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

FIRST SECTION

CASE OF TER-SARGSYAN v. ARMENIA

(Application no. 27866/10)

JUDGMENT

STRASBOURG

27 October 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ter-Sargsyan v. Armenia,

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

Mirjana Lazarova Trajkovska, *President,*
Ledi Bianku,
Kristina Pardalos,
Aleš Pejchal,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 4 October 2016,

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

PROCEDURE

1. The case originated in an application (no. 27866/10) 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 Vaghinak Ter-Sargsyan ("the applicant"), on 11 May 2010.

2. The applicant was born in 1970 and lived in Armavir prior to his imprisonment. He was represented by Mr G. Papoyan, a lawyer practising in Armavir. 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 at any stage of the proceedings and video recordings that had not been examined in court.

4. On 4 June 2013 the complaints concerning the impossibility for the applicant to obtain the attendance and examination of witnesses against him and the use of video recordings were 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

A. The criminal proceedings against the applicant in Kazakhstan

5. On 7 October 2000 S.M. was stabbed by two persons during an event in a café in the town of Kostanay, Kazakhstan. He died on the way to hospital.

6. The following day the authorities of Kazakhstan started an investigation into the incident, the applicant and his friend, B.M., being the main suspects.

7. A number of eyewitnesses were questioned. In particular, witness Kh.H., the owner of the café, stated that he had seen the applicant and B.M. having a conversation with the victim and his nephew, G.T. At the time of the incident he had been outside the café and went back in when he heard the noise. Thereafter he learnt from those present that B.M. and the applicant had stabbed the victim and escaped.

Witness K.H., Kh.H.'s son, stated that he had been in the kitchen when he heard the noise and came out into the hall. He then saw the applicant with a knife in his hands going towards the victim.

Witness G.T. stated that he had been with his uncle, the victim, in the café and had witnessed the applicant and B.M. stabbing him.

Witness O.D., the cook who worked in the café at the relevant time, stated that she had seen the applicant and B.M. having an argument with the victim and stabbing him, after which both of them had fled.

Witness V.H., Kh.H.'s brother, who had also been in the café that night, stated that he had seen B.M. and the victim having an argument, after which the former had stabbed the victim, and then the applicant had also stabbed him.

Witness G.A. submitted that he had been in the café with his wife on the day of the incident and had witnessed B.M. and the applicant attacking the victim and that he had seen a knife in the applicant's hands.

A number of other persons, namely A.O. and A.G., singers, V.K. and E.B., guests, and L.T., the camera person in charge of filming the event, were also questioned. These witnesses did not provide any concrete details or mention any names and stated that they had either been far away from those fighting or for some other reason had not seen exactly what happened. Witness L.T. had recognised the applicant in a photograph shown to him during the investigation.

8. On 21 January 2004 the investigative authorities of Kazakhstan brought charges against the applicant and his detention was ordered. Since his whereabouts were unknown, a search was initiated for him.

9. On 5 November 2004 the applicant was arrested in Armenia.

10. In May 2005 the applicant was released after no agreement was reached between the law enforcement authorities of Armenia and Kazakhstan as regards his extradition.

11. On 29 May 2006 the Kostanay Regional Court found B.M. guilty of murder and sentenced him to seventeen years' imprisonment.

12. As regards the applicant, the case was sent to Armenia for him to be prosecuted in his country of nationality.

B. The criminal proceedings against the applicant in Armenia

13. On 8 July 2008 the Vagharshapat Police investigation unit took over the case and the charges against the applicant were brought into conformity with the relevant provisions of the Criminal Code of Armenia. The applicant was charged with premeditated murder.

14. On 21 August 2008 the applicant was arrested. He was questioned on the same day and refused to make any statement in respect of the events of 7 October 2000.

15. In the course of the investigation the applicant requested a confrontation with witnesses V.H., G.A., G.T., K.H., L.T. and O.D. The investigator dismissed his motion on the ground that both in the course of the investigation and at B.M.'s trial those witnesses had reinstated their statements against him.

16. On 20 October 2008 the case file, including the finalised indictment, was transmitted to the Southern Criminal Court (one of the first instance criminal courts before the relevant amendments to the Code of Criminal Procedure) to be set down for trial.

