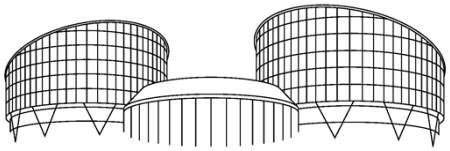

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SÜLEYMAN v. TURKEY

(Application no. 59453/10)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Obtain attendance of witnesses • Examination of witnesses • Anonymity and absence in person before the trial court of eyewitness, constituting a particularly serious restriction in ability to test reliability of their evidence • No good reason to keep secret the identity of the witness, with indications that it was known • No good reason for non-attendance in person of the only direct eyewitness to the shooting at trial and no positive steps taken by domestic court to ensure examination in person • Evidence of absent witness decisive for conviction • Existence of a video recording of witness statements but no possibility to observe the credibility and reliability of witness under questioning • Procedural safeguards incommensurate with nature of complaints and seriousness of life imprisonment

STRASBOURG

17 November 2020

FINAL

17/02/2021

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

In the case of Süleyman v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Aleš Pejchal,
Valeriu Griţco,
Egidijus Kūris,
Carlo Ranzoni,
Arnfinn Bårdsen,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 59453/10) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Hakan Süleyman ("the applicant"), on 6 August 2010;

the decision to give notice to the Turkish Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 13 October 2020,

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

INTRODUCTION

1. The application concerns the alleged unfairness of the criminal proceedings against the applicant in so far it concerned his conviction for the murder of M.Ü., owing to his alleged inability to examine an anonymous witness as required by Article 6 § 3 (d) of the Convention.

THE FACTS

2. Between 14 May 2005 and 30 January 2006, the applicant was alleged to have been involved in various criminal acts, which related to, *inter alia*, murder; robbery; false imprisonment; and inflicting bodily harm (see the bill of indictment in paragraph 14 for further details).

3. In a separate incident, which took place on 30 August 2005 and was the subject of a different set of criminal proceedings, the applicant went to the disco of the Black Sea Hotel in Arsin, Trabzon, together with one of his friends. When the bodyguards found guns on them after searching their persons, they warned them that they would not be allowed into the disco with weapons. Subsequently, a scuffle broke out and the applicant left the hotel with his friend. However, a couple of hours later the applicant went back to the hotel with three other friends. They fired weapons at the hotel, damaging property. The applicant was tried and found guilty in respect of

those acts by the Trabzon Criminal Court of General Jurisdiction at first instance; however, the parties did not submit to it any documents regarding the final outcome of those criminal proceedings.

4. At an unspecified time on 30 January 2006 the applicant falsely imprisoned a national football player, F.T., and asked for a sum of money from him. At an unspecified time on the night of the same day the car of a football player, G.K., his wife's boutique and at 1 a.m. the car of another football player, F.T., were shot at. Also at 1 a.m. a certain Y.Ö. was shot and injured in front of Liman Restaurant in Trabzon. Subsequently, the applicant was indicted for those acts.

5. On 31 January 2006 shortly after midnight, M.Ü., a receptionist at the Black Sea Hotel, was killed by a gunshot to the left part of his chest in front of the hotel. Gendarmerie officers arrived at the hotel soon after the incident and took statements from the individuals working at the hotel. The scene-of-incident report drawn up by the gendarmerie officers at 8 a.m. on the same day indicated that one deformed shell casing had been found and taken from the crime scene. It had been dark when M.Ü. had been shot, with low visibility of approximately 1 to 2 m. Moreover, a certain officer made a telephone call with his mobile telephone in order to determine the base station from which it received signals.

6. The gendarmerie drew up another report on 1 February 2006 containing the list of persons present at the hotel at the time of the incident along with their full names, addresses, telephone numbers and duties at the hotel. None of the individuals, except the one later designated as X, had seen who had carried out the shooting that had killed M.Ü.

7. On 2 February 2006 the Arsin public prosecutor heard evidence from S.A. (who would later be designated as "witness X") in his capacity as a witness. He stated that he had been working as a security guard at the hotel's disco and that when he had gone outside after most of the customers had left, he had heard a gunshot and seen that a person had fired a gunshot from a dark-coloured vehicle, killing M.Ü. The witness went on to state that when the perpetrator, who had been holding the weapon in his hand and sitting in the front passenger seat of the vehicle, had turned his back towards the side, he had been able to see the face of the perpetrator because the hotel lights as well as the streetlights had been on. Following this, the vehicle had quickly driven off from the scene of the incident. Witness X also stated that he had not told the hotel staff about what he had seen because he had been afraid. As for the identity of the perpetrator, he told the public prosecutor that he had not known it initially, but when he had seen the applicant's photos in the newspapers he had become sure that it had been he who had killed M.Ü. When the public prosecutor had shown him a photo of the applicant taken when he had previously been in prison, witness X had identified him as the perpetrator.

8. According to a report issued by the criminal laboratory at the Samsun Security Directorate on 2 February 2006, the deformed shell casing found at the hotel after the killing of M.Ü. had been fired from the same weapon as that used in two different shootings the applicant was suspected of having carried out – the shootings on 30 January 2006 at the cars of G.K. and F.T.

9. On 3 February 2006 the Arsin Magistrates' Court issued an arrest warrant in respect of the applicant, finding that there was a strong suspicion that he had been involved in the offences of murder with a weapon and the unlawful possession thereof.

10. On 12 February 2006 at 9 p.m. the applicant was arrested by the police in Istanbul in connection with, *inter alia*, his involvement in the murder of M.Ü.

11. On 13 February 2006 at 3.30 p.m. the applicant was interviewed by the police in the presence of his lawyer; he exercised his right to remain silent. On the same day, the applicant was also brought before the public prosecutor and the investigating judge respectively, where in the presence of his lawyer he continued exercising his right to remain silent. When his questioning was over, the Arsin Magistrates' Court decided to remand the applicant in custody in relation to the murder of M.Ü.

12. The network provider Turkcell informed the Arsin public prosecutor in a letter dated 14 February 2006 that the telephone call made by one of the officers had been made through a base station called "TRAOTELNAKIS".

13. The police drew up a report dated 17 February 2006 on the basis of the mobile telephone records obtained from Turkcell, indicating the location of the applicant's mobile telephone during the night of 29 January 2006 and the morning of 30 January 2006. Thus, the mobile phone mast records revealed that his mobile telephone had received signals from the following base stations: Karşıyaka district (8.12 p.m.); Karşıyaka district (0.03 a.m.); Trabzon Migros (centre of the city) (2.30 a.m.); Trabzon Pelitli (2.38 a.m.); Trabzon Cape of Yomra (2.43 a.m.). The applicant's lawyer maintained that the gendarmerie officers had also made a mobile call from the Black Sea Hotel with a view to determining the mobile telephone mast covering the hotel. The response given by Turkcell indicated that the base station covering the hotel was "Trabzon Nakış Otel". The applicant's mobile telephone was not amongst those that had made the sixty-eight telephone calls made from that base station at around that time.

