



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

FIFTH SECTION

**CASE OF N.K. v. GERMANY**

*(Application no. 59549/12)*

JUDGMENT

STRASBOURG

26 July 2018

**FINAL**

**03/12/2018**

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



**In the case of N.K. v. Germany,**

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

Erik Møse, *President*,

Angelika Nußberger,

André Potocki,

Síofra O’Leary,

Mārtiņš Mits,

Gabriele Kucsko-Stadlmayer,

Lado Chanturia, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 3 July 2018,

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

**PROCEDURE**

1. The case originated in an application (no. 59549/12) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr N.K. (“the applicant”), on 12 September 2012. The Vice-President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr B. Schroer, a lawyer practising in Marburg. The German Government (“the Government”) were represented by two of their Agents, Ms K. Behr and Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant complained, in particular, that neither he nor a lawyer appointed for him had been granted an opportunity to examine R.K., the victim of and only direct witness to the offences of which the Arnsberg Regional Court had found him guilty. He alleged a breach of his right to a fair trial and, in this context, to examine or have examined witnesses against him, as provided in Article 6 §§ 1 and 3 (d) of the Convention.

4. On 8 May 2016 the complaint concerning the fairness of the applicant’s trial, including a right to examine or have examined witnesses against him, was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and is detained.

#### **A. The preliminary proceedings and the trial before the Regional Court**

6. In early August 2009 preliminary proceedings were initiated against the applicant based on the suspicion that he had committed violent acts against his spouse, R.K. On 6 August 2009 R.K. was examined at the request of the public prosecutor's office by the investigating judge, W., after the latter had decided, at the suggestion of the public prosecutor's office, to exclude the applicant from the hearing under Article 168c § 3 of the Code of Criminal Procedure, since there was a risk, given the nature of the reported offences, that R.K. would not testify or would not tell the truth in the applicant's presence.

7. On 7 August 2009 the investigating judge, at the request of the public prosecutor's office, issued an arrest warrant for the applicant and also assigned counsel to him.

8. On 25 September 2009 the applicant was arrested and detained on remand. On 15 October 2009 the Arnsberg Regional Court assigned a lawyer of his choice as his counsel.

9. On 3 May 2010 the Arnsberg Regional Court opened the main proceedings against the applicant. R.K., who was also summoned to appear on that date, informed the court that she did not wish to give evidence.

10. At the hearing of 28 May 2010, the investigating judge was examined on the evidence he had obtained from his examination of R.K. on 6 August 2009. The Regional Court rejected an objection by the applicant's counsel on the grounds that it was permissible to examine the investigating judge even if the applicant's rights under Article 6 § 3 (d) of the Convention had been breached by R.K.'s examination. Only when adjudicating the case could it be decided whether the investigating judge's statements could be admitted as evidence or not, which, in line with the Court's case-law, would depend on whether it had been corroborated by other significant factors independent of that evidence.

11. At that same hearing, Officers Ra. and Rü. were examined as witnesses with regard to the description of events given to them by R.K. when they had arrived at M.'s home on 2 August 2009 (see paragraphs 27-28 below). The applicant's counsel objected to the use of the evidence obtained from the examination of these two witnesses on the grounds that "the depicted facts cannot be separated chronologically and sequentially".

12. At the hearing of 10 June 2010, R.K. stated that she did not consent to the use of the evidence which she had provided to the investigating judge, to Officers Ra. and Rü. and to the court-appointed medical expert; nor did she consent to the use of the results of the medical examination.

## **B. The Regional Court's judgment of 28 June 2010**

13. On 28 June 2010 the Regional Court convicted the applicant on four counts of dangerous assault, one of these in concurrence with coercion, as well as of maliciously inflicting bodily injury in concurrence with attempted coercion, of coercion and of wilful driving without a licence. The Regional Court sentenced the applicant to six years and six months' imprisonment. In addition, it ordered his subsequent preventive detention, finding that the applicant had a dissocial personality disorder and that there was a very high likelihood that he would commit similar offences in the future.

