

ЗАГАЛЬНА ТЕОРІЯ ДЕРЖАВИ І ПРАВА

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THE RIGHT TO EXAMINE WITNESSES UNDER ARTICLE 6 §§ 1 AND 3 (D) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The article is devoted to the current case-law of the European Court of Human Rights regarding the right to examine a witness as a guarantee of the right to a fair trial under Article 6 of the European Convention of Human Rights. In this regard, the principles developed by the European Court of Human Rights on the right to call witnesses for the defence, the right to examine (or have examined) the prosecution witnesses are clarified. The article further deals with the issue of, reasonable efforts that should be taken by the domestic authorities in securing attendance of a witness, including the anonymous witnesses and witnesses in sexual abuse cases.

It is postulated that the use as evidence of statements obtained at the stage of a police inquiry and investigation is not in itself inconsistent with Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him – either when that witness is making his statements or at a later stage of the proceedings.

The article further deals with the three-step compliance test under Article 6 of the Convention as regards the witnesses available at the pre-trial stage but absent from the subsequent stages of the criminal proceedings.

It is emphasised that in cases involving anonymous witnesses, it is important to balance between fair trial in the interests of the defence and the interests of anonymous witnesses regarding their life, liberty, security or personal situation.

In sexual abuse cases, attention has been drawn to the need of taking into account, on the one hand, the right of a minor victim for privacy, and on the other – an adequate and effective exercise of the rights of the defence.

Keywords: the right to examine or have examined witnesses, case-law of the European Court of Human Rights.

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Article 6 § 3 (d) encompass two different rights: 1) the right to call witnesses for the defence; 2) the right to examine, or have examined, prosecution witnesses.

Three preliminary observations. The term «witness» in this provision has a fully autonomous meaning. It includes, aside from persons called to give evidence at trial; authors of statements recorded in pre-trial proceedings and read out in court; co-accused persons; victims; persons having specific status, such as experts [25; 29; 17; 12; 16].

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Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence [3].

The possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial [24].

The right to call witnesses for the defence. This right does not entail the attendance and examination of every witness on the accused's behalf, but only «under the same conditions as witnesses against him».

The relevant principles in this regard were summarised in *Perna v. Italy*:

«The Court observes (...) that the admissibility of evidence is primarily a matter for regulation by national law. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (...). In particular, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce (...). It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth» [20].

However, the underlying principle is the principle of equality of arms. It implies that the accused must be «afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent», as the Court stated in *Popov v. Russia* [21].

In *Dorokhov v. Russia* [11] the Court added that in respect of witnesses on behalf of the accused, «only exceptional circumstances could lead the Court to conclude that a refusal to hear such witnesses violated Article 6 of the Convention» [6].

In the recent Chamber judgment *Murtazaliyeva v. Russia* [18] the Court confirmed the before-mentioned principles. The main facts of the case are as follows:

In 2004 the flat of the applicant, shared with two other women, was put under secret police surveillance. She was subsequently arrested, and a criminal investigation was opened. Her flat was searched, and evidence was seized indicating that she had been planning a terrorist attack. Eventually, she was convicted and sentenced to nine years' imprisonment. In her appeal she complained *inter alia* about the refusal of her request to summon a police officer as witness who had made a pre-trial statement confirming that he had established a relationship with her at the order of his superiors. The Supreme Court upheld her conviction and held that the police officer could not testify in court because he was on a work-related mission but that his pretrial statement had been read out in court with the consent of the defence.

Our Court, in examining whether the domestic proceedings had been conducted fairly, determined: – first, whether the accused's request was sufficiently reasoned and relevant to the subject matter of the accusation; – secondly, whether the trial court, by not securing the attendance of a certain witness, namely a police officer, breached the accused's right under Article 6 § 3 (d).

