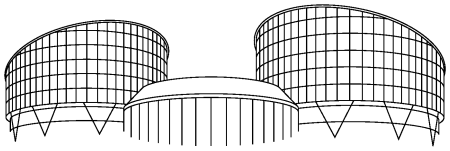

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF DADAYAN v. ARMENIA

(Application no. 14078/12)

JUDGMENT

STRASBOURG

6 September 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dadayan v. Armenia,

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

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 10 July 2018,

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

PROCEDURE

1. The case originated in an application (no. 14078/12) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Garik Dadayan ("the applicant"), on 5 March 2012.

2. The applicant was represented by Mr K. Sardaryan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Government of Armenia to the European Court of Human Rights.

3. The applicant alleged, in particular, that he had not been given an opportunity to cross-examine two witnesses at his trial.

4. On 4 November 2016 the complaint under Article 6 § 3 (d) of the Convention concerning the applicant's inability to have witnesses against him examined was communicated to the Government, and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Yerevan.

6. On 11 March 2010 two individuals, S.T. and H.O., were arrested by the Georgian law-enforcement authorities in Tbilisi when they tried to sell

15 g of enriched uranium which they had transported from Armenia by train on the same day.

7. In April 2010 the National Security Service of Armenia received information from the Georgian authorities that S.T. and H.O. had received the radioactive substance from the applicant. On 22 April 2010 the National Security Service instituted criminal proceedings in relation to the matter.

8. On the same date the applicant was arrested on suspicion of having aided and abetted S.T. and H.O. in the offence. He was believed to have acquired the enriched uranium which he had then sold to H.O. in Yerevan. Thereafter, S.T. and H.O. had smuggled the radioactive substance to Tbilisi, where they had been arrested.

9. On 23 April 2010 the applicant was charged with aiding and abetting S.T. and H.O. in the offence.

10. The applicant denied the charges. His case was that H.O., whom he had known for about ten years, had owed him money for a long time. In February 2010 he had been robbed in Ukraine, and afterwards he had somehow reached Moscow to find a job but had then been obliged to return to Yerevan. However, since his money had been stolen, he had decided to ask H.O. (as the person who owed him money) to send him some money for his journey. After his return he had met H.O. in Yerevan several times in order to discuss financial matters relating to the payment of the rest of the debt.

11. On 28 April 2010 H.O. was questioned as a witness at the Ministry of Internal Affairs of Georgia. He stated that, *inter alia*, the applicant had given him 1 g of a radioactive substance in either 2002 or 2003. At the beginning of March 2010 he and S.T. had asked the applicant, who had been in Russia at the time, whether he would be able to obtain radioactive substances. During the conversation the applicant had enquired about the price per gram that had been offered for such a substance. The next day he had called H.O. and offered to bring the requested radioactive substance to Armenia. Since the applicant had had no means to travel, they had transferred money to him. The applicant had arrived in Armenia several days later and given the radioactive substance to H.O. They had agreed that H.O. would pay the applicant after the deal. When asked whether he owed any money to the applicant, H.O. denied ever having borrowed from him.

12. On 29 April 2010 S.T. was also questioned as a witness at the Ministry of Internal Affairs of Georgia. He stated, *inter alia*, that when he had been in Georgia, some people had offered to buy uranium from him. He had then gone to Armenia and asked H.O. to find the applicant so that he could provide them with uranium. S.T. further stated that H.O. had been in contact with the applicant, who had agreed to come to Armenia and give him uranium. Thereafter they had sent travel money to the applicant by bank transfer. He had then met H.O. at the railway station. H.O. had brought

the radioactive substance back to Georgia and stated that he had taken it from the applicant.

13. On 8 December 2010 the bill of indictment was finalised and the case was transferred to the Tavush Regional Court for trial. The following evidence was relied on in the bill of indictment: the witness statements made by S.T. and H.O. in Georgia; other witness statements, in particular those of K.O. and V.G., made in Armenia; the conclusion of a forensic examination conducted in Georgia, according to which the substance seized from S.T. contained enriched uranium; regular telephone correspondence between the applicant and H.O. in the period between 1 September 2009 and 30 March 2010, and in particular two telephone calls made on 10 March 2010; and the relevant exit and entry stamps in the applicant's passport proving that he had arrived in Yerevan from Moscow on 10 March 2010.

