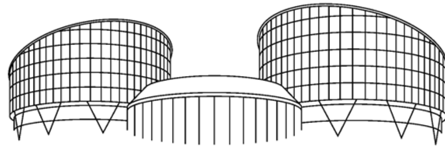

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KESKİN v. THE NETHERLANDS

(Application no. 2205/16)

JUDGMENT

Art 6 §§ 1 and 3(d) (criminal) • Fair hearing • Refusal to call prosecution witnesses of decisive weight for trial's outcome due to defence's failure to substantiate request for their cross-examination • lack of counterbalancing factors • Distinct principles applicable to the right to examine, or have examined, prosecution witnesses and to the right to obtain the attendance and examination of defence witnesses • Accused not to be required to demonstrate the importance of a prosecution witness

STRASBOURG

19 January 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Keskin v. the Netherlands,

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

Yonko Grozev, *President,*
Tim Eicke,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a dual Dutch and Turkish national, Mr Vahap Keskin ("the applicant"), on 29 December 2015;

the decision to give notice to the Dutch Government ("the Government") of the complaints concerning the lack of an opportunity for the applicant to examine a number of witnesses in criminal proceedings against him and the summary reasoning employed by the Supreme Court (*Hoge Raad*) and to declare inadmissible the remainder of the application;

the fact that although informed of their right to intervene in the proceedings under Article 36 § 1 of the Convention, the Turkish Government did not indicate within the time allowed that they wished to exercise that right;

the parties' observations;

Having deliberated in private on 15 December 2020,

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

INTRODUCTION

1. The case concerns the inability of the applicant to cross-examine seven witnesses whose statements were used in evidence in criminal proceedings against him, as well as an alleged lack of reasoning in a judgment of the highest domestic court. The applicant relied on Article 6 §§ 1 and 3 (d) of the Convention.

THE FACTS

2. The applicant was born in 1972 and lives in Hengelo. He was represented by Mr Th.O.M. Dieben and Mr R.J. Baumgardt, lawyers practising in Amsterdam and Spijkenisse, respectively.

3. The Government were represented by their former Agent, Mr R.A.A. Böcker, their Agent, Ms B. Koopman, and their Deputy Agent, Ms K. Adhin, all of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. PROCEEDINGS BEFORE THE OVERIJSSEL REGIONAL COURT

5. On 30 July 2013 the Overijssel Regional Court (*rechtbank*) convicted the applicant *in absentia* of having been in *de facto* control (*feitelijk leiding hebben gegeven*) of the fraud committed by the legal entity Fr., a company, on two other companies, Co. and Jo. In evidence against the applicant, the Regional Court used, *inter alia*, the statements made to the police by six witnesses – A, B, C, E, F and G –, whose statements, together with that of a seventh witness – D –, were set out in appendices to an official report drawn up by the police under oath (*ambtsedig proces-verbaal*). The applicant was sentenced to nine months' imprisonment, of which three months were suspended. The Regional Court also ordered the applicant to pay company Jo., which had joined the criminal proceedings as a civil injured party (*benadeelde partij*) and had filed a claim for damages, the amount of 59,300.42 euros (EUR). It imposed on the applicant, by means of a penal compensation measure (*schadevergoedingsmaatregel*), the obligation to pay the same amount to the State, for the benefit of the victim, an obligation which would be replaced by 316 days of detention in the event of non-compliance. Paying the money to either company Jo. or the State would absolve the applicant from the obligation to pay the other.

II. PROCEEDINGS BEFORE THE ARNHEM-LEEUWARDEN COURT OF APPEAL

6. The applicant appealed against the Regional Court's judgment. Although he acknowledged that company Fr. had committed fraud on the two other companies, he contested that he had been in *de facto* control of that fraud. In the written document setting out the grounds for appeal (*appèlschriftuur*) to the Arnhem-Leeuwarden Court of Appeal (*gerechtshof*) of 7 August 2013, counsel for the applicant stated that he wished to cross-examine, at the hearing or before the investigating judge (*raadsheer-commissaris*), the witnesses A to G whose statements to the police had been used as evidence by the Regional Court. He submitted as regards each of these witnesses that the defence had not yet had an opportunity to examine them, while incriminating statements made by them had been used in evidence against the applicant by the Regional Court. He wished to put further questions to these witnesses in relation to their earlier statements to the police. In particular, he wished to find out from witnesses A, B and F how often they had been in contact with company Fr. between July 2009 and 12 May 2010, and with whom they had been in contact. He wanted to ask witness C to whom he had sold a company named P. and what

that company's equity had been at the time of the sale. Lastly, he wished to know: from witness D, how often he had seen X.Y. (who was the director of company Fr.) or the applicant and in what capacity; from witness E, how often that witness had been in contact with the applicant and X.Y.; and from witness G, how often and where that witness had seen the applicant and X.Y. between July 2009 and 12 May 2010.

7. The Advocate General, for the prosecution, considered that in view of the reasoning submitted for hearing each of the seven witnesses, the request should be granted. On 20 February 2014 the Court of Appeal nevertheless rejected the applicant's request for the time being and informed counsel for the applicant that he could repeat the request at the hearing.

8. The official record of the hearing (*proces-verbaal terechtzitting*) of 16 September 2014 shows that counsel for the applicant repeated his request to cross-examine the seven witnesses. The Advocate General, for the prosecution, stated that she remained of the view that that request should be granted, as it was well reasoned and the statements of the witnesses at issue had been used in evidence by the Regional Court. The Court of Appeal, however, rejected the request, considering as follows:

> "As regards counsel's request for the examination of witnesses [A, B, C, D, E, F and G] ..., the criterion of the interest of the defence (*verdedigingsbelang*) applies. The court finds that the interest of the defence has been insufficiently substantiated in the requests. Having regard to counsel's explanatory statement in the written document setting out the grounds for appeal, it has not been indicated on what points these witnesses would have made incorrect statements. ..."

9. The applicant made a statement at the hearing, in which he said, *inter alia*:

> "I did an internship at company Fr. I was approached to do it because I knew X.Y. ... I was in the office sometimes. I do not want to say too much. I have been threatened ... I have never pretended to be X.Y. If [witness D] states that he recognises me as X.Y. from a photograph, I can tell you that this is impossible. X.Y. was the one who was present at the signing of the contract. You are showing me the photographs on pages 106 and 107 of the case file. There is a photograph of me on page 107. There is a photograph of X.Y. on page 106. You observe that there is no obvious likeness between X.Y. and myself. I agree with you. I do not look like him. I do not know anything about the depositing of annual financial statements. I was hired by X.[Y.] ...
>
> The activities I carried out for company Fr. consisted, *inter alia*, of answering the telephone and checking the quality of the fruit. I worked at company Fr. for a few months. About two or three months. ... I do not want to answer the question about whether I had any contact with company Jo. I also do not want to answer the question about whether I noticed anything concerning payment problems. I do not want to say anything about payments in general. ...
>
> I do not know why those witnesses state that they have had contact with me. That is simply not true. ...
>
> I know there are three witnesses who state that they have had contact with me. They are [witnesses F, D and E]. I can confirm that I have had contact with them. However, I have not pretended to be X.Y. I do not know why they state that I did. ..."

