



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

THIRD SECTION

CASE OF SNIJDERS v. THE NETHERLANDS

(Application no. 56440/15)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Examination of witnesses
• Inability to directly cross-examine anonymous witness whose statements were used in evidence against the applicant • Good reasons justifying the protection of the witness's identity • Statements, albeit not of insignificant weight, not sole or decisive basis for applicant's conviction • Difficulties encountered by the defence in connection with the witness's anonymity sufficiently counterbalanced by procedures applied by the judicial authorities
• Criminal proceedings, considered, as whole, not rendered unfair by admission in evidence of statements

Prepared by the Registry. Does not bind the Court.

STRASBOURG

6 February 2024

FINAL

06/05/2024

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Snijders v. the Netherlands,

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

Pere Pastor Vilanova, *President*,

Jolien Schukking,

Georgios A. Serghides,

Darian Pavli,

Peeter Roosma,

Andreas Zünd,

Oddný Mjöll Arnardóttir, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 56440/15) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Dutch national, Mr Johan Snijders (“the applicant”), on 6 November 2015;

the decision to give notice to the Government of the Kingdom of the Netherlands (“the Government”) of the complaints concerning Article 6 §§ 1 and 3 (d) of the Convention;

the parties’ observations;

Having deliberated in private on 12 December 2023,

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

INTRODUCTION

1. The case concerns the alleged unfairness of criminal proceedings against the applicant owing to his inability to directly cross-examine an anonymous witness whose statements were used in evidence against him. The applicant relied on Article 6 §§ 1 and 3 (d) of the Convention.

THE FACTS

2. The applicant was born in 1961. At the time of the introduction of the application he was detained in Heerhugowaard. He was represented by Mr W. Ausma, a lawyer practising in Utrecht.

3. The Government were represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

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

I. MURDER, STATEMENT BY A WITNESS AND REOPENING OF THE CRIMINAL INVESTIGATION

5. On 8 October 2002 at around 8.45 A.M. the police discovered on a parking lot the body of a man (“Y.”) in the driver’s seat of a van who was found to have been shot and killed shortly before. A police forensic team immediately examined the scene and found amphetamine residues in the van and, approximately 50 metres from the body, a cigarette butt which, given its state and the weather conditions at the time, must have been discarded within twelve hours before Y.’s body was found.

6. From a report drawn up on 28 January 2003 by an expert of the Dutch Forensic Institute it followed that the DNA profile found on the cigarette butt matched with the DNA profile found on sunglasses that had been left behind on 23 November 2001 after a theft committed with violence. The DNA profile did not appear in the DNA database. As the murder was not solved by the criminal investigation, that investigation was closed in 2003.

7. On 8 April 2005 the investigating judge (*rechter-commissaris*; “investigating judge E.”) at the Regional Court (*rechtbank*) of ‘s-Hertogenbosch examined under oath a witness (“X”) about Y.’s murder. Prior to questioning, X had stated that he or she knew who had committed Y.’s murder and that he or she would be willing to make a statement only if granted anonymity, because he or she would have reason to fear for his or her life if it became known that he or she was the source of this information. The investigating judge E. heard X in accordance with Article 190 § 2 of the Code of Criminal Procedure (*Wetboek van Strafvordering*; “the CCP” – see paragraph 34 below), which entailed that he did not ask X to state at the beginning of the hearing his or her personal details and that he gave reasons for preventing the disclosure of that information in the official record of the examination. X stated that the applicant had told him or her that he had murdered Y. and that he had been hired to do so by someone to whom Y. owed money for a drugs deal. X provided details about the murder which the applicant had told him or her. Those details, which had not been disclosed through the media, matched with factual details at the crime scene. According to investigating judge E., X appeared credible because his or her statement was given unequivocally, spontaneously and without hesitation.

8. In 2008 the applicant’s DNA profile – which had been entered in the DNA database earlier that year – was found to match the DNA profile on the cigarette butt that had been found near Y.’s body. After the criminal investigation into Y.’s murder was reopened, the police interviewed a number of witnesses including the applicant’s ex-girlfriend on several occasions. The first witness interview with her took place on 5 November 2009. At that moment the applicant was detained in relation with other criminal acts (four armed bank robberies committed in Germany in 2005 for which he was convicted in 2006 to nine years’ imprisonment). She stated that the applicant

had told her that, and how, he had committed the murder on a young man in a van after the organisation run by the person who had hired him had been cheated in a drugs deal. He had also told her about another murder that he had committed to settle a debt with someone. She stated that she had been repeatedly ill-treated by the applicant and threatened by him with a gun and that she was afraid of him. They broke up in 2005. Measures were taken to contribute to her safety. In February 2010 the applicant was arrested, in prison, on suspicion of involvement in Y.'s murder.

II. PROCEEDINGS AT FIRST INSTANCE AND GRANTING OF THREATENED WITNESS STATUS

9. At a preparatory hearing (*pro-forma zitting*) on 3 June 2010, the 's-Hertogenbosch Regional Court granted a request by the applicant for the examination of X and referred the matter to the investigating judge.

10. On 20 October 2010 the public prosecutor (*officier van justitie*) made an application to the investigating judge that X be examined as a threatened witness (*bedreigde getuige*) pursuant to Article 226a of the CCP (see paragraph 35 below), claiming that it was reasonable to assume in the light of the nature of the crime, the identity of the applicant, the applicant's use or threats of violence as described in a police report of 12 October 2010, and his criminal record – including, among other things, the commission of opium offences, violent crimes and property offences, committed with the application of violence – that X's life, health or safety were at risk, and that X did not wish to make a statement because of this threat.

11. By a decision of 16 August 2011, the investigating judge ("investigating judge A."), after hearing (separately) the public prosecutor, the applicant and his counsel and X, assisted by his or her counsel, dismissed that application, noting that it was not apparent why the Public Prosecution Service (*Openbaar Ministerie*) had considered in 2005 that X was to be examined as a witness in accordance with Article 190 of the CCP, whereas it now believed that he or she should be examined pursuant to Article 226a of the CCP. The appeal against that decision lodged by the public prosecutor, acting on X's behalf, was upheld by a decision of 21 September 2011 of the Regional Court sitting in chambers (*raadkamer*). It found that the decision of investigating judge A. not to grant X the status of threatened witness had been insufficiently reasoned and directed investigating judge A. to reconsider the public prosecutor's application and make a fresh decision.

12. On 11 October 2011 investigating judge A. again decided against granting X the status of threatened witness, which decision was again appealed by the public prosecutor.

13. On 9 November 2011, a three-judge chamber of the 's-Hertogenbosch Regional Court, after hearing X's lawyer and the public prosecutor in camera,

upheld the appeal and itself granted X the status of threatened witness under Article 226a of the CCP.

14. In doing so, the court took into account the following factors: (1) the applicant was suspected of murder and already had many previous convictions for which he had been sentenced to non-suspended terms of imprisonment; (2) it was apparent from the substance of the statement of X that he or she was aware of this; (3) the lawyer of X had stated that the latter had always wished to have full anonymity because he or she feared for his or her life, health and safety if his or her identity were to become known; (4) X had indicated that he or she would not testify if he or she were not granted the status of threatened witness for the witness examination in this criminal case; and (5) X, who had not been represented by a lawyer when making the statement in 2005, had made that statement after his or her request to grant anonymity had been accepted and X had probably been unaware of the differences between Articles 190 and 226a of the CCP and could not be expected to understand the legal details of the status accorded by both provisions, especially when, at the time the statement was made, the end result of the application of Article 190 amounted to full anonymity. Finally, the court held that a new situation had arisen once the applicant had become aware of the existence of this statement and the defence's request to examine X had been granted by the court, and that X could not reasonably have anticipated either the course of action that would be taken by the defence in the proceedings or the other results of the criminal investigation. The fact that the incriminating statement of X had become important in evaluating the overall evidence in this case was enough to make it plausible that a threat previously perceived as fairly general had now become a serious issue. It concluded that in these circumstances a witness was entitled to the protection of Article 226a of the CCP.

15. On 2 March 2012 X was examined by the investigating judge ("investigating judge V.") as a threatened witness in accordance with Articles 226c to 226f of the CCP (see paragraph 35 below). After the judge had taken note of the threat assessment regarding the safety of X, provided by the witness protection department at his request, he decided it to be necessary for ensuring that X's identity remained concealed to hear X at a secret location and that neither the applicant and his counsel, nor the public prosecutor could be present at the examination (see Article 226d §§ 1 and 2 of the CCP in paragraph 35 below). In order to safeguard the parties' interests as much as possible, the applicant and the public prosecutor were provided the opportunity to submit questions in writing to be addressed to witness X. In view of X's status of threatened witness, the substance of his or her statement in 2005 and the outcome of the threat assessment, the investigating judge considered that the interests of the safety and protection of X should take precedence over the interests of the applicant in being able to examine X directly.

16. Prior to the examination of X, the public prosecutor had submitted one written question – whether X wished to confirm his or her statement from 2005 (which was answered affirmatively) – and the applicant had submitted twenty-five, all of which were put to X by investigating judge V. and answered by X under oath. In the interests of protecting the identity of X, the answers to some of the applicant’s questions were not, or not fully, included in the official record of the examination. Investigating judge V. sent the official record of the examination to the applicant and public prosecutor and gave them the opportunity to submit further questions to X, but neither made use of that opportunity.

17. According to the official record X confirmed to stand by his or her statement from 2005 (see paragraph 7 above). Further, in reply to questions, he or she answered, amongst other things, that before the applicant had told him or her about the murder, he or she had not heard about that murder in any way; that he or she was troubled by the fact that he or she had knowledge of a murder of which he or she knew who the murderer was and had gone to the police in 2005 for that reason; that he or she had received no reward for making that statement; that he or she knew the applicant as a nice person, but that in terms of criminal activities he had no conscience and heart; that he was money-hungry; that he had a narrow build, grey hair, a narrow face and was about 1.80 to 1.90 metres tall; and that he or she had never spoken about this case with the applicant’s ex-girlfriend.

18. Investigating judge V. noted in the official record that before examining the witness he had established X’s identity. He further noted that he had assessed the credibility of X by asking questions about his or her life and personal situation and that he considered that X was a reliable witness in view of his or her spontaneous manner of answering and consistency with the previous statement from 2005.

19. In a judgment of 9 July 2012 (ECLI:NL:RBSHE:2012:BX0827) the Regional Court convicted the applicant for the murder of Y. and sentenced him to eighteen years’ imprisonment. It held that the statements of X were sufficiently credible, consistent and reliable to be used as evidence. In that connection the court considered that both in 2005 and 2012 the investigating judges had assessed X’ statements as reliable, that X’s statements were consistent and detailed and that they were corroborated in essential respects by both the findings of the criminal investigation and the statements of the applicant’s ex-girlfriend. It noted that X had declared under oath that he or she had had no contact with the applicant’s ex-girlfriend about this case. It also noted that their statements contained information about the crime which they could not have learned from the media (a notable example was that both stated that Y. was not the actual target), that the statements by X were not the sole or decisive evidence on which it relied for the guilty verdict, and that sufficient measures had been taken to compensate for the limitation of the defence’s right to examine witnesses.

III. PROCEEDINGS BEFORE THE COURT OF APPEAL

20. The applicant appealed against that judgment to the ‘s-Hertogenbosch Court of Appeal. During a preparatory hearing held on 14 November 2012, the applicant’s lawyer confirmed to the court that the defence had been given the opportunity by investigating judge V. to submit further questions to X (see paragraph 16 above). He added that since the answers to some of the questions had been redacted in the official record, he had not considered it useful to submit further questions to X.

21. By judgment of 2 April 2014 (ECLI:NL:GHSHE:2014:943), the Court of Appeal quashed the judgment of the Regional Court as it did not rely on exactly the same evidence, convicted the applicant for the murder of Y. and sentenced him to eighteen years’ imprisonment. The conviction was based on twenty items of evidence, including the DNA profile found on the cigarette butt, the witness statements of the applicant’s ex-girlfriend and the witness statements of X.

22. In its judgment it dismissed the applicant’s request that investigating judge A. be examined as a witness in order (1) to assess whether the Regional Court sitting in chambers had had grounds to confer upon X the status of threatened witness (see paragraphs 13-14 above), and (2) to examine X’s credibility. Regarding the granting of the status of a threatened witness to X, the appellate court referred to a judgment of the Supreme Court of 30 June 1998 (see paragraph 42 below) which held that such a decision could not be re-examined by the trial court unless the manner in which the decision had been taken or the contents of that decision had been so fundamentally defective that the use by the trial court of the results of the subsequent questioning would violate the right of the accused to a fair trial as guaranteed by Article 6 of the Convention. In that connection, the Court of Appeal considered as follows:

“The decision of the [Regional] Court sitting in chambers was based in part on the facts that the case involves a murder accusation, that it is apparent from the case file that the suspect has received many previous non-suspended custodial sentences and that it follows from the substance of the statement made by [X] that he or she is evidently familiar with these facts and circumstances.

The Court of Appeal notes that the previous convictions taken into account by the [Regional] Court sitting in chambers were set out in an extract from the suspect’s criminal record ... which includes the following custodial sentences: (i) six months for threats of serious assault and robbery (1996); (ii) three years for offences including robbery (1997); (iii) four months for offences including attempted robbery (1997); (iv) 36 months (of which eight suspended) for extortion (2001); (v) five months for offences including issuing a threat against a person’s life, and assault (2003); and (vi) nine years for serious predatory extortion (*Schwere räuberische Erpressung*) in four cases (2006; a conviction in Germany which ... concerned armed robberies).

[T]he [Regional] Court sitting in chambers ... was able to base its decision in part on the submissions made by the Public Prosecution Service and [X] about the fears/threat.

Investigating judge [V.] then asked the witness protection department to provide a threat assessment. Partly on the basis of this assessment, investigating judge [V.] ruled that the interests of security and of protection of the threatened witness should prevail over the interests of the defence in being able to question the witness directly. This threat assessment thus provides further grounds – albeit retrospectively – for the decision of the Regional Court sitting in chambers to grant the anonymous witness the status of threatened witness.

On the basis of the foregoing, it is the Court of Appeal’s view that neither the substance of the decision to grant the anonymous witness the status of threatened witness, nor the way in which the [Regional] Court sitting in chambers reached that decision, involved any violation of fundamental principles as referred to above.”

23. Regarding the second ground put forward in the request to hear investigating judge A., the appellate court considered as follows:

“Pursuant to Article 226e of the CCP, the investigating judge assesses the credibility of the threatened witness during the examination and accounts for his or her findings in the official record. In the present case, this examination and its justification were – in accordance with the statutory regulations – the responsibility of investigating judge [V.]. Assessing the credibility of the witness, as prescribed in Article 226e of the Code of Criminal Procedure, was thus not a matter for investigating judge [A.].

In addition, in determining whether [X’s] statement(s) may be used in evidence, it is up to the Court of Appeal, as an independent trial court, to form an opinion on the reliability of the statement(s). The Court of Appeal does not consider it necessary to examine [investigating judge A.] on that point or to receive a more detailed written explanation from him. In this connection the Court of Appeal has taken account of the fact that, as will be considered below, the case file contains sufficient information against which the court can assess the reliability of the anonymous witness’s statements.”

24. The Court of Appeal proceeded by examining whether the statements of X could be used in evidence:

“Article 226d of the CCP gives the investigating judge the power, if such is required to conceal the identity of the threatened witness, to determine that the suspect and/or his or her counsel may not be present when the threatened witness is examined. In such a case, the public prosecutor is not allowed to be present either. To answer the question of whether, in a specific case, the use of this power constitutes an infringement of a suspect’s right to a fair trial, the first significant factors are the manner in which the examination is performed and the measures taken to minimise the handicap created for the defence with regard to the exercise of the right to examine a witness. Another significant factor, however, is whether the results of the examination provide compelling (*in overwegende mate*) evidence of the suspect’s direct involvement in the offence with which he or she is charged ...

In the Court of Appeal’s opinion, the suspect’s right to a fair trial, as guaranteed by Article 6 of the [Convention], was not violated by the manner in which the examination had taken place.

In this connection the court has taken into account that:

- the principle of equality of arms was observed as the public prosecutor had also been barred from attending the examination and had also been permitted only to submit written questions;

- investigating judge [V.] conducted the examination of [X] in part on the basis of a list of questions submitted in advance by the defence;
- investigating judge [V.] sent the official record of the examination to the defence, which had made no use of the opportunity to submit further questions to [X] ...;
- all questions submitted to investigating judge [V.] were put to and were answered by [X];
- [X]’s answers to the majority of the questions submitted by the defence (18 out of 25) were included in the official record of the examination, and the answers to the remaining questions were not or partly included only to preserve his or her anonymity;
- during the examination, investigating judge [V.] assessed the reliability of [X] and accounted for his findings in the official record, and also checked and recorded that at the time of the examination [in 2012] no statement in the name of [X] was on file ...;
- the case file contains information obtained both from another witness ([the applicant’s ex-girlfriend]) and from the technical forensic investigation, against which the reliability of the statements by [X] could be assessed;
- in view of the statements of [the applicant’s ex-girlfriend] and the findings of the technical forensic investigation, the results of the examination of [X] did not constitute decisive or compelling (*in beslissende of overwegende mate*) evidence of the applicant’s direct involvement in the crime with which he had been charged.

The statements given by [X] can therefore in themselves be used in evidence.”