17. On an unspecified date the applicant's lawyer filed a motion seeking to remit the case for further investigation on the ground that, *inter alia*, it was necessary to carry out several confrontations given that there were substantial contradictions between the applicant's statements and the statements of witnesses V.H., G.A., G.T., K.H., L.T. and O. D. It appears that the Southern Criminal Court never examined this request.

18. Following the amendments to the Code of Criminal Procedure the case was taken over by the Armavir Regional Court.

C. The applicant's trial

19. According to the applicant, the eleven witnesses residing in Kazakhstan (see paragraph 7 above), who had made statements against him, were not properly summoned and the Regional Court did not obtain any proof that they had been notified about the trial. The applicant further claimed that at the preparatory hearing the victim's legal heir, S.M.'s wife, had submitted declarations from five out of the eleven witnesses stating

their reasons for being unable to attend the hearings. The declarations, drafted in Russian, were not properly examined by the Regional Court but were included in the case file and it was decided to continue the examination of the case in the absence of all the witnesses.

20. The Government argued that all eleven witnesses were properly summoned to the applicant's trial. However, it had not been possible to locate all of them, while eight of the witnesses submitted to the trial court declarations certified by a notary in Kazakhstan stating their inability to attend the trial for financial, family or work-related issues.

21. The applicant pleaded not guilty at the trial and contested the veracity of the statements of the witnesses made during the investigation of the case in Kazakhstan.

22. The victim's legal heir testified before the trial court that on 7 October 2000 her husband, S.M., had attended an event in the café together with G.T. She had then been told by relatives that her husband had been stabbed during a fight.

23. At the hearing of 26 May 2009 the applicant filed a motion seeking to have examined in court the video recordings from the crime scene included in the case file. He claimed that it was necessary to identify other witnesses of the incident and clarify the colour of his outerwear on the day of the crime. The Regional Court dismissed this motion.

24. On 19 June 2009 the Regional Court convicted the applicant of murder and sentenced him to fourteen years' imprisonment. In doing so, the Regional Court stated, in particular, the following:

> "The Court, taking into account and having assessed the evidence supporting the accusation, finds that [the applicant's] guilt in the offence was established by the following evidence that has been collected in the course of the investigation and examined in the court proceedings:
>
> The [trial] statement of the victim's legal heir ... according to which at around 8 p.m. on 7 October 2000 her husband S.M. attended an event in ... the café together with G.T. She was told ... by the relatives that during a fight in the café Armenian men [B.M.] and [the applicant] had stabbed her husband...
>
> The statement of witness Kh.H. ... (witness Kh.H.'s pre-trial statement was read out)
>
> The statement of witness K.H. ... (witness K.H.'s pre-trial statement was read out).
>
> The statement of witness G.T. ... (witness G.T.'s pre-trial statement was read out).
>
> The statement of witness O.D. ... (witness O.D.'s pre-trial statement was read out).
>
> The statement of witness V.H. ... (witness V.H.'s pre-trial statement was read out).
>
> The statement of witness G.A. ... (witness G.A.'s pre-trial statement was read out).
>
> The statement of witness A.O. ... (witness A.O.'s pre-trial statement was read out).
>
> The statement of witness A.G. ... (witness A.G.'s pre-trial statement was read out).
>
> The statement of witness V.K. ... (witness V.K.'s pre-trial statement was read out).
>
> The statement of witness L.T. ... (witness L.T.'s pre-trial statement was read out).

The statement of witness E.B. ... (witness E.B.'s pre-trial statement was read out).

[The applicant's] guilt ... has been substantiated also by:

The judgment of 29.05.2006 of Kostanay Regional Court ...

... clarifications provided by expert ... during the above-mentioned court proceedings that there were two penetrating knife injuries on the body ... each one of the injuries could by itself have caused the death.

The statement of technical expert [during the proceedings before the Kostanay Regional Court] ...

The conclusion of the forensic medical examination of 31.10.2000 ... S.M.'s death had been caused by extensive haemorrhage as a result of liver wounds.

The statement of forensic medical expert [during the proceedings before the Kostanay Regional Court] ... Each stab wounded the liver.

