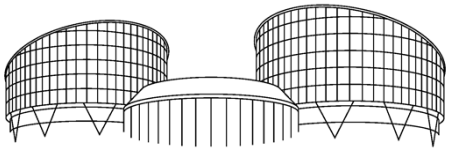

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MARTIROSYAN v. ARMENIA

(Application no. 18550/13)

JUDGMENT

STRASBOURG

6 December 2018

This judgment is final but it may be subject to editorial revision.

In the case of Martirosyan v. Armenia,

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

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Armen Harutyunyan, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 13 November 2018,

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

PROCEDURE

1. The case originated in an application (no. 18550/13) 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 two Armenian nationals, Mr Aram Martirosyan and Mr Artur Martirosyan ("the applicants"), on 4 March 2013.

2. The applicants were represented by Mr L. Simonyan, 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. On 24 February 2017 the Government were given notice of the complaint concerning the applicants' inability to examine witnesses against them. 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

4. The applicants were born in 1966 and 1975 respectively and are currently detained in Sevan Prison. They are brothers and used to live in and run their business activities from the town of Gavar before their conviction and imprisonment.

5. On 5 November 2009 a resident of Gavar, H.H., reported to the police that at around 6.20 p.m. his car had been shot at by someone travelling inside a black sports utility vehicle (SUV) on a street in Gavar, as a result of which his son H. and his friend (who had been with him in the car) had received gunshot injuries and had been taken to hospital.

6. On the same date the Gavar investigative department instituted criminal proceedings for attempted murder and illegal possession of firearms.

7. In the course of the investigation, a number of people were questioned, including eyewitnesses and police officers. It was determined that at around 1 p.m. on 5 November 2009 the applicants and their friend H.P. had beaten up V.M., the son-in-law of H.H. Later that day the shooting in the street had taken place. The applicants had subsequently gone missing, and H.P. had left the country.

8. During his interview H.H., who had been given the status of victim in the proceedings, stated, *inter alia*, that his car had been shot at by someone travelling inside a black SUV. He had seen the first applicant in the vehicle. As the car had driven away, he had recognised it as the second applicant's car.

9. A.S., a person close to the applicants' family and employed by them in one of their businesses, stated in his interview that on the day of the events in question he had met the applicants and H.P. shortly after the shooting and had understood from their conversation that they had shot at H.H.'s car.

10. S.G., the applicants' relative, stated during his interview that on the day of the events in question the second applicant had called him to enquire about the incident. In particular, he had tried to find out who had been inside H.H.'s car and what exactly had happened to them. He had later been informed by his son that the people gathered at the scene of the incident had told him that the applicants had shot at H.H.'s car. He had then talked to the second applicant and tried to obtain more specific information from him. He had not denied anything, so it had become clear to him that it had been the applicants who had committed the offence.

11. M.M., a friend of the mayor of Gavar who was the applicants' relative, stated in his interview that he had lent his car to the mayor (who had allegedly then helped the applicants to leave town). He had later heard from the people gathered in the street that the applicants had shot at H.H.'s car and fled. He had found his car the next morning entirely covered in mud.

12. At some point S.K., the first applicant's friend, was questioned. He stated, *inter alia*, that in November 2009 the first applicant had called him to ask if he would put up some guests in his empty apartment in Yerevan for a couple of days. On the same day he had met the first applicant and given him the key to the apartment. The next day he had gone to the apartment, where he had found the first applicant and two other men whom he did not know. Several days later he had decided to visit the first applicant and his guests once again, but they had already left. He submitted that he did not know exactly why the first applicant and his guests had been visiting Yerevan and staying in his apartment.

13. On 10 November 2009 a new set of proceedings was instituted for hooliganism. The applicants and H.P. were charged with aggravated hooliganism and a warrant was issued for their arrest.

