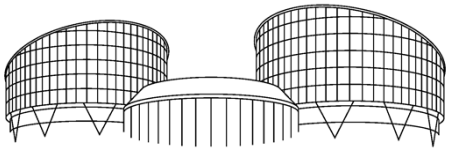

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KHAVSHABOVA v. GEORGIA

(Application no. 26134/19)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) and (d) • Fair hearing • Applicant's defence rights significantly affected by appointment of legal aid lawyer and his participation in the witness hearings without her knowledge • No good reason for non-attendance of prosecution witnesses who provided decisive evidence for applicant's conviction • Insufficient counterbalancing factors • Overall fairness of proceedings undermined

STRASBOURG

29 June 2023

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 Khavshabova v. Georgia,

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

Carlo Ranzoni*, President*,
Lado Chanturia,
Stéphanie Mourou-Vikström,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 26134/19) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Ms Anzhela Khavshabova ("the applicant"), on 6 May 2019;

the decision to give notice to the Georgian Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 6 June 2023,

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

INTRODUCTION

1. The application concerns complaints under Article 6 §§ 1 and 3 (c) and (d) of the Convention relating to the alleged unfairness of criminal proceedings conducted against the applicant on account of the participation in the pre-trial investigation stage of a legal aid lawyer appointed without her knowledge, and in view of the fact that she was not given an opportunity to question prosecution witnesses.

THE FACTS

2. The applicant was born in 1959 and lives in Batumi. She was represented by Mr D. Japaridze, a lawyer practising in Batumi.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

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

I. THE INCIDENT OF 26 JULY 2016 AND PRE-TRIAL INVESTIGATION

5. According to the investigation file, on 26 July 2016 the applicant physically assaulted G.M., a national of Azerbaijan, who at the material time

was renting her apartment in Batumi. The incident was allegedly witnessed by the victim's sister (G.Ma.), mother (Z.M.), brother (M.M.) and a cousin (K.S.). On the same day an investigation was launched into the incident under Article 125 of the Criminal Code (the offence of battery). G.M. underwent a medical examination, as a result of which it was established that she had suffered a bruise measuring 1.8 cm by 2 cm in the area of her chest. Later that day and in the course of the next few days, she and four witnesses were interviewed by the investigator in connection with the circumstances of the incident. The applicant and her mother also gave statements, confirming that the altercation had taken place, but claiming that it was G.M. who had assaulted them.

6. On 27 July 2016 the applicant underwent a medical examination, as a result of which it was established that she had suffered several bruises of various sizes in the areas of her left arm, right elbow, right shin and left foot.

7. On 31 July 2016 the head of the regional legal aid bureau assigned a lawyer, namely L.R., to represent the applicant's interests during the investigation and before the first-instance court. According to the Government's explanation, the applicant required mandatory legal representation pursuant to Article 45 § 1 (b) of the Code of Criminal Procedure because she did not understand the Georgian language. It is not clear from the case file whether the applicant was served with a copy of the above-mentioned decision or whether she was formally informed – and, if so, when – about the assignment of L.R. to her case under the legal aid scheme.

8. On 1 August 2016 the applicant was formally presented with the charge against her in the presence of an interpreter and L.R. The relevant procedural decision on bringing charges contained a list of the rights of an accused person, including his or her right to have a lawyer. The relevant part of the decision read as follows:

> "4. An accused has a right to choose and appoint counsel, and also a right to replace [him or her] at any time, or if [the accused] is indigent, a right to have counsel provided by the State ...
>
> 5. An accused may reject the services of counsel and independently defend his or her own [interests] ... An accused cannot reject the services of a lawyer where the [Code on Criminal Procedure] provides for mandatory legal representation."

9. The above-mentioned procedural decision was duly signed by the applicant, the interpreter and L.R.

10. On 4 August 2016 the prosecution requested the examination of the victim and her sister in the presence of a magistrate judge pursuant to Article 114 of the Code of Criminal Procedure (cited in paragraph 22 below), on the ground that they were both due to leave the territory of Georgia and return to Azerbaijan. Both applications contained the contact details of the applicant and the legal aid lawyer, L.R.

