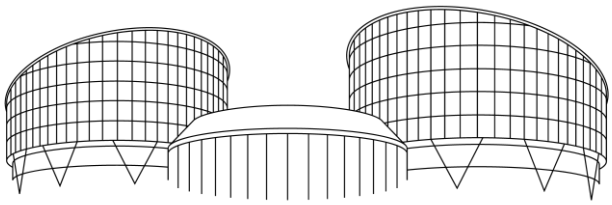

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GANI v. SPAIN

(Application no. 61800/08)

JUDGMENT

STRASBOURG

19 February 2013

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 Gani v. Spain,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Valeriu Griţco, *judges,*

and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 29 January 2013,

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

PROCEDURE

1. The case originated in an application (no. 61800/08) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Albanian national, Mr Leci Gani ("the applicant"), on 10 December 2008.

2. The applicant was represented by Mr T. Gilabert Boyert, a lawyer practising in Salou (Tarragona). The Spanish Government ("the Government") were initially represented by their Agent, Mr F. Irurzun Montoro, and later by their Agent, Mr F. Sanz Gandasegui.

3. The applicant complained under Article 6 §§ 1 and 3(d) of the Convention that he had not been given a proper and adequate opportunity, during either the investigative stage or the hearing, to challenge and question the victim, the sole witness against him in relation to all the crimes for which he had been convicted, with the exception of the forgery of official documents.

4. On 21 October 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 4 November 2011 the Court informed the Albanian Government of their right under Article 36 § 1 of the Convention to intervene in the proceedings. The Albanian Government did not inform the Court of their wish to intervene.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Leci Gani, was born in 1975 and is currently serving a term of imprisonment in the Spanish prison of Quatre Camins in La Roca del Vallès (Barcelona).

7. On 3 June 2004, following reports to the police made by N., the applicant's former partner and the mother of his son, the applicant was arrested at Prat de Llobregat Airport (Barcelona) and taken to a police station where he was informed of his right to appoint private legal counsel or, alternatively, to be provided with an officially appointed lawyer. The applicant opted for the latter.

8. Investigating judge no. 5 of Gavà (Barcelona) instituted a pre-trial investigation into allegations that the applicant had committed several serious offences of bodily harm, abduction and rape of N. On 5 June 2004 the applicant was brought before the investigating judge to be questioned about the offences of which he had been accused. He was accompanied by his officially appointed lawyer. The applicant was first informed by the judge of his right to appoint private legal counsel. He expressly appointed as private counsel the lawyer who had been officially assigned to him, who assisted him during his examination by the investigating judge. On 6 July 2004 the applicant was questioned again by the judge, in the presence of his counsel.

9. On 22 July 2004 N. testified before the investigating judge; the applicant's counsel failed to attend without providing a justification. N. confirmed the statement she had made to the police with the addition of some further details. This statement was written up and added to the case file. From the documents submitted it does not appear that the applicant instituted any liability proceedings against his counsel for negligence.

10. On 16 September 2004 the applicant dismissed his counsel and personally appointed another one, who took over his defence.

11. The hearing before the Barcelona *Audiencia Provincial* took place on 19 April 2006. N. attended the hearing after undergoing a psychological diagnosis which established her suitability to testify in court. She had started to answer the questions posed by the public prosecutor when her statement had to be interrupted, as she was said to be suffering from post-traumatic stress symptoms that were hindering her from testifying. Those symptoms were medically confirmed after the hearing. As a consequence, she could not be cross-examined by the public prosecutor, the private prosecutor or the applicant's counsel. The court had already adjourned the hearing once before, following a similar reaction on the part of N. As a consequence, it had provided her with psychological assistance before and during the hearing on 19 April 2006 to allow for her full

examination, but to no avail. In this regard, the Barcelona *Audiencia Provincial* stated in its judgment:

