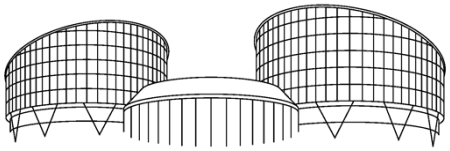

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BOSHKOSKI v. NORTH MACEDONIA

(Application no. 71034/13)

JUDGMENT

STRASBOURG

4 June 2020

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

In the case of Boshkoski v. North Macedonia,

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

Ksenija Turković, President,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pere Pastor Vilanova,
Tim Eicke,
Raffaele Sabato, judges,
and Abel Campos, Section Registrar,

Having regard to:

the above application against the Republic of North Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Ljube Boshkoski, a Macedonian/citizen of the Republic of North Macedonia and a Croatian national ("the applicant"), on 8 November 2013;

the decision to give notice of the application to the Government of North Macedonia ("the Government") and to declare inadmissible the remainder of the application;

the parties' observations;

considering that Jovan Ilievski, the judge elected in respect of North Macedonia, was unable to sit in the case (Rule 28 of the Rules of Court), on 24 July 2017 the President of the Chamber decided to appoint Tim Eicke to sit as an *ad hoc* judge (Rule 29);

noting that the Croatian Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

Having deliberated in private on 12 May 2020,

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

INTRODUCTION

1. The case concerns the alleged unfairness of criminal proceedings against the applicant on account of the courts' reliance on the testimony of a protected witness and the exclusion of the public from several hearings.

THE FACTS

2. The applicant was born in 1960 and lives in Skopje. He was a former member of the Parliament and Minister of Internal Affairs of the respondent State. In 2009 he founded the political party "United for Macedonia" (*Обединети за Македонија*), of which he was the chairman at the time of

the material events. The political party participated in the 2011 parliamentary elections, but did not win any seats in the national Parliament.

3. The applicant was represented by Mr K. Kratovaliev, a lawyer practising in Skopje. The Government were represented by their Agent, Mr K. Bogdanov, succeeded by their present Agent, Ms D. Djonova.

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

I. EVENTS OF 6 JUNE 2011

5. On 6 June 2011, the day after parliamentary elections had taken place, the applicant was arrested in the context of an on-going investigation by the Financial Crime Unit of the Central Police Service of the Ministry of the Interior into a suspected abuse of office (*злупотреба на службена положба и овластување)* and breach of the rules on the funding of electoral campaigns (*Злоупотреба на средствата за финансирање на изборната кампања*) by him. He was brought before an investigating judge (*истражен судија*), Judge M.K. In the presence of a lawyer of his own choosing, the applicant remained silent. Judge M.K. remanded the applicant in custody, where he remained during the entire proceedings.

6. On the same day the investigators took a statement from a witness who stated that he was familiar with the applicant and had had contacts with him on several occasions. He went on to state that he had given the applicant cash on three occasions, in April, May and June 2011, in the amounts of 10,000 euros (EUR), EUR 20,000 and EUR 100,000 respectively, intended to finance the applicant's electoral campaign. Lastly, the witness stated that fearing for his and his family's safety, he would only cooperate with the investigation if he were to be examined as a protected witness.

7. In a separate decision taken on 6 June 2011, Judge M.K. decided that the above-mentioned witness would be examined under a special arrangement for protected witnesses whereby his identity and face would be concealed. He was to produce evidence under the pseudonym "3-1" with the use of a special streaming device, which would distort his voice and face.

The relevant part of the decision reads as follows:

> "... having regard to the nature and gravity of the crimes subject to investigation and in respect of which the witness should produce evidence, the manner in which they were committed and the level of risk, the investigating judge considers that the conditions for special examination of a witness are fulfilled ..."

The applicant, who was served with the decision, did not appeal against it, although the decision contained an explicit legal instruction confirming the availability of an appeal to be lodged within three days of the day of service.

