

Protection of an anonymous witness vs. the right of the defence to a fair trial according to Article 6 (3) (d) ECHR

1. Why did we choose this subject matter and why it is so important?

One of the most important objectives is giving an in-depth analysis in legal rules concerning, on the one hand, the rights of persons charged with criminal offences throughout the trial stage and on the other hand, the legal rules ensuring protection of witnesses in the context of criminal proceedings.

In what circumstances a defendant can have a fair trial when evidence against him is presented by a witness whose identity remains unknown to the defendant? The question engages issues which are controversial, topical and complex. There is of course the need to secure evidence in serious cases in which witnesses are increasingly unwilling to give evidence in fear of reprisal. There is the need to protect witnesses' rights to security and privacy as recognised not only by the European Convention of Human Rights but also by Slovak legislation. On the other hand there are also many disadvantages faced by the defendant. The question is whether those disadvantages really do present so much of an obstacle that there can no longer be a fair trial.

In an anonymous witness case, the witness is called to the court, but is screened from the defendant, screened from the public gallery and his evidence is received through means of technical equipments, so for instance the voice is disguised for the defendant and the public gallery. Only the jury and judge see and hear the witness in his natural state. Reliance on these procedures is therefore questionable.

Is there a breach of the defendant's rights unless there are counterbalancing factors, including strong procedural safeguards, to compensate for the difficulties caused to the defence and the dangers of relying hearsay evidence? In this manner it should be mentioned, that "even when counterbalancing procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be

based either solely or to a decisive extent on anonymous statements...¹. Cogent and specific evidence will be needed before anonymous evidence from law enforcement officers can be relied upon.

2. Protection of the witness at EU level and Slovak republic

2.1 The rights of the witnesses arising out of the European legislation

The protection of witnesses, usually considered as cornerstone of successful criminal justice systems, is often discussed topic nowadays when talking about the serious fight against the wide-spread organized crime. In this respect, the objective is to ensure the possibility to testify freely and without intimidation even if the accused is a member of an organized crime group.

Each of the EU member states has its own regulation focused on the particular measures intended to safeguard the witnesses' protection in case there is a sufficient reason to expect that the witness will experience negative consequences or trouble in the execution of his profession. Although the criminal law still remains the sovereign law field of each Member state, EU standards of witness protection had to be implemented into national policies and legislations in order to harmonize the EU regulation in this area. Member States are required to organize protection of witnesses and their relatives before, during and after the trial (where the competent authorities deem this as necessary), while the criminal justice personnel should have an adequate training to deal with cases where witnesses might be at risk of intimidation.

In order to analyze the European legal framework ensuring the security of witnesses, it is necessary to focus on the relevant legal acts adopted by the EU and the Council of Europe, which include (i) the Resolution of the Council on the protection of witnesses in the fight against international organized crime ², (ii) Resolution of the Council on individuals who cooperate with the judicial process in the fight against international organized crime ³, (iii) the

¹ Doorson v. Netherlands (1996) 22 EHRR 330, para 80.

² Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime (95/C 327/04)

³ Resolution of the Council of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime

Council framework decision on the standing of victims in criminal proceedings ⁴ and (iv) Recommendation of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defense ⁵. The regulation mentioned above is aiming to assure the adequate conditions for victims under the criminal procedure with respect to their rights arising out of these legal acts. For the purpose of this paper it is possible to classify the rights of a witness as follows:

(i) the right not to state the actual address and/or current identity

The trial judge, in the exercise of his inherent jurisdiction in criminal proceedings, may permit a departure from giving the name at the beginning of the trial procedure in appropriate cases. As a result of such decision, the particular witness will not be asked to give his/her name in public. This right could be considered as the first step in such cases when there is a reason to expect some forms of direct or indirect threat, pressure or intimidation of a witness. The competent authorities should have the possibility to decide on their own discretion when taking the threat level into account, whether this procedure will be applied to the witness, whose request can also lead to the anonymization of his personal data. On the other hand, criminal procedural law of each Member State has to provide a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defense. The anonymity should only be granted after hearing the parties by the competent judicial authority, which results into formulating reasonable conclusions, that the life or freedom of the person involved is seriously threatened, the evidence is likely to be significant and the person appears to be credible. However, during the criminal court proceedings the anonymous witness is still obliged to clearly state how (and in what capacity) he came to know certain facts that he is testifying about.

