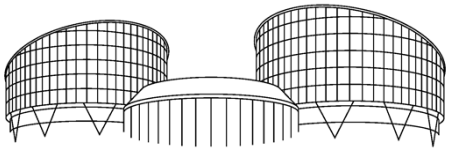

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF SOUROULLAS KAY AND ZANNETTOS v. CYPRUS

(Application no. 1618/18)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Applicants' convictions for money laundering and extortion respectively based on the "most decisive" extent on testimony of accomplice, who was not prompted by any deal but was spared prosecution, not rendering trial unfair
Art 6 § 1 (criminal) and Art 6 § 3 (d) • Rights of defence • Adequate facilities • Domestic courts' refusal to give defence access to prosecution's disk image not amounting to a breach

Prepared by the Registry. Does not bind the Court.

STRASBOURG

26 November 2024

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 Souroullas Kay and Zannettos v. Cyprus,

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

Pere Pastor Vilanova*, President*,
Jolien Schukking,
Georgios A. Serghides,
Darian Pavli,
Peeter Roosma,
Ioannis Ktistakis,
Andreas Zünd*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 1618/18) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Cypriot nationals, Mr Gregoris Souroullas Kay and Mr Venizelos Zannettos ("the applicants"), on 3 January 2018;

the decision to give notice to the Cypriot Government ("the Government") of the applicants' complaints about their inability to access material held by the prosecution and the use of accomplice testimony against them and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 13 February 2024 and 15 October 2024,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns firstly the question whether a criminal trial can be considered to be "fair" within the meaning of Article 6 § 1 of the Convention if it led to a conviction based to a decisive extent on the testimony of an accomplice who had been given immunity from prosecution. Secondly, it concerns the question whether there has been a violation of Article 6 § 3 (b) taken together with Article 6 § 1 of the Convention because the applicants were not afforded adequate facilities for the preparation of their defence.

THE FACTS

2. The applicants were born in 1966 and 1947 respectively and live in Larnaca. They were represented by Mr C. Paraskeva and Mr E. Stephanou, lawyers practising in Nicosia.

3. The Government were represented by their Agent, Mr G. Savvides, Attorney-General of the Republic of Cyprus.

4. The facts of the case may be summarised as follows.

I. THE GOVERNMENT ORDERS AN INQUIRY INTO A LAND DEAL IN DROMOLAXIA

5. In June 2013 the newly formed Council of Ministers set up a commission of inquiry to investigate complaints about a suspicious land deal in the village of Dromolaxia. The land in question, located near Larnaca airport, had previously belonged to a Turkish Cypriot. He had sold it to a private company, and that company had resold it to the pension fund of CYTA, a State-owned telecommunications provider, for an investment project – the construction of a rental office complex.

6. The government suspected that the original Turkish Cypriot owner had had no right to sell his land.[1] The government was also alarmed because, among other things, the pension fund seemed to have made a bad investment, to the detriment of its beneficiaries.

II. THE INQUIRY LEADS TO A CRIMINAL INVESTIGATION

7. Disclosures made to the commission of inquiry convinced its president that the land deal might have involved the commission of criminal offences. She asked the Attorney-General to investigate and in July 2013 the Attorney-General instructed the police to do so.

8. The investigators traced the money involved in the deal to see if bribes had been paid. They searched the offices of the private company that had bought the land and the home of its director, N.L., who was a property entrepreneur and chairman of ALKI Larnaca, a financially troubled football club associated with the AKEL political party. The police also searched the office of N.L.'s financial manager.

III. SEIZURE AND FORENSIC EXAMINATION OF HARD DRIVES

9. During those searches, the police seized computer hard drives. A forensic examiner made their disk-to-disk and disk-to-image copies (*δικανικά αντίγραφα*) and searched the disk images for documents containing terms that interested the investigators, including the term "Poleson" (*sic*).

IV. ARRESTED N.L. PLEDGES COOPERATION WITH THE INVESTIGATION

10. On 26 August 2013 the police arrested N.L. and two police officers. They suspected that N.L. had bribed the officers to draft a false report stating

[1] Turkish-Cypriot properties in the government-controlled areas of the country are placed under a special regime (for details, see *Kazali and Others v. Cyprus* (dec.), nos. 49247/08 and 9 others, 6 March 2012).

that the Turkish-Cypriot owner of the land had lived in the government-controlled areas long enough to be entitled to sell his land.

11. N.L. refused to answer any questions, as advised by his lawyer. He said only that his business had been legal and that he mistrusted the investigators.

12. On 2 September 2013, after consulting his lawyer, N.L. promised the investigators that, once his detention had ended and he had been released, he would provide a written statement about the events that interested the investigators and that he would be ready to clarify that statement, if need be.

13. The investigators went on with their work and had N.L.'s detention extended.

14. On 10 September 2013 the police released N.L. and charged him with bribing the police officers.

V. N.L. IMPLICATES THE APPLICANTS

15. About two days after being released, N.L. telephoned one of the investigators and reaffirmed his intention to cooperate. The investigator made it clear to N.L. that he expected him to tell them everything he knew about the land deal, no matter who might be affected. Only if N.L.'s statements proved to be true would the investigator consider suggesting that N.L. be used as a prosecution witness instead of being charged. Nevertheless, as the investigator could make no promises about that, he advised N.L. to consult his lawyer.

16. Between 23 September and 20 November 2013 N.L. made four written statements to the investigators suggesting, overall, that bribes had been given as part of a conspiracy to sell the land to CYTA's pension fund at an inflated price. He admitted complicity in the conspiracy and implicated seven other people and one company. Among those were Gregoris Souroullas (the first applicant), Venizelos Zannettos (the second applicant), and Polleson Holdings Ltd (a company for whose accounts Gregoris Souroullas was the sole authorised signatory).

17. N.L. stated that Gregoris Souroullas had been complicit in laundering bribe money paid to a representative of the trade union at CYTA for letting the deal go through. He also alleged that Venizelos Zannettos, the financial director of the AKEL party, had threatened to block the deal unless N.L. paid off personal loans taken out by former executives of ALKI FC to shore up the club's finances.

18. The applicants were arrested, charged, and committed for trial in the Larnaca Assize Court together with the six co-accused. Gregoris Souroullas was accused of conspiracy to commit extortion, extortion, and money laundering. Venizelos Zannettos was accused of extortion.

19. The investigators recommended to the Attorney-General not to prosecute N.L. because his statements appeared to be true and contained

valuable information. On 5 November 2013 the Attorney-General decided not to prosecute N.L.

20. The applicants were informed of the contents of N.L.'s statements and of the Attorney-General's decision.

VI. PROCEEDINGS BEFORE THE LARNACA ASSIZE COURT

21. At the start of the trial in March 2014 the applicants pleaded not guilty. Gregoris Souroullas put forward an innocent explanation for his actions. Venizelos Zannettos denied any detailed knowledge of the land deal, claimed that his prosecution was politically driven, and suggested that the court shift its attention to the role played in the deal by another member of AKEL.

A. The examination of N.L. before the Assize Court

22. The prosecution relied mainly on the testimony of N.L.

23. Five different defence lawyers cross-examined N.L. during five full days.

24. They sought to discredit N.L. by referring to his past wrongdoing and alleging that he had let himself be used by the politically motivated investigators. They pointed out that he had made his revelations to the investigators piecemeal, that he had failed to mention all his visits to the police headquarters to the court, and that he had frequently talked to the investigators on the telephone both before and after making his written statements. The lawyers insinuated that the investigators had dictated to N.L. what to write in those statements.

25. N.L. denied those claims and explained that in the beginning his lawyer had advised him against testifying and that he had been wary of the investigators because he suspected that they were politically motivated. But after his release from custody he had made a clear-headed decision to tell the truth. The prosecution added that not all of N.L.'s visits to the police could be officially recorded and that by staying in telephone contact with N.L. the investigators had simply tried to win his trust.

26. After N.L. had testified in the applicants' trial, the proceedings in his own criminal case (see paragraph 14 above) were discontinued.

B. Request to access the disk image on which the police examiner had worked

27. In the course of the applicants' trial, the prosecution asked its forensic examiner to carry out another search of the hard drives that had been seized (see paragraph 9 above). From one of the disk images in her possession, the examiner extracted two documents containing unsigned draft contracts between N.L.'s company and Polleson Holdings Ltd ("Polleson" – see

paragraph 16 above). The prosecution referred to those documents to bolster N.L.'s claim that the conspirators had prepared documents that would cover for the bribe and that Gregoris Souroullas had therefore been aware of the illicit origin of the money that he had parked in Polleson's account.

28. Wondering why that evidence had not been referred to earlier, the applicants' lawyer put it to the investigators that they must have seen those documents earlier but were concealing that.

29. The investigators explained that they would have liked to have disclosed those documents earlier but that they had overlooked them in the mass of other documents, in particular because the list of the search terms initially given to the examiner had contained a misspelling in Polleson's name (see paragraph 9 above).

30. Not satisfied with the above explanation, the lawyer asked the court to allow his expert to inspect the disk image that the police examiner had worked on. Although the lawyer had been given a copy of the disk image, he claimed that that copy was inexact since it had a different hash value[2] from the original. He insisted that only by examining the prosecution's disk image would his expert be able to prove that the investigators had opened the documents and, more crucially, at what moment. In their submissions to the Court, the applicants argued that if their lawyer were able to prove that the investigators had seen the documents, the court might believe that there had been collusion between N.L. and the prosecution since knowledge of those documents would have enabled the investigators to dictate N.L.'s testimony.

31. The prosecution objected, arguing that the police examiner had already testified and had been cross-examined, and that allowing the defence expert to question the quality of her work this late in the trial would give the defence an unfair advantage over the prosecution.

32. The Assize Court agreed with the prosecution and denied the request.

C. The judgment of the Larnaca Assize Court

33. The court reminded itself to assess N.L.'s witness testimony with caution, since he was an accomplice of the defendants. The court nevertheless found it possible to believe him because

> "[he] answered with exemplary consistency and detail, about every aspect he was questioned on, with the demeanour of someone who was clearly telling the truth. He remained ... firm during his long, strenuous and exhaustive cross-examination. He was disarmingly genuine, vivid and illustrative in his descriptions. Even when he declared that he did not remember precisely (or at all) details about which he was being cross-examined, he gave satisfactory and convincing explanations for his inability to do so. He referred to facts and details that only someone who had actually experienced the events could have talked about so precisely and to such an extent, thereby excluding any possibility that they could be a figment of his imagination or, as he was often asked in cross-examination, the product of collaboration and an improper deal with the

[2] An alphanumeric marker used for verifying data integrity.

investigators and the prosecution. His testimony was characterised by spontaneity and willingness."

