KEY THEME[1]
Article 6 §§ 1 and 3 (d)
Absent witnesses and other restrictions on the right to examine witnesses

(Last updated: 28/02/2026)

Introduction

The term "witness" has an autonomous meaning in the Convention system. Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) apply. Thus, the term "witness" includes: co-accused (*Trofimov v. Russia*, 2008, § 37); victims (*Vladimir Romanov v. Russia*, 2008, § 97); expert witnesses (*Constantinides v. Greece*, 2016, §§ 37-38; *Danilov v. Russia*, 2020, § 109); evidence provided by a person in the context of an identification parade or face-to-face confrontation with a suspect (*Vanfuli v. Russia*, 2011, § 110); in some instances, documentary evidence (*Mirilashvili v. Russia*, 2008, §§ 158-159; *Butkevich v. Russia*, 2018, §§ 98-99).

Pursuant to Article 6 § 3 (d) of the Convention, before an accused can be convicted, all evidence against him or her must normally be produced in his or her presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him or her, either when that witness makes his or her statement or at a later stage of proceedings (*Al-Khawaja and Tahery v. the United Kingdom* [GC], 2011, § 118).

Article 6 § 3 (d) contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings. Exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence (*Thomas v. the United Kingdom* (dec.), 2005).

The applicant is not required to demonstrate the importance of personal appearance and questioning of a prosecution witness (*Süleyman v. Turkey*, 2020, § 92). In principle, if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial, and if the testimony of that witness is used by the court to support a guilty verdict, it must be presumed that his or her personal appearance and questioning are necessary (*Keskin v. the Netherlands*, 2021, § 45).

The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, and the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and the victims in proper prosecution and, where necessary, to the rights of witnesses (*Schatschaschwili v. Germany* [GC], 2015, §§ 100-101).

[1] Prepared by the Registry. It does not bind the Court.

Principles drawn from the current case-law

- In *Al-Khawaja and Tahery v. the United Kingdom* [GC], 2011, §§ 119-147, the Court established the principles to be applied when a witness does not attend a public trial. These principles have been further clarified in *Schatschaschwili v. Germany* [GC], 2015, §§ 111-131. They may be summarised as follows (*Seton v. the United Kingdom*, 2016, §§ 58-59; *Dimović v. Serbia*, 2016, §§ 36-40; *T.K. v. Lithuania*, 2018, §§ 95-96):

  (i) The Court should first examine the preliminary question of whether there was a **good reason** for admitting the evidence of an absent witness, keeping in mind that witnesses should, as a general rule, give evidence during the trial and that all reasonable efforts should be made to secure their attendance. However the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d);

  (ii) Typical reasons for non-attendance are the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend trial;

  (iii) When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

  (iv) The admission as evidence of statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him or her. In particular, he or she should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his or her presence, either at the time the witness was making the statement or at some later stage of the proceedings;

  (v) According to the **"sole or decisive rule"**, if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his or her defence rights are unduly restricted;

  (vi) In this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive;

  (vii) In *Schatschaschwili v. Germany* [GC], 2015, § 116, the Court explained that, given that its concern was to ascertain whether the proceedings as a whole were fair, it should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried **significant weight** and that its admission might have handicapped the defence;

(viii) However, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner, including in cases where the witness evidence carried significant weight and its admission might have handicapped the defence;

(ix) In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are **sufficient counterbalancing factors** in place, including measures that permit a fair and proper assessment of the reliability of that evidence. This would allow a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

- The above principles concerning absent witnesses are applied to other instances in which a defendant was not in a position to challenge the probity and credibility of witness evidence, including its truthfulness and reliability, by having the witnesses orally examined in his or her presence, either at the time the witness was making the statement or at some later stage of the proceedings. This may concern:

  (i) Anonymous testimony (*Al-Khawaja and Tahery v. the United Kingdom* [GC], 2011, § 127; *Asani v. the former Yugoslav Republic of Macedonia*, 2018, §§ 36-37; *Süleyman v. Turkey*, 2020);

  (ii) Witnesses, including the co-accused, who refuse to testify at trial or to answer questions from the defence (*Vidgen v. the Netherlands*, 2012, § 42 and *Strassenmeyer v. Germany*, 2023, § 74 concerning co-accused; *Sievert v. Germany*, 2012, §§ 59-61, concerning witnesses);

  (iii) Witnesses questioned under special examination arrangements when, for instance, the defence cannot attend the questioning (*Papadakis v. the former Yugoslav Republic of Macedonia*, 2013, § 89) or when the defence cannot have access to sources on which a witness based his or her knowledge or belief (*Donohoe v. Ireland*, 2013, §§ 78 -79);

  (iv) Witnesses whose testimony is relevant only for the severity of the sanction (*Dodoja v. Croatia*, 2021, §§ 33-37).

