

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

FIRST SECTION

CASE OF AVETISYAN v. ARMENIA

(Application no. 13479/11)

JUDGMENT

STRASBOURG

10 November 2016

FINAL

10/02/2017

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



In the case of Avetisyan v. Armenia,

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

Mirjana Lazarova Trajkovska, *President,*
Ledi Bianku,
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 18 October 2016,

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

PROCEDURE

1. The case originated in an application (no. 13479/11) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Davit Avetisyan ("the applicant"), on 19 February 2011.

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

3. The applicant alleged, in particular, that he was denied a fair trial since his conviction had been based on the pre-trial statements of witnesses whom he had no opportunity to examine. He also raised other complaints concerning the criminal proceedings against him and his conviction.

4. On 11 July 2013 the complaint concerning the applicant's inability to examine the witnesses against him was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1971. As of 19 February 2011, the date on which he lodged his application with the Court, he was serving his sentence of imprisonment in a penitentiary institution in Yerevan.

6. On 27 April 2009 the applicant, together with his friend D.T. and two other persons, D.O. and M.S., went to the town of Goris to visit his friend, M.K., who was serving his sentence in a penitentiary institution there.

7. Upon their arrival, the administration of the penitentiary institution refused to grant them permission to see M.K. Nevertheless, they were allowed to hand over a parcel to be delivered to him.

8. The applicant gave money to D.T., D.O. and M.S. to buy food for M.K. and remained in the penitentiary facility in order to start the formalities. He signed a warning concerning the responsibility for sending prohibited items to a prisoner. D.T., D.O. and M.S. brought a cake that they had bought from a local store. The cake was handed over to the administration as a parcel to be delivered to M.K.

9. Subsequent inspection of the parcel revealed that there was a disposable syringe filled with liquid inside the cake.

10. On the same date the investigator decided to assign a forensic medical examination of the items discovered.

11. On 29 April 2009 the expert delivered his opinion, which stated that the substances examined were narcotics.

12. On 30 April 2009 criminal proceedings were instituted against the applicant.

13. On 11 May 2009 the applicant was charged with illegal acquisition and supply of narcotics in large amounts. The applicant denied the charges. His case was that he had not been inside the parcel drop-off room when the cake was handed over.

14. In the course of the investigation M.S., D.T. and D.O. were questioned as witnesses.

15. During his interview M.S. stated that he, D.T. and D.O. had bought a cake which they had then given to the applicant. Thereafter they had all entered the room where parcels for prisoners were dropped off and there he had seen the applicant putting the syringe inside the cake and spreading the cream so that it could not be seen.

D.T. and D.O. stated that they had given the cake to the applicant before it was handed over to the administration of the penitentiary facility.

G.B., the officer of the penitentiary facility who had inspected the parcel, stated during questioning that he had discovered a syringe filled with liquid inside the cake which was to be delivered to M.K.

16. At a confrontation with the applicant held on 4 November 2009, M.S. reiterated his previous statements.

17. Following the confrontation, the applicant complained about the way it had been conducted. He complained, *inter alia*, that the investigator had failed to record a number of important statements proving his innocence and that he had put several questions to M.S. which were neither recorded nor answered. In this connection the Deputy Prosecutor of the Syunik Region questioned the applicant on 6 November 2009 and recorded his complaints. The applicant also requested that another confrontation be held. His complaints remained unanswered.

18. On 19 November 2009 the bill of indictment was finalised and the case was transmitted to the Syunik Regional Court, sitting in the town of Goris, to be set down for trial. The list of persons to be summoned for trial included M.S., D.T., D.O., residents of the town of Kapan, and G.B., who lived in Goris.

19. On 26 November 2009 Judge D. of the Regional Court took over the case and scheduled the first hearing for 7 December 2009.

20. On 1 December 2009 Judge D. summoned M.S., D.T. and D.O. to the hearing. The summonses sent to D.T. and D.O. were returned to the court. The letter addressed to D.T. contained a note made by the courier on 3 December 2009 which stated that D.T. was in Yerevan and the letter addressed to D.O. contained a similar note, made on 4 December 2009, which stated that the latter was abroad.