8. Later on the same day the protected witness 3-1 gave a statement before Judge M.K., a prosecutor, the applicant and his representative. The judge verified the identity of the witness, who stayed in a separate room, and proceeded to take his statement *via* video link, using software that distorted his face and voice. The witness stated that he had known the applicant for several years and was his friend. The applicant had asked him to help him with the financing of the political campaign, to which he had agreed. Witness 3-1 reiterated his earlier statement (see paragraph 6 above), adding that two of the meetings had taken place in restaurants but he could not recall the exact dates. He stated that the applicant had told him that he would use the money to finance his political campaign. Neither the applicant nor his representative had any questions for the witness.

9. Having taken the statement, Judge M.K. opened an official investigation in respect of the applicant for "abuse of official authority and power" (*Злоупотреба на службената положба и овластување*) in respect of his office as president of a political party and breach of the rules on the funding electoral campaigns, punishable under Articles 353 and 165-a of the Criminal Code. The investigation concerned allegations that the applicant had received, on three occasions, EUR 10,000, EUR 20,000 and EUR 100,000 respectively, from the protected witness, a foreign national, to finance the electoral campaign of his political party.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

10. On 25 July 2011 the applicant was indicted on charges of abuse of official authority and power and breach of the rules on the funding of electoral campaigns. He was accused, in his position as chairman of a political party and organiser of the electoral campaign, of breaching the applicable rules on the financing of political parties and electoral campaigns and of "relying on his long acquaintance with the protected witness", from whom he had received, on 12 April, 28 May and 6 June 2011, the above-mentioned amounts in foreign currency to finance his political party. The indictment relied on the statement given by the protected witness before the investigating judge; audio and video material, recorded on the basis of a court order in the course of the investigation, of the critical meetings between the applicant and the protected witness when money had changed hands; a statement given by a representative of the applicant's political party; search records, fingerprint expert reports and other material evidence. An objection (*приговор*) to the indictment lodged by the applicant was to no avail.

11. The applicant's case was heard by a five-judge panel of the Skopje Court of First Instance (*Основен суд Скопје I* – "the trial court"), presided over by Judge R.V. At the trial, the applicant was represented by four lawyers of his own choosing.

12. At a public hearing of 15 September 2011 the applicant stated that he would remain silent.

13. At the following hearings the trial court heard several witnesses, and several expert reports and other material evidence were adduced.

14. The trial court decided to exclude the public from the hearings of 20 and 25 October 2011 in spite of protests by the defence, holding that it would examine evidence gathered through special investigative measures. At those hearings, which were held in the presence of the applicant and his lawyers, the trial court examined audio and video recordings of the three meetings between the applicant and the protected witness (whose face was concealed) when money had changed hands. Furthermore, in the absence of the protected witness, who was outside the country at the time, the trial court read the statement which he had given before the investigating judge and admitted in evidence the order for the use of special investigative measures (*посебни истражни мерки*), namely, the secret surveillance of the applicant.

15. The public was also excluded from a hearing of 15 November 2011, in spite of protests by the defence that that would run contrary to domestic law. At that hearing, at which the protected witness was present, the trial court heard witness 3-1 after rejecting an objection lodged by the applicant about his being heard as a protected witness. Judge R.V. alone established the witness's identity, and found that "the risk to (his) life, health and physical integrity" still persisted. Judge R.V. warned the witness that his testimony should be truthful and that giving false testimony was a criminal offence. The protected witness was placed in a special room that was physically separated from the courtroom in which the bench (including Judge R.V.), the prosecution as well as the applicant and his lawyers, were present. The examination of the witness was conducted *via* a streaming device using software which distorted the witness's face and voice. In reply to questions put by the defence, the witness confirmed that the money had been intended to finance the electoral campaign. He stated that the meetings with the applicant had been previously arranged, but he "did not remember" who had chosen the meeting places. The witness stated that he still considered the applicant to be his friend. He replied to a number of questions with "I don't know" and "I have the right not to reply to this question". The trial court refused the defence leave to put several questions, including whether the applicant, his wife or any other close member of the applicant's family had ever threatened the witness.