10. At the end of the hearing counsel for the applicant stated that he was persisting in his request to cross-examine the seven witnesses. He argued that the applicant denied that he had been in *de facto* control of the fraud committed by company Fr. and had pretended to be X.Y. Although counsel did not wish to say that the witnesses had lied, he submitted that the situation might have been different from that described in their statements, or more nuanced, which in any event gave rise to many questions.

11. On 30 September 2014 the Court of Appeal quashed the judgment of the Regional Court, convicted the applicant of having been in *de facto* control of the fraud committed by company Fr. on companies Co. and Jo., and sentenced him to six months' imprisonment. It further ordered the applicant to pay company Jo. the same amount in damages and imposed the same penal compensation measure as the Regional Court had done (see paragraph 5 above).

12. In its judgment, in relation to the request to cross-examine witnesses A to G, the Court of Appeal considered as follows:

> "The court is of the opinion that the interest of the defence has been insufficiently substantiated, therefore the court rejects the request. In addition, the accused invoked his right to silence during the police interviews. At the hearing before the court the accused did not want to reply to specific questions of the court about his activities (*werkzaamheden*) at company [Fr.] No indication has been given regarding on what points the statements made to the police by the requested witnesses would be incorrect, and why. An alternative version of events has not been advanced or made plausible."

13. The Court of Appeal found it established that company Fr. had committed fraud on companies Co. and Jo. and the applicant had been in *de facto* control of that fraud. It relied on the following evidence.

1. An extract from company Fr.'s registration in the register of companies of the Chambers of Commerce.
2. An amendment to articles of association (*statuten*) dated 4 February 2009 entailing a change in the name of company P. to Fr.
3. A record from the Chamber of Commerce, according to which company Fr. had deposited annual financial statements for the years 2006-2008 in July 2009.
4. A letter from 2010 from company Fr. to company Jo. bearing the former company's address and the words "Specialised in Eastern Europe for over 20 years".
5. Email exchanges between company Fr. and companies Jo. and Co. bearing company Fr.'s email address.
6. Printouts of digital money transfers to companies Jo. and Co. bearing company Fr.'s stamp and fax number.
7. Order confirmations sent from company Fr. to company Co. bearing the former company's stamp and fax number.

8. The statement which witness A had made to the police to the effect that she worked for company Co. in Italy; that contact between companies Co. and Fr. had taken place by telephone and email; that the person at company Fr. with whom she always used to speak had called himself X.Y.; that company Fr. had previously ordered fruit and vegetables from company Co., but after a certain time company Fr. had stopped paying for goods that had been delivered.
9. The statement which witness B had made to the police to the effect that he worked for company Jo. in Spain; that the point of contact at company Fr. for company Jo. had been X.Y.; and that company Jo. had delivered goods to company Fr., but the latter company had failed to pay for them.
10. The statement which witness C had made to the police to the effect that he had been the director of company P. until February 2009, when the shares in that company had been sold to X.Y. and that company P. had deposited with the Chamber of Commerce annual financial statements up to and including 2006. When shown the annual financial statements over 2006, 2007 and 2008 which had been deposited with the Chamber of Commerce on behalf of company Fr., he had observed that the stated equity was much higher than it had been in reality, and that the presence of stocks was mentioned, whereas company P. had not had any stocks. He also wondered how it had been possible for company Fr. to deposit an annual financial statement over 2006 under its name when there had not yet been a company Fr. at that time.
11. The statement which witness D had made to the police to the effect that he was co-director of a company that had previously rented office space to company Fr. When asked who, according to him, was in charge at company Fr., he had replied that this was the person in a photograph shown to him, which was a photograph of the applicant. Witness D had stated that this was the person who would contact him and come to see him whenever there were problems with the payment of the rent.
12. The statement which witness E, an estate agent, had made to the police to the effect that the applicant – to whom he had referred by name – had acted as the spokesperson for company Fr. during negotiations relating to the rental agreement between that company and the company belonging to witnesses D and G.
13. The statement which witness F had made to the police to the effect that, in his capacity as deputy director of company Sch., he had been visited in early January 2010 by a person calling himself X.Y. who had wanted company Sch. to take care of the distribution of goods that had been ordered by company Fr. "X.Y." had handed

him a business card stating that he represented company Fr. "X.Y." had subsequently always been present to indicate where certain quantities of particular goods should be delivered. When he had been shown a photograph of X.Y., witness F had declared that he did not know the person in the picture. After being shown a photograph of the applicant, the witness had declared that he knew the person in the picture as X.Y.

14. The statement which witness G had made to the police to the effect that he was the director of the company that had previously rented office space to company Fr. and he had had contact with one person working at company Fr., a person who had called himself X.[Y.] He had recognised this man from a photograph of the applicant shown to him; he knew him by his first name, X. This witness had further declared that he would regularly visit company Fr.'s office and would often find three persons there, one of whom was the person featured in the above-mentioned photograph.
15. The statement which the applicant had made at the hearing on 16 September 2014 in which he had said that he had worked at company Fr. as an intern and had been in the office sometimes. He had confirmed that he was the person featured in a photograph shown to him; the Court of Appeal noted that this photograph was the same as the one that had been shown to witness D. When he had been shown a photograph of X.Y., the applicant had agreed that he did not look like X.Y.

14. In relation to the evidence, the Court of Appeal held that as regards the methods by which the fraud had been committed (*oplichtingsmiddelen*), *inter alia*, the false impression had been created that company Fr. was a long-established company. Based on the statement of witness C (see paragraph 13 at point 10), it found it established that the annual financial statements deposited by company Fr. over 2006, 2007 and 2008 had been false. It further noted the accounts of witnesses A and B about monies owed by company Fr. to companies Co. and Jo. which had not been paid. The Court of Appeal considered it proved that the offences had occurred within the domain (*sfeer*) of the legal entity Fr., as orders had been placed with companies Co. and Jo. in the name of company Fr., and the stamp, fax number and address of company Fr. had been used. Lastly, considering the statements by witnesses E, F, and G in conjunction with the statement made by the applicant at the hearing, the Court of Appeal found it established that it was the applicant who had impersonated X.Y. and had been in *de facto* control of the fraudulent acts committed by company Fr.

III. PROCEEDINGS BEFORE THE SUPREME COURT

15. The applicant lodged an appeal in cassation with the Supreme Court (*Hoge Raad*) in which he complained, *inter alia*, that by rejecting his request to call witnesses A to G for the reason that the interest of the defence had been insufficiently substantiated, the Court of Appeal had erred in law (*getuigt van een onjuiste rechtsopvatting*), and moreover its rejection and its reasoning on this point were incomprehensible (*onbegrijpelijk*), in view of the submissions made by the defence. As the Court of Appeal had proceeded to use the statements which these witnesses had made to the police in evidence against the applicant, it had failed to ensure that he had a fair trial within the meaning of Article 6 of the Convention.

16. The Procurator General (*Procureur-Generaal*) at the Supreme Court did not submit an advisory opinion (*conclusie*).

17. On 8 September 2015, providing summary reasoning, the Supreme Court declared the appeal in cassation inadmissible, applying section 80a of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*; see paragraph 21 below).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. EXAMINATION OF WITNESSES IN APPEAL PROCEEDINGS

18. In so far as relevant to the present case, a defendant in appeal proceedings may request to have witnesses summoned for examination by indicating in the written document setting out the grounds for appeal which witnesses he or she wishes to have called to the hearing (Article 410 § 3 of the CCP). The Court of Appeal may refuse, by reasoned decision, to make an order to summon the requested witnesses if it finds, *inter alia*, that it may reasonably be assumed that the defendant will not be prejudiced in his or her defence as a result of that decision (Article 410 of the Code of Criminal Procedure (*Wetboek van Strafvordering*); hereinafter “the CCP”).