⁴Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220JHA)

⁵ Recommendation No. R (97) 13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence (adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Ministers' Deputies)

(ii) the right to change and keep the identity of witness in concealment

If the threat to the witness becomes extremely serious, in terms of endangering his life, the witness has the right to ask the competent bodies to change his identity that will provide him with the relevant documents reflecting his new identity. This procedure is considered as justified in cases of committing corruption crimes, money laundering, trafficking of vulnerable women or abuse of power. The competent body, in general, has to take appropriate measures in order to keep the real identity of the witness in concealment in cases where there is a sufficient reason to believe that his testimony may put him at serious risk. At first place the prosecutor keeps the identity of the witness in concealment. There are various ways to fulfill the above-mentioned in the process of evidence; it may include mainly the change of appearance (even with the help of a plastic surgery) and/or the change of the voice of the witness, sometimes it also includes a total change of the witness's personal data .

(iii) the right to protect the members of witnesses' immediate family

There is no doubt about the fact, that one of the most effective way to intimidate a witness is to exert indirect pressure on him through threatening members of his family. Providing testimony in such situations could be very stressful, that's why it is essential to ensure the witnesses' family the appropriate level of needed protection. In this way this right represents the extension of protection provided for a person, who possesses intelligence or informative material in criminal proceedings, in order to encourage individuals participating in an organized group of criminals or other criminal organization to cooperate with the judicial process. The Council resolution calls on Member states to provide appropriate protection measures for parents, children and other persons close to the witness, who are likely to be exposed to serious and immediate danger as a result of cooperating with the judicial process.

(iv) the right to give an evidence using an appropriate method taking the level of threat into consideration

One of the forms of protection, frequently used in the pre-trial and trial stage of a criminal case, is to execute the examination in a different place in which the accused person of serious crime is situated. This procedure covers the use of audiovisual methods in the presence of an "investigating" judge, who is responsible for placing relevant questions in the process of

hearing. In order to eliminate completely the witnesses feeling of fear, it is proposed to use the method of voice change in the process of transferring the content of the statement.

(v) the right to avoid face to face confrontation with the accused

The competent bodies of the EU Member states are expected to ensure appropriate measures, which should avoid any direct contact of the witness with the prosecuted person. This principle is intended to eliminate the possibility of putting the witness under the direct mental pressure connected with the personal negative attitude to the committed crime. At this point it is necessary to mention, that in the Slovak republic, there have been several cases, in which the competent authorities have been mistaken in completing the above-mentioned procedural conditions.

2.2 The regulation of witness protection in Slovak republic and the considerations de lege ferenda

The regulation aiming to ensure the protection of witnesses in Slovak republic is represented in general by two legal acts, – the Slovak Criminal Procedure Code No. 301/2005 Coll. (hereinafter referred to as „SCPC“) and the Slovak Witness Protection act No. 256/1998 Coll.(hereinafter referred to as „SWPA“). Pursuant to the provisions of this legislation there are two basic ways of protection "*anonymous*" witnesses that have to be differentiated: (i) protection guaranteed mainly through the section 136 of the SCPC (in this respect the "*confidential*" witness) and (ii) special protection program, in which the witness and members of his family can be enrolled according to the section 3 of the SWPA (in this respect we differ between the "*threatened*" and the "*protected*" witness – analysed in the separate chapter). Although it is generally considered as impossible to reach 100% - protection provided to the witness, it is necessary to create adequate and proper procedural conditions.

2.2.1 Witness protection arising out of the Slovak Criminal Procedure Code

There is no separate legal regulation concerning the process of giving an evidence by the anonymous witness in the SCPC. The crucial part of such fragmental legal regulation is to be found in the section 136 of the SCPC, some specific issues related to the examination of the

witness during the trial stage of criminal procedure occur among the provisions intended to regulate the entire process of a criminal trial proceeding (sections 262, 270 and 273).