21. Having been summoned, M.S. sent a written note to Judge D. stating that he would be in Yerevan for personal business from 4 December until the end of the month and would not be able to appear at the trial.

22. On 7 December 2009 Judge D. summoned M.S., D.T. and D.O. to the hearing rescheduled for 17 December 2009.

23. On 17 December 2009 Judge D. made a decision to compel witnesses M.S. and D.T. to appear at the rescheduled hearing to be held on 22 February 2010, given that no valid reasons for their non-attendance had been submitted. The enforcement of this decision was assigned to the police.

24. Judge D. was thereafter provided with a certificate issued on 19 February 2010 by a hospital in Yerevan according to which D.T. had been undergoing treatment there since 17 February 2010.

25. By letter of 22 February 2010 the police informed Judge D. that M.S. no longer resided at the address indicated and, according to his brother's statement, had left for Saint Petersburg in January, while D.T. had signed a written undertaking at the police station to appear at the hearing of 22 February 2010.

26. The hearing of 22 February 2010 was postponed until 9 March 2010 because Judge D. was ill.

27. By letter of 9 March 2010 the police informed Judge D. that, according to D.T.'s mother, he had left for Yerevan at the end of February to undergo medical treatment.

28. At the hearing of 9 March 2010 Judge D. decided to proceed with the applicant's trial in the absence of witnesses M.S., D.T. and D.O. The relevant parts of the record of this hearing read as follows:

> "... Witnesses M.S., D.T., D.O. are not present at the hearing before the court, Kapan Police Department has informed us that M.S. has not resided in the city of Kapan since January 2010, he went to Saint Petersburg, Russian Federation, and D.T. is receiving medical treatment in Yerevan.
>
> The prosecutor opined:
>
> Proceed with the trial, read out the statements of absent witnesses M.S., D. T. and D.O. made during the investigation.
>
> Defence lawyer ... opined:
>
> Proceed with the trial since, in reply to the court's decision to compel the witnesses, the Kapan Police Department has stated the impossibility of their attendance.
>
> The accused opined:
>
> Proceed with the trial although my wife saw M.S. 3 days ago.
>
> Having heard the opinions of the parties, the court decides to proceed with the trial and read out the pre-trial statements of absent witnesses M.S., D.T. and D.O.
>
> ... the accused replied:
>
> They have not told the truth. [D.O.] has been a bit correct.
>
> I did not enter the drop-off room after the cake was delivered.
>
> It is a lie that I put a syringe inside the cake.
>
> I was not in the drop-off room, I do not know whether [D.T.] is lying or not ..."

29. On 15 April 2010 the Regional Court found the applicant guilty as charged and sentenced him to five and a half years' imprisonment. In doing so it stated, in particular, the following:

> "Having assessed the evidence examined ... the court finds it established that [the applicant] illegally acquired ... narcotics, placed them inside a cake and attempted to deliver them to ...prisoner [M.K.] but they were discovered and seized by the officers of ... penitentiary facility during the inspection of the parcel.
>
> [The applicant] pleaded not guilty and reiterated his statements made during the investigation ... that ... when they brought the cake, he had already signed [the papers] ... then they brought the cake and gave it to [G.B.]. He did not touch the cake, did not see or take it ...
>
> According to witness G.B.'s statement before the court, several young men among whom he had recognised [the applicant], came to visit prisoner M.K. The visit did not take place and they wished to hand over a parcel... They left and came back a bit later with a cake. During the inspection of the cake a medical disposable syringe ... was discovered inside the cake...

Witness A.A. stated before the court that he worked in the ... penitentiary facility... he was invited to the parcel drop-off room where he saw a disposable syringe that had been discovered inside a cake ...

... the pre-trial statement of witness M.S. ... which he confirmed during the confrontation with [the applicant] ...

... the pre-trial statement of witness D.T. ...

... the pre-trial statement of witness D.O ...