The manner in which provisions of the CCP relating to the calling and examination of witnesses should be applied, has been set out in case-law of the Supreme Court.

II. CASE-LAW OF THE SUPREME COURT RELATING TO REQUESTS TO CALL WITNESSES

19. In a leading judgment of 1 July 2014 (ECLI:NL:HR:2014:1496), the Supreme Court set out broadly how the rules in force under the CCP relating to the calling or examination of witnesses at the request of the defence were to be interpreted. It held as follows, in so far as relevant:

“The interest of the defence

2.4. In principle, the accused has the right to have examined at the hearing all witnesses whose examination he considers to be in the interest of his defence. Under the current Dutch system of criminal procedure, the accused is able to give effect to that right by bringing witnesses to the hearing. Other than that, he is dependent on the Public Prosecution Service, whose tasks include summoning witnesses. The Public Prosecution Service may refuse to comply with a request to call a witness made by or on behalf of the accused. The accused, or counsel on his behalf, may then seek the opinion of the court about that refusal at the hearing. The Public Prosecution Service – [or] in the event of that service’s refusal or omission to call witnesses requested by the defence, the court – may refuse to grant the request on the ground that, *inter alia*, no prejudice to the defence of the accused will reasonably be caused as a result (hereafter also referred to as ‘the interest of the defence’).

2.5. In case-law and in legal doctrine, it is accepted that that criterion obliges the Public Prosecution Service and the court, respectively, to assess a request to call witnesses from the point of view of the defence, and having regard to the interest of the defence in the request being granted. This means that it can only then be said that the rejection of the request will not reasonably cause prejudice to the defence of the accused if either the points about which the witness is able to make a statement cannot reasonably be of relevance for any decision to be taken in the criminal case, or if it must reasonably be excluded that the witness would be able to state anything about those points.

2.6. This regime means, on the one hand, that the Public Prosecution Service and the court, respectively, exercise restraint as regards the use of the power to reject the request. On the other hand, it presupposes that the defence provide adequate substantiation for the request. A rejection of the request is thus perfectly conceivable when the request is not substantiated, or is substantiated so summarily that the court is unable to apply the criterion of the interest of the defence to the request. The defence may be required to substantiate in respect of each of the witnesses it wants to be called why the examination of that witness is important with regard to any decision to be taken in the criminal case pursuant to Articles 348 and 350 of the CCP. Examples in this context are the substantiation of requests for the examination of witnesses for the defence (*getuigen à décharge*) whose statements may support the dispute of the charges, or [requests] for the examination of witnesses against the accused (*getuigen à charge*) who have made statements in the preliminary investigation, in order to test the credibility and reliability of these persons or the statements made by them.

...

Review in cassation

2.73. In cassation proceedings [the focus of the proceedings] is no longer whether or not to call or examine a witness, but exclusively the review of the decisions of the trial courts in that regard. ...

2.74. It is not possible to complain in cassation proceedings about the correctness of the ... decisions. After all, the Supreme Court cannot assess whether the Court of Appeal was correct in not calling or examining a witness. It is possible to complain in cassation proceedings about the criterion which the Court of Appeal applied and the comprehensibility of the decision.

2.75. In this connection, reference must be made to section 80a of the Judiciary (Organisation) Act, which entered into force in 2012, and the significance of this provision for the scope of a review in cassation as regards the above-mentioned

decisions. Section 80a of the Judiciary (Organisation) Act provides that an appeal in cassation may be declared inadmissible on the ground that the appellant obviously has insufficient interest in the cassation appeal. For that reason, it may reasonably be expected that the defence – in cases where that interest is not obvious – provide an elaboration in the written statement of the grounds for appeal in cassation of what its interest is in the complaint. ...

2.76. In the assessment of the rejection of a request to call witnesses, the question in cassation proceedings is ultimately whether the decision is comprehensible in the light of, on the one hand, the basis for the request as submitted by the defence, and on the other hand, the grounds on which it was rejected – as though [these reasons] were communicating vessels. ...

2.77. Taking into account the restraint with which, as a result of section 80a of the Judiciary (Organisation) Act, a review in cassation is to be conducted in respect of cases in which the interest in quashing [a decision] is not obvious, such a review will therefore, more than in the past, focus on the question of whether the decision of the trial court to call or examine witnesses [or not do so] is comprehensible. In this regard, it must be noted that that comprehensibility can only be assessed to a limited extent in cassation proceedings, having regard to the fact that the weighing up and assessment of the circumstances of the case are the preserve of the trial courts."

20. On 4 July 2017, thus after the judgment of the Supreme Court in the present case (see paragraph 17 above), the Supreme Court issued two leading rulings (ECLI:NL:HR:2017:1015 and ECLI:NL:HR:2017:1219) in which it addressed the question – which had arisen in part in response to the Court's case-law – of how the Supreme Court's requirements with regard to the substantiation of requests to call and examine witnesses related to a defendant's right to a fair trial as referred to in Article 6 of the Convention. In so far as relevant, the Supreme Court held as follows:

"3.3.1. Given the autonomous meaning accorded to the term 'witnesses' in the opening words and sub-paragraph (d) of Article 6 paragraph 3 of the European Convention on Human Rights (ECHR), any incriminating or exculpatory statement made by any person in connection with a criminal case, such as one contained in an official report drawn up under oath, is, from the perspective of the ECHR, regarded as a statement by a witness within the meaning of that provision. On the basis of that provision, the defence is entitled to a reasonable and effective opportunity to examine (or have examined) witnesses at some stage in the proceedings. Article 6 of the ECHR does not, however, give a defendant an unlimited right to have witnesses examined.

3.3.2. If the defence has not had a reasonable and effective opportunity to examine (or have examined) a witness, the use of a statement made by that witness may be incompatible with Article 6 of the ECHR. In this connection, the judgment by the European Court of Human Rights (ECtHR) in the case of *Schatschaschwili v. Germany* (15 December 2015, no. 9154/10) states as follows:

[Citation, in English, of paragraphs 101, 105 (in part), 107, 110 (in part), 113 (case-law references omitted) and 117-18 of the *Schatschaschwili* judgment.]

Case-law of the Supreme Court

3.4. In its judgment of 1 July 2014 [see paragraph 19 above] the Supreme Court outlined how the national rules currently in force under the Code of Criminal Procedure on calling or examining witnesses named by the defence should be interpreted. ...

Further consideration

3.5. In accordance with the case-law of the Supreme Court, an official report drawn up under oath which contains a witness statement made to an investigating officer may be used as evidence against the defendant by the court. However, this principle applies only in so far as the defendant's right to a fair trial as referred to in Article 6 of the ECHR is guaranteed.

In the ECtHR's recent case-law on the right to a fair trial, the emphasis with regard to the right to examine witnesses has been on assessing the 'overall fairness of the trial', partly by means of several related subsidiary questions formulated by the ECtHR (in paragraph 107 of the judgment in *Schatschaschwili v. Germany* cited above at 3.3.2). The decisive factor in this connection is whether the trial, judged as a whole, was fair. This can be definitively evaluated only in retrospect.