The level of the relevant regulation can be regarded as insufficient, as it just briefly implements the recommendations and obligations set up in the relevant international documents without dealing with the concrete procedural steps by giving the evidence in such situations, when there is a serious need to protect the testifying person by the criminal procedure instruments. The relevant section of the SCPC regulates three different law regimes, applicable to an endangered witness based on the current level of threat and the principle of subsidiarity.⁶ The judge as the competent authority gives the consent to the application of above-mentioned procedures; the prosecutor or even the police investigator in the pre-trial stage, whereas the witness protection is usually extended and granted also to the members of witness family.

Within the meaning of the first paragraph the statement of the employment address or other address, where the witness is able to accept the judicial consignment, is considered to be a sufficient measure in order to eliminate or reduce a reasonable concern of the witness' safety based on the statement of the witness' real address. In this respect there is a possibility not to state one's personal data before the hearing in the pre-trial or trial stage of the criminal process, which can be decided either by the prosecutor, judge or by a police investigator during the pre-trial stage. However, the extent of a witness' threat, under which it is possible to use the above mentioned process, is questionable, since by stating the employment address or other address, where the witness is able to accept the judicial documents, the witness gets partly localized and this makes it possible for potential offenders to make a direct or indirect pressure on the witness, especially due to the growing use of advanced information technologies in today's world.

If we consider the purpose of this measure, whose result should be the proper function of the administrative relations between the judicial body and the threatened witness, it is highly appropriate to adjust an alternative way of qualified communication during the criminal process (e.g. through electronic mail or special judicial courier), which reduces the possibility

⁶ Polák, P.: Svedok v trestnom konaní. Bratislava: Eurokódex, 2011, s. 213

of threatening the witness more significantly than stating other relevant address than the real home address.

The second paragraph of the section 136 regulates the situation in which the extent of hazard connected with providing the testimony on the given subject justifies data confidentiality. However, it's necessary to emphasize that the witness' fear of being threatened, or the fear that one of his family members might be threatened, must be based on specific facts, and must be objective and real. At this point the particular provisions regulate the specifics of the hearing of such a witness only fractionally, and, in spite of his concealment, it is possible to place the questions regarding his credibility and relation to the accused person, as well as the questions leading to witness' statement about the facts he testified about. However, what was omitted to emphasize by the legislator at this point is the fact, that the questions the witness is being asked during the main criminal proceeding in order to verify witness' credibility must be carefully selected so that their answering will not lead to revelation of witness' real identity. It is undisputable that there is no possibility to set the legislative instructions on how to place the right questions, so it is necessary to point out the regular training courses of judges, whose quality should constantly rise. Taking into account the procedural obligation, imposed on an anonymous witness according to the section 136 par. 2, to clearly state how and in what capacity he came to know certain facts that he is testifying about, it is only the art of tactics used by the competent judge or prosecutor to preserve the effectiveness of the witness protecting instruments.

Subject matter of the second paragraph of the section 136 is comprised of the implications of the questioning procedure in relation to the contents of the case file. In this respect materials available for establishing the identity of anonymous witness for the duration of threat are not provided. The case file with such data should be completed in time when the threat is over, at this point, however, the lack of competent authority is in place in the national legislative regulation that would decide that the threat no longer prevail along with the procedural consequences of the particular case. The treatment with materials relating to the anonymous witnesses should be handled without any doubt about its legality and regularity and that will increase demands for all judicial personnel who become acquainted with such documents and that justifies the need for establishment a specific training system focused on the adoption of detailed procedural approach which is absent in a complex form of the law.

In the third paragraph of the section 136, the legislator has already made a determination of specific measures, which has the competent authority to perform in accordance with the procedural stages in order to preserve anonymity of the witness: change of the look and voice of the witness and the execution of his questioning by the use of technical equipments to transmit video and audio. The fact that the abovementioned measures found their justification in the adversarial proceedings in pre-trial proceedings reflects to the position of the prosecutor and investigator as the authorities responsible for carrying out their law enforcement in criminal proceedings. However, speculations may arise whether this brief legal regulation would provide the competent judge with sufficient basis for execution of evidence relating to the participatin of anonymous witness in a way, that will exclude any doubts about preserving the rights of the witness and the defendant. The questioning of the witness by the means of technical equipments to transmit video and audio is important to be made in a form allowing to watch facial expressions and gestures of examined witnesses in order to assess their credibility. To avoid any speculation of influencing the witness, it is recommended to set the transmission of video and audio, so that the examined witness will be seen along with audition at the same time in the room.

