



Use of anonymous witness testimony without measures to compensate for the handicaps caused to the defence by the lack of a direct confrontation with the witness

In today's **Chamber** judgment¹ in the case of [Balta and Demir v. Turkey](#) (application no. 48628/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) taken in conjunction with Article 6 § 3 (d) (right to examine witnesses) of the European Convention on Human Rights

The case concerned the applicants' conviction for membership of an illegal organisation, on the basis of statements by an anonymous witness whom the applicants were unable to question at any stage of the proceedings.

The Court observed that the applicants and their lawyers had not had the opportunity at any stage in the proceedings to question the anonymous witness and to cast doubt on his credibility.

The Court found that the domestic courts had not implemented the procedural safeguards provided for by Turkish law, in cases involving the use of anonymous witness testimony, in order to counterbalance the handicap to the defence arising from the lack of a direct confrontation with the witness. It reiterated that any measure restricting the rights of the defence had to be strictly necessary; if less restrictive measures could suffice then those measures should always be applied.

Principal facts

The applicants, Ahmet Balta and Ahmet Gökşen Demir, are Turkish nationals who were born in 1974 and 1991 respectively and live in Tunceli.

On 5 June 2009 the prosecutor's office heard evidence from an anonymous witness in the context of a criminal investigation into the activities of the PKK, an illegal organisation. The witness claimed to have identified Mr Balta and Mr Demir as members of that organisation.

On 22 June 2009 the applicants were arrested and placed in police custody. On 25 June 2009 the prosecutor's office questioned them about their links with the PKK. During those interviews they disputed the statements made by the anonymous witness who claimed to have identified them. Mr Demir's lawyer requested that the witness's identity be disclosed. Both applicants were released the same day.

On an unspecified date Mr Balta, Mr Demir and 14 other persons were charged with membership of the PKK. On 16 September 2009, acting on judicial instructions, a judge questioned the anonymous witness. His evidence was heard in private, in accordance with Article 58 of the Code of Criminal Procedure and the Witness Protection Act (Law no. 5276).

On 20 October 2010 Mr Balta and Mr Demir denied the accusations against them and contested the manner in which the evidence of the anonymous witness had been heard. On 21 October 2010 the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Assize Court sentenced them to six years and three months' imprisonment for membership of an illegal organisation.

On 10 December 2010 Mr Balta and Mr Demir appealed on points of law. The Court of Cassation upheld the first-instance judgment.

Complaints, procedure and composition of the Court

Relying, in particular, on Article 6 (right to a fair trial and right to examine witnesses), the applicants complained about the fact that they had been unable, at any stage in the proceedings, to question or to have questioned the anonymous witness whose statements, in their opinion, had served as the basis for their conviction.

The application was lodged with the European Court of Human Rights on 19 June 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

András **Sajó** (Hungary), *President*,
İşıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Helen **Keller** (Switzerland),
Paul **Lemmens** (Belgium),
Robert **Spano** (Iceland),
Jon Fridrik **Kjølbro** (Denmark),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

[Article 6 § 1 read in conjunction with Article 6 § 3 \(d\)](#)

The Court reiterated that Article 6 § 3 (d) (right to examine witnesses) enshrined the principle that, before an accused could be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. The rights of the defence required as a general rule that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of proceedings.

The Court had spelled out in its case-law (Grand Chamber judgment in [Al-Khawaja and Tahery v. the United Kingdom](#), 15.12.2011) the criteria to be applied in cases involving statements taken from a witness who was absent from the trial. First of all, the Court had to verify whether there had been good reason for the inability of the defence to question or have questioned a witness against the accused. Next, it had to ascertain whether the testimony of the absent witnesses had been the sole or decisive evidence against the defendant. Lastly, the proceedings could be deemed to have been fair overall if there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of that evidence to take place.

The Court observed in the present case that the information in the case file offered no insight into the circumstances in which the witness had been granted anonymity or the authority that had taken that decision. The Government had provided no information on this point. The Court noted that at the trial stage the evidence of the anonymous witness had not been heard by the trial court but by an Assize Court judge acting on judicial instructions, who had questioned the witness at a private hearing. The judge who had taken the witness statements had given no reasons as to why the witness's anonymity had been preserved or why his evidence had been heard without the defence

being present. The judge had simply stated, without further explanation, that the witness had given evidence in private.

Likewise, the trial court had not stated the reasons that had led it to preserve the witness's anonymity and not to hear evidence from him in the presence of the defence. In dismissing the defence's request for the witness to be examined, the Assize Court had merely stated that the witness's identity could not be disclosed and that his statement had been taken on the basis of judicial instructions. Since the domestic courts had not demonstrated that they had sought to establish why the witness had been granted anonymity and why he had not given evidence in the presence of the defence, it could not be said that there had been good reason for preventing the defence from questioning the witness or having him questioned.

The Court noted that the domestic courts had taken into account a number of items of evidence in convicting Mr Balta and Mr Demir of membership of an illegal organisation. However, while the statement of the anonymous witness was not the sole evidence on which the applicants' conviction had been based, it had nonetheless been decisive. The finding that organic links existed between the applicants and the illegal organisation had been based mainly on the statements of the anonymous witness.

The Court noted that, since the witness had never appeared before the judges of the Malatya Assize Court, the latter had not had a chance directly to assess the credibility and reliability of his testimony. The absence of this anonymous witness had denied the trial judges the opportunity to observe his conduct under questioning and to form their own opinions as to his credibility.

Lastly, the Court observed that the applicants and their lawyers had not had the opportunity at any stage in the proceedings to question the anonymous witness and to cast doubt on his credibility. They had therefore been unable to observe his reaction to direct questions that would have allowed them to test the reliability of his statements. Where the judge gave permission for evidence to be heard from a witness without the defence present, the anonymous witness could be questioned in a room away from the hearing room, with an audio and video link enabling the accused to put questions to the witness. The Assize Court had not followed that procedure, provided for by domestic law, and had offered no explanation in that regard. The court had apparently not even considered implementing the procedural safeguards provided for by Turkish law, in cases involving the use of anonymous witness testimony, in order to counterbalance the handicap caused to the defence by the lack of a direct confrontation.

As a general rule, any measure restricting the rights of the defence had to be strictly necessary; if a less restrictive measure could suffice then that measure should always be applied. However, the reasoning of the Assize Court's decision gave no indication that less restrictive measures had been considered. Accordingly, it could not be said that the procedure followed before the authorities had afforded Mr Balta and Mr Demir safeguards capable of counterbalancing the handicaps under which the defence had laboured.

Consequently, having regard to the overall fairness of the proceedings, the Court held that the applicants' defence rights had been restricted to an extent incompatible with the requirements of a fair trial, and that there had been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (d) of the Convention.

[Just satisfaction \(Article 41\)](#)

The Court held that Turkey was to pay the applicants 2,000 euros (EUR) each in respect of non-pecuniary damage.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.