34. The court considered that this Court's case-law authorised the use of accomplice testimony, citing *X. v. the United Kingdom* (no. 7306/75, Commission decision of 6 October 1976, *Decisions and Reports* 7, p. 115).

35. The court rejected the defence's allegation that N.L. and the prosecution had colluded and traded favours to falsely implicate the defendants. It found that N.L. had decided to tell the truth on his own, for justice's sake, regardless of the cost to himself personally and no matter who might be implicated. The court also found nothing unlawful or immoral in the Attorney-General's decision to grant N.L. immunity from prosecution because those involved in corruption had to realise that their accomplices might turn them in.

36. The court found no evidence that would corroborate (*ενισχύω*), that is, independently confirm, N.L.'s testimony. The court nevertheless found it "absolutely safe" to rely on N.L.'s "indestructible and sincere" testimony to a "most decisive" (*καθοριστικότερο*) extent.

37. In addition, the court relied on the testimony of three other witnesses whom it described as "important" (*σημαντικοί*).

38. The first of those witnesses, N.L.'s assistant, had testified that N.L. had issued cheques in that witness's name and that the witness had cashed them and passed the money to N.L. The court found that N.L. had used that money to bribe one of the applicants' co-defendants (E.K.).

39. The second witness had testified about other cheques drawn by N.L. and about the pressure put on N.L. by Venizelos Zannettos and another co-defendant (A.I.) in the context of the land deal.

40. The third witness, N.L.'s associate, had testified that A.I. had told him that AKEL had hoped to get its share from the land deal and that the party would halt the deal if N.L. did not pay. He had also described how N.L. had passed the above-mentioned cash to E.K.

41. However, the court found that the above three witnesses could be considered to have "a purpose of their own to serve" (*με δικό τους σκοπό να εξυπηρετήσουν*), without explaining what that purpose might be. It said that it would therefore approach their evidence with caution.

42. On 22 December 2014 the Larnaca Assize Court convicted Gregoris Souroullas of money laundering and Venizelos Zannettos of extortion, by judgment no. 693/14. It sentenced them to six and a half and three and a half years' imprisonment, respectively.

VII. THE JUDGMENT OF THE SUPREME COURT

43. In their subsequent appeals to the Supreme Court both applicants complained that the Assize Court had relied on N.L.'s testimony despite all its flaws. They repeated their allegations of collusion between the witness and

the prosecution. In addition, Gregoris Souroullas complained that, by denying the defence expert an opportunity to inspect the disk image as he had wanted, the Assize Court had upset the "equality of arms".

44. On 4 July 2017 the Supreme Court rejected those arguments and upheld the applicants' conviction (judgment on appeals nos. 14/2015 and 15/2015).

45. The Supreme Court described N.L.'s testimony as the "foundation" (*θεμέλιο*) of the conviction. It found no evidence of improper dealings between the prosecution and N.L. It further held that neither the criminal charges brought against N.L. on the day of his release (see paragraph 14 above) nor the discontinuance of the relevant proceedings after N.L. had testified in the Assize Court (see paragraph 26 above) suggested that there had been any shortcomings in the investigative work. The court had taken note of the interconnection between a company in which N.L. held a controlling interest and "Polleson Holdings Ltd" (linked to Gregoris Souroullas, see paragraph 16 above). Further, it noted the "indisputable existence" of evidence of transactions in line with N.L.'s account of the facts, thus referring to bank data (i.e. statements, receipts, cheques, transfer orders, withdrawals) presented in cross-examination at the trial (Documents D and E) and found by the Assize Court as corresponding *inter alia* to transactions made by N.L. as a result of Venizelos Zannettos' pressure. The Supreme Court found that the above confirmed some of N.L.'s essential allegations and justified the Assize Court's finding that N.L. was a credible witness notwithstanding that he was an accomplice of the accused. The Supreme Court therefore held that there was no reason to overturn the Assize Court's findings.

46. The Supreme Court agreed with the Assize Court that the second and third of the three witnesses mentioned above could be considered to have had "a purpose of their own to serve", while the first witness was not mentioned at all in the Supreme Court judgment. The court held that the Assize Court had therefore rightly approached these witnesses' statements with caution and had given sufficient reasoning as to why it found them to be credible.

47. As to the disk image, the Supreme Court found that the refusal of access to it had not disadvantaged the defence since the defence had had its own copy of the image, which contained all the documents used in the trial. The Supreme Court considered that if the defence expert had been allowed to inspect the prosecution's disk image, he could have altered the data. Besides, earlier in the trial the defence had been able to put questions to the forensic examiner so as to test the quality of her work.

48. The Supreme Court commuted the sentence of Gregoris Souroullas to four and a half years' imprisonment so that it was in proportion with the sentence of a co-accused which had also been commuted.

THE LAW

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

49. The applicants complained that their trial had been unfair because they had been convicted solely on the testimony of an accomplice who had been granted immunity from prosecution. They relied on Article 6 § 1 of the Convention, which reads as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ..."

A. Admissibility

50. The Government did not contest the admissibility of this complaint.

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

B. Merits

1. The parties' submissions

52. The applicants submitted that the authorities had been under pressure to dispense rapid justice in a much-publicised affair.

53. The sole evidence on which their conviction had been based was N.L.'s testimony. The distinction between corroborating and supporting evidence drawn by the Government had been irrelevant. That testimony had been directed by the investigators and had been unreliable.

54. The Assize Court's self-admonition to be cautious about N.L.'s testimony had had no real effect on its decision-making.

55. The applicants claimed that the country's prosecution authorities routinely elicited testimonies from criminal masterminds like N.L. by offering them the hope of immunity from prosecution. The Attorney-General's power to grant immunity was unregulated and unchecked. Courts would not hesitate to issue convictions relying on such compromised evidence.

56. The applicants accused the Government of misrepresenting the facts of the case to align with precedents from the Court's case-law that were favourable to them, despite the facts being more aligned with precedents where a violation had been found.

57. The Government argued that recourse to N.L.'s testimony had not violated the applicants' right to a fair trial.

58. They disagreed that N.L.'s testimony had been the sole damning evidence. If the Assize Court had held that it had found no "corroborating"

(*ενισχυτική*, literally "reinforcing") evidence, it was only because the court had used that term in the narrow sense in which it was used in the domestic law. In reality, in addition to N.L., the court had relied on three other witnesses (see paragraph 36 above), information about bank transactions, and the sham contracts (see paragraph 27 above). That evidence could be classified as "supporting" (*υποστηρικτική*) evidence under domestic law, which aligned with the broader understanding of "corroborating" evidence familiar to the Court.

59. Relying on the Court's case-law, the Government submitted that the immunity granted to N.L. had not undermined the overall fairness of the applicants' trial. N.L. had not been the mastermind of the conspiracy. He had been driven by a selfless and sincere desire to reveal the truth. The immunity granted to him had served the worthy cause of fighting corruption. The defence had known before the trial that he would not be prosecuted and had been able to cross-examine him at will.

60. The Convention did not, in the Government's opinion, oblige the State to formalise plea bargaining or to provide a means of seeking review of decisions not to prosecute. If some States had chosen to do this, it was to protect the witnesses themselves and not those whom they implicated. Be that as it may, the Attorney-General's decision had been reviewed by the Assize Court in the course of the trial.

2. The Court's assessment

61. The Court reiterates that Article 6 § 1 of the Convention does not set out any rules on how evidence should be assessed. The Court may interfere in this field only if a domestic court assesses evidence arbitrarily or manifestly unreasonably (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015).

62. The Convention does not prohibit a domestic court from relying on incriminating testimony given by an accomplice, even if that witness has been known to move in criminal circles. However, reliance on the testimony of an accomplice which has been given in exchange for immunity from prosecution may render a trial unfair. This is because such testimony by its very nature is open to manipulation and may be given purely to obtain advantage or for personal revenge (see *Xenofontos and Others v. Cyprus*, nos. 68725/16 and 2 others, §§ 76-78, 25 October 2022, with further references). The Court further reiterates that its primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, taking into account the procedural rights of the defence, but also the interests of the public and the victims, in seeing crime properly prosecuted (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 100 and 101, 15 December 2015; *Paić v. Croatia*, no. 47082/12, § 27, 29 March 2016; and *Ibrahim and Others v. the United Kingdom* [GC],

nos. 50541/08, 50571/08, 50573/08 and 40351/09, §§ 250-251, ECHR 2016) and, where necessary, the rights of witnesses (see, for example, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). When assessing the effect of incriminating testimony given by an accomplice on the fairness of the proceedings as a whole, the Court has taken in account, *inter alia*, whether:

– the defence knew the witness's identity;

– the defence knew about the existence of an arrangement with the prosecution;

– a domestic court had reviewed the arrangement;

– the domestic court had considered all the possible advantages received by the witness;

– the arrangement was discussed at the trial;

– the defence had the opportunity to test the evidence of the witness;

– the defence had the opportunity to test the evidence of the members of the prosecution team involved;

– the domestic court was aware of the pitfalls of relying on the evidence of an accomplice;

– the domestic court approached the testimony cautiously;

– the domestic court explained in detail why it believed the witness;

– untainted corroborating evidence existed;

– an appeal court reviewed the trial court's findings in respect of the witness; and

– the question was addressed by all the courts dealing with the various appeals (see *Xenofontos and others*, cited above, § 79, with further references).

63. In the present case, the Court notes that, first and foremost, as was established by the domestic courts, there was no deal between N.L. and the prosecution. N.L. had confessed and given evidence against the applicants voluntarily. The Attorney General's decisions to grant him protection and not to charge him involved the exercise of discretion rather than keeping a promise he had been given (see paragraphs 35 and 45 above). Even though the applicants alleged that there was some inappropriateness in the interaction between the prosecution and the witness, they failed to provide any evidence of a deal between N.L. and the prosecution. The Court must therefore accept that the circumstances of N.L.'s confession were as established by the domestic courts.

64. The Court further notes that the applicants knew N.L.'s identity, the contents of his statement and that he had been granted immunity from prosecution. At the trial, the applicants were able to examine both N.L. and the members of the prosecution team extensively. The trial court was fully aware of the dangers inherent in using the evidence of an accomplice, cautioned itself accordingly and took pains to explain in detail why it believed N.L. The Supreme Court, the only appellate court available, subsequently

reviewed the trial court's assessment of N.L., thus addressing the question of relying on the testimony of a witness who was also an accomplice.

