



PROTECTING THE RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A handbook
for legal practitioners

2nd edition
prepared by Dovydas Vitkauskas

Dovydas Vitkauskas
Grigoriy Dikov

COUNCIL OF EUROPE



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Preface and acknowledgements

This manual targets, first and foremost, practising lawyers, members of the judiciary and other legal professionals already knowledgeable in Article 6 of the European Convention on Human Rights and the case law of the European Court of Human Rights.

Article 6 is arguably the most complex one in the Convention set-up in terms of its scope of application, the number of arising issues and the extent of interpretation by the Strasbourg Court. The context calls for a different approach to increase the chance of practical use of the textbook, especially by legal practitioners. While many Convention textbooks focus on an elaborate telling of “stories” leading to findings of a breach, this manual attempts to extract core principles from prominent cases at the European Court of Human Rights. Very brief stories are included here to illustrate the principles listed in the narrative part, in order to present only typical and exceptional situations where violation or no violation was found. The chosen approach may hopefully be useful to those writing *obiter dicta* or *ratio decidendi* in the context of domestic or international litigation, without forgetting law students and researchers.

The initial feedback received from various corners of Europe following the First Edition of the *Handbook* in 2012 indicates that we are on the right track. It must be emphasised that the inherent limitations on length required me to be concise while remaining comprehensive, as a result of which I may have omitted some relevant issues, or oversimplified certain interpretations by the Strasbourg Court, which, more frequently than not, remain constrained to the “particular circumstances of the case”. I therefore encourage the readers to further enhance their knowledge of both the factual background of the quoted cases and the legal side of the Article 6 jurisprudence. Most importantly, I intended to outline not only the “solved” issues, but also some inconsistencies in certain Convention authorities, which may require further clarifications down the road with a view to enabling the Strasbourg Court to make its Article 6 case law even more “clear and foreseeable”. Nonetheless, I do hope that this manual will serve many users as a practical toolbox rather than merely as food for thought about the unresolved legal problems.

I wish to extend my sincere thanks all those who have played a part in the development of the manual over the years by way of editing and additional contributions, namely Grigory Dikov, Monika Stonkutė, Vasily Lukashevich, Lisa Freeman, Marc Willers and Bert Maan.

Dovydas Vitkauskas

European Convention on Human Rights

Article 6 – Right to a fair trial

- ▶ In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- ▶ Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- ▶ Everyone charged with a criminal offence has the following minimum rights:
 - to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - to have adequate time and facilities for the preparation of his defence;
 - to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - 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;
 - to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Chapter 1

Role of Article 6 of the European Convention on Human Rights: methods and principles of interpretation

Key notions and principles

- ▶ teleological/purposive method of interpretation (*Hornsby v. Greece*, §§40-45);
- ▶ autonomy from domestic law (*Khan v. the United Kingdom*, §§34-40);
- ▶ subsidiarity and the fourth-instance doctrine (*Schenk v. Switzerland*, §§45-49);
- ▶ examining “trial as a whole” (*Salduz v. Turkey* [GC], §§56-62);
- ▶ qualified right and the “essence” test (*O’Halloran and Francis v. the United Kingdom* [GC], §§43-63).

Article 6 of the European Convention on Human Rights (“the Convention”) guarantees the right to a fair trial. It enshrines the principle of the rule of law, upon which a democratic society is built, and the paramount role of the judiciary in the administration of justice, reflecting the common heritage of the contracting states. It guarantees the procedural rights of parties to civil proceedings (Article 6 §1) and the rights of the defendant (the accused suspect) in criminal proceedings (Article 6 §§1, 2 and 3). Whereas other participants in the trial (victims, witnesses, etc.) have no standing to complain under Article 6 (*Mihova v. Italy*,¹ dec.), their rights are often taken into account by the European Court of Human Rights (“the Court”).

1. Cases are cited by title (including respondent state) when first mentioned here, and thereafter generally by applicant name only. A full index of cases, with reference dates, appears in the Appendix.

In a similar way to other provisions of the Convention, Article 6 is subject to teleological interpretation. The Court attempts to give practical effect to the purpose of the provision, with a view to protecting rights that are practical and effective (the principle of effectiveness) rather than theoretical and illusory (*Sakhnovskiy v. Russia* [GC], §§99-107). As a result of this non-literal, contextual interpretation of Article 6, the right of access to a court (*Golder v. the United Kingdom*, §§26-40), the right to enforcement of judgments (*Hornsby v. Greece*, §§40-45) and the right to finality of court decisions (*Brumărescu v. Romania*, §§60-65) have been found to exist among a number of implied requirements (rather than derived from the letter) of this provision.

While the Convention should so far as possible be interpreted in harmony with other rules of international law, including other international engagements of the respondent state, it cannot be excluded that the Convention requirements may override them (*Fogarty v. the United Kingdom*, §§32-39; see also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], §§108-111, and other cases contesting different pieces of European Union legislation from the point of view of the European Convention on Human Rights).

Article 6 must be interpreted in the light of present-day conditions, while taking into account the prevalent economic and social conditions; this is also known as the concept of “the Convention as a living organism” (*Marckx v. Belgium*, §41; *Tyrer v. the United Kingdom*, §31). In interpreting the Convention, the Court may also take into account relevant rules and principles of international law applicable in relations between the contracting parties (*Demir and Baykara v. Turkey* [GC], §§76-84).

Article 6 enjoys significant autonomy within the domestic law of the contracting states, in its substantive as well as its procedural provisions (*Khan v. the United Kingdom*, §§34-40). This implies that a procedural defect within the meaning of the national law will not necessarily amount to a breach of Article 6. At the same time, some elements of Article 6 are less autonomous in domestic law than others. For instance, a greater relevance of the domestic law has always been attached in the context of the applicability test (*Roche v. the United Kingdom* [GC], §§116-126) and, in some cases, also while examining the merits of Article 6, in order to reconcile the inherent differences of accusatorial and inquisitorial systems of proof, such as when the Court approved wider judicial discretion in continental legal systems in choosing which witnesses were to be called at trial (*Vidal v. Belgium*,

§§32-35).² In certain contexts, a breach of the domestic law – or vagueness of the domestic provisions per se – was used by the Court as an additional argument pointing to a violation of Article 6 (*DMD Group, a.s. v. Slovakia*, §§62-72). Occasionally, to support its own finding under Article 6, the Court has also referred to domestic decisions acknowledging a breach of a constitutional provision identical to Article 6 (*Henryk Urban and Ryszard Urban v. Poland*, §§47-56).

Article 6 is essentially concerned with whether an applicant was afforded ample opportunities to state their case and contest the evidence that they considered false, and not with whether the domestic courts reached a right or wrong decision (*Karalevičius v. Lithuania*, dec.).

In accordance with the principle of subsidiarity, Article 6 does not allow the Court to act as a court of fourth instance – namely to re-establish the facts of the case or to re-examine the alleged breaches of national law (*Bernard v. France*, §§37-41), nor to rule on the admissibility of evidence (*Schenk v. Switzerland*, §§45-49). States remain free to apply the criminal law to any act (insofar as it does not breach other rights protected under the Convention), and to define the constituent elements of the resulting offence. As a result, it is not the Court's role to dictate the content of domestic criminal law, including whether there should be any particular defence available to the accused (*G. v. the United Kingdom*, dec., §§28-30).

In recent years, however, the Court has occasionally found violations of Article 6 on account of the persistence of conflicting court decisions on the same issue made within a single court of appeal (*Tudor Tudor v. Romania*, §§26-33), or by different district courts ruling on appeal (*Ștefăniță and others v. Romania*, §§31-40), stressing that the “profound and long-standing” nature of the divergences at issue was incompatible with the principle of legal certainty in its broad meaning. Moreover, the Court has determined that achieving consistency of the law may take time, and periods of conflicting case law may therefore be tolerated without undermining legal certainty (*Albu v. Romania*, §42). At the same time, the Grand Chamber (GC) recently stressed that it was not the Court's function under Article 6 to compare different decisions of national courts – even if given in apparently similar proceedings – save in cases of evident arbitrariness (*Nejdet Şahin and Perihan Şahin v. Turkey* [GC], §§59-96). The question is whether a system is in place to ensure more consistent and

2. See also below, Section 3.1, Access to court; Section 4.1, Independent tribunal established by law; Section 9.3, Examination of witnesses.

predictable case law, allowing for a domestic correction mechanism of conflicting judgments. Profound and long-standing variations in the practice of the highest domestic court are in themselves contrary to the principle of legal certainty, which is implied in the Convention and which constitutes one of the basic elements of the rule of law (*Vrabec v. Slovakia*, §27). Finally, the Court has also accepted that cases when two national courts – each within its own area of jurisdiction – reach divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised in similar factual circumstances, are inevitable and, as such, do not violate Article 6 of the Convention (*Stoilkovska v. “the former Yugoslav Republic of Macedonia”*, §46).

Article 6 establishes a very strong presumption of fact as found by the domestic courts, unless the domestic proceedings curtailed the essence of the Article 6 requirements, such as in cases of entrapment (*Ramanauskas v. Lithuania* [GC], §§48-74), although the latter category of cases is an exception rather than the rule.

Article 6 entails examination of the fairness of proceedings taken as a whole – namely on account of all stages and opportunities given to an applicant – not evaluation of an isolated procedural defect per se. However, in recent years the Court has started attaching greater importance to certain crucial moments in the proceedings – in particular, to the first questioning of a suspect in criminal proceedings (*Imbrioscia v. Switzerland*, §§39-44; *Salduz v. Turkey* [GC], §§56-62; *Panovits v. Cyprus*, §§66-77; *Dayanan v. Turkey*, §§31-43; *Pishchalnikov v. Russia*, §§72-91).

Whether or not a review by a higher court can remedy a procedural defect from an earlier stage of the proceedings depends on the nature of the interference, the powers and the scope of review of the higher court (*Rowe and Davis v. the United Kingdom*, §§61-67). Similarly, the absence of procedural guarantees at a later stage of the proceedings may be compensated by the possibility for applicants to have exercised their rights at an earlier stage (see, however, *García Hernández v. Spain*, §§26-36).

As a rule, a person can claim to be a “victim” of a violation of Article 6 only if the proceedings are over, and once a person is found guilty of a crime (*Oleksy v. Poland*, dec.) or has lost a civil case (at least in part). There are some exceptions though, in that a breach of “access to a court” or the “reasonable time” requirements may occur without a final judgment. The presumption of innocence (Article 6 §2) may be breached without a person being prosecuted or convicted.³

3. See also below, Section 3.1, Access to court; Chapter 8, Presumption of innocence.

While the Court has rarely indicated that Article 6 rights are qualified, a more extensive overview of the Convention case law attests that some elements of this provision – such as the right of access to a court (for example *Ashingdane v. the United Kingdom*, §§55-60) – are very close to being labelled as qualified in a similar vein as the rights guaranteed by Articles 8 to 11 of the Convention. In refining its construction of a qualified right under Article 6, the Court has stated that what constitutes a fair trial cannot be determined by a single unvarying principle but must depend on the circumstances of a particular case. As a result, a *sui generis* proportionality test under Article 6 has been applied on most occasions, also known as the “essence of the right” test – for instance, when a different degree of protection of privilege against self-incrimination was established with regard to minor criminal offences (misdemeanours, or so-called “administrative offences” in some European legal systems) in contrast with the rules that apply to the investigation of more serious crime (*O’Halloran and Francis v. the United Kingdom* [GC], §§43-63); or when a lower degree of protection of equality of arms was confirmed in civil cases as compared with criminal ones (*Foucher v. France*, §§29-38; contrast with *Menet v. France*, §§43-53).

Contracting states are required by Article 1 of the Convention to organise their legal systems so as to ensure compliance with Article 6. As a rule, reference to financial or practical difficulties cannot justify failure to comply with those requirements (*Salesi v. Italy*, §24).

Most Article 6 rights may be waived. However, a waiver (explicit or implicit) will be accepted by the Court only if the waiver is genuine – namely, unequivocal (there should be no doubt as to its existence and scope), free (the person must not be compelled to waive their rights in any manner; *Deweert v. Belgium*, §§48-54) and knowledgeable (the person must understand the consequences of the waiver), and only if it does not go against any important public interest (*Sejdovic v. Italy* [GC], §§96-104; *Talat Tunç v. Turkey*, §§55-64). Existence of a waiver may also be established where a person fails to claim the right, or claims the right belatedly (*Bracci v. Italy*, §§62-65).

Chapter 2

Scope of protection and applicability

Key notions and principles

According to the principle of autonomous interpretation of Article 6, the European Court of Human Rights decides the question of applicability of this provision under either of the following headings:

- ▶ civil rights and obligations (*Ringeisen v. Austria*, §94);
- ▶ criminal charge (*Engel v. the Netherlands*, §§80-85).