### *1. Facts established by the Regional Court*

14. In the 1990s, the applicant was convicted several times of, *inter alia*, several different counts of assault against his respective partners at different times. He met his third wife, R.K., in the summer of 2008. Their relationship was from the outset marked by the applicant's violent behaviour towards R.K., which escalated in July 2009.

15. On 31 July 2009 in their marital home the applicant asked R.K. about her past sex life. He then beat her on different parts of her body and kicked her. Following this he asked her to go to the basement and, while going there, stubbed out a cigarette on her neck. When they arrived in the basement, he asked her to write a letter to the wife of a former lover of hers and to confess to adultery. When R.K. refused, he delivered several blows all over her body, including her head and face, and also beat her with a wooden hiking pole. R.K. then promised to write the letter. The following evening the applicant asked her again to write the letter and delivered blows with his fist, primarily to her head. After having left R.K. alone in the living room, the applicant later returned with a mattress and demanded that she undress and to lie down on her stomach. He then beat her with a thin rope on her back, before forcing her to carry out sexual acts on herself.

16. On the morning of 2 August 2009, R.K. started to write the said letter by hand. When reading the draft, the applicant was angry about its content. R.K. stated that she would write it again. The applicant delivered blows with his fist, mostly to her head, and also beat her with his shoes on the back of her head. He then stubbed out a cigarette on her left breast. R.K. tried to run away but fell down in the hallway. The applicant then choked her so that she could not breathe. In unknown circumstances, R.K. managed to escape and ran into the street in panic, crying for help.

17. There, she ran into S. and Ke., the latter telling her to go to the home of the M. family. She ran over and rang the bell. M. opened the door and let her in. Ke. [probably S., see paragraphs 24 and 26 below] went to the house of the Sch. family and called the police from there. During that call, Mr and Ms Sch. went outside and saw the applicant leave the home and drive off. They reported the number plate of the car to Ke. [S., see above], who passed it on to the police. Inside the house, M.'s mother gave R.K. a towel, which she put on the back of her head, from where she was visibly bleeding. A few minutes later two police officers, Ra. and Rü., arrived.

18. On that same day, R.K. was admitted to a women's shelter. She showed the counsellor there, N., several marks of injury on her head and other parts of her body and described the bodily harm and coercion to which the applicant had subjected her in the period from 31 July to 2 August 2009.

## *2. Evidence taken by the Regional Court*

### **(a) Statement of the investigating judge**

19. The investigating judge, W., stated that he had questioned R.K. for some two hours on 6 August 2009 at the request of the public prosecutor's office (see paragraph 6 above). She had described a multitude of acts of domestic violence in the course of the marriage, which had increased over time, and repeatedly stated that she loved the applicant, which was why she had not come forward before. The violence between 31 July and 2 August 2009 had constituted an escalation and had been too much for her, rendering their living together impossible, which was why she was now ready to testify against the applicant. She had described the events of between 31 July and 2 August 2009 as several acts of torment stretched out over the whole weekend with some breaks in between. He had asked her about every single incident, to which she had given definite and detailed accounts of each, including beatings with a rope, a wooden hiking pole and shoes, as well as being forced to carry out sexual acts on herself. Her account had been consistent and she had not been evasive, maintaining eye contact throughout. She had repeatedly stated that the applicant had beaten her between 31 July and 2 August 2009 in connection with a letter which the applicant had wanted her to write to the wife of a former lover of hers; she had started to write that letter by hand.

### **(b) Subsequent actions of R.K.**

20. R.K. later retracted her statements as reported by the investigating judge and made voluntary disclosures on 2 December 2009 and on 20 April 2010 to the police for having wrongfully incriminated the applicant, claiming that he had not been at home between 31 July and 2 August 2009 and that a third person had injured her. On 23 April 2010 R.K. submitted a

written statement to the Regional Court retracting the voluntary disclosures of 2 December 2009 and 20 April 2010.

**(c) The applicant's statements**

21. The only statement the applicant made during the trial was to confirm that he did not have a driving licence. He did not comment on the remainder of the charges against him.