65. As to the parties' disagreement about whether other evidence incriminating the applicants existed, the Court reiterates that its role in that regard is limited. It therefore relies on the domestic courts' findings (see *Xenofontos and Others*, cited above, § 85). While it relied to the "most decisive" extent on N.L.'s testimony, this being the "foundation" of the conviction (see paragraphs 36 and 45 above), the Assize Court also considered the evidence of three other witnesses that it found "important" and who supported N.L.'s testimony (see paragraph 37 above). The Supreme Court held that N.L.'s testimony was further supported by "indisputable evidence" of financial transactions which were in line with N.L.'s account of the facts (see paragraph 45 above). The Court therefore finds that the domestic courts relied on evidence that corroborated N.L.'s testimony, regardless of the question of whether this evidence satisfied the domestic law definition of "corroborating evidence".

66. There is some room for doubt as to whether the corroborating evidence was untainted, given that the domestic courts held that the three "important" witnesses could be considered to have had their own purpose to serve and expressed caution as to how they would approach their testimony (see paragraph 46 above). However, that doubt is not sufficient to compromise the overall fairness of the impugned proceedings given the procedural safeguards examined above. The Court observes, notably, that the applicants were able to cross-examine N.L. extensively before the Assize Court, which considered the allegations of collusion in detail, took a careful stance on N.L.'s testimony, and explained the reasons why it was prepared to believe him.

67. In the light of the above considerations, the Court finds that the overall fairness of the impugned proceedings was not compromised as a result of the courts' reliance on testimony given by the applicants' accomplice.

68. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (b), TAKEN TOGETHER WITH ARTICLE 6 § 1 OF THE CONVENTION

69. The applicants complained that they had not been allowed to search the prosecution's disk image for traces of collusion between the prosecution and the accomplice. They relied on Article 6 of the Convention, and in particular, paragraph 3 (b) of that Article, which reads:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence ..."

70. The Court reiterates that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision; it will therefore consider the applicant's complaint under both provisions taken together (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, 15 December 2015).

A. Admissibility

71. The Government argued that the applicants had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention. They claimed that the applicants should have requested access to the disk image before the police examiner had given her evidence, raised their concerns during her cross-examination, or asked the Assize Court to recall her.

72. The applicants contested this, arguing that they had requested access to the disk image at the proper points during the trial.

73. The Court rejects the Government's objection. It may well be that, from the point of view of domestic procedural law, the applicants should have made their request at a different moment. Nevertheless, the Supreme Court rejected the ground of appeal pertaining to the dismissal of that request by the applicants, after examining it on its merits (see paragraphs 32 and 47 above). The Court therefore finds that this complaint cannot be dismissed for failure to exhaust domestic remedies (see, *mutatis mutandis*, *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* [GC], no. 32772/02, §§ 43-45, 30 June 2009, with further references).

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

B. Merits

1. The parties' submissions

75. The applicants claimed that they had requested access to the disk image at the proper points during the trial. They stressed that they had needed to inspect the image not to call into question the work of the police examiner but to expose the investigators' dishonesty. The inspection of the image by their expert would not have inconvenienced the Assize Court or delayed the trial. The applicants contended that the Assize Court should have given its own reasons for the refusal instead of merely adopting the reasons put forward by the prosecution. The applicants also argued that, at the time of their request, it had been premature for the Assize Court to concern itself with procedural equality between the parties.

76. Citing, among other authorities, *Natunen v. Finland*, no. 21022/04, § 43, 31 March 2009, the Government argued that the prosecution did not

have to disclose to the defendant material evidence that might exonerate him or her unless the defendant had given "specific reasons" for wishing to see it. However, the disk image requested by the applicants' lawyer had not been "evidence" – the true evidence had been the documents it contained. The lawyer had had his own copy of the image and thus its full contents. The Government struggled to see the relevance of document-access timestamps for aiding the defence. They argued that the lawyer's intention had been to launch a "fishing expedition" and go through the prosecution's disk image in the hope of finding material that appeared to compromise the investigative work. Since that hope had been groundless, the lawyer's reasons for requesting the disk image had not been "specific". The lawyer had also failed to make it plain to the Assize Court his idea that the disk image could help him discredit N.L. (see paragraph 30 above). The applicants had themselves to blame for the refusal, since they had requested access to the disk image so late in the trial that allowing them that access would have created a disparity between the parties. Further, the defence expert could have compromised the integrity of the prosecution's disk image. Lastly, the question of the disk image was not directly related to the charges faced by Venizelos Zannettos.

2. The Court's assessment

77. The Court reiterates that failure to disclose to the defence material evidence which contains such particulars as could enable the accused to exonerate him or herself or have his or her sentence reduced would constitute a refusal of the facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 of the Convention. The accused may, however, be expected to give specific reasons for his request and the domestic courts are entitled to examine the validity of these reasons (see *Matanović v. Croatia*, no. 2742/12, § 157, 4 April 2017, with further references). An issue with regard to access to evidence may arise under Article 6 in so far as the evidence at issue is relevant to the applicant's case, specifically if it had an important bearing on the charges held against the applicant. It should be also noted that the relevant evidence in this context is not only evidence directly relevant to the facts of the case but also other evidence that might relate to the admissibility, reliability and completeness of the former (ibid., § 161, with further references).

78. The Court observes that, in the present case, contrary to the Government's argument, the data requested constituted in principle "evidence" for the purposes of Article 6 § 3 (b) of the Convention, as it related to the reliability of the evidence of a material witness, that is, N.L.

79. The Court notes that the domestic courts duly examined the applicants' arguments and gave reasoned decisions for rejecting them. The Assize Court dismissed the applicants' request on the grounds that granting it would unduly disadvantage the prosecution, given that the request had been submitted at a late stage of the proceedings (see paragraph 32 above). Further,

the Supreme Court, on reviewing the applicants' appeal, held that the rejection of the request had not disadvantaged the defence as the defence had had its own copy of the image containing all the crucial documents and disclosure of the exact disk image might allow tampering with the evidence, while the defence had been able to put questions to the forensic examiner so as to test the quality of her work (see paragraph 47 above).

80. The Court also notes that it is not disputed between the parties that the applicants had access to all the contents of the disk drive in question, including all the documents that were relied upon by the prosecution. The only "reason" raised by the applicants for wanting access to the evidence in question was that it would show collusion between N.L. and the prosecution. In particular, the defence alleged that if it had access to the disk image used by the prosecution, it might be able to prove that the investigators had accessed the documents in question earlier than the prosecution claimed: that would in turn have allowed it to show that the prosecution had directed N.L.'s testimony (see paragraph 30 above).

81. The Court finds it difficult to see why knowing the time at which the documents in question were accessed by the investigators was crucial for demonstrating collusion between N.L. and the prosecution. Even if the investigators had accessed the documents earlier than they had admitted, it is not clear how those documents could have been used to direct N.L.'s testimony. The documents in question concerned a company controlled by N.L. and it is therefore reasonable to suppose that N.L. would have been aware of their content even without the prosecution bringing them to his attention (see paragraphs 8, 9 and 27 above). The Court therefore considers that obtaining the prosecution's disk image would not in itself have been of any assistance to the defence and finds that, in any event, the reasons given by the applicants and their overall arguments are entirely hypothetical (see, *mutatis mutandis, M v. the Netherlands*, no. 2156/10, § 68-69, 25 July 2017).

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention on account of the courts' reliance on the testimony given by the applicants' accomplice;

3. *Holds*, by five votes to two, that there has been no violation of Article 6 §§ 1 and 3 (b) of the Convention.

Done in English, and notified in writing on 26 November 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Pere Pastor Vilanova President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint dissenting opinion of Judges Serghides and Zünd;
(b) Dissenting opinion of Judge Serghides.

JOINT DISSENTING OPINION OF JUDGES SERGHIDES AND ZÜND

I. Introduction

1. The applicants complained that their trial, which led to their conviction and imprisonment, had been unfair. Firstly, they argued that their conviction was unsafe because it relied on the testimony of a key prosecution witness (N.L.) who was an accomplice and had been granted immunity from prosecution. Secondly, they claimed that they had not been allowed to search the prosecution's disk image for traces of collusion between the prosecution and the accomplice who had implicated them. They relied on Article 6 § 1 of the Convention, which, *inter alia*, provides that "in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing" and also on Article 6 § 3 (b) of the Convention, which provides that "everyone charged with a criminal offence has the following minimum rights: ... (b) to have adequate time and facilities for the preparation of his defence".

2. We respectfully disagree with the judgment that there has been no violation of Article 6 § 1 of the Convention on account of the courts' reliance on the testimony given by the applicants' accomplice. We also respectfully disagree with the judgment that there has been no violation of Article 6 § 3 (b) taken together with Article 6 § 1 of the Convention. This is why we have voted against points 2 and 3 of the operative provisions of the judgment dealing respectively with these two issues.

II. Pertinent case-law of the Court

3. The Convention does not prohibit a domestic court from relying on incriminating testimony given by an accomplice. But such testimony may render the trial unfair if it is given in exchange for immunity from prosecution (see *Xenofontos and Others v. Cyprus*, nos. 68725/16 and 2 others, §§ 77-78, 25 October 2022). This is because such testimony by its very nature is open to manipulation and may be given purely to obtain advantage or for personal revenge (ibid., § 78). The Court's conclusion in this regard should depend on the procedural guarantees available to the defendant in the particular trial (ibid., § 79; and present judgment, paragraph 62) as well as on whether the procedures followed by the domestic courts and their decision-making are compatible with the Article 6 fair-trial requirements and standards.

4. The extent of the procedural guarantees available to a defendant which are necessary for a trial to be considered fair will depend on the weight given to the evidence of the witness who was granted immunity from prosecution. The more important that evidence is, the more weight the procedural guarantees will have to carry in order for the proceedings as a whole to be considered fair (see, *mutatis mutandis*, *Schatschaschwili v. Germany* [GC],

no. 9154/10, § 116, 15 December 2015, and *Negulescu v. Romania*, no. 11230/12, § 45, 16 February 2021).