14. At one of the hearings before the Regional Court, relying, *inter alia*, on the Strasbourg Convention of 1959 on Mutual Assistance in Criminal Matters**,** the applicant requested the temporary transfer of S.T. and H.O. from the prison in Georgia so that they could be examined at the trial.

15. His request was granted. Thus, on 27 January 2011 the presiding judge ordered S.T.'s and H.O's temporary transfer to Armenia.

16. By a letter of 29 April 2011, the Ministry of Justice of Georgia, refused to grant the request by referring to Article 11 § 1(b) of the Strasbourg Convention, which states that a request for assistance may be refused if "his or her presence is necessary at criminal proceedings pending in the territory of the requested Party". The Ministry of Justice added that S.T.'s and H.O.'s had been convicted by a judgment of the Tbilisi Court of Appeal of 30 March 2011, but that the judgment was still open to an appeal on points of law.

17. On 6 May 2011 the applicant's representative allowed the Regional Court to continue with the examination of the case even if S.T. and H.O. could not be transferred to Armenia, since the applicant was ill. However, he asked the court not to rely in its judgment on the testimony given in Georgia by those absent witnesses.

18. At a hearing of 24 May 2011 the presiding judge informed the parties of the reply received from the Ministry of Justice of Georgia.

19. At the same hearing the applicant asked to summon S.G. – the conductor of the train who had been questioned during the investigation – as a witness, on the grounds that some of his statements were in contradiction with the statements of S.T. and H.O. The trial court rejected that application, considering it unfounded.

20. On 25 May 2011 the Regional Court convicted the applicant and sentenced him to seven years' imprisonment, and ordered the confiscation of his property. In doing so, the Regional Court relied on the statements of S.T. and H.O. made during the questioning in Georgia; the statements of the witnesses V.D. and K.O. – the applicant's friend and H.O.'s daughter

respectively; the results of forensic examinations carried out in Georgia and Armenia confirming that the substance discovered contained enriched uranium; the evidence of telephone correspondence between the applicant and H.O.; and the existence of exit and entry stamps in the applicant's passport proving that he had arrived in Yerevan from Moscow on 10 March 2010.

21. The applicant lodged an appeal, complaining, *inter alia*, about the lack of opportunity to cross-examine S.T. and H.O. at trial and about the trial court's refusal to summon S.G.

22. On 13 July 2011 the Criminal Court of Appeal upheld the applicant's conviction. The judgment did not address the applicant's arguments regarding the fact that S.T. and H.O. could not be examined and the refusal to examine witness S.G.

23. The applicant lodged an appeal on points of law, raising similar arguments to those put forward in the previous appeal.

24. By a decision of 17 September 2011 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

The Code of Criminal Procedure

25. In accordance with Article 86 §§ 3 and 4 of the Code, a witness is obliged to appear upon being summoned by the authority dealing with a case. The failure of a witness to comply with his obligations shall result in the imposition of sanctions prescribed by the law.

26. Article 153 § 2 of the Code states that a witness may be compelled to appear by a reasoned decision of the court, and shall inform the summoning authority of any valid reasons for not appearing within the set time-limit.

27. Article 332 § 1 of the Code provides that if a witness who has been summoned fails to appear, the court, having heard the opinions of the parties, shall decide whether to continue or adjourn the trial proceedings. The proceedings may be continued if the failure to appear of any such person does not impede the thorough, complete and objective examination of the circumstances of the case.

28. In accordance with Article 342 § 1 of the Code, it is permissible to read out at trial witness statements made during the inquiry, the investigation or a previous court hearing if the witness is absent from the court hearing for reasons which rule out the possibility of his appearance in court, if there is a substantial contradiction between those statements and the statements made by that witness in court, and in other cases prescribed by this Code.

III. RELEVANT INTERNATIONAL LAW

29. Mutual assistance in criminal matters between Armenia and Georgia is governed, in particular, by the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, which in so far as relevant reads:

Article 3 § 2

"If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.

..."

Article 11

"1. A person in custody whose personal appearance for evidentiary purposes other than for standing trial is applied for by the requesting Party shall be temporarily transferred to its territory, provided that he or she shall be sent back within the period stipulated by the requested Party and subject to the provisions of Article 12 of this Convention, in so far as these are applicable.