11. Both requests were granted on the same day. The first witness hearing was scheduled for 6.30 p.m. and the second, for 7.00 p.m. The hearings of the

two witnesses started as scheduled, in the presence of different magistrate judges, and with another legal aid lawyer for the applicant, B.B., in attendance. According to the relevant court records, in reply to a question from the magistrate judges about the reasons for the applicant's absence, B.B. stated that "according to her, she could not come" although "he did not know why". It does not appear from the case materials that B.B. provided the magistrate judges with an authority or other procedural document appointing him as counsel for the applicant. The judges ruled that with counsel present and acting on behalf of the accused, they could proceed with the witness hearings despite the absence of the accused. According to the case materials, the witness hearings were not video recorded.

12. Soon afterwards, the victim, her sister and three other prosecution witnesses, who were all nationals of Azerbaijan, left Georgia.

13. On 9 August 2016 the applicant's legal aid lawyer, L.R., was provided with a list of evidence against the applicant as well as copies of the relevant pieces of evidence. The next day the Batumi City Court, with the participation of the applicant and L.R. acting on her behalf, examined and rejected a request by the prosecutor to impose bail on her. On 23 August 2016 the prosecution exchanged information about the evidence with the defence, among others, a list of the witnesses including the alleged victim and her sister they were willing to examine at the trial. The relevant records regarding the exchange of information about the evidence were all signed by L.R.

II. THE TRIAL

14. According to the case file, during the initial several hearings the applicant was represented by L.R. At the hearing on 4 October 2016 the applicant designated a private lawyer of her own choice. At the hearing of 10 November 2016, the prosecution produced border crossing records showing the departure of the alleged victim and her sister from Georgia and requested that the records of their examination on 4 August 2016 by a judge (see paragraphs 10 and 11 above) be read out. The applicant and her private counsel agreed to the prosecution's application and the statements were read out. The subsequent hearings were adjourned several times at the request of the prosecution, who claimed to have attempted to contact all five prosecution witnesses without success.

15. On 18 July 2017 the defence requested that the above statements of the alleged victim and her sister, be declared inadmissible. They argued, *inter alia,* that the prosecution had included both witnesses in the list of witnesses to be examined in court; their examination was, hence, expected in court and in such circumstances, the reading out of their pre-trial statements was unlawful. They further claimed that the applicant's defence rights were being breached on account of her being unable to examine these witnesses. They alleged that the applicant had never been informed about the victim and her

sister being heard before magistrate judges pursuant to Article 114 of the Code of Criminal Procedure on 4 August 2016 and that the legal aid lawyer B.B. had lied on that account. It does not appear from the case material that this application was examined during the applicant's trial.

16. On 14 November 2017, at the request of the prosecution, the written statements of the remaining three prosecution witnesses were also accepted in evidence and read out. In the meantime, the Batumi City Court heard in person another prosecution witness (the applicant's neighbour, M.P.), the applicant and one defence witness. M.P. claimed not to have seen the incident itself. She added, however, that she knew that something had happened when she saw the applicant with police officers and several other persons in the courtyard of their building. The applicant protested her innocence, claiming that she had been assaulted by the purported victim and her relatives, which was supported by, among other things, the medical report on her injuries. As to the only defence witness, she alleged that she had seen, through an open door of the applicant's apartment, several persons threatening the applicant. In their closing argument the applicant and her lawyer reiterated again that the records of the examination of the alleged victim and her sister of 4 August 2016 by a magistrate judge, had been obtained in breach of the applicant's defence's rights, and were, hence, to be declared inadmissible; or at the very least, the domestic courts should not have relied on them.

17. On 8 January 2018 the Batumi City Court acquitted the applicant, concluding that the prosecution had failed to produce reliable and convincing evidence of her guilt. In its reasoning the first-instance court noted that the prosecution had failed to ensure the presence of the alleged victim and of the main prosecution witnesses during the trial and concluded that it could not base its decision solely on the statements of the absent witnesses who had not been examined in court. It referred in that connection to Article 243 of the Code of Criminal Procedure, which provided that a conviction could not be based solely on witness evidence which had not been examined in court and observed that for that purpose there was no difference between witness evidence obtained through the procedure envisaged by Article 114 of the Code of Criminal Procedure (the hearing of a witness in the presence of a magistrate judge) and evidence obtained by an investigator during the pre-trial investigation stage. The court further noted that the remaining medical and other evidence was not conclusive of the applicant's guilt.