III. Whether the testimony of the immunised accomplice witness, which by its very nature was open to manipulation, undermined the overall fairness of trial

5. It should be observed that in the present case N.L.'s testimony was the "foundation" of both applicants' convictions (see paragraph 45 of the judgment), the domestic courts relying on it to the "most decisive" extent (see paragraph 36 of the judgment). Particularly strong procedural guarantees would therefore be required for the proceedings as a whole to be considered fair.

6. The applicants did enjoy some of the procedural guarantees mentioned in *Xenofontos and Others* (cited above, § 79) during the trial. They knew N.L.'s identity and did cross-examine both him and the investigators who had worked with him. The Assize Court examined the allegation that N.L. had had improper dealings with the investigators, took a stance on that witness's testimony, and explained why it was prepared to believe him. The Supreme Court later reviewed the Assize Court's findings. However, the overall fairness of a trial should not be ascertained arithmetically by how many of the enumerated *Xenofontos* safeguards are satisfied. Different safeguards may carry different weight. The lack of a substantial safeguard, as a counterbalancing factor, may be decisive in finding a violation of Article 6 § 1. Furthermore, while cross-examination is generally a crucial tool for the defence, it may not always be a particularly strong procedural safeguard for the defendant, especially in cases, like the present, where an accomplice witness who is granted immunity is giving evidence as a prosecution witness. In such cases, the relationship between the prosecution and the witness is covered by a veil of secrecy, particularly because the Attorney General's decision under Article 113 § 2 of the Cyprus Constitution, to institute or discontinue criminal proceedings against a person, is taken without disclosing his or her reasoning to those involved or to the public. We believe that it is highly likely that at least an implicit conditional promise was given to N.L. by the prosecution (see paragraph 15 of the judgment: "Only if N.L.'s statements proved to be true would the investigator consider suggesting that N.L. be used as a prosecution witness instead of being charged"). However, it did not take long for the prosecutor to decide on the issue of N.L.'s immunity. This is also made clear by the fact that neither the Government (see paragraph 59 of the judgment) nor the domestic courts (see paragraph 35 of the judgment) have denied that N.L. was granted immunity as from the initial stages of the proceedings.

7. It is further worth noting that upon his initial arrest, N.L. refused to answer any questions, insisted that his business was legal and expressed his

mistrust of the investigators (see paragraph 11 of the judgment). While he was still in detention and after consulting his lawyer, N.L. promised the investigators that, once his detention had ended and he had been released, he would provide a written statement about the events that interested the investigators (see paragraph 12 of the judgment). N.L.'s subsequent eagerness to cooperate with the investigation and to give evidence against the applicants emerged by way of exchange for his release. It could be argued that shortly after his release he was made aware of the possibility of being granted immunity, upon the implicit conditional promise mentioned above. The timing of the occurrence of the benefits obtained by N.L., namely, one before and the other (see paragraph 8 below) only one day after he gave evidence, should not be irrelevant or be overlooked. It is our humble submission that the burden of proving that there was no arrangement between the prosecution and N.L. – and not merely denying the existence of such an arrangement as the prosecution did – should, in the circumstances of the case, fall on the shoulders of the prosecution. It would have been impossible for the applicants to try to prove with certainty that there was an arrangement between the prosecution and N.L. other that arguing that the facts speak for themselves. In this connection, it is to be noted that not all of N.L.'s visits to the police were officially recorded and he was in telephone contact with the investigators (see paragraph 25 of the judgment).

8. It is to be underlined that N.L.'s personal interest in the outcome of the present case was immense and twofold: not only had N.L. been granted immunity from prosecution, but also, after he had testified against the applicants in the trial, the bribery proceedings against him were discontinued (see paragraphs 10, 14 and 26 of the judgment). With regard to this additional benefit, the Supreme Court merely held – with succinct reasoning – that it did not constitute a shortcoming in the investigative work (see paragraph 45 of the judgment). In our view, insufficient attention was given to all the potential benefits obtained by N.L. (careful attention to such benefits being a safeguard included in the list of safeguards provided by the Court in *Xenofontos and Others*, cited above § 79). A reasonable person could see these benefits as rewards granted by the prosecution to N.L. in exchange for giving evidence against the applicants. Such a double reward to N.L. by the prosecution, without at least an implicit conditional promise to N.L. that he would receive some benefit, would be very difficult to believe. Furthermore, since the discontinuance of the bribery proceedings against N.L. occurred one day after he had testified and had been cross-examined, the applicants were deprived of the opportunity to cross-examine N.L. on this matter. Moreover, the Assize Court found bank data that *inter alia* corresponded to transactions made by N.L. as a result of pressure from Venizelos Zannettos, the second applicant (see paragraph 45 of the judgment). Both N.L. himself and the second witness testified regarding Zannettos' pressure on N.L., and about the threats to block a land deal unless N.L. paid off personal loans (see paragraphs 39-40 of the

judgment). Therefore, this reinforces N.L.'s potential personal interest in the matter and could even be viewed as an opportunity for personal revenge for the pressure from one of the applicants, without, however, suggesting that N.L. was telling the truth about extortion on the part of Zannettos. As mentioned in paragraph 3 above, referring to a statement made in *Xenofontos and Others* (cited above), personal revenge can be a reason for giving testimony which is open to manipulation.

9. An important procedural guarantee in the context of the present case should be the existence of untainted corroborating evidence (ibid). In that regard, it is to be noted that the Government affirmed that N.L.'s testimony had in fact been corroborated in a broader sense, because some other evidence "supported" it within the meaning of the domestic law (see paragraph 58 of the judgment). However, the applicants disputed that N.L.'s testimony was corroborated and they argued that the sole evidence on which their conviction had been based was that given by N.L. (see paragraph 53 of the judgment). What is important is the Assize Court's unequivocal finding that there was no evidence that would corroborate – that is, independently confirm – N.L.'s testimony (see paragraph 36 of the judgment). In this connection, it is equally important that the Assize Court found that the three other witnesses on whose evidence it had relied had had "a purpose of their own to serve" (see paragraphs 37 to 41 of the judgment). Lastly, it is significant that the Supreme Court found that N.L.'s testimony was the "foundation" of both applicants' convictions (see paragraph 45 of the judgment). The Supreme Court agreed with the Assize Court that the second and third of the three witnesses whose evidence the Assize Court had relied on could be considered to have had "a purpose of their own to serve" (see paragraph 46 of the judgment); the first witness was not mentioned in the Supreme Court's judgment at all. Consequently, tainted evidence cannot be rendered untainted and cannot be corroborated by other evidence which is also tainted.

10. We accept the findings of the domestic courts referred to in the previous paragraph, because the Court's role in fact finding is limited, and domestic courts are in a better position to assess the evidence that they choose to rely on (see *Xenofontos and Others*, cited above, § 85). We therefore agree with the finding that N.L.'s testimony was uncorroborated, in the specific sense that, even assuming that the other evidence, whether oral or written, did "support" the applicants' conviction, it could not have led independently to that decision. Further, according to the domestic courts' finding, the three "important" witnesses were considered to have had a "purpose of their own to serve". Consequently, even if the Court wished to draw its own conclusions about whether the other evidence was tainted, it would not be able to do so, because, with due respect, the domestic court did not clarify which items of evidence could be said to "support" the findings related to each charge faced by the eight defendants, two of whom were the applicants in the present case. That allegation was actually part of the applicants' ground of appeal, namely

that the judgment of the Assize Court was unreasoned. While this is not mentioned by the majority in the present judgment, the Supreme Court held that a detailed presentation of the constituent elements of the offences would have made the decision more understandable and would have made it easier to follow the judicial outcome regarding the final determination of criminal liability. Despite this omission, the Supreme Court ultimately dismissed the relevant ground of appeal. However, in our humble submission, this failure amounts – from the perspective of requiring sufficient safeguards to compensate for the uncorroborated immunised testimony of N.L. – to the lack of an important procedural guarantee, namely, ensuring that a convicted person must be able to understand why he or she was found guilty (see, *mutatis mutandis*, *Taxquet v. Belgium* [GC], no. 926/05, § 100, 16 November 2010).

11. In view of the above, and given that a number of important procedural safeguards were lacking, the answer to the question whether the testimony of the immunised accomplice witness, which by its very nature was open to manipulation, undermined the overall fairness of the trial should be in the affirmative. The applicants were thus placed in a situation where their defence rights were very limited, if not non-existent.

IV. Preliminary conclusion

12. By way of preliminary conclusion, the applicants were convicted primarily on the uncorroborated testimony of N.L., an accomplice who had been granted immunity from prosecution and who also had another self-interest to serve (the discontinuance of bribery proceedings against him). Further, the other testimony was given by three witnesses also having self-interest; and the Supreme Court's consideration of all the benefits received by N.L. was somewhat cursory. All this serves to undermine the overall fairness of the trial. Furthermore, the trial court in deciding on the guilt of the defendants failed to make clear which items of evidence supported the findings related to each charge faced by each defendant, thus making it impossible for the applicants to understand the judgment or to meaningfully appeal against it. However, although we could stop here and find a violation of Article 6 § 1 of the Convention, we will proceed to examine another relevant issue which will make our opinion even stronger.

V. Procedural guarantee under Article 6 § 3 (b) also disregarded

13. We should now like to examine the applicants' complaint under Article 6 § 3 (b) of the Convention, namely, that they had not been afforded adequate facilities in order to challenge the credibility of N.L. However, we will not examine this complaint separately but through the prism of Article 6 § 1; more specifically, as one of the safeguards relating to an immunised

accomplice's evidence which had to be satisfied. We should point out in this connection that the list of *Xenofontos* safeguards is not exhaustive.

14. This approach of reading the complaint under Article 6 § 3 (b) through the prism of Article 6 § 1 is consistent with the case-law of the Court which considers the Article 6 § 3 minimum rights, representing specific applications of the general right to a fair trial provided for in Article 6 § 1; therefore, taking Article 6 § 1 in conjunction with the different sub-paragraphs of its paragraph 3. Further, the specific guarantee safeguarded by Article 6 § 3 (b) overlaps with the principles of equality of arms and adversarial proceedings, which are implicitly protected by Article 6 § 1, and the complaint under Article 6 § 3 (b) is absorbed by the question of whether paragraph 1 of Article 6 was complied with (see, *mutatis mutandis, Deweer v. Belgium*, no. 6903/75, § 56, 27 February 1980). Therefore, failure to uphold Article 6 § 3 (b) undermines not only the specific guarantee which it safeguards, but also the principles of equality of arms and adversarial proceedings which are implied both in this provision but more generally in Article 6 § 1.