25. The Court of Appeal then assessed the reliability of the statements of X. The statement of X from 2005 was quoted in full in the judgment. The appellate court noted that, according to investigating judge E., X had appeared credible during the examination in 2005 because he or she had given his or her statement unambiguously, spontaneously and without hesitation. The appellate court also noted that in 2012 investigating judge V. had found that X had appeared credible because of his or her spontaneous manner of answering questions and the consistency of his or her statements with those made in 2005. It found no indication that X had fabricated or changed parts of his or her statements and held that the statements were corroborated in multiple respects by the findings of the criminal investigation and contained information which had not appeared in the media. In particular, the court noted that when speaking of a “Jan Snijders” in his or her statements, X had obviously referred to the applicant (given the details provided about the applicant’s address and mobile phone number); that X had provided pertinent details about the place and time of Y.’s murder and the number of shots fired at him (which corresponded with other witnesses’ statements who had been near the crime scene and had heard the shots, with temperature readings of the victim’s body, and with the number of bullet casings found); and that X had stated that the applicant had used the money he had received for Y.’s murder to go on a holiday to one of the Canary Islands in late 2002 (which corresponded with the applicant’s statement that he and his ex-girlfriend had made that holiday trip, with statements of other witnesses who confirmed this, and with the ex-girlfriend’s cash withdrawals on that

island during that period). The Court of Appeal also recognised that in a few respects X's statements did not correspond with the findings of the investigation, but it held that logical explanations could exist for these inconsistencies. In this respect, the court, *inter alia*, noted that X's statement that the victim had been left on the passenger's seat whereas he was found on the driver's seat and that the door of the van had been closed whereas when the police arrived the door was locked, could be explained by the fact that it followed from the forensic investigation that the body of the victim had evidently been moved after his death. The court considered that it was conceivable that the door had locked automatically or had been locked by the applicant (by reaching through the open window) after he had opened and then closed the door.

26. The Court of Appeal noted further that the statements of X corresponded in many essential respects with those of the applicant's ex-girlfriend, which it also considered reliable as they were highly detailed, had been made spontaneously, were corroborated by the statements of other witnesses and the applicant, and included information that had not appeared in the media. The applicant's ex-girlfriend's statement that one evening the applicant wanted them to watch the TV show "*Opsporing Verzocht*" – a show in which the police ask the public for help solving crimes – which covered the murder of a young Moroccan man, and that the applicant told her that he had done it, was, for instance, corroborated by what the appellant had stated himself to the police on 20 May 2010, namely that when they were watching the "*Opsporing Verzocht*" covering Y.'s murder, he had warned her to never be nasty (*vervelend*) to him because otherwise it would be her turn as well (*anders kom jij ook aan de beurt*). The Court of Appeal further took into account that the applicant's ex-girlfriend had been examined as a witness by the investigating judge in the presence of the applicant's counsel, with the applicant following the examination via video link, and that both had had the opportunity to cross-examine her directly and test her credibility. The appellate court also explicitly noted that X and the applicant's ex-girlfriend were not the same person and that there were therefore two separate witnesses, each of whom had stated independently that the applicant had confessed to killing Y.

27. Finally, the Court of Appeal held that the cigarette butt with the applicant's DNA proved that he had been very close to the scene of the crime within twelve hours before Y.'s body had been discovered on 8 October 2002 and that the applicant had provided no consistent or credible exonerating explanation. The court concluded that the alternative scenario submitted by the defence – according to which someone else had killed Y. and the applicant had discarded said cigarette butt after going for a run with S. that morning near the place where Y.'s body was found – was rebutted by the content of the evidence used, which the court found reliable. In that connection the court

also noted, *inter alia*, that S., when heard as witness, had indicated that he always went running with the applicant in the afternoon.

IV. PROCEEDINGS BEFORE THE SUPREME COURT

28. On 21 November 2014 the applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*). The applicant, firstly, complained that contrary to Article 6 of the Convention, the Court of Appeal had based the conviction for the proven offence to a decisive extent on the statement of X and that insufficient measures had been taken to compensate for his inability, or insufficient ability, to cross-examine him or her. Secondly, the applicant complained about the dismissal of his requests for investigating judge A. to be examined.

29. In an advisory opinion of 7 April 2015, the Advocate General (*Advocaat-Generaal*) at the Supreme Court recommended that the appeal on points of law be dismissed. Regarding the complaint under Article 6 of the Convention, the Advocate General, firstly, summarised the relevant general principles set out in the Court's case-law and the assessment framework used by the Supreme Court which was modelled on that case-law and, next, applied the so-called "Al-Khawaja and Tahery-test" (*Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011), noting that since X had been given the status of threatened witness – which the applicant had not complained about in his grounds of appeal on points of law – there could be no doubt that there was a good reason for the non-attendance of this witness, that the finding of the Court of Appeal that X's statements were not "sole or decisive" for the conviction of the applicant was not incomprehensible or inadequately reasoned, and that the question of whether sufficient compensating measures had been offered for the lack of opportunity to question the threatened witness directly did not require further considerations because, after all, that standard applied only to those cases where the conviction was based "solely or to a decisive extent" on the statement of the absent witness.

30. By judgment of 16 June 2015 (ECLI:NL:HR:2015:1664) the Supreme Court dismissed the appeal on points of law. It dismissed the first ground of appeal on points of law because the grievance could not lead to cassation of the impugned judgment. Based on section 81 (1) of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), this required no further reasoning as the grievances did not give rise to the need for a determination of legal issues in the interest of legal uniformity or legal development. As regards the second ground of appeal on points of law, the Supreme Court referred to its judgment of 30 June 1998 (see paragraph 42 below) and found that the Court of Appeal had not failed to apply the criterion formulated in that judgment and that its finding was not incomprehensible in the light of the arguments adduced by the applicant. Referring to the

applicable provisions of the CCP, the Supreme Court further held that the Court of Appeal had not applied an incorrect criterion in dismissing the request to examine investigating judge A. as a witness about the reliability of the statement made by X, and that its decision had not been incomprehensible and had been adequately reasoned.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE CODE OF CRIMINAL PROCEDURE

31. The Act of 11 November 1993, Official Gazette (*Staatsblad*) 1993, no. 603, has added to the CCP a number of detailed provisions relating to the “protection of witnesses”. It entered into force on 1 February 1994. The Explanatory Memorandum (*Memorie van Toelichting*) to the Bill which later became this Act notes that these provisions were introduced specifically in response to the Court’s judgments in *Kostovski v. the Netherlands* (20 November 1989, Series A no. 166) and *Windisch v. Austria* (27 September 1990, Series A no. 186) and were intended to provide a procedure complying with the requirements set out by the Court (see Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 1991/92, 22 483, no. 3, p. 3).

32. The Explanatory Memorandum indicates that the statutory scheme aims to respect the rights of both the witness and the accused in the criminal proceedings. In the case of the witness, this concerns in particular the right to life and respect for private life, enshrined in Articles 2 and 8 of the Convention. In the case of the accused, it concerns the right to a fair trial, enshrined in Article 6 of the Convention. Effective respect for the rights of the witness may imply that his identity must be concealed during questioning, otherwise – in short – he would be in danger. However, such withholding of identity may be at odds with the right of the accused to a fair trial, because concealing the identity of a witness limits the defence’s ability to cross-examine that witness. To compensate for this limitation, the legislature has created a scheme with various procedural safeguards.

33. The distinction between a witness with “limited anonymity” (in practice used, for example, to protect personal details of police officers of arrest, observation, and undercover teams) and a threatened witness with “full anonymity” is that a witness with limited anonymity may, in principle, be cross-examined during the examination by the investigating judge and at the trial hearing. If necessary to conceal that witness’ identity, the judge may order measures such as visual or acoustic shielding to be put in place, or order the accused to (temporarily) leave the hearing so that the examination can be conducted solely in the presence of the defence counsel. The judge may also prevent an answer if there is good reason to believe that disclosure of information will result in the witness experiencing serious problems in the

exercise of his profession. When, however, a witness feels threatened to such an extent that it must reasonably be assumed that there is legitimate reason to fear for the life, health, safety or the stability of the family life or socio-economic position of that witness, he or she may be granted the status of “threatened witness”. The legitimacy of such a threat must be established by the competent judicial authority. If the status of threatened witness has been granted, the investigating judge shall establish the identity of the threatened witness but shall examine that witness in such a way as to ensure that his or her identity remains fully concealed.

34. At the time of X’s examination as a witness in 2005 (see paragraph 7 above), the relevant provision of the CCP concerning a witness with “limited anonymity” read as follows:

Article 190

“1. The investigating judge shall ask ... witnesses ... to state their surnames and forenames, age, profession and place of residence or abode ... If the suspect is known, the investigating judge shall ask witnesses ... whether they are his relatives by blood or marriage, and if in the affirmative, in what degree of kinship.

2. The investigating judge may, of his own motion or on an application (*vordering*) by the public prosecutor or at the request of the suspect or the witness, determine that a question concerning the information referred to in the first paragraph will not be put if there is a well-founded reason to suspect that, in connection with the making of his statement, the witness will be inconvenienced or will be hindered in the exercise of his profession. The investigating judge shall take the measures which are reasonably necessary to prevent disclosure of this information.

3. The investigating judge shall state the reasons for which the provisions of the second paragraph have been applied in his official record.

4. In the case of an examination of a threatened witness, the first paragraph shall not apply.”

35. The statutory scheme governing the procedural position of a “threatened witness” comprises two separate procedures: one in which the decision is taken on granting the status of threatened witness (Articles 226a-226b), and one concerning the examination of the threatened witness (Articles 226c-226f). The relevant provisions of the CCP – which applied at the time of the examination of X as such a witness (see paragraph 15 above) and are still in force now – state, in so far as relevant, as follows:

Article 136c

“‘Threatened witness’ shall be understood to mean a witness whose identity will not be disclosed when he is examined by order of the court under Article 226a [of the CCP].”

Article 226a

“1. The investigating judge shall order, of his own motion or on an application by the public prosecutor or at the request of the suspect or of the witness, that the identity of that witness shall be concealed while he is being examined, if:

(a) the witness or another person, with regard to the statement to be made by the witness, feels threatened to such an extent that it must reasonably be assumed that there is legitimate reason to fear for the life, health, safety or the stability of the family life or socio-economic position of that witness or that other person; and

(b) the witness has indicated that he does not wish to make a statement on account of this threat.

If these requirements are not met, he shall reject the application or the request.

2. The public prosecutor, the suspect and the witness shall be given the opportunity to be heard on this matter. ...”

Article 226b

“1. The decision given by the investigating judge under Article 226a, first paragraph, shall be reasoned, dated and signed and shall be promptly notified in writing to the public prosecutor and served on the suspect and the witness, setting out the time-limit and the manner in which an appeal against the decision must be brought.

2. An appeal against the decision may be lodged by the public prosecutor ... and by the suspect and the witness ... with the trial court (*gerecht in feitelijke aanleg*) in which the case is being prosecuted.

3. The court shall decide as soon as possible. ...

4. The decision of the court shall not be open to appeal on points of law.

5. If it has been irrevocably decided on appeal that the witness is a threatened witness, the members of the court [who decided on that appeal] shall not take part in the court hearing (*onderzoek ter terechtzitting*) of the [criminal] case, and if they do take part then the proceedings shall be nullified. ...”

Article 226c

“1. Before examining a threatened witness, the investigating judge shall establish the witness’s identity and indicate that he has done so in the official record.

2. The witness shall be put under oath or admonished to tell the truth in accordance with the provisions of Article 216.

3. The investigating judge shall examine the threatened witness in such a way as to ensure that his identity remains concealed.”

Article 226d

“1. If required in the interest of keeping the identity of the threatened witness concealed, the investigating judge may determine that the examination of the threatened witness cannot be attended by the suspect or his counsel or both of them. In the latter case the public prosecutor shall not be allowed to attend either.

2. The investigating judge shall as soon as possible notify the public prosecutor, the suspect or, if he has not attended the questioning of the witness, his counsel of the

contents of the statement made by the witness and give him the opportunity to submit, either by means of telecommunication or, if the interest in keeping the identity of the threatened witness concealed does not admit of that, in writing, the questions he would like to be put to the witness. Questions may be submitted before the start of the examination unless the interests of the investigation do not permit the examination to be delayed.

3. If the investigating judge prevents the public prosecutor, the suspect or his counsel from learning of an answer given by the threatened witness, the investigating judge shall have entered in the official record that the question put was answered by the threatened witness.”

Article 226e

“During the questioning the investigating judge shall investigate the credibility of the threatened witness and give account of his findings on that matter in the official record.”

Article 226f

“1. The investigating judge, where possible in consultation with the public prosecutor, shall take whatever measures are reasonably necessary to ensure that the identity of the threatened witness and of any witness in respect of whom a request or an application as referred to in Article 226a, first paragraph, has been submitted is concealed as long as no final decision in the matter has been taken.

2. To that end, he shall be authorised to omit information regarding the identity of the witness from the case documents or to anonymise case documents.

3. ...”

36. Article 226b § 5 (see paragraph 35 above) is a specific expression of the principle of internal disclosure (*beginsel van interne openbaarheid*), which is a fundamental principle in Dutch criminal procedural law. This principle requires that the prosecution, the defence and the trial judge or judges have the same case file, with the same content, in the context of the trial of the suspect. In other words, the trial judge or judges are not allowed to know more than the defence or the prosecution (see also paragraph 43 below). The case file includes all documents that could reasonably be important for the decisions to be taken by the trial judge or judges (Article 149a § 2 of the CCP) and which are thus relevant for the parties to prepare their positions. The principle of internal disclosure serves equality of arms and the adversarial nature of criminal proceedings.

37. The Explanatory Memorandum (see paragraph 31 above) contains the following passages (at p. 10):

“From the *Kostovsky* judgment, the following safeguards can be inferred:

a. the investigating judge must inform himself of the identity of the witness and record in the minutes that he has done so (see art. 226c, first paragraph);

b. the investigating judge must properly verify the credibility and reliance of the anonymous witness and to account for that investigation (see art. 226e);

c. the right of cross-examination by the defence must be respected as much as the guarantee of anonymity allows (see art. 226d, paragraphs 1 and 2).”

and (ibid., p. 18):

“A threatened witness within the meaning of [the proposed Article 226a of the CCP] is only a witness who has been recognised as such by the competent judicial authority in accordance with the legal provisions. ...

Once the competent judicial authority has decided that the identity of that witness must be kept concealed, this question should be left aside in the further course of the proceedings. The witness in respect of whom such an order has been given should therefore be considered to be a threatened witness in the further course of the criminal proceedings.”

and (ibid., p. 14):

“If the anonymity were to apply only *vis-à-vis* counsel, the trial court will know more than counsel. I [the Minister of Justice] consider such a state of affairs to be contrary to the principle of internal disclosure which applies in our criminal procedural law.”

and (ibid., p. 43):

“The proposed Article 226b § 5 of the CCP provides that, if it has been irrevocably decided on appeal that the witness is a threatened witness, the members of the court sitting in chambers are not allowed to participate in the trial, and if they do take part then the proceedings shall be nullified. The principle of internal disclosure which applies in our criminal procedural law stands in the way of this. ... If the members of the court sitting in chambers, who had decided that the witness in question is a threatened witness, were allowed to participate in the trial, they would know more than the defence, especially in so far as the identity of the witness is concerned.”

38. Other relevant provisions of the CCP concerning criminal proceedings before the Regional Court are the following:

Article 344a

“1. The court may not base a finding that there is evidence that the suspect committed the offence as charged in the indictment solely or to a decisive extent (*uitsluitend of in beslissende mate*) on written materials containing statements of persons whose identity is not apparent.

2. An official record of examination conducted before the investigating judge containing a statement by a person who is deemed to be a threatened witness ... may be used as evidence that the suspect has committed the offence as charged in the indictment only if at least the following conditions have been met:

(a) the witness is a threatened witness ... and has been examined as such by the investigating judge; and

(b) the offence as charged in the indictment, to the extent proven, concerns a crime as defined in Article 67, first paragraph [of the CCP; that is, an offence in respect of which a suspect may be remanded in detention], and in view of its nature, the organised context in which it was committed, or the connection with other crimes committed by the suspect, constitutes a serious breach of the legal order.

3. ...”

Article 360

“ 1. If a statement of ... a threatened witness ... [is] used as evidence, the judgment shall give specific reasons.

2. ...

4. All on pain of nullity.”

39. By virtue of Article 415 § 1 of the CCP, the provisions cited above apply equally to proceedings before the Court of Appeal.

II. THE CRIMINAL CODE

40. At the time of Y.’s murder (see paragraph 5 above), Article 289 of the Criminal Code (*Wetboek van Strafrecht*) provided that anyone who intentionally and with premeditation took the life of another person was guilty of murder (*moord*) and liable to life imprisonment or to a term of imprisonment not exceeding twenty years or to a fifth-category fine.

III. RELEVANT CASE-LAW OF THE SUPREME COURT

41. Pursuant to the closed system of legal remedies which governs criminal proceedings in the Netherlands, a decision or judgment taken in the course of a trial may be examined and/or quashed by a higher court only in so far as a legal remedy against the decision or judgment is provided for in law. In a judgment of 18 May 1999 (ECLI:NL:HR:1999:ZD1336) the Supreme Court agreed with the judgment of the Court of Appeal against which an appeal on points of law had been lodged that it would be contrary to this system for an investigating judge to be examined in court as a witness in relation to his or her decisions at any stage of the proceedings if as a result they could be held accountable, and that this rule could only be departed from in special cases.

42. In a judgment of 30 June 1998 (ECLI:NL:HR:1998:ZD1214) the Supreme Court held that it followed from the legislative history of Article 226a of the CCP (see paragraphs 35 and 37 above) that decisions on whether a witness was a threatened witness could not be re-examined by the trial court unless the manner in which such a decision under Article 226a and/or Article 226b of the CCP (see paragraph 35 above) had been taken or the contents of that decision had been so fundamentally defective that the use by the trial court of the results of the subsequent questioning would violate the right of the accused to a fair trial as guaranteed in Article 6 of the Convention (see, in the same vein, the Supreme Court judgment of 28 March 2006, ECLI:NL:HR:2006:AU5471, and the Supreme Court judgment of 24 April 2014, ECLI:NL:HR:2018:666).