18. On 8 February 2018 the prosecution filed an appeal, arguing, among others, that the pre-trial statements of the absent witnesses were corroborated by other incriminating evidence and, hence, in line with Articles 114 and 243 of the Code of Criminal Procedure, they were valid pieces of evidence to rely on. In reply, the applicant filed her own arguments, maintaining that any reliance on the pre-trial statements of the victim and her sister as an argument to convict her, if it were to materialise, would be unlawful. On 27 April 2018, the Kutaisi Court of Appeal, without holding an oral hearing, confirmed the

applicant's acquittal. The court found that the prosecution had failed to produce consistent, clear and convincing incriminating evidence against the applicant. While noting that the alleged victim and one of the eyewitnesses had been examined in the presence of a magistrate judge in accordance with the procedure provided for by Article 114 of the Code of Criminal Procedure, it considered, with reference to Article 243 of the Code, that it could not rely exclusively on such evidence to convict a person.

19. On 23 May 2018 the prosecution lodged an appeal on points of law maintaining their arguments. They emphasised, in particular, that the two key witnesses had been examined in line with the procedure envisaged by Article 114 of the Code of Criminal Procedure, under oath, in the presence of a magistrate judge and with the participation of a lawyer for the defendant. The applicant, on her part, argued that the prosecution's appeal on points of law was inadmissible as the procedural decisions of the first two instances concerning, among others, the interpretation and application of Articles 114 and 243 of the Code of Criminal Procedure were fully in line with the relevant domestic practice.

20. On 30 November 2018 the Supreme Court of Georgia, in a written procedure, overturned the applicant's acquittal, finding the applicant guilty as charged and fining her 500 Georgian laris (the equivalent of approximately 170 euros (EUR)). The Supreme Court found it established that the victim and the main prosecution witness, her sister, had been examined in the presence of a magistrate judge with the participation of a legal aid lawyer representing the applicant. That procedure, which was provided for by Article 114 of the Code of Criminal Procedure, had ensured that the applicant was able to exercise her defence rights and to examine the prosecution witnesses. Hence, the statements obtained through such an examination, coupled with other circumstantial evidence such as the medical examination report of the victim's injuries and the witness statement made in court by the neighbour, were sufficient to prove the applicant's guilt.

RELEVANT LEGAL FRAMEWORK

21. The relevant provisions of the Code of Criminal Procedure concerning the appointment of a lawyer, as in force at the material time, read as follows:

Article 38. Rights and duties of an accused

"...

5. An accused has a right to choose and be represented by a lawyer, and a right to replace a chosen lawyer at any stage; or if he or she does not have one, a right to be represented by a lawyer at the expense of the State. An accused shall have reasonable time and means to prepare for his or her defence. Communication between an accused and his or her lawyer shall be confidential. No restrictions shall be imposed on communication between an accused and his or her lawyer which would impede the exercise of the defence in a proper manner."

Article 45. Mandatory defence

"1. It shall be mandatory for an accused to have a defence lawyer:

...

(b) if the accused person has no command of the language of criminal proceedings."

22. The relevant provisions of the Code of Criminal Procedure concerning the examination of witnesses, as in force at the material time, read as follows:

Article 113 – Procedure for interview

"1. Any person who may have information that is essential for the case may be voluntarily interviewed by the parties. An interviewee may not be forced to provide evidence or disclose information ..."

Article 114 – Procedure for witness examination during [pre-trial] investigation

"1. At the [pre-trial] investigation stage, a person may be examined as a witness, at the request of both the defence and the prosecution, before a magistrate judge according to the place of the investigation or the location of the witness if:

...

(b) he or she intends to leave Georgia for a long period ..."

Article 118 – Examination of a witness during a hearing on the merits

"...

3. A witness who is not able to appear before a court for examination owing to circumstances provided for by Article 114 § 1 (a), (b) and (d) of this Code shall not be examined. In such a case, his or her pre-trial statement shall be made public at the hearing on the merits. Such a statement may not serve as a ground for conviction, unless it is corroborated by other evidence that proves the guilt of a person."

Article 243 – Examination of interview records and statement given during [pre-trial] investigation; distance examination of a witness

"1. If a witness fails to appear before the court at the hearing on the merits to give evidence, the information obtained at the time of his or her interview or the statement given in accordance with Article 114 of this Code during the [pre-trial] investigation may be publicly read out, and the audio or video recording of the information/testimony obtained may be played (shown) only if the witness has died, is outside Georgia, his or her location is unknown or all reasonable ways to bring him or her before the court have been exhausted and the interview/examination was conducted in the manner prescribed by this Code. This evidence alone may not serve as grounds for a conviction."