**(d) Further evidence**

22. N., the women's shelter's counsellor, testified that she had received a copy of the police report and had discussed the report and the events with R.K. when she had been admitted to the shelter on 2 August 2009 in a severely traumatised state. R.K.'s statements had been consistent with the police report. She had provided a detailed account of all the incidents that had taken place between 31 July 2009 and 2 August 2009, and had consistently named the applicant as the perpetrator. That same evening, she had also showed her injuries, in particular bleeding head wounds, burn marks on her left breast and neck, and several bruises and weals on her back. N. had discussed the violent events with R.K. up until the former's examination before the Regional Court. Throughout these discussions, R.K.'s account had been consistent.

23. Re.K., R.K.'s son, who had been born in 1997, stated that on 2 August 2009 he had been in his room from where he had heard the applicant and R.K. having an argument and screaming. He had later learned that his mother had been at a neighbour's home, where he had met her together with the police officers. His mother had been pressing a cloth against her head. He had then gone to the hospital together with her. He had not seen what had happened in the house and had, overall, not noticed much of the events that had occurred that weekend.

24. S., a witness, said that he had been at a local sports meeting with another witness, Ke., on 2 August 2009. At around midday, when they had been walking in the direction of the village, R.K. had run towards them on G. Street, shouting "Help! Help! My husband is going to kill me!" R.K. had been so shocked and disturbed that she had not been able to speak clearly. S. had advised her to go to the home of the M. family. He himself had then gone to the home of the Sch. family to call the police. While he had been on the phone to the police, Ms Sch. told him that the applicant had driven off. Ms Sch. had then given the registration number to S., who passed it on to the police. When S. had gone back outside, he had met Re.K., who had been shaking, and had asked him about R.K. He had then led the police to the house of the M. family. When the door had opened, he had seen R.K. sitting on the stairs, with a bloody cloth pressed on her head. The police then took charge and he left the scene.

25. M., a witness, stated that one Sunday, the doorbell rang. R.K. was standing outside, shouting “My husband, my husband! He’s out to get me. He mustn’t see me.” R.K., who had been terrified, immediately entered the house and sat down on the stairs. She had been bleeding from her head. Later, the police had arrived and called an ambulance. M.’s mother added that she had given R.K. a towel for her bleeding head wound and that R.K. had repeatedly expressed fear of her husband. She had never seen a woman so terrified before, which had overwhelmed her so much that she had not asked R.K. about what had happened.

26. Ms Sch., a witness, testified that S. had rung her door bell on 2 August 2009. S. had told her that he had had to call the police as it had seemed that the applicant had harmed his wife. She had then gone outside her house and looked towards the applicant’s house located only a few metres away. She had observed the applicant leaving his house and driving off. She had told that to S., who had asked her to spell out the car’s number plate, which she had done. Mr Sch. made similar statements.

27. Officers Ra. and Rü. explained that they had been patrolling together on 31 July 2009 when they had received the call to drive to the village B., where a woman had run out of a house screaming and had been hiding at a neighbour’s residence. Several persons had been present when they had arrived at the scene, informing them that R.K. had been at the house of the M. family. When they had gone there, they had found R.K. in shock, pressing a cloth to the back of her head. When Ra. had asked her what had happened, she had stated that her husband had beaten her. R.K. had then given additional evidence, which was later discarded (see paragraph 34 below). She had had a bleeding wound on the back of her head and visible facial bruising. In the beginning, she had been shaking so much that it had not been possible to question her.

28. A draft letter to the wife of a former lover of hers, in which R.K. stated that she wanted to clear up her life and that adultery was a sin, was read out before the Regional Court. Officer Ra. had stated that R.K., after having made her statement to the police and having been examined in hospital, had asked to be admitted to a women’s shelter. She had requested that they stop by the marital home beforehand and for the police officers to accompany her. Besides taking some of her belongings, she had given the letter to Ra. and asked him to keep it. Ra. had included the letter in the case file.

29. Another letter by R.K. of 26 September 2009, addressed to the applicant, was read out before the Regional Court, in which she described examples of acts committed by him from 31 July 2009 onwards, reporting the assaults, humiliations and sexual acts to which she had submitted for fear of receiving even more blows.