43. In a judgment of 20 April 1999 (ECLI:NL:HR:1999:ZD5266) the Supreme Court held that it followed from the legislative history of

Article 226a of the CCP that it would be incompatible with the principle of internal disclosure (see paragraphs 36 and 37 above) if the trial court were to hear a threatened witness in camera without the presence of the prosecution and the defence.

THE LAW

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

44. The applicant complained that he had not been afforded an opportunity to effectively challenge the evidence against him as a result of the procedure followed with regard to the questioning of anonymous witness X, whose incriminating statements had been used in his conviction for murder, contrary to Article 6 §§ 1 and 3 (d) of the Convention, which in so far as relevant 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

45. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

46. The applicant submitted that his right to examine witness X was wrongly restricted, arguing that there had been no good reason to grant X the status of threatened witness. In that connection the applicant submitted that the Regional Court sitting in chambers had decided on the appeal against the decision not to grant the witness that status without having consulted investigating judge A., who had spoken in person to X and was, the applicant

argued, thus the only one to have formed an adequate judgment about whether the granting of the status of threatened witness was necessary.

47. With regard to the evidentiary weight of the statements of X, the applicant submitted that they had been decisive or significant in his conviction since the remainder of the evidence on which his conviction had been based consisted merely of a discarded cigarette butt with the applicant's DNA on it and witness statements by his ex-girlfriend.

48. As to the presence of counterbalancing factors, the applicant argued that although the defence had been somewhat compensated by the opportunity to submit written questions to the anonymous witness, it had been unable to judge his or her credibility. Multiple requests for investigating judge A. to be heard had been dismissed. The fact that the Regional Court sitting in chambers and the trial courts had formed their own opinion about X's credibility had been insufficient compensation.

(b) The Government

49. The Government submitted that there had been good reasons for concealing the identity of X and that the domestic courts had had objective grounds supported by evidence for doing so. They noted that the question whether the anonymous witness X should be granted the status of threatened witness was extensively assessed in the criminal proceedings and that before deciding on the appeal and concluding that X was entitled to the protection afforded by Article 226a of the CCP, the Regional Court sitting in chambers had heard the public prosecutor and X's lawyer. The witness had felt the existence of a threat to his or her life, health and safety, had specifically feared the applicant, and had indicated that he or she had always wanted full anonymity as a condition for making a statement. The case had involved a murder suspect who had received previous non-suspended custodial sentences, the case was linked to a notorious drug-trafficking organisation, X was familiar with these facts and circumstances, and the applicant had become aware of the existence of his or statement made in 2005. The Government also noted that the threat assessment requested by investigating judge V. had provided further grounds, albeit retrospectively, for the decision to grant X the status of threatened witness.

50. The Government submitted that the statements of X had been neither the sole nor the decisive basis for the applicant's conviction, noting that his conviction was based on twenty items of evidence and that the domestic courts had explicitly established that due to the existence of other corroborative and incriminating evidence – in particular the statements of the applicant's ex-girlfriend and the findings of the technical forensic investigation – X's statements had not been determinative for the outcome of the case. Relying on the Court's case-law, the Government considered that the assessment by the domestic courts of the weight attributable to X's statement was neither unclear, nor unacceptable, nor arbitrary.

51. The Government further submitted that in so far as X's statements had to be considered as carrying "significant weight", sufficient counterbalancing factors had been present. In the light of the elements indicated by the Court in *Schatschaschwili v. Germany* ([GC], no. 9154/10, § 145, ECHR 2015), they firstly observed that the domestic courts had made it clear in their reasoned judgments that the statements of the anonymous witness must be treated with caution, and that investigating judge V. and the domestic courts had made a careful assessment of the credibility and reliability of X.

52. The Government subsequently noted that the domestic courts had assessed the availability and strength of further incriminating evidence and had determined that the findings of the criminal investigation and the statements of the applicant's ex-girlfriend who had been cross-examined during the proceedings at first instance, constituted substantial corroboration of X's statements. This had reduced the weight accorded to the statements of X and increased the likelihood that he or she had been reliable.

53. Thirdly, as regards procedural measures to compensate for the inability to directly cross-examine the witness, the Government noted that the applicant had been invited to submit written questions to X (the answers to some of which had been left out of the official record only in so far as necessary to ensure anonymity) and to submit further written questions (of which he had not made use), that he had been heard on the prosecutor's application to grant threatened witness status to X, that he had been in a position to give his own version of the events, and that equality of arms with the public prosecutor had been respected. Questioning investigating judge A., as requested by the applicant, would not have been a counterbalancing factor for the assessment of the reliability of the witness X since pursuant to national law it is the investigating judge examining the threatened witness (which was investigating judge V.) who is entrusted with that assessment.

54. Finally, the Government noted that a further procedural safeguard laid in the fact that the domestic courts had assessed and convincingly explained that no fundamental defects existed in the order granting X the status of threatened witness and that the use of the results of the subsequent examination of that witness had not violated the applicant's rights under Article 6 of the Convention.

2. *The Court's assessment*

(a) **Relevant principles**

55. The Court's primary concern under Article 6 § 1 of the Convention is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, and *Schatschaschwili*, cited above, § 101). Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration

of one particular aspect or one particular incident. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016; *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Schatschaschwili*, cited above, § 100; and *Keskin v. the Netherlands*, no. 2205/16, § 38, 19 January 2021).

56. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law, and as a general rule it is for the national courts to assess the evidence before them. As regards statements made by witnesses, the Court's task under the Convention is not to give a ruling as to whether those statements were properly admitted as evidence, but rather – as already set out in paragraph 55 above – to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III, and *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V).

57. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II, and *Al-Khawaja and Tahery*, cited above, § 118).

(i) *Principles on the admission of untested evidence of prosecution witnesses absent from trial*

58. In *Al-Khawaja and Tahery* (cited above, § 119) the Grand Chamber of the Court summarised and refined the principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him or her were admitted as evidence. The compatibility of such proceedings with Article 6 §§ 1 and 3 (d) of the Convention must be examined in three steps: (i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statement as evidence (*ibid.*, §§ 119-25); (ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (*ibid.*, §§ 119 and 126-47); and (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission

of the untested evidence and to ensure that the trial, judged as a whole, was fair (*ibid.*, § 147).

59. Where absence is the result of fear, a distinction can be drawn between fear attributable to threats or other actions of the defendant or those acting on his behalf and fear attributable to a more general fear of what will happen if the witness gives evidence at trial. In the former case, it is appropriate to allow a statement of that witness to be introduced at trial even if it is the sole or decisive evidence against the defendant, because to allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. As to the latter, there is no requirement that a witness's fear be attributable directly to threats made by the defendant in order for that witness to be excused from giving evidence at trial. This does not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine, first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence (*ibid.*, §§ 122-124).

60. Those principles have been further clarified in *Schatschaschwili* (cited above, §§ 111-31). The Grand Chamber of the Court explained that "good reason for the absence of a witness" must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. If there was a good reason for the witness's non-attendance in that sense, it followed that there was 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). While the absence of a good reason for the non-attendance of the witness could not of itself be conclusive of the unfairness of the applicant's trial, it was a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) of the Convention (*ibid.*, § 113).

61. As regards the question whether the evidence of the absent witness whose statements were admitted in evidence was the sole or decisive basis for the defendant's conviction (the second criterion of the *Al-Khawaja and Tahery* test), the Court reiterated that "sole" evidence is to be understood as the only evidence against the accused and that "decisive" should be narrowly interpreted 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 supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (see *Schatschaschwili*, cited above, § 123).

62. The Court further held that it is not for it to act as a court of fourth instance, its starting-point for deciding whether an applicant's conviction was based solely or to a decisive extent on the depositions of an absent witness

being the judgments of the domestic courts. The Court must review the domestic courts' evaluation in the light of the meaning it has given to "sole" and "decisive" evidence and ascertain for itself whether the domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary. It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear (*ibid.*, § 124).

63. As regards the counterbalancing factors which permit a fair and proper assessment of the reliability of the untested witness evidence, the Court found the following elements of relevance in the assessment of the adequacy of counterbalancing factors: the trial court's approach to the untested evidence; the availability and strength of corroborative evidence supporting the untested witness statements; and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witness at the trial (see *Schatschaschwili*, cited above, §§ 125-31 and 151; *Süleyman v. Turkey*, no. 59453/10, § 85, 17 November 2020; and *Keskin*, cited above, § 65).

64. Furthermore, given that its concern is 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 (see *Schatschaschwili*, cited above, § 116).

(ii) *Similarities and differences between anonymous and absent witnesses*

65. While the judgments in the cases of *Al-Khawaja and Tahery* and *Schatschaschwili* (both cited above) concerned absent rather than anonymous witnesses, the Court has held that the problems raised by the two types of witnesses are not different in principle, since each results in a potential disadvantage for the defendant due to the inability to test the probity and credibility of the witnesses and to test the truthfulness and reliability of their evidence (see *Al-Khawaja and Tahery*, § 127, and *Süleyman*, § 62 and the references cited therein, both cited above). The Court therefore takes a similar approach to the admission in evidence of statements of an absent witness and of statements of a witness whose identity is concealed.

66. The Court has, however, also recognised that the precise limitations on the defence's ability to challenge an anonymous witness differ from those in respect of an absent witness whose identity, after all, is known. The Court reiterates that in the case of a fully anonymous witness, where no details whatsoever as to the witness' identity or background are known, the defence faces the difficulty of being unable to put to the witness any reasons which the witness may have for lying (see *Asani v. the former Yugoslav Republic of*

Macedonia, no. 27962/10, § 36, 1 February 2018). Accordingly, the use in evidence of a fully anonymous witness statement and the inability to question that witness at trial may exacerbate the extent of the handicap under which the defence is labouring.

67. Like in cases where the statement of an absent witness was considered the sole or decisive evidence or where such evidence carried significant weight, the Court must subject the proceedings in which a statement of anonymous witness is used in evidence to the most searching scrutiny. In view of this, the Court must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place (see *Süleyman*, cited above, §§ 63-66; *Al-Khawaja and Tahery*, cited above, § 147; and *Pesukic v. Switzerland*, no. 25088/07, § 45, 6 December 2012).

(b) Application of these principles to the present case

(i) Whether there were good reasons justifying the protection of the identity of the witness

68. Although it is true that the precise source of X's fears was never made known to the defence or the public, the seriousness and well-foundedness of his or her apprehensions were examined by the Regional Court sitting in chambers. The Court observes that when it granted him or her the status of threatened witness, the Regional Court provided detailed reasoning in respect of the danger associated with the applicant and the impact of that danger on X, and it established that X would fear for his or her life, health and safety if his or her identity would become known (see paragraph 14 above). That court did not rely solely on the information provided by X but also on objective facts which could be reasonably considered to have contributed to fear on the part of X. In particular, the applicant was suspected of having been hired by someone to whom the victim, Y., owed money for a drugs deal (see paragraphs 7 and 8 above) and X knew that the applicant had already received many previous non-suspended custodial sentences, including for violent crimes (see paragraph 22 above).

69. The main reason why investigating judge A. refused to grant that status was that X had already made a statement in 2005 as a witness with limited anonymity. In this connection, it is noted however that when X had been examined by the investigation judge in 2005, there was no murder suspect who could have asked to cross-examine him or her. The Regional Court sitting in chambers also drew attention, among other things, to the fact that X, who had not been represented by counsel when making the statement in 2005, had probably been unaware of the differences between Articles 190 and 226a of the CCP, and that an average witness could not be expected to understand the legal details of the status accorded by those provisions. The

fact that the applicant, who in 2010 had been arrested and charged with involvement in Y.'s murder, had become acquainted with the incriminating witness statement against him and had asked for X to be heard at the trial presented, according to the court, a change of circumstances that led it to grant X a more protective status.

70. In the light of the explicit and case-specific findings on this point, it cannot be said that the court's decision to grant X the status of threatened witness was unclear or insufficiently substantiated (contrast *Visser v. the Netherlands*, no. 26668/95, §§ 47-48, 14 February 2002; *Krasniki v. the Czech Republic*, no. 51277/99, §§ 81-83, 28 February 2006; and *Süleyman*, cited above, §§ 70-71 and 74-75), or that the reasons put forward for doing so were speculative (contrast *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 72, 10 November 2005) or based exclusively on the seriousness of the crimes committed (contrast *Van Mechelen and Others*, cited above, § 61). To the contrary, based on the material before it the Court finds that the decision of the Regional Court sitting in chambers to grant X the status of threatened witness on account of his or her fear of reprisals was based on objective grounds and supported by evidence and thus cannot be considered arbitrary or manifestly unreasonable (see also *Doorson v. the Netherlands*, 26 March 1996, § 71, Reports 1996 II; *Kok v. the Netherlands* (dec.), no. 43149/98, ECHR 2000-VI; *Pesukic v. Switzerland*, cited above, § 46; and *Breijer v. the Netherlands* (dec.), no. 41596/13, § 33, 3 July 2018).

71. In the light of the above, the Court is prepared to accept that there was a good reason justifying the protection of X's identity.

(ii) *Whether the evidence of the witness X was the sole or decisive basis for the applicant's conviction*

72. The Court observes that the statements of X were not the sole basis for the applicant's conviction, nor was this alleged by him. The Court further notes that the Regional Court and the Court of Appeal explicitly held that the statements of X did not form the decisive evidence for their guilty verdicts. The Court of Appeal elaborated on that finding by holding that the statements of X corresponded in many essential respects with those of the applicant's ex-girlfriend which were corroborated by the statements of other witnesses and the applicant (see paragraph 26 above), and the discarded cigarette butt with the applicant's DNA on it, with the latter providing a compelling temporal and geographical connection between the applicant and the murder of Y. – a connection for which the applicant had failed to give a consistent and convincing alternative explanation (see paragraphs 24, 26 and 27 above).

73. The above finding of the appellate court is neither arbitrary nor manifestly unreasonable. Considering that it is not its role to act as a court of fourth instance, the Court sees no reason to substitute its own assessment of the weight of the statements in question for that of the Court of Appeal (see

Schatschaschwili, §§ 124 and 141-44, and *Keskin v. the Netherlands*, §§ 50 and 64, both cited above).

74. In view of the above, the Court accepts the Court of Appeal's finding that the applicant's conviction was not based solely or decisively on the statements of X. Nevertheless, noting that the statements of X were not of insignificant weight in that they were used to corroborate those of the applicant's ex-girlfriend and assess her reliability and credibility (see paragraphs 19 and 26 above), and given the need under Article 6 to assess the fairness of the proceedings taken as a whole, the Court will now determine whether there were sufficient factors counterbalancing any handicaps that the admission of that evidence might have entailed for the defence.

(iii) Whether there were sufficient counterbalancing factors

75. The Court found the following elements of relevance in the assessment of the adequacy of counterbalancing factors: the trial court's approach to the untested evidence; the availability and strength of corroborative evidence supporting the untested witness statements; and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witness at the trial (see paragraph 63 above).

76. In this connection, the Court has held that the question whether there were sufficient counterbalancing factors is closely related to the evidentiary weight of the statements of an untested witness, which is, in turn, inversely related to the evidentiary weight of other items of evidence. In other words, the more important the remaining evidence, the less evidentiary weight is attributed to the statements of an untested witness and, in turn, the less weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see, *mutatis mutandis*, *Al-Khawaja and Tahery*, §§ 131 and 139; *Schatschaschwili*, §§ 116 and 123; and, more recently, *Asani*, §§ 34 under item (vi) and 35, all cited above).

77. With respect to the domestic courts' approach to the untested evidence and the presence of further incriminating evidence, the Court observes that the Court of Appeal examined the weight, coherence and consistency of X's statements and cross-referenced them with other available evidence and satisfied itself in a careful manner with detailed reasoning (see paragraphs 25-27 above) that the statements of X were reliable. In this connection, the appellate court considered both the findings on that point by two investigating judges (E. and V.) and the corroborating evidence, principally the strongly similar statements of the applicant's ex-girlfriend (whose reliability had been tested by cross-examination and who was not suspected of collusion), and the applicant's DNA being found on the cigarette butt, in addition to other findings of the criminal investigation (see paragraph 25 above). This reasoning, moreover, withstood scrutiny by the Supreme Court, which dismissed the applicant's first ground of appeal on points of law and

confirmed the judgment of the Court of Appeal (see paragraph 30 above) (see, *mutatis mutandis*, *Breijer*, cited above, § 35).

78. With respect to the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witness at trial, the Court observes the following. While noting that the principle of immediacy would have been better served if the trial judges had been able to assess X's credibility by knowing his or her identity and questioning the anonymous witness themselves – or, at the very least, by receiving the full transcript (thus without answers redacted) of the questioning by the investigating judge –, the Court notes, however, that the procedure prescribed by Articles 226a to 226f of the CCP, which is specifically intended to provide compensatory procedural safeguards, was followed (see paragraphs 13-18, 22-27 and 31-37 above). That procedure, as applied in *Kok* (cited above), was held to sufficiently respect the rights of the defence in that case. The Court also notes that Article 360 §§ 1 and 4 of the CCP (see paragraph 38 above) provides an additional procedural safeguard: if a statement by a threatened witness is used as evidence, the trial court is required to give specific reasons as to the reliability of that statement (see paragraph 25 above).

79. Turning to the case at hand the Court notes that the investigating judge V., who had established X's identity, decided to examine him or her on a secret location which decision was based on a safety assessment provided by the witness protection department on his request. He deemed this measure necessary in order to secure X's safety (see paragraph 15 above). Not only the defence but also the public prosecutor was absent (see paragraph 15 above). The witness was put on oath before the interrogation. The questions asked included a large number submitted in writing beforehand by the defence; in addition, after receiving the (partly redacted) answers, the defence was offered an opportunity to put further questions in writing to X (see paragraphs 16 and 24 above) and, by doing so, to cast doubt on the credibility of his or her testimony (see *Scholer v. Germany*, no. 14212/10, §§ 21 and 60, 18 December 2014).

