

## **Defense response to the court decision on appeal regarding the anonymous witnesses**

The court decided today on the appeals against the decision of the examining magistrate to allow anonymous witnesses.

The basic principle of the law is that witnesses are not heard anonymously. That is why strict conditions are set by law. This strictness is mainly due to the fact that the reliability of anonymous witnesses can hardly be assessed, which is in contrast to witnesses who are not heard anonymously, but under their own identity and in public. Furthermore, in a fair trial, it is crucial that unlimited questions can be asked to a witness also on behalf of the suspect. This way, the reliability of that witness can be tested. Where anonymous witnesses are concerned, not only the defense, but also the court has no idea who the witness is. As a result, questions will remain at all times as to how the witness obtained his or her information and how credible the information is.

In view of those violations of defense rights, the legislator has created strict conditions for hearing an anonymous witness, which may only be done in exceptional cases. These conditions include, among other things, that the defense is heard by the examining magistrate before a decision is made on whether a witness may remain anonymous. This way, the defense (and not only the Public Prosecution service) can also put forward its opinion before the examining magistrate decides whether it is really necessary that the identity of a witness must be kept hidden. The examining magistrate's decision (the "status decision") must then be notified to the suspect without delay. If the defense does not agree with the status decision, the defense can appeal against it. If the court agrees with the appeal, the witness will not be heard anonymously. If the appeal is considered unfounded, the witness will in principle only be heard afterwards. In general, the defense may also be present during that hearing. If this is impossible because of the investigation, the suspect may ask questions in another way.

In the MH-17 case, the examining magistrate violated the aforementioned rules at the request of the Public Prosecution Service. For example, the witnesses have already been heard without the defense being present. In fact, the defense was not informed about this and could therefore not take a position or ask questions in advance. For that reason, the defense has appealed.

The court declared today that the appeal was well-founded and partly unfounded. According to the court, one of the witnesses was unlawfully heard without the suspect being given the opportunity to comment on the request for anonymous hearing. The examining magistrate's decision on this witness must therefore be overturned. Regarding the other anonymous witnesses, the court has considered that the position of the defense, insofar as it relates to violations of the law after the status decision was made, will not be assessed by the court at this time. This means that these decisions of the examining magistrate and the records of the anonymous witness hearings will not be overturned, despite violations of the law alleged by the defense.

During the substantive, later, hearing of the case, the court will have to decide whether the statements of the anonymous witnesses may be used as evidence. The defense can then raise its objections to the use of the statements of those anonymous witnesses again. Today's decision is in this sense a provisional one.