15. Accordingly, we will now explain why in examining an alleged violation of Article 6 § 1, due consideration should be given to the minimum right under Article 6 § 3 (b) of the Convention in the present case. Given the lack of corroboration of N.L.'s testimony, it was essential to give the applicants all possible means of discrediting the evidence of that witness. Indeed, Article 6 § 3 (b), which guarantees a "minimum right", obliges the authorities to disclose all exonerating or mitigating evidence in their possession to a criminal defendant (see, with further references, *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 307, 26 September 2023). This obligation also covers evidence that might be used to challenge the reliability of incriminating evidence (see *Mirilashvili v. Russia*, no. 6293/04, § 200, 11 December 2008). Disclosure may, however, be refused if certain competing interests exist or if the defendant fails to give valid and specific reasons for seeking the disclosure (see *Yüksel Yalçınkaya*, cited above, § 308).

16. In the present case, the evidence in question was the prosecution's working copy of a seized hard drive – a forensic "disk image", that is, a file that replicated the entire hard drive, including its contents, structure, and metadata. By having his expert explore the metadata, the applicants' lawyer hoped to prove his theory of collusion between N.L. and the investigators. The disk image, which existed, can therefore be considered to have been evidence that could have been used to challenge the reliability of the incriminating evidence. That disk image could have helped the applicants to exonerate themselves. If the defence expert had been able to find timestamps showing that the investigators had opened the documents before speaking with N.L., the applicants' lawyer could have argued that the investigators had possessed information enabling them to influence N.L.'s testimony. This could have discredited that witness's evidence.

17. The reasons cited by the applicants' lawyer for seeking the disclosure were valid and specific. Although he had his own copy of the disk image, it appears that that copy must have contained different data from those in the prosecution's image, because the images' hash values (a cryptographic assurance of identical content) reportedly did not match. The applicants' request for access to the disk image was not a "fishing expedition", as the Government rather dismissively suggested. The applicants did have a legitimate goal – to find additional evidence of possible collusion between the investigators and the accomplice. In the context of the trial, where the defence revolved around that witness's credibility, the lawyer's goal should have been apparent to the Assize Court without any further explanation. By contrast, the State's interest in resisting disclosure, as invoked by the Assize Court and the Supreme Court, was not as compelling.

18. The applicants would not have gained an advantage over the prosecution if they had examined the disk image after the forensic examiner had left the stand. Their goal was not to call the forensic examiner's methodology into question, but to find confirmation of their main common defence theory. Furthermore, the applicants made their request while the defence was still presenting its case and, in any event, the right under Article 6 § 3 (b), as any of the other Article 6 § 3 minimum rights, may be asserted at any stage of court proceedings (see *Galović v. Croatia*, no. 45512/11, § 82, 31 August 2021). As to the possibility of the applicants' expert altering the data on the prosecution's disk image, the Supreme Court respectfully failed to explain why in its view that possibility existed and could not be avoided. We therefore maintain that, in the circumstances of the case, the principle of equality of arms did create a positive obligation on the respondent State to give the applicant an opportunity to examine the disk image.

19. It is not for this Court to be satisfied that – or entirely understand why – the fact of knowing the time at which the documents in question were accessed by the investigators would have been crucial for demonstrating collusion between N.L. and the prosecution. After all, revealing all defence plans would risk undermining the defence strategy and therefore may be incompatible with Article 6 § 3 (c) of the Convention, which guarantees the right to legal representation and confidential communication with counsel. Consequently, the domestic courts should not expect the defence to disclose all of their arguments and strategies in advance, especially so in a case like the present one, where the defence was placed in a vulnerable situation confronted by the testimony of N.L., who was, by definition, a biased witness, taking into account the benefits he received. While this is entirely hypothetical, even if nothing of use was found on the disk, it should still have been provided to the applicants to uphold their minimum right under Article 6 § 3 (b) of the Convention. This minimum right ensures that the defendant will have adequate facilities for the preparation of his or her defence. Not

everything the defence needs for its preparation must ultimately prove useful or result in the acquittal of the defendant. Otherwise, the provisions of Article 6 § 3 (b) would be contingent upon the defendant's acquittal, which would be absurd.

20. As said above, while cross-examination is widely recognised as an essential tool for ascertaining the truth and testing the veracity of witness testimony, it is not a cure-all and infallible method for addressing all forms of unreliable evidence. A witness's inherent bias or personal interest, as in the case of N.L., may substantially undermine the credibility of his or her testimony, and simply subjecting the witness to cross-examination may not be sufficient to fully expose or mitigate such unreliability, potentially leaving the defence vulnerable. Therefore, accepting requests such as that of the applicants under Article 6 § 3 (b) could be of additional help for the defence. Respectfully, courts should be rather flexible and not strict and formalistic in dealing with such requests. Furthermore, courts and legal systems must employ additional safeguards, such as corroborating evidence, to ensure that justice is served.

21. Having found above that the applicants lacked adequate facilities for the preparation of their defence, we consider that they were also denied an important safeguard against the abuse of accomplice testimony, contrary to Article 6 § 3 (b) of the Convention. The absence of an appropriate safeguard may be an even stronger reason for not accepting the evidence of a key witness who was an accomplice of the defendants and who had been granted immunity from prosecution, particularly if that safeguard is one that Article 6 § 3 defines as a "minimum right", such as the right under Article 6 § 3 (b) to have adequate time and facilities for the preparation of one's defence.

22. In the present case, the "minimum right" in question may also relate to or have an impact on other safeguards, such as the right to test evidence under Article 6 § 3 (d) of the Convention. In a trial where the main evidence for the prosecution comes from an accomplice who has been granted immunity, that evidence is by its nature tainted. To reiterate, with the humblest respect, the domestic courts should therefore not be formalistic when deciding whether to accept procedural requests like the one made by the defence in the present case when those requests are apparently aimed at discrediting such evidence. Any kind of rigidity regarding the interpretation and application of Article 6, or of any other Convention provision, is at odds with the principle of effective protection of human rights (the principle of effectiveness), the underlying and overarching Convention principle.

VI. Final conclusion

23. In the light of the foregoing considerations, the applicants did not have a fair trial. In particular, the procedural guarantees available to them were not

sufficient to ensure the fairness of the proceedings, in view of the weight that N.L.'s testimony carried in their conviction. Unlike the judgment, whose primary concern was the overall fairness of the trial as a whole and found no violation of Article 6 § 1, in our opinion the overall fairness of the trial is compromised even with the lack of only one procedural safeguard. In this case, however, it was more than just one procedural safeguard that was lacking, as previously discussed. Additionally, the Supreme Court's consideration of all the benefits received by N.L. was somewhat cursory. Consequently, the applicants were prevented from exercising their defence rights in a practical and effective manner under Article 6 § 1, as required by the principle that the rights safeguarded by the Convention, including Article 6, must be exercised in a practical and effective manner and must not be theoretical and illusory (the principle of effectiveness).

24. In view of the above and being consistent with the case-law of the Court, we conclude as follows. By convicting the applicants primarily on the uncorroborated testimony of N.L., an accomplice witness who had been granted immunity from prosecution and who also had another self-interest to serve (the discontinuance of bribery proceedings against him), and additionally on the testimony of the three above-mentioned witnesses, who could be considered to have had "a purpose of their own to serve", while failing to afford the applicants the benefit of the guarantee provided for in Article 6 § 3 (b) and, therefore, denying them an important safeguard against the abuse of accomplice testimony, the domestic courts rendered the applicants' convictions unsafe and problematic. Thus the trial was unfair as a whole.

25. There has accordingly been, in our view, a violation of Article 6 § 1 of the Convention. However, as we are in the minority, it is not necessary for us to proceed to examine any issues of just satisfaction under Article 41 of the Convention.

DISSENTING OPINION OF JUDGE SERGHIDES

I. Introduction

1. In terms of normative analysis, this opinion provides an alternative argument to that which is presented in the present case in the joint dissenting opinion I have expressed with my eminent colleague, Judge Zünd, based on the current case-law perspective on the meaning of the overall fairness of the trial. Not only does this opinion conclude, as does the joint opinion, that there has been a violation of Article 6 § 1 of the Convention, but it also reaches this conclusion more straightforwardly and with less difficulty than the joint opinion. This is so, since, as will be explained, this opinion is not in search of any counterbalancing procedural safeguards.

2. To facilitate comprehension, I will start by reiterating in this opinion what I have said in the joint dissenting opinion with Judge Zünd regarding the applicants' complaints and my disagreement with the judgment.

3. The applicants complained that the trial which led to their conviction and imprisonment had been unfair. Firstly, they argued that their conviction was unsafe because it relied on the testimony of a key prosecution witness (N.L.) who was an accomplice and had been granted immunity from prosecution. Secondly, they claimed that they had not been allowed to search the prosecution's disk image for traces of collusion between the prosecution and the accomplice who had implicated them. They relied on Article 6 § 1 of the Convention, which, *inter alia*, provides that "in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing" as well as on Article 6 § 3 (b) of the Convention, which provides that "everyone charged with a criminal offence has the following minimum rights: ...(b) to have adequate time and facilities for the preparation of his defence".

4. I respectfully disagree with the judgment that there has been no violation of Article 6 § 1 of the Convention on account of the courts' reliance on the testimony given by the applicants' accomplice. I also respectfully disagree with the judgment that there has been no violation of Article 6 § 1 taken together with Article 6 § 3 (b) of the Convention. As for the reasons for my disagreement with the current case-law perspective, I refer to the above-mentioned joint dissenting opinion.

II. Two diametrically different approaches to the overall fairness of the trial under Article 6

5. In order to address the meaning and application of the normative perspective on the overall fairness of trial in this case, it is essential to first provide a brief overview of the two diametrically opposing approaches to the

overall fairness of the trial under Article 6, one of which is the normative approach[1].

6. The current case-law approach regarding the overall fairness of a trial under Article 6, also reflected in the present judgment (see paragraph 62) looks at the proceedings as a whole[2] in order to decide whether the trial was fair overall. It affirms that the specific guarantees under Article 6 are not ends in themselves. Rather, they serve as definitional tools that contribute to ensuring the overall fairness. This fairness is determined through a balancing exercise, taking a broader perspective and, as said above, the proceedings as a whole, rather than focusing on an isolated aspect or incident. The balancing exercise involves weighing the shortfall in an Article 6 guarantee against other factors, considerations, safeguards, and the interests of the State, victims, and witnesses. However, according to this view, it is possible that a specific factor may be so decisive that the fairness of the trial can be assessed at an earlier stage of the proceedings[3].

