



Impossibility for defendant to question key witnesses at any stage of the proceedings made entire trial unfair

In today's **Grand Chamber** judgment¹ in the case of [Schatschaschwili v. Germany](#) (application no. 9154/10) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 6 §§ 1 and 3 (d) (right to a fair trial and right of a person charged with a criminal offence to examine or have examined witnesses against him) of the European Convention on Human Rights.

The case concerned the complaint by a man convicted of aggravated robbery and extortion, who maintained that his trial had been unfair, as neither he nor his counsel had had an opportunity at any stage of the proceedings to question the only direct witnesses to one of the crimes allegedly committed.

The Court found that, in view of the importance of the statements of the only eyewitnesses to one of the offences of which Mr Schatschaschwili had been convicted, the counterbalancing measures taken by the trial court had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence. In particular, although under German law the prosecution authorities could have appointed a lawyer for him at the investigation stage and that lawyer would have had the right to be present at the hearing of the witnesses before the investigating judge, those safeguards had not been used.

Principal facts

The applicant, Swiadi Schatschaschwili, is a Georgian national who was born in 1978 and lives in Kashuri/Surami (Georgia).

In April 2008 Mr Schatschaschwili was convicted by a German court of two counts of aggravated robbery combined with aggravated extortion involving coercion – committed with others in October 2006 in Kassel and in February 2007 in Göttingen – and sentenced to nine years and six months' imprisonment. As regards the second offence, the trial court found in particular that in the evening of 3 February 2007, together with several accomplices, he had robbed two women from Latvia, who temporarily lived in Germany and worked as prostitutes, in their apartment in Göttingen.

As regards the offence in Göttingen, the trial court relied in particular on witness statements which the two women had made in the course of police interrogations and when being questioned by an investigating judge at the pre-trial stage, which were read out during the trial. The investigating judge had excluded Mr Schatschaschwili from the hearing at the pre-trial stage. Although German law provided for that possibility, at that stage no lawyer had been appointed for him, who would have had the right to be present at the witness hearing before the investigating judge. Shortly after being questioned, the two women had left Germany and returned to Latvia. When summoned to testify at Mr Schatschaschwili's trial, they refused, relying on medical certificates indicating that they were traumatised by the crime.

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Subsequently the trial court again unsuccessfully attempted to obtain their attendance, proposing several options and stressing that they would receive protection in Germany. The court then requested legal assistance from the Latvian authorities, and it was agreed to hold a witness hearing at a court in Latvia with an audio-visual link for the questioning to be conducted by the presiding judge of the German court. However, the hearing was cancelled shortly before the scheduled date by the presiding judge of the Latvian court, who found that the two women, relying on medical certificates, had demonstrated that they were still suffering from post-traumatic disorder. The German court informed its Latvian counterpart that, according to the standards of German criminal procedure law, the witnesses had not sufficiently substantiated their refusal to testify. Its proposal that the witnesses be examined by a public medical officer, or alternatively be compelled to attend the hearing, remained unanswered. Having regard to all the steps taken, the German court considered that there were insurmountable obstacles to hearing the two women as witnesses in the near future; it therefore ordered that the records of their interviews by the police and the investigating judge be read out at the trial.

In addition to the records of the two women's statements, the trial court had regard to further evidence: statements made at the trial by several witnesses to whom the two women had reported the offence shortly after it had happened, in particular their neighbour and a friend; information obtained by tapping Mr Schatschaschwili's and his co-accused's mobile telephones; data obtained via a GPS (global positioning system) receiver in the car of one of the co-accused, which had been parked in front of the victims' house at the relevant time; Mr Schatschaschwili's admission during the trial that he had been in the victims' apartment at the relevant time; and the similarity in the way in which the offences in Kassel – of which there were direct witness testimonies made at the trial – and in Göttingen had been committed.

Mr Schatschaschwili's appeal against the judgment – complaining that he had been unable to examine the only direct witnesses to the offence in Göttingen – was dismissed by the Federal Court of Justice. Finally, by decision of 8 October 2009, the Federal Constitutional Court declined to consider Mr Schatschaschwili's constitutional complaint (file no. 2 BvR 78/09).

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (d) (right to a fair trial and right of a person charged with a criminal offence to examine or have examined witnesses against him) of the European Convention on Human Rights, Mr Schatschaschwili complained that his trial had been unfair as neither he nor his counsel had had an opportunity at any stage of the proceedings to question the only direct witnesses of the crime allegedly committed in February 2007.

The application was lodged with the European Court of Human Rights on 12 February 2010.

In its Chamber judgment of 17 April 2014 the Court held, by five votes to two, that there had been no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention, concluding that there had been sufficient counterbalancing factors to compensate for the difficulties to the defence which had resulted from the admission of the two victims' statements.

On 15 July 2014 Mr Schatschaschwili requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 8 September 2014 the panel of the Grand Chamber accepted that request. The Government of the Czech Republic was granted leave to intervene as a third party in the written proceedings (Article 36 § 2 of the Convention). A Grand Chamber hearing was held on 4 March 2015.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
İşil **Karakaş** (Turkey),

András Sajó (Hungary),
Luis López Guerra (Spain),
Päivi Hirvelä (Finland),
Khanlar Hajiyev (Azerbaijan),
Dragoljub Popović (Serbia),
Nona Tsotsoria (Georgia),
Kristina Pardalos (San Marino),
Angelika Nußberger (Germany),
Julia Laffranque (Estonia),
Helen Keller (Switzerland),
André Potocki (France),
Paul Mahoney (the United Kingdom),
Valeriu Griţco (the Republic of Moldova),
Egidijus Kūris (Lithuania),
Jon Fridrik Kjølbro (Denmark),

and also Lawrence Early, *Jurisconsult*.