80. The Court has recognised that the nature and scope of questions put to an anonymous witness are considerably restricted by reason of that anonymity (see *Asani*, cited above, § 42) and that the right to put written questions to such a witness cannot, in particular in the absence of good reasons (the first criterion of the *Al-Khawaja and Tahery* test), be seen as a substitute for the fundamental right to examine witnesses (see, *mutatis mutandis*, *Süleyman*, cited above, §§ 95 and 98). On the other hand, the Court is equally mindful that in the present case the defence refrained from making use of the opportunity to put additional questions. By this course of action the defence may be considered to have waived the right to challenge the credibility of X's statements as regards any incoherence in his or her statements or inconsistencies between his or her statements and those of other witnesses. The defence should have been aware that the testimony thus

obtained could be used as evidence at trial (see, *mutatis mutandis*, *Sarkizov and Others v. Bulgaria*, nos. 37981/06 and 3 others, § 57, 17 April 2012, concerning the applicant's waiver of the right to put questions to an anonymous witness during the pre-trial stage).

81. Moreover, the Court notes that the reliability and credibility of X had been assessed positively by investigating judge E. in 2005 and investigating judge V. in 2012, whose independence and impartiality provided an important procedural safeguard for the fairness of the proceedings (see, *mutatis mutandis*, *Van Wesenbeeck v. Belgium*, nos. 67496/10 and 52936/12, § 107, 23 May 2017). The Court notes that while the applicant could have submitted a request to question investigating judges E. and V. at trial on this point (see also *Kok*, cited above), he did not avail himself of that opportunity. In this connection, the Court further notes that questioning investigating judge A. on the reliability of witness X, as requested by the applicant, could not have served as an additional counterbalancing factor because, as explained in the Court of Appeal's judgment, pursuant to the applicable national law it is the investigating judge examining the threatened witness (investigating judge V.; see paragraph 15 above) who is entrusted with that assessment. Lastly, the Court notes that it also follows from the appellate court's judgment that, with a view to safeguarding the applicant's right to a fair trial, it examined whether the decision to grant X the status of threatened witness and the way in which the Regional Court sitting in chambers had reached that decision, had involved any violations of fundamental principles (see paragraph 22 above).

82. In the light of the foregoing and considering that X's statements were not the sole or decisive evidence for the applicant's conviction, the Court finds the difficulties encountered by the defence in connection with the anonymity granted to X were sufficiently counterbalanced by the procedures applied by the judicial authorities.

(c) Conclusion

83. Taking into account the particular facts and circumstances of the case, the Court finds that it cannot be said that the criminal proceedings against the applicant, when considered as a whole, were rendered unfair by the admission in evidence of the statements of X.

84. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 6 §§ 1 and 3 (d) admissible;
2. *Holds*, by six votes to one, that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 6 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Pere Pastor Vilanova
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint concurring opinion of Judges Pavli and Zünd;
- (b) dissenting opinion of Judge Serghides.

P.P.V.
M.B.

JOINT CONCURRING OPINION OF JUDGES PAVLI AND ZÜND

1. We have voted with the majority in holding that there has been no violation of the applicant's right to a fair trial under Article 6 § 1 of the Convention. In reaching this conclusion, we have attached significant weight to the strength of the corroborative evidence supporting the untested witness's statements, in the overall circumstances of the present case. We also agree with the majority's conclusions on the first two prongs of the relevant test, namely that there were good reasons for granting X the status of protected witness; and that his or her testimony, while not sole or decisive, was "not of insignificant weight" (see paragraph 74 of the judgment).

2. At the same time, we consider that some aspects of the national procedures governing the hearing of anonymous witnesses, involving in particular the powers of the investigating judge as exercised in the present case, appear to be problematic from an Article 6 perspective. While these aspects are not sufficient, in our view, to tip the balance in favour of a finding of a violation in the present case, they might well do so in other circumstances.

3. Before spelling out our concerns, it begs recalling that the Court's established case-law has found that the compensatory safeguards that are owed to criminal defendants in relation to untested evidence cannot rely entirely on the strength of the corroborative evidence, as a matter of substantive fairness. These guarantees should also include "sufficient counterbalancing factors, including ... strong *procedural* safeguards, to permit a fair and proper assessment of the *reliability of that [untested] evidence* to take place" (see paragraphs 67 and 75 of the judgment, emphasis added).

4. Turning to the case at hand, we note, to begin with, that the level of anonymity granted to protected witnesses, and the modalities for obtaining their testimony, can vary considerably. In the present case, the level of anonymity protection granted to witness X was toward the higher end of the spectrum, thus representing a significant degree of handicap for the defence. Specifically, acting on the basis of a threat assessment by the witness protection department, the investigating judge decided that X ought to be questioned at a secret location, without the presence of the applicant or his counsel (see paragraph 15 of the judgment). Having practically no information about the witness's background or the details of the threat assessment, the applicant had no effective possibility of challenging the questioning procedures decided by the investigating judge. Nor does it appear that the trial court was in a position to do so, and the same would apply to the ability of this Court to form an informed view as to whether the level of risk

was so extreme as to rule out other questioning procedures that might have provided stronger safeguards for the defence.

5. A second and related factor involves the scope and nature of disclosures made to the defence about the anonymous witness's background, obviously without compromising his or her identity. No details whatsoever appear to have been shared with the defence in this respect, including as to X's criminal record. Even though a written question on this point was put to X by the investigating judge at the applicant's request, the witness's response was redacted in its entirety from the official record. As a result, the defence was in the dark about the witness's background, including as to factual aspects that might have been important for the purpose of challenging his or her overall credibility. We note, in this regard, that comparative practice on the questioning of protected witnesses in other European jurisdictions shows that it is possible, in principle, to provide significantly greater levels of disclosure to the defence, while still safeguarding their identity and safety (see, for example, *Ellis and Simms v. the United Kingdom* (dec., nos. 46099/06 and 46699/06, 10 April 2012), where the level of threat to the protected witnesses or the dangerousness of the defendants appears to have been no less substantial than in the present case). This being a context in which the Court is called to employ "the most searching scrutiny" (see paragraph 67 of the judgment), it must be satisfied that the domestic authorities have used the most restrictive procedure for questioning protected witnesses only as a measure of genuine last resort.

6. Thirdly, and what we find most troubling, is the fact that not only the applicant and his counsel, but also the trial court itself was left in the dark about certain important aspects of the protected witness's testimony. In the first place, the trial court was not able to hear the anonymous witness directly, a task that was reserved for the investigating judge. Furthermore, the trial court had access only to the redacted record of the questioning, which omitted the witness's answers to several questions that might have been important in assessing his or her credibility and/or having the fullest possible view of the case (compare *Pesukic v. Switzerland*, no. 25088/07, § 50, 6 March 2013, where the identity of the anonymous witness was known to the presiding judge, the witness was questioned before the entire court, and disclosures were made about the witness's criminal record and other aspects). Conversely, in the present case the trial court had to rely to a significant extent on the sole assessment of the investigating judge.

7. The rationale for such an approach, which does not, however, appear to be universally followed,¹ stems from what is known in Dutch legal doctrine as the principle of internal disclosure in criminal proceedings (see

¹ See, for example, the practice of the International Criminal Court under Article 68 § 2 of the Rome Statute and Rule 87 of its Rules of Procedure and Evidence. National systems that do not employ investigative judges (or a similar figure) would also face challenges in accommodating a strict version of the internal disclosure principle.

paragraphs 36 and 37 of the judgment). This means, in essence, that the trial court is not allowed to “know more” than the prosecution or the defence. Without seeking to question the merits of this doctrine in ordinary circumstances, we find it rather paradoxical in the current context that the rights of the defence in relation to the use of anonymous testimony – given by a State witness whose identity is ultimately known to the State – should be further restricted in the name of an abstract need to safeguard equality of arms. In other words, it seems rather evident that the current applicant would have been better off had the trial court been able to hear witness X directly in camera, or at the very least had had access to the complete and unredacted record of his or her questioning by the investigating judge. Be that as it may, the combined effect of highly restrictive questioning procedures and the application of the “internal disclosure” doctrine tends to place criminal defendants under very serious handicaps. Finally, while being cognisant of the independence of the investigating judge and other related safeguards in national criminal procedure, we consider that these cannot replace the crucial role of the trial court in such a delicate context.

8. We must note, finally, that the present applicant has not put forward any explicit challenges to these aspects of national law and practice, whether in Strasbourg or in the course of the national proceedings. While this choice on the applicant’s part has been of some weight in our decision to vote with the majority – not least because the relevant Convention questions have not been properly subjected to our adversarial procedure – we consider nevertheless that the Court, in applying strict scrutiny, cannot afford to lose sight of such aspects, which furthermore may be of broader relevance. The main judgment itself includes certain critical remarks in this respect, with reference to the principle of immediacy (see paragraph 78 of the judgment). In our view, however, they do not go far enough or give the national authorities proper indication of the fragility, in Article 6 terms of the practices discussed in this separate opinion.

9. In conclusion, we note that the present case highlights the persisting tension in our case-law around the definition of the compensatory safeguards that ought to apply under the third prong of the relevant test (see paragraph 63 of the judgment). The latter combines an assessment of procedural safeguards with questions of (substantive) overall fairness, such as the strength of the corroborating evidence. This does not sit comfortably with the fundamental premise of Article 6 as a provision that is primarily concerned with procedural, rather than substantive, fairness. At the same time, it presents a challenge of subsidiarity, insofar as assessment of evidence is quintessentially a matter for the national courts. A more orthodox approach would be for the Court to find a violation of procedural fairness, where this is warranted, which would then allow the national courts to rehear the case and reach a fresh verdict, while excluding the evidence that is “tainted” by the Article 6 violation. Such an approach would appear to be more subsidiarity-friendly

than one in which the Court itself undertakes, essentially, a similar exercise. The fact that the present mixed methodology (intertwining substantive and procedural fairness) is well-established, including through a number of Grand Chamber precedents, does not dispel these built-in tensions.

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I. Introduction

1. Under Article 6 §§ 1 and 3(d) of the Convention, the applicant complained that he had been unable to cross-examine a fully anonymous witness (witness X), whose incriminating statements had been used in the process of deciding the applicant's guilt in relation to a charge of murder, and had not therefore been afforded an opportunity to challenge effectively the evidence against him, as a result of the procedure followed with regard to the questioning of that anonymous witness.

2. On 8 October 2002 the body of a man ("Y.") was discovered by the police. Y. was found to have been shot and killed shortly before. The police forensic team which examined the scene found, approximately 50 metres from the body, a cigarette butt which, given its state and the prevailing weather conditions, must have been discarded within the twelve hours before Y.'s body was found. The murder was not solved by the criminal investigation, so the investigation was closed in 2003 (see paragraph 6 of the judgment). The criminal investigation resumed in 2005, when X stated that he or she knew who had committed Y.'s murder and was examined under oath by investigating judge E. In 2008 the applicant's DNA profile – which had been entered in the DNA database – was found to match the DNA profile of the cigarette butt that had been found near Y.'s body. The police interviewed, among other persons, the applicant's ex-girlfriend who stated in 2009 that the applicant had told her that he had committed the murder, and explained how. In 2010 the applicant was arrested on suspicion of involvement in Y.'s murder and remanded in detention (see paragraph 8 of the judgment).

3. A three-judge chamber of the 's-Hertogenbosch Regional Court granted X the status of threatened witness after investigating judge A. twice dismissed an application by the public prosecutor on that issue. The credibility of X was established by investigating judge V. in 2012. The Regional Court, based, *inter alia*, on the statements of X, convicted the applicant for the murder of Y. and sentenced him to eighteen years' imprisonment (see paragraph 19 of the judgment). Subsequently, the Court of Appeal quashed the judgment of the Regional Court, since it did not rely on the same evidence, convicted the applicant of Y.'s murder and sentenced him to eighteen years' imprisonment (see paragraph 21 of the judgment). The judgment of the Court of Appeal was also based, *inter alia*, on the statements made by X.

4. I voted in favour of point 1 of the operative provisions of the judgment, to the effect that the complaint concerning Article 6 §§ 1 and 3 (d) was admissible, but I voted against point 2 of the operative provisions, which finds that there has been no violation of Article 6 §§ 1 and 3 (d).

5. I will explain how I reached the conclusion that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention, and I will do so by following both the current case-law interpretation of Article 6 §§ 1 and 3 (d) and the meaning of the notion of overall fairness, as well as the proposed approach to the same issues. Before doing so, however, I will first consider how the trial developed, with the applicant being in the dark when “examining” witness X, accompanied by multifaceted and abundant procedural handicaps and Article 6 deviations; and, subsequently, I will argue that the enactment in 1993 of the relevant provisions of the Code of Criminal Procedure by the Act of 11 November 1993 (hereinafter, that Code, as amended in 1993, will be referred to as the “CCP 1993”), on which the above procedural handicaps were based, was not in compliance with the Court’s case-law.

II. “Examination” of X (a fully anonymous witness) in the dark, together with other multifaceted and abundant procedural handicaps and Article 6 deviations

6. The aim of a criminal trial is for the court to determine the truth of the facts before it and to convict an accused person if he or she is found guilty of an offence. Achieving this goal requires the court to ensure that the accused person is granted all the minimum rights under Article 6 § 3, and the procedure followed must be characterised by transparency and fairness and not by complete darkness and arbitrariness, as occurred in the present case with regard to the evidence from X, a fully anonymous witness, a situation which can be open to abuse.

7. The phrase “to examine or have examined” in Article 6 § 3 (d) of the Convention refers to the right of a person who is charged with a criminal offence to cross-examine witnesses against him or her. At the outset, it should be underlined that cross-examination of defence witnesses is not only a minimum right of every accused person under Article 6 §§ 1 and 3 (d) of the Convention in the context of adversarial argument and proceedings and the principle of equality of arms, but also the most effective weapon in the hands of the accused to test and discredit the credibility of prosecution witnesses and the reliability of their evidence (both of which are crucial in assessing the strength of their testimony).¹ This right helps the defendant to receive a fair trial and ensures that the true facts of the case are revealed, thus assisting the court in its aim, which is the discovery of truth. Hence, cross-examination is an indispensable tool for the defence of an accused person and plays a pivotal role in the pursuit of truth and justice in a criminal case; thus, Cox insightfully

¹ Another purpose of cross-examination, of course, is to obtain helpful testimony from the witness which will directly support the defendant’s contention. See Harry Sabbath Bodin, *Principles of Cross-Examination* (American Bar Association Practising Law Institute, 1946), at pp. 1-2.

noted that “cross-examination has been always deemed the surest test of truth, and a better security than the oath.”² Hardwick underlines that “[t]o be thorough in the preparation of the law and facts in every case, is one rule that the advocate cannot safely violate”³, and this, as I submit, was impossible for the applicant’s defence, as he was in dark as to the identity of X and the content of his or her testimony.

8. In this short introduction, it is also pertinent to note what the Grand Chamber observed in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 2228/06, § 130, ECHR 2011), namely, that, “while it is important for the Court to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Article 6 §§ 1 and 3 (d), irrespective of the legal system from which a case emanates”. On the same issue, Cançado Trindade observed:

“In respect of the right to a fair trial and fundamental guarantees, it could hardly be denied that there are some minimum standards of protection of human person below which no country can allow itself to fall.”⁴

9. Despite the special features of the pertinent provisions of the national CCP 1993, Articles 226a-226f, 344a, which entered into force on 1 February 1994 (for further information about the CCP, see paragraph 31 of the judgment), the task of the Court is not to assess the national system in place as such, but to assess whether the result of the application of the domestic law provisions in the present case was Convention-compatible or compliant.

10. In the present case the procedural handicaps or pitfalls under which the defence was labouring and which affected the applicant’s right to defend himself developed in the following manner:

(a) X, the anonymous witness, did not appear at the trial stage of the criminal proceedings instigated against the applicant.

² See Edward William Cox, *The Advocate, his Training, Practice, Rights and Duties* (John Crockford, Law Times Office, London, 1852), at p. 428. Cross-examination is described by Best as “the most effective of all means of extracting truth” (see W. M. Best, *The Principles of the Law of Evidence, with elementary rules for conducting the examination and cross-examination of witnesses*, 12th edition by S. L. Phipson (Sweet & Maxwell, London, 1922), § 663, at p. 581). Similarly, Wigmore, referring to cross-examination, writes that “it is beyond any doubt the greatest legal engine ever invented for the discovery of the truth” (see John Henry Wigmore, *Evidence on Trials at Common Law*, Revised by J. H. Chadbourn (Little, Brown and Company, Boston, Toronto, 1974), Vol. 5, § 1367, at p. 32).

³ See Henry Hardwicke, *The Art of Winning Cases or Modern Advocacy – A practical treatise on preparation for trial, and conduct of cases in court* (Banks and Brothers, Law Publishers, New York and Albany, 1894), at p. 5.

⁴ See Antônio Augusto Cançado Trindade, “The Right to a Fair Trial under the American Convention on Human Rights”, in Andrew Byrnes (ed.), *The Right to Fair Trial in International & Comparative Perspective* (Centre for Comparative and Public Law, The University of Hong Kong, 1997), 4, at p. 11.

(b) Neither the applicant nor his lawyer were able to cross-examine X by any means which could be considered as genuine cross-examination in the meaning of the word (that is, mainly, putting face-to-face oral questions to the witness) and in the context of adversarial argument and proceedings.

(c) Investigating judge A. twice dismissed the public prosecutor's application that X be granted the status of threatened witness (see paragraphs 11 and 12 of the judgment). The second dismissal was made after an appeal by the public prosecutor against the first decision of dismissal, an appeal which was upheld by the Regional Court sitting in chambers (*ibid*).

