CHAPTER FOURTEEN

REQUIREMENTS IN RELATION TO WITNESS EXAMINATION UNDER ARTICLE 6.3 D) ECHR

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1. Introduction

Among the catalogue of minimum rights for the accused, art. 6.3.d) ECHR recognises the right to examine or have examined witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

As with the other guarantees in this section, related to the right to a defence and the presumption of innocence referred to in section two, the requirements concerning witnesses constitute various aspects of the broader right to a fair trial or due process, as ECtHR constantly reiterates. The non-exhaustive character of the guarantee, which emerges from the expression “minimum rights”, similar to that used in art. 14.3 ICCPR, refers to the existence of other rights required under the notion of fair hearing but not listed (for example the right not to give evidence against oneself, and not incriminate oneself)\textsuperscript{1} and also to the possibility that a hearing may respect this catalogue of rights but

not be considered fair or equitable\(^2\) as highlighted, for example in T and V. v. United Kingdom, of 16 December 1999.\(^3\)

The starting point for constructing this right is the concept of “witness”, which has a much broader meaning under the Convention than it has in European national legal systems. It includes witnesses who testify at the trial and any person who has wittingly or unwittingly provided information for criminal proceedings, generally in a formal statement to the police intended for use as evidence in the proceedings despite the absence of the original witness at the trial.\(^4\) Thus in Delta v. France, of 19 December 1990 the Court considered that even though the victims of the crime did not personally testify before the court, they should be considered witnesses because their statements were introduced by the police officers who took the statements and in fact they were taken into account by the court.\(^5\) Also in A.H. v. Finland, of 10 May 2007, the minor who made statements to a psychologist at a Family Advice Centre which were recorded on video and taken to the court where they were used as evidence for the accused was held to be a witness.

We are dealing, therefore, with a very broad concept which also includes expert witnesses, according to the Commission Report included in Bönisch v. Austria, of 6 May 1985, and reiterated on many subsequent occasions.\(^6\) The Report, based on the distinction between witnesses for and against the accused in relation to the statements made, specifies the three requirements in this section, intimately related to the principle of equality of arms inherent in the notion of fair trial\(^7\) and of equilibrium between the prosecution and the defence:

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\(^3\) The case involved the trial of two juveniles accused of kidnapping and murdering a child, which formally complied with the requirements of art. 6 but was not fair as it followed “adult” proceedings without taking into account the age of the accused.


\(^5\) See also Isgró v. Italy of 19 February 1991; Asch v. Austria, of 26 April 1991; Pullar v. United Kingdom of 10 June 1996.

\(^6\) For example, among the most recent, Belsyté-Lideikiene v. Lithuania, of 4 November 2008 and Mirilashvili v. Russia, of 11 December 2008.

\(^7\) In Neumeister v. Austria, of 27 June 1968, the Court stated that although the principle of equality of arms is not expressly reflected in the Convention, it is included in the concept of fair hearing. Subsequently in Delcourt v. Belgium, of 17 January 1970 the court affirmed that equality of arms is only one aspect of the more generic notion of fair trial.