14. On 31 May 2006 the Erzurum public prosecutor filed a bill of indictment against the applicant and two other individuals with the Second Division of the Erzurum Assize Court, which had special jurisdiction to try a number of aggravated crimes enumerated in Article 250 § 1 of the Code of Criminal Procedure in force at the material time (hereinafter referred to as "the Erzurum Specially Authorised Assize Court" or "the trial court"). The public prosecutor accused the applicant of the following offences: a) murder of M.Ü. on 30 January 2006; (b) attempted murder of Y.Ö.; c) aggravated

robbery of F.T.; d) attempted robbery of N.B. and G.K.; e) false imprisonment of F.T.; f) establishing or directing an armed organisation for the purpose of criminal activity; g) eight counts of damaging property; h) four counts of inflicting bodily harm with a weapon; i) ten counts of intentionally endangering public security (or breach of the peace) by using firearms; and j) two counts of unlawful possession of firearms.

15. On 11 July 2006 the Erzurum Specially Authorised Assize Court held the first hearing, at which it heard evidence from the applicant, the two co-defendants and the victim's father and brothers as intervening parties (*müdahil*). According to the transcript, the applicant submitted an eight-page-long submission in his defence and his lawyer argued that none of the hotel staff who had been present at the time of shooting had identified the applicant. As a result of that the police had suddenly "created" witness X, who had allegedly seen the applicant killing M.Ü. It would have been impossible for witness X to see the perpetrator because according to the scene-of-incident report drawn up by the gendarmerie it had been dark with visibility of from 1 to 2 m. Thus, the lawyer was of the opinion that the witnesses should give evidence before the trial court. Lastly, he asked the court to obtain an expert report with a view to determining whether the gun or guns used in the previous incidents in which the applicant had been involved had been the same one as that used in the shooting of M.Ü.

16. The lawyer of the defendant E.K. submitted that witness X had been identified as S.A. in the report compiled by the gendarmerie, arguing that he had been specifically mentioned in the list of people working at the Black Sea Hotel contained in the gendarmerie's report dated 1 February 2006. He further applied to have the trial court give him the right to put questions to witness X when his statement was taken. The public prosecutor requested that "the anonymous witness" give evidence in the absence of the parties, as examining him in their presence might constitute a serious danger to him.

17. At the end of the hearing, the trial court directed that the statements of the witnesses and the complainants be taken on commission by courts located at their places of residences on the grounds that it would be difficult for them to come to the trial court as they lived in districts of Trabzon. As for witness X, the trial court decided, in accordance with Article 58 § 2 and 3 of the Code of Criminal Procedure to send letters of request to the Trabzon Assize Court so that the latter could take his statement. Lastly, it also ordered that an expert report from the Istanbul branch of the Forensic Medicine Institute be obtained to determine from which guns the bullets or the shell casings had been fired and to establish whether there was a link between the gun used in the shooting and the guns used in the previous incidents in which the applicant was suspected of having taken part.

18. On 16 September 2009, in response to the letter of request from the trial court the President of the Trabzon Assize Court heard evidence from witness X in camera. In substance, witness X confirmed the statements he

had previously made to the gendarmerie officers and again identified the applicant as the person who had killed M.Ü. through one photograph. According to the transcript of that hearing, a police officer was also present and recorded these statements by audiovisual means.

19. At the hearing of 7 September 2006 the trial court read out the record of witness X's testimony in the presence of the applicant and his lawyer. The applicant denied the accusations against him, maintaining that he had not killed M.Ü. His lawyer argued that the account of witness X was in clear contradiction with the official account of the shooting and submitted that his identity should be revealed. Submitting that the confrontation carried out by the gendarmerie had clearly been insufficient, he pointed out that the trial would be inconsistent with the requirements of the right to a fair trial if the trial court considered taking such evidence into account. The lawyer further applied to have all the witnesses, including witness X, give evidence in person before the trial court so that the defence could exercise its right to put questions to them. He further argued that the reports obtained from Turkcell clearly showed that at the time of the shooting the applicant had been in Yomra Burnu, a place which was approximately 30 km away from the scene of the incident.

20. The lawyer of the co-defendant E.K. pointed out that the statements of another witness, A.K., which had also been taken on commission had been wrongly recorded in the transcript and asked the trial court to send another letter of request to the same court with a view to clarifying that point. He also argued that the official reports had clearly revealed the identity of witness X and that there was no reason to keep it secret. He also applied to have all witnesses summoned before the trial court.

21. The public prosecutor submitted that he had no comments regarding the submissions of the lawyers, adding, however, that the identity of witness X should not be disclosed.

22. At the end of the hearing, the trial court stated that it had rejected, using its discretion, the applications related to the disclosure of the identity of witness X and his giving evidence before it. It decided to reconsider hearing evidence from the other witnesses and the complainants in person following the delivery of the Forensic Medicine Institute's report. Lastly, the trial court went on to hold that there was no need for the court in his place of residence to re-examine A.K.

23. At the hearing held on 31 October 2006 the applicant's lawyer reapplied to have the witnesses examined in person and before the trial court, asking also for the right to put questions to them. E.K.'s lawyer stated that the call records clearly indicated that at the time of shooting the applicant, E.K. and the other co-defendant had called each other, meaning that at the time of the incident they had not been together. The trial court reiterated its decision to consider taking evidence from witnesses in person after having received the Forensic Medicine Institute's report.

24. On 4 December 2006 the Trabzon Assize Court, acting on letters of request sent by the trial court, heard evidence from F.T. According to the transcript of that hearing, the court had called the applicant's lawyer, as his office was located in Trabzon, and invited him to attend the hearing where he had been able put questions to F.T.

25. The Physics and Ballistics Department attached to the Forensic Medicine Institute prepared a report dated 1 March 2007 concerning the ammunition, finding that the marks on the deformed shell casing found at the scene of the killing of M.Ü. were not sufficient to carry out a comparative analysis with the pistol previously used by the applicant in other incidents. Moreover, it also held, in contrast to the findings of the Samsun police criminal laboratory's report, that the bullets in the two previous incidents the applicant was alleged to have been involved in had not been fired from his pistol.

26. At the hearing held on 3 April 2007 the applicant's lawyer stated that the testimonies of witnesses and victims should not be taken on commission. Instead they should appear before the trial court and he should be given the right to put questions to them if necessary. The trial court did not respond to those applications.

27. At a hearing held on 12 July 2007 the applicant stated that it would be necessary to hear evidence from witness X before the trial court if the latter had to "punish" him for the killing of M.Ü. The trial court did not respond to that submission.

