Institutul Național al Justiției

NORLAM
Misiunea Norvegiană de Experţi
pentru Promovarea Supremaţiei Legii în Moldova

SEMINAR

„EFFICIENCY OF COURT PROCEEDINGS THROUGH PROFESSIONAL INTERACTION”

Participants: judges/prosecutors/lawyers
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EFFICIENCY OF COURT PROCEEDINGS THROUGH PROFESSIONAL INTERACTION

SOURCES

1. *UN COVENANT ON CIVIL AND POLITICAL RIGHTS*

Article 14 (3) (b)

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

… (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

2. *THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF MOLDOVA*

Article 11. Inviolability of a Person
(1) The individual freedom and security of a person are inviolable.
(2) No one may be detained or arrested except in the cases and manners set forth in this Code.
(3) The deprivation of liberty, arrest, forced placement of a person in a medical institution or his/her assignment to a special educational institution shall be allowed based only on an arrest warrant or on a reasoned court judgment.
(4) The detention of a person prior to issuing an arrest warrant may not exceed 72 hours.
(5) Persons detained or arrested shall be immediately informed about their rights and the reasons for their detention or arrest, the circumstances and the legal qualification of the action the person is suspected or accused of in a language they understand and in the presence of a chosen defense counsel or an attorney providing the legal assistance guaranteed by the state.
(6) The criminal investigative body or the court must immediately release any person illegally detained or if the reason for his/her detention or arrest is found to be groundless.
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(7) Searches, bodily searches and other actions that breach the inviolability of a person may be performed without the consent of the person or his/her legal representative only under the provisions in this Code.
(8) Any person detained or arrested shall be treated with respect for human dignity.
(9) In the course of a criminal proceeding, no one may be physically or mentally abused, and any actions or methods that jeopardize the life or health of a person, even with his/her consent and that endanger the environment shall be prohibited. A detainee or a person subject to preventive arrest may not be subject to violence, threats or methods that would affect his/her ability to make decisions or to express his/her views.

Article 14. Privacy of Correspondence
(1) The right to the privacy of letters, telegrams and other mail; of telephone conversations and of other legal means of communication is guaranteed by the state. No one may be deprived of or have this right limited during a criminal proceeding.

(2) Any limitation of the right set forth in para. (1) shall be allowed only with a legal warrant issued under this Code.

Article 15. Inviolability of Private Life

(1) Every person has the right to the inviolability of his/her private life, to the confidentiality of his/her intimate and family life and to the protection of his/her personal honor and dignity. No one shall be entitled to arbitrarily or illegally interfere in the intimate life of a person during a criminal proceeding.
(2) In the course of criminal procedures, information on the private and intimate life of a person may not be collected unless necessary. Upon the request of a criminal investigative body and the court, participants in criminal procedural actions may not disclose such information and a written commitment in this regard shall be made.
(3) Persons requested by a criminal investigative body to provide information on their private and intimate lives shall be entitled to make sure that this information is part of a specific criminal case. Such persons shall not be entitled to refuse to provide information on their private and intimate lives under the pretext of the inviolability of private life; however, such persons shall be entitled to request from the criminal investigative body explanations for the need for such information, and those explanations shall be included into the transcript of the respective procedural action.
(4) Evidence confirming information on the private and intimate life of a person upon her/his request shall be examined during a secret court hearing.
(5) Damage caused to a person by breaching the inviolability of his/her private and intimate life in the course of a criminal proceeding shall be repaired in the manner set forth in the legislation currently in force.

Article 17. Ensuring the Right to Defense
(1) In the entire course of a criminal proceeding, the parties (suspect/accused/defendant, injured party, civil party, civilly liable party) have the right to be assisted or, as the case may be, represented by a defense counsel of their choosing or by an attorney providing the legal assistance guaranteed by the state.
(2) The criminal investigative body and the court must ensure the full exercise of the procedural rights of the participants in a criminal proceeding in line with this Code.
(3) The criminal investigative body and the court must ensure the right of the suspect/accused/defendant to qualified legal assistance provided by a defense counsel of their choosing or by an attorney providing the legal assistance guaranteed by the state and independent of the investigative body.
(4) While examining the injured party and the witnesses, the criminal investigative body shall not be entitled to prohibit the presence of the attorney invited by the person examined to represent him/her.
(5) If the suspect/accused/defendant cannot afford a defense counsel, he/she shall be assisted free of charge by a court-appointed attorney providing the legal assistance guaranteed by the state.

Article 18. Public Nature of Court Hearings
(1) Hearings are public in all courts except in cases provided by this article.
(2) Access to the courtroom may be prohibited to the press or public in a reasoned ruling for the entire duration of the proceeding or for a part thereof in order to ensure the protection of

morality, public order or national security; when the interests of juveniles or the protection of the private lives of the parties in the proceeding so require or to the extent the court considers this measure strictly necessary due to special circumstances when publicity could damage the interests of justice.
(2¹) In a proceeding involving a juvenile victim or witness, the court shall hear his/her testimony in a closed hearing.
(3) Trying a case in a closed court hearing must be justified, and all the rules relating to such a judicial procedure shall be followed.
(4) In all cases, court judgments shall be pronounced publicly.

Article 21. Freedom from Testifying against Oneself

(1) No one may be forced to testify against himself/herself or against his/her close relatives, husband wife, fiancé or fiancée or to plead guilty.
(2) A person to whom a criminal investigative body suggests making revealing statements against himself/herself or against his/her close relatives, husband, wife, fiancé or fiancée shall be entitled to refuse to make such statements and may not be held liable for this.

Article 66. Rights and Obligations of the Accused or the Defendant
(1) The accused or, as the case may be, the defendant shall have the right to defense. The criminal investigative body or, as the case may be, the court shall provide the accused or the defendant with the possibility to exercise his/her right to defense by all means and methods allowed by the law.
(2) The accused or the defendant, in line with the provisions of this Code, shall have the right:
1) to know what he/she is accused of and upon being charged or immediately after detention or arrest or after being notified about an order for a preventive measure to obtain from the criminal investigative body a copy of the charges;
2) immediately after detention or after indictment to obtain from a criminal investigative body written information about his/her rights under this article, including the right to keep silent and not to testify against himself/herself, and the explanations of all his/her rights;
3) if detained, to have legal counseling by the defense counsel prior to his/her first interrogation as an accused;
4) if detained, to be brought immediately but not later than within 72 hours before a judge to be tried within a reasonable timeframe or released during the proceeding;
5) as of the moment of being charged, to be assisted by a defense counsel selected by him/her, and if he/she cannot afford a defense counsel, to be assisted free of charge by a court-appointed attorney to provide the legal assistance guaranteed by the state and, if allowed by law, to waive the defense counsel and to defend himself/herself;
6) to confidentially visit his/her defense counsel with no limitation on the number and dates of such visits;
7) if he/she consents to interrogation, at his/her request to be interrogated in the presence of the defense counsel;
8) to give or to refuse to give testimony;
9) to provide or to refuse to provide explanations about the charges brought against him/her;
10) to admit the charges brought and to sign a plea bargaining agreement;
11) to agree to a special procedure in the criminal investigation and case hearing in line with this Code if pleading guilty;

12) to take part in procedural actions independently or assisted by a defense counsel or to refuse to take part in such actions;
13) to inform through the criminal investigative body his/her relatives or any other person at his/her suggestion about the place of his/her arrest;
14) to prepare materials for a criminal case;
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15) to submit the documents and other sources of evidence to be part of the criminal case file and to be presented in the hearing;
16) to request the recusal of the person conducting the criminal investigation or of the judge, prosecutor, expert, interpreter, translator, court secretary;
17) to request the examination of prosecution witnesses and to insist on summoning defense witnesses under the same conditions as prosecution witnesses;
18) to submit requests, including requests for independent medical assistance;
19) to object to actions of the criminal investigative body and to request that his/her objections be included in the transcript of the respective procedural action;
20) to review the transcripts of the procedural actions conducted with his/her participation and to question the correctness of such transcripts and to request their completion including information that he/she thinks must be mentioned;
21) to review materials transmitted to the court to confirm his/her arrest;
22) upon completion of the criminal investigation, to review all case materials and copy out any necessary data and to submit requests for supplementing the criminal investigation;
23) to participate in the case hearing in the first instance and in an appeal;
24) to speak during judicial arguments if unassisted by a defense counsel;
25) to have the closing statement;
26) to be informed during a criminal investigation about all the decisions related to his/her rights and interests and at his/her request to get copies of the decisions and copies of orders on preventive measures and other procedural constraint measures; copies of the indictment or any other act completing the criminal investigation; copies of civil actions, sentences or appeal and cassation requests; the decision by which the sentence becomes final or the final judgment of the court that heard the case under extraordinary means of appeal;
27) to contest, in the manner duly set out in the law, the actions and decisions of the criminal investigative body or the court including the sentence or decision of the court that heard the case under the ordinary means of appeal;
28) to withdraw any complaint filed personally or by the defense counsel in his/her interests;
29) to reconcile with the injured party in the manner set out in this Code;
30) to object to the complaints of other participants in the criminal proceeding brought to his/her notice by the criminal investigative body or that he/she learned about through other means;
31) to express in the hearing his/her opinion on the requests and proposals of other parties in the proceeding and on the issues settled by the court;
32) to object to any illegal actions of other participants in the proceeding;
33) to object to the actions of the chairperson of the hearing;
34) to request and to obtain redress for damage caused by any illegal actions of the criminal investigative body or the court.
(3) If the charges brought are invalid, the accused or, as the case may be, the defendant shall have the right to rehabilitation.
(4) The exercise or waiver by the accused or the defendant of the rights granted to him/her may not be interpreted to his/her detriment and may not have unfavorable consequences for him/her. The accused or the defendant shall not be liable for his/her testimony unless he/she

makes a deliberately false accusation that the crime was committed by a person who in fact was not related to the commission of the crime, and if he/she makes false testimony under oath.
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(5) The accused or, as the case may be, the defendant shall be obliged:
1) to appear when summoned by the criminal investigative body or the court;
2) if detained, at the request of the criminal investigative body to allow a corporal examination and a bodily search;
3) at the request of the criminal investigative body, to unconditionally allow a medical examination, a fingerprint analysis or the taking of samples of blood or other bodily fluids;
4) at the request of the criminal investigative body, to be examined by an expert;
5) to obey the legal orders of the representative of the criminal investigative body or the chairperson of the hearing;
6) to behave in an orderly fashion during the court hearing and not to leave the courtroom without the permission of the chairperson of the hearing.
(6) The accused or the defendant shall also have other rights and obligations provided hereunder.
(7) The rights of an accused juvenile or a juvenile defendant shall be exercised also by his/her legal representative in line with the provisions hereunder.

Article 68. Rights and Obligations of the Defense Counsel
(1) The defense counsel, depending on the procedural capacity of the person whose interests he/she is defending, shall have the right:
…
10) to review the materials of the criminal case as of the moment of completion of the criminal investigation, to copy out any data from the case file and to make copies;

Article 307. Examining Motions to Subject a Suspect to Preventive or House Arrest
(1) When establishing the need to subject a suspect to preventive or house arrest, the prosecutor shall, ex officio or at the suggestion of the criminal investigative officer, address to the court a motion to select a preventive measure. The motion shall cover the reason and the grounds for subjecting the suspect to preventive or house arrest. Supporting materials shall be attached to the motion.

Article 308. Examining Motions to Subject the Accused to Preventive Arrest, House Arrest or to Extend the Term of Arrest of the Accused
(1) When establishing the need to apply to the accused preventive or house arrest or to extend his/her term of arrest, the prosecutor shall address to the court a motion to select the preventive measure or to extend the duration of arrest of the accused. The motion shall cover the reason and the grounds for the need to subject the accused to preventive or house arrest or to extend his/her duration of arrest. Supporting materials shall be attached to the motion.