When applying the case-law of the ECtHR in the interpretation of (national) rules concerning the calling or examination of witnesses named by the defence, it should however be borne in mind that the national court must take decisions on the calling and examination of witnesses during the criminal trial itself.

3.6. Against this background, it is the Supreme Court's view that, under the rules of Dutch criminal procedure, when the defence asks a trial court to call or examine witnesses, it must substantiate its request to enable the court to assess the relevance of the request in the light of the applicable statutory provisions. This requirement also helps to enable the court to take the right to a fair trial as referred to above into account in its assessment of the request at the earliest possible stage. The reasoning in support of such a request should explain why the examination of each of the witnesses named by the defence is important with regard to any decision to be taken in the criminal case pursuant to Articles 348 and 350 of the CCP. Article 6 paragraph 3 (d) of the ECHR is not an obstacle to the requirement that such a request be substantiated. Nor does the ECtHR's case-law on the right to examine witnesses dictate the setting of less strict requirements on substantiating a request to call and examine witnesses. After all, the ECtHR's case-law also formulates the defendant's obligation to substantiate such a request 'by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth.' [A footnote here makes reference to *Perna v. Italy* ([GC], no. 48898/99, § 29, ECHR 2003-V), and *Poropat v. Slovenia* (no. 21668/12, § 42, 9 May 2017)]

3.7.1. The opening words and sub-paragraph (d) of Article 6 paragraph 3 of the ECHR provide that everyone charged with a criminal offence has the right 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. In its rules on summoning and examining witnesses, the Code of Criminal Procedure does not distinguish between witnesses for the prosecution and witnesses for the defence, or, to put it in other words, witnesses who (could) testify against the defendant or on the defendant's behalf.

3.7.2. As regards the requirements to be met by a request to examine a witness, it makes no difference in principle whether the request concerns a witness for the prosecution or a witness for the defence. As a rule, however, the public prosecutor includes any witness statement made during the preliminary judicial investigation in the case file, in order to indicate, in the light of Article 149a paragraph 2 of the CCP, that in the view of the public prosecutor, the substance of the witness statement could reasonably be relevant for the decisions to be taken by the court. Nevertheless, this does not automatically mean that the examination of that witness would also be significant

with regard to any decision to be taken in the criminal case pursuant to Articles 348 and 350 of the Code of Criminal Procedure.

Therefore, it is not sufficient, when substantiating a request to examine a witness, simply to state that a statement by that witness was included in the case file. Nor, in the context of appeal proceedings, is it sufficient to state that the court of first instance made use of the witness statement as evidence. Rather, a substantiated request must explain, given that the statement already given by the witness has been included in the case file, why the examination of the witness is relevant.

3.7.3. If the request to examine a witness concerns a person who has not yet made a statement as part of the preliminary judicial investigation, the reasoning behind the request must relate to the relevance of the witness giving a statement by means of examination to any decision to be taken in the criminal case pursuant to Articles 348 and 350 of the CCP. Specifically, reasons must be given as to why the witness's testimony could assist the defence in contesting the charges or support a defence or position that relates to one of the other decisions to be taken by the court pursuant to Articles 348 and 350 of the CCP.

3.8.1. The court's assessment of whether a request to examine witnesses is properly substantiated and whether it should be granted must be made in the light of all the circumstances of the case, and with due regard for the applicable criterion. If the court denies a request, it must state the factual and/or legal grounds on which its decision rests in the official record of the proceedings or in the judgment. This obligation on the court to give its reasons is based in part on Article 6 of the ECHR.

3.8.2. In the context of an appeal in cassation, the assessment of the denial of a request to examine witnesses essentially concerns the question of whether the decision was comprehensible in the light of two interconnected elements: on the one hand, the reasoning underpinning the request, and on the other hand, the grounds on which it was denied.

3.9. As observed at 3.5., the national court takes decisions on calling and examining witnesses during the trial. However, this does not detract from the requirement that, before giving judgment, the court must satisfy itself that the proceedings as a whole have respected the right to a fair trial that is guaranteed by Article 6 of the ECHR. If necessary, it must either proceed *ex proprio motu* – on the basis of Article 315 paragraph 1, Article 346 paragraphs 1 and 2, or Article 347 paragraph 1 of the CCP – to call and examine one or more witnesses, or it must consider, when deciding on its findings as to whether the charges are proved, what (if any) consequences should be attached to the fact that the defence did not have the opportunity to examine or have examined the relevant witness(es) at any stage in the proceedings, despite undertaking initiatives to that end."

III. SECTION 80a OF THE JUDICIARY (ORGANISATION) ACT

21. Section 80a of the Judiciary (Organisation) Act entered into force on 1 July 2012. In so far as relevant, it provides as follows (references to other domestic legislation omitted):

"1. The Supreme Court may, after taking cognisance of the advisory opinion of the Procurator General (*gehoord de procureur-generaal*), declare an appeal in cassation inadmissible if the complaints raised do not justify an examination in cassation proceedings (*de aangevoerde klachten geen behandeling in cassatie rechtvaardigen*), because the appellant obviously has insufficient interest in the cassation appeal

(*klaarblijkelijk onvoldoende belang heeft bij het cassatieberoep*) or because the complaints obviously cannot succeed (*klaarblijkelijk niet tot cassatie kunnen leiden*).

2. The Supreme Court shall not take a decision as referred to in the first paragraph without first taking cognisance of:

...

b. [in criminal cases,] the written statement of the grounds for the cassation appeal (*de schriftuur, houdende de middelen van cassatie*) ...

3. The cassation appeal shall be considered and decided by three members of a multi-judge Chamber (*meervoudige kamer*), one of whom shall act as president.

4. If the Supreme Court applies the first paragraph, it may, in stating the grounds for its decision, limit itself to that finding."

22. For relevant domestic case-law and practice relating to the application of section 80a of the Judicial (Organisation) Act, see *El Khalloufi v. the Netherlands* ((dec.), no. 37164/17, §§ 22-26, 26 November 2019).

IV. POSSIBILITY TO REOPEN CRIMINAL PROCEEDINGS

23. Article 457 of the CCP governs the possible means of obtaining revision (*herziening*) of final domestic judgments. In 2002 a new sub-paragraph was added, in order to create the possibility to reopen criminal proceedings in instances where the Court had found a violation of the Convention.

Article 457 provides as follows, in so far as relevant:

"1. Following an application by the Procurator General or by the former suspect in respect of whom a judgment or appeal judgment has become irrevocable, the Supreme Court may, for the benefit of the former suspect, review a judgment entailing a conviction rendered by the courts in the Netherlands:

...

b. on the grounds of a ruling (*uitspraak*) of the European Court of Human Rights in which it has been determined that the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol to this Convention has been violated in proceedings which led to a conviction or a conviction for the same offence, if review is necessary with a view to legal redress as referred to in Article 41 of that Convention;

..."

24. It appears from the drafting history of Article 457 § 1 (b) that it was intended for cases where the Court had established that a violation of the Convention had taken place. Creating the possibility of a review of the final domestic judgments would enable reparation of the damage caused by that violation as far as possible (Explanatory Memorandum (*Memorie van Toelichting*), Parliamentary Documents, Lower House of Parliament 2000-2001, 27 726, no. 3, p. 1).

THE LAW

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

25. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he had been denied a fair hearing, in that he had not been afforded an opportunity to put questions to seven witnesses whose statements to the police, incriminating him, had been used against him.