> "...
>
> At the time of the suspension [of the proceedings] the victim was presenting obvious post-traumatic stress symptoms, which were hampering her memory and wrecked her capacity to express herself. The court's final decision [i.e. to suspend the witness-victim's examination and replace it with the reading out of the statements she had made to the police and the investigating judge] was not arbitrary, but was made in the light of what had happened at a prior hearing which had also had to be suspended – for the same reason – and at which the psychological treatment of the victim had been ordered, the court's perception having been confirmed by a valuable therapeutic procedure, which nonetheless did not result in the victim overcoming her incapacity. Both the persistence in the witness's condition during the new hearing and the failure of the therapeutic procedure, which did not lead the court to feel optimistic in the short run (the proceedings concerning an accused person in prison on remand), justified the final decision to declare the victim's examination impracticable. The court had previously attempted – perhaps to the point of excess – to exhaust all remedies to obtain her statement. It had made use of all the psychological support that the presence of officials from the victims' service could provide to the witness, relaxation exercises during the trial, suspensions and recesses. It had also attempted, – as a kind of safety valve – to fragment her account regarding the most violent events and to redirect her attention to other events that had been less emotionally intense. The efforts were fruitless, however, and the witness's resolved will to collaborate was prevented by one of the most horrific cases of psychological annihilation of a victim that this court has ever witnessed in its long professional experience. The witness rightly started her statement by giving a detailed description of the evolution of her relationship with the accused, the process of rupture and how their personal relations had developed in its aftermath in the light of their common child. Her determination began to weaken when, with slightly shaking hands, she began to describe the assaults she had suffered on the second day. The shaking later developed into an uncontrollable trembling of her mouth and her entire body as soon as she started to describe the specific aggressions she had been subjected to. Whether she was encouraged to stand up, sit down, drink water or have her hands held, nothing was of the slightest help to calm her down. Only continuous breaks and recesses and an excessive effort on her part enabled her to make, in more that an hour, some progress in her statement, which came to a dramatic end as she was telling the court about the episode of a cold-water bath with which she had been tortured. Her testimony essentially corroborated her pre-trial statement and proved the authenticity of her post-traumatic stress, which was later confirmed by an expert report. The continuation of the witness's examination would have been incompatible with Article 8 § 4 of the Protection of Victims Statute approved by a European Union Framework Decision of 15 March 2001, which states that 'Each Member State shall ensure that, where there is a need to protect a victim - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, following a decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles'."

12. As an alternative to having N. questioned by the parties, the Barcelona *Audiencia Provincial* ordered that the statements which had been taken from her during the investigation stage of the proceedings be read out. The applicant gave his alternative account of the facts.

13. On 5 May 2006 the Barcelona *Audiencia Provincial* delivered its judgment. The court found that on 4 April 2004 the applicant had gone to N.'s apartment and had made death threats when she had not let him in to see their son. Upon leaving the apartment, he had twice knocked a car belonging to J., a close male friend of N., causing damage to the vehicle. The court also found that on 6 April 2004 at around 1 a.m., the applicant had returned to N.'s apartment and broken in through a window. Upon entering the apartment against N.'s will, he had punched J., who had been there with N., and then hit N. repeatedly. It also found that the applicant had remained in N.'s apartment for the next three hours against her will, had stubbed out a cigarette on N.'s left hand and had threatened her with a penknife, with which he had cut her finger. He had prevented J. and N. from leaving the apartment unless they brought him his son, who had been staying elsewhere that night. The court also found that after those three hours had elapsed, the applicant had abducted N. He had forced her into his car after having ordered J. to take the child to an address which he would provide later by telephone. The applicant had driven N. to a petrol station where, with the assistance of two other people – who could not be identified – she had been immobilised, gagged and blindfolded before being introduced into another vehicle and driven to an apartment where she had been subjected to further aggressions. They had culminated in her hands and feet being tied, being immersed in icy water, thrown on a bed and raped vaginally and anally. Afterwards she had been obliged to phone J. and give him the address to which he should bring the child. At the time of the arranged meeting, the applicant had left the apartment for a short time in which N. had been given dry clothes by a hooded man who had left the room before the applicant had come back with J. and the child. They had remained together in the apartment for approximately an hour, after which the applicant had let them go under death threats. Lastly, the court found that, when the applicant had been arrested at Prat de Llobregat Airport (Barcelona), he had been carrying false identification documents.