Article 371. Reading Out in a Hearing Statements of a Witness
(1) The statements of a witness made during a criminal investigation may be read out, and the audio and video recordings of such statements may be played at the request of the parties in the following instances:
1) when there are essential contradictions between the statements made during the hearing and those made during the criminal investigation;
2) when a witness fails to appear at the hearing and his/her absence is justified either

by the absolute impossibility to appear in court or by the impossibility to ensure his/her security, provided that the witness had been heard and has confronted the suspect/accused or the witness has been heard in line with arts. 109 and 110.
(2) Playing audio or video recordings without reading out in advance the statements entered in the respective transcript shall not be permitted.
(3) Should a witness exempted by law from testifying based on the provisions in art. 90 para. (11) refuse to testify in the hearing, his/her statements made during the criminal investigation may not be read out in the hearing nor may any audio or video recordings of his /her statements be played.

PROCEDURES IN CASES INVOLVING JUVENILES

Article 474. General Provisions

(1) The criminal investigation and hearing of cases involving juveniles and conveying for enforcement court judgments involving juveniles shall be performed in line with the usual procedures with the additions and exceptions in this Chapter.
(2) The provisions of this Chapter shall apply to cases involving persons who at the moment of the commission of the crime have not reached the age of 18.
(3) The hearing of a case involving a juvenile shall, as a rule, not be public.

Article 475. Circumstances to Be Established in Cases Involving Juveniles

(1) In the course of a criminal investigation and the hearing of a case involving juveniles, in addition to the circumstances provided in art. 96, the following shall be established:
1) the age of the juvenile (date, month and year of birth);
2) the conditions in which the juvenile lives and is educated, his/her level of intellectual, volitional and psychological development, peculiarities of his/her character and temper, his/her interests and needs;
3) the influence of adults or other juveniles on the juvenile;
4) the reasons and conditions that contributed to the commission of crime.
(2) Should it be established that the juvenile suffers from a mental debility that is not related to a mental disease, it shall also be established if he/she was fully aware of the commission of the act. In order to establish these circumstances, the parents, teachers, educators of the juvenile and other persons who can provide the necessary information shall be heard, and a public enquiry, the necessary documents shall be requested and other criminal investigative and judicial acts shall be performed.

Article 476. Splitting a Case Involving Juveniles

(1) If adults participated in the commission of the crime along with a juvenile, the case involving the juvenile shall be split to the extent possible and a separate case file shall be created.
(2) Should a split be not possible, the provisions of this Chapter shall apply only to the juvenile.

Article 477. Detaining a Juvenile and Applying Preventive Measures

(1) When resolving the issue of preventive measures for juveniles, the possibility of transferring a juvenile under supervision in line with art. 184 shall be mandatorily discussed in every case.
(2) The detention and preventive arrest of juveniles based on the grounds provided in arts. 166,
176, 185, 186 may be applied only in exceptional cases if serious crimes involving violence, especially serious or exceptionally serious crimes were committed.
(3) The prosecutor and the parent or other legal representatives of the juvenile shall be notified of the detention or preventive arrest of the juvenile and a note to that effect shall be made in the transcript of detention.

Article 478. Manner for Summoning a Juvenile Suspect/Accused/Defendant
A juvenile suspect/accused/defendant who is not under arrest shall be summoned to the criminal investigative body or to the court via his/her parents or other legal representatives or if the juvenile is in a special institution for juveniles via the administration of this institution.
Article 479. Hearing a Juvenile Suspect/Accused/Defendant
(1) A juvenile suspect/accused/defendant shall be heard in line with art. 104. Any interrogation may not last more than two hours without breaks and in total may not exceed four hours per day.
(2) When hearing a juvenile suspect/accused/defendant, the participation of a defense counsel and of a teacher or psychologist shall be mandatory.
(3) The teacher or the psychologist shall be entitled, with the consent of the criminal investigative body, to address questions to the juvenile and upon the completion of the hearing to review the transcript or, as the case may be, the written statements of the juvenile and to make written remarks on their completeness and correctness. These rights shall be explained to the teacher or the psychologist prior to the beginning of the hearing for a juvenile and a relevant entry to that effect shall be made in the respective transcript.
Article 480. The Participation of the Legal Representative of a Juvenile Suspect/Accused/Defendant in a Criminal Proceeding
(1) The participation of the legal representative of a juvenile suspect/accused/defendant in a criminal proceeding shall be mandatory except for cases provided in this article.
(2) The legal representative of a juvenile suspect/accused/defendant shall be admitted to the criminal proceeding by an order of the criminal investigative body from the moment of detention or preventive arrest or of the first hearing of a juvenile who is not detained or arrested. Once the legal representative of the juvenile is admitted to the proceeding, he/she shall be handed written information about the rights and obligations provided in art. 78, and an entry to that effect shall be made in the order.
(3) The legal representative of a juvenile may be removed from a criminal proceeding or replaced by another, if possible, if there are grounds to consider that his/her actions prejudice the interests of the juvenile. The court or, as the case may be, the body conducting the criminal investigation shall issue a reasoned judgment on the removal of the legal representative of a juvenile and his/her replacement by another representative.
Article 481. Hearing a Juvenile Witness
(1) A juvenile witness shall be summoned and heard in line with the provisions in arts. 105, 109 and 478–480 which shall duly apply.
(2) Prior to hearing him/her, a juvenile witness shall be advised of his/her rights and obligations as provided in art. 90 including the obligation to make true statements. A juvenile witness shall not take the oath.
(3) The legal representative of a juvenile witness or, as the case may be, his/her representative in line with the provisions in arts. 91 and 92 shall participate in his/her hearing.
Article 482. Completion of a Criminal Investigation with Regard to a Juvenile
Upon the completion of a criminal investigation with regard to a juvenile, the criminal investigative body may by a reasoned order not present to the accused juvenile some criminal investigative materials, which, to its mind, may have a negative impact on the juvenile; however, these materials shall be presented to the legal representative of the juvenile.
Article 483. Terminating a Criminal Investigation and Exempting a Juvenile from Criminal Liability
(1) If it is established in the course of a criminal investigation for a minor or less serious crime committed by a juvenile that the juvenile committed such a crime for the first time and that he/she may reform without subjecting him/her to criminal liability, the criminal investigative body may propose that the prosecutor terminate the criminal investigation of the

juvenile and exempt him/her from criminal liability based on the grounds provided in art. 54 of the Criminal Code and instead apply coercive educational measures in line with the provisions in art. 104 of the Criminal Code.
(2) The motion of the prosecutor to exempt a juvenile from criminal liability and place him/her in a special education and reeducation institution or in a treatment and reeducation institution shall be examined by the investigative judge in line with the provisions in art. 308. Should the investigative judge reject the motion to exempt a juvenile from criminal liability and place him/her in a special education and reeducation institution or in a treatment and reeducation institution, the prosecutor shall cancel the ordinance on termination of the criminal proceeding and shall send the case and the indictment to court in the usual manner.
(3) Control over the execution by the juvenile of the requirements in the educational measure shall be exerted by the specialized state body ensuring juvenile reform.
(4) The termination of criminal proceedings on the grounds specified in para. (1) shall not be admitted if the juvenile or his/her legal representative disagrees with it.
(5) When hearing a criminal case on its merits, the court shall be entitled to terminate criminal proceedings on the grounds specified in para. (1) and to apply the provisions in arts. 54 and 104 of the Criminal Code.

Article 484. Removing a Juvenile Defendant from the Courtroom

(1) Upon the request of the defense counsel or the legal representative of a juvenile defendant, the court hearing the opinions of the parties shall be entitled to decide to remove a juvenile defendant from the courtroom for the duration of the examination of circumstances that could have a negative impact on the juvenile.
(2) Upon a juvenile's return to the courtroom, the chairperson of the hearing shall inform him/her in a straightforward manner about the nature of the examination in his/her absence and shall provide him/her with the possibility to address questions to the persons heard in his/her absence.
(3) If there are several defendants in the same case and some of them are juveniles aged under 16, the court, upon hearing those persons who have not reached the age of 16, may decide to remove them from the courtroom if it deems that further judicial inquiry and the arguments could have a negative impact on the juveniles.

Article 485. Issues to Be Resolved by the Court when Issuing a Sentence in a Proceeding Involving a Juvenile

(1) When issuing a sentence in a proceeding involving a juvenile, in addition to the issues specified in art. 385, the court shall examine the possibility of exempting the juvenile from criminal liability in line with the provisions in art. 93 of the Criminal Code or to conditionally suspend the execution of his/her punishment in line with the provisions in art. 90 of the Criminal Code.
(2) If the juvenile is exempted from criminal liability and placed in a special education and reeducation institution or in a treatment and reeducation institution and if the coercive educational measures provided in art. 104 of the Criminal Code are applied, the court shall inform thereof the respective specialized state body and shall assign it to monitor the behavior of the convicted juvenile.

Article 486. Exempting a Juvenile from Criminal Liability and Applying Educational Measures

Should the court establish the conditions provided in art. 93 of the Criminal Code, when issuing a conviction it shall decide to exempt a juvenile defendant from criminal liability and apply to him/her the educational measures provided in art. 104 of the Criminal Code.

Article 487. Exempting a Juvenile from Placement in a Special Education and Reeducation Institution or in a Treatment and Reeducation Institution

(1) Should the court establish the circumstances provided in art. 93 of the Criminal Code,

when issuing a conviction it shall decide to exempt the juvenile from criminal liability and place him/her in a special education and reeducation institution or in a treatment and reeducation institution until he/she reaches majority, however, for a term not exceeding the maximum term of punishment provided by the Criminal Code for the crime committed by the juvenile.
(2) The juvenile's stay in the special education and reeducation institution or in a treatment and reeducation institution may be terminated prior to reaching majority if he/she has reformed and does not need to be anymore influenced by this measure. Extensions of a person's stay in the aforementioned institutions after reaching majority shall be admitted only prior to him/her completing his/her general or professional education. The issue of terminating or extending a juvenile's stay in the aforementioned institutions shall be resolved based on a motion by the specialized state body ensuring juvenile reform to the investigative judge of the court that issued the sentence or of the court in the territorial jurisdiction in which the juvenile lives within 10 days from receipt of the motion.
(3) The convicted juvenile, his/her legal representative, defense counsel, the prosecutor and a representative of the specialized state body shall be summoned to the examination of the motion. The failure of a legally summoned convicted juvenile and his/her legal representative to appear shall not prevent the court from examining the motion if the case may be heard in their absence.
(4) The conclusion of the specialized state body that filed the motion shall be examined in the hearing, the opinions of the persons participating in the hearing shall be heard and then the court shall issue a ruling admitting or rejecting the motion. The court ruling may be subject to cassation by interested persons.

3. *THE CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA*

Article 79. Application of a Punishment Milder Than the One Provided by Law
(1) Considering the case of exceptional circumstances related to the purpose and motive of the act, the role of the guilty person in the commission of the act, his/her behavior during and after the commission of the crime, and other circumstances that essentially diminish the seriousness of the act and its consequences, as well as the active contribution of the participant in the commission of a group crime to its solving, the court may apply either a punishment less than the minimum limit set by criminal law for the respective crime or a milder form of punishment of a different category, or it may decide not to apply the mandatory complementary punishment. The minority of the person who committed the crime shall be considered an exceptional circumstance.
(3) When convicting adults for the commission of extremely serious crimes, the court may apply a punishment less than the minimum limit set by criminal law but it must account for at least two thirds of the minimum punishment set by this Code for the crime committed.
(4) The provisions of par. (1) shall not apply to adults sentenced to life imprisonment or in cases of recidivism.