Decision of the Court

Article 6

The Court confirmed and clarified the principles developed in its Grand Chamber judgment in the case of *Al-Khawaja and Tahery v. the United Kingdom*.² It thus had to examine: whether there was a good reason for the non-attendance of the witnesses at the trial; whether the evidence of the absent witnesses was the sole or decisive basis for the defendant's conviction; and whether there were sufficient counterbalancing factors to compensate for the handicaps to the defence as a result of the admission of the untested evidence.

The Court considered that there had been a good reason, from the German trial court's perspective, for the non-attendance of the two witnesses at the trial and, as a result, for admitting as evidence the statements they had made when questioned by the police and by the investigating judge at the pre-trial stage. The Court noted in particular that the trial court had not immediately accepted the witnesses' state of health or their fear as justification for their absence at the trial. It was only after having attempted in vain to obtain their attendance and after the hearing at the Latvian court had been cancelled that the trial court had found that there were insurmountable obstacles to its hearing the witnesses in the near future. The Grand Chamber thus shared the conclusion of the Chamber judgment that the German trial court had made all reasonable efforts within the existing legal framework to obtain the witnesses' attendance. That court did not have any other reasonable means within its jurisdiction, on the territory of Germany, to secure the attendance of the two women, Latvian nationals residing in their home country.

As regards the importance of the witnesses' evidence before the trial court, the Court noted that the two women had been the only eyewitnesses to the offence in question. The additional evidence was either just hearsay evidence or merely circumstantial technical and other evidence which was not conclusive as to the robbery and extortion as such. The Court therefore considered that the evidence of the absent witnesses – although not being the sole evidence – had been decisive, that is, determinative of Mr Schatschaschwili's conviction.

² Grand Chamber judgment in the case of *Al-Khawaja and Tahery v. the United Kingdom* (application nos. 26766/05 and 22228/06) of 15 December 2011

As regards the question of whether there were sufficient counterbalancing factors to compensate for the handicaps to the defence, the Court first considered the trial court's approach to the untested evidence. It found that that court had examined the credibility of the absent witnesses and the reliability of their statements in a careful manner. Being aware of the reduced evidentiary value of those testimonies, it had compared the content of the repeated statements made by the two women with one another and had found that they had given detailed and coherent descriptions of the circumstances of the offence. It had observed that the witnesses' inability to identify Mr Schatschaschwili when confronted with photos of potential suspects during the police interviews showed that they had not testified with a view to incriminating him. Moreover, in assessing their credibility, the trial court had addressed different aspects of the witnesses' conduct, finding in particular that there were explanations for their non-attendance at the trial, namely their fear of encountering problems with the police or of acts of revenge by the perpetrators, which did not affect their credibility.

However, the Court noted that hardly any procedural measures had been taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial. It was true that Mr Schatschaschwili had had the opportunity to give his own version of the events – of which he had availed himself – and to cast doubt on the credibility of the witnesses, also by cross-examining the other witnesses giving hearsay evidence at the trial. He had not, however, had the possibility to put questions to the two women indirectly, for instance in writing. Moreover, neither he nor his lawyer had been given the opportunity to question those two witnesses at the investigation stage.

The Court observed that under German law the prosecution authorities could have appointed a lawyer for Mr Schatschaschwili, who would have had the right to be present at the witness hearing before the investigating judge. Those safeguards had not been used in his case. In that context, the Court agreed with Mr Schatschaschwili in noting that the witnesses had been heard by the investigating judge precisely because, in view of their imminent return to Latvia, the prosecution authorities had expected the risk of their evidence being lost. Despite this, the authorities had not given him an opportunity to have the witnesses questioned at the investigation stage by a lawyer appointed to represent him. By proceeding in that manner, the authorities had taken the foreseeable risk, which later materialised, that neither the accused nor his counsel would be able to question the witnesses at any stage of the proceedings.

Overall, the Court concluded that, in view of the importance of the statements of the only eyewitnesses to the offence of which Mr Schatschaschwili had been convicted, the counterbalancing measures taken had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence. There had accordingly been a violation of Article 6 §§ 1 and 3 (d).

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

The Court did not make any award under Article 41, observing that Mr Schatschaschwili, who had been granted legal aid in the proceedings before the Court, had not submitted any just satisfaction claims within the relevant time-limits in the proceedings before the Chamber and he had not submitted any new quantified claim in respect of additional costs incurred in the proceedings before the Grand Chamber.

Separate opinions

Judges Spielmann, Sajò, Karakaş and Keller expressed a joint concurring opinion. Judges Hirvelä, Popović, Paradalos, Nussberger, Mahoney and Kūris expressed a joint dissenting opinion. Judge Kjølbros expressed a separate dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

This press release is a document produced by the Registry. It does not bind the Court. Decisions, judgments and further information about the Court can be found on www.echr.coe.int. To receive the Court's press releases, please subscribe here: www.echr.coe.int/RSS/en or follow us on Twitter [@ECHRpress](https://twitter.com/ECHRpress).

Press contacts

echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Nina Salomon (tel: + 33 3 90 21 49 79)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

Inci Ertekin (tel: + 33 3 90 21 55 30)

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.