14. The applicant was sentenced as the principal offender for: (i) making very serious threats to N., to fifteen months' imprisonment; (ii) breaking and entering into N.'s home using violence and coercion, to two and a half years' imprisonment and a fine of nine months' minimum income with a daily fee of 12 euros (EUR); (iii) causing minor bodily injuries to N., to twelve days' house arrest; (iii) causing minor bodily injuries to J., to twelve days' house arrest; (iv) N.'s kidnapping under threat, with the aggravating factor of family ties, to eight years' imprisonment; (v) J.'s kidnapping, to three years' imprisonment; (vi) a crime against N.'s moral integrity with the aggravating factor of family ties, to two years' imprisonment; (vii) N.'s rape with the aggravating factor of family ties, to fifteen years' imprisonment; and (viii) forgery of official documents, to six months' imprisonment and a

fine of six months' minimum income with a daily fee of EUR 12. He was also fined EUR 30,525 for damages.

15. For the applicant's above-mentioned conviction the *Audiencia Provincial* relied mainly on the alleged victim's pre-trial statements, which had been admitted as evidence and read out at the hearing. The credibility of her testimony was enhanced by the weakness of the applicant's statement. The trial court also relied on other evidence. In his statement the applicant had admitted the veracity of the details in N.'s account that did not have or had minor criminal implications, such as her changing into clothes belonging to him during her kidnapping, the damage inflicted on J.'s car, and the fact that J. had eventually brought him his child at an absolutely inappropriate time. It also relied on J.'s statement at the hearing; the contradictions of a hearsay witness for the defence as to the way in which the applicant had entered N.'s apartment; a medical report stating that the bodily injuries presented by N. were fully consistent with the aggressions she had reported; the forensic medical opinion that the bodily injuries presented by the victim fifteen days after the facts were temporarily and causally consistent with the aggressions reported; the expert opinion that N. was suffering from a post-traumatic stress disorder consistent with the facts reported; and, lastly, the court's direct assessment of N.'s psychological inability to relive the facts that she had described – albeit only in part – at the hearing sufficiently accurately and coherently to evoke clearly what had actually happened. The court considered that the use as evidence of the victim's pre-trial statements had not infringed the applicant's right to defend himself, as that form of evidence had been introduced only once it had become clear that N.'s cross-examination was impracticable and it had been open to challenge by the applicant during the hearing. The court further considered that the reliability of N.'s statement had been enhanced when confronted with the applicant's implausible statement.

16. The applicant lodged an appeal on points of law with the Supreme Court, which on 21 February 2007 partially quashed the *Audiencia Provincial*'s judgment. The Supreme Court reduced the penalty imposed on the applicant in respect of kidnapping to bring it into line with the prosecutor's submissions, lessened the classification of the offence of making threats and reduced the penalty imposed on the applicant in that respect, and acquitted him of the crime against moral integrity because, in the instant case, this crime could be considered to come under the offence of rape. The remainder of the *Audiencia Provincial*'s judgment was upheld.

17. The Supreme Court maintained that the applicant's rights to examine witnesses against him and to be presumed innocent had not been infringed by the trial court's decision to admit N.'s pre-trial statements as evidence in the proceedings. Firstly, the *Audiencia Provincial* had decided not to pursue N.'s cross-examination only once it had become clear that it would not be feasible to attempt to proceed. The trial court had first tried to resolve the

problem by staying the hearing and ordering a medical examination of the witness with a view to excluding any possibility of feigning on her part and to adequately assess her apparent inability to give a statement before the court.When the same difficulties had recurred at the final hearing, the trial court had ordered that N. should be provided with medical support with a view to obtaining a direct testimony, which in the end proved impossible despite the efforts in that regard. Secondly, although the general rule was that witnesses should always be available for cross-examination at a hearing, the law permitted that pre-trial statements could be read out in the courtroom as an alternative when a witness's testimony could not be produced owing to circumstances beyond the parties' control, such as a physical or psychological impediment on the part of the witness to give a statement at the hearing, provided that the alleged impediment had been tested. Thirdly, the applicant's counsel had been duly summoned to the judicial interview with N. during the investigative stage of the proceedings, but had failed to attend without providing a justification.