16. On 29 November 2011 the trial court convicted the applicant as charged and sentenced him to seven years' imprisonment. The judgment was based on oral and material evidence, including several expert opinions (including one which had found the applicant's fingerprints on the confiscated money), photographs of the confiscated money, audio and video recordings (see paragraph 14 above) and the statement of witness 3-1. The

trial court held that the audio and video recordings had been lawfully obtained; that that material had enabled the court to establish the place where money had changed hands, its amount and purpose (namely to finance the electoral campaign of the applicant's political party). The trial court further held that it was confirmed beyond doubt that the money had been given for the electoral campaign of the applicant's party on the basis of the statement given by protected witness 3-1 (*Од исказот на загрозениот сведок 3-1 ... неспорно произлегува да истиот во неколку наврати на обвинетиот му дал парични средства ...*). Lastly, the court dismissed the defence's argument about the exclusion of the public from some of the hearings, finding that it concerned only a limited number of hearings at which the audio and video recordings and the protected witness had been examined.

17. The applicant appealed against the judgment, arguing, *inter alia*, that witness 3-1 should not have been treated as a protected witness given that he was his friend, he knew his identity and home address, and the witness had never been threatened either by the applicant or by anyone else. In this connection, he argued that the trial court had not explained why it had considered that there had been a risk to the witness's life and health. Furthermore, the screen showing the witness had been completely dark and the applicant could not see whether he had been alone in the room or whether there had been other people instructing him how to reply to the questions. Lastly, only Judge R.V. had established the witness's identity before the examination had started, and not the entire judicial panel, and the trial court had not provided any reasons for excluding the public from a part of the trial.

18. The first-instance public prosecutor's office and the higher public prosecutor's office submitted observations in reply, urging the Appeal Court (*Апелационен суд Скопје*) to dismiss the applicant's appeal.

19. On 23 April 2012 the Appeal Court held a public hearing in the presence of the applicant and three of his representatives. The Appeal Court partly accepted the applicant's appeal and reduced his sentence to five years' imprisonment, while upholding the remainder of the judgment. It held that the trial court had given sufficient reasons for excluding the public from the part of the trial regarding the evidence obtained with the use of special investigative measures and from the protected witness. It also agreed with the findings of the trial court that witness 3-1 should be treated as a protected witness. In this connection, it stated that "the risk is a personal feeling of the person concerned, and this witness felt that his life and physical integrity were seriously endangered, given the gravity *(тежината)* of his statement".

20. The applicant challenged those judgments before the Supreme Court (*Врховен суд*) by applying for an extraordinary review of a final judgment

(*барање за вонредно преиспитување на правосилна пресуда*), raising the same complaints as those mentioned in his appeal.

21. The State Public Prosecutor (*Јавен обвинител на Република Македонија*) submitted observations in reply, requesting that the Supreme Court dismiss the applicant's request.

22. By a judgment of 30 January 2013 the Supreme Court dismissed the applicant's request and upheld the lower courts' judgments. It held that the applicant had been convicted after the lower courts had correctly assessed all evidentiary material and had established the relevant facts. The court reiterated that all of the evidence against the applicant had been lawfully obtained. The protected witness had been examined in accordance with the law, and the use of a streaming device that distorted the witness's face and voice was an established practice in other States. It added that the fact that the public had been excluded from the part of the trial concerning evidence obtained with the use of special investigative measures and from the protected witness did not violate the principle of publicity of the proceedings. This judgment was served on the applicant on 8 May 2013.

III. RELEVANT LEGAL FRAMEWORK

Criminal Proceedings Act, as applicable at the time

23. Section 142-b limits the use of special investigative measures. According to this section, such a measure can only be used following a court order and is limited to crimes punishable to a minimum of four years' imprisonment and organized crime.