Transfer may be refused if:

a. the person in custody does not consent;

b. his or her presence is necessary at criminal proceedings pending in the territory of the requested Party;

c. transfer is liable to prolong his or her detention, or

d. there are other overriding grounds for not transferring him or her to the territory of the requesting Party.

...

3. The transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from whom transfer is requested applies for his or her release."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

30. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he had not been given an opportunity to cross-examine S.T. and H.O. at his trial. He further complained under the same provisions about the court's refusal to examine the witness S.G.

31. The relevant parts of Article 6 §§ 1 and 3 (d) of the Convention read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

32. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

33. The applicant argued that the Regional Court had read out the written statements of the witnesses S.T. and H.O. in court before it had received a reply from the Georgian authorities refusing the transfer of the witnesses to Armenia. Even after receiving the reply, the court had not made any efforts to find out whether the witnesses' transfer could be done at a later stage. By his application of 6 May 2011, the applicant had not waived his right to cross-examination, but had asked the court not to rely on the written statements of those absent witnesses in its judgment.

34. Concerning the "sole and decisive" criterion, the applicant pointed out that the statements of S.T. and H.O. had been listed in the domestic judgments as evidence substantiating his guilt, without any evaluation. This evidence had been the only evidence proving that it had been he who had sold them the enriched uranium, and this evidence had thus been sole and decisive. The other evidence had merely been circumstantial. Moreover, the Regional Court had not approached this evidence with caution. The applicant had not been given any opportunity at the investigation stage to question the witnesses S.T. and H.O.

35. As to the refusal to hear S.G., the applicant had requested that that witness be heard because of the contradictions between his pre-trial testimony and the statements of the absent witnesses. The failure to hear him had constituted not only a breach of the applicant's rights under Article 6 § 3 (d), but also an insufficient counterbalancing measure under the *Al-Khawaja* (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011) test.

(b) The Government

36. The Government maintained that all relevant and appropriate steps had been taken to ensure the presence of the witnesses S.T. and H.O., but their transfer from Georgia had been refused by the Georgian authorities. Nor had it been possible to conduct an interrogation by video link, since the authorities had not been properly equipped. Thus, there had been a good reason to admit the written witness statements as evidence. Moreover, on 6 May 2011 the applicant's representative had allowed the court to continue with the trial, which had constituted a waiver of the right to cross-examine S.T. and H.O.

37. The Government argued that the statements of S.T. and H.O. had not been the sole evidence against the applicant, and nor could they be considered decisive. The Regional Court had relied upon other evidence serving as a basis for the applicant's conviction. There had also been sufficient counterbalancing factors to compensate the applicant for any shortcomings. The applicant had had the opportunity to challenge the admissibility of the statements given by absent witnesses, but he had failed to do so. The domestic courts had also compensated for the applicant's inability to question the absent witnesses by making a critical assessment of the credibility of their statements. There had been strong similarities between the statements of absent witnesses and those by other witnesses.

38. As to the refusal to hear S.G., the Government noted that it was for the national courts to assess whether it was appropriate to call a witness. The Regional Court had refused the application for S.G. to be heard because he had not given any information in his pre-trial testimony which could presumably have had any significance for the case. Nor had the applicant's conviction been based on this testimony.

2. The Court's assessment

(a) General principles

39. The Court reiterates that the key principle governing the application of Article 6 is fairness. The right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively (see

Moreira de Azevedo v. Portugal, 23 October 1990, § 66, Series A no. 189, and *Gregačević v. Croatia*, no. 58331/09, § 49, 10 July 2012).

40. The Court further reiterates that, as a general rule, Article 6 §§ 1 and 3 (d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Al-Khawaja and Tahery*, cited above, § 118, and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 81, 12 May 2016).

41. In *Al-Khawaja and Tahery* (cited above, §§ 119-147), the Grand Chamber clarified the principles to be applied when a witness does not attend a public trial. Those principles may be summarised as follows:

(i) the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should, as a general rule, give evidence during the trial, and that all reasonable efforts should be made to secure their attendance;

(ii) typical reasons for non-attendance are, as in the case of *Al-Khawaja and Tahery* (cited above), the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend a trial;

(iii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iv) the admission as evidence of the statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings;

(v) according to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(vi) in this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive;

(vii) however, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(viii) in particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable, given its importance to the case.