18. The Supreme Court contended that it had repeatedly stressed that trial courts should take special care in assessing victims' statements when they were the sole direct evidence against the accused. It further reiterated its advice that trial courts should identify further evidence to corroborate those statements so that they may assess them objectively. The trial courts should be satisfied that those statements have not been capriciously changed during the proceedings and that there are no prior relations between the victims and the accused that could put into question the credibility of their statement. In the light of those considerations, the Supreme Court was satisfied that the *Audiencia Provincial* had acted cautiously enough when assessing N.'s statement, since it had relied on corroborating evidence to convict the applicant. The Supreme Court added that the delay with which N. had reported the facts to the police could be explained by her fear and by the fact that she had had a child with the applicant. It further contended that it did not find in N.'s statement any alteration or substantial change which could be deemed as rendering it inconsistent and thus weakening its validity.

19. The applicant lodged an *amparo* appeal with the Constitutional Court. In a decision served on 3 July 2008, the appeal was declared inadmissible for being devoid of any constitutional content.

II. RELEVANT DOMESTIC LAW

A. The Constitution

20. Article 24 of the Constitution provides:

"1. Everyone has the right to obtain the effective protection of judges and the courts in the exercise of his or her legitimate rights and interests, and in no event may he or she go undefended.

2. Likewise, everyone has the right of access to the ordinary courts as predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to declare themselves guilty; and to be presumed innocent."

B. Criminal Procedure Act

21. Section 730 of the Criminal Procedure Act provides:

"In the event that any evidence cannot be produced during the hearing, a record of the relevant investigation shall be read out, if this is so requested by any of the parties."

C. Judicature Act (Law no. 6/1985)

22. Section 229 of the Judicature Act reads as follows:

"1. Judicial proceedings shall be mainly oral, particularly in criminal matters, without prejudice to their being recorded in writing.

2. Statements, oral examinations, testimony, challenges, inspections, reports, confirmations of expert reports and hearings shall take place before the judge or court in the presence of the parties, who may intervene when appropriate and in public, unless otherwise prescribed by law.

3. Where the judge or court so decides, such proceedings may be conducted by means of a videoconference or other similar means allowing the two-way simultaneous communication of images and sound, and the visual, auditory and verbal interaction of two geographically distant people or groups of people, provided that the possibility of cross-examination and the rights of the defence are not endangered."

THE LAW

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

23. The applicant complained that he had not been given a proper and adequate opportunity, during either the investigative stage or the hearing, to

challenge and question the victim, the sole witness in relation to all the crimes for which he had been convicted with the exception of the forgery of official documents, as provided in Article 6 §§ 1 and 3 (d) of the Convention, which reads as follows:

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

24. The Government contested that argument.

A. Admissibility

25. The Court notes 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 submissions of the parties

(a) The applicant

26. The applicant argued that his conviction for all the crimes for which he had ultimately been sentenced, with the exception of the forgery of official documents, was based exclusively on the statement made by N. during the investigative stage of the proceedings.

27. In that connection, the applicant stated that the only evidence on which a court could rely to convict a person charged with a criminal offence was that produced at the hearing, and that the respondent Government had not contested the fact that he had been prevented from challenging and questioning his alleged victim during the hearing.

28. He further argued that his counsel had failed to attend the pre-trial examination of N. and that therefore he had not had the opportunity to have her cross-examined, during either the investigative stage of the proceedings or the hearing.

29. The applicant referred to the Court's case-law set out in *Mayali v. France* (no. 69116/01, 14 June 2005) and *Karpenko v. Russia* (no. 5605/04, 13 March 2012) to complain that his rights under Article 6 §§ 1 and 3 (d) of the Convention had been unacceptably restricted.

He blamed the domestic courts for unfairly preventing him from questioning N., for in his view she had been exempted from cross-examination without good reason. The applicant referred to page 10 of the Supreme Court's judgment, according to which the medical report that had been delivered in view of the final hearing had not identified any medical impediment to the applicant's alleged victim testifying at the trial. He argued that the reason for his alleged victim's inability to be cross-examined was not, contrary to what the domestic courts stated, her alleged post-traumatic stress symptoms –which had not been medically established – but rather her unwillingness to testify so as to avoid contradictions with her pre-trial statements.

(b) The Government

30. The Government contested the applicant's argument that his conviction for all the crimes for which he had been ultimately sentenced, with the exception of the forgery of official documents, had been based exclusively on the statement made by his victim during the investigative stage of the proceedings. They argued that it could be easily inferred from the judgments that the only conviction which could be said to have been based exclusively or to a decisive extent on the alleged victim's statements was the applicant's conviction for rape.