The legislator in the last paragraph of section 136 admits a special way of confidentiality on the identity of a witness as the most intensive level of protection granted, namely the possibility to use the caption as a summary information about the person (identity, marital status, education and employment). The caption is usually created by the prosecutor in cooperation with the witness and the relevant screen data are submitted to the investigator. In this case, it is supposed to be a very intensive intervention in a criminal proceedings, which must be justified by a significant degree of threat to life, health and physical integrity of the witness and members of his family in connection with the perpetration of the offences defined.

2.2.2 The Slovak witness protection program

The witness protection programs in the EU should offer various methods of protection; this may include giving witnesses, their relatives and other persons close to them a change of

identity, relocation, assistance in obtaining new jobs, providing them with bodyguards and other physical protection. ⁷

The legal regulation concerning the Slovak witness protection program is to be found in the witness protection act No. 256/1998 Coll., which has been adopted taking into account the international recommendations in order to provide a long-term physical security program to involved persons, whose physical integrity is threatened. In times of substantially advanced European integration instruments aiming to foster international co-operation are continuously used to allow the special programs to operate across borders (the necessity of this aspect is determined by the frequent need to relocate the threatened witness and his immediate family).

Firstly it is necessary to briefly analyse the fundamental terms of the SWPA, stated directly in the introductory part of the document. We have to differentiate between the "threatened" and the "protected" witness, both belonging to the category of "anonymous" witnesses. For this purpose anonymity means that the identifying particulars of the witness remain totally unknown to the defendant.

The difference is, that the protected witness was already enrolled into the protection program based on the proposal made by the responsible prosecutor or pre-trial judge, while the threatened witness is someone who provided testimony material to the criminal proceeding and is suggested to be enrolled in this program. The problem of this provision is, that according to its current version there is no possibility to grant the protection to a person, who hasn't yet testified in the procedural status of an ordinary witness, in spite of that, provided some relevant information concerning the committed crime in the pre-trial stage of proceedings. That is the reason which should justify the extension of protection guaranteed through this particular provision in order to create an opportunity to enroll potential witnesses into the protection program. ⁸

The competent body to make a decision whether the specific person is placed into the protection program is the Commission, which consists of a chairman and four other members nominated by the Minister of Interior. Following factors seem to be essential to its' decision:

⁷ Recommendation No. R (97) 13, section 15

⁸ Perhács, Z.: Perhács, Z.: Proposals and recommendation which strengthen level and efficiency of witness protections guarantee in criminal proceeding, In: Judicial revue, Nr. 4/2007, pg. 499.

(i) the nature of the risk to the security of the witness, (ii) the danger to the community if the witness is admitted to the program, (iii) the nature of prosecution involving the witness and the importance of the witness in the matter, (iv) the value of information or evidence given by the witness and (v) the likelihood of the witness being able to adjust to the program considering the witnesses' maturity, judgment, personal characteristics and family relationships.⁹

An important aspect of this procedure is the written protection agreement between the testifying person and the competent police section, that has to be signed within two weeks after the commission approval, whereas it is recommendable to attach its' template to the SWPA. This agreement contains basic clauses outlining the obligations of both parties, but is otherwise drafted to fit the specific case. Following the rules of this agreement the witness is obliged to fulfill the duties arising out of this document and therefore meet some notable restrictions (mainly refrain from activities that break the law or might otherwise compromise the security of a witness and accept and give effect to reasonable requests and directions made by the competent authority).

Considering the fact that being part of the protection program leads to the witness mental strain it would be reasonable to examine the mental health and preparedness of the witness and the members of his immediate family in an institutionalized way before thinking about enrolling them into this stressful program.¹⁰ Various serious psychical consequences (e.g. changes in emotionality, interpersonal relationships and stress arising out of the need to adaptate to new living conditions) connented with taking part in the proteccion program should be taken into account before the decision about placing the particular witness into the program is made.