Article 6, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. The Government's request to strike out this part of the application under Article 37 § 1 of the Convention

26. On 29 December 2016 the Government submitted a unilateral declaration with a view to resolving the issues raised by this part of the present application. They further requested the Court to strike the application out of the list of cases in accordance with Article 37 of the Convention. The Government submitted that it could not be ruled out that Article 457 § 1 (b) of the CCP (see paragraph 23 above) offered scope for the applicant to apply for a retrial following a strike-out decision of the Court, since that provision required a "ruling" from the Court, a term which might also relate to decisions. It was, however, up to the Supreme Court alone to assess whether any application for a retrial under that provision could be considered well founded.

27. The applicant disagreed with the terms of the unilateral declaration. Moreover, he argued that under domestic law, a strike-out decision, unlike a judgment of the Court finding a violation, might not provide grounds for reopening his case at domestic level, which was the main aim of his application.

28. The relevant general principles on unilateral declarations have been summarised in *Jeronovičs v. Latvia* ([GC], no. 44898/10, §§ 64-71, ECHR 2016) and *Aviakompaniya A.T.I., ZAT v. Ukraine* (no. 1006/07, §§ 27-33, 5 October 2017).

29. The Court reiterates that, as a rule, where a violation of Article 6 of the Convention is found, a retrial or the reopening of the proceedings, if requested, represents in principle the most appropriate form of redressing that violation (see, among other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-II, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, *Cabral v. the Netherlands*, no. 37617/10, §§ 42-43, 28 August 2018 and *Chernika v. Ukraine*, no. 53791/11, § 82, 12 March 2020). The Court finds no reason to hold otherwise in the circumstances of the present case, also having regard to the applicant's submission that the aim he pursued with the present application was the reopening of the criminal proceedings against him (see paragraph 27 above). It is therefore necessary to address the question of whether a procedure by which such a reopening can be requested is available to the applicant.

30. The Court notes that Article 457 § 1 (b) of the CCP provides for the possibility to reopen proceedings on the basis of a ruling of the Court in which it has been determined that the Convention has been violated (see paragraph 23 above); it further notes that it appears from the drafting history that this provision requires the Court, in that ruling, to have found that a violation of the Convention has taken place (see paragraph 24 above).

31. The Court therefore cannot agree with the Government's submissions on this point (see paragraph 26 above) and finds that, under Dutch law, a decision of the Court striking out (part of) an application from its list does not provide the same assured access to a procedure allowing for the examination of the question of whether to reopen domestic criminal proceedings as a Court judgment finding a violation of the Convention (see *Van der Kolk v. the Netherlands* [Committee], no. 23192/15, § 5, 28 May 2019; and, *mutatis mutandis*, *Aviakompaniya A.T.I., ZAT*, cited above, § 38, and *Romić and Others v. Croatia*, nos. 22238/13 and 6 others, § 85, 14 May 2020).

32. For the above reasons, the Court cannot find that it is no longer justified to continue the examination of this part of the application. Moreover, respect for human rights, as defined in the Convention and its Protocols, requires it to continue the examination of this part of the application. The Government's request for this part of the application to be struck out of the list of cases under Article 37 of the Convention must therefore be rejected.

B. Admissibility

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

C. Merits

1. *The parties' submissions*

(a) The applicant

34. The applicant submitted that the Court of Appeal's rejection of his request to examine the seven prosecution witnesses, for the reason that the interest of the defence had been insufficiently substantiated in that request, was incomprehensible, having regard to the reasons he had advanced in support of the request. Moreover, his case was a typical illustration of a worrying trend in Dutch criminal procedure whereby ever more stringent requirements were imposed on the defence to substantiate requests to call witnesses and obtain their attendance at trial. In this regard, he referred, *inter alia*, to the judgment of the Supreme Court of 1 July 2014, cited in paragraph 19 above. In the applicant's view, it followed from the Court's case-law that the defence should always be given an opportunity to examine prosecution witnesses without having to substantiate why it wished to examine them, and that, on the contrary, it was for the trial court to substantiate that it was still possible for the accused to have a fair trial despite the fact that the defence had not been able to examine the witness at issue, and why.

35. In a letter of 11 July 2017, the applicant further drew the Court's attention to two advisory opinions of two Advocates General (*Advocaten-Generaal*), both dated 17 January 2017 (ECLI:NL:PHR:2017:171 and ECLI:NL:PHR:2017:172), in which they expressed a different view, with reference to the Court's case-law, on the issue at stake and to the subsequent Supreme Court judgments of 4 July 2017 (see paragraph 20 above), which had all been issued after the conclusion of the criminal proceedings against him. The applicant submitted that the Supreme Court had maintained the position which he believed to be at odds with the case-law of the Court. He noted in this regard that in support of its view that the case-law of the Court did not "dictate the setting of less strict requirements on substantiating a request to call and examine witnesses" (see paragraph 20 above at point 3.6), the Supreme Court had referred to two judgments of the Court (*Perna v. Italy* [GC], no. 48898/99, ECHR 2003-V, and *Poropat v. Slovenia*, no. 21668/12, 9 May 2017); however, these judgments concerned witnesses for the defence rather than for the prosecution.

36. As to the application in his case of the three-step test developed in the Court's case-law to verify the compliance with the Convention of a trial in which untested incriminating witness evidence had been admitted, the applicant argued, firstly, that none of the reasons that had been accepted in the Court's case-law as being capable of justifying the absence of prosecution witnesses pertained (such as the illness or death of a witness, an inability to

reach him or her, or the witness being threatened or invoking his or her right to remain silent). Secondly, his conviction had been based solely, or in any event to a decisive extent, on the statements of the seven witnesses. Lastly, no counterbalancing measures had been in place to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence.

(b) The Government

37. The Government, who had made a unilateral declaration in relation to this complaint (see paragraph **Error! Reference source not found.** above), did not submit observations on its merits. However, having been invited to comment on the content of the applicant's letter of 11 July 2017 (see paragraph 35 above), the Government in its reply of 4 September 2017 submitted a translation into English of the relevant paragraphs of the Supreme Court's judgments of 4 July 2017 (see paragraph 20 above) and argued that it could be concluded from the Court's case-law that the defence might be expected to substantiate a request to examine witnesses, regardless of whether that request concerned a witness for the prosecution or for the defence. In this regard, they referred to *Perna* (cited above, § 29); *Poropat* (cited above, § 42); *Bocos-Cuesta v the Netherlands* (no. 54789/00, § 67, 10 November 2005); *Patsuria v. Georgia* (no. 30779/04, § 89, 6 November 2007); *Caka v. Albania* (no. 44023/02, § 105, 8 December 2009); and *Karulis v. Latvia* ((dec.), no. 22502/02, § 41, 2 November 2010).

2. The Court's assessment

(a) Relevant principles

38. The Court's primary concern under Article 6 § 1 of the Convention is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015). 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. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016; *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Schatschaschwili*, cited above, § 100; and *Boshkoski v. North Macedonia*, no. 71034/13, § 37, 4 June 2020).

39. 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. As regards statements made by witnesses, the Court's task under the Convention is not to give a ruling as to whether those statements were properly admitted as evidence, but rather – as already set out in paragraph 38 above – to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III, and *Perna*, cited above, § 29).