31. The Government stressed that the applicant's counsel had been duly summoned by the Gavà investigating judge no. 5 to the examination of the victim he had conducted on 22 July 2004, but had failed to attend without providing any justification. They further stressed the fact that the lawyer who had taken over the applicant's defence from 16 September 2004 had not asked the investigating judge to conduct a new cross-examination of the victim before the hearing took place.

32. The Government referred to the Constitutional Court's case-law, whereby even though the only valid evidence on which courts can rely to convict a person charged with a criminal offence is, in principle, that produced in his presence at a public hearing with a view to adversarial argument, exceptions to that principle are possible in exceptional circumstances, for instance if it proves materially impossible for a witness to make a statement during the hearing owing to his or her mental state. In those cases, courts are allowed to rely on witnesses' statements made at earlier stages of the proceedings, provided, *inter alia*, that they are read out in court and the defendant is given an adequate opportunity to challenge them, as had happened in the present case. The Government further indicated that this exception was not applicable to cases of physical illnesses of witnesses, since the Constitutional Court had found in the criminal legislation more appropriate solutions for this situation, such as at-home interrogations or statements via video-conference.

33. The Government further contended that from the Court's reasoning in many of its judgments, such as those in the cases of *Krasniki v. the Czech Republic* (no. 51277/99, 28 February 2006) and *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011), it could be inferred that fear of death or physical injuries on the part of a witness or other person, or even the fear that significant economic losses might be incurred, constitute relevant considerations that trial courts may take into account in dispensing a witness from appearing in trial.

34. In this connection, the Government stated that the Barcelona *Audiencia Provincial* had taken all the counterbalancing measures at its disposal, including procedural safeguards, to compensate the applicant for the adverse consequences arising from the fact that his victim could not be cross-examined by him or his counsel during the hearing. The trial court had made a thorough assessment of the evidence produced in the hearing and of the credibility of the statements made during and before the hearing.

35. Moreover, the Government referred to the Barcelona *Audiencia Provincial*'s reasoning (see paragraph 11 above) in stressing that the trial court had decided not to pursue the victim's cross-examination only once it had become clear that it was completely unfeasible to attempt to proceed. The Government referred to two medical files on the victim dated 22 July 2004 and 4 November 2005, which they had enclosed with their observations. The first file indicated that the victim had been afraid for her life, suffering nervous "alteration" and a sense of helplessness. The second file concluded that she had been suffering from chronic post-traumatic stress and had not had the necessary psychological resources to face an examination in court.

2. The Court's assessment

(a) General principles applicable to the present case

36. The Court reiterates that Article 6 § 3 (d) of the Convention is a specific aspect of the right to a fair hearing guaranteed by Article 6 § 1 which must be taken into account in any assessment of the fairness of the proceedings. Consequently, the complaint will be examined under the two provisions taken together (see, amongst other authorities, *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203, and *S.N. v. Sweden*, no. 34209/96, § 43, ECHR 2002-V)

37. The Court further recalls that the admissibility of evidence is primarily governed by domestic law and that, as a rule, it is for the national courts to assess the evidence before them. It is also normally for the domestic courts to decide whether it is necessary or advisable to hear a witness, since Article 6 does not grant the accused an unlimited right to secure the appearance of the witness in the court (see *S.N. v. Sweden*, cited above, § 44). The task of the Court is to ascertain whether the proceedings

as a whole, including the way in which evidence was taken, were fair (see *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports of Judgments and Decisions* 1996-II, and *Gossa v. Poland*, no. 47986/99, § 52, 9 January 2007).

38. All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence have been respected. As a rule, those rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he or she was testifying or at a later stage of the proceedings (see *Unterpertinger v. Austria*, 24 November 1986, § 31, Series A no. 110). When a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see, in particular, *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II, and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 119, ECHR 2011).

39. In this connection, the Court has stated that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see, *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII).That measure forms part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see, amongst other authorities, *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). However, *impossibilium nulla obligatio est*; provided that the authorities cannot be accused of a lack of diligence in their efforts to award the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see *Artner v. Austria*, 28 August 1992, § 21, Series A no. 242-A; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005; and *Ž. v. Latvia*, no. 14755/03, § 94, 24 January 2008).