28. At a hearing held on 16 October 2007 the applicant's lawyer invited the trial court to hear evidence from witness X in person, arguing that his identity had already become known to the public. He also asked the trial court to carry out an on-site inspection (*keşif*) to ascertain whether his statements corresponded to reality. E.K.'s lawyer submitted that the photograph on the basis of which witness X had identified the applicant as the perpetrator of the killing had no legal value as it had not been of the applicant. Another lawyer of E.K. also argued that there had been no decision to keep the identity of witness X secret and asked the court to secure his presence in person so that they would be able to put questions to him. He also pointed out that the image file alleged to have been of the applicant and contained in the case file and those that had appeared in the newspapers were different. As a result, he did not accept the identification made by witness X. The trial court did not respond to the applications related to witness X but held that large-size colour photographs of the applicant be taken both in profile and face-on.

29. At the hearing held on 11 December 2007 the trial court received the photographs of the applicant. The applicant's lawyer submitted that the photographs used in the identification and those received by the court bore no resemblance whatsoever. However, the trial court did take a decision in

respect of the applicant's lawyer's request regarding the newly received photographs.

30. On 7 February 2008 the applicant's lawyer submitted his defence submissions on the merits of the case and stated, in respect of the murder of M.Ü., that the statements made by witness X were in contradiction with the facts of the incident, as he had claimed to have seen the applicant from 25-30 m whereas the visibility at that night was around 1-2 m as certified by the gendarmerie report. For that reason, his application for an on-site inspection should have been accepted by the trial court. Likewise, his application that witness X give evidence in person should also have been allowed given that his identity had long been revealed. Thus, the procedural provisions had been breached. Lastly, the lawyer argued that the reports obtained from mobile operators confirmed that the applicant had not been at the scene of the shooting when it had taken place. Moreover, the report issued by the Forensic Medicine Institute also supported their defence.

31. At the end of that hearing, the trial court found the applicant guilty of, *inter alia*, the murder of M.Ü. and sentenced him to life imprisonment. While convicting him for that offence, the trial court relied, *inter alia*, on the testimony of X and the mobile telephone records indicating the times and base stations from which the applicant's mobile telephone had received signals on the night of 29 January 2006 and the morning of 30 January 2006. The trial court went on to accept that the murder had taken place some time between 2 a.m. and 2.30 a.m. while acknowledging that that was not certain. However, noting the base stations from which the applicant's mobile telephone had received signals (see paragraph 13) and the fact that his mobile telephone had been turned off between 0.03 a.m. and 2.30 a.m., the trial court concluded that the mobile telephone recordings had not showed that the applicant had not been at the scene of the incident. In fact, given the distance (approximately 20 km) between the scene of the incident and Trabzon city centre from where the applicant's mobile telephone had received a base-station signal at 2.30 a.m., it was possible that the applicant could have gone back to the city centre in the period between 2 a.m. and 2.30 a.m.

32. The trial court further held that in view of the nature of the incident, the scope of the accusations and the allegation that the shooting had been carried out within the context of a criminal association, it had not been found necessary to examine witness X at the trial or to have his full name written when his statements had been taken on commission by the Trabzon Assize Court. In contrast to that line of reasoning, however, the trial court indicated the true identity of witness X on page forty-two of its reasoned judgment, where it reproduced the gendarmerie's scene-of-incident report dated 30 January 2006.

33. The trial court furthermore found the applicant guilty of establishing or directing a criminal association under Article 220 § 1 and 3 of the

Criminal Code; aggravated robbery of F.T. (Article 149 of the Criminal Code); attempted robbery of G.K.; false imprisonment of F.T.; three counts of inflicting bodily harm with a weapon; and two counts of unlawful possession of firearms. It sentenced him to forty-one years and three months' imprisonment and a fine. In respect of the remaining offences, the trial court either acquitted the applicant or decided not to render a judgment given that the applicant had already been convicted of offences warranting more serious punishments.

34. On 20 April 2008 the applicant's lawyer lodged an appeal against the trial court's judgment, arguing, *inter alia*, that witness X should have given evidence before the trial court in person, that the trial court's failure to ensure that had violated the applicant's right to directly examine that witness and that the veracity of witness X's testimony could only be adjudicated upon by hearing him in person and that witness X should have be required to carry out the identification again and in line with the procedural rules.

35. On 12 February 2010 the Court of Cassation upheld the judgment in so far as it concerned the applicant's conviction for the murder of M.Ü.

36. While the applicant was serving his sentence, on 6 July 2015 the applicant's lawyer made an application for the reopening of the criminal proceedings against the applicant in so far as they concerned the murder of M.Ü., arguing that the use by the trial court of the statements made by witness X had been unlawful.

37. On 14 July 2015 the First Division of the Erzurum Assize Court dismissed the applicant's application. On 1 March 2016 the applicant's lawyer made another application for the reopening of the criminal proceedings against the applicant. The First Division of the Erzurum Assize Court decided to reopen the proceedings in respect of the applicant and E.K. in so far as they concerned the aggravated robbery of F.T. and dismissed the applicant's lawyer's requests regarding the remaining offences.

38. On 11 May 2017 the Second Division of the Erzurum Assize Court overturned that decision and later quashed the applicant's conviction for the aggravated robbery of F.T. It acquitted him, finding it established that the impugned offence had not been committed by the applicant.

RELEVANT LEGAL FRAMEWORK

39. Article 52 of the Code of Criminal Procedure entitled "Hearing evidence [from] witnesses" (*Tanıkların dinlenmesi*) reads as follows:

> "(1) Every witness shall give evidence separately and without the subsequent witnesses being present next [to him or her].
>
> (2) Up until the trial stage [*kovuşturma evresi*] witnesses may only be confronted with each other and the suspect only in cases concerning the determination of identity or in the event that delay would be prejudicial.

(3) Image and audio may be recorded in the course of witnesses giving evidence. However, such recordings are mandatory in the testimony of:

a) Minor victims;

b) Individuals who cannot be brought to a hearing and whose evidence is imperative for revealing the material fact[s].

(4) Audio and image recordings obtained by means of application of the third subsection shall only be used in criminal proceedings."

40. Article 58 of the Code of Criminal Procedure, in so far as relevant, provide as follows:

"...

(2) If disclosure of the [true] identity of the persons who are to be heard as witnesses, would constitute a grave danger to them or their next-of-kin [*yakınları*], the necessary precautions shall be taken to keep secret the identities' of [those persons]. A witness whose identity has been concealed is under a duty to explain on what grounds and by which means he or she came to know the events to which he or she testified. The personal information of the witness shall be retained by the public prosecutor, the judge or the court to keep his or her identity secret.

(3) In cases where hearing evidence from a witness in the presence of those who are present would constitute a grave danger to that witness and where such danger could not be averted in any other way or [it] would pose a danger in terms of revealing the material fact[s], the judge may examine the witness in the absence of those who have the right to be present. Audiovisual transmission shall be made in the course of witness evidence. The right to put questions [to the witness] is preserved.

...

(5) The provisions of the second, third and fourth subsections may only be applied in respect of offences committed within the framework of the activities of a[n] [criminal] association."