14. On 9 December 2009 H.P. was arrested. He was also charged with illegally crossing the State border.

15. It appears that H.P. admitted to the charges. During his interview he stated, *inter alia*, that after the incident with V.M. on 5 November 2009, the applicants had given him various types of firearms, which he had put in the second applicant's SUV. While driving together with the applicants, they had noticed H.H.'s car in the street, which had turned in their direction and started to follow them. They had then seen that H.H. was armed. The first applicant had screamed to open fire, which H.P. had done from the back seat, where he had been sitting. The applicants had then also fired their guns. The shooting had lasted for about twenty seconds, after which the second applicant had driven towards the centre of Gavar. Several seconds later they had heard shooting behind them.

16. On 9 April 2010 the proceedings in respect of H.P. were severed from the main proceedings. On 11 May 2010 the Gegharkunik Regional Court convicted H.P. as charged, and he received a custodial sentence.

17. On 5 May 2010 the proceedings were stayed on the grounds that the identity of the perpetrator of the attempted murder was unknown and, as regards the incident of hooliganism, the accused had absconded.

18. On 15 June 2010 the applicants gave themselves up to the police and the main proceedings were resumed. During their interviews that day, the applicants refused to answer most questions and pleaded not guilty.

19. During their interviews on 18 June and 21 June 2010 respectively the applicants pleaded not guilty and denied participating in the crimes they were being questioned about.

20. On 3 September 2010 the proceedings for hooliganism were severed from the main proceedings and sent to court.

21. On 7 September 2010 the main proceedings for attempted murder were once again stayed on the grounds that the identity of the perpetrator was unknown.

22. By a judgment of 26 October 2010 the Regional Court found the applicants guilty of hooliganism. They received custodial sentences and were released.

23. On 4 March 2011 the proceedings were resumed and the case was assigned to the Special Investigative Service.

24. On 14 March 2011 the applicants were detained and charged with the attempted murder of two or more persons committed by a group and illegal possession of firearms. The applicants' rights were explained to them and they exercised their right to be represented by a lawyer.

25. On 16 March 2011 H.P. was charged with the same offences as the applicants.

26. On 18 April and 3 May 2011 respectively the applicants were interviewed, but they refused to answer any questions.

27. According to the Government, on 18 May 2011 a face-to-face confrontation was held between the first applicant and H.H., who maintained his previous statements. During the confrontation, the first applicant maintained his innocence and exercised his right to pose questions to H.H., who gave self-incriminating answers. On the same day a confrontation was held between the second applicant and H.H., who again maintained his previous statements. However, the second applicant refused to answer H.H.'s questions and did not ask him any questions.

28. On 19 May 2011 the applicants were again questioned in respect of the alleged attempted murder, but they refused to answer questions and maintained their innocence.

29. According to the Government, at the end of the investigation the applicants and their representative acquainted themselves with the material in the criminal case file. On 16 June 2011 the applicants' representative lodged a request with the investigator, asking, *inter alia*, that a confrontation be held between the applicants, A.S. and H.P. This request was refused by the investigator as ill-founded. In particular, the investigator stated that the confrontations requested by the applicants could not be conducted at that stage of the proceedings because (a) a warrant had been issued for A.S.'s arrest and his whereabouts remained unknown, and (b) H.P., exercising his rights as an accused, had refused to take part in a confrontation with the applicants.

30. On 22 June 2011 the criminal case was sent to the Regional Court for trial.

31. On an unspecified date H.P. was examined before the Regional Court, but he mainly contradicted his pre-trial statements.

32. On 13 July 2011 H.H. wrote to the Regional Court to ask that his pre-trial statements be taken into account since he was in another city for health reasons and did not wish to attend the trial as the events had made him suffer psychologically.

33. In the course of the trial, the Regional Court attempted to secure the attendance of H.H. and H., as well as the witnesses A.S., M.M., S.G. and S.K.