(d) After the second dismissal of the request to grant X the status of threatened witness, a three-judge chamber of the 's-Hertogenbosch Regional Court, having heard X's lawyer and the public prosecutor in camera, granted X the status of threatened witness (see paragraph 13 of the judgment). Hence, neither the applicant nor his lawyer was present during this procedure, although the public prosecutor was not only present but was also heard. The Regional Court's decision was taken without that court hearing X and not in his or her presence, but only in the presence of his or her lawyer (see paragraph 13 of the judgment).

(e) Furthermore, the said three-judge chamber of the Regional Court did not hear or consult investigating judge A., who had spoken in person to X, before making its decision on whether to grant X the status of threatened witness. More explicitly, the Regional Court, sitting in chambers, set aside the decision of investigating judge A., without hearing his point of view, despite the fact that, firstly, investigating judge A. had spoken to the witness in person and was therefore able to make a better assessment of the application presented by the public prosecutor, and, secondly, investigating judge A. expressly asked the Regional Court to allow him to be present at the appeal and to express his view (see paragraph 16 of the applicant's observations). The said decision of the Regional Court, sitting in chambers, marked an end to the procedure on granting X the status of a threatened witness.

(f) In granting X the status of a threatened witness the three-judge chamber of the Regional Court conducted no balancing exercise between X's rights and those of the accused, that is, the applicant; it only decided on whether to grant X the status of a threatened witness, and it ultimately granted X full instead of limited anonymity.

(g) The composition of the Regional Court which tried the case and convicted the applicant for the murder of Y. was different from that of the three-judge chamber of the Regional Court which decided whether to grant X the status of a threatened witness. The trial courts, namely, the Regional Court and the Court of Appeal were bound by the decision of the three-judge chamber of the Regional Court to the effect that X had the status of a threatened and fully anonymised witness.

(h) The Court of Appeal dismissed the applicant's request that investigating judge A. be examined as a witness in order, *inter alia*, to assess whether the Regional Court sitting in chambers had had grounds to confer on X the status of a threatened witness (see paragraph 22 of the judgment). The applicant alleged that he had made such a request many times, but it had been dismissed (see paragraph 48 of the judgment).

(i) The credibility of X was decided by investigating judge V. (see paragraphs 18 and 81 of the judgment), who was not a member either of the composition of the Regional Court which had tried and convicted the applicant for the murder of Y., or of the composition of the Court of Appeal or of the composition of the Supreme Court. In view of X's status as threatened witness, the substance of his or her statement in 2005 and the outcome of the threat assessment, investigating judge V. considered that the interests of X's safety and protection should take precedence over the interests of the applicant in being able to examine X directly (see paragraph 15 of the judgment).

(j) The Regional Court which tried the applicant did not hear or even see X and accepted that he or she was a credible witness based on the assessment made by investigating judge V. in 2012 (see paragraph 19 of the judgment), and on the assessment made by investigating judge E., who had examined X many years before, in 2005 (*ibid.*). Investigating judge E. was also not in the composition of the Regional Court, or of the Court of Appeal or of the Supreme Court.

(k) The Court of Appeal had not heard or seen X and accepted that he or she was a credible witness, basing this conclusion on the assessments made by investigating judge V. and investigating judge E. (see paragraph 25 of the judgment).

(l) The applicant was not allowed to submit any questions in writing to witness X via investigating judge E. That was because, as stated in paragraph 69 of the judgment, when X was examined by investigating judge E. in 2005, there had been no murder suspect who could have asked to cross-examine him or her. However, both of the trial courts, the Regional Court and the Court of Appeal all based their decisions concerning X's credibility not only on the assessment made by investigating judge V., but also on the assessment made by investigating judge E.

(m) The Court of Appeal found X credible, despite not hearing him or her personally and although recognising that in a few respects, X's statements had not corresponded to the findings of the investigation. However, it held that logical explanations could exist for these inconsistencies (see paragraph 25 of the judgment). Under section 6, entitled "reliability of the anonymous witness's statements", the Court of Appeal's judgment refers to four such instances of inconsistency (which means that they were in fact more than four), the first being that X stated that the applicant left the victim in the passenger seat, while the investigation showed that the victim was found in

the driving seat. Also, in section 9 of the Court of Appeal’s judgment, dealing with consistency between X’s statements and those of the applicant’s ex-girlfriend, two such inconsistencies are mentioned, one of which is that X stated that the applicant had killed Y. for a monetary award of EUR 50,000 while the applicant’s ex-girlfriend mentioned that he did so for a monetary award of EUR 100,000. Fully aware that the assessment of evidence belongs to the domestic courts unless it is arbitrary or manifestly unreasonable, I mention these inconsistencies to show that the Court of Appeal found X credible, without, however, having the opportunity to see his or her demeanour before it, in court, and without having knowledge of those answers which were redacted from the record of his or her examination before investigating judge V.

(n) In the official record of the examination of 2 March 2012, investigating judge V. recorded that he asked witness X a number of questions about his life and personal circumstances, but X’s answers were not included in the record because of the need to protect him or her (see section 6 of the Court of Appeal’s judgment, on the reliability of the anonymous witness’ statements). Hence, when the applicant was asked to submit questions, he was not first provided with any record of the questions posed by investigating judge V. in relation to X’s life and personal circumstances.

(o) The applicant submitted to investigating judge V. twenty-five questions to be answered by X (see paragraphs 16, 24 and 79 of the judgment). However, the answers received by the applicant regarding five of these twenty-five questions were fully redacted, meaning that investigating judge V. did not record X’s answers at all, in order to shield him or her, as he stated. These were Questions 5, 9, 21, 22, 24. Question 19, was partly redacted by investigating judge V. The question was “Did you ever see [the applicant] with a firearm, or have you ever heard him talking about it?”⁵ The response of X was “I did hear him talking about firearms before”, but the rest of the reply was redacted by investigating judge V., adding that the rest of the answer had been heard by him, but he did not record it in order to shield the witness. The answer to Question 20, “How do you know that [the applicant] received money on his prison bank account from or on behalf of, Peter?” was also partly redacted. What was not redacted was only this: “In this respect of this question, I stick [to] the statement I made earlier before the investigating judge” [E., in 2005]. The answers given by X to Questions 2 and 11 did not directly address the question. In particular, the answer to Question 11 merely referred to the answer given to Question 10 and the answer to Question 2 referred to the answer given to Question 1, with the additional information “He likes to tell stories about what he had done”. The motives of X in answering in such an indirect and generally unconstructive manner are

⁵ All translations of questions and answers are unofficial.

unknown, since the applicant was deprived of his right under Article 6 § 3 (d) to cross-examine X.

In sum, five out of the 25 questions were fully redacted, two were partly redacted and the answers to two questions did not directly reply to the question. It is important to note that apart from investigating judge V. and anonymous witness X, nobody else knew what had been redacted from X's answers and, of course, the extent to which they had been redacted.

Let me give an instance of a question which was fully redacted and another which was not redacted at all, which could be related. Question 21 was fully redacted and read as follows: "Did you ever come into contact with law enforcement and, if so, did you ever receive a prison sentence?" Question 8 was not redacted at all, and is set out here with the corresponding reply:

"Q: Have any further agreements or promises been made or have you been promised a reward in any form (monetary or renunciation of a possible criminal prosecution, reduction of sentence or the like)?"

"A: During the first conversation with the CIE [i.e., Criminal Intelligence Unit] officers, no promises or agreements were made about any form of reward. I did mention during that conversation, if a form of reward for my testimony was possible, I would like to claim that reward. Subsequently, I made a statement in front of the investigating judge and afterwards I have been in contact with the CIE officers. They then told me that there would be a 'wanted' poster with a reward and that I might be able to claim that reward that way, considering the statement I made in front of the investigating judge. That award was 20,000 euros. However, nothing came of that because it was later denied by the CIE officers. The CIE public prosecutor did admit afterwards that this 'wanted' poster was meant to account for my possible claim. I understood that the CIE public prosecutor said that based on the 'wanted' poster I could claim this reward, considering my testimony. This was, however, after I made a statement in front of the investigating judge. No commitment was made to me before I made a statement in front of the investigating judge. Until this day I have not received any form of reward and I did not pursue this either."

Question 21 is completely redacted and also creates confusion regarding its connection with Question 8. It is clear that X was seeking to receive benefit, in the form of a reward, for giving his or her testimony, as he or she asked for such an award during the first conversation with CIE officers. Furthermore, X argues that the authorities told him or her - after he or she had given his or her statement before the investigating judge - that an award of EUR 20,000 might be available, but subsequently the CIE public prosecutor did not admit that such an offer had been made. From all this dark picture, it is possible that X might have had a self-interest in giving his or her testimony. X's reply to Question 21, which was fully redacted, could be relevant in establishing whether he or she had an interest in giving evidence, but this matter however remained unclarified. The word "further" in the phrase "Have any further agreements or promises been made" in Question 8 probably refers to agreements or promises in addition to the one described in X's answer to Question 7. Answering Question 7, X stated that he or she had been willing to make the 2005 statement before the investigating judge only on condition of anonymity, and that such anonymity had been promised by that

investigating judge before X went on to give his or her statement. Hence, what cannot be denied is, firstly, that there was an agreement between investigating judge E. and X that the latter's statement would be covered by anonymity, and, secondly, that X wished and looked forward to receiving an award as a result of giving his or her evidence before investigating judge V. There is no doubt, however, that under domestic law anonymity should not be granted on the basis of agreements between an investigating judge and a potential witness, which may impact the credibility of the assessment of fear, at any stage.

11. The trial courts, namely the Regional Court and the Court of Appeal, did not receive investigating judge V.'s full official report regarding X's testimony, and they were completely unaware of X's redacted answers.

III. Whether the relevant provisions of the Code of Criminal Procedure 1993, on which the above procedures were based, were compliant with the Court's preceding case-law and subsequent judgments

12. The above procedures, which affected the enjoyment of the applicant's minimum right under Article 6 § 3 (d) in the present case, had, as their legal basis, the pertinent provisions of the CCP 1993, Articles 226a-226f, 344a (these provisions are set out in paragraphs 35-39), which entered into force on 1 February 1994.

A. The Court's judgment in *Kostovski v. the Netherlands* should have been given serious consideration before enactment of the pertinent provisions of the CCP 1993

13. Regrettably, the enactment of the pertinent CCP 1993 provisions, and, therefore, the procedures followed in the present case, were not in compliance with the Court's Plenary judgment of *Kostovski v. the Netherlands* (20 November 1989, Series A no. 166). In that case, the Court was composed of eighteen judges and its judgment was unanimous in finding a violation of Article 6 § 3 (d) taken together with Article 6 § 1. The facts of that case and the Court's conclusion in it have been summarised appropriately by Professors Roberson and Merrills, and I find their succinct and accurate summary suitable for adoption: "The applicant in the *Kostovski* [case] was a man with a long criminal record who escaped from prison and, while on the run, was identified by two witnesses as having taken part in a bank robbery. Because they feared reprisals, the witnesses indicated that they wished to remain anonymous. Consequently at the applicant's trial, which resulted in his conviction, neither witness was heard although the court based its finding of guilt on reports drawn up by the police and examining magistrates on the basis of their evidence which the court treated as decisive and reliable. The

Court and the Commission were unanimous in deciding that, despite the witnesses' understandable desire for anonymity, there had been a breach of the applicant's rights under Article 6(3)(d)."⁶

14. The reasoning of the Court which led it in finding a breach of Article 6 § 3 (d) read together with Article 6 § 1, was the following:

“39. It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law ... Again, as a general rule it is for the national courts to assess the evidence before them ...

In the light of these principles the Court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair ...

This being the basic issue, and also because the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 ..., the Court will consider the applicant's complaints from the angle of paragraphs 3 (d) and 1 taken together.

40. The Court notes that only one of the authors of the statements - namely the person whose statements were read out at the trial - was, under Netherlands law, regarded as a 'witness' ... However, in view of the autonomous interpretation to be given to this term, both authors should be so regarded for the purposes of Article 6 § 3 (d) of the Convention, since the statements of both of them, whether read out at the trial or not, were in fact before the court and were taken into account by it.

41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument ... This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 provided the rights of the defence have been respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings ...

42. Yet such an opportunity was not afforded to the applicant in the present case, although there could be no doubt that he desired to challenge and question the anonymous persons involved. Not only were the latter not heard at the trials but also their declarations were taken, whether by the police or the examining magistrate, in the absence of Mr Kostovski and his counsel ... Accordingly, at no stage could they be questioned directly by him or on his behalf.

It is true that the defence was able, before both the Utrecht District Court and the Amsterdam Court of Appeal, to question one of the police officers and both of the examining magistrates who had taken the declarations ... It was also able, but as regards only one of the anonymous persons, to submit written questions to him/her indirectly through the examining magistrate ... However, the nature and scope of the questions it could put in either of these ways were considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved.

The latter feature of the case compounded the difficulties facing the applicant. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be

⁶ See A. H. Robertson and J. G. Merrills, *Human Rights in Europe – A Study of the European Convention on Human Rights*, third edition (Manchester University Press, 1994), at p. 115.

designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.

43. Furthermore, each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability. The courts admittedly heard evidence on the latter point ... and no doubt - as is required by Netherlands law ... - they observed caution in evaluating the statements in question, but this can scarcely be regarded as a proper substitute for direct observation.

It is true that one of the anonymous persons was heard by examining magistrates. However, the Court is bound to observe that - in addition to the fact that neither the applicant nor his counsel was present at the interviews - the examining magistrates themselves were unaware of the person's identity ..., a situation which cannot have been without implications for the testing of his/her reliability. As for the other anonymous person, he was not heard by an examining magistrate at all, but only by the police ...

In these circumstances it cannot be said that the handicaps under which the defence laboured were counterbalanced by the procedures followed by the judicial authorities.

44. The Government stressed the fact that case-law and practice in the Netherlands in the matter of anonymous evidence stemmed from an increase in the intimidation of witnesses and were based on a balancing of the interests of society, the accused and the witnesses. They pointed out that in the present case it had been established that the authors of the statements in question had good reason to fear reprisals ...

As on previous occasions ..., the Court does not underestimate the importance of the struggle against organised crime. Yet the Government's line of argument, whilst not without force, is not decisive.

Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as 'the interest of everybody in a civilised society in a controllable and fair judicial procedure'. The right to a fair administration of justice holds so prominent a place in a democratic society ... that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based 'to a decisive extent' on the anonymous statements.

45. The Court therefore concludes that in the circumstances of the case the constraints affecting the rights of the defence were such that Mr Kostovski cannot be said to have received a fair trial. There was accordingly a violation of paragraph 3 (d), taken together with paragraph 1, of Article 6."

15. It is clear from paragraph 44 of the *Kostovski* judgment, quoted above that the issue of granting a witness the status of threatened witness was governed by the case-law and practice in the Netherlands. It is also clear from paragraph 31 of that judgment that the CCP in force at that time contained no express provisions on statements made by anonymous witnesses.

16. The principles set out in paragraphs 39-41 above apply also in the present case, as well as in other similar cases.

17. The handicaps of the defence set out in paragraphs 42-43 above regarding anonymous witnesses were similar to those that the defence encountered in the present case.

18. The Court's conclusion in the present case, were it to follow the judgment in *Kostovski*, should have been similar to the Court's conclusion in the latter case, as set out in its paragraphs 44 (sub-paragraph 3) and 45, quoted above.

B. Another judgment delivered before the enactment of the pertinent provisions of the CCP 1993: *Windisch v. Austria*, following *Kostovski*

19. *Kostovski* was followed by *Windisch v. Austria* (27 September 1990, Series A no. 186). The latter judgment was delivered ten months after *Kostovski*, by a Chamber of the Court consisting of seven judges, six of whom, including its president, had also members (and the president) of the *Kostovski* composition. In the Austrian case, the two anonymous female witnesses had been heard only, at the investigation stage, by the police officers in charge of the case, who later gave evidence in court concerning their statements. As a result, neither the applicant nor his counsel - in spite of their repeated requests - ever had an opportunity to examine the witnesses whose evidence had been taken in their absence. According to the Government, the applicant could have put written questions to these two anonymous witnesses, had he so requested at the trial. This possibility, as the Court held (see *Windisch*, § 28), cannot, however, replace the right to examine prosecution witnesses directly before the trial court. In particular, the nature and scope of such written questions were, in the circumstances of the case, considerably restricted by reason of the decision to preserve the anonymity of these two persons. The Court also held that, being unaware of these witnesses' identity, the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility (*ibid.*, § 28). Furthermore, as the Court argued, the trial court, which was also unaware of the two anonymous witnesses' identity, was prevented from observing their demeanour under questioning and thus forming its own impression of their reliability and the police officers' evidence on this point at the hearings cannot be regarded as a proper substitute for direct observation (*ibid.*, § 29). As in *Kostovski*, the Court in *Windisch* noted that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants (*ibid.*, § 30); however, the subsequent use of their statements by the trial court to found a conviction is another matter (*ibid.*). As the Court also noted, the right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrifice (*ibid.*). The Court ultimately found a violation of Article 6 § 3 (d) taken together with Article 6 § 1.

20. Thus, before the enactment of the pertinent provisions of the CCP 1993 in the Netherlands, there had been two authoritative judgments by this Court, namely, *Kostovski* and *Windisch*, which should have inspired and directed the domestic authorities not to enact provisions which were incompatible with the principles enunciated in these two cases.