The Chamber held, by four votes to three, that the refusal of the domestic court to call witness for the defence did not affect the overall fairness of the trial. The three minority judges, in a joint dissenting opinion, expressed their view that the police officer obviously was an important witness, and that in such circumstances there was no obligation for the accused to give additional reasons why a certain witness should be summoned. The

standard test as defined in the *Perna* judgment would not fit in this situation, and such a rigorous test would jeopardise the overall fairness of criminal proceedings.

Meanwhile, the *Murtazaliyeva* case has been referred to the Grand Chamber, and we will see whether the existing principles are to be confirmed or amended.

The right to examine, or have examined, prosecution witnesses. The relevant principles are set out in the recent Grand Chamber judgment *Schatschaschwili v. Germany* [23], based on the previous judgment *Al-Khawaja and Tahery v. the United Kingdom* [3].

The *Schatschaschwili* case concerned the complaint by an applicant, convicted of aggravated robbery and extortion, who maintained that his trial had been unfair, as neither he nor his counsel had an opportunity at any stage of the proceedings to question the only direct witnesses. When summoned to testify at trial, the witnesses, who resided in Latvia, refused to attend, relying on medical certificates indicating that they were traumatised by the crime. Subsequently, the trial court again unsuccessfully attempted to obtain their attendance, proposing several options and requesting legal assistance from the Latvian authorities. Finally, the German court considered that there was insurmountable obstacles to hearing the two witnesses, and therefore ordered that the records of their interviews by the police and the investigating judge be read out at the trial.

The Grand Chamber found, by nine votes to eight, a violation of Article 6 of the Convention. It held that, in view of the importance of the statements of the only eyewitnesses, 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.

The *relevant principles* were summarised as follows. The use as evidence of statements obtained at the stage of a police inquiry and judicial investigation is not in itself inconsistent with Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him – either when that witness is making his statements or at a later stage of the proceedings.

The compatibility with Article 6 §§ 1 and 3 (d) of proceedings in which statements made by a witness, who had not been present and questioned at the trial, were used as evidence needs to be examined in three steps: 1) was there a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence? 2) was the evidence of the absent witness the sole or decisive basis for the defendant's conviction? 3) Were there sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair?

The absence of good reason for the non-attendance of a witness, although a very important factor, cannot of itself be conclusive of the unfairness of a trial. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness.

The Court established *further principles* relating to each of the three steps of the test:

1) Good reasons for the non-attendance of a witness at trial could be death or fear of retaliation, absence on health grounds or the witness's unreachability;

2) «Sole» evidence is to be understood as the only evidence. «Decisive» evidence must be narrowly interpreted as so significant or important «as is likely to be determinative of the outcome of the case»;

3) Counterbalancing factors to compensate for the non-attendance of a witness may be, *inter alia*, the cautious approach of domestic courts to untested evidence; the detailed reasoning as to why this evidence can be considered reliable; directions given to a jury;

the video recording of the absent witness's questioning at the investigation stage; the availability of corroborative evidence supporting the untested evidence; the possibility for the defence to put questions to the absent witness indirectly, for example in writing; the opportunity given to the accused or his lawyer to question the witness during the investigation stage; the possibility afforded to the accused to give his own version of the events and to cast doubt on the witness's credibility.

A recent Ukrainian case, in which these principles were applied, was *Palchik v. Ukraine* [19].

In 2002 criminal proceedings were instituted against the managing director of a private company on suspicion of having concluded fictitious contracts with four Ukrainian private companies to obtain export value added tax refunds. During the pre-trial investigation managers of the four companies admitted that the contracts had either been forged or fictitious and that no actual shipments of the goods had taken place. Between 2003 and 2004 the police tried on several occasions to bring these witnesses to court hearings on the case, however without success. The witnesses' pre-trial statements were therefore read out at a court hearing.

Before our Court, the applicant complained, in particular, that the witnesses whose statements had been used to convict him had not been examined at trial, and that five other witnesses had not been called at all. Because of the admission of the untested statements of one specific witness, the Court found a violation of Article 6. It held (1) that no good reasons for the non-attendance were convincingly shown, (2) that the witnesses' statements were «decisive», and (3) that not sufficient counterbalancing factors existed, in particular, the applicant did not have an opportunity to put questions to the witness at any stage in the proceedings.