9 The Moldovan Constitutional Court, Decision No. 28 dated 14.12.2010

CONSTITUTIONAL COURT

DECISION No. 28
dated 14.12.2010

on the Control of Constitutionality of the Provisions of Art. 22, para.(1), letter b) of the Law No. 544-XIII dated July 20, 1995 on the Status of the Judge in the version of the Law No. 247-XVI dated July 21, 2006 on Amendment and Completion of Certain Legislative Acts

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Effective as of 14.12.2010

In the name of the Republic of Moldova,
The Constitutional Court composed of:
Dumitru PULBERE - Chairman
Victor PUŞCAŞ - Judge
Petru RAILEAN - Judge
Elena SAFALERU - Reporting Judge
Valeria ŞTERBEŢ - Judge
Court Secretary - Dina Musteaţa,
with participation of the permanent representative of the Parliament at the Constitutional Court, Ion Creangă, the permanent representative of the Government, Gheorghe Susarenco, in absence of the authors of the motion, in line with Art. 135, para.(1), letter a) of the Constitution, Art. 4, para. (1), letter a) of the Law on the Constitutional Court, Art.4, para. (1), letter a), and Art. 16, para. (1) of the Code on the Constitutional Jurisdiction, examined in the open plenary hearing the case on control of the constitutionality of the provisions of Art. 22, para. (1), letter b) of the Law No. 544-XIII dated July 20, 1995 on the Status of the Judge in the version of the Law No. 247-XVI dated July 21, 2006 on Amendment and Completion of Certain Legislative Acts.

The case was heard based on the motion of the deputies from the parliamentary group of the Communists' Party of the Republic of Moldova, Maria Postoico, Igor Vremea, Oxana Radu, Alla Mironic, Victor Mîndru, Irina Vlah, and Elena Bodnarenco.

By the decision of the Constitutional Court dated July 27, 2010 the motion was accepted for trial on its merits.

During the preliminary hearing of the motion the Constitutional Court solicited the points of view of the Parliament, President of the Republic of Moldova, Government, Ministry of Justice, Supreme Court of Justice, General Prosecutor's Office, Superior Council of Magistracy, Academy of Science of Moldova, the State University of Moldova, the Free International University of Moldova.

Having examined the case materials, listened to the information presented by the reporting judge, and the explanations of the participants in the proceeding,

the Constitutional Court established that:

1. On July 21, 2006 the Parliament adopted Law No. 247-XVI on Amendment and Completion of Certain Legislative Acts[1].

By Art. II a number of amendments and completions were made to the Law No. 544-XIII dated July 20, 1995 on Status of the Judge[2] (hereinafter referred to as the Law on the Status of the Judge). Art. 22 entitled "Disciplinary Violations", para. (1) was completed by letter b).

According to Art. 22, para. (1), letter b) of the Law on the Status of the Judge, disciplinary violation constitutes a non-uniform interpretation or application of the legislation, intentional or due to severe negligence, unless such is justified by the modification of the judicial practice.

2. The authors of the motion consider that these provisions conflict with Article 6, Article 114, Article 115, para. (1), and Article 123, para. (1) of the Constitution, because they "leave at the discretion of the Superior Council of Magistracy to arbitrarily decide which court judgments comply with the judicial practice and which judgments are conflicting with such practice."

The authors of the motion highlight that the provisions of Article 22, para. (1), letter b) of the Law on the Status of the Judge served as the ground to initiate disciplinary proceedings in regard to judges, whose judgments became final and subject to enforcement, as well as with regard to judges of the Supreme Court of Justice who issued irrevocable decisions. The court judgments influence also the judicial practice. Therefore, the provisions of Article 119 and Article 120 of the Constitution were violated.

The authors of the motion claim that the contested norm conflicts with point 4 of the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crimes and Treatment of Offenders held at Milan in 1985 and endorsed by the General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 3, 1985.

3. Having examined the contested legal provisions from the perspective of the relevant constitutional and legal norms, the Court states the following.

The respect and protection of persons in the Republic of Moldova, according to Article 16 of the Constitution, is a fundamental obligation of the state, and an inalienable duty of all branches of state authority.

A well functioning judiciary is the most important factor in the state mechanism of protection of human rights and fundamental freedoms, so that every citizen has the right to obtain effective protection from competent courts against actions infringing on his/her legitimate rights, freedoms and interests (Article 20, para. (1) of the Constitution).

[1] M.O., 2006, No. 174-177, Art. 796
[2] M.O., 1995, No. 59-60, Art. 664

However, an efficient and complete judicial protection may be achieved only in case of a true independence of the judiciary.

The constitutional provisions on separation of powers into legislative, executive and judicial (Article 6), on independence, impartiality and irremovableness of judges in the courts (Article 116, para. (1)), on establishing by an organic law of the courts' structure, their areas of competence and judicial procedures (Article 115, para. (4)), define the legal status of the judge in the Republic of Moldova and recognize justice as an independent and impartial branch of the state authority.

4. The provisions of Article 114 and Article 116, para. (1) of the Constitution, and Article 17 of the Law on the Status of the Judge set forth the principle on the independence of judges. In its absence it is impossible to speak about an authentic dispense of justice. The achievement of the principle on the independence of the judge, founding the autonomy of the judicial authority, is ensured by the procedure of dispensing justice, the manner of appointing, suspending, resigning, and dismissing a judge.

Considering the legal and constitutional status of the judge, his/her capacity of the exponent of the judiciary, and taking into account that the independence of the judge implies his/her capacity to correctly apply the law and to have high moral qualities, the legislator caused that selection, promotion, appointment of the judge is subject to a series of objective requirements related to his/her qualification, honesty, competence and life experience.

5. Independence of the judge is a prerequisite of a rule-of-law state and a fundamental guarantee of a fair trial. This implies that no one may interfere into the decisions and the way of thinking of a judge, other than following the set judicial procedures.

According to the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress, the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (p. 2).

Thus, the independence of the judiciary is not a privilege or a prerogative of a judge. It means responsibility of every judge, so that to allow him/her settle a dispute in an honest and impartial manner, based on evidence, without any pressure or external influences and without any fear for interference from someone.

According to p. 2 of the Principle V of the Recommendation No. (94)12 of the Committee of Ministers to the Member States on Independence, Efficiency and Role of Judges adopted on October 13, 1994, the judges have the duty and should be given the power to exercise their judicial responsibilities *to ensure that the law is properly applied* and cases are dealt with fairly, efficiently and speedily.

Considering this recommendation and the constitutional provisions, Article 15, para. (1) of the Law on the Status of the Judge sets forth that judges are obliged to strictly execute all the legal requirements related to the dispense of justice, to ensure the protection of the citizens' rights and liberties, their honor and dignity, to protect the interests of the society and the high culture of judicial activity, and to be impartial.

6. Regarding the observance and guarantee of the independence of judges there is the problem of conditions and manner of subjecting judges to liability, because in a democratic society the judge may not have an absolute immunity. At the same time, the judge shall be subjected to liability with utmost prudence determined by the need to guarantee the independence and freedom of judges of any induced pressures.

Both Article 116, para. (6) of the Constitution, and the legislation currently in force, Article 15, para. (6) of the Law on the Status of the Judge and Article 15, para. (1) of the Code of Ethics of the Judge[3] set forth that failure of a judge to execute his/her obligations imply liability provided by law.

Article 21, para. (1) of the Law on the Status of the Judge provides that judges shall be subject to disciplinary liability for deviations from official duties, as well as for conduct, which damages the interest of judicial office and judicial prestige.

The social value protected by certain disciplinary norms is represented by the social relations imposing that justice is dispensed and the legal provisions are observed.

The Constitution (Article 123, para. (1)), providing for the main duties of the judicial administration authority, sets that the Superior Council of Magistracy ensures the appointment, transfer, detachment, promotion and *application of disciplinary measures to judges.*

According to Article 4, para. (3) of the Law No. 947-XIII dated July 19, 1996 on the Superior Council of Magistracy[4], when exercising its functions the Superior Council of Magistracy has certain competences in the area of securing the discipline and ethics of judges:

a) examines petitions of the citizens on matters related to the ethics of judges;
b) examines appeals against decisions issued by the Disciplinary Board;
c) applies disciplinary sanctions to judges;
d) validates the decisions (opinions) issued by the Qualification Board and Disciplinary Board.

According to Article 1 and Article 7 of the Law No. 950-XIII dated July 19, 1996 on the Disciplinary Board and the Disciplinary Liability of Judges[5] (hereinafter referred to as the Law on the Disciplinary Board and the Disciplinary Liability of Judges), the Disciplinary Board under the Superior Council of Magistracy is a body competent to examine cases related to the disciplinary liability of judges and solve cases related to premature repeal of the disciplinary punishment.

The Superior Council of Magistracy and the Disciplinary Board, as disciplinary authorities, in order to make a judge responsible for the commission of a disciplinary violation must determine whether there are constitutive elements of such a violation, and correspondingly, the objective and subjective sides thereof. In absence of one of these constitutive elements the

[3] www.csm.md (approved by the Decision of the Superior Council of Magistracy No. 366/15 dated November 29, 2007)
[4] M.O., 1996, No.64, Article 641
[5] M.O., 1996, No.61-62, Article 607

disciplinary violation shall not be valid and, hence, no disciplinary liability may be applied to the judge.

The disciplinary procedure in regard to a judge may be initiated only based on a notification made in writing by the persons entitled to initiate such a procedure.

The procedure of disciplinary sanctioning shall be applied in strict compliance with the Constitution and the legal provisions.

Article 9, para. (1) of the Law on the Disciplinary Board and the Disciplinary Liability of the Judge provides that a judge may be subjected to disciplinary liability for the commission of disciplinary violations specified in Article 22 of the Law on the Status of the Judge.

Article 22 of the Law on the Status of the Judge provides for disciplinary violations qualified as violations of official duties or behavior damaging the judicial office interest and prestige.

7. As mentioned above, Article 22, para. (1), letter b) of the Law on the Status of the Judge sets forth that: a disciplinary violation constitutes a non-uniform interpretation or application of legislation, intentional or due to severe negligence, unless it is *justified* by the modification of the judicial practice.

According to the contested legal norm the Disciplinary Board shall examine the following matters:

a) whether a judge *interpreted* the legislation in a non-uniform manner;
b) whether a judge *applied* the legislation in a non-uniform manner;
c) whether the court judgments issued by the judge comply with the judicial practice ;
d) whether it is not *justified* by the modification of judicial practice;
e) whether application or interpretation of the legislation in a non-uniform manner by the judge was intentional or due to severe negligence.

7.1. In order to recognize the actions of a judge as a disciplinary violation the legislator refers in Article 22, para. (1), letter b) to two basic notions: non-uniform interpretation or application of legislation. Legislative interpretation, according to the general theory of law, is a stage of the process of application of law, the final purpose being to highlight the will of the legislator materialized in the legal norm to be applied.

The Constitutional Court considers that a judge may not be subjected to disciplinary liability only for non-uniform interpretation of the legislation. The judge's right to think freely, to interpret laws differently is thus violated, as the judge has the obligation to follow the legal norms determining, first of all, the legality of the legal act based on which the dispute is settled. The legislator did not consider the fact that there are jurisprudence discrepancies in certain cases, and that not in all cases there are decisions issued by the Supreme Court of Justice regarding the application of the legal norms.

It shall be mentioned in this regard that issuance by higher courts of directives, explanations or resolutions must be discouraged. However, as long as such are available, they shall not be mandatory for lower courts. They represent violation of individual independence of judges. In addition, the sample judgments of higher courts and judgments specially issued as case-law by these courts shall serve as recommendations and shall not be mandatory for lower courts in

other cases. They shall not be used to limit the freedom of lower courts and the decision-making process.

It does not result from the contested legal norm how a judge could interpret the legislation non-uniformly, *due to severe negligence*, without applying it. The notion "non-uniform interpretation of legislation" is unclear. There is the notion of correct and unitary interpretation of the law.

Thus, the legal norm in part related to acknowledging non-uniform interpretation of the legislation due to severe negligence as a disciplinary violation is not clear and predictable.