C. Two judgments against the Netherlands subsequent to the enactment of the pertinent provisions of the CCP 1993, one somewhat inconsistent with *Kostovski* (namely, *Doorson*), the other consistent with it (namely, *Van Mechelen and Others*)

21. Not only were the pertinent provisions of the CCP 1993 enacted with procedures incompatible with the Court’s preceding case-law, but the Court itself, in *Doorson v. the Netherlands* (26 March 1996, *Reports of Judgments and Decisions* 1996-II), had compromised some of the important principles laid down in the previous two cases. Although in that judgment the Court began by saying that, as it [had] held on previous occasions, the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants (see *Doorson*, § 69), it proceeded to make the following statement:

“70. It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”

22. Commenting on the above passage, Professor Eva Brems argues that “an equitable equilibrium of the conflicting rights must be sought”, compatible with “the principle of practical concordance: both rights must be fully protected, which requires limited exceptions of both.”⁷ The Court in *Doorson* held that the maintenance of the anonymity of the two witnesses presented the defence with difficulties which criminal proceedings should not normally involve; however, no violation of Article 6 § 1 taken together with Article 6 § 3 (d) can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Doorson*, § 72). Unlike the present case, it should be noted that in *Doorson*, the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an

⁷ See Eva Brems, “Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedom”, *Human Rights Quarterly*, 27 (2005), 294 at p. 317.

investigating judge who was aware of their identity, even if the defence was not (ibid., § 73). *Doorson* was distinguished from *Kostovski*, because counsel was not only present, but was put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered (ibid.). The Court went on to find that, on balance, the Amsterdam Court of Appeal had been entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses (ibid., § 74). The Court concluded by seven votes to two that there had been no violation of Article 6 § 1 read together with Article 6 § 3 (d). The two dissenters were Judge Ryssdal and Judge de Meyer. Both of these judges were also in the composition of the Court in the *Kontovski* and *Windisch* judgments, and Judge Ryssdal was the President of the composition of the Court in all three cases. The two dissenters in *Doorson* agreed with the unanimous decision of the Commission, which found that there had been a breach of the applicant's defence rights and argued that it was not permissible to resolve such problems by departing from such a fundamental principle as the one that witness evidence challenged by the accused cannot be admitted against him if he has not had an opportunity to examine or have examined, in his presence, the witness in question. The applicant did not have such an opportunity in relation to the one witness who "disappeared", or to the other two witnesses who were heard only in the presence of his lawyer. Moreover, these two witnesses were anonymous witnesses, whose identity was only known to the investigating judge but not to the applicant and his lawyer, nor to the Regional Court and the Court of Appeal. In conclusion, while *Doorson* can somehow be distinguished from *Kostovski*, it is still, to the extent that the two dissenters disagreed with it, a deviation of or departure from *Kostovski*.

23. The last judgment we shall discuss here is *Van Mechelen and Others v. the Netherlands* (23 April 1997, *Reports of Judgments and Decisions* 1997-III),⁸ where the Court followed the principles laid down in *Kostovski*. In that case, anonymous police officers were with the investigating judge in a separate room, from which the accused and even their counsel were excluded. All communication was via a sound link. The defence was thus not only unaware of the identity of the police witnesses but was also prevented from observing their demeanour under direct questioning, and thus from testing their reliability. The Court observed that, having regard to the place that the right to a fair administration of trial justice holds in a democratic society, any

⁸ Compare *Kok v. the Netherlands*, no. 43149/98, 28 August 1998, not a judgment but a *de plano* Chamber decision of inadmissibility, which again represented a setback to the Court's correct approach regarding the testimony of anonymous witnesses, since the Court concluded therein that the procedure followed approximated, as closely as was possible in the circumstances, the hearing of a witness in open court and that, therefore, the rights of the defence were sufficiently respected.

measures restricting the accused's person rights should be strictly necessary, and that, if a less restrictive measure can suffice, then that measure should be applied (see *Van Mechelen*, § 58). It had not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered (*ibid.*, § 60). The Court also expressed the view that, in the absence of any further information, it could not find that the operational needs of the police provided sufficient justification. It also noted that the explanatory memorandum of the bill which became the Act of 11 November 1993 referred in this connection to the possibilities of using make-up or disguise and the prevention of eye contact (*ibid.*) In fact, the anonymous police officers were questioned before an investigating judge, who had himself ascertained their identity and had, in a very detailed official report of his findings, stated his opinion on their reliability and credibility as well as their reasons for remaining anonymous (*ibid.*, § 61). However, as the Court held, these measures could not be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability (*ibid.*, § 62). It thus could not be said that the handicaps under which the defence laboured were counterbalanced by the above procedures. The Court ultimately held by six votes to three that there had been a violation of Article 6 § 1 taken together with Article 6 § 3 (d). Three of the judges of the majority were also judges of the Court's composition in *Kostovski*.

IV. Whichever interpretation of Article 6 §§ 1 and 3 (d) and meaning of the notion of overall fairness is to be followed, the finding of a violation of Article 6 is unavoidable

A. The current case-law interpretation of Article 6 §§ 1 and 3 (d) and the meaning of the notion of overall fairness of the trial

1. Relevant principles on which the current case-law approach is based

24. According to the current case-law approach, compliance with the requirements of a fair trial must be examined in each case, having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see paragraph 55 of the present judgment and, *inter alia*,

Ibrahim and Others v. the United Kingdom [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016; *Gäffgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015; and *Keskin v. the Netherlands*, no. 2205/16, § 38, 19 January 2021).

25. According to the same current case-law approach, Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him or her must normally be produced in his or her presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible, but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see paragraph 57 of the present judgment and, *inter alia*, *Lucà v. Italy*, no. 33354/96, § 39, 27 February 2001, and *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, § 118).

26. The Court refers in paragraph 58 of the present judgment to *Al-Khawaja and Tahery* (cited above, § 119), and, in particular, to the point in that judgment where the Grand Chamber summarised and refined the principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him or her were admitted as evidence. According to the same judgment, the compatibility of such proceedings with Article 6 §§ 1 and 3 (d) of the Convention must be examined in three steps: (i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statement as evidence (*ibid.*, §§ 119-25); (ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (*ibid.*, §§ 119 and 126-47); and (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (*ibid.*, § 147).

27. The present judgment (in paragraph 60) also refers to *Schatschaschwili* (cited above, §§ 111-131), where the Grand Chamber explained that a "good reason for the absence of a witness" must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. If there was a good reason for the witness's non-attendance in that sense, it followed that there was 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). While the absence of a good reason for the non-attendance of the witness could not of itself be conclusive of the unfairness of the applicant's trial, it was, nevertheless, a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and

one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) of the Convention (*ibid.*, § 113).

28. The present judgment continues, in paragraph 61, by stating that, as regards the question whether the evidence of the absent witness whose statements were admitted in evidence was the sole or decisive basis for the defendant's conviction (the second criterion of the *Al-Khawaja and Tahery* test), "sole" evidence is to be understood as the only evidence against the accused and that "decisive" should be narrowly interpreted as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the unividence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (see *Schatschaschwili*, cited above, § 123).

29. The Court also observes in paragraph 64 of the present judgment that, given that its concern is to ascertain whether the proceedings as a whole were fair, it 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 (*Schatschaschwili*, § 116).

30. Subsequently, the present judgment deals with the similarities and differences between anonymous and absent witness. In particular, in paragraph 65, it observes that while the judgments in the cases of *Al-Khawaja and Tahery* and *Schatschaschwili* (both cited above) concerned absent rather than anonymous witnesses, the Court has held that the problems raised by the two types of witnesses are not different in principle, since each results in a potential disadvantage for the defendant due to the inability to test the probity and credibility of the witnesses and to test the truthfulness and reliability of their evidence (see *Al-Khawaja and Tahery*, cited above, § 127, and *Süleyman v. Turkey*, no. 59453/10, § 62, 17 November 2020, and the references cited therein). Consequently, the present judgment concludes that the Court takes a similar approach to the admission in evidence of statements from an absent witness and of statements from a witness whose identity is concealed.

31. As the present judgment also remarks (see paragraph 66), the Court has, however, recognised that the precise limitations on the defence's ability to challenge an anonymous witness differ from those in respect of an absent witness whose identity, after all, is known. It also reiterates, and rightly so, that in the case of a fully anonymous witness, where no details whatsoever as to the witness' identity or background are known, the defence faces the difficulty of being unable to put to the witness any reasons which the witness may have for lying (see *Asani v. the former Yugoslav Republic of Macedonia*, no. 27962/10, § 36, 1 February 2018). Accordingly, the use in evidence of a

fully anonymous witness statement and the inability to question that witness at trial may exacerbate the extent of the handicap under which the defence is labouring. And the present judgment (see paragraph 67) concludes on this point, by making it clear that, as in cases where the statement of an absent witness was considered the sole or decisive evidence or where such evidence carried significant weight, the Court must subject the proceedings in which a statement of anonymous witness is used in evidence to the most searching scrutiny, adding that, in view of this, it must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place (see *Süleyman*, cited above, §§ 63-66; *Al-Khawaja and Tahery*, cited above, § 147; and *Pesukic v. Switzerland*, no. 25088/07, § 45, 6 December 2012).

32. In order to have a clearer picture of the handicaps the defence may face with the testimony of fully anonymous witness, it is useful to quote paragraphs 63-66 of *Süleyman v. Turkey*, cited above, to which the present judgment refers in in paragraph 67:

“63. However, the precise limitations on the defence’s ability to challenge a witness in proceedings differ in the two cases. Thus absent witnesses present the particular problem that their accounts cannot be subjected to searching examination by defence counsel. However, their identities are known to the defence, which is therefore able to identify or investigate any motives they may have for lying ...

64. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author’s reliability or cast doubt on his credibility (see *Kostovski v. the Netherlands*, 20 November 1989, § 42, Series A no. 166).

65. In the case of a fully anonymous witness, where no details whatsoever are known as to the witness’ identity or background, the defence faces the difficulty of being unable to put to the witness any reasons which the witness may have for lying. In this case, the extent of the disclosure regarding the anonymous witness has an impact on the extent of the handicap under which the defence is labouring ...

66. Accordingly, in assessing the fairness of a trial involving anonymous witnesses called to give oral evidence before the court, this Court must examine, firstly, whether there are good reasons to keep secret the identity of the witness. Secondly, the Court must consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction. Thirdly, where a conviction is based solely or decisively on the evidence of anonymous witnesses or where such evidence carried significant weight in respect thereof (see *Schatschaschwili*, cited above, § 116), the Court must subject the proceedings to the most searching scrutiny. In view of this, the Court must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, § 147, and *Pesukic v. Switzerland*, no. 25088/07, § 45, 6 December 2012). Obviously, if the anonymous witness was called to give oral evidence before a court other than the trial court, the Court will also assess whether there are good reasons for the non-attendance of the witness at the trial and admitting her or his evidence ...”

33. From paragraph 66 of *Süleyman*, cited above, it is clear that the second step of the three-pronged test is extended, as regards anonymous witnesses, apart from sole or decisive evidence, to significant evidence also (“evidence carried significant weight in respect thereof”).

2. Application of the above principles to the facts of the present case

2.1. In the judgment

34. The present judgment in paragraphs 68-82 argues that the three steps or requirements of *Al-Khawaja and Tahery* (cited above) are satisfied in the present case. It concludes in paragraphs 83-84 that there has been no violation of Article 6 §§ 1 and 3 (d) because it cannot be said that the criminal proceedings in the present case, when considered as a whole, were rendered unfair by the admission of X’s statements in evidence.

35. Regarding the application of the three steps or requirements in *Al-Khawaja and Tahery* to the present case, I simply, for the sake of brevity, refer to that judgment without making any summary. However, in respect of the third step or requirement, I consider it better for the discussion below, in which I will describe my view regarding the application of this requirement, to refer specifically to what the judgment says.

36. With regard to the procedural measures taken to compensate for the lack of opportunity to cross-examine the witness at trial, the present judgment (in paragraph 78) holds that, while noting that the principle of immediacy would have been better served if the trial judges had been able to assess X’s credibility by knowing his or her identity and questioning the anonymous witness themselves - or, at the very least, by receiving the full transcript (thus, without answers redacted) of the questioning by the investigating judge -, the Court notes, however, that the procedure prescribed by Articles 226a to 226f of the CCP 1993, which is specifically intended to provide compensatory procedural safeguards, was followed. That procedure, as applied in *Kok v. the Netherlands* ((dec.), no. 43149/98, ECHR 2000-VI), was held to respect sufficiently the rights of the defence in that case. The present judgment also notes that Article 360 §§ 1 and 4 of the CCP 1993 (see paragraph 38) provides an additional procedural safeguard: if a statement by a threatened witness is used as evidence, the trial court is required to give specific reasons as to the reliability of that statement (see paragraph 25).

37. In its paragraph 80, the present judgment rightly acknowledges that the Court has recognised that the nature and scope of questions put to an anonymous witness are considerably restricted by reason of that anonymity and that the right to put written questions to such a witness cannot, in particular in the absence of good reasons, be seen as a substitute for the fundamental right to examine. On the other hand, as the present judgment

also states, the Court is equally mindful that in the present case, the defence refrained from making use of the opportunity to put additional questions. By this course of action, the present judgment argues that the defence may be considered to have waived the right to challenge the credibility of these statements by confronting X with any incoherence in his or her statements or inconsistencies between his or her statements and those of other witnesses. The defence should have been aware that the testimony thus obtained could be used as evidence at trial.

38. In the next paragraph (paragraph 81), the present judgment states that the Court emphasises that X's reliability and credibility had been assessed positively by investigating judge E. in 2005 and by investigating judge V. in 2012, and that their independence and impartiality provided an important procedural safeguard for the fairness of the proceedings. In this connection, the judgment argues that questioning investigating judge A. as to witness X's reliability, as requested by the applicant, could not have served as an additional counterbalancing factor. That was because, as explained in the Court of Appeal's judgment, pursuant to the applicable national law it is the investigating judge examining the threatened witness who is entrusted with that assessment. Lastly, the present judgment notes that it also follows from the appellate court's judgment that, with a view to safeguarding the applicant's right to a fair trial, it examined whether the decision to grant X the status of threatened witness and the way in which the Regional Court, sitting in chambers, had reached that decision had involved any violations of fundamental principles. In the light of the foregoing and considering that X's statements were not the sole or decisive evidence for the applicant's conviction, the present judgment finds the difficulties encountered by the defence in connection with the anonymity granted to X were sufficiently counterbalanced by the procedures applied by the judicial authorities (see paragraph 82 of the judgment).

2.2. Where my dissent with the judgment lies, while following the same principles of the current case-law as the judgment

39. I will begin by stating that, when the testimony of a fully anonymous witness is taken into account in a criminal procedure, all three steps or requirements set out in *Al-Khawaja and Tahery* (cited above) and subsequent cases should be examined by the Court in conducting an overall examination of the fairness of the criminal proceedings and in order to establish whether or not there has been a violation of Article 6 §§ 1 and 3 (d). It is to be clarified that this three-pronged test is not excessively rigid or mechanical in its

application, since all stages are subordinate to the standard of overall fairness.⁹

40. I would argue that the first step or requirement of *Al-Khawaja and Tahery*, namely, that there was a good reason for the non-attendance of the witness before the relevant domestic court, was not satisfied in the present case. That is because, in deciding whether to grant X the status of a threatened witness, the three-judge chamber of the Regional Court, firstly, did not consider whether there existed alternatives means of protecting X other than granting him or her full or limited anonymity, and, secondly, did not weigh the consequences of granting – or not granting – X full anonymity against the applicant’s rights to have a fair trial. Even if the power of this three-judge chamber was confined only to a threat analysis concerning X, without having the power to examine alternatives means of protecting X other than full or limited anonymity, its decision about granting full anonymity to X was final. Hence, at this first stage, there was no other judicial authority in the domestic system of law capable of conducting a balancing exercise between X’s rights and the applicant’s rights. Needless to say, had X been given limited anonymity (see paragraph 33 of the judgment), the defence rights would have been affected less. As will be seen, in the case of a fully anonymous witness, as X was, whose anonymity was final at the first stage of the *Al-Khawaja and Tahery* test with all the consequential procedural handicaps for the applicant, it is difficult to argue that the balancing test between X’s interests and those of the applicant can sufficiently and effectively be made solely in the third step of such a test, any balancing test having been excluded in the first step.

41. As regards the second step or requirement of *Al-Khawaja and Tahery*, namely, whether the evidence of X was the sole or decisive basis for the applicant’s conviction, it has already been clarified above that this step was extended in *Süleyman* so as to include, in the alternative, significant evidence in the case of anonymous witness. In *Schatschaschwili*, cited above, § 116 (see also paragraph 64 of the present judgment), dealing with absent witnesses, the Court even accepted that stage two of the test applies also when it is unclear whether the evidence in question was the sole or decisive basis but the Court is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. While the Grand Chamber judgment in *Schatschaschwili* (and, of course, the judgment in *Süleyman* also) were subsequent to the domestic Supreme Court judgment in the present case, the Court in the present case rightly considers them and has followed them (see paragraphs 65 and 67).

42. In his observations before the Court the applicant refers to his application form, in which he alleges that X’s evidence was decisive for his conviction, and the least that can be said is that that evidence was significant

⁹ See Andreas Samartzis, “Weighting Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European Convention on Human Rights”, in *Human Rights Law Review*, 2021, 21, 409, at pp. 415-416 and relevant case-law cited therein.

for his conviction (see also paragraph 47 of the judgment). Similarly, the Government described X's statements "as carrying 'significant weight'" (see paragraph 51 of the judgment). The present judgment, while accepting that the Court of Appeal's finding that the applicant's conviction was not based solely or decisively on the statements by X (see paragraphs 29 and 72), nevertheless noted (see paragraph 74) that the statements by X were not of insignificant weight, in that they were used to corroborate those of the applicant's ex-girlfriend and that there was a need to assess under Article 6 the fairness of the proceedings taken as a whole. It is apparent, however, that it was only after X made his or her first statement to investigating judge E. in 2005 that the domestic authorities discovered the applicant's identity and proceeded in 2008 (see paragraph 8 of the judgment) to match the applicant's DNA with that on the cigarette butt (the only real evidence available in the present case), and also discovered the identity of and questioned his ex-girlfriend in 2009 (who had been afraid to appear before the domestic authorities on her own, and informed them about what she knew regarding Y.'s murder, see section 7 of the Court of Appeal's judgment). This observation thus makes X's testimony all the more significant, since it was instrumental or decisive in discovering the other evidence and ultimately for the applicant's conviction and sentencing. I disagree with the phrase used in the judgment in paragraph 74, using a double negative to describe the significance of X's evidence, namely, "the statements of X were not of insignificant weight". This is because, by using such a double negative formulation, the Court lessens the significance of the evidence provided by X, which is also reflected in its concluding paragraph 82 (regarding the question whether there were sufficient counterbalancing factors), where no reference was made at all to the significance of evidence, but only to the lack of sole and decisive evidence. In my view, however, X's evidence was, without hesitation, significant for the applicant's conviction and sentence, and it should be treated as such by the judgment.