24. Under section 223 witnesses should be examined individually and separately from other witnesses. The trial court judge should issue a warning to witnesses that providing false testimony is punishable by imprisonment under the relevant provisions of the Criminal Code. Under section 223-a, where a witness or his or her family is likely to be exposed to a serious risk to their health, life and physical integrity, he or she can refuse to give information until adequate facilities for his protection are provided.

25. Under section 270-a, the trial court will decide on the measures to protect the status of a witness following a proposal by the public prosecutor. The prosecutor, the accused and the witness can lodge an appeal against that decision within three days. Under section 270-b, witness protection measures can entail the concealment of the identity and appearance of the witness. Concealing the appearance of a witness is done by means of special audio and video software, which alters his or her face and voice, while the witness is kept in a room separate from the courtroom. Under section 339 (3) a judgment cannot be based solely on testimony of a protected witness.

26. Under sections 280 and 281, the trial court may decide to exclude the public from a hearing *proprio motu* or following a proposal by one of the parties, if it is necessary to do so in order to protect State, military, official or business secrets, or to safeguard public order, the private life of the accused, a witness or the injured party, or to protect the safety of a witness or a minor. Such a decision has to be publicly pronounced and contain reasons.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF UNFAIRNESS OF THE PROCEEDINGS

27. The applicant complained under Article 6 of the Convention of the overall unfairness of the criminal proceedings against him. He complained that his rights under Article 6 §§ 1 and 3 (d) had been breached as a result of the special arrangements regarding the questioning of witness 3-1. Under the same Article he complained that his right to a public hearing had been violated on account of the exclusion of the public from three hearings. Article 6 of the Convention, insofar as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. Admissibility

28. The Government did not raise any objection as to the admissibility of the application.

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

B. Merits

1. The parties' submissions

(a) The applicant

30. The applicant argued that he knew witness 3-1, as they had had multiple contacts prior to and during the material events, and he had considered him as a friend. This had also been confirmed by witness 3-1 himself. Moreover, he had never threatened the witness, and any fear expressed by witness 3-1 as to his life and health or that of his family was baseless. Even if the opposite were true, that fear would not have been alleviated by concealing witness 3-1's identity during the proceedings. The reasoning given by the domestic courts that "fear was a personal feeling" had been insufficient and lacked evidence in support. Furthermore, given the special arrangements, the defence had been unable to establish whether witness 3-1 had been alone in the hearing room or whether someone had been instructing him how to answer. As a consequence of those arrangements, the defence had been unable to observe the witness's demeanour during the questioning.

31. The testimony provided by witness 3-1 might not have been the sole evidence, but it had certainly been decisive in securing the applicant's conviction. Furthermore, there had been insufficient counterbalancing factors in the proceedings, as there had been a distinct lack of corroborating evidence to support the applicant's conviction. The possibility of questioning that witness by special arrangements had been inadequate, given that his voice and image had been distorted to the extent that the audience had been presented with a screen which had been half white and half black, without even the outline of a face.

32. The domestic courts had failed to provide adequate reasons for excluding the public from three of the hearings. Moreover, excluding the public from those hearings had been unlawful, as hearing a protected witness was not a ground for excluding the public under the Criminal Proceedings Act. Given the special arrangements made to hear that witness, excluding the public would not have provided any additional protection.

(b) The Government

33. The Government submitted that witness 3-1 had been examined by the defence at the hearing held on 15 November 2011 and it was therefore immaterial to examine whether there had been good reasons for the witness's non-attendance. As to the status of witness 3-1 as a protected witness, they made reference to the case of *Dzelili v. Germany* ((dec.) no. 15065/09, 29 September 2009), arguing that protected witness status may be justified by fear based on the notoriety of the defendant or his associates.

34. The Government further argued that the domestic courts had relied on considerable oral and material evidence, including audio and video recordings of the events, which had been sufficient to convict the applicant without taking into consideration the testimony of witness 3-1. Therefore, the testimony of witness 3-1 had constituted neither the sole nor decisive evidence for the applicant's conviction.