23. Under section 28 of the Act on Courts of Common Jurisdiction, a magistrate judge is appointed by the High Council of Justice to a district and/or city court. As far as criminal cases are concerned, the main role of a magistrate judge under Article 20 § 2 of the Code of Criminal Procedure is to oversee the conduct of the pre-trial investigation stage of criminal proceedings. This means that he or she rules on applications concerning the conduct of investigative measures and the imposition of preventive measures

and examines complaints concerning allegedly unlawful acts of an investigator and/or prosecutor.

THE LAW

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

24. The applicant complained that the conduct of the criminal proceedings against her had been unfair. In particular, she alleged that the two main prosecution witnesses had been examined during the pre-trial investigation stage in her absence with the participation of a legal aid lawyer appointed without her knowledge; that those witnesses had not been heard at the trial; and that her conviction had been primarily based on their evidence. She relied on Article 6 §§ 1 and 3 (c) and (d) of the Convention, the relevant parts of which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

25. The Government argued that the complaint under Article 6 §§ 1 and 3 (c) of the Convention regarding legal representation was inadmissible for non-exhaustion of domestic remedies as the applicant had failed to initiate disciplinary proceedings against B.B. before the Georgian Bar Association. Alternatively, they submitted that that complaint was manifestly ill-founded. The applicant disagreed.

26. As regards the Government's non-exhaustion plea, the Court notes the following: the applicant maintained throughout her trial that B.B. had not been appointed with her knowledge and she had not been informed of his participation in the witness hearings held on 4 July 2016. She thus brought her complaint regarding the resulting unfairness of the proceedings to the attention of the domestic courts. The initiation of a separate set of proceedings

seeking a disciplinary sanction of B.B. could not have remedied the situation complained of by the applicant.

27. The Court further considers that the application raises complex issues of facts and law which cannot be determined without an examination on the merits. It finds that the above complaint of the applicant is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

28. The Court notes that the requirements of Article 6 § 3 of the Convention are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1. It will, accordingly, examine each of the applicant's complaints under those two provisions taken together (see, among many other authorities, *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015, and *Idalov v. Russia* [GC], no. 5826/03, § 169, 22 May 2012) and will then proceed with assessing their impact on the overall fairness of the criminal proceedings conducted against the applicant.

1. Alleged restrictions on the right of access to a lawyer

(a) The parties' submissions

29. The applicant maintained her argument of not having been duly informed about the appointment of the second legal aid lawyer, B.B. She further claimed that she had not been informed about the interviewing procedure held on 4 August 2016 and that B.B. had never contacted her. She submitted information about her incoming and outgoing mobile phone calls for the period between 26 July and 5 August 2016 and provided the official mobile phone number of B.B., claiming that he had never contacted her.

30. The Government noted that the applicant had voluntarily consented to the appointment of the lawyers under the legal aid scheme; that they had represented her interests throughout the pre-trial investigation and the trial stage of the proceedings until the very moment she had decided to appoint a private lawyer; and that she had not complained to the national courts about the quality of their legal services. The Government further submitted that as far as the appointment of the second lawyer, B.B., was concerned, it was established practice within the legal aid bureau to assign two lawyers to a case at the same time in order to ensure the smooth and unimpeded running of the proceedings, in case the first lawyer was not available to take part in a certain investigative measure. That was how B.B. had ended up acting on behalf of the applicant in the interview procedure before the magistrate judges. The Government submitted that the magistrate judges would not have authorised B.B. to act on behalf of the applicant had he not been duly appointed by the legal aid bureau.

31. In support of their argument, they provided an explanatory note from the head of the relevant regional legal aid bureau dated 18 December 2022 detailing the circumstances in which L.R. had been assigned to the applicant's case. As to the witness hearings held on 4 August 2016, according to that explanatory note, B.B. had participated in those hearings at the request of L.R., because the latter had been attending another hearing at the material time.

32. Lastly, according to the Government, even if the conduct of a legal aid lawyer was considered deficient, the State could not be held responsible for what appeared to be an essentially private matter between defendant and counsel, whether the latter was privately retained or appointed under the legal aid scheme.