Noteworthy examples

- *Al-Khawaja and Tahery v. the United Kingdom* [GC], 2011 – absence of witnesses for reasons of death and fear;
- *Schatschaschwili v. Germany* [GC], 2015 – difficulties summoning witnesses from abroad;
- *Vidgen v. the Netherlands*, 2012 and *Sievert v. Germany*, 2012 – refusal of witnesses to testify in court;
- *Lučić v. Croatia*, 2014 – witnesses in sexual abuse cases;
- *Süleyman v. Turkey*, 2020 – anonymous witnesses;
- *Danilov v. Russia*, 2020 – absent expert witnesses.

Recap of general principles

- *Seton v. the United Kingdom*, 2016, §§ 58-59.

Related (but different) topics

Defence witnesses:

- Different considerations apply under Article 6 §§ 1 and 3 (d) concerning the right of an accused to call witnesses for the defence. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter (*Perna v. Italy* [GC], 2003, § 29; *Solakov v. the former Yugoslav Republic of Macedonia*, 2001, § 57; *Murtazaliyeva v. Russia* [GC], 2018, § 139). However, there may be exceptional circumstances which could prompt the Court to conclude that the failure to examine a person as a witness was incompatible with Article 6 §§ 1 and 3 (d) of the Convention (*ibid.*, § 148).
- In *Murtazaliyeva v. Russia* [GC], 2018, § 158, the Court formulated the following three-pronged test for the assessment of whether the right to call a witness for the defence under Article 6 § 3 (d) had been complied with: (1) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (2) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (3) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.

  - In respect of the first element, the Court held that it is necessary to examine whether the testimony of witnesses was capable of influencing the outcome of a trial or could reasonably be expected to strengthen the position of the defence. The "sufficiency" of reasoning of the motions of the defence to hear witnesses will depend on the assessment of the circumstances of a given case, including the applicable provisions of the domestic law, the stage and progress of the proceedings, the lines of reasoning and strategies pursued by the parties and their procedural conduct (*ibid.*, §§ 160-161).

  - As to the second element of the test, the Court explained that generally the relevance of testimony and the sufficiency of the reasons advanced by the defence in the circumstances of the case will determine the scope and level of detail of the domestic courts' assessment of the need to ensure a witness' presence and examination. Accordingly, the stronger and weightier the arguments advanced by the defence, the closer the scrutiny must be and the more convincing the reasoning of the domestic courts must be if they refuse the defence's request to examine a witness (*ibid.*, § 166).

  - With regard to the overall fairness assessment as the third element of the test, the Court stressed that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident. While the conclusions under the first two steps of that test would generally be strongly indicative as to whether the proceedings were fair, it cannot be excluded that in certain, admittedly exceptional, cases considerations of fairness might warrant the opposite conclusion (*ibid.*, §§ 167-168).

See for example:

- *Škoberne v. Slovenia*, 2024 – refusal of the applicant's request to examine two co-defendants as witnesses following their admission of guilt;
- *Vasaráb and Paulus v. Slovakia*, 2022 – domestic courts' refusal, without sufficient reasons, of the applicants' request to take and examine witness evidence on their behalf;
- *Olga Kudrina v. Russia*, 2021 – refusal of the applicant's request to summon to trial certain witnesses on her behalf, which was based on scant reasoning;
- *Abdullayev v. Azerbaijan*, 2019 – refusal to have a video recording of a fight examined at a court hearing.

KEY CASE-LAW REFERENCES

Leading cases:

- *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011 (no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) in respect of the first applicant, violation of Article 6 § 1 of the Convention read in conjunction with Article 6 § 3 (d) in respect of the second applicant);
- *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015 (violation of Article 6 §§ 1 and 3 (d)).