34. In particular, on 20 July 2011 the Regional Court issued decisions requiring H.H. to appear in court. In reply to those, on 28 July 2011 the Gavar police informed the Regional Court that H.H. was not in the city. According to the relevant police records, H.H.'s wife had told the police that H.H. and H. were in the Nagorno Karabakh Republic for health reasons and had mentioned an address in Yerevan, indicating that H.H. and H. had been living there. However, on 28 July 2011 the Yerevan police informed the Regional Court that H.H. was not at the above-mentioned address. The owner of the apartment had told them that H.H. and H. had rented it for

about eight months. However, they had left and she had no information about their whereabouts.

35. On 4 August 2011 the Regional Court issued new decisions requiring the witnesses A.S., M.M., S.G. and S.K. to appear in court. On 10 August 2011 the Gavar police informed the Regional Court that A.S., M.M., S.G. were not in the city and that they had no information about their place of residence. In particular, it appeared that A.S., M.M. and S.G. had left the country. On the same day, the Yerevan police informed the Regional Court that S.K. was absent from his place of permanent residence, as he had apparently been working in another city.

36. On 17 August 2011 the Regional Court again issued decisions requiring H.H., M.M., S.G. and S.K, among others, to appear in court. On 24 August 2011 the Gavar police addressed a similar reply regarding the whereabouts of H.H., M.M. and S.G. Specifically, M.M. was apparently in Russia and S.G. had left for Egypt. Meanwhile, by means of a telegram addressed to the Regional Court on 9 August 2011, S.K. asked the court to take into account his pre-trial statements. On 26 August 2011 the Yerevan police informed the court that he was not in Yerevan.

37. On 24 August 2011 the applicants asked the Regional Court to disregard the pre-trial witness statements of A.S., M.M., S.G. and S.K. but not to exclude them from the list of the witnesses to be heard at trial.

38. On 14 September 2011 the Regional Court again decided to order H.H. to appear in court. On 22 September 2011 the Gavar police informed the court that daily visits by the police officers to H.H.'s place of residence had not yielded any results and that he had apparently not been seen there for about a year.

39. On 23 February 2012 the Regional Court convicted the applicants and H.P. as charged and sentenced them to thirteen years' and twelve years' imprisonment respectively. In doing so, the Regional Court referred, among other items of evidence, to the pre-trial statements of H.H. and the witnesses A.S., M.M., S.G. and S.K., all of whom had failed to attend the applicants' trial. The Regional Court also referred, *inter alia*, to the testimony of more than twenty witnesses obtained during the pre-trial and trial stages; the records of confrontations conducted as part of the investigation; a forensic medical examination report; a complex ballistic and fingerprint examination report; a complex ballistic and forensic chemical examination report; the record of an investigatory experiment; records of an operative-investigative measure; a vehicle inspection report concerning H.H.'s and the second applicant's cars; a crime scene inspection report; a number plate recognition report concerning the second applicant's car; transcripts of calls to and from several telephone numbers; and a complex forensic fibre examination report.

40. The applicants lodged appeals, complaining, *inter alia*, that the pre-trial statements of H.H. and the witnesses A.S., M.M., S.G. and S.K. had

been admitted in evidence against them even though they had failed to attend the proceedings.

41. On 20 July 2012 the Criminal Court of Appeal upheld the Regional Court's judgment in full.

42. The applicants lodged an appeal on points of law, raising similar arguments to those raised in their previous appeals.

43. On 7 September 2012 the Court of Cassation declared the applicants' appeal on points of law inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

44. The following provisions of the Code of Criminal Procedure are relevant in the context of the present case.

Article 86: A witness

"3. A witness shall ... appear upon the summons of the authority dealing with the case in order to give testimony or to participate in investigative and other procedural measures ...

4. Failure of a witness to comply with his obligations shall lead to sanctions prescribed by law."

Article 153: Obligation to appear

"1. A witness ... may be required to appear by a reasoned decision of ... the court if he fails to appear upon a summons without valid reasons. A witness ... shall inform the summoning authority if there are valid reasons preventing his appearance by the deadline stipulated in the summons."