41. Article 201 of the same Code entitled "Posing questions directly" reads as follows:

"(1) The public prosecutor, defence counsel [*müdafi*], lawyer[s] taking part in the hearing in [his or her] capacity as a representative [*vekil*] may, in conformity with the order of the hearing, directly pose questions to the accused, intervening parties, witnesses, experts and the other individuals summoned to the hearing. The accused and intervening parties may also pose questions through the president of the court or the judge. The president of the court shall decide whether it is necessary to pose a [given] question if it has been objected to. If need be, those concerned may ask questions again.

(2) Judges comprising the bench in courts which sit as a bench may ask questions to the individuals specified in subsection (1)."

42. Article 209 of the same Code entitled "The documents and reports reading out of which is compulsory during a hearing", as in force at the material time, reads as follows:

"Reports concerning an accused's questioning by an appointed judge [*naip hakim*] or by [a judge or a court] acting pursuant to letters rogatory, reports containing the

statements of a witness who has been examined by an appointed judge [*naip*] or by [a judge or a court] acting pursuant to letters rogatory and the documents and other writings that are to be used as evidence such as the reports of on-site inspections and examinations [*muayene*], summaries of criminal records and documents containing information regarding the personal and financial situation of the accused shall be read out during a hearing.

A court may decide to read out the documents containing personal information of the accused and the victim in camera if they explicitly request [it]."

43. Article 215 of the same Code entitled "Asking [the parties'] submissions after hearing or reading out [of evidence]" reads as follows:

"Following the hearing of evidence of an accomplice, witness or expert or the reading out of any document, the intervening party [*katılan*] or [his or her] representative, the public prosecutor, the accused and [his or her] defence council shall be asked whether [they] have anything to say *vis-à-vis* that [evidence]."

44. Sections 10 and 18 of the Witness Protection Act (Law no. 5726, which entered into force on 5 July 2008) prescribes that all the decisions thereunder, including those of non-disclosure of the identity of a witness or his or her examination in the absence of the parties, shall be taken pursuant to principles of confidentiality.

THE LAW

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

45. The applicant complained that the fairness of the criminal proceedings against him had been tainted owing to his alleged inability to confront and question the only eyewitness to the shooting of M.Ü., namely witness X, in person as required by Article 6 §§ 1 and 3 (d) of the Convention, 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;

..."

A. Admissibility

46. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The Government

47. The Government maintained firstly that there had been good reasons to keep secret the identity of witness X because the trial court had decided that his identity should remain undisclosed to the defence in accordance with the relevant domestic legal provisions, namely paragraphs 2 and 3 of Article 58 of the Code of Criminal Procedure. As a result, only his initials and the fact that he had been present at the hotel during the shooting on 30 January 2006 had been set out in the trial court's reasoned judgment. The trial court also stated that it had decided not to disclose the true identity of the witness having regard to the nature of the incident, the scope of the accusations and the fact that the case related to an organisational offence, while at the same time noting that the identity of witness X had been in the report compiled by the gendarmerie officers, which had included the names of the hotel personnel who had been present at the time of the incident.

48. Secondly, whilst acknowledging that witness X had given evidence before the Trabzon Assize Court following the letters of request sent by the trial court (the Erzurum Specially Authorised Assize Court), the Government argued that that had been so because the witness had resided in Trabzon. Given that the distance between the provinces of Erzurum and Trabzon was 268 km and the land between the two provinces had the geographical characteristics of highland and rough terrain with consequent effects on the quality of the roads, the trial court had decided that witness X should be heard by a court situated in his place of residence.

49. Thirdly, the Government submitted that although it could be argued that the statements of witness X had been decisive within the meaning of the Court's case-law for the applicant's conviction, the case file included other evidence which had convinced the national courts that the applicant had committed the impugned killing. In fact, the national courts had established that the applicant's mobile telephone had received signals in the vicinity of the area where M.Ü. had been killed. The Government concluded that the trial court had convicted the applicant in the light of the statements made by X and the aforesaid signal information of his mobile telephone.

50. As for procedural safeguards capable of remedying the applicant's inability to confront and question witness X in person, the Government

submitted that according to the transcript of the in camera hearing of the Trabzon Assize Court, the statement of witness X before that court had been recorded audiovisually. However, neither the applicant nor his lawyer had attempted to obtain a copy of it or asked the trial court to play it during the trial. In their view, while the applicant had had the opportunity to raise his objections after examining the relevant recordings to which he had had the right of access, he had not availed himself of that possibility and had likewise failed to explain why he had not made use of that opportunity.

51. Moreover, relying on the Grand Chamber judgment in the case of *Murtazaliyeva v. Russia* ([GC], no. 36658/05, 18 December 2018), the Government further asserted that neither the applicant nor his lawyer had presented the trial court with reasons as to why examining witness X had been important for the defence.

52. The Government placed further emphasis on the fact that neither the applicant nor his lawyer had applied to ask any questions after the trial court had read out the evidence given by witness X at the hearing held on 7 September 2006, despite having been entitled to do so by virtue of the right conferred upon them under the relevant statutory provisions, notably Article 58 § 3 *in fine* of the Code of Criminal Procedure.

53. In so far as the applicant's allegation that witness X had identified him on the basis of photographs which had not been of him, the Government rejected that allegation, maintaining that he had been identified on the basis of certified photographs of him.

b. The applicant

54. The applicant first pointed out that the criminal proceedings before the specially authorised courts under the then Article 250 of the Code of Criminal Procedure had been marked with manipulation and fabricated evidence, "secret witnesses" being one of its infamous methods. As a result, he argued, Parliament had decided to close down all such courts by repealing the aforesaid provision of the Code of Criminal Procedure. In that connection, the applicant also pointed out that the four prosecutors and two judges involved in the case against him, including the presiding judges of the trial court, had later been detained and charged.

55. As to whether there had been good reasons for the absence of witness X from the trial, the applicant argued that the trial court had never examined the difficulties or the impossibilities in bringing him to the hearings and had not taken any alternative steps. In the same vein, the reasons relied on by the Government for the absence of witness X had not been given by the trial court. Furthermore, closeness of the cities was one of the considerations in the establishment of the geographical jurisdiction of the special assize courts. In any event, both cities had airports and the duration of a journey by car would have taken a maximum of four hours.

More importantly, many other witnesses and complainants had come to the trial and attended the hearings.

56. As regards the non-disclosure of witness X's identity, the applicant's lawyer submitted that no convincing rationale had been put forward by the Government that had obliged the trial court to keep his identity secret. In any event, his true identity had been revealed as early as the first session in the light of the gendarmerie report dated 1 February 2006, where all the information regarding his identity had been indicated. Yet, the trial court had decided to maintain the non-disclosure, preventing the defence from confronting and cross-examining him. Moreover, although his lawyer had applied at almost every hearing for the identity to be revealed, the trial court had rejected the requests in its reasoned judgment only with abstract words such as "the nature of the incident and charges".