40. In the Court's case-law, the question whether there has been compliance with Article 6 §§ 1 and 3 (d) as interpreted by the Court in the case of *Lucà*, cited above, has arisen mainly in three different contexts. The first context concerns the case of so-called "anonymous witnesses", in which the identity of a witness is concealed in order, for instance, to protect him or her from intimidation or threats of reprisals (see, for example, *Doorson*, cited above). The second context concerns cases of "absent witnesses", where use is made in evidence of the statement of a witness who

does not appear before the court to give evidence in person because he or she has died, cannot be traced or refuses to appear out of fear or for some other reason (see, for example, *Craxi v. Italy (no. 1)*, no. 34896/97, 5 December 2002, *S.N. v. Sweden*, cited above, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011). Those categories are not mutually exclusive, since witnesses may be both anonymous and absent (see, for example, *Lüdi v. Switzerland*, 15 June 1992, Series A no. 238, and *Van Mechelen and Others v. the Netherlands*, 23 April 1997, *Reports of Judgments and Decisions* 1997-III). The third context concerns cases of witnesses who invoke their privilege against self-incrimination (see, for example, *Vidgen v. the Netherlands*, no. 29353/06, 10 July 2012).

41. In those three contexts the Court has always considered it necessary to carry out an overall examination of the fairness of the proceedings in order to determine whether the defendant's rights have been unacceptably restricted. This has traditionally included an examination of both the significance of the untested evidence for the case against the accused, namely whether the untested evidence constituted the sole or decisive evidence brought against the applicant (see, for example, *Kornev and Karpenko v. Ukraine*, no. 17444/04, §§ 54-57, 21 October 2010; *Caka v. Albania*, no. 44023/02, §§ 112-16, 8 December 2009; *Guilloury v. France*, no. 62236/00, §§ 57-62, 22 June 2006; *Lucà*, cited above, §§ 40-43; and *Vidgen*, cited above, §§ 45-46), and of the counterbalancing measures taken by the judicial authorities to compensate the handicaps under which the defence had laboured (see *Doorson,* cited above, §§ 73-76; *S.N. v. Sweden*, cited above, §§ 49-53; *V.D. v. Romania*, no. 7078/02, §§ 113-115, 16 February 2010; and, most recently, *Al-Khawaja and Tahery,* cited above, §§ 147 and 153-65, and *Vidgen*, cited above, § 47).

42. According to the Court's case-law, the so-called "sole or decisive rule" should not be applied in an inflexible manner when reviewing questions of fairness of the proceedings, because to do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of proceedings, namely by weighing in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice (see *Al-Khawaja and Tahery*, cited above, § 146). The Court has thus considered that where a conviction was based solely or decisively on evidence given by absent witnesses who had not been available for cross-examination by the defence, the admission as evidence of those hearsay statements will not automatically result in a breach of Article 6 § 1. In those cases, however, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient

counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable, given its importance in the case (ibid., § 147).

(b) Application of the general principles to the present case

43. Having regard to the material before it, the Court concedes that the statements given by N. during the pre-trial investigation were significant evidence in finding the applicant guilty of all the crimes with which he had been charged (with the clear exception of the forgery of official documents). However, the Court considers that those statements were the sole direct or decisive evidence only with respect to the facts that had taken place in the time between N.'s abduction from her apartment and J.'s arrival with N.'s son at the address where she was being held, for which the applicant was sentenced to twelve days' house arrest for inflicting bodily injuries on N. and to fifteen years' imprisonment for N.'s rape. The Court will thus, having regard to the entire domestic proceedings, restrict its analysis to the domestic courts' rulings concerning those two convictions.

44. The Court reiterates that N. was not cross-examined by the applicant or his counsel, even though she did appear before both the investigating judge and the trial court with a view to giving evidence in person. The Court observes that on 22 July 2004 the investigating judge held an interview with N. in which the applicant's counsel could have put questions to her. He had been duly summoned to the interview but had failed to attend without providing a justification (see paragraph 9 above). It is thus clear that the applicant was given an opportunity to have N. examined but that his counsel unjustifiably missed that opportunity. The Court considers that the domestic authorities cannot be reproached on account of the investigating judge's decision to carry out the interview in the absence of the applicant's counsel. Nonetheless, the Court holds that that fact is not decisive in concluding that the proceedings were fair. As has already been said, the Court's role under Article 6 § 1 of the Convention is to ascertain whether the proceedings as a whole were fair. In the circumstances of the case, this requires that the Court examine whether positive steps were taken by the judicial authorities to enable the applicant to examine or have examined N. at the hearing, where evidence must be normally produced.