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[1] See on these two approaches also in my following separate opinions: Paragraphs 28-50 of my dissenting opinion in *Xenofontos and Others v. Cyprus*, nos. 68725/16 *et al*., 25 October 2022; paragraphs 8-9 of my partly concurring, partly dissenting opinion in *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20*,* 26 September 2023; paragraphs 71-81 of my dissenting opinion in *Snijders v. the Netherlands*, no. 56440/15, 6 February 2024; and paragraphs 26-29 of my dissenting opinion in *W.R. v. the Netherlands*, no. 989/18, 27 August 2024.

[2] See, *inter alia, Kostovski v. the Netherlands*, no. 11454/85, § 39, 20 November 1989 (Plenary); *Windisch v. Austria*, no. 12489/86, § 25, 27 September 1990; *Doorson v. the Netherlands*, no. 20524/92, §§ 60, 67, 78, 83, 26 March 1996; *Van Mechelen and Others v. the Netherlands*, no. 21363/93 and three others, § 50, 23 April 1997; *Gäfgen v. Germany* [GC], no. 22978/05, § 164, 1 June 2010; *Taxquet v. Belgium* [GC], no. 926/05, § 84, 16 November 2010; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 118, 135, 144, 152, 158 and 165, 15 December 2011; *Dvorski v. Croatia* [GC], no. 25703/11, §§ 81, 103, 111-113, 20 October 2015; *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, 15 December 2015; *Blokhin v. Russia* [GC], no. 47152/06, §§ 194, 23 March 2016; *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 *et al.*, §§ 251-252, 254, 257, 260-262, 273-275, 280-294, 297 and 301-311, 13 September 2016; *Lhermitte v. Belgium* [GC], no. 34238/09, § 69, 29 November 2016; *Correia de Matos v. Portugal* [GC], no. 56402/12, §§ 118-119, 126, 132, 137, 148, 155, 159-160, 4 April 2018; *Beuze v. Belgium* [GC], no. 71409/10, §§ 121, 9 November 2018; *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 138, 18 December 2018; *Doyle v. Ireland*, no. 51979/17, § 71, 23 May 2019; *Akdağ v. Turkey,* no. 75460/10, §§ 47, 65, 17 September 2019; *Radzevil v. Ukraine*, no. 36600/09, §§ 77, 79, 10 December 2019; *Stephens v. Malta (No. 3)*, no. 35989/14, § 78, 14 January 2020; *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, §§ 126, 194, 28 October 2020; *Keskin v. the Netherlands*, no. 2205/16, § 38, 19 January 2021; *Negulescu v. Romania*, no. 11230/12, § 43, 16 February 2021; *Hasáliková v. Slovakia*, no. 39654/15, § 55, 24 June 2021; *Nevzlin v. Russia*, no. 26679/08, § 162, 18 January 2022; *Hamdani v. Switzerland*, no. 10644/17, §§ 29, 36, 28 March 2023; *Yüksel Yalçınkaya*, cited above, § 310; *Snijders*, cited above, at § 55; *Škoberne v. Slovenia*, no. 19920/20, § 103, 15 February 2024; and *W.R. v. the Netherlands*, cited above, § 72.

[3] See *Ibrahim and Others,* cited above, § 251; *Beuze,* cited above, § 121; *Akdağ,* cited above, § 47.

7. The second approach, which, in my respectful submission, is the only Convention-compatible one, is addressed in a normative argument and strongly critiques the first approach, namely, the current case-law approach, particularly for disregarding the wording and purpose of Article 6 § 3. This perspective, endorsed by distinguished academics or judges in their extrajudicial capacity[4] and reflected in some separate opinions[5], has also been

[4] See, *inter alia*, Georghios M. Pikis, *Justice and the Judiciary* (Martinus Nijhoff Publishers, 2012), at § 145 (p. 63); Yvonne McDermott, *Fairness in International Criminal Trials* (OUP, 2016), at p. 39; Ioannis Sarmas, "Fair Trial and Search for Truth in the Case Law of the European Court of Human Rights", in R. Spano, I. Motoc, B. Lubarda, P. Pinto de Albuquerque, M. Tsirli (eds), *Fair Trial: Regional and International Perspectives*, Liber Amicorum Linos-Alexandre Sicilianos (Anthemis, 2020), at p. 500; Antônio Augusto Cançado Trindade, "The Right to a Fair Trial under the American Convention on Human Rights", in Andrew Byrnes (ed.), *The Right to Fair Trial in International & Comparative Perspective* (Centre for Comparative and Public Law, The University of Hong Kong, 1997), 4, at p. 11; Ryan Goss, *Criminal Fair Trial Rights – Article 6 of the European Convention on Human Rights* (Bloomsbury, 2016), Section II; Ryan Goss, "The Disappearing 'Minimum Rights' of Article 6 ECHR: the Unfortunate Legacy of *Ibrahim* and *Beuze*", *Human Rights Law Review*, 2023, 23, 1, at pp. 22-23; Ryan Goss, "Out of Many, One? Strasbourg's *Ibrahim* Decision on Article 6", in (2017) 80(6) *Modern Law Review* 1137, at pp. 1143-1150; Ryan Goss, "The Undermining of Article 6 ECHR", in P. Czech, L. Heschl, M. Nowak and G. Oberleitner (eds), *The European Yearbook on Human Rights* (Intersentia, 2019), 295, at pp. 311-312; Nikos Vogiatzis, "Interpreting the Right to Interpretation under Article 6(3)(e) ECHR: A Cautious Evolution in the Jurisprudence of the European Court of Human Rights", *Human Rights Law Review,* 2022, 22, 1, at pp. 12-16, 23-25; Andreas Samartzis, "Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European Convention on Human Rights", in *Human Rights Law Review,* 2021, 21, 409, at pp. 411, 416-431; Stefan Trechsel, "The Character of the Right to a Fair Trial" in J. Jackson and S. Summers (eds), Obstacles to Fairness in Criminal Proceedings – Individual Rights and Institutional Forms (Hart, Oxford, 2018), 19, at pp. 23-26, 30, 32-35; Stefan Trechsel, (with the assistance of Sarah J. Summers), *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), at pp. 86-89; Laura Hoyano, "What is balanced on the scales of justice? In search of the essence of the right to a fair trial", (2014), *Criminal Law Review* 1, 4, at pp. 4-6, 24-29; and Paul Lemmens, "The Right to a Fair Trial and its Multiple Manifestations", in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013), 294, at pp. 311-314.

[5] See, *inter alia*, joint dissenting opinion of Judges Serghides, Ktistakis, and Zünd in *Hamdani v. Switzerland*, no. 10644/17, 28 March 2023; concurring opinion of Judge Bonello in *Van Geyseghem v. Belgium* [GC], no. 26103/95, 21 January 1999; joint concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković in *Dvorski*, cited above; joint partly dissenting and partly concurring opinion of Judge Pinto de Albuquerque and Karakaş in *Al-Khawaja and Tahery*, cited above; dissenting opinion of Judge Pinto de Albuquerque in *Murtazaliyeva,* cited above; dissenting opinion of Judge Serghides in *Xenofontos and Others*, cited above; partly concurring, partly dissenting opinion of Judge Serghides in *Yüksel Yalçınkaya,* cited above; dissenting opinion of Judge Serghides in *Snijders*, cited above; dissenting opinion of Judge Serghides in *W.R. v. the Netherlands*, cited above; dissenting opinion of Judge Serghides in *Angerjärv and Greinoman v. Estonia*, nos. 16358/18 and 34964/18, 4 October 2022. See also International Criminal Court, *The Prosecutor v. Germain*

recognised in certain past judgments[6] of the Court. It holds that the specific guarantees under Article 6 are independent components of the right to a fair trial, with each constituting a stand-alone right that must be respected as such. Consequently, any failure to secure one of these guarantees results in a violation *per se*, without the need to balance competing factors or considerations.

8. The normative view holds that all Article 6 guarantees, whether explicit or implicit, are fundamental and indispensable to ensuring a fair trial. These guarantees are integral components of the right to a fair trial. Put more vividly, all Article 6 guarantees are crucial elements that work together to form a comprehensive framework for a fair trial, collectively contributing to this objective. Each guarantee serves a specific purpose and plays a vital role in safeguarding the rights of individuals involved in legal proceedings. Unlike the current case-law view, the normative view requires that full effect and satisfaction be given to each of the Article 6 guarantees.

9. To elaborate further on the normative view, a trial can only be fair overall when all its guarantees are satisfied; any shortfall renders it unfair. In other words, fairness is the objective of Article 6, and this can only be achieved by acknowledging the importance of and securing every guarantee, giving them all practical and effective interpretations and applications. The notion of fairness is inextricably connected with the norm of effectiveness enshrined in Article 6. The idea that a trial can only be considered fair if all its guarantees under Article 6 are met is akin to a fragile bridge spanning turbulent waters. Just as a missing support beam can cause a bridge to collapse, the absence of any Article 6 guarantee renders the trial unfair. The overall fairness of a trial is ensured only through the uncompromised application of all Article 6 guarantees to the specific facts of a case. This is mandated by the principle of effectiveness, serving as both a norm of international law and a method of interpretation[7].

10. As I have argued elsewhere[8], while the current case-law approach is specifically known as the "overall fairness of the trial" approach, I consider

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Katanga, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI, 7 March 2014.

[6] See *Luedicke, Belkacem and Koç v. Germany*, nos. 6210/73 *et al,* §§ 38-50, 28 November 1978; *Öztürk v. Germany*, no. 8544/79, §§ 57-58, 21 February 1984 (Plenary); *Isyar v. Bulgaria*, no. 391/03, §§ 45, 48-49, 20 November 2008; *Pakelli v. Germany*, no. 8398/78, §§ 39-42, 25 April 1983; *Artico v. Italy*, no. 6694/74, 13 May 1980; *Hadjianastassiou v. Greece*, no. 12945/87, §§ 31-37, 16 December 1992; and *Salduz v. Turkey* [GC], no. 36391/02, §§ 50, 55, 27 November 2008.