Applicability of Article 6 to pre-trial, appeal and other review stages is established on the basis of non-autonomous criteria, and depends to a large extent on the existence of accessible remedies in domestic law (*Delcourt v. Belgium*, §§23-26).

Somewhat different standards of applicability exist for Article 6 §2 as compared with Article 6 §1 and Article 6 §3.⁴

2.1. Civil rights and obligations

Key notions and principles

Applicability of Article 6 under its civil heading entails cumulative presence of all the following elements:

- ▶ there must be a “dispute” over a “right” or “obligation” (*Bentham v. the Netherlands*, §§32-36);
- ▶ that right or obligation must have a basis in domestic law (*Roche*, §§116-126); and finally;
- ▶ the right or obligation must be of a “civil” nature (*Ringeisen*, §94).

4. See also below, Chapter 8, Presumption of innocence.

2.1.1. Dispute over a right based in domestic law

According to what are known as the *Bentham* criteria (*Bentham*, §§32-36), Article 6 must involve a “dispute” over a right or obligation which:

- ▶ must be construed in a substantive rather than formal meaning;
- ▶ may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised;
- ▶ may concern questions of fact or law;
- ▶ must be genuine and serious;
- ▶ must be decisive for the applicant’s rights, and must not have a mere tenuous connection or remote consequences.

Dispute over right based in domestic law

- ▶ Refusal of licence to operate a gas-supply installation – genuine and serious nature of dispute being attested, *inter alia*, by previous long-term use of object by applicant (*Bentham*)
- ▶ Out-of-time request for lawyer’s re-admission to Bar (*H. v. Belgium*)
- ▶ Claim of foreign-trained medic to become registered doctor in another country, despite applicable domestic legislation not being clear-cut as to required qualifications (*Chevrol v. France*)
- ▶ Claim for compensation for allegedly unlawful detention of conscientious objector, even though compensation was only available under domestic law in principle, not in particular circumstances (*Georgiadis*)
- ▶ Claim for nuisance caused by noise from nearby airport having basis in domestic law; example of no substantive bar (*Hatton and Others v. the United Kingdom*; but see *Powell and Rayner*)
- ▶ Proceedings concerning change of name, regardless of domestic legislation affording significant discretion to administrative authorities in deciding on applicant’s *locus standi* for such action (*Mustafa v. France*)

A “dispute” having a basis in domestic law entails the possibility of a claim being recognised under the domestic law, at least on arguable grounds (*Georgiadis v. Greece*, §§27-36). It is not sufficient for a right to exist *in abstracto*; the plaintiff should show some link to the specific claim they make in the domestic proceedings.

The character of the legislation governing how the matter is to be determined (civil, commercial, administrative law, etc.) or the authority invested with

jurisdiction in the matter (court, tribunal, local authority or professional body) is of little consequence. So long as that body has the power to determine the “dispute”, Article 6 will apply (*Ringeisen*). At the same time, where the body examining the dispute does not have the necessary characteristics of a tribunal, a question may also arise under the heading of “impartiality” or “independence”.⁵

A basis in domestic law will be found where that law imposes a procedural bar for claiming a particular right rather than a substantive bar for the action (*Roche*, §§116-126).

No dispute over a right based in domestic law

- ▶ Re-assessment of professional certification akin to school or university examination (*Van Marle v. the Netherlands*)
- ▶ Challenge to presidential decree publishing bilateral agreement to permit enlargement of airport, capable of affecting applicants’ property and business interests; lack of “decisiveness” (*Sarl du Parc d’activités de Blotzheim v. France*)
- ▶ Refusal of legal aid in relation to minor offence, despite domestic law allowing for possibility (albeit not “right”) of legal aid in relation to offence in question (*Gutfreund v. France*)
- ▶ Claim for nuisance caused by noise from nearby airport having no basis in domestic law; example of substantive bar (*Powell and Rayner v. the United Kingdom*; but see *Hatton*)
- ▶ Attempt to defend trademark by reference to its alleged acquisition from state company several years earlier; no evidence supporting claim of corporate succession (*OAO Plodovaya Kompaniya v. Russia*)

It would be inconsistent with the principle of the rule of law to remove from the jurisdiction of the domestic courts a whole range of civil claims or confer immunity from civil liability on large groups or categories of persons. Such removals would therefore be considered as merely a procedural bar (*Osman v. the United Kingdom*, §§136-140).

However, the Court would require strong reasons to depart from the domestic courts’ finding as to a substantive bar to submit a claim where the highest national courts have reviewed the question while taking into account the Convention principles. Hence, on the question of applicability, Article 6 enjoys significant but not full autonomy from domestic law (*Osman*; *Roche*).

5. See also below, Section 4, Independent and impartial tribunal established by law.

2.1.2. Civil rights and obligations

The notion of civil rights and obligations is autonomous, irrespective of the domestic law definition (*Ringeisen*).

Article 6 applies irrespective of the status of the parties, and of the character of the legislation governing the determination of the dispute; what matters is the character of the right at issue, and whether the outcome of the proceedings will have a direct impact on the private-law rights and obligations (*Baraona v. Portugal*, §§38-44).

The economic nature of the right is an important but not a decisive criterion in establishing the applicability of Article 6. The existence of a financial claim among the grievances of the applicant does not necessarily make the dispute “civil” (*Panjeheighalehei v. Denmark*, dec.).

The private-law elements must be predominant over the public-law elements for an action to be qualified as “civil” (*Deumeland v. Germany*, §§59-74). At the same time, there are no elaborate criteria for a universal definition of a “civil” dispute, in contrast to the criteria for defining a “criminal offence” (*Engel*).

Civil dispute

- ▶ Any dispute between private parties, such as actions in tort, contract or family law involving the right to earn a living by engaging in a liberal profession – e.g. practising as a medic (*Koenig v. Germany*), accountant (*Van Marle*) or advocate (*H. v. Belgium*)
- ▶ Involving a right to engage in economic activity restricted by administrative regulation or withdrawal of licence – e.g. to operate taxi (*Pudas v. Sweden*) or gas-supply installation (*Benthem*), serve liquor (*Tre Traktörer AB v. Sweden*) or work a gravel pit (*Fredin v. Sweden*)
- ▶ Annulment of order for damages for improper termination of construction tender (*Stran Greek Refineries and Stratis Andreadis v. Greece*)
- ▶ Actions concerning pension entitlements, social, health and other benefits, regardless of whether these rights are derived from contractual relations, previous personal contributions or public-law provisions on social solidarity – so long as assessment of an amount of money is the object of dispute (*Salesi*).
- ▶ Actions in tort of negligence directed against police in relation to their function of crime prevention, where brought by direct victim of alleged negligence (*Osman*)

- ▶ Claims for access to information held by public authorities, where such disclosure could influence significantly the person's private career prospects (*Loiseau v. France*)
- ▶ Administrative decisions directly affecting property rights, including refusal of approval of land sale contract (*Ringeisen*), compensation claims arising from arrest warrant (*Baraona*), proceedings relating to the right to occupy one's property (*Gillow v. the United Kingdom*), expropriation of land (*Sporrong and Lönnroth v. Sweden*), building permits (*Mats Jacobsson v. Sweden*), permission to retain assets acquired at auction (*Håkansson and Sturesson v. Sweden*) or restitution (*Jasiūnienė v. Lithuania*) proceedings.
- ▶ Claims for compensation arising from unlawful detention (*Georgiadis*) or conditions of detention (*Ganci v. Italy*)
- ▶ Claims for compensation for alleged torture, including where committed by private persons or abroad (*Al-Adsani v. the United Kingdom*)
- ▶ Claims of victims of alleged crime lodged in criminal proceedings (*Saoud v. France*); rights of a widow in criminal proceedings against her (deceased) defendant (*Grădinar v. Moldova*); disciplinary proceedings in respect of a prisoner where they resulted in restriction of the right to receive family visits in prison (*Gülmez v. Turkey*) or the right to temporary leave for social reintegration (*Boulois v. Luxembourg*)

For many years, actions concerning access to services, unlawful dismissal or the reinstatement of public officials who occupied their functions as depositaries of the state power were regarded as falling outside the scope of Article 6 (*Pellegrin v. France* [GC], §§64-71). However, since the *Vilho Eskelinen and others v. Finland* [GC] judgment of 2007 (§§50-64), the Court has applied a presumption of applicability of Article 6, considering such cases as "civil" where the dispute concerns ordinary labour matters (salaries, allowances, etc.) and where the national legislation grants access to a court for such categories of dispute – even where the only access open to an applicant is to a constitutional court (*Olujić v. Croatia*, §§31-43).

No civil dispute

- ▶ Investigation by government inspectors into business takeover, despite tenuous consequences of their report on applicant's reputation (*Fayed v. the United Kingdom*)

- ▶ Investigation by government inspectors into business takeover, despite tenuous consequences of their report on applicant's reputation (*Fayed v. the United Kingdom*)
- ▶ Determination of right to occupy political office, such as sitting in legislature (*Ždanoka v. Latvia*, dec.) or becoming president (*Paksas v. Lithuania* [GC]) or mayor (*Cherepkov v. Russia*)
- ▶ Proceedings for asylum, deportation or extradition (*Slivenko v. Latvia*, dec.; *Monedero Angora v. Spain*)
- ▶ Proceedings concerning tax assessment (*Lasmane v. Latvia*, dec.), unless surcharges and penalties are involved – in the latter case Article 6 may apply under its “criminal” head (*Janosevic v. Sweden*)
- ▶ Proceedings within Evangelical Lutheran Church concerning transfer of priest to another parish, not amenable to judicial review under domestic law (*Ahtinen v. Finland*)
- ▶ Proceedings concerning internal administrative decisions of international organisation, namely European Patent Office (*Rambus Inc. v. Germany*, dec.)

2.2. Criminal charge

Key notions and principles

Applicability of Article 6 under its criminal heading entails the (non-cumulative) presence of any of the three following elements (*Engel*):

- ▶ categorisation of an alleged offence in the domestic law as criminal (the first *Engel* criterion);
- ▶ nature of the offence (the second *Engel* criterion);
- ▶ nature and degree of severity of the possible penalty (the third *Engel* criterion).

Not every decision taken by a judge in the course of criminal proceedings can be examined under the “criminal” limb of Article 6; only proceedings aimed at the determination of the criminal charge (i.e. which may result in a criminal conviction) may fall within the ambit of Article 6 under this head (*Antoine v. the United Kingdom*, dec.); thus Article 6 does not apply to proceedings in which the judge decides on the eventual pre-trial detention of a suspect (*Neumeister v. Austria*, §§22-25).⁶ By contrast, Article 6 §2 can apply in the context of proceedings which are not “criminal” – neither by their domestic characterisation nor by their nature or penalty – where those proceedings contain a declaration of guilt (in the criminal sense) of the applicant (*Vassilios Stavropoulos v. Greece*, §§31-32).

6. See also below, Chapter 8, Presumption of innocence.

2.2.1. Categorisation in domestic law

The question for the first *Engel* criterion is whether the offence is defined by the domestic legal system as criminal, disciplinary or both concurrently (*Engel*).

A clear domestic categorisation as criminal automatically brings the matter within the scope of Article 6 under the same head; however, the absence of such categorisation carries only a relative value, and then the second and third criteria are of more weight (*Weber v. Switzerland*, §§32-34).

Where the domestic law is unclear on the issue – as in *Ravnsborg v. Sweden* (§33), where the question arose about the domestic characterisation of a fine imposed for improper statements in court by a party to civil proceedings – it becomes inevitable to look at the second and third criteria only.

2.2.2. Nature of offence

This is a weightier criterion than the first one (*Weber*, §32). It entails a comparison of the domestic law and the scope of its application with other, criminal offences within that legal system (*Engel*, §§80-85).

The domestic provisions aiming to punish a particular offence are, in principle, “criminal”; in some cases, however, the aim of punishment can co-exist with the purpose of deterrence: both these objectives can be present, and are therefore not mutually exclusive (*Öztürk v. Germany*, §53).

Where the law aims to prevent an offence committed by a particular group or class of people (soldiers, prisoners, medics, etc.), there is a greater likelihood of it being regarded as disciplinary and not covered by Article 6 (*Demicoli v. Malta*, §33).

The fact that an offence is directed at a larger proportion of the population rather than a particular sector is just one of the relevant indicators usually indicating the “criminal” nature of the offence; extreme gravity is another one (*Campbell and Fell v. the United Kingdom*, §101).

At the same time, the minor nature of an offence, of itself, does not take it outside the ambit of Article 6; the “criminal” nature does not necessarily require a certain degree of seriousness (*Öztürk*, §53).