Other cases under Article 6 §§ 1 and 3 (d):

- *Thomas v. the United Kingdom* (dec.), no. 19354/02, 10 May 2005 (inadmissible – manifestly ill-founded);
- *Vladimir Romanov v. Russia*, no. 41461/02, 24 July 2008 (violation of Article 6 § 1 taken together with Article 6 § 3 (d) on account of an absence of a proper and adequate opportunity to challenge the statements of the absent witness);
- *Trofimov v. Russia*, no. 1111/02, 4 December 2008 (violation of Article 6 §§ 1 and 3 (d));
- *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008 (violation of Article 6 § 1);
- *Vanfuli v. Russia*, no. 24885/05, 3 November 2011 (violation of Article 6 § 3 (d) taken together with Article 6 § 1 on account of the fact that his conviction was to a decisive event based on evidence he could not challenge);
- *Vidgen v. the Netherlands*, no. 29353/06, 10 July 2012 (violation of Article 6 §§ 1 and 3 (d));
- *Sievert v. Germany*, no. 29881/07, 19 July 2012 (no violation of Article 6 § 1 read in conjunction with § 3 (b) and (d));
- *Papadakis v. the former Yugoslav Republic of Macedonia*, no. 50254/07, 26 February 2013 (violation of Article 6 §§ 1 and 3 (d) in respect of the applicant's defence rights regarding the examination of the undercover witness);
- *Donohoe v. Ireland*, no. 19165/08, 12 December 2013 (no violation of Article 6);
- *Lučić v. Croatia*, no. 5699/11, 27 February 2014 (violation of Article 6 §§ 1 and 3 (d));
- *Constantinides v. Greece*, no. 76438/12, 6 October 2016 (no violation of Article 6 §§ 1 and 3 (d) as regards the complaint about an expert's non-attendance at hearings);
- *Seton v. the United Kingdom*, no. 55287/10, 31 March 2016 (no violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d));
- *Dimović v. Serbia*, no. 24463/11, 28 June 2016 (violation of Article 6 §§ 1 and 3 (d));
- *Asani v. the former Yugoslav Republic of Macedonia*, no. 27962/10, 1 February 2018 (violation of Article 6 §§ 1 and 3 (d) in respect of the applicants' defence rights regarding the examination of the anonymous and absent witnesses);
- *Butkevich v. Russia*, no. 5865/07, 13 February 2018 (violation of Article 6 § 1 as regards the fairness requirement);
- *T.K. v. Lithuania*, no. 14000/12, 12 June 2018 (violation of Article 6 §§ 1 and 3 (d));
- *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018 (no violation of Article 6 §§ 1 and 3 (b) as regards the viewing of the secret surveillance videotape; no violation of Article 6 §§ 1 and 3 (d) as regards the applicant's inability to call and examine at the trial two attesting witnesses);

- *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, 27 October 2020 (violation of Article 6 §§ 1 and 3);
- *Danilov v. Russia*, no. 88/05, 1 December 2020 (violation of Article 6 §§ 1 and 3 (d) in respect of the applicant's right to cross-examine expert witnesses against him);
- *Süleyman v. Turkey*, no. 59453/10, 17 November 2020 (violation of Article 6 §§ 1 and 3 (d));
- *Keskin v. the Netherlands*, no. 2205/16, 19 January 2021(violation of Article 6 §§ 1 and 3 (d));
- *Dodoja v. Croatia*, no. 53587/17, 24 June 2021 (violation of Article 6 §§ 1 and 3 (d));
- *Strassenmeyer v. Germany*, no. 57818/18, 2 May 2023 (no violation of Article 6 §§ 1 and 3 (d));
- *Vasile Pruteanu and Others v. Romania*, no. 9308/18, 14 January 2025 (no violation of Article 6 §§ 1 and 3 (d));
- *Jaupi v. Albania*, no. 23369/16, 29 April 2025 (no violation of Article 6 §§ 1 and 3 (d) in respect of the conviction for murder, and violation of Article 6 §§ 1 and 3 (d) in respect of the conviction for attempted murder);
- *Engels v. Belgium*, no. 38110/18, 27 May 2025 (no violation of Article 6 §§ 1 and 3 (d));
- *Anna Maria Ciccone v. Italy*, no. 21492/17, 5 June 2025 (violation of Article 6 §§ 1 and 3 (d) in respect of the applicant's right to re-examine expert witnesses in the proceedings before the Assize Court of Appeal, which overturned her acquittal, and in which the expert evidence was decisive).