The conclusion of technical forensic examination of 21.10.2005 ... according to which ... the traces of two penetrating wounds ... discovered on S.M.'s vest could have been inflicted by a ... knife.

The records of examination of the crime scene, records of ... examination of victim S.M.'s clothes, two video recordings of the event, the video recording of the examination of the body during the examination of the crime scene and forensic medical examination."

25. The applicant lodged an appeal claiming, *inter alia*, that there had been no confrontation between him, B.M. and the witnesses against him during the investigation of the case, either in Kazakhstan or in Armenia. He further complained that the Regional Court had failed to summon properly the witnesses and relied on their pre-trial statements without good reason. He also complained about the fact that the video recordings from the crime scene had not been examined during the trial, although the Regional Court relied on them as evidence against him.

26. On 31 August 2009 the Criminal Court of Appeal upheld the applicant's conviction with reliance on the same evidence. As regards the non-attendance of witnesses the Court of Appeal stated that, according to the materials of the case, the witnesses had been properly summoned but had submitted statements about their inability to appear before the court due to lack of funds or reasons relating to family or work and reinstated their statements made during the pre-trial investigation.

27. The applicant lodged an appeal on points of law raising arguments similar to those submitted in his previous appeal.

28. On 12 November 2009 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit stating, *inter alia*, that the Court of Appeal had reached the correct conclusion as regards the applicant's complaints about his inability to examine the witnesses against him.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Code of Criminal Procedure

29. Article 86 (§§ 3 and 4) states that a witness is obliged to appear upon the summons of the authority dealing with the case in order to testify or to participate in investigative and other procedural activities. The failure of a witness to comply with his obligations shall result in imposition of sanctions prescribed by the law.

30. According to Article 105, in criminal procedure it is illegal to use as evidence or as a basis for accusation facts obtained by violation of the defence rights of the suspect and accused.

31. 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 (Article 153 § 2).

32. According to Article 216 § 1 the investigator is entitled to carry out a confrontation of two persons who have been questioned previously and whose statements contain substantial contradictions. The investigator is obliged to carry out a confrontation if there are substantial contradictions between the statements of the accused and some other person.

33 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).

34. Article 342 § 1 permits the reading out at the trial of witness statements made during the inquiry, the investigation or a previous court hearing 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.

35. 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).

36. According to Article 426.4 § 1 (2) judicial acts may be reviewed on the ground of new circumstances if a violation of a right guaranteed by an international convention to which Armenia is a party has been found by a final judgment or decision of an international court.

B. The Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters

37. The Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters came into force in respect of Armenia and Kazakhstan in 1994. The relevant provisions of this Convention read as follows:

Article 9
Summoning witnesses, victims, civil plaintiffs, civil defendants, their representatives and experts

"...

3. The requesting Contracting Party shall reimburse travel and subsistence expenses to the witnesses, experts, the victim and his legal representatives as well as the salary for the days of absence from work; the expert also has the right to be paid for the expertise. The summons shall mention the payments to which the summoned persons are entitled; the judicial body of the requesting Party shall make an advance payment for the relevant expenses upon their request."

Article 16
Finding out addresses and other data

"1. If requested the Contracting Parties shall, in accordance with their legislation, provide assistance in finding out addresses of persons residing on their territory, if it is necessary for the exercise of the rights of their citizens ..."

C. The Chişinău Convention of 7 October 2002 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters

38. The Chişinău Convention of 7 October 2002 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, a follow-up to the Minsk Convention of 22 January 1993 which did not supersede it, took effect in Armenia and Kazakhstan in 2005 and 2004 respectively. The relevant provisions of this Convention read as follows:

Article 12
Validity of documents

"1. Documents which have been issued or certified on the territory of one of the Contracting Parties by a competent institution or a person specially vested with such power within its competence and in compliance with the prescribed manner and attested with the Coat of Arms seal, are valid in the territories of other Contracting Parties without any special certification.

2. Documents which are considered as official on the territory of one Contracting Party have the legal effect of official documents on the territories of other Contracting Parties."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

39. The applicant complained that he had been deprived of the opportunity to examine the witnesses against him at any time during the criminal proceedings and that the video recordings, which were part of the evidence against him, were not examined in court. He alleged a breach of Article 6 §§ 1 and 3(d) of the Convention, the relevant provisions of which read 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."