57. With regard to the probative value of the evidence given by witness X, the applicant's lawyer had submitted that it had been the sole evidence, explaining that the mobile telephone records had not shown that the applicant had been at the scene of the incident at the time of the killing.

58. In so far as the identification made by witness X was concerned, the applicant pointed out that witness X had identified him as the perpetrator of the shooting on the basis of photographs that had not been of him. In any event, that identification had clearly been against domestic law, notably additional section 6 (16) of Law no. 2559 on the Duties and Powers of the Police, which prescribed that no identification could be made on the basis of a single photograph.

59. The applicant's lawyer further criticised the domestic courts for not inviting him to witness X's questioning in court, despite his office being in Trabzon and despite the fact that he had been duly summoned to the examination of another witness in the same set of criminal proceedings, namely F.T., which had also been carried out by the courts in Trabzon following the letters of request sent by the trial court.

60. As for the video recording of witness X's statements, the applicant pointed out that that recording had neither been given to him before, nor played during the trial. In fact, he had never even been informed of its existence.

2. The Court's assessment

a. General principles

61. The general principles with regard to right to obtain the attendance and examination of witnesses can be found in the Grand Chamber judgments of *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011) and *Schatschaschwili v. Germany* ([GC], no. 9154/10, § 100, ECHR 2015).

62. While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, 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 (see *Al-Khawaja and Tahery*, cited above, § 127, and *Sarkizov and Others v. Bulgaria*, nos. 37981/06 and 3 others, § 55, 17 April 2012).

63. However, the precise limitations on the defence's ability to challenge a witness in proceedings differ in the two cases. Thus absent witnesses present the particular problem that their accounts cannot be subjected to searching examination by defence counsel. However, their identities are known to the defence, which is therefore able to identify or investigate any motives they may have for lying (see *Ellis*, *Simms and Martin v. the United Kingdom* (dec.), nos. 46099/06 and 46699/06, § 74, 10 April 2012).

64. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility (see *Kostovski v. the Netherlands*, 20 November 1989, § 42, Series A no. 166).

65. In the case of a fully anonymous witness, where no details whatsoever are known as to the witness' identity or background, the defence faces the difficulty of being unable to put to the witness any reasons which the witness may have for lying. In this case, the extent of the disclosure regarding the anonymous witness has an impact on the extent of the handicap under which the defence is labouring (see *Ellis*, *Simms and Martin*, cited above, § 74).

66. Accordingly, in assessing the fairness of a trial involving anonymous witnesses called to give oral evidence before the court, this Court must examine, firstly, whether there are good reasons to keep secret the identity of the witness. Secondly, the Court must consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction. Thirdly, where a conviction is based solely or decisively on the evidence of anonymous witnesses or where such evidence carried significant weight in respect thereof (see *Schatschaschwili*, cited above, § 116), the Court must subject the proceedings to the most searching scrutiny. In view of this, the Court must be satisfied that there are sufficient counterbalancing factors,

including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, § 147, and *Pesukic v. Switzerland*, no. 25088/07, § 45, 6 December 2012). Obviously, if the anonymous witness was called to give oral evidence before a court other than the trial court, the Court will also assess whether there are good reasons for the non-attendance of the witness at the trial and admitting her or his evidence (see, *mutatis mutandis*, Al-*Khawaja and Tahery*, cited above, § 120, and *Seton v. the United Kingdom*, no. 55287/10, § 58, 31 March 2016).

b. Application of those principles to the instant case

67. The Court notes at the outset that the trial court decided at the hearing held on 11 July 2006 that the witnesses and victims would be heard by the courts located in their places of residence, while at the same time holding that the anonymous witness X would be examined in accordance with Article 58 § 2 and 3 of the Criminal Code (see paragraph 17), that is to say by a court in his place of residence and in the absence of the parties while keeping his true identity secret. Thus, it appears that the trial court, by keeping the identity of the witness secret and by asking the Trabzon Assize Court to hear him in camera and in the absence of the parties, effectively combined the concepts of absent and anonymous witnesses in witness X (compare *Scholer v. Germany no. 14212/10*, § 52, 18 December 2014 *in fine*). While it is true that the identity of witness X was known, he was formally anonymous and the defence had no further details about him or his background, so that the Court considers that he may be regarded essentially as an anonymous witness.

68. Therefore, the Court will address the following issues respectively: (i) whether there was a good reason justifying the concealment of the anonymous witness's identity; (ii) whether there was a good reason for his absence; (iii) whether the evidence given by him was the sole or decisive basis for the applicant's conviction or it was of significant weight for it; and (iv) whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured *vis-à-vis* the evidence given by witness X.

i. Whether there was a good reason to keep secret the identity of the witness

69. The Court observes that the trial court's interlocutory decision on 11 July 2006 indicated that witness X would be examined on the basis of Article 58 § 2 and 3 of the Code of Criminal Procedure. In practice, that decision appears to have meant that the identity of the witness would be concealed (Article 58 § 2) and that he would give evidence in the absence of the parties *via* an audiovisual link in accordance with Article 58 § 3 (see, for a similar situation *Papadakis v. the former Yugoslav Republic of*

Macedonia, no. 50254/07, § 90, 26 February 2013, and *Dončev and Burgov v. the former Yugoslav Republic of Macedonia*, no. 30265/09, § 51, 12 June 2014).

70. The Court notes that Article 58 § 2 of the Code of Criminal Procedure provided for the concealment of the true identity of the witness in cases where there was a "grave danger" to him or his next of kin. Nevertheless, when deciding to apply that provision at the first hearing, the trial court did not attempt to explain in any way, other than merely referring to the aforesaid legal provision, what constituted "grave danger" to the applicant or to his next-of-kin (see *Balta and Demir v. Turkey* no. 48628/12, § 46, 23 June 2015). Similarly, the Court observes that the president of the Trabzon Assize Court, who took evidence from witness X, also failed to explain – other than by stating that the witness had been examined on the basis of Article 58 § 2 and 3 of the Code of Criminal Procedure – the reasons on the basis of which he had deemed it necessary to keep his identity secret (ibid., § 45).

71. At this juncture, the Court notes that it has already held in cases against Turkey, albeit in the context of complaints related to Article 5 of the Convention, that the mere reproduction of the wording contained in the statutory provisions cannot be considered as sufficient reasoning to implement a protective measure which clearly lacked an individualised assessment taking account of the particular circumstances of a given case (see, among many other authorities, *Şık v. Turkey*, no. 53413/11, § 62, 8 July 2014). These considerations also hold true in the instant case in the light of the trial court's failure to explain the existence of the prerequisite element enabling it to keep secret the identity of witness X under Article 58 § 2 of the Code of Criminal Procedure.