[7] Without referencing my own works on the principle of effectiveness, it suffices to refer to Daniel Rietiker, "'The principle of effectiveness' in the recent jurisprudence of the European Court of Human rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*", in *Nordic Journal of International Law*, 2010, 79, 245 *et seq.*

[8] See paragraph 28 of my dissenting opinion in *W.R. v. the Netherlands*, cited above.

that both this approach and the normative one pertain to the overall fairness of the trial. "Overall" literally means taking everything into account. In the context of a trial, "overall fairness" literally and properly means fairness in every respect, as supported by the normative view. This stands in contrast to the current case-law approach, which endorses a concept of fairness that may lack in some respects but is "outweighed" by other considerations. In my view, the normative perspective is the most orthodox, as it aligns with the wording and purpose of Article 6, as well as the principle of effective protection of the right in question. In contrast, the current case-law approach, which adopts a balancing method regarding the specific guarantees in Article 6, can be described—using Ashworth's term—as "heresy"[9], as it does not conform to the wording and aim of Article 6 or the principle of effectiveness. This approach deems a trial fair overall even when a significant guarantee is absent or breached, which is not only misleading but also an oxymoron.

11. The difference between the normative view and the current case-law view may stem from the fact that the latter considers the right to a fair trial under Article 6 to be a relative right[10], while the former views it as an absolute[11]. In other words, the divergence between these two perspectives can be explained by the stance each takes on the nature of the right to a fair trial – whether it is qualified or absolute.

[9] See Andrew Ashworth, "Security, Terrorism and the Value of Human Rights" in B. Goold and L. Lazarus (eds), *Security and Human Rights* (Oxford: Hart Publishing, 2007), 203, at p. 215. See also Laura Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial", cited above, at p. 13.

[10] Even in judgments such as *Ibrahim and Others*, § 250, which initially characterised the right to a fair trial under Article 6 § 1 as an "unqualified right", the Court, nevertheless, proceeded to treat it as a relative right. It emphasised, in particular, that what constitutes a fair trial cannot be determined by a single unvarying rule but must depend on the specific circumstances of each case, subsequently engaging in a balancing exercise. If the right to a fair trial were to be "unqualified", then one should expect that its constituent elements should be "unqualified" as well, unless this is so provided by any of the provisions of Article 6. Indeed, there are four exceptions where, according to the current case-law approach, a breach of a certain Article 6 guarantee automatically leads to a violation of Article 6, thus treating these guarantees as absolute. These guarantees are the following: the three institutional guarantees of a tribunal established by law that is independent and impartial, and the guarantee that the trial cannot rely on evidence obtained by torture. On these exceptions, see some representative case-law in paragraph 8 of my partly concurring, partly dissenting opinion in *Yüksel Yalçınkaya*, cited above.

[11] Nonetheless, the normative approach accepts that certain guarantees may be subject to limitations: specifically, the guarantee of a public hearing and the public pronouncement of judgments under Article 6 § 1, as well as the implicit guarantee of the right to a court under the same Article.

III. Reaching the same conclusion as in my joint dissenting opinion with Judge Zünd, by following the normative approach

12. I will begin this part by asking a legal question relevant to the facts of this case. What pertinent specific guarantee, if any, implicit in Article 6 § 1 of the Convention would, if breached, according to the normative (and my proposed) view, automatically result in a violation of this provision?

13. In *Xenofontos and Others* (cited above, see paragraph 29 of my partly dissenting opinion in that case), I provided an answer to this question. In that case, which also concerned the testimony of an accomplice witness who was granted immunity, I proposed that the prohibition in or preclusion from a criminal trial of fundamental flaws which inherently taint and contaminate the whole trial (as do the fundamental flaws which emanate from the evidence of the key witness in the present case, N.L.) is an implicit or implied specific guarantee of a fair trial which springs from the general right to a fair trial under Article 6 § 1 of the Convention. The failure to secure this guarantee infects the whole procedure and may extinguish the fairness of a trial (ibid., partly dissenting opinion, §§ 32, 48). The concept of integrity in criminal proceedings should be viewed as a continuous and inseparable whole, such that any tainted evidence will contaminate the entire procedure. Therefore, in my humble view, a court in that situation is unable to justify the conviction and punishment of an accused person.

14. This logic would apply in the present case because the flaw is so intrinsic and fundamental to the procedure that the whole trial would be tainted and contaminated completely by the flaw, and, therefore, no "safeguards" would be able to counterbalance it. On the contrary, it would be futile, pointless and contrary to the moral element of human rights to counterbalance any factor or "safeguard" against a fundamental flaw which would pervade the whole trial to such an extent that it is entirely contaminated (ibid., partly dissenting opinion, § 30). Stated otherwise, in my submission, a fundamental flaw, such as the admission of material witness evidence given by an accomplice who has been granted immunity as in the present case, would not amount merely to breaking a link in the chain of evidence, but rather to not having any chain of evidence to begin with and would ultimately lead to an absence of incriminating evidence (ibid., partly dissenting opinion, § 45). Consequently, this would not constitute just a minor impediment in the procedure, but rather a complete breakdown in the entire process of the trial.

15. The inherent fundamental flaw in admitting the testimony of the immunised accomplice, N.L., was not only a source of legal uncertainty for the applicants, while giving the prosecution a clear advantage in the handling of their case – and, therefore, breaching the principle of equality of arms –, it also impaired the essence of the applicants' right to a fair criminal hearing. More emphatically, in my view, this fundamental flaw deprived the applicants of their liberty, without due process (also safeguarded by

Article 30 §§ 2 and 3 of the Cyprus Constitution and, for example, by the Fifth Amendment to the United States Constitution), thus denying them a fair trial (see also *Xenofontos and Others*, cited above, partly dissenting opinion, § 48).

16. It is noteworthy in this respect that Cesare Beccaria, in dealing with the pardon offered in some tribunals to an accomplice to a grave crime who has provided evidence against associates, insightfully argued that "the tribunal, which has recourse to this method, betrays its fallibility, and the laws their weakness, by imploring the assistance of those by whom they are violated"[12]. He also observed that "[i]t appear[ed] to [him], that a general law, promising a reward, would be better than a special declaration in every particular case"[13]. Without taking a position as to whether such a proposal would still violate Article 6, it is to be noted that there is no such general law in Cyprus.

17. The present judgment, following *Xenofontos and Others* (cited above), assessed the effect of the testimony given by the accomplice witness N.L.— which was by its nature open to manipulation—on the fairness of proceedings as a whole. In so doing it engaged in a balancing exercise by taking into account certain safeguards included in the non-exhaustive list mentioned in *Xenofontos and Others* (cited above). The normative view runs counter to such an enterprise. As I have argued elsewhere[14], *there can be no safeguard for a lack of an Article 6 guarantee/safeguard in the sense that there can be no counterbalancing safeguard or factor capable of compensating for the absence or breach of another safeguard.*

18. It follows from the above, that, unlike the current case-law approach, according to the normative perspective a complaint that one of the Article 6 sub-rights or guarantees was breached cannot be answered by showing that the other sub-rights or guarantees, or at least some of them, were not breached[15]. Therefore, regarding the present case, following the normative view and in order to determine whether the trial was fair overall, it is not correct to argue that the breach of the Article 6 § 1 implicit guarantee in question in this case (see paragraph 13 above) could be counterbalanced by certain procedural safeguards that the applicants enjoyed (see paragraph 62 of the judgment), like their right to cross-examine N.L. under Article 6 § 3 (d) of the Convention. Otherwise, it would risk allowing breaches of Article 6

[12] See Marguis [Cesare Bonesana di] Beccaria, *Essay on Crimes and Punishments*, new edition (W. C. Little & Co, Albany, 1872), at p. 139.
[13] Ibid.
[14] See paragraph 7 of my partly concurring, partly dissenting opinion in *Yüksel Yalçınkaya*, cited above; paragraph 72 of my dissenting opinion in *Snijders*, cited above; and paragraph 29 of my dissenting opinion in *W.R. v. the Netherlands,* cited above.
[15] See also Lord Hope of Craighead in *Dyer v. Watson and Another* and *K. v. HM Advocate* [2004] 1 A.C. 379 at [407].

guarantees to persist, with the result of undermining or breaching the rule of law.

19. When a balancing test is allowed under the Convention, as in the case of Articles 8-11 of the Convention, the variables compared within the balancing scale should be permissible ones—namely, rights, on one side, and lawful, legitimate restrictions, on the other. Therefore, there should be no variables that infringe upon, or are incompatible with, the concept of a fair trial[16]. Simply put, when a balancing test is applied to determine whether a trial was fair overall, there should be no room for fundamental defects, flaws, or shortcomings in the guarantees. In any event, the normative view precludes any restrictions on the right to a fair trial beyond those expressly stated in Article 6 or those concerning the implicit right of access to a court[17]. Samartzis, when criticising the current case-law perspective, argues "[t]hat the novelty of the overall fairness assessment can be viewed as a pathology of the Court's proportionality analysis, an instance of spillover into Article 6 cases of the Court's general tendency to determine its conclusions on the basis of *ad hoc* balancing."[18]. The term "pathology" describes the Court's problematic proportionality analysis in determining the overall fairness of the trial, while "spillover" effectively captures its negative consequences.

20. Pikis insightfully argued that "no deviation or shortfall of a fair trial should be countenanced"[19]. This statement is very inspiring and supportive of the normative view. To allow of no compromise on the right to a fair trial, through shortfalls and breaches of that right, ensures that each individual faces the legal process on equal terms to others, preventing any attempt to circumvent the principle of fairness. It also safeguards against attempts to undermine the legal process, preserving its integrity and ensuring that justice is served. Furthermore, such an interpretation of Article 6, in which no compromise on a fair trial can be tolerated, is the only one compatible with assigning a moral reading to the right to a fair trial. Undoubtedly, the fact that all Article 6 guarantees should be fully respected is also a requirement of the rule of law and the principle of effectiveness, in its capacity both as a norm of international law and as a method of interpretation. The overarching and active principle for determining the fairness of a trial should be this principle of effectiveness. The rule of law, one aspect of which is the principle of effectiveness, serves as the foundation and guiding star for a fair trial. It imposes a positive obligation on member States to secure all Article 6 guarantees for any accused person, without sacrificing them in any way or to any extent for any purpose. Importantly, Articles 1 and 19 of the Convention and the inclusion by Protocol No. 15 to the Convention of the principle of

[16] See also paragraph 43 of my partly dissenting opinion in *Xenofontos and Others*, cited above.
[17] See also note 11 above.
[18] See Andreas Samartzis, cited above, at p. 421.
[19] See Georghios M. Pikis, *Justice and the Judiciary*, cited above, at § 145, p. 63.

subsidiarity in the Preamble to the Convention, emphasise the primary responsibility of the member States, under the supervisory jurisdiction of the Court, to ensure the effective protection of human rights. A correct understanding of subsidiarity, as reaffirmed by Protocol No. 15, obliges member States and the Court to ensure the effective protection of the right to a fair trial without compromising on Article 6 guarantees in favour of other considerations or interests.