Article 216: Confrontation

"1. The investigator may conduct a confrontation between two persons who have been questioned previously and whose statements contain substantial contradictions. The investigator shall conduct a confrontation if there are substantial contradictions between the statements of the accused and some other person.

...

3. Persons summoned to a confrontation shall be asked in turn to give their version of events in relation to which the confrontation is being conducted. The investigator shall then ask questions. Persons summoned to a confrontation may ask each other questions, with the investigator's permission.

...

5. In the cases provided for by this Code, the defence counsel, interpreter and legal representative of the person being questioned may participate in the confrontation and shall also sign the record."

Article 332: Deciding whether to examine a case in the absence of a witness, expert or specialist who has failed to appear

"1. If any of the witnesses ... summoned to court fail to appear, the court, having heard the opinions of the parties, shall decide [whether to] continue or adjourn the proceedings. The proceedings may be continued if the failure of any such persons to

appear shall not obstruct the thorough, complete and objective examination of the circumstances of the case."

Article 342: Reading out of witness statements

"1. The reading out at trial of witness statements made during an inquiry, investigation or previous court hearing ... shall be permitted if the witness is absent from the court hearing for reasons which prevent his appearance in court, if there is a substantial contradiction between those statements and the statements made by that witness in court, and in the other cases provided for by this Code."

Article 426.1: The court reviewing judicial acts on the ground of newly discovered or new circumstances

"1. Only final acts are subject to review on the ground of newly discovered or new circumstances.

2. On the ground of newly discovered or new circumstances a judicial act of the court of first instance shall be review by the appeal court, while the judicial acts of the appeal court and the Court of Cassation shall be reviewed by the Court of Cassation."

Article 426.4: Grounds and time-limits for review on the ground of new circumstances

"1. Judicial acts may be reviewed on the ground of new circumstances [if] ... a violation of a right guaranteed by an international convention to which Armenia is a party has been found by a final judgment or decision of an international court..."

THE LAW

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

45. The applicants complained under Article 6 § 1 taken in conjunction with Article 6 § 3 (d) of the Convention that they had not been given an opportunity to cross-examine the victim H.H. and the witnesses A.S., M.M., S.G. and S.K. at trial.

46. Article 6 §§ 1 and 3 (d) of the Convention reads 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

47. 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 applicants

48. The applicants argued that there had been no substantiated reasons for admitting the pre-trial investigation statements of the victim H.H. and the witnesses A.S., M.M., S.G. and S.K. as evidence instead of having them examined during the trial by the applicants. The Regional Court had not made any efforts to secure the attendance of the victim H.H., who had been a key witness for the applicants. It had been common knowledge that H.H. had been in Armenia, and his psychological condition had not been a reason for not attending the trial. As to A.S., M.M., S.G. and S.K., they had been summoned to the court but had not appeared, since they had left Armenia. Concerning these witnesses' whereabouts, the Regional Court had referred to the statements of relatives and neighbours but had not made any efforts to verify their truthfulness. The witnesses had had an important impact on the applicants' case and therefore the court should have made efforts to secure their examination by the applicants.

49. The pre-trial statements of H.H., A.S., M.M., S.G. and S.K. had been the sole and decisive evidence used to convict the applicants. It had been mentioned in the judgments that the applicants' guilt had been proven by these pre-trial statements. H.H. had been the only eyewitness in the case. The confrontation between H.H. and the applicants during the pre-trial investigation could not be considered to have constituted a proper opportunity for the applicants to examine him. There had therefore been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

(b) The Government

50. The Government maintained that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention. The Regional Court had taken into account a number of items of evidence obtained during the proceedings, including the pre-trial statements of the victim H.H. and the witnesses A.S., M.M., S.G. and S.K. There had been confrontations between the applicants and H.H. on 18 May 2011, during which the applicants had had a proper opportunity to challenge his statements. The Regional Court had made efforts to secure the attendance of the witnesses concerned, but none of

them could be reached. The court had issued at least four decisions ordering them to attend court and the hearings had been postponed to ensure their attendance. As the court had made all reasonable efforts to secure their attendance (albeit in vain), it had been justified to admit their pre-trial statements.