Offence of a criminal nature

- ▶ Administrative fine for taking part in an unauthorised demonstration for breach of public order, relevant factors being, *inter alia*, brief custody and questioning of applicant by investigators leading to imposition of fine, and jurisdiction of criminal chambers of domestic court to hear case (*Ziliberberg*)
- ▶ Reprimand of prisoners for gross personal violence to prison officers and mutiny in prison context (albeit not an offence under domestic criminal law); in view of proximity of offences to ordinary crimes of causing bodily harm and conspiracy, and especially grave character of accusations (*Campbell and Fell*)
- ▶ Punishment of lawyer for contempt of court following insulting remarks *vis-à-vis* judges, in view of very wide field of application of impugned law (*Kyprianou*, §31 of the Chamber judgment)
- ▶ Fine imposed on plaintiff in criminal defamation proceedings for disclosure to media of certain procedural documents about pending investigation; punishment was provided for by law for parties to proceedings who were outside the narrow group of judges and lawyers coming within “disciplinary sphere of judicial system” (*Weber*, but see also *Ravnsborg*)

Where domestic law provides for even a theoretical possibility of concurrent criminal and disciplinary liability, it is an argument in favour of classifying the offence as mixed. The mixed-nature criterion is important in cases requiring more complicated cumulative analysis, such as those relating to breaches of prison discipline (*Ezeh and Connors v. the United Kingdom*, §§103-130).

Where the facts of the case are less likely to give rise to an offence outside a particular closed context (such as military barracks or prison), that offence is more likely to be defined as disciplinary and not criminal in nature (*Ezeh and Connors*, §104-106).

While Article 6 does not apply to extradition (or deportation) proceedings, at least in theory, “the risk of a flagrant denial of justice in the country of destination ... which the Contracting State knew or should have known” may give rise to a positive obligation of the state under Article 6 not to extradite (*Mamatkulov and Askarov v. Turkey* [GC], §§81-91).

Measures imposed by the courts for the purpose of good administration of justice, such as fines, warnings or other types of disciplinary reprimand directed strictly at lawyers, prosecutors (*Weber*) and parties to court proceedings (*Ravnsborg*), are not to be considered as “criminal” in nature unless the legislation protecting the courts’ reputation is so wide that it permits the reprimanding of anyone outside the strict context of the specific proceedings – as is the case with the “contempt of court” provisions in some legal systems (*Kyprianou v. Cyprus*, §31 of the Chamber judgment; but see *Zaicevs v. Latvia*).

No criminal nature of offence

- ▶ Fine levied by court on party to civil proceedings for improper statements, to ensure good administration of justice, as parties to legal proceedings were found to be bound by “disciplinary” powers of courts (*Ravnsborg*)

2.2.3. Nature and degree of severity of penalty

The third *Engel* criterion is either to be relied upon in a cumulative way where no conclusion can be reached after the analysis of the first and second elements on their own (*Ezeh and Connors*, §§108-130), or as an alternative and ultimate criterion which may attest a “criminal” charge even where the nature of the offence is not necessarily “criminal” (*Engel*).

Criminal penalty

- ▶ Committal to disciplinary unit involving deprivation of liberty for three to four months in military disciplinary proceedings (*Engel*)
- ▶ Loss of substantive period of remission of sentence for prison mutiny (*Campbell and Fell*)
- ▶ At least seven “additional days” of custody in prison disciplinary proceedings (*Ezeh and Connors*)
- ▶ Tax surcharges in addition to unpaid tax in tax assessment proceedings, in view of punitive nature of penalty involved (*Janosevic*)
- ▶ Motoring offences punishable by fine, including causing traffic accident (*Öztürk*) or flight from scene (*Weh v. Austria*) in view of punitive nature of penalties involved

While the Court has recognised the advantages of decriminalising certain conduct – such as minor traffic offences – which do not result in a criminal record for the offender and relieve the system of administration of justice of less significant cases, states are prevented by Article 6 from arbitrarily depriving minor offenders of more ample procedural guarantees that should apply in “criminal” cases (*Öztürk*).

No criminal penalty

- ▶ Light arrest, not involving deprivation of liberty, or two-day period of strict arrest in military disciplinary proceedings (*Engel*)
- ▶ Dismissal proceedings of prosecutor accused of bribery (*Ramanauskas*, dec.)
- ▶ Dismissal of state officials under national security legislation on grounds of alleged lack of loyalty to state (*Sidabras and Džiautas v. Lithuania*, dec.)
- ▶ Fine imposed on teacher for having gone on strike (*S. v. Germany*, dec. 1984)
- ▶ Compulsory residence order restricting to a particular locality a person whose alleged mafia-type connections constituted a threat to public order (*Guzzardi*)
- ▶ Civil recovery (of illicit assets) proceedings having no punitive or deterrent effect do not involve determination of “criminal charge”, and thus Article 6 under its criminal limb is inapplicable (*Walsh v. the United Kingdom*)

This element implies assessment of the maximum possible penalty rather than the actual penalty imposed in the circumstances (*Ezeh and Connors*).

The penalty needs to be punitive rather than merely deterrent to be classified as “criminal”; in view of the punitive nature of the penalty involved, the possible degree of severity (amount) of the penalty becomes irrelevant (*Öztürk*).

A penalty related to deprivation of liberty as a sanction, even of a relatively short duration, almost automatically makes the proceedings “criminal”. In *Zaicevs v. Latvia* (§§31-36) three days of “administrative detention” for contempt of court was regarded as placing the offence in the criminal sphere (see also *Menesheva v. Russia*, §§94-98).

2.3. Applicability to pre-trial investigation, appeal, constitutional and other review proceedings

In cases concerning a “criminal charge”, the protection of Article 6 starts with an official notification of suspicion against the person (*Eckle v. Germany*, §§73-75), or practical measures, such as a search, when the person is first substantially affected by the “charge” (*Foti v. Italy*, §§52-53). Where persons are questioned by the police in circumstances which imply that the police consider them as potential suspects, and their answers are later used against them at the trial, Article 6 is applicable to this questioning as well, even though the persons have not the formal status of suspect or accused (*Aleksandr Zaichenko v. Russia*, §§41-60).

Article 6 applies where the higher court deals only with questions of law (and not fact and law), and even if it can eventually only quash or confirm the lower decision rather than adopt a new judgment (*Delcourt*, §§23-26). However, not all the guarantees of Article 6 apply at the appellate stage in the same manner as before the trial court. If the personal presence of a party was secured before the trial court, their appearance before the court of appeal may not be necessary, for example, provided that their lawyer is present and/or there is no need to re-examine facts or decide on the applicant’s personality and character (*Sobolewski (No. 2) v. Poland*, §§37-44).

The manner in which Article 6 applies at various appeal stages depends on the special factors of the proceedings concerned; account has to be taken of the entirety of proceedings in the domestic legal order – therefore, deficiencies at one stage may be compensated for at another stage (*Dallos v. Hungary*, §§47-53). However, the Court is now starting to pay more attention to incidents at certain crucial moments in the proceedings, such as the absence of effective legal representation during the first questioning of the suspect (*Panovits*, §§66-77) or at the final stage of the trial (*Güveç v. Turkey*, §§125-133), these situations presenting exceptions to the “trial as a whole” approach.

Article 6 covers the whole of the trial in both civil and criminal cases, including the determination of the damages and sentence, even where the question of sentencing has been delegated to the executive (*T. and V. v. the United Kingdom*, §§106-110).

However, it does not apply to various proceedings incidental to the determination of the “criminal charge”, which take place after the conviction and sentence have become effective (*Delcourt*), such as:

- ▶ application for release on probation or parole (*X v. Austria*, dec., 1961);
- ▶ request for retrial (*Franz Fischer v. Austria*, dec.);

- ▶ request for reduction of the sentence (*X v. Austria*, dec., 1962);
- ▶ proceedings determining in which prison the sentence is to be served (*X v. Austria*, dec., 1977);
- ▶ recall of a prisoner conditionally released (*Ganusauskas v. Lithuania*, dec.)

Article 6 is inapplicable to proceedings before constitutional courts, as long as the constitutional courts decide on the compatibility of the legislation *in abstracto* (*Valašinas v. Lithuania*, dec.). However, Article 6 may apply where the decision of a constitutional court is capable of affecting the outcome of a dispute to which Article 6 applies (*Olujić*, §§31-43).

Article 6 is inapplicable to unsuccessful attempts to re-open criminal or civil proceedings on the basis of new facts or by way of extraordinary or special review procedures on points of law (*Tumilovich v. Russia*, dec). However, once a case has been re-opened or the extraordinary review granted, the guarantees of Article 6 will apply to the ensuing court proceedings (*Vanyan v. Russia*, §§56-58).

Chapter 3

Right to court

Key notions and principles

In order to give effect to the purpose of Article 6 and to protect rights that are “practical and effective” rather than “theoretical and illusory”, the following structural elements were developed by the Strasbourg Court as part of the wide-ranging “right to a court”:

- ▶ access to a court by way of ability to file a suit and have it determined by judicial decision (*Golder*);
- ▶ finality of court decisions (*Brumărescu*);
- ▶ timely execution of final judgments (*Hornsby*).

The right to a court is a qualified right (*Ashingdane*) and takes rather different forms in the civil and criminal spheres.

3.1. Access to court

Key notions and principles

The right of access to a court concerns four main problem areas:

- ▶ absence or lack of standing of the applicant to bring a civil claim (*Golder*) or criminal appeal (*Papon v. France*, §§90-100), or obtain a court decision (*Ganci*);
- ▶ procedural obstacles to access, such as time limits (*Hadjianastassiou v. Greece*, §§32-37) and court fees (*Kreuz v. Poland*, §§52-67);
- ▶ practical obstacles to access, such as lack of legal aid (*Airey v. Ireland*, §§22-28);
- ▶ immunities of civil defendants (*Osman*).

3.1.1. Substantive obstacles: locus standi

This is the right to submit a claim to a tribunal with the jurisdiction to examine points of fact and law relevant to the dispute before it, with a view to adopting a binding decision (*Le Compte, Van Leuven and De Meyere*, §§54-61). At the same time, Article 6 does not create substantive rights (to obtain damages, for example); a right claimed in court must have a basis in domestic legislation and the claimant should have a personal interest in the outcome of the proceedings, i.e. the case should not be moot.

The right of access to a court draws its source from the principle of international law that forbids denial of justice (*Golder*).

It applies to both “civil” and “criminal” proceedings (*Deweer*, §§48-54), and involves the right to obtain a court decision (*Ganci*).

After a long period of exclusion, the right of access to a court in administrative proceedings was also introduced (*Julin v. Estonia*).

There is a certain overlap between this right and the right to a “tribunal established by law”, insofar as they both require access to a judicial institution capable of adopting binding decisions and not merely conclusions of a recommendatory character (*Bentham*, §§40-43).

Where a decision affecting “civil” rights or a “criminal” charge is made by an administrative, disciplinary or executive body, there must be a structural right of appeal to a judicial body in the domestic law – the ability to apply for at least one stage of court review is an autonomous requirement of Article 6 (*Albert and Le Compte*, §§25-37).

At the same time, Article 6 does not provide, as such, a right to appeal to a higher court from a decision of a lower court; only where the domestic procedure provides for such a right will Article 6 apply to the superior stages of court jurisdiction – the ability to apply for two or more stages of court review is therefore a non-autonomous requirement of Article 6, depending on whether the domestic laws allow it, in principle (*Delcourt*).

The right to a reasoned decision – albeit at times examined by the European Court of Human Rights from the point of view of “fairness” of proceedings (*Hirvisaari v. Finland*, §§30-33)⁷ – falls structurally within the concept of the right to a court because it likewise requires determination of the relevant factual and legal questions raised by the applicant in a particular case (*Chevrol*, §§76-84).

7. See also below, Section 6, Fairness and judicial decision making.

The right to claim an award of pecuniary and non-pecuniary damages has been considered a constituent part of the right of access to a court in civil matters both for individual and corporate applicants (*Živilinskas v. Lithuania*, dec., where reference was made, *mutatis mutandis*, to *Comingersoll S.A. v. Portugal* [GC], §35). However, it is for the domestic courts to determine the person's entitlement to and the amount of damages; Article 6 considers only whether this question has been dealt with in an arbitrary or wholly unreasonable manner (*Živilinskas*).

The right of access to a court is qualified: it is open to states to impose restrictions on would-be litigants, as long as these restrictions pursue a legitimate aim, are proportionate and are not so wide-ranging as to destroy "the very essence of the right" (*Ashingdane*). In certain rare cases, fair-trial guarantees might require the state to apply exceptions to otherwise reasonable restrictions, for example in the case of a mentally-ill person's challenging their incapacitation (*Stanev v. Bulgaria*).

Any legal provision allowing executive discretion in restricting standing to bring a court action must make that discretion subject to judicial control (*Tinnelly*, §§72-79).