The Court states that in p. 77, letter i) of the Opinion No. 3 adopted on November 19, 2002 in Strasbourg, the Consultative Council of European Judges (CCEJ) requested the member-states that in each country the statutes or the fundamental charter applicable to judges should define as far as possible *in specific terms* the failings that might give rise to disciplinary sanctions, as well as the procedures to be followed.

The Court concludes that in the contested legal norm the Parliament determined the disciplinary liability of judges in unclear terms.

7.2. The Court mentions that it is not the competence of the Superior Council of Magistracy and the Disciplinary Board to assess the compliance of the court judgments with the judicial practice, because it implies the assessment of legality of the court judgments.

This is the exclusive duty of the courts, especially of the Supreme Court of Justice.

According to Article 1, para. (2) of the Law No. 789-XIII dated March 26, 1996[6], the Supreme Court of Justice "is the supreme court *securing a correct and uniform application* of the legislation by all the courts, ensuring *settlement of disputes arisen within the application of laws.*"

It results from the contested legal norm that non-uniform application of the legislation may be considered a violation of the law leading to cancellation of the court judgment.

In this regard we would like to mention the provisions of the Criminal Procedure Code, as per which *one of the grounds for cassation* is: the legal norm applied in the judgment appealed contradicts a *judgment on the application of the same norm issued by the Supreme Court of Justice* (Article 427, para. (1, point 16) of the Criminal Procedure Code).

In the course of procedural evidentiary actions, the reporting judge shall indicate the jurisprudence on the legal issues applied to settle the appealed judgment (Article 431, para. (2) of the Criminal Procedure Code).

The court of cassation establishing that the legal norm applied by the judge conflicts with a decision on application of this norm, shall cancel this judgment. However, in line with Article 9 of the Law on the Disciplinary Board and Disciplinary Liability of Judges, cancelling or modifying court judgments shall not imply liability if the judge who issued the judgment did not violate the law intentionally or due to severe guilt.

[6] M.O., 1996, No. 32-33, Article 323

The Court considers that only the court may assess if the judge intentionally or due to severe negligence applied the legislation in a non-uniform manner.

7.3. According to the contested legal norm, the Disciplinary Board shall decide on applying disciplinary sanctions to judges for non-uniform interpretation or application of the legislation also when the case was not heard by the higher court, its judgment being final, while the conclusions on the charge are based both on the materials of the control conducted and on the case materials, requesting additional documents and materials and judicial cases where the judge violated the law.

It results from the aforementioned that the Disciplinary Board and, correspondingly, the Superior Council of Magistracy, shall assess the legality of the court judgment, the correctness of application of the legislation, undertaking, thus, the duties of a justice dispense authority.

However, the control of legality and sufficiency of a legal act may be exerted only by the appeal and cassation courts in line with the jurisdictional procedures.

Inadmissibility to doubt the legality of court judgments is expressly set forth in Article 120 of the Constitution.

According to Article 120 of the Constitution, it is compulsory to abide by the sentences and the other final legal rulings pronounced in courts of law and to co-operate with the latter at their specific request during trials, the execution of sentences and other final court judgments.

Article 25, para. (5) of the Criminal Procedure Code[7] sets forth that court sentences and judgments in a criminal case may be verified only by the respective courts, while Article 19, para. (2) of the Civil Procedure Code[8] provides that a court judgment issued in a civil case may be controlled and reviewed only by the competent court in the duly set legal manner.

Hence, the Disciplinary Board and, correspondingly, the Superior Council of Magistracy may examine any decision to initiate a disciplinary proceeding in cases set forth in Article 22, para. (1), letter b) of the Law No. 544-XIII only within the limits of their competence, without interfering into the judicial act or diminishing its authority. In order to appreciate the actions of the judge related to interpreting or applying the legislation in a non-uniform manner, a reasonable proportionality ratio between the means applied and the aim pursued shall also be considered.

The disciplinary sanction shall be applied to the judge only in case the imperfect judgment is cancelled and it is stated that when hearing the case the judge, intentionally or due to severe negligence, interpreted or applied the legislation in a non-uniform manner.

7.4. The Court considers that the contested legal norm does not exclude disciplinary sanctioning judges also for applying or interpreting the law in a non-uniform manner in an irrevocable court judgment.

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[7] [7]M.O., 2003, No. 104-110, Article 447
[8] [8]M.O., 2003, No. 111-115, Article 451

The principle of security of legal relations imposes that an irrevocable judgment issued in a case may not be the subject of a new proceeding.

Article 449 of the Civil Procedure Code and Article 458 of the Criminal Procedure Code provide for cases when the irrevocable court judgments are reviewed.

According to Article 449, letter a) of the Civil Procedure Code, a review shall be declared when it was established, by an irrevocable sentence, that one of the trial participants or one of the judges committed a crime related to the case hearing. According to Article 458, para. (3), point 2) of the Criminal Procedure Code, a review shall be requested when reaching a final judgment it was established that the judges and prosecutors in the course of the case hearing committed abuses construed as crimes.

In this regard the Court mentions that intentional interpretation or application of the legislation in a non-uniform manner is subject to the provisions of Article 307 of the Criminal Code[9] (issuing a sentence, decision, ruling or judgment contrary to the law), while non-uniform interpretation or application of the legislation due to severe negligence stated by a court constitutes a disciplinary violation.

The Court concludes that none of the bodies, except for courts, are entitled to doubt the legal force of a judicial act, including the one in the adoption of which the judge, in whose regard the disciplinary proceeding was initiated, participated, and to assess the compliance of the court judgments with the judicial practice.

Considering the aforementioned, the Court concludes that the contested legal norm is contrary to Article 6, Article 114, and Article 116, para. (1) of the Constitution.

Based on Article 140 of the Constitution, Article 26 of the Law on the Constitution Court, and Article 62, letter a) of the Constitutional Jurisdiction Code,

The Constitutional Court DECIDES:

1. To declare unconstitutional the provisions of Article 22, para. (1), letter b) of the Law No. 544-XIII dated July 20, 1995 on the Status of the Judge in the version of the Law No. 247-XVI dated July 21, 2006 on Amendment and Completion of Certain Legislative Acts.
2. This decision is final, it is not subject to appeal, it takes effect on the date of adoption and is published in "*Monitorul Oficial al Republicii Moldova*."

CHAIRMAN OF THE
CONSTITUTIONAL COURT Dumitru PULBERE

No. 28. Chişinău, December 14, 2010.

[9] M.O., 2002, No. 128-129, Article 1012

EFFICIENCY OF COURT PROCEEDINGS THROUGH PROFESSIONAL INTERACTION

ACCESS TO EVIDENCE AND CASE FILES IN CRIMINAL CASES

INTERNATIONAL CONVENTIONS/NATIONAL LEGISLATION

- ECHR Art 5 § 4
- ECHR Art 6 – Fair trial
- MD CPC Art 66(2) 21), 307(1) and 308(1) – Pre-trial detention
- MD CPC Art 66(2) 22) and 68(1) 10) – Upon completion of the criminal investigation

ECtHR CASE-LAW

Adversarial hearings

Bulut v Austria (1996) Application no 17358/90 – Violation of ECHR Art 6 § 1[10]

> 47. The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent…

Alekseyenko v Russia (2009) Application no 74266/01 – Violation of ECHR Art 6 § 1

> 52. The applicant complained that the supervisory review proceedings before the Supreme Court on 18 October 2000 had been unfair in that the authorities had failed to notify and summon the defence whilst the prosecution had been present.
>
> 64. The fact remains, however, that the supervisory review instance was not bound by the scope of the request for supervisory review and could carry out a full scale judicial review of the decisions in the case by either quashing or amending them, remitting the case to lower courts or an investigator, or terminating the criminal proceedings partly or altogether … Even though in the end the applicant's sentence remained unchanged, the Presidium of the Supreme Court did exercise its power by amending the conviction and thereby determining a criminal charge against him…

[10] All translations of ECtHR decisions used in this document are unofficial translations.

65. Having regard to the above and the fact that the supervisory review proceedings were initiated on the prosecution's request, the Court considers that in order to satisfy the principle of fairness enshrined in Article 6 of the Convention the Presidium of the Supreme Court should have notified the applicant and his defence lawyer of the contents of the prosecution's supervisory review request and the date and place of the hearing. And since the prosecution was later present at the supervisory review hearing of 18 October 2000 and made submissions, the principle of adversarial proceedings also required that the defence be present at that hearing in order to be able to contest and comment on the arguments advanced by the prosecution. In these circumstances, the Court rejects as irrelevant the Government's reference to the fact that the absence of the applicant and his counsel from the hearing was not unlawful under domestic law.

1. Pre-trial detention

Garcia Alva v Germany (2001) Application no 23541/94 – Violation of ECHR Art 5 § 4

40. In the present case, the applicant was, upon his arrest, informed in general terms of the grounds for suspicion and of the evidence against him, as well as of the grounds for his detention. Upon counsel's request, copies of the applicant's statements to the police authorities and the detention judge, of the record of the search of the applicant's premises, as well as of the arrest warrant against him were made available to the defence, but at that stage, the Public Prosecutor's Office dismissed counsel's request for consultation of the investigation files, and in particular of the depositions made by Mr K., on the ground that consultation of these documents would endanger the purpose of the investigations.

The Berlin-Tiergarten District Court, for its part, reached its conclusion that there was a strong suspicion that the applicant had committed the offences in question on the basis of the contents of the investigation file – including, to a large extent, Mr K.'s statements – and the parties' submissions. In June and July 1993 the applicant's respective appeals were dismissed by the Berlin Regional Court and the Berlin Court of Appeal, which also had a copy of the files at their disposal.

41. The contents of the investigation file, and in particular the statements of Mr K. thus appear to have played a key role in the District Court's decision to prolong the applicant's detention on remand. However, while the Public Prosecutor and the District Court were familiar with them, their precise content had not at that stage been brought to the applicant's or his counsel's knowledge. As a consequence, neither of them had an opportunity adequately to challenge the findings referred to by the Public Prosecutor and the District Court, notably by questioning the reliability or conclusiveness of the statements made by Mr K., who had a previous conviction and was the subject of another set of investigations for drug-trafficking.

It is true that, as the Government point out, the arrest warrant gave some details about the facts grounding the suspicion against the applicant. However the information provided in this way was only an account of the facts as construed by the District Court on the basis of all the information made available to it by the Public

Prosecutor's Office. In the Court's opinion, it is hardly possible for an accused to challenge the reliability of such an account properly without being made aware of the evidence on which it is based. This requires that the accused be given a sufficient opportunity to take cognisance of statements and other pieces of evidence underlying them, such as the results of the police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence which he seeks to be given access to.

42. The Court is aware that the Public Prosecutor denied the requested access to the file documents on the basis of Article 147 § 2 of the Code of Criminal Procedure, arguing that to act otherwise would entail the risk of compromising the success of the on-going investigations, which were said to be very complex and to involve a large number of other suspects (see paragraphs 13 and 19 above).

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer.

43. In these circumstances, and given the importance in the Berlin Courts' reasoning of the contents of the investigation file, and in particular of the statements made by Mr K., which could not be adequately challenged by the applicant, since they were not communicated to him, the procedure before the said courts, which reviewed the lawfulness of the applicant's detention on remand, did not comply with the guarantees afforded by Article 5 § 4. This provision has therefore been violated.

Turcan and Turcan v Moldova - violation of ECHR Article 5 § 4

40. D.T. also complained under Article 5 § 4 of the Convention about the failure of the authorities to give him and his lawyer access to the relevant parts of the criminal file in order to challenge his remand.

…

59. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness, in the sense of the Convention, of his client's detention.The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law but also concerns the reasonableness of the suspicion grounding the arrest, the legitimacy of the purpose pursued by the arrest and the justification of the ensuing detention.

60. The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be

kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer.

…

63. The Court also considers that the practice of not disclosing materials of the file concerning the grounds for detention, when coupled with the failure of the courts to give sufficient reasons for detention, legitimately reinforces the accused's impression that his detention was arbitrary.