### 3. *The Regional Court's assessment of the evidence*

30. The Regional Court relied, *inter alia*, on the testimony R.K. had given at her examination by the investigating judge. It considered that the applicant had rightly been barred from attending that hearing. However, since Article 6 § 3 (d) of the Convention guaranteed the applicant's right to examine or have examined witnesses against him, defence counsel should have been appointed for the applicant so that the latter could examine R.K. at that hearing. Yet, the mere fact that neither the applicant nor his counsel had had the opportunity to cross-examine R.K. did not automatically constitute a breach of Article 6 §§ 1 and 3 (d) of the Convention. It was decisive whether the proceedings in their entirety, including the manner in which evidence had been taken and assessed, had been fair. Where the lack of an opportunity to cross-examine a witness had been a result of procedural errors imputable on the judiciary, as in the present case, the Court found a breach of the Convention where the conviction had been based to a decisive extent on the evidence of the untested witness. A conviction could thus only be based on untested evidence where it was corroborated by other significant factors independent of that evidence. In the present case, the applicant's conviction could be based on R.K.'s statements as reported by the investigating judge, for they were corroborated by other significant factors independent of them.

31. In this regard, the Regional Court referred to R.K.'s letter of 26 September 2009, in which she had described examples of acts committed by the applicant from 31 July 2009 onwards, reporting the assaults, humiliations and sexual acts to which she had submitted for fear of receiving even more blows (see paragraph 29 above). Her statement that the applicant had struck her in order to make her compose a letter to the wife of a former lover of hers had been corroborated by the draft letter with the content she had described which she had given to Ra. (see paragraph 28 above). Both letters had been admitted as evidence, as a witness's written statements could be admitted even in a case where he or she lawfully refused to give evidence at trial.

32. Moreover, witness N. of the women's shelter in which R.K. had sought refuge had, on the day of R.K.'s admission to the shelter, observed wounds in the head area, some of which had been bleeding, and burn marks on R.K.'s left breast and neck as well as various bruises and weals on her back which R.K. had shown her. During her stay in the shelter, R.K. had repeatedly described to N. the details of the applicant's violent acts (see paragraph 22 above).

33. Re.K., R.K.'s son, who was in the marital home on 2 August 2009, stated that he had heard the applicant and R.K. having an argument and screaming (see paragraph 23 above). Other witnesses reported that R.K. had run into the street in panic that day, with a bleeding wound on the back of her head, and had subsequently sought refuge with the M. family until the

police had arrived, while the applicant had been seen leaving the house and driving off following that (see paragraphs 24-27 above). Therefore, the Regional Court was convinced that R.K.'s subsequent voluntary disclosures, in which she had mainly claimed that the applicant had not been at home and which she had subsequently retracted (see paragraph 20 above), had not been truthful.

34. R.K.'s initial statements to Officers Ra. and Rü., as reported by them (see paragraph 27 above), were possible to admit as evidence despite R.K. subsequently invoking her right to remain silent, as they were to be qualified as a "spontaneous utterance". At the same time, the Regional Court did not take into account the additional evidence given to the police by R.K. (see paragraph 27 above), as the police had not been sure at which point they had informed her of her right to remain silent.

### **C. Proceedings before the Federal Court of Justice**

35. On 29 June 2010 the applicant, represented by counsel, lodged an appeal on points of law against the judgment. He argued that evidence obtained in breach of the right of confrontation enshrined in Article 6 § 3 (d) of the Convention must never be admitted, regardless of its importance. The importance of the untested evidence in relation to the other evidence used by the court must not be decisive. Nor did it matter whether the court of first instance had undertaken a particularly careful examination of the evidence of the untested witness, as the breach of the right of confrontation could not be counterbalanced. Furthermore, in the light of R.K.'s subsequent invocation of her right to remain silent, the Regional Court had wrongly admitted the evidence given by the police officers Ra. and Rü. R.K.'s statements to the police officers had not been a "spontaneous utterance", as the latter had been called to the scene because a woman had run out of a house screaming and had been hiding at a neighbour's house and had, on arrival, asked her what had happened (see paragraph 27 above).

36. In a written submission of 8 November 2010 the Federal Public Prosecutor General argued that the examination of the investigating judge, resulting in the use of the untested evidence given by R.K., had not rendered the proceedings unfair. The evidence given by R.K. to the investigating judge had been corroborated by other significant factors independent of her evidence. Moreover, the Regional Court had counterbalanced the limitation of the applicant's defence rights through a particularly careful and critical assessment of the evidentiary value of that testimony.