72. This is all the more so given that at the same hearing (11 July 2006), the lawyer of another co-accused stated that they had in their possession the list drawn up by the gendarmerie officers containing the names of the hotel personnel who had been present at the hotel when the shooting had taken place, implying that the only one who had not testified and whose identity had not been disclosed, namely witness X, was known to them. Likewise, the applicant also submitted, both in his application form and his observations on the admissibility and the merits of the case, that the identity of witness X had been known to the parties from the beginning of the trial. Whilst that point appears to have been repeatedly brought to the attention of the trial court both by the applicant and the defence lawyers in the course of the proceedings, the trial court only implicitly responded to those submissions in its reasoned judgment by holding that the indication of the true identity of witness X or in his statements before the Trabzon Assize Court or hearing evidence from him before it had not been necessary having regard to the nature of the incident, the scope of the accusations and the fact that the case related to an organised crime offence (see *Van Mechelen and*

Others v. the Netherlands, 23 April 1997, § 60, *Reports of Judgments and Decisions* 1997-III).

73. Notwithstanding that and contrary to the Government's allegations that the reasoned judgment only included the initials of witness X, the Court observes that the trial court also referred to him by his full first name and surname on page forty-two of its reasoned judgment when listing the gendarmerie report dated 1 February 2006 as one of the pieces of evidence, the very document the defence relied on to contest the concealment of his identity throughout the proceedings. Thus, the Court cannot conclude that the trial court subjected this issue to a careful scrutiny commensurate with the guarantees of Article 6 of the Convention (see *Schatschaschwili*, cited above, § 122).

74. Crucially, it also transpires from the documents in the Court's possession – and the Government did not argue otherwise – that witness X had at no stage of the proceedings indicated that he had experienced a general fear on account of his appearing before the trial court to give evidence in the presence of the parties or fear that is attributable to threats or other actions of the defendant or those acting on his behalf (see *Cevat Soysal v. Turkey*, no. 17362/03, § 78, 23 September 2014, and compare *Pesukic*, cited above, § 46).

75. In view of the above, the Court discerns no reason from the documents submitted to it by the parties justifying the trial court's decision to conceal the true identity of witness X in the light, notably, of the trial court's contradictory stance on that issue. Hence, the Court is not convinced that the Government have been able to demonstrate that there was a good reason from the trial court's perspective to keep secret the identity of witness X.

ii. Whether there was a good reason for the non-attendance of witness X at the trial

76. The Court reiterates that the trial court decided that witness X and all the other witnesses and victims should give evidence in courts located in their places of residence, finding that most of them lived in the province of Trabzon and that it would be difficult for them to attend the hearings before it, which were to take place in another city, namely Erzurum. As a result, witness X never attended the hearings before the trial court and gave his statements before the Trabzon Assize Court in the absence of the parties.

77. The Court reiterates that the Contracting States are required to take positive steps, in particular to enable the accused to examine or have examined witnesses against him (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 78, Series A no. 146). Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective

manner (see *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96 and 3 others, § 67, ECHR 2001-VIII).

78. In support of the trial court's decision to examine him in Trabzon, the Government provided the Court with information as to the distance between Erzurum and Trabzon, which they submitted as being 268 km. They also added that the topography between the two cities was mountainous and so the roads tended to be of poor quality. The Court observes that that additional information given by the Government was not referred to by the trial court in its decision to examine witness X in Trabzon. Be that as it may, even assuming that it did refer to it, the Court considers that the distance between the two cities cannot be regarded of itself and in the abstract as a good reason for the failure by the judges to ensure the examination of the anonymous witness despite their ultimately convicting the applicant and sentencing him to life imprisonment (see, among many other authorities, *Bátěk and Others v. the Czech Republic*, no. 54146/09, § 44, 12 January 2017, and *Nikolitsas v. Greece*, no. 63117/09, § 35, 3 July 2014). Sight should also not be lost of the applicant's argument that the territorial jurisdiction of the now defunct specially authorised courts – in the present case the Erzurum Specially Authorised Assize Court – was also determined having due regard, *inter alia*, to the geographical proximity between different cities in Turkey.

79. Furthermore, the Court notes that other individuals, who were also resident in Trabzon, were heard as witnesses or complainants before the trial court in person (see paragraph 15). That being the case, the absence of a good reason for the non-attendance of witness X at trial was imputable to the trial court, which did not appear to have considered taking any positive steps to secure his appearance before it so as to ensure his examination in person.

80. Therefore, the Court concludes that the Government have failed to show that the national courts set out the factual or legal basis of any good reason for the absence of witness X. Nonetheless and despite being imperative, the absence of a good reason for the non-attendance of a witness is not of itself dispositive of the wider consideration of whether the trial was fair as a whole.

iii. Whether the evidence of the absent witness was the sole or decisive basis for the applicant's conviction

81. As to the extent to which the national courts relied on the evidence given by witness X when convicting the applicant, the Court observes that the trial court did not make any examination of the weight to be given the evidence given by witness X. The court has not shown that it was aware that that evidence carried less weight (see *Schatschaschwili*, cited above, § 126).

82. Therefore, the Court will carry out its own examination on this matter. In that connection, the Court notes that witness X was the only

eyewitness to the shooting and that there was no other direct and concrete evidence capable of proving that it was the applicant who killed M.Ü. Importantly, the ballistics report on the bullet casing found at the scene of the incident concluded that it was not possible to verify whether that bullet had been fired from the applicant's pistol used in previous incidents.

83. As for the mobile telephone records, the Court notes that the applicant's mobile telephone received a signal at 2.30 a.m. from a base situated in Trabzon city centre, which is approximately 20 km from the crime scene. Considering that he could have gone from the hotel to the city centre within thirty minutes, the trial court concluded that the mobile telephone records had not shown that the applicant had not been at the scene of the incident at the time of shooting. In the Court's view, that finding does not alter the decisive character of the evidence given by the anonymous witness X.

84. In short, the Court concludes that, even if it was not the sole reason, the evidence given by witness X was decisive for the applicant's conviction for the murder of M.Ü. (see *Schatschaschwili*, cited above, § 144).

iv. Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

85. As to the existence of any counterbalancing factors capable of offsetting the handicaps caused by the applicant's inability to confront witness X and examine him in person before the trial court, the Court notes that the following elements have been identified as 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 directly cross-examine the witnesses at the trial (see *Schatschaschwili*, cited above, §§ 125-31 and 145).

86. The Court stresses that where, as in the instant case, a conviction is based decisively on the evidence of an absent witness, the Court must subject the proceedings to the most searching scrutiny (see *Al-Khawaja and Tahery*, cited above, § 147, and *Ellis, Simms and Martin*, cited above, § 78).