A warning according to which [the applicant] handed over a parcel addressed to [M.K.] and had been warned about the responsibility for sending items prohibited by law ...

... the record of discovery of a prohibited item ...

... the record of seizure of the discovered prohibited item ...

... the opinion of the forensic expert ...

Thus, the court finds it established that [the applicant] committed the offence charged and that his guilt in committing it has been substantiated.

[The applicant's] arguments ... are unsubstantiated and are rebutted by the evidence listed above."

30. The applicant lodged an appeal complaining, *inter alia*, that the witnesses against him were not questioned in court.

31. On 29 June 2010 the Criminal Court of Appeal upheld the applicant's conviction. In doing so, it stated that the Regional Court had duly examined and decided upon the applicant's motions seeking to have the witnesses questioned in court.

32. On 20 July 2010 the applicant lodged an appeal on points of law complaining, *inter alia,* of the non-examination of witnesses against him either in the Regional Court or in the Court of Appeal.

33. On 20 August 2010 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

The Code of Criminal Procedure (in force from 12 January 1999)

34. Article 65 § 2 lists the rights of the accused in criminal proceedings. The accused has the right to, *inter alia*, become acquainted with the records of investigative and other procedural measures in which he has participated or been present (Article 65 § 2 (16)) and familiarise himself with all the materials of the case file from the moment of the completion of the investigation (Article 65 § 2 (17)).

35. According to Article 86 (§§ 3 and 4) a witness is obliged to appear upon the summons of the authority dealing with the case. The failure of a

witness to comply with his obligations shall result in imposition of sanctions prescribed by the law.

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

37. If a summoned witness fails to appear the court, having heard the opinions of the parties, decides whether to continue or adjourn the trial proceedings. The proceedings may be continued if the failure to appear of any such person does not impede the thorough, complete and objective examination of the circumstances of the case (Article 332 § 1).

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

39. Article 426.1 § 1 states that only final acts are subject to review on the ground of newly discovered or new circumstances. On the ground of newly discovered or new circumstances a judicial act of the court of first instance is reviewed by the appeal court, while the judicial acts of the appeal court and the Court of Cassation are reviewed by the Court of Cassation (Article 426.1 § 2).

40. Article 426.4, which refers to re-opening of judicial proceedings, reads, in so far as relevant, as follows:

> "1. Judicial decisions shall be reviewed on the basis of new circumstances in the following cases:
>
> ...
>
> 2) where a violation of a person's right guaranteed by an international agreement to which the Republic of Armenia is a party has been established by a final judgment or decision of an international court of which the Republic of Armenia is a member.
>
> ...
>
> 3. An application seeking review of a judicial decision based on new circumstances may be lodged within a period of three months from the date on which the applicant learnt or ought to have learnt about their existence.
>
> 4. The running of the three-month time-limit for the purposes of the second point of the first paragraph of this provision starts from the date on which the [relevant] international court ... has delivered, in accordance with its rules of procedure, its final judgment or decision [in the applicant's case]."

THE LAW

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

41. The applicant complained that the admission of the pre-trial statements of M.S., D.T. and D.O., whom he had no opportunity to examine at his trial, amounted to a violation of his right to a fair trial as provided in Article 6 §§ 1 and 3(d) of the Convention, which 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."

42. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

44. According to the applicant's submission, his conviction was entirely based on the statements of witnesses M.S., D.T. and D.O., none of whom attended his trial although there had not been a good reason for their non-attendance. He had no opportunity to examine D.T. and D.O. at any stage of the proceedings. Although a confrontation had been held between him and M.S. during the investigation, his procedural rights had not been respected during this measure. In any event, the confrontation could not satisfy the requirements of Article 6 § 3 (d) of the Convention since he could not effectively challenge M.S.'s statement, being unfamiliar with its content, given that the defence has the right to study the case file only after the completion of the investigation.