37. On 16 December 2010 the Federal Court of Justice dismissed the appeal as ill-founded, finding that the review of the Regional Court's judgment had not revealed any legal errors that had been detrimental to the applicant.

#### **D. Proceedings before the Federal Constitutional Court**

38. On 11 January 2011 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that his right of confrontation had been infringed when the investigation judge had examined R.K. without him or his counsel having had the opportunity to be present and to question her. It had been unlawful to admit her testimony, as reported by the investigating judge, as evidence and to use it to convict him. It was not sufficient to take the violation of his right of confrontation into consideration as part of the evidentiary assessment by attaching less evidentiary value to the untested testimony and by requiring that it be corroborated by other significant pieces of evidence. Similarly, it was unlawful to admit as evidence the statements of the two police officers, as R.K.'s statement, which they reported, was not a "spontaneous utterance".

39. In a written submission of 22 August 2011 the Federal Public Prosecutor General argued that the Regional Court had sufficiently taken the Court's case-law on Article 6 § 3 (d) of the Convention into account.

40. On 4 April 2012 the Federal Constitutional Court refused to admit the constitutional complaint for adjudication, without providing reasons.

#### **II. RELEVANT DOMESTIC LAW AND PRACTICE**

41. The relevant domestic law and practice has been summarised in *Hümmer v. Germany* (no. 26171/07, §§ 24-27, 19 July 2012). The right of a – current or former – spouse of the accused not to give evidence against him or her is enshrined in Article 52 § 1 no. 2 of the Code of Criminal Procedure. According to the Federal Court of Justice's case-law there is an exception for a "spontaneous utterance" made by the witness before or outside his or her formal testimony.

#### **THE LAW**

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

42. The applicant complained that neither he nor a lawyer appointed for him had been granted an opportunity to examine R.K., the victim of and only direct witness to the offences of which the Arnsberg Regional Court had found him guilty. He alleged a breach of his right to a fair trial, including the right to examine or have examined witnesses against him, as provided in Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

43. The Government contested that argument.

#### **A. Admissibility**

44. The Government argued that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention. He had, before the domestic courts, not elaborated on whether R.K.’s statements, as reported by the investigating judge and, in part, by Officers Ra. and Rü., had constituted the sole or decisive evidence for his conviction, nor on whether there had been any counterbalancing measures. By not addressing the relevant criteria of the Court’s case-law before the domestic courts, he had not raised the complaint, which was now before the Court, “at least in substance” before those courts.

45. The applicant pointed out that he had objected to admitting the respective statements before the Regional Court, and that he had made substantiated complaints in this connection in his appeal on points of law and in his constitutional complaint.

46. Before the domestic courts, the applicant had complained of a violation of Article 6 § 3 (d) of the Convention because the evidence of the victim and only direct witness R.K., as reported by the investigating judge and, in part, Officers Ra. and Rü., without him or a lawyer appointed for him having had the opportunity to examine that direct witness at any stage of the proceedings, had been admitted (see paragraphs 10, 35 and 38 above). He argued that this, in itself, had amounted to a violation of that provision, regardless of whether or not the untested witness statement had constituted the “sole or decisive” evidence for his conviction, and that this breach could not be counterbalanced.

47. The Court observes, firstly, that the applicant made his submissions before the Regional Court and Federal Court of Justice in 2010 and lodged his constitutional complaint in January 2011. It cannot be held against the applicant that he did not – at the domestic level – elaborate on the criteria subsequently established or refined by the Court in the cases 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, ECHR 2015).

48. Secondly, the Court notes that the applicant did rely on Article 6 § 3 (d) of the Convention and the Court’s case-law on absent witness evidence before the domestic courts (unlike the applicant in the case

of *Bhojwani v. the United Kingdom* (dec.), no. 49964/11, §§ 21 and 51-53, 21 June 2016) and made clear and substantiated arguments (unlike the applicant in *R.A. v. the United Kingdom* (dec.), no. 73521/12, 3 May 2016) before the Regional Court, the Federal Court of Justice and the Federal Constitutional Court. In his submissions, the applicant challenged the so-called “sole or decisive rule”, from which the Court subsequently departed in *Al-Khawaja and Tahery* (cited above). While his argument that evidence provided by an untested direct witness should not be admitted at all differed from the approach subsequently taken by the Court, it has to be noted that he challenged the Court’s case-law itself as it stood at that time.