⁹ <http://www.justice.gc.ca/eng/pi/icg-gci/pw-pt/pw-pt.pdf>

¹⁰ Perhács, Z.: Perhács, Z.: Proposals and recommendation which strengthen level and efficiency of witness protections guarantee in criminal proceeding, In: Judicial revue, Nr. 4/2007

3.The right of the defence on the fair trial according to the Article 6 (3) (d) ECHR

3.1. Principle of equality of arms and the right to adversarial proceedings

In the context of criminal proceedings, the defendant must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis the prosecution. As a general rule, under the ECHR, all the evidence should be produced in the presence of the accused at a public hearing and the accused has a right to examine and have examined the witnesses against him. Article 6 (3) (d) ECHR¹¹ does embody the principle that there should be equality of arms between the parties before the court and this includes the right to advance and to challenge evidence in the court. The ECtHR held that, *[t]he concept of a fair hearing also implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision ...*¹²

3.2. The issue of anonymous witness evidence in relation to the Article 6 (3) (d) ECHR

In the Court's opinion, the balancing of the interests of the defense against arguments in favour of maintaining the anonymity of witnesses raises some difficulties as to its consistency with Article 6 (3) (d) ECHR. It means that the anonymous witness evidence can be relied upon, where justified, so long as there are counterbalancing factors to protect the accused. Recommendation to the member states¹³ in the area of domestic criminal policy and legislation stated that „... *the anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons*

¹¹ Article 6 ECHR, (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.“

¹² Krcmar v Czech Republic (2001) 31 EHRR 41, at [40].

¹³ Recommendation to the member states concerning Intimidation of Witnesses and the Rights of the Defence (97).

and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his credibility and the origin of his knowledge. Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that i) the life or freedom of the person involved is seriously threatened, or in the case of an undercover agent, his potential to work in the future is seriously threatened and ii) the evidence is likely to be significant and the person appears to be credible. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons ...“.

3.3. Key Case – law of Article 6 (3) (d) regarding to the rights of the accused to a fair trial

The wording and the case-law of Article 6 (3) (d) ECHR support the principle of equality of arms which underlines Article 6 in its entirety. A significant line of cases has clarified the right of an accused to a fair trial and specifically the right to confront and cross-examine witnesses. The Court has often found violations of Article 6 (3) (d) where convictions have been based on the testimony of anonymous witnesses unavailable for questioning by the defence (*Kostovski v. the Netherlands*, *Windisch v. Austria*, *Saidi v. France*, *Birutis and Others v. Lithuania*). It has also found violations where the witnesses were police officers, whether anonymous (*Van Mechelen v. the Netherlands*) or identified but made unavailable for the purposes of confrontation (*Hulki Günes v. Turkey*). In several cases the ECHR has dealt with the issue of anonymous witnesses indirectly or by stating that there was a violation of Article 6 (3) (d) on the ground that the statements of the anonymous witness had been the sole or decisive reason for a conviction (*Delta*, *Unterperinger*, *A.M.*) or by stating that there was no violation because these statements were corroborated by other evidence.¹⁴ I would like to emphasize the fact that ECHR distinguishes between evidence as such and supporting evidence. In this respect, for instance, the *Kostovski case* pointed out that „ ... *the Convention does not preclude reliance, at the investigative stage of criminal proceedings, on sources such as anonymous informants. However, whether the subsequent use of anonymous statements is*

¹⁴ EU standards in witness protection and collaboration with justice. Institute for international research on Criminal Policy, Ghent University. Maklu-Uitgevers. European Commission (JAI/2004/AGIS/077).

*sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the right of the defence which were irreconcilable with the guarantees contained in Article 6 ...“.*¹⁵ In essence, anonymous statements have to be corroborated by other evidence or cannot be taken into account making their statements for evidential purposes irrelevant. These statements should therefore primarily be used by the judicial authorities as a basis for finding another other evidence.