40. The Government contested that argument.

A. Admissibility

41. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Admission at the applicant's trial of the evidence of absent witnesses

(a) The parties' submissions

42. The applicant submitted that his conviction was mainly based on evidence of witnesses whom he had been unable to question at any stage of the proceedings. In particular, none of the eleven witnesses whose pre-trial statements were relied on by the trial court when convicting him were properly summoned to his trial. The Regional Court had failed to verify whether the witnesses in question had in fact received their summonses, which indeed had not been the case. As for the declarations submitted by some but not all the witnesses, the reasons advanced in them such as insufficient financial means, work or family issues could not be considered as good reasons for not attending his trial.

43. The Government contended that all prosecution witnesses had been duly summoned to the applicant's trial. They submitted court summonses notifying eleven witnesses about the hearings of 3, 16 and 29 April 2009 and also summonses notifying six of them about the hearing of 13 May 2009. The Government submitted that the trial court took due note of the declarations by eight witnesses about their inability to attend the applicant's trial for various reasons. Moreover, these declarations, which had been certified by a notary in Kazakhstan and were thus considered as documents having a legal value in Armenia, contained their requests to admit their pre-trial statements. The Government further submitted that the pre-trial statements of the absent witnesses were not the sole and decisive evidence against the applicant. In addition to their evidence, the applicant's conviction was based on the judgment of Kostanay Regional Court in respect of B.M., the results of forensic examinations and investigative activities, the records of questioning of experts which were read out in court and the trial statement of the victim's legal heir.

(b) The Court's assessment

(i) General principles

44. 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).

45. 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).

46. 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.

47. 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).

(ii) Application of these principles to the present case

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

48. The Court notes that the applicant was convicted by the courts in Armenia of murder committed on the territory of Kazakhstan, where the offence was investigated without the participation of the applicant. The murder had been committed in a public place during an event in the presence of a number of individuals. These individuals, namely Kh.H., K.H., G.T., O.D., V.H. and G.A., when questioned during the criminal proceedings in Kazakhstan, had pointed to the applicant as the person who, together with B.M., had stabbed the victim. The rest of the eyewitnesses, namely A.O., A.G., V.K., L.T. and E.B., who were also questioned by the Kazakh investigative authorities, had described the events without indicating the applicant's name as the alleged perpetrator while L.T. had recognised him when shown his picture (see paragraph 7 above). The Court further notes that none of these eleven witnesses attended the applicant's trial.

49. The Court observes that no reasons were provided by the trial court for admitting the evidence of absent witnesses, while the justification relied on by the Court of Appeal for not securing their attendance was that they had been properly summoned by the trial court but had stated their inability to attend due to financial, family and work issues (see paragraph 26 above). However, the Court is not convinced that this could be considered a good reason justifying the failure to have these witnesses examined and for admitting their evidence. Notably, the fact that the domestic courts were

unable to locate the witness concerned or the fact that a witness was absent from the country in which the proceedings were conducted was found not to be sufficient in itself to satisfy the requirements of Article 6 § 3 (d), which require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (see *Gabrielyan v. Armenia*, no. 8088/05, § 81, 10 April 2012; *Lučić v. Croatia*, no. 5699/11, § 79, 27 February 2014). Such measures form part of the diligence which the Contracting States have to exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Gabrielyan*, cited above, § 81, with further references). Otherwise, the witness's absence is imputable to the domestic authorities (see *Tseber v. the Czech Republic*, no. 46203/08, § 48, 22 November 2012, and *Lučić*, cited above, § 79).