49. In the light of the foregoing, the Court considers that the applicant raised the complaint in substance before the domestic courts and that, consequently, he exhausted domestic remedies as required by Article 35 § 1 of the Convention. The Government’s objection must therefore be rejected.

50. The Court notes that the application is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties’ submissions*

#### **(a) The applicant**

51. The applicant argued that admitting the evidence of the victim and only direct witness R.K., as reported by the investigating judge, who had failed to inform the applicant of the examination of R.K. and to appoint counsel for him who could have cross-examined her, had breached his rights under Article 6 §§ 1 and 3 (d) of the Convention. This untested evidence had been decisive for his conviction. No sufficient counterbalancing measures had been taken to compensate for the handicaps under which the defence had laboured as a result of the admission of the untested witness evidence. It had been foreseeable that R.K. would make use of her right to refuse to testify in the trial against the applicant.

52. In addition, it had been unlawful to admit the evidence of Officers Ra. and Rü. in so far as they had reported the statements R.K. had made towards them at the scene of the events. These statements could not be qualified as a “spontaneous utterance”, but as having been made in the course of police questioning. Therefore, the police officers had been required to inform R.K. of her right to remain silent beforehand, which they had failed to do.

#### **(b) The Government**

53. The Government submitted that the Regional Court had thoroughly reasoned why the evidence given by the police officers that had been

admitted had concerned spontaneous utterances by R.K. and had thus, in line with the case-law of the Federal Court of Justice, been admissible. There had been no indications that the Regional Court's qualification of these statements as a "spontaneous utterance" had been arbitrary. At the same time, they accepted that there had been a breach of the applicant's right of confrontation due to the failure to appoint counsel for him for R.K.'s hearing before the investigating judge. Nonetheless, this procedural error had not resulted in a breach of the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention.

54. The applicant's spouse, R.K. had been entitled under domestic law to refuse to give testimony against him. There had thus been "good reasons" why the applicant and his counsel had not been able to cross-examine her at trial. Under domestic law, it was possible to examine the investigating judge with regard to the content of the statements which a witness, who was now refusing to give testimony, had made at the pre-trial stage. Even though the untested witness evidence had been of significant weight for the applicant's conviction, it had not been decisive for it. The Regional Court had had regard to the Court's case-law and had determined that the evidence given by R.K., as reported by the investigating judge, had been corroborated by other significant factors independent of that evidence. The Regional Court had thoroughly and cautiously assessed the credibility of R.K. and the reliability of her statements as reported by the investigating judge. R.K. had attended several hearings of the trial and answered certain questions of a procedural nature. The applicant and his counsel had been able to observe her demeanour and could have asked R.K. to reconsider her decision not to give testimony. Furthermore, they had been able to cross-examine the investigating judge when he had given evidence as a witness. The applicant had been given the opportunity to present his own version of the events. In the light of these counterbalancing measures, the trial, viewed as a whole, had been fair.

## *2. The Court's assessment*

### **(a) General principles**

55. The relevant general principles as set out, in particular, in *Al-Khawaja and Tahery* (cited above) and in *Schatschaschwili* (cited above), have recently been summarised in *Bátěk and Others v. the Czech Republic* (no. 54146/09, §§ 36-40, 12 January 2017).

### **(b) Application of these principles to the present case**

56. The Court notes at the outset that R.K. was not absent in the sense of being unreachable. Rather, she refused to give evidence at the trial. Before the Regional Court, her pre-trial statements were reported by the investigating judge and, in part, by two police officers. The case thus

concerns a scenario similar to that in *Hümmer* (cited above, §§ 41-42). The Court considers that the principles as set out in *Al-Khawaja and Tahery* (cited above) and in *Schatschaschwili* (cited above) concerning absent witnesses apply, *mutatis mutandis*, to the present scenario.