42. These principles have been further clarified in the case of *Schatschaschwili* (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 111-131, ECHR 2015), in which the Grand Chamber confirmed that the absence of a good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see *Seton v. the United Kingdom*, no. 55287/10, §§ 58 and 59, 31 March 2016).

43. Since the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, in this case, the Court will examine the complaints under Article 6 §§ 1 and 3 (d) together (see, *mutatis mutandis*, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 49, *Reports of Judgments and Decisions* 1997-III, and *Gregačević*, cited above, § 52).

(b) Application of these principles to the present case

44. The Court observes that the Regional Court found the applicant guilty of aiding and abetting S.T. and H.O. in an offence and sentenced him to seven years' imprisonment. S.T. and H.O. were questioned as witnesses

during the pre-trial investigation. The applicant asked to have them summoned and brought before the trial court for questioning, but their transfer to Armenia was refused by the Georgian authorities. The trial court also refused to summon S.G. as a witness on behalf of the applicant.

45. Concerning the failure to summon S.G., as a witness for the defence, the Court notes that Article 6 of the Convention does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to examine a witness (see *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V, and *Accardi and Others v. Italy* (dec.), no. 30598/02, 20 January 2005). Moreover, it is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see, among others, *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V). In the present case, the applicant maintained that the statement of S.G. was in contradiction with the statements of S.T. and H.O. Nevertheless, the trial court and the Criminal Court of Appeal refused to hear S.G. (see paragraphs 19 and 22 above) without providing any concrete reasons therefore. Accordingly, in the Court's view, this is an element to take into account in the assessment of whether the proceedings as a whole were fair (ibid).

46. Turning to the use of the written testimony of the absent witnesses S.T. and H.O., the Court has held on many occasions that one of the requirements of a fair trial is the possibility for the accused to confront the witnesses in the presence of a judge who must ultimately decide the case, because the judge's observations on the demeanour and credibility of a certain witness may have consequences for the accused (see *Hanu v. Romania*, no. 10890/04, § 40, 4 June 2013 with further references).

(i) Whether there was a good reason for the absence of witnesses

47. The Court reiterates that, from the trial court's perspective, there must be a good reason for the absence of a witness; that is to say, the court must have good factual or legal grounds for not being able to secure the witness's attendance at the trial. If there is a good reason for the witness's non-attendance in that sense, it follows that there is a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence (see *Schatschaschwili*, cited above, § 119). There are a number of reasons why a witness may not attend trial (see *Al-Khawaja and Tahery*, cited above, §§ 120-125), including situations where the witness has proved to be untraceable (see *Tseber v. the Czech Republic*, no. 46203/08, § 48, 22 November 2012, and *Paić v. Croatia*, no. 47082/12, § 34, 29 March 2016).

48. The reason for S.T. and H.O.'s absence from the trial was that their transfer had been refused by the Ministry of Justice in Georgia, due to the fact, that at the relevant time their convictions were still open to an appeal on points of law (see paragraph 16 above). The Court finds it noteworthy, though, that after receiving that information, the trial court did not initiate any further attempts in the matter, for example, try to find out whether the convictions of S.T. and H.O. would become final and, if so, when, and whether, under the Strasbourg Convention of 1959 on Mutual Assistance in Criminal Matters (see paragraph 29 above), they could be transferred to Armenia for the trial at a later stage. Nor does it appear that other means that would have enabled the applicant to examine the witnesses were contemplated, for instance the possibility of having oral evidence from them taken in Georgia, or by video link. As regards the latter, the Court notes that the Government argued that this would not have been possible since the authorities had not been properly equipped (see paragraph 36 above). However, in the light of the facts as supplied by the parties, it does not seem that the trial court ever considered recourse to that measure (see paragraphs 14-20 above).

49. Even assuming that there was no good reason justifying the failure to have these persons examined at the hearing, the absence of a good reason is not the end of the matter. Although it constitutes a very important factor to be weighed in the overall balance, together with the other relevant considerations, it is nevertheless a consideration which is not in itself conclusively indicative of a lack of fairness of criminal proceedings (see *Seton*, cited above, § 62).

(ii) Whether the evidence was "sole or decisive"

50. The second stage of the test in *Al-Khawaja and Tahery* is assessing whether or not the evidence of the absent witness whose statements were admitted in evidence constituted the sole or decisive basis for the defendant's conviction. The Government argued that the evidence of the absent witnesses S.T. and H.O. had not been sole and decisive in securing the applicant's conviction, while the applicant argued that their evidence had been the only evidence proving that it had been he who had sold them the enriched uranium.