50. The Court accepts that the trial court made certain efforts to secure the attendance of the witnesses. Thus, according to postal receipts submitted by the Government, the eleven witnesses questioned during the investigation conducted by the Kazakh authorities were summoned to at least three hearings before the trial court. However, only witnesses L.T., O.D. and Kh.H received one or more of their summonses. The Court notes that eight out of the eleven witnesses submitted to the trial court written declarations certified by a notary in Kazakhstan stating various reasons for their inability to attend the trial and requesting the courts to accept their statements made during the investigation. In particular, witnesses V.H. and E.B. stated that they were unable to attend the trial due to lack of financial means; witness O.D. referred to family issues while witnesses A.G., G.T., V.K., L.T. and K.H. stated that they could not appear because of work. In addition to work issues, witnesses L.T. and K.H. also referred to the lack of financial means. It is not entirely clear how some of the witnesses, who had not received their summonses, were notified about the applicant's trial so that they submitted the relevant declarations. In any event, the Court takes note of the fact that at least eight witnesses were aware of the applicant's trial in Armenia while witness Kh.H., having received his summons, had neither attended the trial nor submitted a declaration similar to the others.

51. The Court is not persuaded that all reasonable efforts can be said to have been made to secure the attendance of witnesses Kh.H., K.H., G.T., O.D., V.H., G.A., A.O., A.G., V.K., L.T. and E.B. The trial court could have resorted to international legal assistance in accordance with the Minsk Convention of 22 January 1993 (see paragraph 37 above) to which both Armenia and Kazakhstan are parties. Furthermore, the courts in Armenia readily accepted the reasons advanced in the declarations submitted by eight witnesses, namely that they were unable to attend the applicant's trial due to lack of financial means, family or work, without even considering the possibility of reimbursing the costs of their travel and subsistence which possibility existed under the above-mentioned Minsk Convention (ibid.). Thus, it cannot be said that there were good reasons for the failure to have

witnesses Kh.H., K.H., G.T., O.D., V.H., G.A., A.O., A.G., V.K., L.T. and E.B. examined. However, the absence of a good reason for their non-attendance 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).

(β) Whether the evidence of the absent witness was "sole or decisive"

52. As to the second stage of the test, the Court notes that the trial court explicitly referred to the evidence of the eleven absent witnesses when substantiating the applicant's guilt (see paragraph 24 above). It is not in doubt that, as pointed out by the Government, this evidence did not constitute the only item of evidence on which the trial court relied in its judgment (ibid.). The Court therefore needs to determine whether the evidence produced by the absent witnesses was "decisive" for the applicant's conviction (see *Schatschaschwili*, cited above, § 123 and *Al-Khawaja and Tahery*, cited above, § 131). In view of the fact that the domestic courts did not express their position on this issue, the Court must make its own assessment of the weight of the evidence given by these witnesses, having regard to the additional incriminating evidence available (see *Schatschaschwili*, cited above, § 143; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07, 32786/10 and 34278/10, § 88, 12 May 2016).

53. The Court observes in this regard that the additional incriminating evidence relied on by the trial court when convicting the applicant included the statement of the victim's legal heir before it, the judgment of 29 May 2006 of Kostanay Regional Court in respect of the applicant's co-offender, the statements made by forensic experts during the latter's trial in Kazakhstan, the results of forensic examinations, the records of various investigative activities conducted in Kazakhstan and the video recordings of the event. The Court, having regard to these elements of evidence, cannot but note that witnesses Kh.H., K.H., G.T., O.D., V.H., G.A., A.O., A.G., V.K., L.T. and E.B were the only eyewitnesses of the offence whereas the victim's legal heir, although examined at the applicant's trial, had not personally witnessed the offence. The other evidence available was not conclusive as to the fact that it was indeed the applicant who had stabbed S.M. The Court therefore considers that the evidence of the absent witnesses was "decisive" for the applicant's conviction.

(γ) Whether there were sufficient "counterbalancing factors"

54. 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.

55. The Court observes that the applicant had no opportunity to examine the witnesses in question at any stage of the proceedings. It is true that the applicant did not participate in the criminal proceedings against him in Kazakhstan for reasons not attributable to the authorities. He therefore did not have the opportunity to cross-examine those witnesses either at the pre-trial stage when they made their statements or at later stages of the proceedings in Kazakhstan. The Court notes, however, that the applicant was eventually deprived of the possibility of examining those witnesses during the criminal proceedings against him in Armenia, including at his trial. The Court further notes that no procedural measures were taken to compensate for the lack of opportunity to cross-examine the witnesses at the trial. Furthermore, the trial court did not assess the credibility of the absent witnesses and the reliability of their statements in a careful manner and merely listed them as evidence substantiating the applicant's guilt (see paragraph 24 above).

56. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was unreasonably restricted in his right to examine witnesses whose testimony played a decisive role in securing his conviction.

57. Accordingly, there has been a violation of Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention in this respect.

2. *The refusal by the trial court to examine the video recordings*

(a) The parties' submissions

58. The applicant submitted that two video recordings of the event, which were not examined by the trial court, were relied on in its judgment as evidence substantiating his guilt. The trial court had refused to examine those recordings, despite the specific request of the defence in view of the fact that their examination could have contributed to the establishment of the facts of the case, including those present at the event and the applicant's outerwear on that day.

59. The Government contended that the non-examination of the video recordings did not affect the fairness of the applicant's trial. The facts that the applicant sought to have established had already been established by the Kostanay Regional Court in the judgment of 29 May 2006 which, in accordance with the Minsk and Chişinău Conventions, was an official document having evidentiary force in Armenia.

(b) The Court's assessment

60. The Court reiterates that the concept of a fair hearing implies, *inter alia*, the right to an adversarial trial which means, in a criminal case, that

both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, § 67, Series A no. 211). In this respect, the Court notes that it is possible that a procedural situation which does not place a party at any disadvantage vis-à-vis his or her opponent still represents a violation of the right to adversarial proceedings if the party concerned did not have an opportunity to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (see *Krčmář and Others v. the Czech Republic*, no. 35376/97, §§ 38-46, 3 March 2000 and *Gregačević v. Croatia*, no. 58331/09, § 50, 10 July 2012).

61. The Court observes that in its judgment the trial court listed the two video recordings in question among other evidence substantiating the applicant's guilt in the offence (see paragraph 24 above) without any further reasoning which would enable the Court to determine the evidentiary value of this piece of evidence. The Court further observes that the defence requested those recordings to be examined, claiming that this would have assisted the trial court in determining certain facts which, in its opinion, could have influenced the trial court's decision.

62. In the absence of any reasoning by the domestic courts with regard to the evidentiary value of the video recordings, the Court is not willing to speculate on the degree of influence the recordings had on the trial court's decision. Nevertheless, the Court notes that the video recordings in question had been filmed in the café on the day of the events and they were admitted in material evidence against the applicant without having been examined by the trial court in the course of the proceedings, which fact deprived the defence of the opportunity to put forward arguments in relation to them.

63. The Government argued that the facts sought to be allegedly established by the examination of the recordings had already been established in the judgment of the Kostanay Regional Court of 29 May 2006. The Court observes, however, that this judgment concerned the conviction of the applicant's co-offender based on the assessment of the evidence, including the video recordings at issue, by the trial court in Kazakhstan. The Court further observes that there is nothing in the case file to suggest that there was any new evidence gathered by the Armenian investigative authorities in addition to the evidence transmitted to them by the Kazakh authorities that had conducted the investigation (see paragraphs 13, 14, 15 and 16 above). Nevertheless, the Court finds that the non-examination of the video recordings by the Armenian trial court in order to make its own assessment of this evidence was not in line with the requirements of adversarial proceedings under Article 6 § 1 of the Convention, given that the defence was eventually deprived of any possibility to comment on this piece of evidence.

64. Accordingly, there has been a violation of Article 6 § 1 of the Convention in this respect also.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

67. The Government submitted that the finding of a violation would constitute sufficient just satisfaction. In any event, the applicant's claims were excessive.

68. The Court accepts that the applicant has suffered non-pecuniary damage, which is not sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 3,100 in respect of non-pecuniary damage.

69. Furthermore, 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).

70. 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 35 and 36 above). The Court is in any event of the

view that the most appropriate form of redress in cases where it finds that a trial was held in breach of the fair trial guarantees of Article 6 of the Convention 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, *mutatis mutandis*, *Lungoci*, cited above, § 56).

B. Costs and expenses

71. The applicant did not submit any claims under this head.

C. Default interest

72. 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* that there has been a violation of Article 6 § 1 of the Convention as regards the non-examination of video recordings;

4. *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, EUR 3,100 (three thousand one hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into Armenian drams at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 27 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Mirjana Lazarova Trajkovska
President