57. It is not disputed between the parties that R.K. was entitled under Article 52 § 1 no. 2 of the Code of Criminal Procedure to refuse to give evidence against the applicant because she was married to him (see paragraph 41 above). There had thus been a good reason for her not appearing for cross-examination at the trial and for admitting the evidence of R.K., as reported by the investigating judge and, in part, by two police officers, at the trial. In this regard, the Court notes that it cannot discern any arbitrariness in the Regional Court's qualification of R.K.'s statement to the police officers as a "spontaneous utterance" (see paragraphs 27 and 34 above) and considers that there is no appearance that the applicant's rights under the Convention were disrespected by admitting that statement, as reported by the police officers, as evidence.

58. As regards the significance of the untested evidence, the Court notes that R.K.'s pre-trial statements, as reported by the investigating judge, were not the only evidence on which the Regional Court relied in its judgment on 28 June 2010. That court also relied on the statements of the counsellor of the women's shelter to whom R.K. had provided a detailed account of the incidents and shown her injuries (see paragraphs 22 and 32 above); R.K.'s son, who had heard screams and the applicant and R.K. having an argument (see paragraphs 23 and 33 above); the statements of several neighbours who had seen R.K. immediately after her escape from the marital home with a bleeding head wound in a terrified state, and had seen the applicant leave that home and drive off following that (see paragraphs 24-27 and 33); the letter by R.K. of 26 September 2009 in which she gave examples of the acts committed by the applicant in the period in question (see paragraphs 29 and 31 above); a draft letter to the wife of a former lover of hers (see paragraphs 28 and 31 above); and R.K.'s statement to the police officers, which the Regional Court qualified as "spontaneous utterance", as reported by those officers (see paragraphs 27 and 34 above). The Regional Court concluded that the applicant's conviction could be based on R.K.'s statements, as reported by the investigating judge, for they were corroborated by other significant factors independent of them (see paragraph 30 above).

59. The Court finds that this evaluation of the weight of the evidence was neither unacceptable nor arbitrary (see *Schatschaschwili*, cited above, § 124, with further references), as R.K.'s testimony, as reported by the investigating judge, was corroborated by substantial incriminating evidence. At the same time, it considers that R.K.'s statement made at the pre-trial stage carried at least significant weight for the applicant's conviction and

that its admission may have handicapped the defence (see also *Štulíř v. the Czech Republic*, no. 36705/12, §§ 63-67, 12 January 2017).

60. As regards counterbalancing measures to compensate the handicaps under which the defence laboured as a result of the admission of the untested witness evidence at trial (see *Schatschaschwili*, cited above, §§ 125 and 145), the Government – and the Regional Court itself – agreed that counsel for the applicant should have been appointed who could have examined R.K. during the hearing before the investigating judge. By not doing so, the authorities took a foreseeable risk, given that R.K. was married to the applicant and thus had a right to refuse to testify under domestic law – an eventuality which subsequently materialised – that neither the applicant nor his counsel would be able to question R.K. at any stage of the proceedings (compare *ibid.*, §§ 152-60).

61. However, the Court considers that the Regional Court thoroughly and cautiously assessed the credibility of R.K. and the reliability of her statements as reported by the investigating judge and that there was ample and strong corroborating evidence (see paragraph 58 above). The applicant had the opportunity to present his own version of the events, which he chose not to do, and to cross-examine the investigating judge when he gave evidence as a witness.

62. In making an assessment of the overall fairness of the trial (see *Schatschaschwili*, cited above, § 161), the Court, having regard to the foregoing considerations – notably the weight of R.K.’s statement for the applicant’s conviction, the Regional Court’s approach to assessing that statement, the availability and strength of further incriminating evidence and the compensatory procedural measures taken by the Regional Court –, finds that the counterbalancing factors were capable of compensating for the handicaps under which the defence laboured. It concludes that the criminal proceedings against the applicant, viewed in their entirety, were not rendered unfair by the admission as evidence of the statement by the untested witness R.K., as reported by the investigating judge.

63. There has accordingly been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;



2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 26 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Erik Møse  
President