(b) The Court's assessment

(i) General principles

33. The Court clarified the general principles to be applied with regard to restrictions on the right of access to a lawyer and concerning the fairness of proceedings in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08, 505571/08, 50573/08 and 40351/09, §§ 257-65, 13 September 2016), *Dvorski v. Croatia* ([GC], no. 25703/11, §§ 76-82, ECHR 2015, and *Croissant v. Germany*, 25 September 1992, § 29-, Series A no. 237-B) and *Simeonovi v. Bulgaria* ([GC], no. 21980/04, §§ 112-20, 12 May 2017, with further references); it confirmed those principles recently in *Beuze v. Belgium* ([GC], no. 71409/10, §§ 119-50, 9 November 2018), and *Atristain Gorosabel v. Spain* (no. 15508/15, §§ 41-45, 18 January 2022).

(ii) Application of the above principles to the circumstances of the present case

34. The Court notes that the applicant signed the procedural decision on bringing charges against her, and that that document informed her of her right to legal assistance, among other things (see paragraphs 8-9 above). The document in question, which was also signed by L.R., the legal aid lawyer assigned to the applicant under the legal aid scheme, and the interpreter, contains no note from the applicant concerning her choice of legal assistance (contrast *Rusishvili v. Georgia*, no. 15269/13, § 41, 30 June 2022). The Court finds it unnecessary, however, to deal with the circumstances of L.R.'s appointment given the fact that the applicant has not claimed that anything prejudicial to her fair trial rights occurred during the brief period when L.R. was formally her representative.

35. As to the appointment of B.B., the case file does not contain a single procedural document showing that the applicant was informed about the assignment of the second legal aid lawyer to her case (see *Elif Nazan Şeker v. Turkey*, no. 41954/10, § 54, 8 March 2022; see also *Lobzhanidze and Peradze v. Georgia*, nos. 21447/11 and 35839/11, §§ 86-87, 27 February

2020). While the Government referred to the legal aid bureau at the material time having a practice of assigning two legal aid lawyers simultaneously to a case, it appears from the explanatory note provided by the head of the bureau that B.B. was simply asked to replace L.R. in the witness hearings at the very last minute (see paragraph 31 above). In discharging its obligation to provide parties to criminal proceedings with legal aid when this iss provided for by domestic law, the State must display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (see *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001; see also *Blokhin v. Russia* [GC], no. 47152/06, § 214, 23 March 2016, where the Court noted that it was unclear when the legal aid lawyer had been appointed for the applicant and to what extent she had actually defended the applicant's rights). The manner in which B.B. was assigned to the applicant's case did not meet the above criterion of diligence and entailed, as a result, a restriction on the applicant's right to a lawyer.

36. In assessing the impact of this procedural shortcoming, the Court starts by noting that there is no indication that B.B. had informed the applicant about the witness hearings that took place on 4 August 2016 or about his participation on her behalf in that procedure. Although the Government referred to the record of the hearings, according to which B.B. confirmed that he had contacted the applicant in advance, the Court finds this claim less than convincing in view of the content of the explanatory note from the head of the legal aid bureau (see paragraph 31 above) and also the timeline of relevant events, notably the extremely short interval within which the interviews were requested, granted and held within one and the same day. The applicant's relevant allegation, made during her trial, was left unexamined by the courts. The Court also notes that the Government did not comment on the applicant's claim that the document submitted by her in the proceedings before it (see paragraph 29 above) providing information concerning her incoming and outgoing mobile phone calls for the relevant period of time, established that she had not been contacted by B.B.

37. The Government contended that, in any event, B.B.'s conduct was an issue that should have been resolved by the applicant, arguing that the State was not supposed to interfere with the lawyer-client relationship. The Court cannot accept this argument in circumstances when the applicant was not even informed about B.B.'s appointment, either by the lawyer himself or by the investigator, or by the legal aid bureau. As repeatedly noted by the Court, the mere nomination of a defence lawyer does not ensure effective assistance (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, and *Elif Nazan Şeker*, cited above, § 55).

38. The Court further notes that two key prosecution witnesses – the alleged victim and her sister – were interviewed in the absence of the applicant and the officially assigned lawyer, L.R. Their statements formed an important part of the evidence on which the applicant's final conviction was

based (see paragraph 20 above; contrast *Rusishvili,* cited above, § 41 *in fine*) despite the applicant's and her chosen lawyer's express objection (see paragraph 14 above). In such circumstances, in view of the importance of that specific procedural step and notwithstanding the fact that the applicant was subsequently duly represented by a lawyer of her own choosing, the Court considers that the manner of appointment of B.B. and his participation in the witness hearings without the applicant's knowledge had a significant impact on the applicant's defence rights. However, before making the final assessment of the overall fairness of the proceedings, the Court will examine the complaint concerning the use of the absent witnesses' evidence.