Substantive obstacles to access to court: violation

- ▶ Impossibility for prisoner accused of assault in prison to bring proceedings for defamation (*Golder*)
- ▶ Impossibility for engineer to bring action to recover his fees due to requirement that professional organisation must make a claim on his behalf (*Philis v. Greece*)
- ▶ Inability to bring appeal in cassation in criminal case unless person surrendered himself into custody (*Papon*)
- ▶ Mutually exclusive interpretations of jurisdictional rules leaving applicant in "judicial vacuum", without effective forum to hear case in court (*Bezmyannaya v. Russia*) or referring case to another court which manifestly lacks jurisdiction (*Zylkov v. Russia*, §§23-29)
- ▶ Claims before mandatory *ad hoc* arbitration body, defined in contract concluded between company and majority shareholder, whereas arbitration body had no characteristics of lawfully established tribunal (*Suda v. the Czech Republic*)
- ▶ Inability of sole shareholder and managing director of company to challenge liquidation order on company, where this right belonged only to *ad hoc* representative (*Arma v. France*)

- ▶ Rejection of petition regarding allegedly unlawful strip-search due to applicant's failure to follow mandatory alternative dispute-resolution procedure, where courts endorsed prison administration's refusal to institute proceedings without independent review (*Julin v. Estonia*)
- ▶ Inability of person in psychiatric facility to apply for restoration of his legal capacity other than through guardian or other persons directly mentioned in law (*Stanev v. Bulgaria*)

Even where Article 6 is not violated or is inapplicable, other provisions of the Convention may come into play, offering rights comparable to that of access to a court, such as the guarantees afforded to victims of crime by way of the positive obligation to protect life (*Osman*, §§115-122) and investigate death (*Paul and Audrey Edwards v. the United Kingdom*, §§69-87) under Article 2; to protect from and investigate ill-treatment under Article 3 (*Z and others v. the United Kingdom*); or to guarantee the right to an effective remedy (as a result of the limited scope of judicial review of the statutory schemes to increase air traffic in the vicinity of the applicants' homes: *Hatton v. the United Kingdom* [GC], §§116-130).

Substantive obstacles to access to court: no violation

- ▶ Limitation of standing of mental patients to bring action for damages against medical staff for acts done in negligence or bad faith – including cap on liability of medical staff where such *locus standi* was allowed (*Ashingdane*)
- ▶ Restrictions on access – due to obligation to obtain special leave from judge to bring action – in order to prevent abuse of legal proceedings by vexatious litigant (*H. v. the United Kingdom*, 1985)
- ▶ Restriction on individual access by shareholders of nationalised company – owing to requirement to elect representative of all shareholders as recognised party to proceedings – in order to avoid multiplicity of same claims (*Lithgow and Others*, but see *Philis*)
- ▶ Impossibility for Member of Parliament to require continuation of criminal proceedings against him, which had been suspended due to his parliamentary immunity (*Kart v. Turkey*)
- ▶ Requiring prisoner to pay fixed stamp duty for lodging complaint in administrative proceedings regarding conditions of detention (*Julin v. Estonia*)

3.1.2. Procedural obstacles: time limits, fees, appeal jurisdiction and other formalities

It is acceptable, in principle, to establish procedural restrictions and requirements in domestic law for the purpose of good administration of justice; they should not, however, impair the very essence of the right of access to court (*Hadjianastassiou*, §§32-37).

If a state makes provision for an appeal to a higher instance, it is entitled to lay down the conditions for such an appeal including substantive and procedural conditions, for example court fees, time limits, mandatory representation, etc. (*Stepenska v. Ukraine*).

An applicant is expected to show considerable diligence in order to comply with the procedural requirements of the domestic law, such as the time limits for appeals (*Jodko v. Lithuania*, dec).

The request for legal aid does not automatically affect the running of the time limit, imposing no duty to extend it (*Bąkowska v. Poland* §§48-55). At the same time, where practical obstacles, such as lack of legal aid, effectively prevent submission of an appeal on time, setting of a new time limit under statute – or an *ad hoc* extension of the original time limit – may be required (*Zapadka v. Poland* §§62-65).

Where domestic law gives a possibility to file an “open-ended appeal” in order to allow the appellant to comply with the time limit without having a full written copy of the contested decision, such appellant must be relieved from the requirement to specify grounds for appeal and must be enabled to do it later, once the reasons are delivered (*Krastyo Damyanov Krastev v. Bulgaria*).

It is not clear whether a right exists, as such, to be informed in a court decision of the applicable time limits for an appeal; but such a right may exist where there exist two concurrent time limits under the domestic law – such as one in regard to the appeal itself, and the another in regard to the time allowed to substantiate that appeal (*Vacher v. France*, §§22-31),⁸ or where the appeals court fails to inform an applicant of a time limit to find a new lawyer, when the former legal-aid lawyer had refused to represent the applicant on appeal (*Kulikowski v. Poland*, §§60-71).

The right to be informed about the applicable time limit might also exist when a new time frame for appeal is set automatically under domestic law

8. See also below, Section 9.1.2, Adequate time and facilities to prepare defence.

in cases where the delivery and service of the lower court decision is belated (*Żebrowski v. Poland* §§76-81). At the same time, where new time frame is not automatically set in case of belated delivery of the lower decision, information about whether an old (or new) time limit should apply is not always required (*Smyk v. Poland* §§54-65).

A detained criminal defendant may furthermore be required to show “best effort” in finding out the reasons of the court decision they intend to appeal against; there is no right, as such, to be furnished with a written decision where it is available for obtaining from the court registry (*Jodko, dec.*).⁹ Moreover, Article 6 cannot be construed as conferring on litigants an automatic right to obtain a specific form of service of court documents, such as by registered mail (*Bogonos v. Russia*). However, where domestic law clearly establishes a duty for the competent authorities to serve a court decision, leave to appeal cannot be denied to an applicant if delays are caused by the authorities in the exercise of the duty of service, even if it was theoretically possible for the applicant to learn about the lower decision from other sources (*Davran v. Turkey*, §§31-47).

Domestic procedure rules may furthermore require that an action or appeal, including its factual and legal arguments, be written by the applicant in accordance with a certain form. However, this requirement should not result in excessive formalism, and a certain inquisitorial inquiry is required from the domestic courts to rule *proprio motu* on the merits of the applicant’s arguments even if they may have not been formulated in an absolutely clear or precise manner (*Dattel (No. 2) v. Luxembourg*, §§36-47).

Procedural obstacles to access to court: violation

- ▶ Requirement to pay significant amount of money as court fee, constituting proportion of civil claim for damages against defendant, state authority (*Kreuz*, but see *Schneider v. France, dec.*)
- ▶ Inability to have time limit for appeal extended, or appeal supplemented, where written version of impugned decision with reasoning part was obtained more than one month after pronouncement of operative part, following expiry of time limit of five days allotted by law for appeal (*Hadjianastassiou*, but see also *Krastev* and *Jodko* below)
- ▶ Cassation appeal submitted in time but disallowed on ground that applicant had failed to substantiate it within required time limit, given lack of knowledge by applicant about existence of two concurrent time limits: one for lodging cassation appeal, and one for submitting reasons (*Vacher*)

9. See also below, Section 5.2.4, Public nature of court decision.

- ▶ Failure of appeal court to inform unrepresented defendant about new time limit for finding lawyer in order to lodge appeal (*Kulikowski*)
- ▶ Legal aid granted to submit cassation appeal, but assigned lawyer refusing file one day before time limit expiry – lack of possibility to ask for extension of time limit (*Zapadka v. Poland*)
- ▶ Lower court decision served 7 days (*Żebrowski v. Poland*) or 6 days (*Jędrzejczak v. Poland*) before time limit for cassation appeal was due to expire – obligation to provide information about application of new time limit (but see *Smyk* below)
- ▶ Action disallowed as it was “impossible to grasp its meaning and scope” – lack of inquiry by court *ex officio* into vaguely formulated complaint (*Dattel (No. 2) v. Luxembourg*)
- ▶ Appeal disallowed for failure of applicant to “clearly state facts” of case – facts were sufficiently established at first instance (*Liakopoulou v. Greece*)
- ▶ Requirement for civil complainant in criminal proceedings – discontinued under statute of limitations – to initiate new case before civil courts (*Atanasova v. Bulgaria*)
- ▶ Refusal of court to accept collective action in electronic format, where printed materials would have amounted to 42 million pages (*Lawyer Partners, a.s. v. Slovakia*)
- ▶ Requirement to pay fee from successful party to obtain written reasoned copy of judgment (*Cakir v. Turkey*)
- ▶ Conclusion by court on applicant’s waiver of right to be present at his trial due to his disruptive behaviour (*Idalov v. Russia*)¹⁰
- ▶ Denial of direct access to a court to claim restoration of legal capacity by a person declared partly incapable (*Stanev v. Bulgaria*).

Continuation of civil proceedings may be conditioned by the claimant’s fulfilling certain procedural requirements, such as personal presence. However, refusal of the court of appeal to consider an appeal where the plaintiff was absent for one day due to an illness, whereas his lawyer was present, was considered to be a “particularly rigid and heavy sanction” contrary to Article 6 § 1 (*Kari-Pekka Pietiläinen v. Finland*, §§29-35).

10. See also below, Section 5.2.1, Oral hearing and personal presence.

The requirement to pay court fees, such as stamp duty, is compatible with the right of access to a court as long as it does not impair its very essence (*Kreuz*).

A significant court fee required from a civil claimant to be paid up-front will be compatible with Article 6 when the defendant is a private person and where a link is made by law between the stamp duty and the amount of claim for pecuniary damage (*Jankauskas v. Lithuania*, dec.). But a large fee may breach the right of access to a court where it involves the state authority as a party (*Kreuz*) or where a proportion of the claim for non-pecuniary damage is required in the court fee (*Jankauskas*, dec.).

When determining whether Article 6 was infringed by excessive court fees, the Court has examined the applicant's actual ability to pay these sums in the particular circumstances of the case, as well as their chances of obtaining an exemption; therefore, even court fees that may seem relatively small may actual infringe upon access to a court (*Julin v. Estonia*, §§161-162). There is thus no objective test of a "reasonable fee" for all cases, and the test in each case is inherently subjective.

Article 6 may be breached not only in cases where a significant fee is necessary to initiate proceedings, but also where a successful party is required to pay to obtain a written reasoned copy of the judgment in its favour (*Cakir v. Turkey*, §§21-22). Although imposing a fine to avoid unnecessary claims (to prevent delays in payment of debt) pursues the aim of the proper administration of justice, such fines have to be proportionate (*Sace Elektrik Ticaret Ve Sanayi A.S. v. Turkey*, §§29-34).

Procedural obstacles to access to court: no violation

- ▶ Imposition by law, in principle, of various formal restrictions to bring action or appeal for purpose of good administration of justice, such as need to lodge appeal with proper court (*MPP "Golub" v. Ukraine*) and comply with various time limits for appeals (*Stubbings and others v. the United Kingdom*)
- ▶ Time limit for appeal missed owing to lack of best effort / due diligence by applicant to try to obtain written version of impugned decision – regardless of fact that applicant was detained at material time (*Jodko*, dec.)
- ▶ Significant amount of stamp duty representing 5% of amount claimed in pecuniary damages in defamation proceedings – but there was no stamp duty fixed in relation to amount of non-pecuniary claim (*Jankauskas*, dec.)

- ▶ Amount of court fee linked to claim for pecuniary damage, even if it was likely that claimant would receive much less than claimed due to insolvency of debtor (*Urbanek v. Austria*)
- ▶ Fines for excessive speeding required to be deposited by applicant in advance in order to allow them to be contested in court – in view of the frequency of appeals against speeding and need to prevent overloading of police courts (*Schneider, dec.*, but see also *Kreuz*)
- ▶ Lower court delivering its reasons with significant delay after deciding on operative part – as it was for applicant to show necessary diligence and lodge “open-ended appeal” within the statutory deadline (*Krastyo Damyanov Krastev v. Bulgaria*)
- ▶ Decision by lower (appellate) court served 24 days before end of the cassation time limit – setting new time limit (or informing applicant about it) not required (*Smyk v. Poland*); but see *Żebrowski* and *Jędrzejczak* above)

A civil claimant or defendant who loses a case may be required to cover the expenses of the winning party. This is not contrary to Article 6 §1 provided that the domestic courts have taken into account the financial resources of the party concerned, and the amount awarded is not prohibitive (*Collectif national d’information et d’opposition à l’usine Melox – Collectif stop Melox et Mox v. France*, §§13-16).

In principle, domestic courts are better placed to define whether or not they are competent to hear the case. Refusal of a court to accept a claim for want of territorial or substantive jurisdiction over a particular dispute would not breach the applicant’s right to a court; however, where one court refers the case to another which manifestly lacks jurisdiction, a problem with access may arise (*Zylkov v. Russia*, §§23-29).

3.1.3. Practical obstacles: lack of legal aid

There is no right, as such, to legal aid in civil matters, and an autonomous requirement to provide legal aid in civil cases arises only where (*Airey*, §26) either:

- ▶ domestic procedures compel an applicant to be represented by a lawyer before a certain (higher) stage of jurisdiction, such as a court of cassation; or
- ▶ legal aid is required by reason of the complexity of the procedure or the case.