40. As is apparent from the text of Article 6 § 3 (d) (see paragraph 25 above), this provision sets out a right relating to the examination of witnesses against the accused. The Court has defined such witnesses, to whom it also frequently refers as "prosecution witnesses", as persons whose deposition may serve to a material degree as the basis for a conviction and which thus constitutes evidence for the prosecution (see *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II). Paragraph 3 (d) also contains a right to obtain the attendance and examination of witnesses on behalf of the accused, or "defence witnesses", that is to say witnesses whose statements are in favour of the defendant (see, for instance, *Pello v. Estonia*, no. 11423/03, § 31, 12 April 2007).

41. The case-law of the Court reflects the fact that paragraph 3 (d) of Article 6 comprises those two distinct rights. The Court has developed general principles which relate exclusively to the right to examine, or have examined, prosecution witnesses, as well as general principles specifically concerning the right to obtain the attendance and examination of defence witnesses.

(i) The right to obtain the attendance and examination of defence witnesses

42. When it comes to defence witnesses, it is the Court's established case-law that Article 6 § 3 (d) does not require the attendance and examination of every witness on the accused's behalf, the essential aim of that provision, as indicated by the words "under the same conditions", being to ensure a full "equality of arms" in the matter (see, amongst many authorities, *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 139, 18 December 2018, in which judgment the Court reaffirmed and further clarified the general principles concerning the right to obtain attendance and examination of defence witnesses). The concept of "equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6, nor that of paragraph 1, of which this phrase represents one application among many others (see, among other authorities, *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B).

43. As a general rule, it is for the domestic courts to assess the relevance of the evidence which defendants seek to adduce, and Article 6 § 3 (d) leaves

it to them, again as a general rule, to assess whether it is appropriate to call a particular witness (see *Perna*, cited above, § 29). It is not sufficient for a defendant to complain that he or she has not been allowed to question certain witnesses; he or she must, in addition, support the request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be capable of influencing the outcome of a trial or must reasonably be expected to strengthen the position of the defence (see *Perna*, cited above, § 29, and *Murtazaliyeva*, cited above, §§ 140 and 160). Whether the defendant has advanced "sufficient reasons" for his or her request to call a witness will depend on the role of the testimony of that witness in the circumstances of any given case (ibid., § 161). The Court has formulated the following three-pronged test where a request for the examination of a defence witness on behalf of the accused has been made in accordance with domestic law (ibid., § 158):

(i) Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation?

(ii) Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial?

(iii) Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

(ii) The right to cross-examine prosecution witnesses

44. As regards the right to the examination of prosecution witnesses, the Court has held that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, cited above, § 39, and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

45. Contrary to the situation with defence witnesses, the accused is not required to demonstrate the importance of a prosecution witness. 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 (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 712, 25 July 2013, and *Khodorkovskiy and Lebedev v. Russia* (no. 2), nos. 51111/07 and 42757/05, § 484, 14 January 2020).

(iii) Principles on the admission of untested evidence of prosecution witnesses absent from trial

46. In *Al-Khawaja and Tahery* (cited above, §§ 119) the Grand Chamber of the Court summarised and refined the principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him or her were admitted as evidence. The compatibility of such proceedings with Article 6 §§ 1 and 3 (d) of the Convention must be examined in three steps:

(i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statement as evidence (ibid., §§ 119-125);

(ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (ibid., §§ 119 and 126-147); and

(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (ibid., § 147).

47. In its Grand Chamber judgment *Schatschaschwili* (cited above, §§ 111-31) the Court reaffirmed and further clarified those principles. The Court noted that, as a rule, it will be pertinent to examine the three steps of the *Al-Khawaja and Tahery* test in the order defined in that judgment; it acknowledged, however, that in a given case, it may be more appropriate to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings (ibid., § 118). In this latter context the Court made reference, *inter alia*, to a case in which the statement of the untested witnesses was neither "sole" nor "decisive" (*Mitkus v. Latvia*, no. 7259/03, §§ 102 and 106, 2 October 2012).

48. The Court further explained that "good reason for the absence of a witness" must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. If there was a good reason for the witness's non-attendance in that sense, it followed that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence (see *Schatschaschwili*, cited above, § 119). While the absence of a good reason for the non-attendance of the witness could not of itself be conclusive of the unfairness of the applicant's trial, it was a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) of the Convention (ibid., § 113).

49. As regards the question whether the evidence of the absent witness whose statements were admitted in evidence was the sole or decisive basis for the defendant's conviction (second step of the *Al-Khawaja and Tahery* test), the Court reiterated that "sole" evidence is to be understood as the only

evidence against the accused and that "decisive" should be narrowly interpreted 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 supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (ibid., § 123).

50. It further held that it is not for the Court to act as a court of fourth instance, its starting-point for deciding whether an applicant's conviction was based solely or to a decisive extent on the depositions of an absent witness being the judgments of the domestic courts. The Court must review the domestic courts' evaluation in the light of the meaning it has given to "sole" and "decisive" evidence and ascertain for itself whether the domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary. It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear (ibid., § 124).

51. Furthermore, given that its concern is to ascertain whether the proceedings as a whole were fair, the Court 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 its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (ibid., § 116).

(b) Application of these principles to the present case

52. The applicant contended that the use in evidence against him of statements made by witnesses A to G, whom he had not been allowed to cross-examine, had resulted in a violation of his defence rights. As the guarantees of paragraph 3 (d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article (see also paragraph 38 above), the Court will consider the complaint concerning the inability to cross-examine prosecution witnesses under the two provisions taken together (see, for example and among many authorities, *Schatschaschwili*, cited above, § 100).

(i) Whether there was a good reason for the non-attendance of witnesses A to G at the trial

53. The Court observes that on 30 September 2014 the Arnhem-Leeuwarden Court of Appeal found the applicant guilty of having been in *de facto* control of the fraud committed by a company on two other companies (see paragraph 11 above), on the basis, *inter alia*, of statements made to the police by seven witnesses, A to G (see paragraph 13 above at points 8 to 14). The Regional Court, in convicting the applicant at first instance, had relied on the statements of six of these seven witnesses (see paragraph 5 above). Counsel for the applicant had asked that these witnesses be summoned before the Court of Appeal or the investigating judge so that he could cross-examine them (see paragraphs 6 and 10 above); however, the Court of Appeal had rejected those requests (see paragraphs 8 and 12 above).

54. The Court observes that those requests were not rejected on grounds such as death or fear, absence on health grounds or the witnesses' unreachability (see *Schatschaschwili*, cited above, § 119, with further references), nor on grounds related to the special features of the criminal proceedings (see, for instance, *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V, and *D.T. v. the Netherlands* (dec.), no. 25307/10 § 47, 2 April 2013); the Court of Appeal's sole justification for the rejection of the requests lay in its finding that the applicant had failed to substantiate the defence's interest in the examination of these witnesses.

55. In that context the Court of Appeal noted that the defence had not indicated on what points the statements of witnesses A to G were incorrect (see paragraphs 8 and 12 above) and, in addition, that the applicant had availed himself of his right to remain silent when he had been interviewed by police, and that he had not wished to reply to specific questions about his activities for company Fr. which had been put to him by the Court of Appeal at the hearing (see paragraph 12 above). To the extent that these additional observations of the Court of Appeal ought to be interpreted as meaning that it found those facts relevant for its refusal to secure the attendance of the witnesses, the Court considers that the right of an accused to cross-examine witnesses against him or her cannot be made dependent on his or her renunciation of the right to remain silent.

