investigation or any subsequent court proceedings;
- **b.** The provision of training for the police as to the performance of the task of securing the attendance of witnesses for examination;
- **c.** The adoption of a requirement for police and prosecutors to consider whether the age, health or vulnerability of a potential witness would preclude her/him from giving evidence in court or would make it unlikely that s/he would be able to do so and, in such a case, to organise - under judicial supervision - the examination of this witness by, or on behalf, of the person accused of the crime concerned, with this examination being video-recorded;
- **d.** The specification of the reasons that would justify the non-attendance of a witness (death, fear, vulnerability, illness, and unreachability) or

280. Melnikov v. Russia, no. 23610/03, 14 January 2010. he Plenum of the Supreme Court has also clarified how the Russian judges should comply with these legislative requirements in practice. See the note by the Department for the Execution of Judgments at: https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECTitle%22:[%22melnikov%22],%22EXECIdentifier%22:[%22004-13763%22]}. The ruling of the European Court is Zadumov v. Russia, no. 2257/12, 12 December 2017.

the grant of anonymity, together with a requirement to assess whether they are genuinely justified, having regard in particular to the adequacy of efforts made to find and bring the witness to court and the availability of international legal assistance;

e. The specification that the privilege against self-incrimination can only be invoked in respect of questions for which this might be relevant and cannot be a sufficient reason for non-attendance;

f. The provision for the admissibility of a video-recording of the examination of a witness in the course of the investigation at the trial that follows it;

g. The preparation of guidance for judges as to being satisfied about the arrangements for interpretation for an accused who requires this for the purpose of examining a witness;

h. The preparation of guidance for judges with respect to interventions by them in the conduct of examinations by, or on behalf of, an accused, with this dealing particularly with the protection of witnesses from humiliation or intimidation while ensuring that it is possible for the defence to question their credibility in an effective manner;

i. The adoption of a requirement that the removal of the accused from the court room during the examination of a witness should not then result in the impossibility of that examination being continued by a lawyer who is able to receive instructions remotely from the accused;

j. The adoption of a requirement for judges to be satisfied that, where an accused consents to the admission of a statement of a witness without being examined by, or on behalf, of her/him, (i) s/he does so voluntarily and could reasonably foresee what might be the consequences of such consent and (ii) such a waiver does not run counter to any important public interest;

k. The adoption of a requirement for judges to consider the impact on the defence of admitting, without the consent of the accused, the statement of a witness who is justifiably absent both at the time of doing this and after all the other evidence has been presented and to be satisfied as to the existence of sufficient counterbalancing factors to ensure the overall fairness of the proceedings, with these measures including the viewing of a video-recording of the examination of the witness by, or on behalf of, the accused other than where this was absolutely impossible;

l. The preparation of guidance for judges as to how to explain in their judgments the reasons for admitting the statements of an absent witness, the weight which they attached to it in convicting the accused and the counterbalancing factors that they considered were in place to ensure the overall fairness of the proceedings;

m. The adoption of a prohibition on a change in the composition of the

court where the statement of an absent witness has already been admitted; and

n. The provision of training for judges and prosecutors on the case law of the European Court on the requirements arising from Article 6(3)(d) of the European Convention.

About the Project

SUPPORT FOR THE EXECUTION BY ARMENIA OF JUDGMENTS IN RESPECT OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
January 2021- December 2022

The project aims to support Armenia in the execution of the European Court of Human Rights (ECtHR) judgments in which violations of Article 6 of the Convention are established. The major groups of such judgments include improvement of access to justice, prevention of the non-execution or delayed execution of judgments of national courts, development of remedies concerning excessive length of judicial proceedings.

The project also supports the Court of Cassation of Armenia in building effective procedures related to interaction with the ECtHR, with a focus on the implementation of Protocol No. 16 to the ECHR.

Overall, the Project aims to support the judicial reform in Armenia to strengthen judicial independence and the effectiveness of legal proceedings and promote access to justice in line with European standards.

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