Effective access to a court may well be achieved by free legal aid as well as by simplification of procedures allowing personal representation in civil cases (*Airey*, §26).

Additionally, where the state has created a civil legal-aid system on its own, any refusal of legal aid will be considered as an interference with access to a court (non-autonomous requirement); however, there will be no breach of this right as long as the state has set up an effective machinery to determine which cases qualify for legal aid and which do not, the Convention leaving a rather wide discretion for states to decide on the relevant categories (*Granger v. the United Kingdom*, §§43-48).

A requirement to provide legal aid in civil cases also arises where the domestic procedure compels an applicant to be represented by a lawyer before a certain (higher) level of jurisdiction (*Larin v. Russia* §§41-56).

Practical obstacles: violation

- ▶ Substantial delay in allowing prisoner access to legal advice in order to institute proceedings for personal injury (*Campbell and Fell*)
- ▶ Refusal of legal aid to impecunious applicant in divorce proceedings, where personal representation was impracticable (*Airey*, but see also *Webb* and *Granger*, below)
- ▶ Practical obstacles facing applicant in suing lawyer after a number of legal-aid lawyers withdrew from case, unwilling to participate in suit against colleague (*Bertuzzi v. France*)

Practical obstacles: no violation

- ▶ Refusal of legal aid in civil case for lack of prospect of success or frivolous or vexatious nature of claim (*Webb*, dec.)
- ▶ Statutory exclusion of certain types of civil disputes from legal-aid scheme (*Granger*)
- ▶ Imposition of small fines to discourage vexatious litigants from filing frivolous demands for rectification in judgments (*Toyaksi and others v. Turkey*)

Systems of mandatory legal representation before the highest courts – in which unrepresented persons cannot appeal to the upper level of jurisdiction – are not, as such, contrary to Article 6 §1 (*Webb v. the United Kingdom*,

dec.), but should be accompanied by procedural safeguards against arbitrariness. Thus, where a legal-aid lawyer refused to bring proceedings to the cassation court in the belief that there was little prospect of success, the lawyer's decision should have been put in writing for its reasons to be ascertained (*Staroszczyk v. Poland*, §§121-139).

3.1.4. Immunity of defendant in civil case

An absolute immunity enjoyed by certain domestic or foreign authorities from civil actions may result in violation of Article 6 (*Osman and Z and others v. the United Kingdom*); in some cases Article 6 was found to be inapplicable altogether (*Roche*).¹¹

The highest domestic courts enjoy a rather significant discretion in defining whether any such claim has a basis in domestic law and, accordingly, whether Article 6 may be deemed as applicable, while the Court will need strong reasons to depart from their conclusions (*Roche*).

Immunity of defendant: violation

- ▶ Member of Parliament benefiting from immunity in connection with statements lacking any substantial connection with parliamentary activities (*Cordova v. Italy*, but see also *A v. the United Kingdom*)
- ▶ Civil claim against Member of Parliament in connection with his public statement disallowed on ground of immunity – breach because impugned statement was made outside strict context of political / parliamentary debate (*C.G.I.L. and Cofferati*)
- ▶ Immunity enjoyed by foreign embassy in view of allegedly discriminatory dismissal, given essentially private-law contractual relationships at stake (*Cudak v. Lithuania* [GC]; *Sabeh El Leil v. France*, but see also *Fogarty*)

Where Article 6 is applicable, distinction must be made between functional immunity in respect of certain types of actions – such as immunity from a certain type of suit, for instance that accorded to the police in regard to the investigative function (*Osman*), and a more general structural immunity from legal liability, such as that enjoyed by a foreign embassy (*Fogarty*) or another state (*Al-Adsani*, §§52-67). In order to be acceptable under Article 6, the immunity

11. See also above, Section 2.1.1, Dispute over a right based in domestic law.

must by preference be functional rather than structural: the nature of the dispute rather than the legal status of the parties must determine whether the immunity is justified (*Fogarty*, §§32-39). A judgment in *Jones and Others v. the United Kingdom* (§§190-215) confirmed a trend towards a *jus cogens* exception of state immunity in civil claims against another state. However, the scope and extent of such an exception has not yet been established by the Court, while some other international authorities (International Court of Justice) did not confirm this trend.¹²

A reasonable relationship of proportionality is called for in assessing the acts alleged by the claimant on the one hand, and the need to protect a certain defendant based on a legitimate aim pursued by the state on the other (*Osman*, §147).

In assessing such proportionality, a margin of appreciation is accorded to the respondent state (*Fogarty*, §§32-39). Despite this margin, the Court is more and more eager to review various decisions of national authorities – including parliaments – on whether or not immunity is justified (see *C.G.I.L. and Cofferati v. Italy*, §§63-80, where the Court disagreed with the Italian Chamber of Deputies as to whether or not a statement by one of its members was made in the exercise of his functions as MP).

Immunity of defendant: no violation

- ▶ Immunity enjoyed by local authority from action in negligence with respect to failure to take positive action to remove certain children from care of abusive parents (*Z and others v. the United Kingdom*, but also see *Osman*).
- ▶ Immunity attaching to statements made during parliamentary debates in legislative chambers, designed to protect interests of parliament as institution, as opposed to those of individual parliamentarians (*A v. the United Kingdom*, 2002, but see also *Cordova* and *C.G.I.L. and Cofferati*).
- ▶ Immunity in the United Kingdom of foreign state from action for damages for alleged torture occurring in that country, in view, *inter alia*, of certain practical considerations, such as the impossibility of eventually obtaining execution of any possible decision (*Al-Adsani*). Similar immunity has been held to apply to officials of the relevant foreign country (*Jones and Others v. the United Kingdom*).
- ▶ Inability to sue judge for decisions taken by him in capacity of court official (*Schreiber and Boetsch*; *Esposito v. Italy*, dec.)

12. ICJ, *Germany v. Italy*, judgment of 3 February 2012.

While the Convention should “so far as possible be interpreted in harmony with other rules of international law”, including other international engagements of the respondent state, it cannot be excluded that Convention requirements may override them (*Fogarty*, §§32-39).

The proportionality test of immunity involves the balancing of the existence of competing public-interest considerations in order to prevent blanket immunities, in which respect the nature of the dispute, the analysis of what is at stake for the claimant, and the gravity of the alleged act or omission by the defendant must be taken into account (*Osman*, §151).

3.2. Finality and enforcement of court decision

Key notions and principles

- ▶ *res judicata* (*Brumărescu*);
- ▶ legal certainty (*Ryabykh v. Russia*, §§51-58);
- ▶ effectiveness (*Hornsby*).

3.2.1. Finality: *res judicata*

Res judicata means that once a civil judgment, or a criminal acquittal, has become final, it must instantly become binding and, in principle, there should be no undue risk of its being overturned (*Brumărescu*).

This right draws its source from the principle of legal certainty (*Ryabykh v. Russia*, §§51-58). The main examples of breaches of this provision involve interventions by way of extraordinary or special appeal by various highest state officials with a view to re-examining the case after the time limits for normal appeal have run out (*Brumărescu*, *Ryabykh*).

The power of higher court review should be exercised, in principle, by way of normal stages of appeal and cassation proceedings, with a limited number of instances and foreseeable time limits (*Ryabykh*; see also *OOO “Link Oil SPB” v. Russia*, dec.).

Extraordinary review must be strictly limited to very compelling circumstances, and it should not become an appeal in disguise: the mere possibility of there being two views on the subject of law is not a ground for re-examination (*Ryabykh*). However, a criminal conviction may be set aside following an extraordinary review, provided that the quashing is warranted by a serious defect in the original proceedings (*Lenskaya v. Russia*, §§36-44).

States must not influence judicial determination of a dispute by adopting new legislation. Even though a legislative intervention which predetermines the outcome of a pending case may be justified by the “compelling ground of the general interest”, in principle, financial reasons could not by themselves warrant such intervention (*Arnolin v. France*, §§73-83). At the same time, there is no breach of the principle of legal certainty if a party loses the case due to a change in the case law affecting procedural rules, which occurred while the proceedings were still under way (*Legrand v. France*, §§39-43).

A case may be re-opened on the grounds of newly discovered circumstances; however, new legislation adopted with retroactive effect cannot amount to such “circumstances” (*Maggio and others v. Italy*, §§44-50; *SCM Scanner de l'Ouest Lyonnais and others v. France*, §§29-34). Any piece of new legislation should, therefore, in principle apply only to future legal relationships.

The *res judicata* principle does not in itself require the domestic courts to follow precedents in similar cases; achieving consistency of the law may take time, and periods of conflicting case law may therefore be tolerated without undermining legal certainty. This means that two courts, each with its own area of jurisdiction, may decide similar (on facts and law) cases by arriving at divergent but nevertheless rational and reasoned conclusions (*Nejdet Şahin and Perihan Şahin*, §§61-96). However, in various cases a violation of Article 6 has been found because of inconsistencies between judicial decisions, especially where they were adopted by the same (higher) court (*Beian v. Romania (No.1)*), where the legal issue at stake was a matter of general concern to the whole of society (*Tudor Tudor v. Romania*) or where cases shared high similarities of factual circumstances in the disputes involving litigants belonging to a clearly defined group (*Ştefănică and Others v. Romania*).¹³

3.2.2. Timely enforcement of final court decision

This right is drawn from the principle of effectiveness, in order to prevent a Pyrrhic victory for the applicant in a case where no complaint is made about unfairness of the proceedings (*Hornsby*).

The state cannot cite a lack of funds as such to be an excuse for not honouring a debt incurred as a result of a judgment ordered against a state authority (*Burdov v. Russia*, §§34-38). However, the lack of funds may justify failure to enforce a final judgment against a private individual or a company (*Bobrova*

13. See also below, Section 6.3, Inconsistent domestic jurisprudence.

v. Russia, §§16-17). In such “horizontal” disputes (where the opposing parties are private), the role of the authorities is to provide a successful claimant (creditor) with reasonable assistance in enforcing the judgment in the claimant’s favour, but not guarantee its enforcement in all circumstances (*Fuklev v. Ukraine*, §§84-86). Such legal assistance must be adequate, sufficient and diligent, and it should form a legal arsenal available to an individual (*Fociac v. Romania*, *Dachar v. France*). A failure by the state to discharge obligations in this area does not necessarily lead to a violation, except in cases of deleterious effect on the enforcement proceedings (*Kunashko v. Russia*).

While the Court has acknowledged that a court-ordered obligation upon the state in purely socio-economic rights area – such as that to provide housing and utility services – might cause a longer period of enforcement, the length of the enforcement process must not be unreasonable (*Gerasimov and Others v. Russia*).¹⁴

Enforcement: violation

- ▶ Lack of payment of compensation awarded by domestic courts against social security authorities, despite execution order obtained by applicant some six years later (*Burdov*)
- ▶ Refusal by authorities to execute court judgments ordering shut-down of thermal power plants (*Okyay and others v. Turkey*)
- ▶ Failure to implement, after more than eight years, court judgment obliging authorities to award plot of land in compensation under special domestic legislation on restitution of property rights (*Jasiūnienė*, but see *Užkurėlienė*)
- ▶ Failure of authorities to provide housing and utility services as ordered by courts – doctrine of “unreasonable” delay (*Gerasimov and Others v. Russia*)
- ▶ Inaction of enforcement officers in recovery of salary arrears, while debtor (applicant’s former employer) initially had some assets but later went bankrupt (*Kunashko v. Russia*; but also see *Fociac v. Romania*)
- ▶ Failure to release applicant from detention upon acquittal (*Assanidze v. Georgia*)

14. See also below, Section 7, Trial within reasonable time.

This guarantee is autonomous from the requirements of domestic law. A breach of domestic time limits for enforcement does not necessarily mean a breach of Article 6. A delay in enforcement may be acceptable for a certain period of time, provided it does not impair the very essence of the right to a court (*Burdov*).

The criteria for assessing the appropriateness of a delay in execution of a court decision are not equivalent to the more stringent requirements of a “reasonable time”; the latter test applies only in regard to the court proceedings determining the dispute itself,¹⁵ although some elements, such as the complexity of the case and the behaviour of the parties, are relevant under both tests (*Užkurėlienė and others v. Lithuania*, §§31-37).

Since the enforcement of a court decision to award a plot of land involves more than a one-off act such as a payment of money (as in *Burdov*), substantially longer delays in execution may be acceptable under Article 6 in the former cases (*Užkurėlienė*). In different cases the Court has resorted to indicating diverse maximum time limits (6 months, 1 year, 2 years) presumed sufficient for enforcement of judgments, depending on the type of award (*Gerasimov and Others v. Russia*, §§170-171). However, the particular circumstances of a case might justify shorter time limits in cases requiring special diligence on the part of the authorities. The test of the required time limit for proper enforcement therefore remains essentially subjective.