3.3.1. *Kostovski v. the Netherlands*¹⁶

In January 1982 three masked men conducted an armed raid on a bank. Subsequently the police received visits from two persons who wished to remain anonymous for fear of reprisals and who made statements implicating the applicant and others in the robbery. An examining magistrate later interviewed, in the absence of the public prosecutor and of the applicant and his defence counsel, one of the witnesses, who confirmed his/her previous statements. Mr. Kostovski's lawyer was afterwards given an opportunity to submit, through an examining magistrate, written questions to the witness, but the majority were either not asked nor answered in order to preserve his/her anonymity. The applicant and his co-accused had been convicted and sentenced for armed robbery. The anonymous witnesses, whose identity was known to the public prosecutor, were not heard at the trial. The District Court based its finding on the reports drawn up by the police and the examining magistrates, which it admitted as evidence and regarded as decisive and reliable. A retrial before the Court of Appeal also admitted the reports as evidence and a subsequent appeal by the applicant to the Supreme Court was dismissed. The essence of the applicant's claim was that he had not received a fair trial (Article 6-1) and that his right under Article 6-3-d had been violated. The Court recalled that in principle all the evidence had to be reproduced in the presence of the accused at a public hearing with a view to adverse argument. However, statements obtained at the pre-trial stage could be used as evidence, provided the rights of the defence had been respected; as a rule, those rights required that an accused be given, at some stage in the proceedings, an adequate and proper opportunity to challenge and question witnesses against him. Yet, in the Court's view, such an opportunity had not been afforded to him. Moreover,

¹⁵ *Kostovski v. the Netherlands*. Judgement of 20th. November 1989, 166 ECtHR.

¹⁶ For an analysis of *Kostovski* case, as a leading case on the ECHR Article 6 (3) (d) fair trial right of an accused to confront witnesses against him, see R. A. Lawson & H. G. Schermers. *Leading cases of the European Court of Human rights*. Ars Acquis Libri. Nijmegen 1999. 2nd edition at 7-11.

the Court did not consider that the procedures followed by the judicial authorities had counterbalanced the handicaps suffered by the defence. The trial courts did not see the witnesses, and so could not form their own impression of the reliability of the anonymous witnesses. In addition, only one of them had been heard by an examining magistrate, but he had been unaware of the witness's identity.

Whilst recognizing the force of the Government's references to an increase in the intimidation of witnesses and the need to balance the various interests involved, the Court observed that the right to a fair administration of justice could not be sacrificed to expediency. The use of anonymous statements as sufficient evidence to found a conviction, as in the present case, was a different matter from reliance, at the investigation stage, on sources such as anonymous informants. The Court concluded that in the circumstances of the case Mr. Kostovski could not be said to have received a fair trial. It accordingly held unanimously that there had been a violation of paragraph 3 (d), in conjunction with paragraph 1 of Article 6.

The remarkable aspect of the *Kostovski decision* is the extent to which it pushes national inquisitorial systems towards a more adversarial approach. As a result of the decision, The Netherlands amended its Code of Criminal Procedure¹⁷ by introducing guidelines that must be followed whenever the statements of anonymous witnesses are used as evidence in criminal trials. The new legislation complies with the core rule of *Kostovski case* – the use of anonymous witnesses is permissible in the investigative stage, however a criminal conviction should not rest to a decisive extent on statements made by anonymous witnesses which the defendant has not had an opportunity to question at any stage. The new legislation required that „a written document containing a statement of a person whose identity is not apparent, may only be used in evidence, if the conviction is based to a significant degree on other evidence and if the defence has not at any time sought to question that person or have him questioned“. Only if the witness is officially labelled by the investigating (pre-trial) judge as a threatened witness is it possible for a witness to stay anonymous and his statement be part of evidence, although not to a significant degree; in that case however the accused is given the possibility in the pre-trial stage to question this witness.

¹⁷ Articles 226a-226f , 342 and 344 WvSv (Code of Criminal Procedure of the Netherlands).

3.3.2. *Van Mechelen and Others v. The Netherlands*¹⁸

The Kostovski rule has been affirmed in the case of *Van Mechelen and Others v. The Netherlands*. *Van Mechelen* was similar to *Kostovski* in that the underlying offence was a criminal crime perpetrated by armed career criminals. Like Mr. *Kostovski*, the *Van Mechelen* applicants were convicted almost exclusively on the basis of anonymous witness statements. In succinct terms the Court reiterated the heart of *the Kostovski rule*: i) all evidence must normally be produced by at a public hearing in the presence of the accused with a view to adversarial argument, ii) exceptions are permissible to this general principle, but they must not infringe the right of the defence, iii) the defence must be allowed by given an opportunity to challenge witness statements, either when made or at a later stage, iv) there is no hard and fast rule against anonymous witnesses, but „if the anonymity of anonymous witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not ordinarily involved“, requiring that this handicap on the defence be counterbalanced by the procedures followed by the judicial authorities.