51. Furthermore, the Government maintained that the untested testimony of H.H., A.S., M.M., S.G. and S.K. had not constituted the "sole or decisive" evidence with regard to the applicants' conviction, as the Regional Court had taken into account a large number of other items of evidence. The applicants' guilt would have been established even in the absence of the statements of H.H., A.S., M.M., S.G. and S.K. The Regional Court had referred, for example, to several of H.P.'s incriminating statements, which had ascertained the applicants' guilt.

52. The Government argued that, at the investigation stage, the applicants had been granted the opportunity to question those testifying against them, which constituted an important counterbalancing factor. Moreover, under domestic law, the investigator had to conduct a face-to-face confrontation if there were substantial contradictions between the statements of the accused and other people. The applicants had not been deprived of an opportunity to lodge a request with the investigator or prosecutor for a confrontation with the witnesses in question. The applicants had only made such a request at the end of the investigation and only in respect of A.S., who had gone into hiding. At the trial the applicants had not requested a confrontation either and had even asked that A.S., M.M., S.G. and S.K. be excluded from the list of witnesses to be summoned to take part in the trial owing to the unreliability of their testimony.

53. The Government concluded that the proceedings as a whole had been fair and adversarial and had respected the principle of equality of arms. The applicants had been able to exercise all of their procedural rights both during the investigation and at the trial stage.

2. The Court's assessment

(a) General principles

54. 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).

55. Furthermore, the Court 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 v. the United Kingdom, [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 81, 12 May 2016).

56. 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, bearing 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 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.

57. These principles have been further clarified in the case of *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).

58. 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

59. The Court observes that the Regional Court found the applicants guilty of the attempted murder of two or more persons committed by a group and illegal possession of firearms, and sentenced them to thirteen and twelve years' imprisonment respectively. The only confrontation held during the pre-trial investigation was that between H.H., as a witness, and the applicants. The applicants asked to have H.H. and the witnesses A.S.,

M.M., S.G. and S.K. summoned and brought before the trial court for questioning, but none of them appeared.

60. Concerning the use of the written testimony of absent witnesses, the Court has held on many occasions that one of the requirements of a fair trial is the ability 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

61. 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).

62. The reason for the absence of H.H., A.S., M.M., S.G. and S.K. from the trial was that they could not be found. Apparently H.H. and S.K. were still in Armenia, but A.S., M.M. and S.G. had left the country (see paragraphs 34-36 above). The Court observes that although the trial court tried on several occasions to secure their attendance, it was not successful in its attempts. The trial court did not initiate any further measures to locate H.H. and S.K. on Armenian territory, and nor did it resort, for example, to international legal assistance in order to locate A.S., M.M. and S.G., who were apparently abroad.

63. Even assuming that there was no good reason to justify 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"

64. The second stage of the *Al-Khawaja and Tahery* test 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 had not been sole and decisive in securing the applicants' conviction, while the applicants argued that their statements had been the only evidence proving the applicants' guilt. Moreover, according to the applicants, H.H. had been the only eyewitness in the case.

65. The Court observes in this connection 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 H.H., A.S., M.M., S.G. and S.K. It appears from its judgment that the Regional Court also took into account: the testimony of more than twenty witnesses obtained during the pre-trial and trial stages; the records of confrontations conducted as part of the investigation; a forensic medical examination report; a complex ballistic and fingerprint examination report; a complex ballistic and forensic chemical examination report; the record of an investigatory experiment; the records of an operative-investigative measure; a vehicle inspection report concerning H.H.'s and the second applicant's cars; a crime scene inspection report; a number plate recognition report concerning the second applicant's car; transcripts of calls to and from several telephone numbers; and a complex forensic fibre examination report (see paragraph 39 above).