Repeated problems with non-enforcement in regard to certain countries have been dealt with by way of a pilot judgment, whereby a systemic problem can be indicated and various measures – including legislative ones – may be required by the European Court of Human Rights to be carried out by the respondent state within a limited time frame (*Burdov (No. 2) v. Russia*, §§125-146).

Enforcement: no violation

- ▶ Delay of four years in enforcing court decision in land-restitution proceedings, in view of complexity of steps needed to be taken and somewhat ambivalent attitude of applicants / lack of their due diligence in process (*Užkurėlienė*; see also *Jasiūnienė*)
- ▶ Failure by state to pay amounts ordered in applicant’s favour by domestic courts against bankrupt private defendant (*Shestakov, dec.*)
- ▶ Long delays and partial non-enforcement of judgment against applicant’s former employer caused by latter’s resistance, while the authorities took all necessary steps to assist applicant (*Fociac v. Romania*; but also see *Kunashko v. Russia*)

15. See also below, Section 7, Trial within reasonable time.

Chapter 4

Independent and impartial tribunal established by law

Key notions and principles

This right includes three main characteristics required from a judicial body, some of them at times overlapping each other:

- ▶ tribunal “established by law” (*H. v. Belgium*);
- ▶ “independent” tribunal (*Campbell and Fell*, §§78-82);
- ▶ “impartial” tribunal (*Piersack v. Belgium*, §§30-32);

Where a professional, disciplinary or executive body does not conform with the above requirements, Article 6 will still be complied with provided the applicant subsequently has access to full judicial review on questions of fact and law (*A. Menarini Diagnostics S.R.L. v. Italy*, §§57-67).

The requirements of “impartiality”, “independence” and “establishment by law” are applicable only to judicial bodies.

Police or prosecution authorities need not be impartial, independent or lawfully established. However, where the institution of investigating judge or *juge d’instruction* exists within the criminal justice system, the requirement of impartiality may be applicable to that institution (*Vera Fernández-Huidobro v. Spain*, §§108-114); similarly, where a judicial assistant to a chief judge *de facto* performs important functions within the adjudicative process, the assistant’s personal interest in the outcome of the case may affect the impartiality of the court (*Bellizzi v. Malta*, §§57-62).

4.1. Independent tribunal established by law

4.1.1. Tribunal established by law

This provision deals, in principle, with the question whether a certain disciplinary or administrative body determining a dispute has the characteristics of a “tribunal” or “court” within the autonomous meaning of Article 6, even if it is not

termed a “tribunal” or “court” in the domestic system (*H. v. Belgium*, §§50-55). This is the only provision of Article 6 which explicitly refers back to domestic law, warranting a certain degree of inquiry into “lawfulness” from the Court. At the same time, there is a strong presumption that domestic courts know the rules of jurisdiction better, and if the matter of jurisdiction is properly discussed at the domestic level the Court would tend to agree with the domestic courts in a decision on competence to hear the case (*Khodorkovskiy (No. 2) v. Russia*, dec.).¹⁶

Tribunal established by law: violation

- ▶ Lay judges elected to sit in without statutory requirement of drawing of lots and past applicable time limits (*Posokhov v. Russia*, but see *Daktaras*, dec., for more traditional approach under this heading)
- ▶ Pending case assigned by president of court to himself and decided on same day by way of procedure lacking transparency (*DMD Group, a.s.*)
- ▶ During period while law on lay judges was abrogated and no new law adopted, lay judges actually continued to decide cases in accordance with established tradition (*Pandjikidze and others*)

The point of departure is the function of the body to determine matters in its competence on the basis of the rule of law (*Belilos v. Switzerland*, §§62-73), the latter denoting primarily the absence of unfettered discretion of the executive (*Lavents v. Latvia*, §§114-121).

The body need not be part of the ordinary judicial machinery, and the fact that it has other functions besides a judicial one does not necessarily render it outside the notion of a “tribunal” (*H. v. Belgium*). The term established by law is intended to ensure that the judicial organisation does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament.

Members of the body do not necessarily have to be lawyers or qualified judges (*Ettl v. Austria*, §§36-41).

The body must have the power to make binding decisions (*Sramek v. Austria*, §§36-42) and not merely tender advice or opinions, even if that advice is usually followed in practice (*Bentham*, §§37-44).

16. See also above, Section 3.1.1, Substantive obstacles to access to court; Section 3.1.2, Procedural obstacles to access to court.

The decisions of a “tribunal” should not be under any risk of being set aside by a non-judicial body (*Cooper v. the United Kingdom* [GC]).

Tribunal established by law: no violation

- ▶ Various professional disciplinary bodies, such as the Bar Council, despite their overlapping self-regulatory, administrative, advisory, disciplinary and adjudicative functions (*H. v. Belgium*; also see *Oleksander Volkov v. Ukraine*)
- ▶ Military and prison disciplinary bodies (*Engel*)
- ▶ Administrative bodies dealing with questions pertaining to land sale (*Ringeisen*) and land reform (*Ettl*)
- ▶ Arbitration bodies dealing with compensation for nationalisation and compulsory purchase of shares (*Lithgow and others*)
- ▶ Labour court in regard to which a government minister could decide, by way of delegated legislation, where that court should be established and what its territorial jurisdiction should be (*Zand, dec.*)
- ▶ German court trying person for genocide committed in Bosnia (*Jorgic v. Germany*)
- ▶ Specialised court established for trying corruption and organised crime offences (*Fruni v. Slovakia*)

The jurisdiction of the tribunal should be defined by statute; it is not necessary, however, that every detail of judicial organisation should be regulated by primary legislation (*Zand v. Austria, dec.*). At the same time, it is unacceptable if the position and the role of a judge is regulated only by custom (*Pandjigidze and others v. Georgia, §§103-111*).

The assessment of the notion of a “tribunal established by law” involves a more general examination of the statutory structure upon which the whole class of the bodies in question is set up; it does not, as a rule, pertain to the examination of the competence of a particular body in the circumstances of each and every case – such as the re-assessment of domestic lawfulness of the territorial or hierarchical jurisdiction of a certain court or the composition of the bench which dealt with the applicant’s grievances (*Daktaras v. Lithuania, dec.*; see also the doctrine of fourth instance).

Only in some very exceptional cases does the Court undertake to examine the notion of a “tribunal established by law” as including domestic lawfulness

of the composition of the bench; the standard of proof in this respect is very stringent, and a total absence of domestic statutory basis – rather than a mere doubt or insufficiency of competence by a particular body or its member – must be shown by the applicant (*Lavents*).

4.1.2. Independent tribunal

The notion of the independence of the tribunal somewhat overlaps with the first element (“tribunal established by law”) as it entails the existence of procedural safeguards to separate the judiciary from other powers, especially the executive (*Clarke v. the United Kingdom*, dec.). Independence is also often analysed in conjunction with “objective impartiality”, no clear distinction being made between these two aspects (*Moiseyev v. Russia*, §§175-185).¹⁷

A certain structural degree of separation of the body from the executive is required; a minister or government can never be considered an “independent” tribunal (*Bentham*).

The mere possibility of the executive being able to change a decision of the body or suspend its enforcement deprives the body of the characteristics of an “independent” tribunal (*Van de Hurk v. the Netherlands*, §§45-55). A decision of a “tribunal” should not be under any risk of being set aside by a non-judicial body (*Cooper v. the United Kingdom* [GC]).

The very fact that judges of courts of ordinary jurisdiction are appointed by an executive authority, such as a minister, or funded by way of government regulated procedures and modalities, does not itself mean that those judges will lack “independence” (*Clarke*, dec.). Under this heading, a more comprehensive analysis of the manner of appointment, the terms of office and the statutory guarantees against outside pressure is called for.

Security against removal of members of the tribunal by the executive during their term of office is a necessary corollary of their “independence”, but the irremovability need not be formally recognised in law, provided it is recognised in fact (*Campbell and Fell*).

17. See also below, Section 4.2, Impartial tribunal.

Independent tribunal: violation

- ▶ Courts martial with jurisdiction over civilians (*Incal*)
- ▶ Single police officer sitting as tribunal, in view of the theoretical subordination of this officer – albeit only on basis of appearances, not hard evidence – to superiors of police force who brought actual proceedings against applicant (*Belilos*, but under more traditional approach, question of appearances is usually considered under objective “impartiality” test)¹⁷
- ▶ Mixed court involving lay judges (“judicial assistants”) with no sufficient guarantees of independence – for instance, protection against premature termination of duties or restrictions in deciding cases involving parties on whose behalf they had been appointed (*Luka v. Romania*)
- ▶ Military tribunal where judges were appointed by and financially dependent on defendant (Ministry of Defence), in view in particular of ministry’s role in distributing housing among officers (*Miroshnik v. Ukraine*)
- ▶ Courts martial composed of military officer with no legal background and two military judges – while officer’s lack of legal knowledge was not considered problematic, his continuing service and subordination to military discipline was (*Ibrahim Gürkan v. Turkey*)
- ▶ Special commission combining investigative and adjudicative functions, conducting disciplinary proceedings against financial company (*Dubus S.A. v. France*)
- ▶ Assessors in Polish courts who could be removed from office by decision of Ministry of Justice, given no adequate guarantees protecting them against arbitrary exercise of that power by minister (*Henryk Urban and Ryszard Urban*).
- ▶ Judiciary governance body deciding dismissal of judge, composed of majority of members who were not “judges elected by their peers”, including Prosecutor General and Minister of Justice (*Oleksander Volkov v. Ukraine*)

18. See also below, Section 4.2, Impartial tribunal.

No particular term of office has been specified as a necessary minimum; the relatively short but nonetheless acceptable term of three years in a case of a prison disciplinary body is probably the lower benchmark (*Campbell and Fell*).

Judges nominated for the office but undergoing a probationary period awaiting their lifelong appointment (which usually lasts up to 5 years in some jurisdictions) have never been held by the Court to lack a feature of “independence”. Having said that, a question could be asked if the probationary period of 10 years or more would not be considered as problematic, especially where the executive authorities (minister or president) have a final say about the lifelong appointment.

A system allowing a mixed court involving professional judges and lay judges (who could be judicial assistants, court clerks, assessors etc.) will be compatible with the independence requirement only as long as sufficient guarantees as to the lay judges’ independence are afforded, including protection against premature termination of duties or restrictions in deciding cases involving parties who may have played a role in the lay judges’ appointment (*Luka v. Romania*, §§55-61). An absence of any legal qualifications of a non-professional judge (even in a military court) does not, as such, impair independence (*Ibrahim Gürkan v. Turkey*).

The Court has often stressed the importance of the appearance of independence – that is, whether an independent observer perceives the body as an “independent tribunal” (*Belilos*). Questions of appearance in a specific case are usually dealt with under the objective “impartiality” test (*Daktaras v. Lithuania*, §§30-38), but with some rare exceptions these issues have been looked at from the angle of “independence” – especially where the matters were not decided by courts of ordinary jurisdiction but by specialised tribunals (*Belilos*).

The procedure of appointing judges to sit on the bench in a particular case may also cast doubt on their independence. In *Moiseyev* (§§175-185) the Court found a breach of the “independence” and “impartiality” requirements because the composition of the court was modified (by decision of the court president) eleven times, while only on two occasions were reasons given for such modification. In another case *DMD Group, a.s.* (§§62-72), a very similar situation was analysed under the heading of “tribunal established by law”.

A tribunal composed of professional seconded foreign judges represents an additional guarantee against outside pressure. A short term of their office also does not cast doubt on their independence (*Maktouf and Damjanović v. Bosnia and Herzegovina* §§48-52).

Independent tribunal: no violation

- ▶ Industrial tribunal, despite implementation of its decision being subject to executive discretion (*Van de Hurk*)
- ▶ Prison disciplinary body whose members were appointed by minister, but not subject to any instructions as to their adjudicatory role (*Campbell and Fell*)
- ▶ Compensation tribunal, two members of which were appointed by minister – himself respondent in impugned proceedings – where parties were consulted prior to and made no disagreement as to appointment of those two members (*Lithgow and others*)
- ▶ Specialised land tribunal involving civil servants under statutory obligation to act independently (*Ringeisen*)
- ▶ Military tribunal with jurisdiction over parties who were members of military (*Incal v. Turkey*; but compare with *Miroshnik v. Ukraine*)
- ▶ Mixed court martial involving civil judge, accused being entitled to object to certain appointments to that body and appeal to higher court (*Cooper v. the United Kingdom*)
- ▶ Tribunal composed of professional foreign judges seconded from their respective countries for short periods of time (*Maktouf and Damjanović v. Bosnia and Herzegovina*)

Funding received by the courts from the executive budgetary channels does not, in itself, give reason to doubt their independence, unless, in cases where the state is a defendant, it is possible to establish a causal link between the funds received by the court and the specific case (*Porubova v. Russia*, dec.).