2. Main hearing

Edwards vs UK (1992) Application no 13071/87 – No violation of ECHR Art 6 no 1

30. He submitted that the trial proceedings were unfair because of the failure of the police to disclose to the defence (1) the fact that one of the victims, who had made a statement that she thought she would be able to recognise her assailant, had failed to identify the applicant from a police photograph album … and (2) the existence of fingerprints which had been found at the scene of the crime ... If his counsel had been aware of these facts he would have been able to attack the credibility of police testimony. Bearing in mind that this was the main evidence against him there existed a possibility that one more juror might have been persuaded that he was innocent which would have led to his acquittal ... As a result, the defence was denied an adequate opportunity to examine the police witnesses and was not on an equal footing with the prosecution as required by paragraph 3 (d) of Article 6 (art. 6-3-d). …

36. The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (art. 6-1), indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings.

However, when this was discovered, the Secretary of State, following an independent police investigation, referred the case to the Court of Appeal which examined the transcript of the trial including the applicant's alleged confession and considered in detail the impact of the new information on the conviction ...

39. Having regard to the above, the Court concludes that the defects of the original trial were remedied by the subsequent procedure before the Court of Appeal ... Moreover, there is no indication that the proceedings before the Court of Appeal were in any respect unfair.

Foucher v France (1997) Application no 22209/93 – Violation of Art 6 § 1 and 3

26. Mr **Foucher** complained of an infringement of the rights of the defence in that, in criminal proceedings, he had not been able to have access to his case file or to obtain a copy of the documents in it. He relied on Article 6 para. 1 of the Convention taken together with Article 6 para. 3…

36. The Court, like the Commission, therefore considers that it was important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him.

…

As he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of Article 6 para. 1 of the Convention taken together with Article 6 para. 3 (art. 6-3+6-1).

Rowe and Davis v UK (2000) Application no 28901/95 – Violation of ECHR Art 6 § 1

60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party…

…

In addition Article 6 § 1 requires, as indeed does English law (see paragraph 34 above), that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused…

61. However, as the applicants recognised …, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused …In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 ... Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities …

63. During the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1…

66. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial. The facts of the present case set it apart from that of Edwards cited above, where the appeal proceedings were adequate to remedy the

defects at first instance since by that stage the defence had received most of the missing information and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence (op. cit., p. 35, §§ 36-37).

Padin Gestoso v Spain (1998) (Decision) – No violation of Art 6 § 3 b)

1. The applicant complained that he had never been supplied with a copy of the complaint lodged by the public prosecutor's office and that he had come to learn of it through his lawyers nearly ten months after it was lodged and declared admissible by central investigating judge no. 5.

2…
The Court notes in particular that after the forty-seven persons charged, including the applicant, were committed on 19 February 1992 for trial before the Criminal Division of the *Audiencia Nacional*, that court, by a decision of 29 October 1992, ordered that each of their lawyers be supplied with a complete copy of the investigation file, which ran to more than eighty volumes, so that they could make a provisional classification of the offences. The Court therefore notes that investigation of the case continued for several years, so that the applicant had sufficient time, after being served with the decision to charge him of 11 June 1990, for the preparation of his defence, which is the main purpose of Article 6 § 3 (b) of the Convention…

Fitt v UK (2000) Application no 29777/96– No violation of ECHR Art 6 § 1

47. On 23 March 1994 the prosecution made an *ex parte* application to the trial judge for an order authorising non-disclosure. The defence were told that the material in question related to sources of information and were able to make representations to the judge, outlining to him the defence case and enjoining disclosure of any evidence which related to it. In the absence of the defence, prosecution counsel described the evidence to the judge, who decided that it should not be disclosed. He explained that in performing the balancing exercise he had "adopted the principle that if something did or might help further the defence then I would order disclosure". The prosecution made a second *ex parte* application on 25 April 1994, which was followed by an *inter partes* hearing on the question whether a witness statement taken from C. after his guilty plea should be disclosed to the defence. In the course of this hearing the defence were able to argue the case for disclosure and to hear the arguments of the prosecution and the judge's reasons for not ordering complete disclosure of the statement. Although the judge decided against full disclosure of the statement in question, since it contained references to sources of information, the defence were provided with a summary of it ...

48. The Court is satisfied that the defence were kept informed and were permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds…

49. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of withholding the evidence. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6 § 1. He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial. Moreover it can be assumed – not least because he expressly stated on 23 March that he would have ordered disclosure if it might have helped the defence – that the judge applied the principles which had recently been clarified by the Court of Appeal, for example that, in weighing the public interest in concealment against the interest of the accused in disclosure, great weight should be attached to the interests of justice, and that the judge should continue to assess the need for disclosure throughout the trial

Jasper v UK (2000) Application no 27052/95 – No violation of ECHR Art 6 § 1

43. The applicant submitted that any failure to disclose relevant evidence undermined the right to a fair trial, although he agreed with the Government and the Commission that the right to full disclosure was not absolute and could, in pursuit of a legitimate aim such as the protection of national security or of vulnerable witnesses or sources of information, be subject to limitations. Any such restriction on the rights of the defence should, however, be strictly proportionate and counterbalanced by procedural safeguards adequate to compensate for the handicap imposed on the defence. Whilst accepting that in certain circumstances it might be necessary in the public interest to exclude the accused and his representatives from the disclosure procedure, he contended that the *ex parte* hearing before the judge … violated Article 6 because it afforded no safeguards against judicial bias or error and no opportunity to put arguments on behalf of the accused.

…

51. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence.The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, §§ 66, 67). In addition Article 6 § 1 requires, as indeed does English law (see paragraph 19 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.

…

53. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them ... In any event, in many cases, such as the present, where the evidence in question has never been revealed, it would not be possible for the Court to

attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

54. On 14 January 1994, shortly before the commencement of the applicant's trial, the prosecution made an *ex parte* application to the trial judge to withhold material in its possession on the grounds of public interest immunity. The defence were notified that an application was to be made, but were not told of the category of material which the prosecution sought to withhold. They were given the opportunity to outline the defence case to the trial judge, namely that the applicant had not known that the consignment of meat contained cannabis and had collected it pursuant to instructions received by telephone the previous night, and to request the judge to order disclosure of any evidence relating to these alleged facts. The trial judge examined the material in question and ruled that it should not be disclosed. The defence were not informed of the reasons for the judge's decision.

55. The Court is satisfied that the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.

Edwards and Lewis v UK (2004) Application no 39647/98 and 40461/98 – Violation of ECHR Art 6 § 1

58. Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue. For example, in Mr Edwards' case, the Government revealed before the European Court that the evidence produced to the trial judge and Court of Appeal in the *ex parte* hearings included material suggesting that Mr Edwards had been involved in drug dealing prior to the events which led to his arrest and prosecution. During the course of the criminal proceedings the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation, which might have been directly relevant to the judges' conclusions that the applicant had not been charged with a “state created crime” (see paragraph 16 above). In Mr Lewis' case, the nature of the undisclosed material has not been revealed, but it is possible that it also was damaging to the applicant's submissions on entrapment. Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure.

RECITATION OF WITNESS STATEMENTS IN COURT HEARING

INTERNATIONAL CONVENTIONS/NATIONAL LEGISLATION

- ECHR Art 6 – Fair trial
- MD CPC Art 371 – Reading Out in a Hearing Statements of a Witness

ECtHR CASE-LAW

Unterpertinger v. Austria (1986) (Application no. 9120/80) – Violation of Art. 6 para. 1 of ECHR

30. When called by the Innsbruck Regional Court, Mrs. Unterpertinger and Miss Tappeiner refused to give evidence, as they were entitled to do by virtue of Article 152(1)(1) of the Austrian Code of Criminal Procedure (see paragraphs 16 and 19 above). This accordingly prevented the trial judge from hearing them as witnesses and prevented the defence - and the prosecution - from examining them during the oral proceedings. As such, the provision manifestly is not incompatible with Article 6 §§ 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention: it makes allowance for the special problems that may be entailed by a confrontation between someone "charged with a criminal offence" and a witness from his own family and is calculated to protect such a witness by avoiding his being put in a moral dilemma; furthermore, there are comparable provisions in the domestic law of several member States of the Council of Europe.

31. While the trial court and then the Court of Appeal were thus unable to hear evidence from Mrs. Unterpertinger and Miss Tappeiner - or to acquaint themselves with the statements made by the former to the judge at Kufstein -, they had, on the other hand, been obliged to have the women's statements to the police read out when the prosecution so requested (see paragraph 19 above).

In itself, the reading out of statements in this way cannot be regarded as being inconsistent with Article 6 §§ 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention, but the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of Article 6 (art. 6) to protect. This is especially so where the person "charged with a criminal offence", who has the right under Article 6 § 3 (d) (art. 6-3-d) to "examine or have examined" witnesses against him, has not had an opportunity at any stage in the earlier proceedings to question the persons whose statements are read out at the hearing.

32. In the instant case the police had taken statements from Mrs. Unterpertinger as a "suspect" in relation to the incident on 14 August 1979 and then as a complainant in relation to the incident on 9 September 1979; from Miss Tappeiner they had taken a statement as a "person involved" in connection with the first incident (see paragraphs 10 and 12 above). By refusing to give evidence in court, they prevented the applicant from examining them or having them examined on their statements. Admittedly, he was able to submit his comments freely during the hearing, but the Court of Appeal refused to admit the evidence he sought to adduce in order to put his former wife's and step-daughter's credibility in doubt (see paragraph 21 above).

33. It is true that the statements made by Mrs. Unterpertinger and Miss Tappeiner were not the only evidence before the courts. They also had before them, inter alia, the police reports, the medical reports appended thereto and the file on the couple's divorce proceedings (see paragraphs 19 and 22 above); in addition, the Court of Appeal had heard a sister-in-law of Mr. Unterpertinger as a witness.

However, it is clear from the judgment of 4 June 1980 that the Court of Appeal based the applicant's conviction mainly on the statements made by Mrs. Unterpertinger and Miss Tappeiner to the police. It did not treat these simply as items of information but as proof of the truth of the accusations made by the women at the time. Admittedly, it was for the Court of Appeal to assess the material before it as well as the relevance of the evidence which the accused sought to adduce; but Mr. Unterpertinger was nevertheless convicted on the basis of "testimony" in respect of which his defence rights were appreciably restricted.

That being so, the applicant did not have a fair trial and there was a breach of paragraph 1 of Article 6 (art. 6-1) of the Convention, taken together with the principles inherent in paragraph 3 (d) (art. 6-3-d).

LUCÀ v. ITALY (2001)

37. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 49).

38. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67, and *Van Mechelen and Others*, cited above, p. 711, § 50).

39. The evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49, and *Van Mechelen and Others*, cited above, p. 711, § 51).

40. As the Court has stated on a number of occasions (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 12, § 34, and *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper

opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; and *Van Mechelen and Others*, cited above, p. 712, § 55; see also *Dorigo v. Italy*, application no. 33286/96, Commission's report of 9 September 1998, § 43, unpublished, and, on the same case, Committee of Ministers Resolution DH (99) 258 of 15 April 1999).

41. In that regard, the fact that the depositions were, as here, made by a co-accused rather than by a witness is of no relevance. In that connection, the Court reiterates that the term "witness" has an "autonomous" meaning in the Convention system (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see, *mutatis mutandis*, *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 950-51, §§ 51-52).

42. In the light of the foregoing, the reasons given by the Court of Cassation in its judgment of 19 October 1995 for dismissing the appeal brought under Article 6 § 3 (d) of the Convention – reasons on which the Government also relied in part – do not appear pertinent. In particular, the fact that under the domestic law in force at the material time (see paragraph 26 above) the court could rule statements made before the trial admissible if a co-accused refused to give evidence could not deprive the accused of the right which Article 6 § 3 (d) afforded him to examine or have examined in adversarial proceedings any material evidence against him.