43. Now I will examine the third step or requirement of *Al-Khawaja and Tahery*, regarding whether there were sufficient counterbalancing factors.

44. Taking into account the multifaceted and abundant procedural handicaps and Article 6 deviations referred to in Section II of this opinion, one cannot seriously argue, in my humble view, that the applicant was afforded strong procedural safeguards and sufficient counterbalancing factors to compensate for the handicaps faced by him as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair. In other words, the third step or requirement of *Al-Khawaja and Tahery*, referred to in paragraph 58 of the judgment and applied also to anonymous witnesses (see paragraph 65 of the judgment), was not satisfied at all in the present case.

45. The Explanatory Memorandum to the Bill of CCP, page 10 (see paragraphs 31 and 37 of the judgment) provides that "the right of cross-

examination of the defence must be respected as much as the guarantee of anonymity allows (see art. 226d, paragraphs 1 and 2)”. This implies that the rights of witnesses who were granted anonymity automatically take precedence over the rights of the defence to have a fair trial by exercising the right of cross-examination, and it explains the fact that the three-judge chamber of the Regional Court which decided on whether X should be granted the status of threatened witness did not carry out any balancing test between X’s rights and the applicant’s rights. However, this is not compatible with Article 6 § 3 (d), which safeguards the right of the accused person without making any reference to the rights of third persons, such as witnesses. As Judges Sajó and Karakaş observed in their joint partly dissenting and partly concurring opinion in *Al-Khawaja and Tahery* “[o]ne must not allow prosecutorial interests to prevail simply because they appear in the guise of witness protection or the need to convict the accused (which is presented as *the* interest of justice)”.

46. I respectfully submit that the procedural handicaps and Article 6 deviations referred to in Section II clearly show that not only was the manner in which X’s testimony was given extremely problematic, but also that the principle of adversarial proceedings, the principle of equality of arms,¹⁰ the principle of effective defence participation in criminal proceedings and the principle of immediacy were violated in the present case. In my submission, the departure from all these Convention principles could not be compensated by the obligation on the trial court to give specific reasons regarding the reliability of X’s testimony (see paragraph 78 of the judgment), or by the option available to the applicant to submit a request to question investigating judges E. and V. at trial on the issue of X’s credibility and reliability (see paragraph 81 of the judgment), or by the applicant’s right to ask X some questions through investigating judge V. (see paragraphs 79-80 of the judgment).

47. The right of an accused person under Article 6 § 3 (d) is premised on the principles of equality of arms and adversarial proceedings, both of which require that the defence should not be disadvantaged compared to the prosecution and that the accused should be able to test the evidence presented

¹⁰ The source of the principle of the equality of arms in respect to the applicant’s right to cross-examine State’s witnesses is not only Article 6 § 1, but also Article 6 § 3 (d), which uses the phrase “under the same conditions as witness against him”. According to the Court’s case-law, the right to examine or have examined the prosecution’s witnesses constitutes a guarantee of the right to fairness of the procedure and does not only aim for securing equality of arms between the prosecution and the defence, but it also provides the defence and the judicial system with an essential instrument for controlling the credibility and reliability of incriminating statements and, thereby, the merits of the charges (see *Riahi v. Belgium*, no. 65400/10, § 39, 14 June 2016; *Tseber v. Czech Republic*, no. 46203/08, § 59, 22 November 2012; and *Sică v. Romania*, no. 12036/05, § 69, 9 July 2013).

against him. In *Yüksel Yalçınkaya v. Türkiye* ([GC], no. [15669/20](#), § 307, 26 September 2023), the Grand Chamber held that the right to an adversarial trial also requires, in a criminal case, that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused. X was the State's or prosecution's witness, despite the fact that the public prosecutor did not know the content of X's answers which had been redacted by investigating judge V. The specificities of the domestic law did not justify a departure from adversarial proceedings by preventing the applicant from knowing all the evidence given by X, and from being able to effectively cross-examine him or her in court and having the opportunity to watch him or her while giving evidence.

48. Regarding the principle of equality of arms, the Court of Appeal held that the applicant's right to a fair trial had not been violated by the manner in which the examination had taken place, because, *inter alia*, it had taken into account that the principle of equality of arms had been observed, as the public prosecutor had also been barred from attending the examination conducted by investigating judge V. and had also been permitted only to submit written questions (see paragraph 24 of the judgment). However, and with all due respect, in considering that the principle of equality of arms was observed, the Court of Appeal and the present judgment overlooked, firstly, that X was a State witness and the prosecution benefited from his or her testimony although the applicant was unable to cross-examine him or her in court, and, secondly, that in deciding whether to grant X the status of threatened witness, the three-judge chamber of the Regional Court heard only X's lawyer and the public prosecutor in camera and without hearing the applicant or his lawyer, who were not even present during the procedure (see paragraph 13 of the judgment).

49. Consequently, the entirety of the proceedings was tainted by the defect of inequality of arms. Moreover, the principle of adversarial proceedings was violated in the present case: firstly, because X, as a prosecution or State witness, gave evidence against the applicant, thus incriminating him, without X appearing in the public criminal procedure before the trial courts and without the applicant being able to cross-examine him or her, and, secondly, because the trial courts did not have the opportunity to watch and hear X and make their own assessment as to his or her status as a threatened witness and as to his or her credibility.

50. Hence, the principles of equality of arms and adversarial proceedings were disregarded, not only during the applicant's trial in criminal proceedings, but also in the assessment of X as a threatened witness before the three-judge chamber of the Regional Court, and in the assessment of X's credibility before investigating judge V.

51. The other principle from which the Court has departed was that of immediacy. That was an important guarantee for the applicant, because the trial courts' findings about X's demeanour and credibility required that his or

her examination be carried out in their presence, which, however, did not occur.

52. The procedure regarding the testimony of an anonymised witness was based on the pertinent provisions of the CCP 1993 and the principle, fundamental in Dutch criminal procedural law, of internal disclosure derived therefrom (especially from Article 226b § 5), to which the judgment refers in paragraphs 36-37, and 43. This principle means that the decision on whether a witness should be granted the status of a threatened witness and therefore the right to be subsequently examined as an anonymous witness by an investigating judge is decided by a court other than the trial court, because otherwise, if the trial court were to hear a threatened witness in camera without the presence of the prosecution and defence, it would know more than the defence, especially in so far as the identity of the witness is concerned. I disagree with the judgment (see paragraph 36) that the principle of internal disclosure serves the principle of equality of arms and the adversarial nature of proceedings. On the contrary, I would reiterate that, in my opinion, the application of this domestic-law principle in the present case led to a departure from the Convention principles of adversarial proceedings, equality of arms, effective participation of the defence at trial and immediacy. It should also not be overlooked with regard to the departure from the principle of equality, that, firstly, it was on account of an appeal by the public prosecutor that the Regional Court, sitting in chambers, ultimately decided to grant X the status of fully anonymous witness, and, secondly, unlike the defence, the public prosecutor was present and heard in that procedure.

53. Instead of acknowledging that the principle of immediacy was not applied and was therefore breached in the present case, the judgment notes that that principle would have been better served had the trial court been able to assess X's credibility by knowing his or her identity and questioning the anonymous witness themselves - or, at the very least, by receiving the full transcript (thus, without answers redacted) of the questioning by the investigating judge (see paragraph 78 of the judgment). However, these are in fact the necessary requirements of the principle of immediacy that were not followed in the present case, and should not be considered as conditions for a better application of that principle, as the judgment suggests. The provisions of Articles 226a to 226f of the CCP 1993 could in no way substitute or be able to compensate for the necessary requirements of the principle of immediacy. Instead of following the Court Plenary's judgment in *Kostovski v. the Netherlands*, and the judgments in *Windisch v. Austria* and in *Van Mechelen v. the Netherlands* (all cited above), the judgment, wrongly in my humble view, followed the *de plano* Chamber decision of *Kok v. the Netherlands* (cited in footnote 8 above), which was not consistent with the previous case-law and accepted the same fundamental procedural flaws as the present case.

54. I submit that, due to the procedural handicaps explained above, which departed from the given fundamental Convention principles, there was no counterbalancing factor capable of compensate the applicant for these shortcomings. In my view, the factors that the judgment considers to be counterbalancing are not merely insufficient, but, in fact, are not counterbalancing factors at all. I will further explain below why there existed no counterbalancing factors to set against the handicaps which prevented the applicant from effectively defending himself.

55. X was not present at the applicant's criminal trial and his or her identity was unknown to the applicant. The procedure for the applicant to ask witness X questions through investigating judge V. cannot be considered as cross-examination in the context of adversarial argument and proceedings. Under the circumstances, by granting X the status of a threatened and fully anonymised witness, it was impossible for the applicant to ascertain any of X's motives (for example, bias, prejudice, interest, and so on) and background, and it was therefore impossible for him to test X's credibility, as well as the reliability of his or her evidence. Here, it is important to remind oneself that the answer given by X to Question 21 (see paragraph 10(o) of this opinion), asked by the applicant regarding X's possible previous convictions, was fully redacted by investigating judge V. In any event, it was impossible for the applicant to test the credibility of X, since that had been determined by investigating judge V in 2012 (as well as by investigating judge E. in 2005) without the applicant or his lawyer being present during that assessment and being able to ask questions (in 2005, of course, no suspect had been identified). Hence, the applicant, by being deprived of his right to cross-examine X, was prevented from testing and challenging X's credibility, trustworthiness, reliability and accuracy and identifying any potential inconsistencies, biases, prejudices or potential motives or motivations that could undermine X's testimony. Also, the applicant was deprived of an opportunity to uncover discrepancies between X's statements and other evidence presented in the case. In this connection, it is useful to cite what the Latin orator Quintilian said regarding the cross-examination of witnesses against the accused: "there is need for careful inquiry with the view of discovering the character of the witness against the accused and what are his motives for hostility and to what extent."¹¹ The applicant's inability to cross-examine X is even worse, since he did not know X's identity. As the Court said in *Kostovski* (cited above, § 42), if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.

¹¹ Quintilian, *The Institutio Oratoria of Quintilian*, with an English translation by H. E. Butler (Harvard University Press, 1921, repr. 1985), Book V, vii. 22.

56. Regarding the question why allowing anonymous testimony will conflict with the notion of providing the accused with a fair trial, McLaughlin argues the following:

“By allowing witnesses to testify anonymously, it is argued, the accused will be prejudiced by not knowing the identity of the witnesses. Knowledge of witness identity is important for many reasons. First, it allows the accused to mount a complete defense to the testimony given by conducting background searches of the witness. Second, the accused will be better able to specifically refute testimony made by the witness if the accused has personal knowledge of the situation and the person involved. This can be done on cross-examination of the witness as well as through the testimony of the accused. Also, knowledge of a witness’s identity gives more legitimacy to the specific trial. Besides these considerations, the ability of the Court to ensure the legitimacy of the witness’s statement is vital to a proper trial. The best way to ensure the truthfulness of the witness’s testimony is by allowing the accused, his or her counsel, as well as the judges, to monitor the witness.”¹²

57. Along the same line, Judges Sajó and Karakaş in their joint partly dissenting and partly concurring opinion in *Al-Khawaja and Tahery* (cited above), insightfully observed the following:

“The value of testimony hinges on a witness’s credibility. To challenge that credibility requires knowledge of the witness’s identity. Personal demeanour is of great importance, as is the direct impression of the evidence on the judge or jury hearing the case.”

58. Furthermore, the trial courts, namely the Regional Court and the Court of Appeal, did not have the opportunity to observe X during the trial or elsewhere and ask him or her questions, or to assess both X’s credibility and the reliability of his or her testimony after cross-examination by the defence. The motives and background of X were unknown to the trial courts. The handicaps faced by the defence in the present case were more severe than those in *Ellis and Simms v. the United Kingdom*, nos. 46099/06 and 46699/06, § 41, 10 April 2012 (dec.), where the judge, the jury, counsel and solicitors could all see and hear the anonymous witness give evidence. There was no voice distortion, although he was “lightly disguised” in order to boost his confidence. However, neither the defendants nor the public were able to see him, and his voice was distorted for them.

59. I also consider that to accept testimony from a fully anonymous witness where crucial points had been redacted was not only in breach of Article 6 § 3 (d), but was also not in line with Article 6 § 3 (b), which provides that the criminal defendant must have facilities for the preparation of his defence. However, since this last point was not raised by the applicant, I will not discuss it further.

¹² See Colin McLaughlin, "Victim and witness provisions of the ICC compared to other international tribunals" (2005), War Crimes Memoranda. 14, https://scholarlycommons.law.case.edu/war_crimes_memos/14, at pp. 32-32.

60. It should be underlined that the ability of the trial courts, namely, the Regional Court and the Court of Appeal to hear a witness directly and watch his or her demeanour is important to the assessment of the witness's credibility and of the reliability of his or her testimony. While an investigating judge may be independent and impartial, he or she is not the trial judge and does not therefore have the full evidential picture. Also, X's oath was given not before the trial courts but before investigating judge V. The Regional Court and the Court of Appeal merely endorsed the assessment made by investigating judges V and E, without having, however, access to the entirety of the written record, but only to that part which was not redacted, and, most importantly, without even being able to put a question to X, who never appeared before them and was also anonymous for the trial courts. Hence, granting X the status of threatened witness not only affected his or her ability to testify in person, in court, and in the context of adversarial proceedings, but it also rendered the applicant completely unable to effectively defend himself, either through cross-examination aimed at undermining X's credibility or by proving that X's evidence was unreliable. Even the judgment (in paragraph 32), referring to the Explanatory Memorandum of the Code of Criminal Procedure, states that "effective respect for the rights of the witness may imply that his identity must be concealed during questioning, otherwise – in short – he would be in danger. However, such withholding of identity may be at odds with the right of the accused to a fair trial, because concealing the identity of a witness limits the defence's ability to cross-examine the witness". Subsequently, the judgment states: "To compensate for this limitation, the legislature has created a scheme with various procedural safeguards". In my view, this handicap does not amount merely to a limitation, but to an abrogation of the defence's ability to cross-examine the witness and cannot be compensated for with what the domestic law and the present judgment considers as "various procedural safeguards".

61. A process whereby the applicant asked questions in writing through a third person (namely, investigating judge V.), to be answered by a prosecution witness X, who had been granted full anonymity, and investigating judge V. subsequently provided to the applicant X's answers, a substantial number of which had been redacted (fully or partly) by investigating judge V. in order to preserve X's anonymity (see paragraph 10(o) of this opinion) could not, in my opinion, be considered a procedural safeguard such as to compensate for the handicaps faced by the defence as the result of the decision to admit X's untested evidence. This is because, through this procedure of "examination" in complete darkness, it was impossible for the applicant to exercise effectively his right under Article 6 § 3 (d) so as to challenge X's credibility or the reliability of his or her testimony. Undoubtedly, the core of the sub-right safeguarded by this provision cannot be protected by such a procedure. Hence, I respectfully disagree with the finding of my eminent colleagues that the applicant, by refraining from

making use of the opportunity to put additional questions, may be considered to have waived the right to challenge X's credibility as regards any incoherence in his statements or inconsistencies between his or her statements and those of other witnesses (see paragraph 80 of the judgment). Regrettably, they failed to see that the applicant's lawyer in a preparatory hearing before the Court of Appeal (14 November 2012) clarified that, since the answers to some of the questions put to X had been redacted in the official record, he had not considered it useful to submit further questions to X (see paragraph 20 of the judgment). Indeed, it would be useless and futile to submit additional questions where so many of X's answers were redacted from the official record by investigating judge V. In my view, the applicant's right to challenge X's credibility cannot be waived if, in the first place, he had been essentially deprived of the said right; any additional questions could not therefore be a means of maintaining that right. In this connection, as also noted above, the judgment (in paragraph 66) reiterates, by referring to *Asani v. the former Yugoslav Republic of Macedonia* (cited above), that in the case of a fully anonymous witness where no details whatsoever as to his or her identity or background are known, the defence faces the difficulty of being unable to put to the witness any reasons which he or she may have for lying. The applicant in the present case faced the same difficulty. As the judgment goes on to acknowledge (in paragraph 66), the use in evidence of a fully anonymous witness statement and the inability to question that witness at trial may exacerbate the extent of the handicap under which the defence is labouring, and the Court must therefore exercise "the most searching scrutiny" as to the existence of sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place (see paragraph 67 of the judgment). However, in my humble view no such searching scrutiny was exercised, and no such procedural safeguards were implemented.

62. X gave neither direct evidence (he or she did not personally, with his or her own senses, perceive the applicant murdering Y.) nor circumstantial evidence. He or she testified only about an alleged confession, made to him or her by the applicant, to the effect that he had murdered Y. Thus, the circumstances of this hearsay evidence are important in establishing whether this could be admissible. In addition to X's credibility, the level of trust between the applicant and X is relevant, as is whether such an alleged confession by the applicant was made voluntarily. The applicant's task of seeking to discredit X was thus even more impossible since he did not know X's identity.