87. In that connection, the Court firstly notes that witness X first gave evidence, with his true identity, on 2 February 2006 before the Arsin public prosecutor and identified the applicant on the basis of one photograph as the person who had fatally shot M.Ü.. However, it appears that neither the applicant nor his lawyer had been informed of or invited to attend the examination of witness X by the public prosecutor during the pre-trial stage (see *Lučić v. Croatia*, no. 5699/11, § 82, 27 February 2014). Nor does it transpire from the documents in its possession that the authorities arranged for a confrontation between the applicant and witness X in the course of the preliminary investigation stage (see *Chernika v. Ukraine*, no. 53791/11, §§ 42-3, 12 March 2020; *Palchik v. Ukraine*, no. 16980/06, § 50, 2 March

2017 with further references therein, and *Ilyadi v. Russia*, no. 6642/05, § 41, 5 May 2011). As the Court is not called upon to examine whether the provisions of the Code of Criminal Procedure offered the necessary procedural safeguards aimed at providing the defence with the possibility to attend the examination of witnesses during the preliminary investigation stage, the Court's examination will be limited to the issues raised by the case before it (see *Vacher v. France*, 17 December 1996, § 23, *Reports* 1996-VI).

88. As for the trial stage, the Court observes that witness X gave evidence before the Trabzon Assize Court in the absence of the parties in accordance with the trial court's decision under Article 58 § 3 of the Code of Criminal Procedure, the application of which was contingent upon two elements, namely that (i) examining a witness in the presence of the parties would cause "a grave danger" and (ii) such danger could not be averted in any other way or would jeopardise the disclosure of material facts, as the wording of Article 58 § 3 suggests. However, the trial court did not explain at all the grave danger examining witness X before it and in the presence of the parties would entail. Neither did the Trabzon Assize Court indicate any specific reasons regarding the need to examine him in the absence of the parties.

89. Furthermore, the Court finds it significant that neither the trial court nor the Trabzon Assize Court made any assessment of the question as to whether less stringent alternatives would be sufficient, which would indicate that they had indeed carried out a balancing exercise, albeit implicitly, between the rights of the defence and those of the victims and the witnesses. Similarly, there is also no indication in the case file showing that the national courts either approached the evidence given by witness X with any particular caution or that they were aware that it carried less weight owing to his absence from the trial (see *Dimović and Others v. Serbia*, no. 7203/12, § 63, 11 December 2018, *İshak Sağlam v. Turkey*, no. 22963/08, § 52, 10 July 2018, and *Daştan v. Turkey*, no. 37272/08, § 31, 10 October 2017). More importantly, none of the national courts embarked upon an examination of the reliability of the statements of witness X either (see *Balta and Demir*, cited above, §§ 56-57).

90. In view of the above-mentioned shortcomings the Court is unable to conclude that the trial court administered the necessary safeguards in respect of the evidence given by witness X (compare *Ellis*, *Simms and Martin*, cited above, § 88), a situation falling short of the requirements of a fair trial under Article 6 of the Convention.

91. Notwithstanding that conclusion, the Court will address the Government's submissions under this heading, which were as follows: (i) the applicant had failed to show why examining witness X had been important to him; (ii) the applicant had failed to use his statutory right to put written questions to witness X after the trial court had read out the record of

his statements at the trial; and (iii) the applicant had failed to avail himself of the videotaped statement of witness X which had moreover made it possible for the trial court to form its own impression of his credibility.

92. The Court dismisses the Government's first argument in the light of the fact that witness X was a "prosecution witness" and unlike the situation with defence witnesses, the applicant was not required to demonstrate the importance of personal appearance and questioning of a prosecution witness (see *Cevat Soysal*, cited above, § 77, and *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 712, 25 July 2013). In any event, and having regard to the applicant's and his lawyer's submissions before the trial court, the Court finds that the applicant was able to demonstrate why it was important for them to examine witness X in person.

93. Before addressing the Government's second and third arguments, the Court would like to point out that it is not its task to assess in hindsight whether the overall fairness of the proceedings was guaranteed merely by statutory provisions providing for certain procedural safeguards. On the contrary, the Court must examine whether those procedural safeguards were applied and remedied the difficulties the defence had to encounter as a result of not being able to directly question or cross-examine witness X, whose statements were relied on by the trial court to a decisive extent to convict the applicant. In that connection, the Court cannot but note that at no stage of the proceedings did the trial court consider applying the two safeguards suggested by the Government, which might have demonstrated that it was aware of the requirement to remedy the disadvantageous position the defence found itself in in its attempts to challenge the evidence of witness X. In any event, the Court makes the following observations regarding the safeguards suggested by the Government.

94. With regard to the applicant's alleged failure to submit the questions he wished to be put to witness X after his statements were read out to him by the trial court, the Court stresses that the underlying principle of Article 6 § 3 (d) of the Convention is that before an accused can be convicted, all evidence against her or him normally has to be produced in his presence at a public hearing with a view to adversarial argument (see *Schatschaschwili*, cited above, § 103). Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him or her, whether during the investigation or at the trial (ibid., § 105).

95. The Court further notes that the possibility to put written questions to an absent witness should not be regarded as a panacea remedying the absence of an important witness from the trial and the resulting prejudice the trial court's use of his or her evidence entailed to the rights of the defence irrespective of the individual circumstances of a given case (see *Asani v. the former Yugoslav Republic of Macedonia*, no. 27962/10, § 42,

1 February 2018 for a comparison of the different weight attached to such a possibility in the context of absent and anonymous witnesses; and compare *Lučić*, cited above, § 75). This is particularly true when there are no good reasons for the absence of the witness from the trial, a situation which requires the Court to subject the proceedings to the most searching scrutiny. Neither should the right to put written questions to an absent witness be seen as a substitute in the abstract for the fundamental right to examine or have the absent witness examined in person in such a case.

96. Therefore, caution must be exercised before concluding that the possibility to put written questions to an absent witness is capable of compensating for the difficulties arising from his or her unjustified absence, that is to say when there was no good reason for his or her non-attendance. Otherwise, the balance between the rights of the defence, the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, the rights of witnesses risk being undermined in the absence of a good reason to depart from the underlying principle under Article 6 § 3 (d) of the Convention.

97. Turning back to the circumstances of the present case, the Court observes that E.K.'s lawyer asked the trial court to give him the right to put questions to the absent witness during the first hearing, at the end of which the trial court decided to issue letters of request to the courts situated at witness X's place of residence to take evidence from him. Yet, the trial court did not provide an answer to that application. Moreover, whilst the applicant and his lawyer consistently raised their objections to the examination of witness X by another court and they repeatedly invited the trial court to secure his appearance in person so that they could cross-examine and question him, the trial court did not even respond to some of those applications (see *Tseber v. the Czech Republic*, no. 46203/08, § 63 *in fine*, 22 November 2012). Indeed, when the applicant's lawyer reiterated that application and asked the trial court to provide him with the right to put questions to witness X if it found it necessary, the trial court did not address it. Under these circumstances, the Court is not convinced that the Government have been able to show with sufficient clarity that applications to the same effect would have had any different outcome given the trial court's stance on that matter (see, *mutatis mutandis*, *Ömer Güner v. Turkey*, no. 28338/07, § 39, 4 September 2018, and compare *A.M. v. Italy*, no. 37019/97, § 27, ECHR 1999-IX).