43. In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N. before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him.

44. In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

45. The applicant was, therefore, denied a fair trial. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d).

50. The Court further observes that, as soon as D had declared his wish to remain silent, the prosecutor requested, and the High Court granted, authorisation to read out his depositions to the police (see paragraph 10 above). In this respect the present case is similar to *Lucà* (cited above, §§ 13 -15); and *Craxi*, cited above, § 30), where the reading out was to be done if the co-accused chose to remain silent. At no point during the proceedings prior to the reading out of D's statements by the prosecutor were the applicants given an opportunity to challenge and question D through cross-examination. Rather than allowing the applicants' respective counsel to put questions to D and plead their defence in the light of D's replies or refusals to reply, the High Court gave the floor to the prosecution so that it could read out D's depositions. Thus, D's opting to exercise his right of silence had the effect of dispensing him altogether from answering any question that the applicants might have wished to address to him.

51. This appears to have been the situation also after D's statements had been read out, when counsel for the second applicant made a reasoned request to put a question to D. The High Court president responded that, since D had invoked his right of silence, it would not be permitted to question him directly. It is true that the president nevertheless asked D if he wished to give oral evidence in full or in part, and that D replied that he still did not wish to give oral evidence even in relation to the specific question put to him by the second applicant's counsel (see paragraph 12 above). However, even at this stage, with the High Court president acting as an intermediary filter between the second applicant as a defendant and D – here as a witness, it cannot be said that the second applicant was given a real opportunity to confront D (cf. *Harri Peltonen v. Finland* (dec.) no. 30409/96, 11 May 1999).

52. Furthermore, the Court is not convinced that, had the applicants been afforded an opportunity to question D directly, this could not have been reconciled with D's right not to answer those questions that might have incriminated him.

53. The High Court's interpretation of the law seems to have had implications for its conduct of the proceedings in relation to the matter complained of under Article 6 §§ 1 and 3 (d) of the Convention. The Court cannot but note that the High Court considered that, as a co-accused, D had not been a "witness" for the purposes of these provisions (see paragraph 10 above). According to the Supreme Court, the High Court appeared to have proceeded from the assumption that the Convention limitations on the reading out of depositions to the police did not apply to such statements made by a co-accused (see paragraph 16 above). In the Court's view, this interpretation by the High Court is hardly consistent with the autonomous meaning of the term "witness" in the Court's case-law, according to which the fact that the depositions were made by a co-accused rather than by a witness is of no relevance (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). It should be reiterated that, where a deposition may serve to a material degree as the basis for a conviction then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see *Lucà*, cited above, § 41).

54. The Court finds no reason to adopt a different approach in this case. Having regard to the findings made by the Supreme Court, it must be presumed that D's depositions had a decisive influence on the outcome of the case (see paragraphs 19 and 45 above).

55. Against this background, the Court is not satisfied that the applicants were given an adequate and proper opportunity to contest the statements on which their conviction was based.

56. The applicants were therefore denied a fair trial. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

GOSSA v. POLAND (2007)

55. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court recalls that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see, *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). However, *impossibilium nulla est obligatio*; provided that the authorities cannot be accused of a lack of diligence in their efforts to award the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see, in particular, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21; *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005; *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005). Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should, however, be treated with extreme care (see *Visser v. the Netherlands*, no. 26668/95, § 44, 14 February 2002; *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V). The defendant's conviction may, in any event, not solely be based on the statements of such a witness (see, in particular, *Mayali*, cited above, § 32).

56. In that regard, the fact that the statements were, as here, made by a co-accused rather than by a witness is of no relevance. In that connection, the Court reiterates that the term "witness" has an "autonomous" meaning in the Convention system (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). Thus, where a statement may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see, *mutatis mutandis*, *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 950-51, §§ 51-52).

S.N. V. SWEDEN (no. **34209/96**) ***No violation Article 6 §§ 1 and 3 (d)***

The applicant, S.N., a Swedish national born in 1965, was accused by a ten-year-old boy, M., of sexual abuse. In April 1995 a police interview with M. took place and was recorded. On S.N.'s request, the police carried out another recorded interview with M. in September 1995. The applicant's counsel did not attend, but indicated to the police officer interviewing M.

which issues needed to be addressed. On 29 September 1995 the applicant was indicted for sexual acts with a child.

The District Court played the recordings of the child's interviews at the trial. No request for M. to be heard in person by the court was made. Relying almost entirely on the child's assertions, the court convicted the applicant and sentenced him to imprisonment. On the applicant's appeal, the Court of Appeal upheld the conviction, although it reduced the sentence. The court acknowledged that there was no technical evidence supporting the child's allegations, which were sometimes imprecise. However, it found that the police interviews provided sufficient evidence for the applicant's guilt to be established. He unsuccessfully lodged an appeal with the Supreme Court.

S.N. claimed that he did not have a fair trial, as he was not given an opportunity to question M. He maintained that the police interviews with M. were flawed and that there was no evidence in the case to support M.'s statements. He relied on Article 6 §§ 1 (right to a fair hearing) and 3 (d) (right to examine witnesses).

The Court observed that the statements made by M. were virtually the sole evidence on which the courts' findings of guilt were based. The witnesses heard by the courts – M.'s mother and his school teacher – had not seen the alleged acts and gave evidence only on the perceived subsequent changes in M.'s personality. The Court also accepted the applicant's view that he could not have obtained the appearance of M. in person before the courts.

However, the applicant's counsel had consented not to be present during the second police interview, notwithstanding the resulting handicap to the defence, and had also accepted the manner in which the interview was to be conducted. Although it had been open to the applicant's counsel to ask for a postponement of the interview or to request that it be video-taped, he had chosen not to do so. Furthermore, he was able to have questions put to M. by the police officer conducting the interview. Having subsequently listened to the audio tape and read the transcript of the interview, he was apparently satisfied that the questions he had indicated to the police officer had actually been put to M. Accordingly, there has been no violation of Article 6 § 3 (d) on the ground that the applicant's counsel was absent during the second police interview.

Nor could it be said that the applicant had been denied his rights under Article 6 § 3 (d) on the ground that he was unable to examine or have examined the evidence given by M. during the trial and appeal proceedings. The Court noted that the videotape of the first police interview was shown during the trial and appeal hearings and that the record of the second interview was read out before the District Court and the audio tape of that interview was played back before the Court of Appeal. Those measures had to be considered sufficient to have enabled the applicant to challenge M.'s statements and his credibility in the course of the criminal proceedings. Indeed, that challenge resulted in the Court of Appeal reducing the applicant's sentence because it considered that part of the charges against him had not been proved.

The Court reiterated that evidence obtained from a witness under conditions in which the rights of the defence could not be secured to the extent normally required by the Convention should be treated with extreme care. However the Court was satisfied that the necessary care was applied in the evaluation of M.'s statements. The Court therefore considered that the criminal proceedings against the applicant, taken as a whole, could not be regarded as unfair.

The Court held by five votes to two that there had been no violation of Article 6 §§ 1 and 3 (d).

44. The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention organs is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see Saïdi v. France, judgment of 20 September 1993, and A.M. v. Italy, no. 37019/97). The Court further draws attention to the fact that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see, among other authorities, Bricmont v. Belgium, judgment of 7 July 1989,).

TARAU V. ROMANIA (2009)
Please see attached to the handout

FIFTH SECTION
CASE OF ZHUKOVSKIY v. UKRAINE
*(Application no. **31240/03**)*
JUDGMENT
STRASBOURG
3 March 2011
FINAL
15/09/2011

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

In the case of Zhukovskiy v. Ukraine,
The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Boštjan M. Zupančič,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ann Power,
Ganna Yudkivska,
Angelika Nussberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*
Having deliberated in private on 8 February 2011,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. **31240/03**) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Andrey Vasilyevich Zhukovskiy ("the applicant"), on 13 September 2003.

2. The applicant, who had been granted legal aid, was represented by Ms O.V. Shevchenko, a lawyer practising in Kiev. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. The applicant alleged that the criminal proceedings against him had been unfair and that the courts had based his conviction on the testimony of witnesses whom he had not been allowed to question.

4. On 8 September 2009 the Court declared the application partly inadmissible and decided to communicate the complaint concerning unfairness of trial proceedings and inability to examine witnesses, under Article 6 § 1 and 3 (d) of the Convention, to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and serves his sentence.

6. In 1996 the applicant moved from Ukraine to the Sakha Republic in the Russian Federation.

7. On 21 June 1998 a Mr G. was murdered in the city of Yakutsk, Russia. According to the applicant, the murder was committed by Mr Gl. and the applicant only helped to transport and hide the body.

8. On 14 September 1998 the police instituted criminal proceedings into the murder of Mr G. The same day the applicant was arrested and questioned as a suspect. He showed the police the place where the decapitated corpse of Mr G. was hidden.

9. On 10 October 1998 the applicant's girlfriend Ms R. indicated to the police the place where the head of the murdered Mr G. was hidden.

10. The investigation conducted a number of forensic examinations and questioning, including cross-examination by the applicant of some of the witnesses.

11. On 12 February 1999 the applicant was released under an obligation not to abscond.

12. On 11 March 1999 Mr Gl., who had been on the run, was arrested. The next day the applicant breached his undertaking not to abscond and left for Ukraine.

13. On 19 November 1999 the Supreme Court of the Sakha Republic (the Russian Federation) sentenced Mr Gl. to fifteen years' imprisonment for the murder of Mr G. This judgment was upheld by the Supreme Court of the Russian Federation and became final on 19 April 2000.

14. On 2 December 1999 the General Prosecutor's Office of the Russian Federation requested the General Prosecutor's Office of Ukraine under the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 ("the Minsk Convention") to prosecute the applicant for the crime committed on the territory of the Russian Federation, given that the applicant, a Ukrainian national, could not be extradited to Russia.

15. On 4 April 2001 the applicant was arrested within another set of criminal proceedings and on 31 July 2001 the Chornobayivsky Local Court sentenced him to six months' imprisonment for another, unrelated offence. On 25 September 2001 the Cherkassy Regional Court of Appeal (the Cherkassy Court) upheld that judgment.

16. On 4 October 2001, under the request of 2 December 1999, the applicant was charged with murder committed on the territory of the Russian Federation in June 1998.

17. On 18 December 2001 the Cherkassy Court, sitting as a court of first instance, held its first hearing in the criminal case against the applicant. The applicant's lawyer requested the court to summon and examine the witnesses who had participated in the judicial proceedings on the territory of the Russian Federation, and also Mr Gl.

18. The Cherkassy Court summoned the witnesses to appear before it on 15 January and then on 19 February 2002

19. On 22 February 2002 the Cherkassy Court granted the request of the applicant's defence counsel to cross-examine the witnesses in the criminal proceedings who lived in the Russian Federation. The court noted that some witnesses had confirmed their statements by cable and stated that they could not travel to Cherkassy for financial reasons[1]. The court ruled that it was necessary to examine the witnesses either in Ukraine or at their place of residence by a local judicial authority with jurisdiction under the Minsk Convention. Taking into account lack of sufficient funds for travel and accommodation for the witnesses from the city of Yakutsk in the city of Cherkassy, the court opted for the international legal assistance mechanism and ordered that the appropriate Russian authorities be requested to conduct a judicial examination of the witnesses in the Russian Federation. The records of that examination would be used by the Cherkassy Court as evidence in the criminal case against the applicant. The court also noted that as an alternative the witnesses could be brought to Cherkassy if the relevant authorities of the Russian Federation could cover their costs.

20. On 6 March 2002 and 19 April 2002, under the procedure envisaged by the European Convention on Mutual Assistance in Criminal Matters, the court lodged with the Ministry of Justice of Ukraine a request for letters rogatory to be sent to the Russian authorities in order to have nine citizens residing in the Russian Federation questioned or to ensure their appearance before the court.