2. Reliance on the evidence of absent witnesses

(a) The parties' submissions

39. The applicant complained that she had not had an opportunity to examine the absent prosecution witnesses at any stage of the proceedings and that the interviewing of the victim and her sister in the presence of magistrate judges had been organised without her being informed. She submitted that their evidence had been decisive for her conviction and that without their incriminating statements, the prosecution file contained no other incriminatory evidence against her. The applicant also complained that no reasonable efforts had been taken to secure the examination of the five prosecution witnesses during the trial.

40. The Government submitted that there had been a good reason for the non-attendance of the prosecution witnesses as all of them were nationals of Azerbaijan and had returned home shortly after the disputed incident. Throughout the trial, the Government argued, the prosecution had attempted on numerous occasions to get in touch with those witnesses but had been unsuccessful. Accordingly, the domestic courts had been right when they had allowed the statements made by the absent witnesses at the pre-trial stage of the proceedings to be read out. Moreover, the examination of the two key prosecution witnesses had been organised in advance, before their departure, in the presence of magistrate judges and with the participation of the defence, in accordance with Article 114 of the Code of Criminal Procedure. This type of witness hearing had allowed the defence to put questions to the two witnesses in the presence of magistrate judges and had accordingly counterbalanced the witnesses' subsequent absence during the trial. From that perspective this evidence was to be treated on an equal basis with the court-tested evidence.

41. The Government also argued that in any event the disputed witness statements did not meet the test of being the sole or decisive evidence for the conviction. The Supreme Court, according to them, had also relied on the results of the medical examination of the victim and the court-tested evidence of M.P. to support its finding about the applicant's guilt.

(b) The Court's assessment

(i) General principles

42. The relevant general principles, as set out in particular in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011) and *Schatschaschwili* (cited above), have been summarised in *Bátěk and Others v. the Czech Republic* (no. 54146/09, §§ 36-40, 12 January 2017).

(ii) Application of the above principles to the circumstances of the current case

43. The Court notes that in convicting the applicant the Supreme Court relied on the statements of two absent witnesses, namely the alleged victim and her sister, the in-court statement of the neighbour and the medical examination report of the victim. The evidence given by three other absent witnesses who had been interviewed only by an investigator were not mentioned by the Supreme Court (see paragraph 20 above). The Court will accordingly limit its examination of the applicant's present complaint under Article 6 §§ 1 and 3 (d) of the Convention to the use of the alleged victim's and her sister's evidence.

44. The Court further notes that while the defence's initial consent to the reading out of the pre-trial statements of the victim and her sister at trial could be perceived as a waiver of the applicant's right to examine those witnesses in court (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 119-20, 18 December 2018), their examination was expected as they were on the list of the prosecution witnesses admitted for questioning in court (see paragraphs 13 and 15 above). Moreover, the applicant complained before the domestic courts about her inability to examine those witnesses at trial and eventually requested that their pre-trial evidence be declared inadmissible (see ibid. Contrast *Murtazaliyeva,* cited above, §§ 123 and 126; compare *Makeyev v. Russia*, no. 13769/04, § 37, 5 February 2009, *Gabrielyan v. Armenia*, no. 8088/05, § 85, 10 April 2012, and *Palchik v. Ukraine*, no. 16980/06, § 36, 2 March 2017). In such circumstances, the Court cannot find that the applicant may be regarded as having unequivocally waived her right to have them questioned.

(α) Whether there was a good reason for the non-attendance of the two prosecution witnesses at the trial

45. With regard to the first question as to whether there was a good reason for the non-attendance of the two prosecution witnesses at the trial, the Court notes that the only reason, accepted by the national courts, was that they were in Azerbaijan. Relying on Articles 114 and 243 of the Code of Criminal Procedure, the trial court admitted the records of their examination at the investigation stage as evidence in the proceedings (see paragraph 14 above).