45. In this connection, the Court observes that the trial court stayed the hearing in the light of N.'s incapacity to describe what had happened on 4 and 6 April 2004 and that, once it had been medically ascertained that N. was suffering post-traumatic stress symptoms, the court ordered that she be provided psychological support with a view to having her fully cross-examined at a public hearing. Although a medical examination

conducted before the final hearing took place established that N. was able to give evidence, N. broke down before the public prosecution had finished examining her. Only after countless unsuccessful efforts, including medical support, had been made to enable N. to continue with her statement, the court decided that her pre-trial statements would be read out as an alternative to direct cross-examination by the parties. The trial court took into account that N. would not be available for cross-examination within a reasonable time and that the applicant was in prison on remand. An expert report confirmed after the hearing that N. had been suffering from a post-traumatic stress disorder. In the light of the circumstances, the Court considers that the trial court cannot be accused of lack of diligence in its efforts to provide the defendant with an opportunity to examine the witness. Neither can the Court agree with the applicant's argument that the trial court unduly exempted N. from cross-examination.

46. The Court has lastly to examine whether the use of N.'s pre-trial statements by the domestic courts was accompanied by sufficient counterbalancing factors, including measures that permitted a fair and proper assessment of the reliability of that evidence to take place. The Court reiterates that the only convictions in the instant case which raise an issue under Article 6 §§ 1 and 3 (d) of the Convention are those of bodily injuries and rape, in so far as they are based solely or decisively on statements made by the applicant without cross-examination.

47. The Court is aware of the difficulties faced by the domestic courts when dealing with sexual crimes (see, mutatis mutandis, *Tyagunova v. Russia*, no. 19433/07, § 68, 31 July 2012), which are normally surrounded by secrecy and which are frequently, whether for fear or other reasons, reported too late for the carrying out of a full corroborative medical examination. Thus, in many such cases the sole or decisive evidence for the defendant's conviction is the victim's statement, the truthfulness and credibility of which may be put in question by the defence at the hearing by means of his or her cross-examination. In the present case, the victim's cross-examination proved impracticable owing to post-traumatic stress symptoms that, as has already been stated, were medically confirmed (see paragraph 11 above).

48. The Court notes, however, that the applicant had been given the opportunity to put questions to N. during the investigative stage of the proceedings but his counsel had failed to attend the interview (see paragraph 9 above). In those circumstances, the interests of justice were obviously in favour of admitting N's statements in evidence. The Court observes that those statements were read out before the trial court and that the applicant was allowed to challenge their truthfulness by giving his own account of the facts, which he duly did. The Court further observes that the domestic courts carefully compared both versions of the facts, which partially coincided, particularly those aspects that did not involve the

commission of any criminal offence or that had minor criminal implications. They deemed the applicant's version weak and inconsistent, and that of N. logical and sufficiently detailed to eliminate any suspicion of simulation or revenge. The Court notes in this respect that the domestic courts also took into account the statement given by N. at the hearing which, although incomplete, served to corroborate her pre-trial statements (see paragraph 11 above). The reliability of N.'s statements was further supported by indirect evidence, such as the fact that she had been abducted from her apartment by the applicant and that when she had been released by the applicant she had been wearing different clothes belonging to the latter, and by the medical opinions and reports confirming that her bodily injuries and psychological condition were consistent with her account of the facts (see paragraph 15 above). Indeed, the use of all this corroborating evidence led the Supreme Court to conclude that the trial court had acted cautiously enough in the treatment of N.'s statements (see paragraph 18 above).

49. Against this background, and viewing the fairness of the proceedings as a whole, the Court considers that there were sufficient counterbalancing factors to conclude that the admission in evidence of N.'s statements did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

50. Accordingly, in the light of the foregoing considerations, the Court considers that there has been no violation of Article 6 §§ 1and 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

51. The applicant submitted various other complaints under Articles 3, 6 §§ 1, 2 and 3 (c), and 13 of the Convention. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 6 §§ 1 and 3 (d) admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 19 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President