63. In view of the above arguments, the handicaps created in relation to the applicant were fatal to the fairness of his criminal trial in the absence of any sufficient counterbalancing factors to compensate him. Consequently, the third step or requirement was not satisfied in the present case and, taken

together with all of the above considerations, rendered the criminal trial for the applicant, overall unfair, thus breaching, Article 6 §§ 1 and 3 (d).

3. A critique of the *Al-Khawaja and Tahery* three-pronged test, as applied also to anonymous witnesses

64. In my humble view, it is paradoxical and problematic that the first two steps or requirements of the *Al-Khawaja and Tahery* three-pronged test are of a purely substantive and not of a procedural nature, and that the sufficiency or the weight of counterbalancing factors in the third step of the test is closely related to the evidentiary weight of statements of an untested witness in the second step of the test. It is therefore paradoxical that the meaning of the fairness of the trial under Article 6 is to be considered mainly in substantive rather than procedural terms.

65. The three-pronged test is also problematic because it establishes an implied limitation of the Article 6 § 3 (d) sub-right, which is interpreted and applied in a very broad manner. Although, in accordance with the proposed view as explained below, the said sub-right should not be subjected to any implied limitation or restriction, if, however, any restriction *were* to be allowed to this sub-right then it should be interpreted narrowly and strictly, and not broadly, as required by the principle of effectiveness, and as the Court's case-law has done in respect of restrictions of other Convention rights, such as those of Articles 8-11 (see, *inter alia*, *Sidiropoulos and Others v. Greece*, no. 26695/95, § 38, *Reports of Judgments and Decisions* 1998-IV; *Demir and Baykara* [GC], no. 34503/97, § 119, ECHR 2008; *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, no. 45487/17, § 96, 10 June 2021; and my dissenting opinion in *Humpert and Others v. Germany* [GC], nos. 59433/18 and three others, §§ 11, 15, 24, 35, 39, 41, 14 December 2023).

66. The three-pronged test is even more problematic in the present case, given that its first step is in the exclusive competence of a court (here, the three-judge chamber of the Regional Court) other than the trial courts. The former court decided to grant X the status of threatened witness, in the absence of and without hearing X, or the applicant or his lawyer, or investigating judge A, who had spoken to X in person and decided not to grant him or her the status of threatened witness. However, as mentioned above, the three-judge chamber of the Regional Court heard the public prosecutor.

67. As Judges Sajó and Karakaş rightly commented in their joint partly dissenting and partly concurring opinion in *Al-Khawaja and Tahery* (cited above), “[w]hen the Convention singled out paragraph 3 rights this meant that these basic rights of the defence were necessary to counterbalance the dominant power of the prosecution, in the interests of fairness. To balance these rights a second time against the interests of the administration of justice

... is to give the prosecution and the interests of administering justice (namely, to punish) a clear advantage.”¹³

68. It should be understood that, in adopting the majority’s approach in *Al-Khawaja and Tahery*, the “conflict” between the interest of a prosecution or State witness who has been granted fully anonymity and the interest of an accused person does not arise directly between the absent or anonymous witness and the accused. In reality, it arises between the accused and the State, which is acting through the absent or anonymous witness in the name of the administration of justice. Thus, this is not in fact a genuine conflict arising between the human rights of different individuals, but rather a limitation imposed by the State on the right of the accused, allowing, contrary to the principle of equality of arms, a clear advantage to the dominant power of the State, for a second time, as argued by the two dissenters in *Al-Khawaja and Tahery*. This so-called “conflict” or limitation, which arises during the criminal proceedings, may lead to removing from the accused his or her minimum right and shield of protection under Article 6 § 3 (d) and, ultimately, amount to a deprivation of that right. In this connection, Lord Hope, an opponent of the infiltration of balancing in Article 6, rightly argues in *Dyer v. Watson and Another* and *K v. HM Advocate* [2004] 1 A.C. 379 at [407]), that the overriding right to a fair trial under Article 6 § 1 “has been described by the Strasbourg court as a fundamental principle of the rule of law: *Salabiaku v. France* (1988) 13 EHRR 379, 388, para 28). He infers from this “that it is an absolute right which does not permit the application of any balancing exercise, and that the public interest can never be invoked to deny that right to anybody under any circumstances: see *Montgomery v. HM Advocate* [2003] 1 AC 641, 670, 673 and *Brown v. Stott* [2003] 1 AC 681, 719.”

69. The *Al-Khawaja and Tahery* judgment has also been severely criticised by Hoyano. She argues the following:

“There is no conflict between the rights of the accused and the administration of justice as *Al-Khawaja* would have it. This false antithesis extradites the defendant from the aggregate public interest in protecting the community from those committing crimes, merely because she is accused, heedless of the presumption of innocence.”¹⁴

“After *Al-Khawaja* the ‘minimum rights’ guaranteed by art.6(3) are not minima, because they must always be ‘read in conjunction with’ art.6(1), which always, and merely,

¹³ *Beuze v. Belgium* ([GC], no. 71409/10, 9 November 2018), a case concerning the right to have a lawyer under Article 6(3)(c), is another case where, as Goss (see Ryan Goss, “The Undermining of Article 6 ECHR”, in P. Czech, L. Heschl, M. Nowak and G. Oberleitner (eds.), *The European Yearbook on Human Rights* (Intersentia, 2019), 295, at p. 311) argues, the Court regrettably allowed the public interest to be counted twice, in the first stage of the test, by considering public interest considerations through the lens of “compelling reasons”, and in the second stage of the test, by allowing for consideration of the weight of the public interest as an element of the proceedings as a whole.

¹⁴ Laura Hoyano, “What is balanced on the scales of justice? In search of the essence of the right to a fair trial”, (2014), *Criminal Law Review* 1 at p. 24.

requires a retrospective overall evaluation of the proceedings ‘as a whole’, balancing the a priori conflicting rights of the defence, ‘victim’, witnesses and the public interest in the effective administration of justice. This aspires to an impossibly precise quantitative as well as qualitative analysis of all that has, and should have, transpired in the trial. In reality it is an exercise more conclusory than evaluative, dissolving the minimum guarantees in art.6(3). It risks condoning individual incidents of unfairness and the deprivation of procedural rights along the way. After *Al-Khawaja* there is no longer a bottom line to art.6.”¹⁵

70. Along the same lines, but in a different context, Judge Pinto de Albuquerque in his dissenting opinion in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, 18 December 2018), concludes that:

“After the weakening of the right to a confrontation with prosecution witness in the *Al-Khawaja and Tahery and Schatschaschwili* judgments and the eroding of the right to legal representation in *Ibrahim and Others*, the present judgment on the non-attendance of defence witnesses closes the circle, by revisiting the *Perna* test on the basis of the overall fairness test. With the unfortunate triangle *Schatschaschwili/Ibrahim and Others/Murtazaliyeva*, the Court erroneously pursues the double path of persistently watering down defence rights and ‘deferential[ly]’ abandoning its supervisory powers to the domestic courts. The silent assault on the rights of the defence in criminal procedure has been incontrovertibly stepped up, to such an extent that one wonders where it will stop.”

B. The proposed interpretation of Article 6 §§ 1 and 3 (d) and the meaning of the notion of overall fairness of the trial

1. Legal explanation and foundation of the proposed view

71. In brief, the proposed view, based on the aim and wording of Article 6, maintains that all Article 6 guarantees, including the guarantee of the minimum right set out in Article 6 § 3 (d), are indispensable components or elements of the right to a fair trial and incorporate the norm of the effectiveness of the right concerned. Consequently, a breach of any of the Article 6 guarantees would *per se* and automatically entail a violation of Article 6 itself, without the need to search for counterbalancing factors or safeguards or to employ a balancing test involving any other considerations or interests. Hence, unlike the current case-law view which maintains that the overall fairness of a trial is decided by a balancing exercise, permitting a shortfall or breach of the Article 6 guarantee if it is counterbalanced by other factors or considerations, the proposed view requires that full effect and satisfaction be given to each of the Article 6 guarantees.

72. In my partly concurring, partly dissenting opinion in *Yüksel Yalçinkaya*, cited above, I argued that there can be no safeguard for a lack of a safeguard (*ibid.*, opinion, § 7), in the sense that there can be no counterbalancing safeguard or factor capable of compensating for the absence

¹⁵ *Ibid.*, at p. 28.

or breach of another safeguard. In this connection, as insightfully argued by Pikis, J., “no deviation or shortfall of a fair trial should be countenanced” (Georghios M. Pikis, *Justice and the Judiciary* (Martinus Nijhoff Publishers, 2012), at § 145, p. 63). In my view, a trial can only be fair overall when all its guarantees are satisfied, and therefore it is fair with regard to all its guarantees; hence, it cannot be fair overall when a guarantee is lacking. I had the opportunity to expand further on my preferred view as to the meaning of the notion of the overall fairness of the trial in paragraphs 30-48 of my partly dissenting opinion in *Xenofontos v. Cyprus* (nos. 68725/16 and 2 others, 25 October 2022). While overall fairness hinges on the specific facts of each case, this does not mean or imply that there should be instances where not all Article 6 guarantees are to be satisfied. A complaint that one of the Article 6 sub-rights was breached cannot be answered by showing that the other sub-rights were not breached (see Lord Hope in *Dyer*, cited above, § 407).

73. Allowing no compromises on the right to a fair trial, through shortfalls and breaches of that right, ensures that each individual faces the legal process on equal terms, preventing any attempt to circumvent the principle of fairness. It also safeguards against attempts to undermine the legal process, preserving its integrity and ensuring that justice is served. Furthermore, such an interpretation of Article 6, in which no compromises to a fair trial are tolerated, is the only one compatible with assigning a moral reading to the right to a fair trial (see paragraph 33 of my partly dissenting opinion in *Xenofontos*, cited above).

74. Importantly, the fact that all Article 6 guarantees should be fully respected is also a requirement of the rule of law and the principle of the effective protection of human rights (the principle of effectiveness), both in its capacity as a norm of international law and as a method of interpretation. The overarching and active principle for determining the fairness of a trial should be this principle of effectiveness. The rule of law, one aspect of which is the principle of effectiveness, is the foundation of and guiding star for a fair trial and imposes a positive obligation on the member States to secure the minimum rights of any accused person under Article 6 § 3, and in no way and to no extent to sacrifice these minimum rights for any purpose. Articles 1 and 19 of the Convention and the inclusion by Protocol No. 15 of the principle of subsidiarity in the Preamble to the Convention emphasise the primary responsibility of the member States, under the supervisory jurisdiction of the Court, to ensure the effective protection of human rights.

75. As I explained in my separate opinion in *Yüksel Yalçinkaya* (cited above), the proposed view is supported by the fact that, according to the Court’s current case-law in respect of at least four Article 6 guarantees (namely, the three institutional guarantees of (i) a tribunal established by law to try the case, which must be (ii) independent and (iii) impartial, and the fourth guarantee (an implied one) of a prohibition of evidence obtained by torture), the Court would find a *per se* violation of Article 6 whenever even

one of them is lacking (*ibid.*, opinion, § 8). As I also explained there, the proposed view is supported academically by a number of distinguished authors (*ibid.*, opinion, § 9).

76. The difference between the proposed view and the current case-law view may be derived from the fact that the latter considers the right to a fair trial under Article 6 as a qualified one, including all the sub-rights or minimum rights of Article 6 § 3 and all the other Article 6 sub-rights, while the former view considers the Article 6 right to be absolute, including all its sub-rights, save the two sub-rights of paragraph 1, namely, those referring to a public hearing and the public pronouncement of judgments, which contain some limitations or exceptions, expressly provided therein, as well as the implied or implicit sub-right of access to a tribunal, which is subject to regulation by member States.

77. The introductory wording of Article 6 § 3, and in particular the terms: “everyone” (charged with a criminal offence), “has”, and “minimum” (rights), show in my view that the enumerated minimum rights, including that of sub-paragraph (d), are indispensable sub-rights which should always be respected, without any exception or limitation. The word “has” in Article 6 § 3 of the Convention may imply that the minimum rights safeguarded therein are inherent sub-rights of an accused person, with their origin in natural law.

78. Contrary to the current case-law view, the preferred view is in line with the aim and wording of Article 6 § 3 (d), which, unlike Articles 8-11 § 2 of the Convention, does not provide for any limitations. Article 6 § 3 provides for minimum rights and does not make its provisions subject to any other Convention Articles or rights. I am of the view that the right to a fair trial has implied or implicit sub-rights, like the right to access to a tribunal, which may contain implicit limitations,¹⁶ but not implied or implicit limitations to any of its express sub-rights, such as that set out in Article 6 § 3 (d).

79. Unlike the current case-law view, the proposed view as regards the interpretation and application of Article 6 § 3 (d) does not lead to situations which may give rise to conflicts between the right of the accused person and the rights of the victims or witnesses under any other provision of the Convention, such as Articles 2, 3 and 8, or, more accurately, as explained in paragraph 68 of this opinion, to conflicts between the State, through a witness, and the accused. It follows that, by adopting the proposed view, no issues of hierarchy of rights or guarantees may arise in the context of Article 6 § 3 (d), and, in consequence, one is not engaged in any balancing exercise between the right of the accused to examine witnesses and the rights of other persons, or with any limitations on this right, imposed by the State, or in dealing with any of the steps or requirements of *Al-Khawaja and Tahery*

¹⁶ Starmer argues that “where the European Court has read implied rights into the Convention it has also read in implied restrictions” on those rights. (See Keir Starmer, *European Human Rights Law* (Legal Action Group, 1999), at p. 182, para. 4.75).

(cited above) and the subsequent pertinent case-law. Article 6 § 3 (d) aims to bestow on “everyone charged with a criminal offence” a minimum right, and, therefore, it is not correct to render Article 6 § 3 (d) subject to the rights or interests of other persons or the State and to abrogate the accused’s minimum right by giving precedence, for example, to the interest or the protection of a fully anonymous witness, as the present judgment does. To state this in other terms: one cannot overlook the fact that the aim of a criminal trial is to decide on the guilt of an accused person who is presumed to be innocent, and not to protect, at the expense of the accused person’s defence, a prosecution witness, by granting him or her full anonymity. Otherwise, one may reach the fallacious conclusion that the accused is no longer the only subject of the criminal trial, that is, the person who is facing criminal proceedings.

80. While some might perceive the proposed view as rigid, it is, in fact, the most orthodox one, and the most compatible with the wording and the aim of Article 6 and the principle of effective protection of the right concerned. In contrast, any other view, adopting a balancing approach as regards the minimum rights in Article 6 § 3 (d), can be labelled, to adopt Ashworth’s expression, “heresy”,¹⁷ as not being in line with the wording and aim of Article 6 and the said principle.

81. All this being stated, this does not mean that the courts should not try to find ways to protect the interests of witnesses and victims, without, however, compromising the minimum rights of the accused person. It is not, however, the purpose of this opinion to suggest ways in which a State might afford such protection to witnesses.

2. Applying the proposed view to the facts of the present case

82. Applying the proposed view to the facts of the present case, the consequence would be a finding that there has been a breach of the Article 6 § 3 (d) guarantee, because the evidence from X, a fully anonymous witness, was used in the criminal proceedings which ultimately led to the applicant’s conviction, without the applicant having the opportunity to cross-examine X as to his or her credibility and the reliability of his or her evidence; without the Regional Court and the Court of Appeal having the chance to observe X and make their own assessment of X’s credibility and the reliability of his or her evidence; and, lastly, without observing the principles of adversarial proceedings, equality of arms, effective participation by the defence in the trial, and immediacy. In my submission, the whole procedure as regards X’s testimony had rendered the criminal proceedings against the applicant unsafe, problematic and, therefore, overall unfair, and led to a *per se* and automatic

¹⁷ See Andrew Ashworth, “Security, Terrorism and the Value of Human Rights” in B. Goold and L. Lazarus (eds.), *Security and Human Rights* (Oxford: Hart Publishing, 2007), 203, at p. 215. See also Laura Hoyano, “What is balanced on the scales of justice? In search of the essence of the right to a fair trial”, in *Criminal Law Review* 2014, 1, 4 at p. 13.

breach of Article 6 § 3 (d), without requiring the examination of any of the steps or conditions of *Al-Khawaja and Tahery* (cited above) and the subsequent pertinent case-law. Since the sub-right of Article 6 § 3 (d) is an indispensable component or element of the right to a fair trial, Article 6 is automatically and *per se* violated as a whole, and, in consequence, Article 6 § 1, where the general right to a fair trial is embodied.

83. In my view, the domestic authorities could initially do their best to protect witnesses who consider themselves threatened or appear to be threatened, by means other than granting them the status of fully anonymous witnesses in criminal proceedings. If such protection proves not to be possible, such persons could merely be used as informants, and not as anonymous witnesses whose statements can be brought before the criminal proceedings of the domestic courts. The same could have occurred in the present case. X could have been protected in a way other than by being a fully anonymous witness, and if that was not possible, X could have been used merely as an informant, rather than an anonymous witness. In this connection, as the Plenary of the Court (composed of eighteen judges) held in *Kostovski v. the Netherlands* (cited above), § 44, also reiterated in *Windisch* (cited above), § 30:

“The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6...”

V. Conclusion

84. The above discussion has shown that, in my view, whichever interpretation of Article 6 §§ 1 and 3 (d) and meaning of the notion of overall fairness is to be followed, namely, that used in the current case-law or the proposed approach, a finding of a violation of Article 6 §§ 1 and 3 (d) would be unavoidable.

85. I have included my personal view in the argument explored in the present opinion, not merely for the sake of an academic dialogue with the current case-law view, but also with the hope that the pertinent case-law will in future be more compatible with the text and the aim of Article 6.

86. My intention has been to be faithful both to the pertinent current case-law of the Court and to my judicial oath to exercise my function, in interpreting and applying Article 6 in the best and most effective manner compatible with the text and the aim of that Article.