21. The questioning took place in February and March 2003.

22. On 5 May 2003, having received the materials that had been requested by letters rogatory from the Ministry of Justice of the Russian Federation, the Ministry of Justice of Ukraine forwarded them to the court.

23. On 29 July 2003 the Cherkassy Court found the applicant guilty of murder and sentenced him to fourteen years' imprisonment. The court based its findings on the materials in the criminal case file received from the relevant Russian authorities and the materials obtained during the judicial examination of witnesses by the court in Russia in February and

March 2003. The court also made a separate ruling noting the unlawfulness and irregularities of certain periods of the applicant's detention and lack of cooperation of the Ukrainian authorities responsible for international legal assistance.

24. The applicant appealed in cassation complaining, among other things, that the evidence obtained in the Russian Federation was not admissible, since the applicant and his lawyers had not participated in the questioning.

25. On 18 November 2003 the Supreme Court upheld the decision of the Cherkassy Court. In its decision, it stated that the applicant and his representatives had been aware of the difficulty of obtaining the attendance of witnesses from Russia and had agreed to and supported the proposal to send a request to a Russian court to have the witnesses questioned in that country, but that they had not showed any interest in attending the questioning, which they had had the right to do. In the absence of any actions on the part of the applicant and his lawyer in this matter, the court did not establish any violation of the applicant's right to defence.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

26. Article 9 of the Constitution provides:

"International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."

B. Code of Criminal Procedure of Ukraine

27. Relevant provisions of the Code provide:

Article 31
The procedure for communications between courts, prosecutors, investigators, or inquiry authorities and the respective authorities of foreign States

"The procedure for communications between the courts, prosecutors, investigators, or inquiry authorities and the respective authorities of foreign States as well as the procedure for execution of mutual letters rogatory shall be established by legislation of Ukraine and international treaties to which Ukraine is a signatory."

Article 48
Duties and rights of defence counsel

"Defence counsel shall use remedies available under this Code and other legislative acts in order to ascertain the circumstances dispelling the suspicion or rebutting the charges, extenuating or excluding criminal liability on the part of the suspect, accused, defendant or convicted person, and shall provide them with the necessary legal assistance.

After having been permitted to provide legal representation in the proceedings, defence counsel shall have the right:

...

(7) to put questions in court to the defendants, victims, witnesses, and also to the expert, specialist, claimant or respondent, and to participate in the examination of other evidence;

(8) to adduce evidence, lodge requests or challenges, express in court his or her opinion on requests made by other participants in the judicial proceedings, appeal against acts or decisions of a person conducting an inquiry, or against those of the investigator, prosecutor, or court; ...

(13) to collect information on matters which can be used as evidence in the case; ..."

Article 65
Evidence

"Criminal evidence is any factual information on the basis of which the inquiry authority, the investigator and the court ascertain whether or not an act which is a danger to society has been committed, establish the guilt of the person who has committed the act, and any other circumstances relevant to the proper determination of the case.

Such information shall be established: from statements from witnesses, the victim, a suspect, an accused, and also from expert reports, material evidence, reports on investigative and judicial actions, reports – with relevant materials attached thereto – drawn up by the appropriate authorities on the results of detective and search activities, and other documents."

Article 67
Assessment of evidence

"The court, prosecutor, investigator, or the person who conducts the inquiry shall assess evidence according to their inner convictions based on an extensive, full and objective review of all circumstances of the case in their entirety and in compliance with the law.

No evidence shall have a prejudicial effect on the court, prosecutor, investigator, or the person who conducts the inquiry."

Article 68
Witness testimony

"Anyone known to be aware of the circumstances relating to the case may be summoned as a witness.

A witness may be questioned about the circumstances to be established in a particular case and, *inter alia*, about matters relating to the personality of the accused or the suspect and about the witness's relationships with the accused or the suspect."

C. CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 ("the Minsk Convention")

28. Relevant provisions of the Convention provide:

Article 8
Execution procedure

"1. In executing letters rogatory for assistance in legal proceedings, the requested authority shall apply legislation of its State. If so requested by the requesting authority, it may also apply procedural rules of the requesting Party...

...

3. If so requested by the requesting authority, the requested authority shall inform in timely manner the requesting authority and interested parties of the time and place of execution of the letters rogatory in order to enable them to be present at the execution of the letters rogatory in accordance with legislation of the requested Party."

Article 13
Validity of documents

"1. The documents made or certified in the territory of one of the Contracting Parties by the authority or duly authorised person within their competence and in due form, sealed with an official stamp, shall be accepted in the territories of the other Contracting Parties without any certification for such purposes.

2. The documents regarded as official in the territory of one of the Contracting Parties shall have evidential force of official documents in the territories of the other Contracting Parties."

Article 60
The content and form of letters rogatory for assistance in criminal proceedings

"1. Letters rogatory for assistance in criminal proceedings shall be drawn up in accordance with Article 7 of this Convention.

2. The letters rogatory shall also contain:

...

в) the list of questions to be clarified at the interrogation;

D. European Convention on Mutual Assistance in Criminal Matters

29. Relevant provisions of the Convention provide:

Article 1

"The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party."

Article 3

"1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it."

Article 4

"On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents."

Article 14

"1. Requests for mutual assistance shall indicate as follows:

a. the authority making the request,

b. the object of and the reason for the request,

c. where possible, the identity and the nationality of the person concerned, and

d. where necessary, the name and address of the person to be served.

2. Letters rogatory referred to in Articles 3, 4 and 5 shall, in addition, state the offence and contain a summary of the facts."

Article 17

"Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication."

Article 23

Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention. (...)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant complained under Article 6 §§ 1, 2, and 3 (b) and (d) of the Convention about unfairness of the proceedings and lack of opportunity to examine or have examined any of the witnesses in his case. The Court considers that among the provisions of Article 6 invoked by the applicant, those of Article 6 §§ 1 and 3 (d) are relevant to his complaints. These provisions 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

31. The Government asserted that the applicant had failed to exhaust the domestic remedies that had been available to him at the domestic level.

32. The Court notes that the Government's objection is closely linked to the merits of the applicant's complaint. It therefore joins it to the merits.

33. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

34. The applicant considered that the Ukrainian and Russian authorities had acted in an accusatory manner, seeking to find him guilty. He noted that the prosecutor had been present during the questioning of the witnesses in the Russian Federation, while his representative had not been. He also contested the assessment of the body of evidence in his case by the domestic courts.

35. The Government noted that the applicant's lawyer had requested that witnesses residing in another State be examined, and therefore he had to be aware of the procedural rights guaranteed to the defence under two relevant international legal instruments: the Minsk Convention and the European Convention. However, it does not follow from the applicant's submissions or available materials that the applicant's defence counsel had ever requested to participate in the examination of witnesses in accordance with Article 48 of the Code of Criminal Procedure of Ukraine. Furthermore, should his request have been accepted the lawyer could have either participated himself or instructed local lawyer in Russia to participate on his behalf in the examination of the witnesses. They asserted that the trial court could not interfere in such a matter by arranging for such participation of its own motion. Therefore, the Government considered that the applicant had failed to avail himself of the remedy envisaged by the international conventions on legal assistance in criminal matters; in particular, he had not requested that his defence counsel be allowed to participate in the execution of the letters rogatory for examination of the witnesses residing outside Ukraine.

36. Furthermore, the Government contended that the request of the applicant's defence counsel for examination of the witnesses residing in the Russian Federation had referred only to general reasons for the witnesses to be examined again during the proceedings in the applicant's case before the Ukrainian court. However, the applicant have provided no indication that his defence counsel had tried to formulate any precise questions to be put to

the witnesses residing in the Russian Federation. Nor did the case file contain any request from the applicant's defence counsel or the applicant as regards the necessity to put specific questions to the witnesses.

37. The Government considered that the applicant failed to exhaust domestic remedies as required by Article 35 of the Convention – in particular, the applicant did not avail himself of the opportunity, provided for by the international conventions on legal assistance in criminal matters, to participate in the execution of the letters rogatory or to indicate the questions to be put to the witnesses outside Ukraine.

38. The Government also submitted that the applicant's conviction was not based solely on the contested statements, as there were case file materials concerning the material evidence and the investigative actions conducted with the applicant in Russia before his departure to Ukraine.

39. The Government noted that it could not be said in this case that the applicant had not been allowed to participate in the questioning of the witnesses in the Russian Federation, since the applicant or his lawyer had never requested to participate.

2. The Court's assessment

(a) Applicable principles

40. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others*, cited above, p. 711, § 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67). All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.

41. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others*, cited above, p. 711, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see *A.L. v. Finland*, no. 23220/04, § 37, 27 January 2009).

42. As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

43. The Court further reiterates that the authorities should make "every reasonable effort" to secure the appearance of a witness for direct examination before the trial court. With respect to statements of witnesses who have proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court would emphasise that "paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. 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*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII; *Trofimov v. Russia*, no. 1111/02, § 33, 4 December 2008; and *Makeyev*, cited above, § 36). Furthermore, in the event of a particular geographic obstacle, the Court must also examine whether the respondent Government undertook measures which sufficiently compensated for the limitations of the applicant's rights (see, *mutatis mutandis*, *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 10, 2 November 2010).

(b) Application of the above principles to the facts of the case

44. The Court notes that the importance of rehearing of the witnesses in the present case had been acknowledged by the domestic courts on many occasions and it was not disputed before this Court. The issue before this Court is whether the arrangements made by the domestic authorities in the present case to obtain statements from the witnesses were in compliance with the requirements of Article 6 §§ 1 and 3 (d) of the Convention.

45. The Court notes that the domestic authorities examined different ways of obtaining the statements and opted for the questioning of the witnesses in the Russian Federation through the international legal assistance mechanism. Such a solution, to which the defence did not object, could be found reasonable. However, in the circumstances of the case it led to the situation in which the applicant found himself convicted of a very serious crime mainly on the basis of evidence given by witnesses none of whom were present during his trial in Ukraine. The domestic courts did not hear the direct evidence of these witnesses and the applicant had no opportunity to cross-examine them. The Court is not persuaded that the materials of pre-trial investigation, in which the applicant partly participated, and the video of the questioning could compensate such complete lack of possibility for the courts and the applicant to examine the witnesses directly. Furthermore, being aware of difficulties in securing the right of the applicant to examine the witnesses in the present case, the Court considers that the available modern technologies could offer more interactive type of questioning of witnesses abroad, like a video link.

46. The Court further notes, that although the applicant and his lawyer, and they did not contest this, did not take any available steps to be more actively involved in the questioning and did not provide any reasons for their failure to do so, the domestic authorities on their part had at least to ensure that they were informed in advance about the date and place of hearing and about questions formulated by the domestic authorities in the present case. Such information would give the applicant and his lawyer reasonable opportunity to request for clarifying or complementing certain questions that would deem important. In the light of these findings the Court rejects the Government's objection as to admissibility of the present part of the application.

47. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was unreasonably restricted in his right to examine witnesses and his conviction was based to a decisive extent on the testimonies of such witnesses.

There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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."

49. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's objection, and rejects it after an examination on the merits;

2. *Declares* the remainder of the application admissible;

3. *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 3 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

JUVENILE JUSTICE

I THE RIGHT TO LEGAL COUNSEL AND APPROPRIATE ASSISTANCE

a) International Conventions/National Legislation

- UN Convention on the Rights of the Child Art. 40(2)(b)(ii) – minimum guarantees
- The Beijing Rule Art 15.1 – Legal counsel
- ECHR Art 6 § 3 b) and c) – Fair trial – minimum rights
- The International Covenant on Civil and Political Rights Art 14(3)(b)
- MD CPC Art 17 - Ensuring the right to Defence
- MD CPC Art 66 (2) 3), 5) and 7) Rights and Obligations of the Accused or the Defendant

II EFFECTIVE PARTICIPATION IN THE TRIAL

a) International Conventions/National legislation

- UN Convention on the Rights of the Child Art 12 2. – The right to be heard
- UN Convention on the Rights of the Child Art 40 1. – Treated with dignity
- The Beijing rules art 14.2
- ECHR Art 6 – Fair trial
- MD CPC Art 66 Rights and Obligations of the Accused or the Defendant

b) ECtHR Case-law

S.C. V UK (2004) Application no 60958/00 - Violation of ECHR Art 6 § 1

> 28. The right of an accused to effective participation in his or her criminal trial generally includes, *inter alia*, not only the right to be present, but also to hear and follow the proceedings (see *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26). In the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (see *T. v. the United Kingdom*, cited above, § 84), including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition...