46. As repeatedly noted, departure abroad does not in itself constitute sufficient reason to justify the absence of the witness concerned from the trial (see *Seton v. the United Kingdom*, no. 55287/10, § 61, 31 March 2016; see also *Gabrielyan*, cited above, § 81; *Paić v. Croatia*, no. 47082/12, § 38, 29 March 2016; and *Al Alo v. Slovakia*, no. 32084/19, §§ 48-52, 10 February 2022). As required in cases concerning the absence of prosecution witnesses, the Court must examine whether the relevant authorities made all reasonable efforts to secure the witnesses' attendance (see *Schatschaschwili*, cited above, § 120). The Court notes in this regard that the Batumi City Court accepted border crossing records showing the witnesses leaving the country as sufficient. It is not clear from the case materials what specific measures, if any, the domestic authorities took to ensure the witnesses' attendance during the proceedings, even though their whereabouts were not unknown (contrast *Schatschaschwili*, cited above, §§ 133-37).

47. At all events, the Court notes that the domestic courts failed to consider the applicant's argument that she had not been adequately represented when the two absent witnesses had been questioned in accordance with the procedure envisaged under Article 114 § 1 (b) of the Code of Criminal Procedure. This was an argument of utmost importance, as it pointed to an imperative reason for ensuring the absent witnesses' attendance at trial. In view of these elements, the Court finds that the domestic courts did not make reasonable efforts within the existing legal framework to secure the attendance of the two prosecution witnesses. It thus concludes that there was no good reason for their non-attendance.

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

48. As to whether the evidence given by the alleged victim and her sister on 4 August 2016 before a judge and read out during the trial was the sole or decisive ground for the applicant's conviction, the Court observes that the first-instance and appeal courts considered that their evidence was decisive (see paragraphs 17 and 18 above) and that the Supreme Court, while it pointed to additional evidence, did not appear to take a different stand on its decisive nature (see paragraph 20 above). The only two pieces of further evidence that the Supreme Court relied on when convicting the applicant were the witness statement of a neighbour, M.P., who had simply confirmed that there had been an altercation between the applicant and the victim but that she had not seen anything (see paragraph 16 above), and a medical report on the injury that the victim had sustained (see paragraph 5 above). The Supreme Court omitted, however, to consider the medical report concerning the various injuries that the applicant had sustained as a result of the same incident (see paragraphs 6 and 18 above).

49. In making its own assessment of the weight of the evidence of the absent witnesses in the light of the domestic courts' findings, and noting that

the other evidence available to the courts, while confirming the fact of altercation, was not in itself conclusive of the applicant's guilt, the Court considers that the evidence of the alleged victim of the disputed incident and her sister who had witnessed the incident, was at least "decisive", that is determinative of the applicant's conviction.

(γ) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

50. As to the existence of any counterbalancing factors capable of offsetting the handicaps caused by the applicant's inability to confront the prosecution witnesses and examine them in person before the trial court, the Court notes that the following elements have been identified as relevant in this context: the trial court's approach to the untested evidence; the availability and strength of further incriminating evidence; and the procedural measures taken to compensate for the lack of opportunity to examine the witnesses directly at the trial (see *Schatschaschwili*, cited above, §§ 125-31 and 145).

51. The Court starts by noting that the applicant had the opportunity to give her own version of the events of 26 July 2016 and thereby to cast doubt on the credibility of the key prosecution witnesses.

52. As to the domestic courts' approach to the untested evidence, the Court notes that in the Supreme Court's judgment there is no indication that it approached the statements of the victim and her sister with any specific caution or that it attached less weight to their statements (compare, for instance, *Al-Khawaja and Tahery*, cited above, § 157, and *Bobeş v. Romania*, no. 29752/05, § 46, 9 July 2013). On the contrary, it based the applicant's conviction primarily on their statements without examining the witnesses' credibility as such or the reliability of their evidence (contrast *Schatschaschwili*, cited above, §§ 148-50; compare *Brzuszczyński v. Poland*, no. 23789/09, §§ 86 and 89, 17 September 2013; *Prăjină v. Romania*, no. 5592/05, § 59, 7 January 2014; and *Nikolitsas v. Greece*, no. 63117/09, § 37, 3 July 2014), and moreover treating it as court-tested evidence (see paragraph 20 above). In the latter respect, the Court notes that a witness statement taken in the presence of a magistrate (investigating) judge cannot in itself be regarded as a substitute for the applicant's right to examine that witness in the presence of the trial judge, who ultimately adjudicates upon the question of his or her guilt (see *Schatschaschwili*, cited above, § 155; see also *Hümmer v. Germany*, no. 26171/07, § 48, 19 July 2012; *Hanu v. Romania*, no. 10890/04, § 40, 4 June 2013 *in fine*; and *Dadayan v. Armenia*, no. 14078/12, § 46, 6 September 2018; see also, *mutatis mutandis, Faysal Pamuk v. Turkey*, no. 430/13, §§ 70-71, 18 January 2022).