56. As to any requirement for the defence to substantiate a request to examine prosecution witnesses, the Court reiterates, as already set out in paragraph 44 above, that the underlying principle of the right contained in Article 6 § 3 (d) of the Convention in relation to the examination of prosecution witnesses is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him or her. This principle requires that a defendant be able to test the truthfulness and reliability of evidence provided by witnesses which incriminates him or her, 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

(see paragraph 46 above). Therefore, in a situation where the prosecution relies on such a witness statement and the trial court may use that statement to support a guilty verdict, the interest of the defence in being able to have the witness concerned examined in his or her presence must be presumed and, as such, constitutes all the reason required to accede to a request by the defence to summon that witness (see paragraph 45 above).

57. It does not appear that the Court of Appeal took the relevance of the testimony of witnesses A to G – or lack of it – into account when it decided not to accede to the requests of the applicant to call those witnesses, nor have the Government argued that the testimony of any of the witnesses would have been manifestly irrelevant or redundant.

58. The Court observes that the Court of Appeal's refusal to accede to the request of the defence was in line with a leading judgment issued by the Supreme Court some three months earlier, in which the latter court had set out how the relevant provisions of the CCP were to be interpreted (see paragraph 19 above). In that ruling, the Supreme Court had held that, under Dutch law, a request by the defence to call a witness might be refused if that request was not substantiated, either at all or sufficiently, and that the defence was thus required to substantiate why the examination of a particular witness was important "with regard to any decision to be taken in the criminal case pursuant to Articles 348 and 350 of the CCP" (see paragraph 19 above at point 2.6).

59. It appears from the examples given in its judgment that, according to the Supreme Court, requests to call and examine witnesses require substantiation, regardless of whether they concern witnesses for the prosecution or for the defence (see paragraph 19 above at point 2.6). The Supreme Court subsequently stated this explicitly in two further leading judgments of 4 July 2017 – that is, after the conclusion of the domestic proceedings in the present case – in which it explained how the requirement that such requests be substantiated related to the right to a fair trial under Article 6 of the Convention (see paragraph 20 above). It considered that that requirement did not run counter to Article 6 § 3 (d) of the Convention, and in that connection it attached relevance to the fact that the Court had also articulated in its case-law an obligation for the defendant to substantiate a request to call a witness (see paragraph 20 above at point 3.6). At this point in its judgment, in a footnote, the Supreme Court referred to two judgments of the Court: *Perna* (cited above, § 29) and *Poropat* (cited above, § 42). It further noted that the provisions of the CCP concerning the calling and examination of witnesses did not distinguish between witnesses who (could) testify against the accused and witnesses who (could) testify on behalf of the accused (see paragraph 20 above at point 3.7.1), and it held that, as regards the requirements to be met by a request to examine a witness, it made no difference in principle whether that request concerned a witness for the

prosecution or a witness for the defence (see paragraph 20 above at point 3.7.2).

60. The Court observes that in the cases which led to the *Perna* and *Poropat* judgments, the accused applicants had sought the attendance and examination of witnesses whose testimony they believed could arguably have strengthened the position of their defence, or even led to their acquittal (see *Perna*, cited above, §§ 17 and 31, and *Poropat*, cited above, §§ 13 and 46); accordingly, their requests concerned witnesses on their behalf. This is consequently not the same situation as the one which pertains where an accused is confronted with witness testimony which incriminates him or her (see paragraph 45 above).

61. Moreover, the *Perna* judgment – to which reference is made in paragraph 42 of the *Poropat* judgment – pre-dates the *Al-Khawaja and Tahery* judgment (cited above), in which the Grand Chamber consolidated and clarified its case-law as regards the examination of witnesses for the prosecution under Article 6 § 3 (d). This also applies to the four other Court rulings to which the Government refer in their submissions of 4 September 2017 (see paragraph 37 above) and which were issued between 2005 and 2010. Accordingly, in so far as those four rulings are not in line with the principles enunciated in *Al-Khawaja and Tahery*, they were superseded by that Grand Chamber judgment, which was rendered in 2011 and thus before the present case was decided in the domestic courts (see paragraphs 5, 11 and 17 above). In addition, it is to be noted that none of the four cases referred to by the Government concerned a situation like that in the present case, where a request to call prosecution witnesses was rejected at the domestic level for the reason that it lacked substantiation. The Court takes this opportunity to reaffirm the general principles relating to the right of an accused to examine or have examined witnesses against him or her, as set out in paragraphs 44-45 above, from which it follows that the interest of the defence in being able to have those witnesses examined in its presence must in principle be presumed (see also paragraph 60 above).

62. The above considerations lead the Court to the conclusion in the present case that it cannot be said that the Court of Appeal established good factual or legal grounds for not securing the attendance of prosecution witnesses A to G.

63. The absence of a good reason for the non-attendance of the witnesses is not of itself conclusive of the unfairness of the applicant's trial. However, it constitutes a very important factor to be weighed in the overall balance together with the other relevant considerations, notably whether the evidence of the witnesses was the sole or decisive basis for the conviction and whether there were sufficient counterbalancing factors (see *Schatschaschwili*, cited above, § 113).

(ii) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

64. The Court notes at the outset that the evidence on which the Court of Appeal relied for its guilty verdict was not restricted to the statements of witnesses A to G (see paragraph 13 above); the conviction of the applicant was thus not based on their statements alone (see *Al-Khawaja and Tahery*, cited above, § 131). Moreover, it appears to the Court that none of those statements can by themselves be considered capable of proving that the applicant had been in *de facto* control of the fraud on companies Jo. and Co. committed by company Fr. The Court of Appeal did not explicitly indicate its position on the weight of the evidence given by the absent witnesses (see paragraph 50 above and, *a contrario*, *Seton v. the United Kingdom*, no. 55287/10, § 63, 31 March 2016). Having regard to the considerations in relation to the evidence employed by the Court of Appeal (see paragraph 14 above), the Court considers that the evidence of the absent witnesses was of such significance or importance as is likely to have been determinative of the outcome of the case (see paragraph 49 above).

(iii) Whether there were sufficient counterbalancing factors

65. The Court reiterates that there must be counterbalancing factors which permit a fair and proper assessment of the reliability of the untested witness evidence. It has found the following elements of relevance in the assessment of the adequacy of counterbalancing factors: the trial court's approach to the untested evidence, the availability and strength of corroborative evidence supporting the untested witness statements, and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial (see *Schatschaschwili*, cited above, §§ 125-31 and 151).

66. The Court firstly notes that the statements of the witnesses A to G were listed along with the other evidence substantiating the applicant's guilt, without the judgment containing any indications that the Court of Appeal was aware of the reduced evidentiary value of the untested witness statements, or containing reasoning as to why it considered that evidence to be reliable (see paragraphs 13-14 above; see also, *mutatis mutandis*, *Avetisyan v. Armenia*, no. 13479/11, § 63, 10 November 2016).

67. Next, the Court observes that no corroborative evidence supporting the untested evidence of the kind as described in paragraphs 125-31 of the *Schatschaschwili* judgment was available in the present case, or other corroborative evidence that could have provided the same safeguard.