Where the independence and impartiality of a court president are questioned, there would be no breach of Article 6 §1 if the president did not participate personally in the examination of the case and did not give specific instructions on application of the law to other judges, even if he oversaw the implementation of strict rules of distribution of cases and assigning of rapporteurs and also played an important role in the performance assessment and disciplinary process (*Parlov-Tkalčić v. Croatia*, §§81-97).¹⁹

19. This case was examined under the heading of “impartiality”, in a similar way to *Daktaras* and other comparable cases mentioned below.

Even if a higher (appeal) court is “independent”, this cannot by itself make up for the lack of independence of the lower court, unless the higher court were to address the specific issue of independence in its decision (*Henryk Urban and Ryszard Urban*, §§47-56).

4.2. Impartial tribunal

While the notion of the “independence” of the tribunal involves a structural examination of statutory and institutional safeguards against interference in the judicial matters by other branches of power, “impartiality” entails inquiry into the court’s independence *vis-à-vis* the parties of a particular case (*Piersack*). The presence of even one biased judge on the bench may lead to a violation of the impartiality requirement, even if there are no reasons to doubt the impartiality of other (or a majority of other) judges (*Sander v. the United Kingdom*, §§18-35).

“Impartiality” is a lack of bias or prejudice towards the parties. The impartiality test exists in two forms: subjective and objective (*Piersack*).

The subjective test requires a more stringent level of individualisation/causal link, requiring personal bias to be shown by any member of the tribunal *vis-à-vis* one of the parties; subjective impartiality is presumed unless there is proof to the contrary (*Piersack*). Examples of a lack of subjective impartiality:

- ▶ public statements by a trial judge assessing the quality of the defence and the prospects of the outcome of the criminal case (*Lavents*; this case involved a finding of the presumption of innocence on these grounds), or giving negative characteristics of the applicant (*Olujić*, §§56-68);
- ▶ statement by judges in the courtroom that they were “deeply insulted” while finding the applicant lawyer guilty of contempt of court (*Kyprianou*, 118-135, where the Court also held that no separate issue under the heading of presumption of innocence arose);
- ▶ statement by an investigative judge in a decision to commit the applicant for trial that there was “sufficient evidence of the applicant’s guilt”, where that judge subsequently tried the applicant’s case and found him guilty (*Adamkiewicz v. Poland*, §§93-108).

Impartial tribunal: violation (objective test)

- ▶ Judge hearing merits of criminal case who had previously acted as investigating judge in same case (*De Cubber*)
- ▶ Trial judge who had previously taken orders extending detention on remand, by reference notably to strength of evidence against applicant (*Hauschildt*); albeit impartiality is not called into question on mere ground of having previously extended detention itself (*Perote Pellon v. Spain*)
- ▶ Judges acting both as accusers and adjudicators in summary proceedings of contempt of court (*Kyprianou*)
- ▶ Interference by superior judge who appointed chamber at cassation level and submitted *sui generis* appeal in case, albeit he did not sit in case himself (*Daktaras*)
- ▶ Participation at “supervisory review” stage by judge who had initiated review (*Svetlana Naumenko v. Ukraine*)
- ▶ Lower court instructed by letters by superior court as to what decision to adopt (*Baturlova v. Russia*)
- ▶ Judge sitting in criminal case who had formerly been head of section of prosecution department involved in case (*Piersack*)
- ▶ Pressure on judges by executive authorities to use discretionary powers to re-open proceedings (*Sovtransavto v. Ukraine*)
- ▶ Court adjudicating on legislation whose members had previously participated in drafting that statute (*Procola*, but see *Kleyn v. the Netherlands*)
- ▶ Proceedings under “lustration” law against constitutional court judge who had attempted to invalidate legislation in question in his previous capacity, coupled with straightforward criticism of his actions by “lustration commission” (*Ivanovski v. “the former Yugoslav Republic of Macedonia”*)
- ▶ Judge at higher level who had previously acted as legal counsel for applicants’ opponents in lower set of same proceedings (*Mežnarić v. Croatia*)
- ▶ Same judge participating in same set of factually and legally related civil proceedings between same parties (*Golubović v. Croatia*)

- ▶ Two judges – who had been excluded for lack of impartiality in earlier cases – examining new case involving same applicant (*Harabin v. Slovakia*)
- ▶ Same judge called upon to decide whether his interpretation of substantive law made in previous decision (in same case) was to be upheld or not (*Toziczka v. Poland*)
- ▶ Judge, previously involved in settling applicant’s husband’s financial problems with bank, examining claim against same bank (*Sigurdsson*, but see *Pullar*, dec.)
- ▶ Jury where certain members had previously made racist jokes concerning the applicant, despite fact that those damaging statements were subsequently rebutted by jury itself (*Sander*)
- ▶ Prosecutor speaking to jurors informally during trial break, coupled with presiding judge’s failure to ask jurors about nature of conversation (*Farhi*)
- ▶ Close family ties (uncle–nephew) between judge and lawyer of opposite party (*Micallef v. Malta*)
- ▶ Extremely virulent press campaign surrounding trial of two minor co-accused, coupled with lack of effective participation by these defendants (*T. and V. v. the United Kingdom*)¹⁹
- ▶ Higher court declining to quash lower decision on ground that first-instance judge was biased (*Alenka Pečnik v. Slovenia*)

The objective test of impartiality necessitates a less stringent level of individualisation/causal link and, accordingly, a less serious burden of proof for the applicant. An appearance of bias, or a legitimate doubt as to the lack of bias, is sufficient from the point of view of “an ordinary reasonable observer” (*Piersack*). By contrast with the subjective test, an allegation of lack of objective impartiality creates a positive presumption for the applicant’s allegation of bias that can only be rebutted by the respondent state if sufficient procedural safeguards are shown which exclude any such legitimate doubt (*Salov v. Ukraine*, §§80-86; *Farhi v. France*, §§27-32).

Legitimate doubts as to the impartiality may appear as a result of previous employment of a judge with one of the parties (*Piersack*), intertwining of

20. See also below, Section 5.2.2, Effective participation.

prosecutorial and judicial functions by the same person at different stages of the same proceedings (*De Cubber v. Belgium*, §§24-30), attempt at participation by the same judges at different levels of court jurisdiction (*Salov*), interference by a non-sitting judge (*Daktaras*), overlap of legislative/advisory and judicial functions (*Procola*, §§41-46), family, business or other previous relations between a party and the judge (*Sigurdsson v. Iceland*, §§37-46), and the same social habits and practices such as political affiliation involving a party and the member of the tribunal (*Holm v. Sweden*, §§30-33).

A sufficiently strong causal link must be shown between the feature alleged to call into question the objective impartiality of the tribunal on the one hand, and, on the other, the facts to be assessed (*Kleyn*, §§190-202) or the persons (*Sigurdsson*) involved in the particular case. As a result, the mere affiliation by the member of the tribunal to a certain social group or association – such as belonging to the same political party or religious confession as one of the parties in the case – is not sufficient to sustain the legitimacy of the doubt under the objective test; a sufficient degree of individualisation/causal link of the alleged bias of the tribunal is necessary even under the objective test (compare, for instance, the different conclusions in similar circumstances in *Holm* and *Salaman v. the United Kingdom*, dec.; *Sigurdsson* and *Pullar v. the United Kingdom*, dec.; see the box examples).

A more significant level in individualising the legitimate doubt of the reasonable observer sometimes blurs the line between the objective and subjective tests (*Sander*, §§22-35).

The Strasbourg Court considers a breach of impartiality among the core grounds sufficient in themselves to warrant quashing of a lower decision by higher domestic courts (*Alenka Pečnik v. Slovenia* §§19-22).

Impartial tribunal: no violation

- ▶ Same judge examining case at first instance in view of referral back from appeals court (*Stow and Gai v. Portugal*)
- ▶ Members of court adjudicating on validity of legislation who had previously advised on bill leading to its adoption, but not on aspects of draft law which had reasonable link to subsequent dispute under that legislation (*Kleyn*)
- ▶ Participation in medical disciplinary tribunal of medical practitioners who were members of professional body which defendants had objected to joining (*Le Compte, Van Leven and De Meyere*)

- ▶ Where court had previously dealt in succession with similar or related cases, establishing certain trend in practice in that respect (*Gillow*)
- ▶ Same judge – who examined two unrelated but similar claims submitted by same applicant – expressing separate unfavourable opinion concerning applicant’s first dispute (*Khoniakina v. Georgia*)
- ▶ Where judge allegedly belonging to Freemasons was called upon to examine validity of will drawn up by alleged Freemason (*Salaman, dec.*; but see *Holm*)
- ▶ Where judge gave jurors full and unequivocal directions to ignore adverse media publicity about applicant (*Mustafa Kamal Mustafa (Abu Hamza) (No. 1), dec.*)
- ▶ Filming of applicant’s arrest by journalists from private television station did not breach Article 6 or amount to “virulent media campaign”, specifically in absence of any evidence that it had been instigated by authorities (*Natsvlishvili and Togonidze v. Georgia*)
- ▶ Where one of the lay judges, whose impartiality was at issue, sat on bench for short period of time and was soon removed from proceedings, in view of fact that eventual decision was taken without that lay judge (*Procedo Capital Corporation v. Norway*)
- ▶ Where judicial assistant to chief judge had earlier worked as consultant for one of parties, given lack of evidence that assistant had any relation to that particular case (*Bellizzi*)

While it has been stated, in principle, that an extremely virulent press campaign surrounding a criminal trial may adversely affect fairness of proceedings and impartiality of the jury (*Hauschildt v. Denmark*, §§45-53), and to a lesser extent the impartiality of the professional courts (*Butkevičius v. Lithuania, dec.*), a test as to what kind of positive obligation arises for the courts or other authorities in this respect has not yet been elaborated.²¹ Where a presiding judge instructs the jury to ignore the media coverage of the events and the image of the accused’s personality concocted by the press – while also issuing repeated warnings to the media to respect fairness and the presumption of innocence – no problem under Article 6 arises (*Mustafa Kamal Mustafa (Abu Hamza) (No. 1) v. the United Kingdom, dec.*, §§36-40).

21. See also below, Section 5.2.2, Effective participation.

Unequivocal declaration of guilt made by a judge before conviction serves as evidence of a violation of Article 6 §1 under the heading of subjective impartiality and also a violation of the presumption of innocence under Article 6 §2 (*Lavents; Kyprianou*).²² In most cases, however, a violation of Article 6 §2 resulting from a statement of a judge would take precedence as *lex specialis* and make an examination under Article 6 §1 unnecessary, unless the statement in question did not amount to an unequivocal declaration of guilt; in which case the examination of impartiality would be more relevant (*Kyprianou*).

Suspicion expressed in a judicial statement, the wording of which is not strong enough to amount to a violation of the presumption of innocence under Article 6 §2, may still be sufficient to disqualify the judge as biased from the objective standpoint under Article 6 §1 (*Hauschildt*) or even from the subjective standpoint where the statement is directed at some personal characteristics of the defendant and goes beyond the usual procedural requirements (*Kyprianou*).²³

A decision of a judge to refuse bail to the accused does not necessarily mean that this judge is unfit to examine the accused's case on the merits. However, where the law requires that the judge ordering detention must have a definite suspicion that the person has committed the offence imputed to him, that judge cannot sit on the bench at the trial (*Ekeberg and others v. Norway*, §§34-50). A judge ordering detention must be extremely careful in his choice of words. There is no bias if a remand judge merely describes a "state of suspicion" against the defendant. However, that judge is biased from the point of view of Article 6 if in the decision refusing bail he refers – in detail and in unequivocal terms – to the applicant's role in the crime and to the existence of sufficient evidence "proving guilt": as a result, this judge may not sit on the bench during the trial (*Chesne v. France*, §§34-40).

22. See also below, Section 8, Presumption of innocence.

23. *Ibid.*

Chapter 5

Fairness

Summary

The requirement of “fairness” is different from all the other elements of Article 6 mainly because it covers the proceedings as a whole, and the question whether a person has had a “fair” trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (*Monnell and Morris v. the United Kingdom*, §§55-70).

The notion of “fairness” is also autonomous from the way the domestic procedure construes a breach of the relevant rules and codes (*Khan*, §§34-40), with the result that a procedural defect amounting to a violation of the domestic procedure – even a flagrant one – may not in itself result in an “unfair” trial (*Gäfgen v. Germany* [GC], §§162-188); and, vice versa, a violation under Article 6 can be found even where the domestic law was complied with.

On the other hand, in the rather exceptional case of *Barberà, Messegue and Jabardo v. Spain* (§§67-89), the domestic proceedings were ruled to have been unfair because of the cumulative effect of various procedural defects – despite the fact that each defect, taken alone, would not have convinced the Court that the proceedings were “unfair”.

In accordance with the principle of subsidiarity, Article 6 does not allow the European Court of Human Rights to act as a court of fourth instance – namely to re-establish the facts of the case or to re-examine the alleged breaches of national law (*Bernard*, §§37-41), nor to rule on admissibility of evidence (*Schenk*, §§45-49). At the same time, the manner in which the evidence was obtained and used by the domestic authorities might be relevant to the conclusion regarding the overall fairness of a trial, notably when a breach of Article 3 is involved (*Jalloh v. Germany*, *Othman v. the United Kingdom*).