35. In any event, there had been sufficient counterbalancing factors, most importantly, the trial court's warning to witness 3-1 regarding his obligation to give truthful testimony. The defence had been free to question that witness, and the trial court had refused only those questions which would have led to the identification of the witness or questions that were irrelevant or repetitive. When all of those elements were taken into account, the defence's rights had not been restricted to a degree incompatible with Article 6 of the Convention.

36. The Government argued that the exclusion of the public had been limited to three hearings (see paragraphs 14 and 15 above). This had been strictly necessary in the interests of justice. Moreover, it had been limited only to the hearings at which the audio and video recordings had been adduced as evidence and witness 3-1 had been heard. This had been necessary to prevent the identity of the witness from becoming known to the general public and the media.

(c) The Court's assessment

(i) General principles

37. The Court's primary concern under Article 6 § 1 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, §§ 250-52, 13 September 2016; *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Schatschaschwili*, cited above, § 100; and *Asani v. the former Yugoslav Republic of Macedonia*, no. 27962/10, § 32, 1 February 2018).

38. The relevant principles regarding complaints about an infringement of the defence's rights on account of evidence provided by absent witnesses

have been outlined in the case of *Schatschaschwili* (cited above, §§ 110-31) and reiterated more recently in the case of *Seton v. the United Kingdom*, (no. 55287/10, § 59, 31 March 2016). While the problems raised by absent witnesses and anonymous witnesses are not identical, the two situations are not different in principle. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that the witness is prejudiced, hostile or unreliable, and, just as in the case of an absent witness, may be faced with difficulties in challenging the reliability of the evidence given by the witness (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 127, ECHR 2011, and *Scholer v. Germany*, no. 14212/10, § 50, 18 December 2014). Similar considerations apply to witnesses with concealed identities (see, for example, *Papadakis v. the former Yugoslav Republic of Macedonia*, no. 50254/07, §§ 86-95, 26 February 2013).

39. The holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. By rendering the administration of justice transparent, publicity contributes to fulfilling the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention. The requirement to hold a public hearing, however, is subject to exceptions. Thus, it expressly permits the press and the public to be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Furthermore, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses, or to promote the free exchange of information and opinion in the pursuit of justice. In any event, before excluding the public from criminal proceedings, the national court must make a specific finding that exclusion is necessary to protect a compelling public interest and must limit secrecy to the extent necessary to preserve that interest. It is relevant, when determining whether a decision to hold criminal proceedings *in camera* was compatible with the right to a public hearing under Article 6, whether public interest considerations where balanced with the need for openness, whether all evidence was disclosed to the defence and whether the proceedings as a whole were fair (see *Artemov v. Russia*, no. 14945/03, § 102, 3 April 2014; *Welke and Białek v. Poland*, no. 15924/05, § 77, 1 March 2011; *Belashev v. Russia*, no. 28617/03, §§ 79-80 and 83, 4 December 2008; *Doorson v. the Netherlands*, 26 March 1996, § 70, Reports of Judgments and Decisions 1996-II; and *Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000).

(ii) Application to the present case

(1) Alleged violation of the applicant's defence rights regarding the examination of witness 3-1

40. Having in mind the general principles outlined above, the Court must examine, first, whether there are good reasons for keeping the identity of the witness concealed. Secondly, the Court must consider whether the evidence of the witness was the sole or decisive basis for the conviction. Thirdly, the Court must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place. The review of the counterbalancing factors is also required in cases where it finds it unclear whether the evidence in question was sole or decisive but nevertheless is satisfied that it carries 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 (see *Ellis, Simms and Martin v. the United Kingdom*, nos. 46099/06 and 46699/06 (dec.), §§ 76-78, 10 April 2012; *Seton*, § 59, cited above reflecting *Schatschaschwili*, §§ 111-131, cited above).