45. The Government argued that the Regional Court had made all reasonable efforts to hear witnesses M.S., D.T. and D.O. in person at the trial. The Regional Court had postponed the hearings several times and

made a decision to compel M.S. and D.T. to attend, with the assistance of the police. However, despite all efforts, it had not been possible to secure their presence since M.S. and D.O. were abroad while D.T. was in hospital. The Government submitted that the applicant's conviction was based mainly on the statements of witnesses M.S., D.T., D.O. and two officers of the penitentiary facility, G.B. and A.A. While the first three witnesses were absent from the applicant's trial for a good reason, the other two were heard directly by the trial court. Furthermore, a confrontation was held between the applicant and M.S. in the presence of the applicant's lawyer.

2. The Court's assessment

(a) General principles

46. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011); it will therefore consider the applicant's complaint under both provisions taken together (see *Windisch v. Austria*, 27 September 1990, § 23, Series A no. 186).

47. The Court further reiterates that all evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, Article 6 §§ 1 and 3 (d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 707, 25 July 2013).

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

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

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

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

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

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

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

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

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

49. Those principles have been further clarified in the case of *Schatschaschwili* (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 111 – 131, ECHR 2015) in which the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases

where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see *Seton v. the United Kingdom*, no. 55287/10, §§ 58 and 59, 31 March 2016).

(b) Application of these principles to the present case

(i) Whether there was good reason for the non-attendance of the witnesses at trial

50. The preliminary question for the Court to examine is whether there was a good reason for admitting the pre-trial statements of witnesses M.S., D.T. and D.O. in evidence without having them questioned at the applicant's trial.

51. The Court has generally adopted a robust approach in determining whether a domestic court had good factual or legal grounds not to secure the witness's attendance at trial. For example, it has held that the absence of a witness from the country where the proceedings were being conducted was not in itself sufficient reason to justify his or her absence at trial (see *Seton*, cited above, § 61). Notably, where a witness cannot be located, the Court has held that the authorities must "actively search for the witness" and do "everything which was reasonable to secure the presence of the witness" (see *Lučić v. Croatia*, no. 5699/11, § 79, 27 February 2014).

52. Turning to the present case, the Court observes that the justification relied on by the trial judge, which was subsequently accepted by the Criminal Court of Appeal, for not securing the attendance of the witnesses was that M.S. and D.O. were abroad, while D.T. was receiving medical treatment in the capital (see paragraphs 28 and 31 above).

53. In the light of the strict approach adopted by the Court in previous cases, the Court is not persuaded that all reasonable efforts can be said to have been made to secure the attendance of the witnesses in question. It is true that the trial court made a decision to compel witnesses M.S. and D.T. to attend through police assistance. This measure, however, did not produce any results (see paragraphs 23, 25 and 27 above). In such circumstances, the trial court could have resorted to international legal assistance in order to secure the attendance of witnesses M.S. and D.O. who were alleged to be absent from the country. Furthermore, the trial court did not even attempt to find out when D.T. would be discharged from hospital so that he could attend the trial. The trial court readily accepted the justifications for the

unavailability of the witnesses provided by the police (see paragraph 28 above) which were moreover based on the statements of the witnesses' relatives rather than any actions of the police in a serious attempt to locate those witnesses (see paragraphs 25 and 27 above).

54. However, the absence of a good reason for the non-attendance of the witnesses at the trial of the applicant is not the end of the matter. This is a consideration which is not of itself conclusive of the lack of fairness of a criminal trial, although it constitutes a very important factor to be weighed in the overall balance together with the other relevant considerations (see *Schatschaschwili*, cited above, § 113).

(ii) Whether the evidence of the absent witnesses was "sole or decisive"

55. As regards the second step of the *Al-Khawaja* test, that is the question of 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 Court reiterates that "sole" evidence is to be understood as the only evidence against the accused (see *Al-Khawaja and Tahery*, cited above, § 131). "Decisive" evidence 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 (ibid., § 131).