However, concerning two other witnesses the applicant could confront them in the course of the investigation, which constituted an important counterbalancing factor. Therefore, no violation of Article 6 was found in this respect.

For further recent case-law examples see, *inter alia*, *Cafagna v. Italy*, *Daştan v. Turkey*, *Valdhuter v. Romania*, *Van Wesenbeeck v. Belgium*, *Chap Ltd v. Armenia*, and, concerning experts, *Constantinides v. Greece* [7; 8; 9; 10; 27; 28].

Reasonable efforts in securing attendance of a witness. The Contracting States have a duty to take positive steps to enable the accused to examine or have examined relevant witnesses. In this respect, they must do everything that is reasonable to secure the presence of the witness. These steps may differ depending on the ground for the non-attendance of a witness, and the authorities must inquire about the reasons for the absence of a witness.

If a witness is unreachable, the authorities must actively search for the witness and establish his whereabouts, if necessary with the help of the police. If a witness is absent from the country where the proceedings are conducted, the authorities must resort, whenever possible, to international legal assistance [13].

However, there is no obligation to the impossible. If the authorities displayed due diligence in their efforts to find and summon the witness, his unavailability as such does not make it necessary to discontinue the proceedings [4; 5; 14; 15].

If a witness is unable to testify before court due to illness, arrangements may be made to enable the witness to be examined at his home [6].

If a witness cannot be compelled to testify, for example a family member who might be put into a moral dilemma when confronted with the accused, the evidence could, in principle, be admitted in documentary form [26].

Anonymous witnesses. A slightly different situation, albeit to a certain extent similar, occurs when statements are made by anonymous witnesses. The Court summarised the relevant principles in the case of *Doorson v. the Netherlands* [12; 16] as follows.

The interests of witnesses relating to their life, liberty, security or personal situation need to be taken into consideration. Such interests are in principle protected by other, substantive provisions of the Convention. Therefore, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify. However, national authorities must adduce relevant and sufficient reasons to keep secret the identity of certain witnesses. Moreover, the handicaps caused to the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities. With this in mind, an accused should not be prevented from testing the anonymous witness's reliability. In addition, no conviction should be based either solely or to a decisive extent on anonymous statements.

The recent Chamber judgment *Van Wesenbeeck v. Belgium* [28] concerned a proactive investigation against the applicant and other suspects, on suspicion, *inter alia*, of drug trafficking and money laundering. This investigation involved special observation and infiltration methods. After indictment, the trial court convicted the applicant and sentenced him to ten years' imprisonment. He then complained that he had been unable to examine or to have examined the undercover officers.

The Court pointed out that it was an essential tool in the fight against organised crime to enable undercover police operatives to supply information anonymously. However, anonymous witness could only be used in exceptional circumstances. In the present case, the Court accepted that the safety of the undercover officers and the importance of anonymity with a view to their work on other cases had precluded their examination at trial. It found that the applicant had been able to challenge the evidence gathered through the intervention of the undercover officers and that there were adequate procedural safeguards to counterbalance the difficulties caused to the defence. Therefore, no violation of Article 6 was found.

Witnesses in sexual abuse cases. Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular, in cases involving a minor. In the assessment of whether the trial against the accused was fair, the right to respect for the private life of the alleged victim must be considered. Therefore, certain measures may be taken in order to protect the victim. However, such measures must be reconciled with an adequate and effective exercise of the rights of the defence [1; 2; 22].

The recent case of *Vronchenko v. Estonia* [20] concerned the conviction of the applicant for sexual abuse of a minor, his stepdaughter. He complained that he did not have an opportunity to question the alleged victim, on whose testimony during the pre-trial proceedings his conviction had been mainly based. The Court found a violation of Article 6.