98. Against the above background and bearing in mind that there were no good reasons for the absence of witness X from the trial, the Court is likewise not convinced that the applicant waived his rights under Article 6 § 3 (d) of the Convention to test the truthfulness of the only direct eyewitness in the present case (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07 and 2 others, §§ 87-9, 12 May 2016, where the Court found that the applicants had waived their

right to cross-examine the absent witnesses whose evidence had been neither the sole nor the decisive evidence, on the basis of their failure to object to the reading out their statements and to put questions to them; *Sarkizov and Others*, cited above, § 57, for a consideration of the waiver of the applicant's right to pose questions to the anonymous witness during the pre-trial stage; and *Gabrielyan v. Armenia*, no. 8088/05, § 85, 10 April 2012 where no such waiver was in place; and compare *Dončev and Burgov v. the former Yugoslav Republic of Macedonia*, no. 30265/09, 12 June 2014, where the applicant's lawyer's refusal to put written questions to the protected witness despite having been aware of his identity was held against him).

99. Similar considerations also apply in respect of the last procedural safeguard suggested by the Government, namely the video recording of the statements X had made before the Trabzon Assize Court. In that connection, the Court notes that although the Government argued that the applicant could have asked to have a copy of the videotaped statements of witness X, they failed to explain on what legal basis he would have been able to do so, given that the trial court had opted to protect him by withholding his true identity throughout the proceedings in accordance with Article 58 § 2 and 3 of the Code of Criminal Procedure. Indeed, had the applicant been allowed to obtain a copy of the videotaped statement, it would have effectively rendered that protection measure futile. The fact that the video recording was not played at any stage of the trial appears to lend support to that inference, too (see *Paić v. Croatia*, no. 47082/12, § 47 *in fine,* 29 March 2016). There is also no indication in the trial court's judgment showing that that court measured the reliability of the evidence given by that witness from his videotaped statements. In fact, no mention was ever made by the trial court either in the transcripts of the hearings or in its reasoned judgment of the video recording of the statements witness X had made to the Trabzon Assize Court. Similarly, the recording was also not listed as a piece of evidence by the trial court in its reasoned judgment. Furthermore, the Court also observes that certain provisions of the Witness Protection Act – which admittedly entered into force only on 5 July 2008 – expressly provided that witness protection measures, such as non-disclosure of a witness's identity and examining him or her in the absence of the parties are to be exercised in accordance with secrecy principles and that their records are to be kept secret.

100. Even assuming that the trial court had indeed considered and examined the videotaped statements of witness X, which could have given its judges the opportunity to observe his demeanour (see *Boyets v. Ukraine*, no. 20963/08, § 92, 30 January 2018), that fact alone would not have altered the fact that both the trial court and the applicant and his lawyer had not had the possibility to observe the credibility and the reliability of witness X under questioning as he was not subjected to questioning by the Trabzon

Assize Court, which merely took his statements and asked him to make an identification on the basis of the applicant's photograph. Likewise, his evidence, despite his being the only direct eyewitness to the shooting of M.Ü., remained untested throughout the criminal proceedings against the applicant given that the latter had no chance to confront and cross-examine him at any stage of the proceedings (see *A.M.*, cited above, § 26).

101. In any event, considering that the applicant had suffered a particularly serious restriction in terms of his ability to properly and fairly test the reliability of the evidence given by witness X as a result his being both "absent" and "anonymous" within the meaning of its case-law under Article 6 § 3 (d) of the Convention, and bearing in mind the national courts' indifferent stance *vis-à-vis* that evidence; the absence of any good reason for his non-attendance at the trial, and what was at stake for the applicant, namely life imprisonment, the Court cannot conclude that the mere existence of a video recording of the statements of witness X was such that it was sufficient to cure the restrictions imposed on the defence in its ability to effectively challenge that evidence, which was at the heart of the applicant's conviction, all the more so given the Court of Cassation's failure to address and remedy the above-mentioned shortcomings (see *Rozumecki v. Poland* (dec.), no. 32605/11, § 63 *in fine*, 1 September 2015 where the examination of the anonymous witness by the trial court in the absence of the applicant and his lawyer, who were able to question the anonymous witness, who had neither made any incriminatory statements nor identified him as the perpetrator, *via* an audio-link was considered sufficient).

102. Accordingly, the foregoing considerations allow the Court to conclude that the applicant was not afforded proper safeguards commensurate with the nature of his complaints and the importance of what was at stake for him, namely life imprisonment, enabling him to sufficiently test the reliability and truthfulness of evidence given by witness X in line with the guarantees of a fair trial under Article 6 of the Convention (see *Hulki Güneş v. Turkey*, no. 28490/95, § 96, ECHR 2003-VII (extracts)). There has therefore been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

103. In view of its above finding, the Court does not consider it necessary to address separately the applicant's complaint that the identification made by witness X and the procedure followed by the national courts for that purpose was allegedly contrary to the provisions of domestic law and hence was unlawful.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. 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."

105. The applicant failed to submit claims for pecuniary and non-pecuniary damage within the time-limit allotted to him.

106. Relying on Rule 60 § 1 of the Rules of Court and the Court's practice direction on just satisfaction claims, the Government invited the Court not to make an award in respect of pecuniary and non-pecuniary damage to the applicant, pointing out to his failure to duly submit any such claim. Likewise, no award for costs and expenses should be made in the absence of a claim under those headings and any documentary proof.

107. As for pecuniary damage, costs and expenses, the Court makes no award under these heads, regard being had to the absence of any claim by the applicant.

108. As for non-pecuniary damage, the Court notes that the applicant was invited by the Registry's letter dated 19 April 2019 to submit, *inter alia*, his claims for just satisfaction. In the same letter, his attention was drawn to the Rules of Court which contained requirements relating to just satisfaction, including the requirement to make a "claim" within the prescribed time period during the communication stage of the proceedings before the Chamber and to the Court's Practice Directions on Just Satisfaction claims wherein it was explicitly stipulated that "...The Court will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time."

109. However, the applicant's lawyer failed to comply with the above-mentioned requirements of which he had properly been advised. The fact that he submitted the claims for just satisfaction in the application form lodged with the Court does not alter that conclusion either (see *Nagmetov v. Russia* [GC], no. 35589/08, § 59, 30 March 2017). That being the case and having discerned no exceptional circumstances (ibid., §§ 74-82), the Court makes no award in respect of non-pecuniary damage pursuant to Rule 60 § 3 of the Rules of Court.

110. Notwithstanding that conclusion, the Court reiterates that the most appropriate form of redress would be a retrial in accordance with the requirements of Article 6 of the Convention, should the applicant so request (see *Soytemiz v. Turkey*, no. 57837/09, §§ 63-64, 27 November 2018).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 17 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Jon Fridrik Kjølbro
Registrar	President