56. The Court observes that the judgments of the domestic courts listed the statements of witnesses M.S., D.T. and D.O. in the evidence substantiating the applicant's guilt without any evaluation of this evidence for the Court to have a starting point for deciding whether the applicant's conviction was based solely or to a decisive extent on the depositions of these witnesses (see paragraphs 29 and 31 above). The Court must therefore make its own assessment of the weight of the evidence given by the absent witnesses having regard to the additional incriminating evidence available (see *Schatschaschwili*, cited above, § 143; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 88, 12 May 2016).

57. In this connection the Court notes that the applicant's guilt had been established based on the following evidence: the trial statements of prison officers G.B. and A.A., the pre-trial statements of witnesses M.S., D.T., and D.O., the fact that the applicant had signed the relevant papers as the sender of the parcel and had been warned about the prohibition to send illegal items to a prisoner, the records of discovery and seizure of the items found in the cake and the opinion of the forensic expert according to which the discovered substances were narcotics (see paragraph 29 above).

58. The Court, having regard to these elements of evidence, cannot but note that the evidence from witnesses M.S., D.T. and D.O. was the only evidence substantiating that it had been the applicant who had placed the narcotics inside the cake. M.S. had directly incriminated the applicant, stating that he had witnessed him putting the syringe inside the cake while D.T. and D.O. had stated that they had given the cake to the applicant before it was handed over to the administration (see paragraph 15 above). In any event, the statements of all three absent witnesses rebutted the applicant's defence that he had not touched the cake before it was given to the prison administration. The other evidence available, including the statements of the two prison officers G.B. and A.A., was merely circumstantial technical and other evidence which was not conclusive as to the commission of the offence by the applicant. In view of these elements, the Court considers that the evidence of the absent witnesses was decisive for the applicant's conviction.

(iii) Whether there were sufficient "counterbalancing factors"

59. The Court must lastly determine whether there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of the evidence of the absent witnesses to take place. The following elements are relevant in this context: the trial court's approach to the untested evidence, the availability and strength of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to cross-examine directly the witnesses at the trial (see *Schatschaschwili*, cited above, §§ 125-131).

60. The Court would further reiterate that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest and it must be attended by minimum safeguards commensurate with its importance (see *Dvorski v. Croatia* [GC], no. 25703/11, § 100, ECHR 2015 and the cases cited therein).

61. The Court observes that at the hearing of 9 March 2010 the applicant's counsel agreed to carry on with the trial in view of the letter of the police stating the impossibility of securing the attendance of the witnesses. Moreover, the applicant himself stated that he agreed to proceed with the trial but mentioned that his wife had seen M.S. three days before the hearing, thus contesting M.S.'s alleged absence in the city (see paragraph 28 above). In this respect the present case differs from cases the Court has dealt with where the defendant in criminal proceedings was considered to have waived his right to cross-examine witnesses against him (see, in particular, *Ben Moumen v. Italy*, no. 3977/13, § 60, 23 June 2016

and *Poletan and Azirovik*, cited above, § 87). In these circumstances, it cannot be said that by agreeing to continue with the trial, the applicant unequivocally waived, either tacitly or explicitly, any right that he had under Article 6 of the Convention to examine the witnesses against him. On the contrary, having no other alternative as a result of the repeated failure by the trial court and the police to secure the attendance of the witnesses in question, the applicant agreed to carry on with his trial in their absence and raised the issue in his subsequent appeals.

62. In view of the foregoing, the Court finds that the applicant's consent to proceed with his trial in the absence of the witnesses in question did not amount to a waiver of his right to examine the witnesses against him.

63. As regards the domestic courts' treatment of the evidence of the absent witnesses M.S., D.T. and D.O., the Court observes that the Regional Court did not approach that evidence with caution. The Regional Court's judgment does not contain any indication that it was aware of the reduced evidentiary value of the untested witness statements. On the contrary, the statements of the untested witnesses were listed along with other evidence substantiating the applicant's guilt, without any assessment of their credibility (see paragraph 29 above). The Court therefore considers that the Regional Court failed to examine the reliability of the absent witnesses' statements in a careful manner.

64. The Court further observes that the Regional Court, as shown above (see paragraphs 57 and 49), did not have before it additional incriminating evidence supporting the statements made by M.S., D.T. and D.O.