It first stated that pursuant to psychological and psychiatric expert opinions it was not considered safe for the victim to be cross-examined at the trial, even with the use of remote examination. It therefore accepted that a good reason for the non-attendance of the witness existed. Secondly, the Court held that her testimony constituted «decisive» evidence. As to the third consideration, the counterbalancing measures, the Court had no doubts that the domestic judicial authorities acted in the best interests of the child in declining to summon the presumed victim. It took into account that the video recording of the victim's statements in the investigation was played at the court hearing. However, having regard to the importance of her testimony, the Court considered the measures insufficient to secure the applicant's rights of defence because he was never given an opportunity to have questions put to the victim. Lastly, there was no strong corroborative evidence supporting the victim's statements.

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ПРАВО ДОПИТУВАТИ СВДКІВ ВІДПОВІДНО ДО П. 1 ТА П. 3 (D) СТАТТІ 6 КОНВЕНЦІЇ ПРО ЗАХИСТ ПРАВ ЛЮДИНИ ТА ОСНОВОПОЛОЖНИХ СВОБОД

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У поданій в авторській редакції статті проаналізовано сучасну прецедентну практику Європейського суду з прав людини щодо права на допит свідка як гарантії права на справедливий суд. Звернуто увагу на автономне значення поняття «свідок». Продемонстровано на прикладі справи Перна проти Італії принципи та позицію Європейського суду з прав людини щодо права на допит свідка сторони захисту, а також звернуто увагу на можливість підтвердження або зміни підходу ЄСПЛ щодо допиту свідка сторони захисту у справі Муртазалієва проти Росії, яка передана на розгляд Великої Палати.

Право на допит свідків обвинувачення висвітлено у зв'язку з принципами та позицією Європейського суду з прав людини у справах Щаташвілі проти Німеччини та Аль-Хавая проти Сполученого Королівства. У зв'язку з цим констатовано, що використання показів свідків обвинувачення на досудовому розслідуванні як таке не суперечить статті 6, якщо особа має право на захист та можливість оскаржити та поставити безпосередні питання свідкові обвинувачення на більш пізніх стадіях судового розгляду.

Охарактеризовано значення та зміст використання покровоного тесту на відповідність статті 6 Конвенції допиту свідка на досудовому розслідуванні та його подальшої

неможливості присутності та допиту на судовому процесі. Такий покроковий тест складається із трьох елементів та передбачає послідовну відповідь на такі запитання: 1) чи існувала вагома причина для неявки свідків до суду? 2) чи були показання відсутніх свідків єдиною або вирішальною підставою для визнання заявника винним? 3) чи існували достатні врівноважувальні чинники для компенсації невігідного становища захисту під час судового розгляду?

Розглянуто сформовані Європейським судом з прав людини позиції щодо позитивних зобов'язань держави вживати розумних зусиль, що спрямовані на забезпечення присутності свідків. Звернуто увагу на те, що якщо органи влади продемонстрували належну обачність у своїх зусиллях щодо пошуку та виклику свідка, його відсутність як така не призводить до необхідності припинення розгляду справи.

Висвітлено підходи та позиції Європейського суду з прав людини, сформовані у справі Доорсон проти Нідерландів, щодо показів анонімних свідків. У зв'язку з цим важливим є балансування між справедливим судовим розглядом в інтересах сторони захисту та інтересами анонімних свідків щодо їх життя, свободи та безпеки. Проте органи держави повинні навести відповідні та достатні аргументи щодо збереження анонімності певного свідка. Однак засудження не може ґрунтуватися виключно та вирішальною мірою на анонімних показах.

Розглянуто проблемні аспекти права на допит свідка у справах про сексуальні злочини, зокрема на прикладі справи Вронченко проти Естонії, та звернуто увагу на необхідність враховувати, з однієї сторони, право неповнолітнього потерпілого на приватність, а з іншої – на адекватність та ефективність використання можливостей захисту.

Ключові слова: право допитувати свідків, прецедент не право Європейського суду з прав людини.

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