21. I wish to reiterate what I have stated elsewhere,[20] namely, that the biggest and most concerning problem with the Court's current case-law approach to interpreting trial fairness is its tendency to compromise on guarantees that are lacking or breached by appealing to an overall sense of fairness, rather than addressing specific breaches directly. Apart from length-of-proceedings cases, the Court is, regrettably, very cautious in finding violations of Article 6, more so than with any other provision of the Convention. This is concerning because Article 6 is crucial for safeguarding human rights and serves as the foundation for the vindication of other Convention rights[21]. Moreover, the Court's case-law emphasises that the right to a fair trial occupies a "central position" in the Convention and "reflects the fundamental principle of the rule of law"[22], holding such a prominent place in a democratic society that a restrictive interpretation would not be consistent with the object and purpose of the Article[23]. As Lemmens observes, "[t]he Court seems to have become more 'result'-oriented which allows it to leave more room for domestic policy considerations when it comes to creating a framework for judicial proceedings", adding that "[t]his development seems to fit with an increased emphasis on the 'subsidiary' character of the Convention protection system"[24]. However, an overzealous application or

[20] Paragraph 38 of my dissenting opinion in *W.R. v. the Netherlands*, cited above.

[21] The right to a fair trial is the most invoked right in cases before the Court, and as Hoyano argues, it "is pre-eminent because it provides the platform for the vindication of all other legal rights" (Laura Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial," cited above, at p. 4). Importantly, Quiroga and Contreras also rightly argue regarding the right to due process provided in Article 8 of the American Convention on Human Rights, which is equivalent to the right to a fair trial provided in Article 6 of the European Convention: "[i]n the eyes of the Court [the Inter-American Court of Human Rights], the position of due process is paramount because it constitutes the safeguard for all the rights in the Convention" (Cecilia Medina Quiroga and Valeska David Contreras, *The American Convention on Human Rights – Crucial Rights and Their Theory and Practice*, 3rd edition (Intersentia, 2022), at p. 311).

[22] *Sunday Times v. the United Kingdom*, no. 6538/74, § 55, 26 April 1974 (Plenary).

[23] See *Delcourt v. Belgium*, no. 2689/65, § 25, 17 January 1970; *Artico v. Italy*, no. 6694/74, § 33, 13 May 1980; *Moreira de Azevedo v. Portugal*, no. 11296/84, § 66, 23 October 1990; *De Cubber v. Belgium,* no. 9186/80, §§ 30, 32, 26 October 1984; *Nevzlin v. Russia*, no. 26679/08, §§ 134-136, 18 January 2022; and *Gregačević v. Croatia*, no. 58331/09, § 49, 10 July 2012.

[24] Paul Lemmens, "The Right to a Fair Trial and its Multiple Manifestations", cited above, at p. 313.

misapplication of the principle of subsidiarity can impede the principle of effective protection of human rights – which opposes a restrictive interpretation of Article 6 – by preventing the Court from fulfilling its essential role. By emphasising that it is not acting as a "fourth instance" court and giving significant deference to national legal systems, the Court risks undermining its position as the guardian of human rights, potentially overlooking its duty to ensure that domestic laws and procedures comply with the Convention's fairness standards. It is vital that the Court examines and decides on the Convention compatibility of domestic procedures, which should not be confused with acting as a "fourth instance" court.

22. The normative approach of requiring the fulfilment of all procedural guarantees in Article 6 is not rooted in formalism or mere adherence to legal technicalities. Rather, it stems from a deeper understanding that each guarantee in Article 6 plays an essential role in safeguarding procedural fairness, shielding substantive justice, and upholding the integrity and legitimacy of the judicial process itself.

23. The adoption of a fairness test that compromises on Article 6 guarantees in domestic trials may undermine the legitimacy of the Court as the highest European and international human rights court. This concern is heightened by the fact that the same fairness principle would also apply when the Court itself decides cases. There is no doubt that a fair trial is the only means to do justice before any court, domestic or international, including this Court. As the International Criminal Tribunal for the former Yugoslavia (ICTY) emphasised, the right to a fair trial is not just a fundamental right of the accused, "but also a fundamental interest of the Tribunal related to its own legitimacy"[25].

24. Before concluding on the normative view and its application in the present case, I wish to sum up by emphasising that the test of overall fairness of a trial, in cases like the present one, should not involve a balancing of factors, but rather the *ascertainment* that all pertinent Article 6 guarantees are fully upheld throughout the criminal trial, which, in the present instance, was not the case, as explained above.

25. By way of conclusion, following the normative view to which I adhere, there has been a violation of Article 6, because the domestic courts accepted the evidence of the key witness who was an accomplice of the applicants and who was granted immunity from prosecution. Therefore, the implicit guarantee in Article 6 § 1, mentioned in paragraph 13 above, was breached and it contaminated the whole procedure.

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[25] *Prosecutor v. Šešelj,* Decision on Prosecution Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence (Case No. IT-03-67-PT, 9 May 2003, para. 21). See also Yvonne McDermott, *Fairness in International Criminal Trials,* cited above, at pp. 34-35.

IV. The possible implication of Article 6 § 3 (b) of the Convention

26. The question arises as to whether it should also be examined whether there has been a violation of Article 6 § 1 due to the non-observance of the minimum right provided for by Article 6 § 3 (b) of the Convention. Beyond examining Article 6 § 1 through the lens of Article 6 § 3 (b), or *vice versa*, the necessity of a separate examination of the complaint under Article 6 § 3 (b) may also arise. The answers to these questions can be more easily articulated if, for the sake of argument, we first assume that there has been a breach of the guarantee in Article 6 § 3 (b) of the Convention.

27. In my view, the lack of any of the guarantees, namely, those in Article 6 § 1 and that in Article 6 § 3 (b), would, *in theory*, be a deathblow to the right to a fair trial, and, therefore, there should be no hierarchical order between them as regards their consequences and importance.

28. However, *in practice*, similar to the death of a human being where the first fatal bullet is the one which causes the death, the chronological order of the occurrence of the different shortfalls or breaches of Article 6 guarantees during the criminal trial is decisive (or at least relevant) for the determination of the lack of the guarantees which ultimately caused the violation of the right to a fair trial. In the present case, chronologically, the first failure to respect guarantees was the acceptance by the court of the key accomplice's evidence which tainted and contaminated the whole trial.

29. It was the lack of this guarantee – namely, the preclusion from criminal trials of fundamental flaws – which, in my view, contaminated the fairness of the entire trial; not the lack of the Article 6 § 3 (b) guarantee, despite the fact that the latter is described by the said provision as a minimum right of everyone charged with a criminal offence. In any event, in my view, all Article 6 guarantees are part of the core of the right to a fair trial and indispensable components of the notion of fairness, and not only the minimum rights expressly provided in Article 6 § 3. This pragmatic reasoning based on the chronological order of the intervention of the guarantees is further supported by the fact that, had the Court not accepted the evidence of this key accomplice witness, the satisfaction of the guarantee of Article 6 § 3 (b), which was aimed at discrediting this witness, would not come into play.

30. Nonetheless, the right to adequate facilities under Article 6 § 3 (b) of the Convention can be applied "to all stages of proceedings, including the pre-trial and appeal stages", though the most common scenario is when this lack of guarantee occurs at the pre-trial stage[26]. Therefore, arguing on a theoretical level, there might be cases where the lack of the Article 6 § 3 (b) guarantee precedes the commencement of a trial and therefore precedes the giving of testimony which is tainted, thus causing the lack of another Article 6

[26] See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 5th edition (Oxford University Press, 2023), at p. 477.

guarantee, namely, the aforesaid implicit guarantee of Article 6 § 1. In such a case, of course, the shortfall or breach of the Article 6 § 3 (b) guarantee, would, in my submission, be the one which would cause the breach of Article 6. However, this is not the case here.

31. Consequently, unlike the approach I adopted together with my distinguished colleague Judge Zünd in following the current case-law approach, by adopting the normative (and proposed) view the finding of a violation of Article 6 § 1 in the present case will be reached without giving any consideration to the minimum right of Article 6 § 3 (b), whether in examining Article 6 § 1 through the lens of Article 6 § 3 (b), or in examining Article 6 § 3 (b) separately.

V. Conclusion

32. The above analysis has shown that, in my humble view, whichever interpretation of Article 6 § 1 and meaning of the notion of overall fairness of the trial is to be followed, namely, that used in the current case-law or the normative (and proposed) approach, a finding of a violation of Article 6 § 1 would be unavoidable in the present case.

33. In view of all that has been said in this opinion as well as in the joint dissenting opinion I have expressed with my eminent colleague Judge Zünd, I can say with certainty that I am unable to subscribe to a judgment like the present one, which regrettably sets a concerning precedent. A judgment which was based on, or more accurately, over-relied on uncorroborated accomplice testimony from a witness who was granted immunity – testimony which is inherently unreliable – undermined the integrity of the justice system and the defence rights under Article 6. I am also unable to subscribe to a judgment which could encourage prosecutors to prioritise securing convictions over ensuring justice, risking incentivising biased, unreliable or even false testimony from accomplices who stand to benefit from implicating others. Lastly, having in mind that fairness is the very foundation upon which justice should stand and a trial unfolds, I am unable to subscribe to a judgment which not only fails to administer justice fairly to the applicants, but also may have long-term negative implications for the fairness of future trials as well as for the correct understanding, interpretation and application of Article 6 by the Court and the domestic courts.

34. I have included my personal view on the normative argument explored in the present case, not merely for the sake of an academic dialogue with the current case-law view, but also with the hope, as I also did in *Xenofontos and Others, Yüksel Yalçınkaya*, *Snijders* and *W.R. v. the Netherlands* (all four cited above), that the pertinent case-law will in future be more compatible with the text and the aim of Article 6. This will serve as a modest, yet crucial reminder, of how the Court's case-law might and should evolve, underscoring the notion that justice is not a static concept but a dynamic dialogue shaped

by our collective democratic values. It is crucial to weave our evolving understanding of fairness and morality into the fabric of Article 6 to ensure that criminal justice adapts and remains pertinent in an ever-changing society.