– *Whether there were good reasons justifying the protection of the witness's identity*

41. The Court observes that an investigating judge decided not to disclose the identity of witness 3-1 to the defence by a decision of 6 June 2011 (see paragraph 7 above). Thus the Court considers that the decision to protect the identity of witness 3-1 should be reviewed according to the principles pertaining to anonymous witnesses (see *Papadakis*, § 90, cited above).

42. The investigating judge decided to grant witness 3-1 the status of an anonymous witness on the basis of the level of risk, a fear for his and his family's safety, the nature and gravity of the alleged crimes and the manner in which they had been committed. From the wording of that decision the Court observes that in granting witness 3-1 the status of a protected witness, the investigating judge did not examine whether the defendant or those acting on his behalf had directed any threats or other actions at the witness.

43. The Court observes that the trial court subsequently relied on the continued existence of a risk to the witness's life, health and physical integrity to dismiss the defence's protests regarding the status of the witness. No evidence was at any stage adduced to substantiate the existence of any threats made against the witness or his family and a question by the defence to this end was not allowed (see paragraph 15 above). The Government's argument that the witness's fear had been justified given the

applicant's notoriety, an argument not relied on by the domestic courts, is similarly unsubstantiated (compare *Ellis, Simms and Martin*, cited above, § 80). Even if the notoriety of the defendant or his associates may justify the anonymity of a witness, even in the absence of any specific threat, the Court notes that the trial court did not conduct appropriate enquiries to determine whether or not there were objective grounds for fear and whether those grounds were supported by evidence (see *Al-Khawaja and Tahery,* § 124, cited above). Accordingly, the Court cannot accept that the domestic courts examined whether there existed objective reasons in support of the fear expressed by the witness that would justify his status as a protected witness (compare *Scholer*, § 56, cited above).

44. The Court also observes that it was not disputed by the parties that witness 3-1 and the applicant confirmed that they were familiar with each other, and even considered each other to be friends (see paragraphs 8, 15 and 30 above). Furthermore, the Court notes that, in relation to the applicant's complaint concerning the exclusion of the public from three hearings, the Government expressly relies on the fact that the protected witness' identity was already known to the applicant and maybe to some other persons from his surroundings. Considering these circumstances, it remains unclear how concealing the witness's identity from the defence alleviated any fear on the part of the witness, irrespective of whether the fear had been objectively justified or not. This is further underlined by the prosecutions' reliance on audio and video evidence recording the circumstances and location of the meetings between the applicant and witness 3-1. The fact that the applicant failed to appeal against the decision assigning the witness protected status (see paragraph 7 above) cannot lead to a different conclusion, especially given the dismissal of his objections in this regard during the proceedings (see paragraph 15 above). The Court reiterates that while the absence of good reason for the non-disclosure of the identity of the witness in cannot of itself be conclusive of the unfairness of a trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 (see, *mutatis mutandis, Schatschaschwili*, § 113, cited above).

– *Whether the witness testimony was the sole or decisive basis for the applicant's conviction*

45. The trial court admitted considerable evidence, including the audio and video recordings of the meetings between the applicant and witness 3-1, as well as several expert opinions, one of which established the presence of the applicant's fingerprints on the money. The Court observes that the audio and video recordings served to establish similar factual circumstances to those described in witness 3-1's testimony, namely, the place and time at which the money exchanged hands and its purpose. However, given that the

trial court "confirmed beyond doubt" the purpose for which the money was given on the basis of that witness's testimony, which was considered to be of particular gravity, it appears to have given that witness's testimony particular weight (see paragraphs 16 and 19 above). Therefore, even if it cannot be said that witness 3-1's testimony constituted either "sole" or "decisive" evidence, it certainly carried significant weight for the outcome of the case.

– *Whether there were sufficient counterbalancing factors*

46. Witness 3-1 was examined under special arrangements in accordance with section 270-b of the Criminal Proceedings Act. He was heard from a separate room, *via* video link using software that distorted his appearance and voice. These special arrangements, as well as the applicant's allegation that their use had the result of presenting the audience with a screen which was half black and half white (see paragraph 31 above) were not contested by the Government. The Court therefore accepts that the arrangements in place rendered both the trial court panel and the defence unable effectively to observe the witness's demeanour while he was being questioned.