53. As to the procedural measures aimed at compensating for the lack of opportunity to directly examine the witnesses at the trial, the Court notes that the victim and her sister, two key prosecution witnesses, were examined in

the presence of magistrate judges with the participation of the prosecutor and B.B., the legal aid lawyer, during the pre-trial investigation, in accordance with the procedure envisaged under Article 114 of the Code of Criminal Procedure. In normal circumstances, the Court would consider such a procedure to afford strong procedural safeguards to an accused who is unable to examine the witnesses during the actual trial (see *Schatschaschwili*, cited above, § 155; compare *Gani v. Spain*, no. 61800/08, § 44, 19 February 2013). However, in view of its findings in paragraphs 34-38 above, given the manner of the appointment of B.B. and his participation in the relevant procedure in the absence of the applicant, the Court considers that the applicant was not allowed to avail herself of that procedural safeguard (compare *Schatschaschwili*, cited above, § 155; see also *Hümmer,* cited above, § 48).

54. The Court reiterates that the way in which prosecution witnesses are questioned at the investigation stage holds considerable importance for, and is likely to prejudice, the fairness of the trial itself where key witnesses cannot be heard by the trial court and the evidence obtained at the investigation stage is therefore introduced directly at the trial. In such circumstances, it is vital for the determination of the fairness of the trial as a whole to ascertain whether, at the time the witnesses were heard at the investigation stage, the authorities were proceeding on the assumption that the witnesses would not be heard at the trial. Where the investigating authorities took the reasonable view that a witness would not be examined at the hearing in the trial court, it is essential for the defence to have been given an opportunity to put questions to the witness at the investigation stage (see *Schatschaschwili*, cited above, §§ 156-57). The Court agrees with the applicant that the two witnesses were heard by the magistrate judges because, in view of their imminent return to Azerbaijan, the prosecution authorities considered that there was a danger of their evidence being lost. This is shown by the reasoning of the prosecution's own request to the magistrate judge to hear the two witnesses (see paragraph 10 above). In such circumstances it was all the more important for the relevant authorities to properly give the applicant an opportunity, available under the provisions of domestic law, to have the two key witnesses questioned at the investigation stage in her presence and/or the presence of a lawyer of her own choice. By proceeding as they did, they took the foreseeable risk, which subsequently materialised, that the accused would not be able to question the victim and her sister at any stage of the proceedings (see, for the importance of counsel's presence at the hearing of prosecution witnesses by the investigating judge, *Hümmer*, cited above, §§ 43 and 48).

55. Last but not least, the Court observes that the domestic courts were unable to watch a video-recording of the witness hearings before the magistrate judges at the trial since no such recording had been made (see paragraph 11 above). As noted in *Schatschaschwili* (cited above, § 127), trial courts in various legal systems have recourse to that option, which allows them, as well as the defence and the prosecution, to observe a witness's

demeanour under questioning and to form a clearer impression of the witness's credibility. Neither the applicant nor the judges had such an opportunity in the present case (see, for example, *Blokhin*, cited above, § 215; see also *Chernika v. Ukraine*, no. 53791/11, § 73, 12 March 2020).

(iii) Assessment of the trial's overall fairness

56. In assessing the overall fairness of the trial, the Court, having regard to all the above mentioned factors, notably the manner of appointment of B.B. and his participation in the witness hearings without the applicant's knowledge, the decisive nature of the two absent witnesses' evidence, the scarcity of other incriminating evidence and the lack of procedural measures which could compensate for the lack of opportunity to directly examine the witnesses at trial, concludes that the applicant's defence rights were adversely affected to such an extent as to undermine the overall fairness of the proceedings. The Court accordingly finds a violation of Article 6 §§ 1 and 3 (c) and (d) of the Convention in this respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

58. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

59. The Government submitted that the applicant had failed to justify the emotional trauma she alleged she had experienced on account of the disputed criminal proceedings. Alternatively, they argued that the finding of a violation would in itself constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

60. In view of the nature of the violation found above, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its own assessment on an equitable basis, the Court awards the applicant EUR 1,200 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

61. The applicant did not make any claim in respect of the costs and expenses related to her representation.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

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

Done in English, and notified in writing on 29 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Carlo Ranzoni President