29. The Court accepts the Government's argument that Article 6 § 1 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail. Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom: this is why the Convention, in Article 6 § 3 (c), emphasises the importance of the right to legal representation. However, "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence…

T. v United Kingdom (1999) – Violation of ECHR Art 6 § 1

87. As previously mentioned (see paragraph 16 above), there is limited psychiatric evidence in relation to this applicant. However, it is noteworthy that Dr Vizard found in her report of 5 November 1993 that the post-traumatic stress disorder suffered by the applicant, combined with the lack of any therapeutic work since the offence, had limited his ability to instruct his lawyers and testify adequately in his own defence (see paragraph 11 above). Moreover, the applicant in his memorial states that due to the conditions in which he was put on trial, he was unable to follow the trial or take decisions in his own best interests (see paragraph 17 above).

88. In such circumstances the Court does not consider that it was sufficient for the purposes of Article 6 § 1 that the applicant was represented by skilled and experienced lawyers…

89. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 § 1.

III THE RIGHT NOT TO BE COMPELLED TO GIVE TESTIMONY OR TO CONFESS GUILT

a) International Conventions/National Legislation

- UNCRC art 40(2)(b)(iv)
- Beijing Rule 7 Rights of Juveniles
- Beijing Rule 10.3 Contact between law enforcement agencies and the juvenile
- MD CPC Art 21 Freedom from Testifying against Oneself
- MD CPC Art 66 (2) 2) Rights and Obligations of the Accused or Defendant

b) ECtHR Case-law

Corsacov v Moldova (2006) Application no 18944/02 – Violation of ECHR Art 3

> 51. According to the applicant, the salaries and career prospects enjoyed by Moldovan police officers depend on the number of detected offences. This favours the practice of ill-treating suspects in order to obtain confessions from them.
>
> 52. He submitted that he was threatened with death and severely beaten up by the police officers A. Tulbu and V. Dubceac. He relied in particular on the medical report of 28 February 2000, issued by an independent commission of forensic doctors appointed by the Prosecutor's Office (see paragraph 33 above), which, according to him, confirmed the gravity of his injuries. As a result of the beatings he became deaf and incapable of working while still being a minor. According to the applicant the treatment applied to him amounted to torture.

> 55. The Court recalls that where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment…
> … It is not sufficient for the State to refer merely to the acquittal of the accused police officers in the course of a criminal prosecution, and consequently, the acquittal of officers on a charge of having assaulted an individual will not discharge the burden of proof on the State under Article 3 of the Convention to show that the injuries suffered by that individual whilst under police control were not caused by the police officers

IV CHILD-FRIENDLY ENVIRONMENT

a) International Conventions/National Legislation

- UNCRC Art 40(2)(vii) – To have his/her privacy fully respected
- ECHR Art 3 – Protection against torture/ill-treatment
- ECHR Art 6 – Fair trial
- MD CPC Art 15 – Inviolability of Private Life, Art 18 – Public Nature of Court Hearings

ECtHR Case-law

T. v UK (1999) Application no 24724/94 – Violation of ECHR Art 3 and 6

> 9. Their trial took place over three weeks in November 1993, in public, at Preston Crown Court before a judge and twelve jurors. In the two months preceding the trial each applicant was taken by social workers to visit the courtroom and was introduced to trial procedures and personnel by way of a "child witness pack" containing books and games.

The trial was preceded and accompanied by massive national and international publicity. Throughout the criminal proceedings, the arrival of the defendants was greeted by a hostile crowd. On occasion, attempts were made to attack the vehicles bringing them to court. In the courtroom, the press benches and public gallery were full.

The trial was conducted with the formality of an adult criminal trial. The judge and counsel wore wigs and gowns. The procedure was, however, modified to a certain extent in view of the defendants' age. They were seated next to social workers in a specially raised dock. Their parents and lawyers were seated nearby. The hearing times were shortened to reflect the school day (10.30 a.m. to 3.30 p.m., with an hour's lunch break), and a ten-minute interval was taken every hour. During adjournments the defendants were allowed to spend time with their parents and social workers in a play area. The judge made it clear that he would adjourn whenever the social workers or defence lawyers told him that one of the defendants was showing signs of tiredness or stress. This occurred on one occasion.

73. The second part of the applicant's complaint under Article 3 concerning the trial relates to the fact that the criminal proceedings took place over three weeks in public in an adult Crown Court with attendant formality, and that, after his conviction, his name was permitted to be published.

86. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence

V THE RIGHT TO PRIVACY – OPEN/CLOSED COURTS

a) International Conventions/National Legislation

- UNCRC Art 16 – No interference with privacy…correspondence…
- UNCRC Art 40(2)(b)(vii) – To have his/her privacy fully respected
- The Beijing Rule Art 8 – Protection of privacy
- The Beijing Rule Art 21 – Records

- ECHR Art 6 § 1
- MD CPC Art 11 – Inviolability of a person, Art 14 – Privacy of correspondence, Art 15 – Inviolability of Private Life, Art 18 – Public Nature of Court Hearings

b) ECtHR Case-law

T. v UK (1999) Application no 24724/94 – Violation of ECHR Art 3 and 6

S.C. V UK (2004) Application no 60958/00 - Violation of ECHR Art 6 § 1

> 30. In the present case, the Court notes that, although the applicant was tried in public, in the Crown Court, steps were taken to ensure that the procedure was as informal as possible; for example, the legal professionals did not wear wigs and gowns and the applicant was allowed to sit next to his social worker. In contrast to the situation in *T.* and *V. v. the United Kingdom*, cited above, the applicant's arrest and trial were not the subject of high levels of public and media interest and animosity and there is no evidence that the atmosphere in the courtroom was particularly tense or intimidating.

NART v. TURKEY (2008) Application no 20817/04 - Violation of ECHR Art Article 5 § 3

30. In the present case, the Court notes that the period to be taken into consideration began on 28 November 2003 with the applicant's arrest and ended on 16 January 2004 with his release during the first hearing before the Izmir **Juvenile** Court. It thus lasted forty eight days.

31. In examining this case, the Court has taken into account the wealth of important international texts referred to above (paragraphs 17-22 above) and recalls that the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.

32. The Court observes that, when the applicant objected to his detention on remand, the Izmir Assize Court rejected his motion on the basis of the contents of the case file, the nature of the offence and the state of evidence (paragraph 10 above). Although, in general, the expression "the state of evidence" may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it cannot alone justify the length of the detention of which the applicant complains (see *Selçuk v. Turkey*, no. 21768/02, § 34, 10 January 2006).

33. It is also noted that, although the applicant's lawyer brought to the attention of the authorities the fact that the applicant was a minor, it appears that the authorities never took the applicant's age into consideration when ordering his detention. Furthermore, the case file reveals that, during his detention, the applicant was kept in a prison together with adults (paragraph 8 above).

34. In the light of the foregoing, and especially having regard to the fact that the applicant was a minor at the time, the Court finds that the length of the applicant's pre-trial detention contravened Article 5 § 3 of the Convention.

35. There has accordingly been a violation of this provision.

FOX, CAMPBELL AND HARTLEY v. THE UNITED KINGDOM (1990) Application no. 12244/86; 12245/86; 12383/86 – No violation of Article 5 § 2 of the Convention

40. Paragraph 2 of Article 5 (art. 5-2) contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5 (art. 5): by virtue of paragraph 2 (art. 5-2) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 (art. 5-4) (see the van der Leer judgment of 21 February 1990, Series A no. 170, p. 13, § 28). Whilst this information must be conveyed "promptly" (in French: "dans le plus court délai"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.

SALDUZ v. TURKEY (2008) Application no. 36391/02 – violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention

56. In the present case, the applicant's right of access to a lawyer was restricted during his police custody, pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively. Thus, no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect, as set out at paragraph 52 above.

57. The Court further observes that the applicant had access to a lawyer following his detention on remand. During the ensuing criminal proceedings, he was also able to call witnesses on his behalf and had the possibility of challenging the prosecution's arguments. It is also noted that the applicant repeatedly denied the content of his statement to the police, both at the trial and on appeal. However, as is apparent from the case file, the investigation had in large part been completed before the applicant appeared before the investigating judge on 1 June 2001. Moreover, not only did the İzmir State Security Court not take a stance on the admissibility of the applicant's statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy (see paragraph 23 above). In this connection, the Court observes that in convicting the applicant, the İzmir State Security Court in fact used the evidence before it to confirm the applicant's statement to the police. This evidence included the expert's report dated 1 June 2001 and the statements of the other accused to the police and the public prosecutor. In this respect, however, the Court finds it striking that the expert's report mentioned in the judgment of the first-instance court was in favour of the

applicant, as it stated that it could not be established whether the handwriting on the banner matched the applicant's (see paragraph 15 above). It is also significant that all the co-defendants, who had testified against the applicant in their statements to the police and the public prosecutor, retracted their statements at the trial and denied having participated in the demonstration.

58. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. However, it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings.

59. The Court further recalls that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...; *Kolu*, cited above, § 53, and *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). Thus, in the present case, no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent (see paragraph 14 above).

Ages of criminal liability in some European countries

8	-	Scotland
10	-	England, Wales, Northern Ireland
12	-	The Netherlands, Greece, Turkey
13	-	France
14	-	Moldova, Romania, Italy, Germany, Bulgaria
15	-	Denmark, Sweden, Norway, Finland, Czech Republic
16	-	Spain, Poland
18	-	Belgium, Luxembourg

List of useful links

http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/
http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=59043977&skin=hudoc-en
http://www.humanrights.coe.int/aware/GB/publi/caselawdtb.asp
http://www.coe.int/t/e/human_rights/awareness/7._Special_Projects/1_Case_Law.asp
http://www.scj.ro/decizii_strasbourg.asp
http://www.csm1909.ro/csm/index.php?cmd=9503
http://www.echr.ru/documents/decisions.htm
http://www.lhr.md/hot/
http://sutyajnik.ru/rus/library/

Some figures from the ECtHR statistics[11]

by 1st of January 2010

Country	*First judgment*	*Total number of judgments*	*Violation judgments*	*No violation judgments*	*Other judgments*	*Inadmissibility decisions*	*Pending applications*	*Allocated applications/ population*[12] *(10,000) in 2009*	*Pending applications/ population (10,000)*[13]	*Violation judgments/ population (100,000)*
Moldova	2001	168	158	1	9	1,906	3,349	3.7	9.36	4.41
Norway	1990	27	20	7	0	770	68	0.16	0.14	0.41
Romania	1998	648	584	18	46	18,917	9,812	2.45	4.56	2.71
Italy	1980	2,023	1,556	48	419	8,988	7,158	0.60	1.19	2.58
Russia	2002	862	815	28	19	36,083	33,568	0.96	2.39	0.58
Ukraine	2001	608	602	3	3	17,050	9,975	1.03	2.19	1.32
Georgia	2004	35	28	6	1	293	4,049	5.03	9.59	0.66
Estonia	2000	21	18	2	1	981	422	1.52	3.14	1.34

[11] The European Court for Human Rights Country Fact Sheets 1959-2009
http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf

[12] The number of population is based on Eurostat Service or United Nations Statistics Division

[13] Calculation by Norlam, based on the figures from ECtHR statistics