47. On the other hand, the Court notes the presence of corroborating evidence and the fact that the witness was warned by the presiding judge about the consequences of giving false testimony.

48. Lastly, the Court observes that the domestic courts did not approach the protected witness's statement with particular caution (see, *Asani*, § 50, cited above and *mutatis mutandis*, *Al-Khawaja and Tahery,* cited above, § 157). On the contrary, the courts stressed its importance, finding that it confirmed the relevant facts beyond doubt (see paragraphs 16 and 19 above).

(2) Alleged violation of the applicant's defence rights on account of the exclusion of the public from three hearings

49. The Court's further task in the present case is to establish whether the exclusion of the public from the hearings before the trial court of 20 and 25 October and 15 November 2011 was justified.

50. The Court reiterates that before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling public interest and limit secrecy to the extent necessary to preserve such an interest (see *Pichugin v. Russia*, no. 38623/03, § 187, 23 October 2012).

51. The Court observes that the trial court excluded the public from the hearings of its own motion, in spite of protests from the defence. It justified this decision both by reference to the examination of the protected witness 3-1, as well as the examination of evidence gathered by means of special investigative measures, namely audio and video recordings of the meetings

between the applicant and the witness 3-1 (whose face was concealed) when money had changed hands (see paragraphs 14, 15, 19 and 22 above).

52. The Court accepts that each of the grounds relied on by the domestic courts may in principle be capable of justifying the exclusion of the public (see paragraph 39 above). However, in the present case the trial court did not take any measures to counterbalance the detrimental effect that the decision to hold the trial in camera must have had on public confidence in the proper administration of justice. The Court has already held that in the circumstances of the instant case there were no good reasons for keeping the witness's identity a secret (see paragraph 44 above). As to the argument that witness 3-1's identity needed to be protected from the public in general, the Court notes that in the audio and video recordings, as well as when giving his testimony, witness 3-1's face and voice were distorted (see paragraphs 14 and 15 above), so that there was no apparent need in addition to those measures also to hold the hearings in camera. The Government's argument should therefore be dismissed.

53. Accordingly, the Court does not find that in the circumstances of the case, it was objectively justified that the public be excluded from the hearings of 20 and 25 October and 15 November 2011.

(3) Conclusion

54. Having regard to the foregoing, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing (see *Kinský v. the Czech Republic*, no. 42856/06, § 113, 9 February 2012).

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

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

56. In his observations lodged with the Court on 10 April 2018 the applicant advanced further separate complaints under Article 6 of the Convention on the basis that protected witness 3-1 had been an *agent provocateur* who "exerted such an influence on the applicant as to incite the commission of an offence that otherwise would not have been committed" and that his conviction had been the result of a political vendetta against him. He also complained about a violation of the principle of adversarial proceedings arguing that two submissions of the prosecution were not served on him. However, given that these complaints were raised before the Court for the first time in reply to the Government's observations on admissibility and the merits and, therefore, more than six months after the date when the applicant was served with the Supreme Court's final

judgment, that is, 8 May 2013, they must be rejected as inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 18,000 euros (EUR) in respect of non-pecuniary damage.

59. The Government contested the claim as excessive.

60. The Court, taking into account the different aspects of the violation found, awards the applicant EUR 4,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

61. The applicant also claimed EUR 10,739 for the costs and expenses incurred before the Court, namely lawyers' fees for drafting the application, filing observations, the time spent on consultations with the applicant, office supplies and postal services.

62. The Government contested the claim as excessive and unsubstantiated.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,220 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

64. 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 complaints under Article 6 of the Convention concerning the examination of the protected witness and public hearing admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 of the Convention on account of the overall unfairness of the proceedings against the applicant;

3. *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, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,220 (one thousand two hundred and twenty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 4 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Ksenija Turković President