3.3.3. *Birutis and Others v. Lithuania*¹⁹

The three applicants/prisoners were charged with organizing and participating in a prison riot. The evidence against the first applicant consisted of written statements obtained by the investigating authorities from seventeen anonymous witnesses, mostly other prisoners, statements made by three co-accused and evidence given at his trial by five members of the prison staff. The evidence against the second applicant was broadly the same, however the only evidence against the third applicant comprised of written statements by six anonymous witnesses. The trial court convicted all the applicants and imposed long prison sentences on them. In this case, the European court held that „ ... as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a latter stage...“ The judges were united in concluding that the conviction of the third applicant solely on the basis of anonymous evidence violated the Doorson principle.

¹⁸ *Van Mechelen and Others v. Lithuania*. Judgement of 23rd of April 1997.

¹⁹ *Birutis and Others v. Lithuania*. Judgement of 28th of March 2002.

Furthermore, the trial court had failed to implement counterbalancing procedures, such as questioning the anonymous witnesses or scrutinizing how their evidence had been obtained, to safeguard the defence rights of the first and second applicants. Therefore, the Court found a breach of Article 6 (3) (d) had occurred in respect of each applicant.

3.3.4. A.M.

In the A. M. case Italian prosecuting authorities brought criminal proceedings against A.M. for sexual assault on a minor. As the defendant was an American national a rogatory letter asked the American judicial authorities to have questions put to the minor in question, specifying that no lawyer should be present during the interview. On the basis of these statements and the statements of the parents and the psychotherapist, A.M. was convicted for a two year suspended sentence. After Appeal and Cassation, A. M. would file a complaint to the ECHR on the basis of a violation of Article 6 (1) and (3) (d) as he had not been given the opportunity to examine or have examined the statements of the parents and the psychotherapist, as well as that his conviction had solely or to a decisive extent been based on the statements of the minor. The court would evaluate both objections together. In relation to the latter complaint, the Court noted that the domestic courts indeed relied solely on the statements made in the United States before trial and was at no stage in the proceedings confronted with the accusers. The ECHR therefore concluded that A. M. could not be regarded as having had a proper and adequate opportunity to challenge the witness statements that formed the basis of his conviction. As a result Article 6 (1) and (3) (d) had been violated.

Although the protection of victims and witnesses may be balanced against the rights of the accused, there is no „exception“ to the minimum guarantees of Article 6 ECHR; anonymity may be allowed at some stages of the proceedings, but the overall trial must still provide the accused with the fundamental fairness guaranteed by the ECHR. To sum up, having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.

3.3.5. *Windisch v. Austria*²⁰

In 1985 the applicant was convicted of burglary and sentenced on the basis of statements made to the police by two unidentified witnesses. The court had examined the police officers who had interrogated the witnesses, however, it refused the applicant's request to have the latter summoned and to be confronted with them, on the ground that the police officers had promised not to reveal their identity on account of their fear of retaliation. The Supreme Court subsequently rejected the applicant's plea of nullity and his appeal against the sentence. The applicant complained, under Article 6-3-d (rights of an accused concerning witnesses), that he had been convicted exclusively on the basis of the evidence given by the anonymous witnesses, who had not been heard by the Regional Court and whom he had no opportunity to examine.

The Court considered the applicant's complaint from the angle of paragraphs 1 and 3 (d) together. Although the two unidentified persons did not give direct evidence in court, they are to be regarded for the purposes of Article 6-3-d as witnesses - a term to be given an autonomous interpretation. The Court's task was to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. In principle, all the evidence has to be produced in presence of the accused at a public hearing with a view to adversarial argument. However, the use of statements obtained at the pre-trial stage can be used as evidence provided that the rights of the defence are respected. As a rule, those rights require that the accused have at some stage adequate and proper opportunity to challenge and question a witness against him. Here two witnesses could at no stage be questioned directly by or on behalf of the applicant and the scope of possible indirect questions were restricted by the decision to preserve their anonymity. The defence being unaware of the witnesses' identity was unable to test their reliability and credibility. The trial court was also deprived of observing the witnesses under questioning. The Court was aware of the need for collaboration of the public with the police, but the right to a fair administration of justice could not be sacrificed. In this connection the Court noted that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, with reference to the judgment of 20 November 1989 in the *Kostovski* case, the subsequent use of their

²⁰ *Windisch v. Austria*. Judgement of 27th of September 1990.

statements by the trial court to found a conviction is another matter. This involved limitations on the defence rights with the result that the applicant did not have a fair trial. The Court unanimously held that there had been a violation of paragraph 1 and (3) (d) of Article 6 of the Convention. The Court finally decided that the question of application of Article 50 of the Convention as regards an award of damages was not ready for decision and reserved that question.