66. However, the Court finds that the statements of H.H., A.S., M.M., S.G. and S.K. were of fundamental relevance to the case. On the basis of this evidence, the domestic courts needed to decide whether the applicants were guilty of attempted murder and the illegal possession of firearms. Even though this evidence may not have constituted the sole evidence in the case, it was at least decisive as far as the applicants' involvement was concerned. This is all the more so as the other evidence available to the courts appears to have been inconclusive. Moreover, in respect of this evidence, the Regional Court was obliged to provide the applicants with an opportunity to organise their defence in an appropriate way and put forward all their relevant arguments. Instead, the court based its conclusions on witness evidence which had never been examined at the hearing (contrast *Kashlev v. Estonia*, no. 22574/08, § 47, 26 April 2016). In these circumstances, the failure of the Regional Court to hear in person the witnesses H.H., A.S., M.M., S.G. and S.K. – whose statements were later used against the applicants – was capable of substantially affecting the applicants' defence rights.

(iii) Whether there were sufficient counterbalancing factors

67. The Court reiterates that it should not review the existence of sufficient counterbalancing factors only 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 may 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*, § 145, and *Paić*, § 38, both cited above).

68. The Court observes that there were some procedural safeguards in place to compensate for the handicaps caused to the defence, such as the confrontation between the victim H.H. and the applicants during the pre-trial investigation. However, in the Court's view these were not sufficient to compensate for the fact that the applicants had not even had the opportunity to challenge the witness statements of A.S., M.M., S.G. and S.K. during the investigation phase. 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, and nor did it seem to attach less weight to such statements (compare, for example, *Al-Khawaja and Tahery*, § 157, and *Paić*, § 43, both cited above).

(iv) Conclusion

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

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

72. The applicants claimed 24,000 and 18,000 euros (EUR) respectively in respect of pecuniary damage and EUR 20,000 each in respect of non-pecuniary damage.

73. The Government considered that there was no causal link between the alleged violation of the Convention and the pecuniary damage suffered. As to the non-pecuniary damage, the Government considered that the finding of a violation would constitute in itself sufficient just satisfaction for

any non-pecuniary damage sustained by the applicants. In any event, the amount claimed was excessive and should be reduced.

74. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicants EUR 2,400 each in respect of non-pecuniary damage.

75. The Court considers it also necessary to point out that a judgment in which it finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, if any, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; and *Lungoci v. Romania*, no. 62710/00, § 55, 26 January 2006). In the case of a violation of Article 6 of the Convention, the applicant should as far as possible be put in the position he would have been in had the requirements of this provision not been disregarded (see, *mutatis mutandis*, *Sejdovic v. Italy* [GC], no. 56581/00, § 127, ECHR 2006-II; and *Yanakiev v. Bulgaria*, no. 40476/98, § 89, 10 August 2006).

76. The Court notes in this connection that Articles 426.1 and 426.4 of the Code of Criminal Procedure allow the reopening of the domestic proceedings if the Court has found a violation of the Convention or its Protocols (see paragraph 44 above). As the Court has already held on previous occasions, in cases such as the present one, the most appropriate form of redress would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial (see *Gabrielyan v. Armenia*, no. 8088/05, § 104, 10 April 2012; *Avetisyan v. Armenia*, no. 13479/11, § 75, 10 November 2016; and *Asatryan v Armenia*, no. 3571/09, §§ 73-74, 27 April 2017).

B. Costs and expenses

77. The applicants made no claim for costs and expenses.

C. Default interest

78. 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 6 § 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months, EUR 2,400 (two thousand four hundred euros) each, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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 applicants' claim for just satisfaction.

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

Abel Campos Registrar	Ksenija Turković President