51. The Court observes in this respect that the Regional Court's judgment, which was later fully upheld by the Criminal Court of Appeal, also referred to evidence other than the statements of S.T. and H.O. The Regional Court also relied on the statements of the witnesses G.D. and K.O. – the applicant's friend and H.O.'s daughter respectively; the results of forensic examinations carried out in Georgia and Armenia confirming that the substance discovered contained enriched uranium; the evidence of telephone correspondence between the applicant and H.O.; and the existence of exit and entry stamps in the applicant's passport proving that he

had arrived in Yerevan from Moscow on 10 March 2010 (see paragraph 20 above).

52. However, the Court finds that the statements of S.T. and H.O. were of fundamental relevance to the case. On the basis of this evidence, the domestic courts needed to decide whether it was the applicant who had sold the enriched uranium to S.T. and H.O. Even though this evidence may not have been the sole evidence in the case, it was sole or at least decisive as far as the applicant's involvement was concerned. Moreover, in respect of this evidence, the Regional Court was obliged to provide the applicant with an opportunity to organise his defence in an appropriate way and put forward all his relevant arguments. Instead, the court based its conclusions on witness evidence which had never been examined (see, *a contrario*, *Kashlev v. Estonia*, no. 22574/08, § 47, 26 April 2016). In these circumstances, the omission of the Regional Court to hear S.T. and H.O. – whose statements were later used against the applicant – in person was capable of substantially affecting the applicant's defence rights.

(iii) Whether there were sufficient counterbalancing factors

53. The Court reiterates that it should not only review the existence of sufficient counterbalancing factors in cases where the evidence of an absent witness was the sole or decisive basis for an applicant's conviction, but also in cases where it finds it unclear whether the evidence in question was sole or decisive, but is nevertheless satisfied that it carried significant weight and that its admission might have constituted a handicap to the defence (see *Schatschaschwili*, cited above, § 116, and *Seton*, cited above, § 59). In the case of *Schatschaschwili*, the following elements were identified by the Grand Chamber as being relevant in this context: the trial court's approach to the untested evidence, the availability and strength of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine witnesses at the trial (see *Schatschaschwili*, cited above, § 145, and *Paić*, cited above, § 38).

54. The Court observes that there were some procedural safeguards in place to compensate for the handicaps caused to the defence, such as for example, the opportunity to challenge the admissibility of the testimonies given by S.T. and H.O.. However, in the Court's view these were not sufficient to compensate for the fact that the applicant had not even had the opportunity to challenge their witness statements during the investigation phase. These witnesses were prosecuted and convicted in Georgia, while the applicant, who was accused of having assisted them, was arrested and prosecuted in Armenia. In any event, all evidence should have been tested before the courts. Furthermore, there is nothing in the Regional Court's judgment to indicate that it approached the untested evidence with any specific caution, nor did it seem to attach less weight to such statements

(compare, for example, *Al-Khawaja and Tahery*, cited above, § 157, and *Paić*, cited above, § 43).

(iv) Conclusion

55. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to a fair trial was breached in the instant case.

56. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

58. The applicant claimed 90,000 euros (EUR) in respect of non-pecuniary damage.

59. The Government considered the amount claimed excessive and unjustified. They argued that the assessment should be made on an equitable basis and in accordance with the Court's case-law.

60. The Court awards the applicant EUR 2,400 in respect of non-pecuniary damage.

B. Costs and expenses

61. The applicant also claimed EUR 9,200 for costs and expenses incurred before the Court. In this respect he submitted a lawyer's contract.

62. The Government maintained that the applicant had failed to present any itemised information on costs and expenses, in particular, the hours worked and the hourly rate used. Nor was there any documented proof that the costs and expenses, including the translation fees, had actually been incurred and paid for. In any event, the amount claimed was unjustified and excessive.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has only submitted a lawyer's contract. Agreements of this nature – giving rise to obligations solely between lawyer and client – cannot bind the Court. Nevertheless, having

regard to the issue before it, and the fact that it is clear that the lawyer represented the applicant in the proceedings before the Court, it considers it reasonable to award EUR 1,000 for costs and expenses.

C. Default interest

64. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
      (i) EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 September 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Deputy Registrar

Linos-Alexandre Sicilianos
President