4. Conclusion

The duty to testify about facts important for the criminal proceedings according to criminal procedures acts of Member States is one of the basic duties of every citizen of European Union. It is possible that fulfilling this obligation is going to be problematic at the moment, when it could pose a risk to life, health and physical integrity not only for a person who provides testimony but also for people living around him. Intensity of this threat is increasing as the organized crime gradually infiltrates into structure of crime and also as the violent forms of this crime increased during second half of 20th century. Not only the witnesses but also the victims are afraid to testify and therefor the criminal proceedings in particular case doesn't start just because there is nobody who would file a criminal complaint because he was successfully threatened. It should be the main interest of whole society to effectively protect the witness by fulfilling his abovementioned civil duty. Analyzed legal acts of European integration grouping are to be considered as a manifestation of effort to reach an appropriate degree of witness's protection at the European level. The provisions of these acts were without change implemented into national criminal proceedings codes and they set many procedurals instrument which serve to help to reach mentioned aim.

Procedurals measures for witness protection are getting beyond question into collision with the defendants right to effective defense, which awaken European case law to the effort to set the boundaries of application of evidence that have been based on testimonies of anonymous witnesses. The European court of human rights several times stated that this process represents highly difficult search for balance between the rights of defendant (especially the right to fair trial) on one hand and between the rights and interests of witnesses and victims on the other hand. By the effort of guaranteeing sufficient witness protection is to be aware of the

risky situations which can eventually occur by accused of a crime in case of misusing the anonymous testimony. In the legal state abovementioned conflict between witness protection and defendants interest narrows the space for granting him the protection which could without merit affect the contradictory of particular stage of criminal proceedings. It is possible to grant a protection only for serious threats of fundamental rights of witness for protection of his life and health or by threat to his closed ones.

We suppose that it is impossible to bring abovementioned process of searching for the balance which every time depends on circumstances of particular case to an end and that this process is even beneficial because it makes the participating parties maintain mutual comparable quality of procedural rights.

5. Bibliography

Lacko, G.: The protection of witnesses, available at: <http://www.justice.gc.ca/eng/pi/icg-gci/pw-pt/pw-pt.pdf>

Perhács, Z.: Proposals and recommendation which strengthen level and efficiency of witness protections guarantee in criminal proceeding, In: Judicial revue, Nr. 4/2007

Perhács, Z.: Execution of the witness protection program in Slovak Republic. In: Criminalistics, Nr. 4/2004

Polák, P.: Witness in criminal proceedings. Bratislava: Eurokódex, 2011

EU standards in witness protection and collaboration with justice. Institute for international research on Criminal Policy, Ghent University. Maklu-Uitgevers. European Commission (JAI/2004/AGIS/077)

Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220JHA)

Opinion of General Attorney Nr. 5/1995 on enforcing Code of Criminal Procedures provisions on protecting witnesses

Recommendation No. R (97) 13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence

Resolution of the Council of 20 December 1996 on individuals who cooperate with the

judicial process in the fight against international organized crime

Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime (95/C 327/04)

Recommendation No. R (97) 13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence

Slovak Code of Criminal Procedure No. 301/2005 Coll.

The European Convention on Human Rights

The witness protection act No. 256/1998 Coll.

Wetboek van Strafvordering (Criminal Procedure Act of Netherlands)

Birutis and Others v. Lithuania, Judgement of 28th March 2002

Doorson v. Netherlands, Judgement of 26th March 1996

Kostovski v. the Netherlands, Judgement of 20th November 1989

Krcmar and others v. The Czech Republic, Judgement of 3rd March 2000

Van Mechelen and Others v. Lithuania, Judgement of 23th April 1997

Windisch v. Austria, Judgement of 27th September 1990