68. As regards procedural measures which may have been capable of compensating for the defence's lack of opportunity to cross-examine the witnesses, the Court notes that the applicant was able, in the course of the domestic proceedings, to give his own version of the events in question, which he did at the hearing held before the Court of Appeal on 16 September

2014 (see paragraph 9 above). It further appears from the reasoning employed by the Court of Appeal for its refusals to allow the applicant to cross-examine witnesses that it had been open to him to challenge the accuracy of the statements which those witnesses had made to the police (see paragraphs 8 and 12 above). In this context the Court observes that, at the abovementioned hearing, the applicant disputed that witness D could have recognised him from a particular photograph and that he had had contact with a number of the witnesses who had claimed that they had had contact with him (see paragraph 9 above). The Court considers that an opportunity to challenge and rebut absent witnesses' statements is of limited use in a situation where a defendant has been denied the possibility to cross-examine the witnesses, and moreover it has repeatedly held that such an opportunity cannot, of itself, be regarded as a sufficient counterbalancing factor to compensate for the handicap for the defence created by the witnesses' absence (see, *mutatis mutandis*, *Trampevski v. the former Yugoslav Republic of Macedonia*, no. 4570/07, § 49, 10 July 2012, and *Riahi v. Belgium*, no. 65400/10, § 41, 14 June 2016). This is also the case here.

69. Having regard to the above, the Court finds that it cannot be said that there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured.

(iv) Conclusion

70. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's inability to cross-examine the prosecution witnesses rendered the trial as a whole unfair. There has, accordingly, been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

71. The applicant further complained that the Supreme Court's failure to provide sufficient reasons for the dismissal of his appeal in cassation had been contrary to Article 6 § 1 of the Convention, bearing in mind that his cassation complaint had concerned the violation of a fundamental right protected by the Convention, that there had been no advisory opinion from the Procurator General from which he could have deduced why his appeal might not succeed (see paragraph 16 above), and that he had been unable to respond to the Procurator General's *de facto* opinion that his appeal could be declared inadmissible under section 80a of the Judiciary (Organisation) Act.

72. The Government contested that argument, submitting that the Court did not find it contrary to Article 6 § 1 of the Convention when a domestic appellate court applied a specific legal provision to dismiss an appeal as having no prospects of success. Moreover, when the Procurator General refrained from issuing an advisory opinion on a particular case, this did not imply a disguised opinion on the case, and in the absence of such an opinion,

the requirement that a defendant in a criminal case have the opportunity to respond to the written advisory opinion of the Procurator General did not arise.

73. The Court refers to its recent decision in *El Khalloufi v. the Netherlands* ((dec.), no. 37164/17, 26 November 2019), in which it declared inadmissible very similar complaints.

74. The Court notes that according to the applicant, the fact that the Procurator General refrained from issuing an advisory opinion in writing on his appeal in cassation implied that the latter was of the view that that appeal should be declared inadmissible under section 80a of the Judiciary (Organisation) Act (see paragraph 71 above). However, this is contrary to what the Procurator General himself stated in his advisory opinion of 16 December 2014 (ECLI:NL:PHR:2014:2304), in which he informed the Supreme Court and the public of his decision to discontinue the practice of taking a position on the application of section 80a of the Judiciary (Organisation) Act in every single case, and in which he emphasised that not taking a position in writing did not imply a disguised advisory opinion on a case (see *El Khalloufi*, decision cited above, §§ 24-25). In any event, and as it also held in *El Khalloufi*, the Court has found in the past that the failure to transmit written observations or documents during proceedings and the applicant's inability to comment on such observations and documents did not constitute a violation of the right to a fair hearing in a number of cases where granting the applicant such rights and opportunities would have had no effect on the outcome of the proceedings because the legal approach adopted had not been open to discussion; for example, because the appeal was inadmissible or manifestly unfounded (ibid., § 48, with further references). As it also found in *El Khalloufi*, the Court considers that the same must apply *a fortiori* when there is no document to transmit (ibid., § 49), which was the situation in the present case.

75. In *El Khalloufi* the Court further reiterated that it was acceptable under Article 6 § 1 of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raised no fundamentally important legal issue, and that likewise it was not contrary to Article 6 for those courts to dismiss, on the basis of a specific legal provision, an appeal in cassation as having no prospect of success, without providing further explanation. Moreover, the Court stated that it had previously held that no issue of principle arose under Article 6 § 1 of the Convention when an appeal in cassation was declared inadmissible or dismissed with summary reasoning by the Netherlands Supreme Court in the context of accelerated procedures within the meaning of section 80a of the Judiciary (Organisation) Act (ibid., § 55, with further references).

76. The Court perceives no cause to depart from those findings in the present case. In particular, it cannot find that the fact that a violation of a right

protected by the Convention was alleged in the appeal in cassation should have acted as a barrier to the application of section 80a of the Judiciary (Organisation) Act, notwithstanding the Court's finding of a violation of the Convention right at issue in the present judgment (see paragraph 70 above). In that context, it notes, firstly, that the Court of Appeal's judgment was in line with the Supreme Court's case-law to the extent that the latter court had held, in its leading judgment of 1 July 2014, that a request to call and examine witnesses, including prosecution witnesses, should be refused if it lacked substantiation (see paragraph 19 above, at point 2.6), and that the comprehensibility of a trial court's decision not to accede to a request to call and examine a witness could only be assessed to a limited extent in cassation proceedings (see paragraph 19 above, at point 2.7). Secondly, the Court observes that in his appeal in cassation (see paragraph 15 above) the applicant did not argue that the Supreme Court's above-mentioned case-law, which had been applied by the Court of Appeal in his case, was contrary to the interpretation given by this Court to Article 6 § 3 (d) of the Convention. Thirdly, and lastly, the Court cannot find any indication that the impugned decision was flawed by arbitrariness or otherwise manifestly unreasonable (see *Talmane v. Latvia*, no. 47938/07, § 31, 13 October 2016).

77. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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."

A. Damage

79. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage in relation to his complaint under Article 6 §§ 1 and 3 (d) of the Convention.

80. The Government considered that an amount of EUR 3,000 was reasonable.

81. As it did in paragraph 29 above, the Court refers to its consistent case-law, according to which where, as in the instant case, a person is convicted in domestic proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a new trial or the reopening of the domestic proceedings at the request of the interested person would be the most appropriate way to redress the violation (see the authorities cited in

paragraph 29 above). In this connection, it notes that Article 457 § 1 (b) of the Netherlands CCP (see paragraph 23 above) provides a basis for reopening proceedings if the Court finds a violation of the Convention.

82. Therefore, the Court considers that the finding of a violation constitutes sufficient just satisfaction in the present case.

B. Costs and expenses

83. The applicant also claimed EUR 692.65 for the costs and expenses incurred before the Supreme Court and for those incurred before the Court in relation to his complaint under Article 6 §§ 1 and 3 (d) of the Convention. Although legal aid had been granted by the domestic authorities for the proceedings before both courts, he had had to pay an amount of EUR 678 as his own contribution to the cost of legal assistance. In addition, sending his application to the Court by registered mail had cost EUR 14.65.

84. The Government indicated that they deferred to the Court's judgment on this point.

85. The Court awards the applicant the sum claimed, that is EUR 692.65.

C. Default interest

86. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Declares* the complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the inability to cross-examine prosecution witnesses admissible, and the remainder of the application inadmissible;

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

3. Holds that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 692.65 (six hundred and ninety-two euros and sixty-five cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Yonko Grozev
President