65. As regards the procedural measures taken to compensate for the lack of opportunity to cross-examine the absent witnesses at the trial, the Court observes that a confrontation had been held between the applicant and witness M.S. during the investigation (see paragraph 16 above). While M.S. could be considered as the key prosecution witness, given that he directly pointed to the applicant, D.T. and D.O.'s statements were equally relied on by the Regional Court in finding the applicant's guilt in the offence established without any special weight being given to M.S.'s evidence (see paragraph 29 above). The Court further observes that the applicant was not given any opportunity at the investigation stage to question witnesses D.T. and D.O.

66. The applicant argued that, being unfamiliar with M.S.'s previous statements, he was unable to challenge their credibility at the confrontation. The Court notes, however, that in any event M.S. had reiterated his statements during the confrontation (see paragraph 16 above) which made the applicant aware of M.S.'s account of the events, therefore providing the applicant with an opportunity to put questions to him. That said, the Court notes that the applicant had complained about the manner in which the confrontation had been conducted, alleging that some of his questions had not been properly recorded and his complaints had remained unanswered

(see paragraph 17 above). The Court also notes that the trial court merely stated in its judgment that M.S. had confirmed his previous statements at the confrontation but it did not make any evaluation of the results of the confrontation between the applicant and M.S. in order to assess the reliability of M.S.'s statements (see paragraph 29 above).

67. In such circumstances, the Court considers that the confrontation held with only one of the three absent witnesses, which moreover did not affect the assessment of their evidence, was insufficient to compensate for the lack of opportunity for the applicant to cross-examine these witnesses directly at his trial.

68. Having regard to the absence of a good reason for the non-attendance of the absent witnesses, the unavailability of additional incriminating evidence and the insufficiency of procedural safeguards capable of counterbalancing the absence of witnesses M.S., D.T. and D.O. at the applicant's trial, the Court finds that the criminal proceedings, looked at as a whole, were rendered unfair by the admission in evidence of the pre-trial statements of these absent witnesses.

69. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. Article 41 of the Convention provides:

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

A. Damage

71. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage.

72. The Government submitted that the applicant's claim was excessive.

73. Making its assessment on an equitable basis, and having regard to the circumstances of the case, the Court awards the applicant EUR 2,400 in respect of non-pecuniary damage.

74. On the other hand, the Court considers it necessary to point out that a judgment in which it finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, if any, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as

possible the situation existing before the breach (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; and *Lungoci v. Romania*, no. 62710/00, § 55, 26 January 2006). In the case of a violation of Article 6 of the Convention, the applicant should as far as possible be put in the position he would have been in had the requirements of this provision not been disregarded (see, *mutatis mutandis*, *Sejdovic v. Italy* [GC], no. 56581/00, § 127, ECHR 2006-II; and *Yanakiev v. Bulgaria*, no. 40476/98, § 89, 10 August 2006).

75. The Court notes in this connection that Articles 426.1 and 426.4 of the Code of Criminal Procedure allow the reopening of the domestic proceedings if the Court has found a violation of the Convention or its Protocols (see paragraphs 39 and 40 above). As the Court has already held on previous occasions, in cases such as the present one, the most appropriate form of redress would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial (see *Gabrielyan v. Armenia*, no. 8088/05, § 104, 10 April 2012).

B. Costs and expenses

76. The applicant also claimed EUR 500 for legal costs incurred before the Court. The applicant submitted a legal services agreement concluded between his mother and Mr Alumyan, his representative before the Court, in support of his claims.

77. The Government argued that the claimed legal costs were not actually incurred by the applicant since the lawyer had been hired and paid by his mother.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the fact that the submitted legal services agreement clearly indicates that it has a direct link with the present application, the Court considers it reasonable to award the sum of EUR 500 for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention as regards the applicant's inability to question the witnesses against him;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Armenian drams at the rate applicable at the date of settlement:
      (i) EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 10 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Mirjana Lazarova Trajkovska
Deputy Registrar	President