Article 6 establishes a very strong presumption of fact as found by the domestic courts, unless the domestic proceedings curtail the essence of the Article 6 requirements, such as in cases of entrapment (*Ramanauskas* [GC], §§48-74).

In refining its construction of a qualified right under Article 6, the Court applies a *sui generis* proportionality test, also known as the “essence of the right” test – for instance, when a different degree of protection of privilege against self-incrimination is established with regard to minor criminal offences (misdemeanours, called “administrative offences” in some European legal systems) in contrast to the rules that apply in the investigation of more serious crime (*O’Halloran and Francis*, §§43-63); or when a lower degree of protection of equality of arms was confirmed in civil cases compared to criminal ones (*Foucher*, §§29-38; to be contrasted with *Menet*, §§43-53).

“Fairness” within the meaning of Article 6 essentially depends on whether an applicant was afforded sufficient opportunities to state their case and contest the evidence that they considered false; and not with whether or not the court reached a right or wrong decision (*Karalevičius*, dec.).

Key notions and principles

Following the teleological interpretation of Article 6, “fairness” includes the following implied requirements in criminal and civil cases:

- ▶ adversarial proceedings (*Rowe and Davis*);
- ▶ equality of arms (*Brandstetter v. Austria*, §§41-69);
- ▶ presence (*Ekbatani v. Sweden*, §§24-33) and publicity (*Riepan v. Austria*, §§27-41).

“Fairness” furthermore includes additional implied requirements in criminal matters:

- ▶ entrapment defence (*Ramanauskas*);
- ▶ right to silence and not to incriminate oneself (*Saunders v. the United Kingdom*, §§67-81);
- ▶ right not to be expelled or extradited to a country where one may face a “flagrant denial of justice” (*Mamatkulov and Askarov*, §§82-91).

5.1. Adversarial principle and equality of arms

5.1.1. Adversarial principle

The requirement of “adversarial” proceedings under Article 6 entails having an opportunity to know and comment on at trial the observations filed or evidence adduced by the other party. “Adversarial” essentially means that the relevant material or evidence is made available to both parties (*Ruiz-Mateos*

v. Spain). This rather narrow understanding by the Court of “adversarial” (*adversaire*) proceedings derives from the French legal system, and does not require the creation of fully adversarial systems (or, in the criminal sphere, accusatorial systems) of presenting proof and handling evidence, similar to those existing in common-law jurisdictions. At the same time, while the Court has many times affirmed the ability of adversarial and inquisitorial legal systems to co-exist, some typical features of inquisitorial systems – for instance, in relation to the limited ability of parties to summon witnesses at trial – have nonetheless much more often given rise to breaches of the principle of “fairness” (*Vidal*, §§32-35).²⁴

While it is for the national law to lay down the rules on admissibility of evidence and it is for the national courts to assess evidence, the nature of the evidence admitted and the way in which it is handled by the domestic courts are relevant under Article 6 (*Schenk*).²⁵ Even the “risk” of use of evidence obtained by torture may result in a “flagrant denial of justice” (*Othman v. the United Kingdom*).²⁶

Access to materials of a nature “vital” to the outcome of the case must be granted (*McMichael v. the United Kingdom*, §§78-82); access to less important evidence may be restricted.

In a criminal trial, the requirement of “adversarial” proceedings under Article 6 §1 usually overlaps with the defence rights under Article 6 §3, such as the right to question witnesses. Hence, alleged violations of these provisions are usually examined in conjunction (*Bricmont v. Belgium*, §§76-93).

A more specific requirement of “adversarial” proceedings in a criminal trial requires disclosure to the defence of evidence for or against the accused; however, the right to disclosure is not absolute and may be limited to protect a secret investigative method or the identity of an agent or witness (*Edwards v. the United Kingdom*, §§33-39).

The use of confidential material may be unavoidable, for instance, where national security or anti-terrorism measures are at stake (*Khan*, §§34-40). However, whether or not to disclose materials to the defence cannot be decided by the prosecution alone. To comply with Article 6, the question of non-disclosure must be: a) put before the domestic courts at every level

24. See also below, Section 5.1.2, Equality of arms; Section 9.3, Examination of witnesses.

25. See also below, Section 6, Fairness and judicial decision making.

26. See also below, Section 5.3.3, Risk of flagrant denial of justice abroad.

of jurisdiction, b) approved by the domestic courts by way of the balancing exercise between the public interest and the interest of the defence – and only where strictly necessary (*Rowe and Davis*).

Difficulties caused to the defence by non-disclosure must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Fitt v. the United Kingdom*, §45-46). Those procedures may involve the release to the defence of a summary of the undisclosed evidence (*Botmeh and Alami v. the United Kingdom*, §§42-45).

Adversarial principle: violation

- ▶ Denial of request to make submissions in civil proceedings that applied to review of case before constitutional court (*Ruiz-Mateos*)
- ▶ Lack of access by applicants to social reports held to be “vital” in child-care proceedings (*McMichael*)
- ▶ Trial judge denied opportunity to examine confidential evidence in order to approve its non-disclosure, even if this could be remedied on appeal (*Dowsett v. the United Kingdom*)
- ▶ Failure of appeal judges to examine confidential evidence to rule on its non-disclosure (*Rowe and Davis*)
- ▶ Destruction before trial of originals of allegedly fraudulent cheques – certified copies of which served as a “crucial piece of evidence” against applicant (*Georgios Papageorgiou*)
- ▶ Failure of trial judge to order at least partial disclosure of materials which might have cast doubt on lawfulness of his wiretapping (*Mirilashvili v. Russia*)
- ▶ Significant part of case file classified “top secret” by prosecutor, defence being unable to review it otherwise than at court registry but without possibility of making copies or notes (*Matyjek v. Poland*)

The “adversarial” requirement within the meaning of Article 6 thus usually entails an analysis of the quality of the domestic procedure – such as the possibility for the defence to put arguments against non-disclosure before the courts at both first and appeal instances (*Rowe and Davis*) and the domestic courts’ obligation to carry out a balancing exercise – but not an examination of the appropriateness of the domestic courts’ decision on non-disclosure, since the Court itself is not in a position to decide on strict necessity without having sight of the secret material in question (*Fitt*).

At the same time, the strict necessity test of non-disclosure – coupled with the established restrictions on the use of other forms of secret evidence, such as anonymous witnesses (*Doorson v. the Netherlands*, §§66-83) – suggests that any non-disclosure will only be compatible with the “adversarial” requirement so long as that piece of evidence is not used to a decisive extent to found (form a basis for) the conviction (*Pesukic v. Switzerland*) or is not a crucial piece of evidence in the case (*Georgios Papageorgiou v. Greece*, §§35-40).²⁷

Where full disclosure of the material used against the defendant is impossible (for example, where it runs counter to a serious public interest, such as in the context of the fight against terrorism), the rights of the defence may be counterbalanced by the appointment of a special advocate, enabled to represent the defendant without, however, communicating to them the “secret” elements of the material the prosecution wants to withhold. At least some core information about the incriminating material should be made available both to the advocate and the accused.²⁸

The more important the secret evidence is in founding the conviction, the more likely it is that disclosure of that evidence will be required by Article 6 (*Fitt*).

Non-disclosure will not be accepted under Article 6 – even if duly reviewed by the domestic courts – where it can prevent defendants from substantiating an affirmative defence they are trying to raise, such as entrapment (*Edwards and Lewis v. the United Kingdom*, Chamber judgment of 2003, §§49-59).

Restrictions may be placed that limit the suspect’s location, dates, time limits and copy possibilities of the case file, as long as their lawyers’ access to the case file is unrestricted (*Khodorkovskiy and Lebedev v. Russia*). This is a change from the previous position of the Court, which had stipulated the unrestricted obtaining of all file document copies as an important guarantee of a fair trial (*Matyjek v. Poland*, §§59 and 63).²⁹

27. See, however, *Al-Khawaja and Tahery v. the United Kingdom*, §§120-165; and below, Section 9.3, Examination of witnesses.

28. See, in the context of the “adversarial” requirement as part of implied provisions of the right to speedy review of detention under Article 5 §4 of the Convention, *A. and others v. the United Kingdom* [GC], §§212-224; *Kurup v. Denmark* dec. mentioned below. See also below, Section 9.2, Legal representation or defence in person, for other justified restrictions on communication between a client and their lawyer.

29. See also below, Section 9.1.2, Adequate time and facilities to prepare defence; and Section 9.2, Legal representation or defence in person.

Adversarial principle: no violation

- ▶ Non-disclosure of evidence scrutinised by trial and appeal judges and forming no part of prosecution case (*Fitt*)
- ▶ Partial disclosure of secret materials to special advocate in terrorism-related proceedings, where open material available to defence was sufficiently detailed to permit applicants to defend themselves effectively (*A. and others v. the United Kingdom* [GC])
- ▶ Specific requirements placed on accused for viewing case file (i.e. presentation of documents only in specific location, prohibition on making photocopies), so long as accused's lawyers were allowed unrestricted access to case file, while he was allowed to take and keep handwritten notes (*Khodorkhovskiy and Lebedev v. Russia*)
- ▶ Temporary limitation on access to case file containing classified information, awaiting defendant counsel's security clearance (*Nikolova and Vandova v. Bulgaria*)

5.1.2. Equality of arms

"Equality of arms" requires that each party be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* another party (*Brandstetter*). The Court has stated that it is not its task to dictate the organisation of the domestic system for admission of evidence in a given member state, but rather to ensure that there are sufficient safeguards available for the defendant to have overall access to fair proceedings (*C.B. v. Austria*, §44).

Procedural rules on taking evidence and producing it at trial should not make it impossible for the defence to exercise the rights guaranteed by Article 6 of the Convention in a practical and effective manner (*Khodorkovskiy and Lebedev v. Russia*, §731 and *Matytsina v. Russia*, §187).

While "equality of arms" essentially denotes equal procedural ability to state the case, it usually overlaps with the "adversarial" requirement – the latter in accordance with the rather narrow understanding of the Court concerning the access to and knowledge of evidence³⁰ – and it is not clear on the basis of the Court's consistent case law whether these principles in fact have independent existence from each other (but see *Yvon v. France*, §§29-40).

30. See also above, Section 5.1.1, Adversarial principle.

It can safely be said that issues with non-disclosure of evidence to the defence may be analysed from the standpoints of both the requirement of adversarial character of the proceedings (ability to know and test the evidence before the judge) and the “equality of arms” guarantee (ability to know and test evidence on equal conditions with the other party).

In some civil cases it would not appear inappropriate to also look at the question of the ability to access and contest evidence as part of the general requirement of “access to a court” (*McGinley and Egan v. the United Kingdom*).³¹ In *Varnima Corporation International S.A. v. Greece* (§§28-35), for instance, the domestic courts applied two different limitation periods to the respective claims of each party (the applicant company and the state), disallowing the applicant’s claim while admitting the one filed by the authorities.

A minor inequality which does not affect fairness of the proceedings as a whole will not infringe Article 6 (*Verdú Verdú v. Spain*, §§23-29). At the same time, as a general rule, it is for the parties alone to decide whether observations filed by another participant in the proceedings call for comment, no matter what actual effect the note might have had on the judges (*Ferreira Alves (No. 3) v. Portugal*, §§35-43).

While there is no exhaustive definition as to what are the minimum requirements of “equality of arms”, there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to: a) adduce evidence, b) challenge hostile evidence, and c) present arguments on the matters at issue (*H. v. Belgium*, §§49-55).

The opposing party must not be given additional privileges to promote its view, such as the right to be present before a court while the other party is absent (*Borgers v. Belgium*, §§24-29). In this respect the “equality of arms” requirement overlaps not only with “adversarial proceedings” requirement but also with the right to personally present a case.

The fact that a similar point of view is defended at trial by a number of parties – for instance, where civil proceedings were initiated by a prosecutor – does not necessarily place the opposing party in a position of “substantial disadvantage”, but only where the other party has equal bargaining power (*Korolev (No. 2) v. Russia*). The presence of a prosecutor in civil proceedings opposing two private parties can be justified if the dispute affects also the

31. See also above, Section 3.1, Access to court.

public interest or if one of the parties belongs to a vulnerable group in need of special protection (*Batsanina v. Russia*, §§20-28). The presence of a prosecutor in a civil context can also be allowed where the prosecutor acts in defence of a large group of persons whose interests are affected by the civil wrongdoing concerned, or where notable state assets and interests are to be protected (*Menchinskaya v. Russia* §§30-40).

Equality of arms: violation

- ▶ State representative allowed to make submissions to court of cassation in absence of defence (*Borgers*)
- ▶ Unequal application of time limits for different parties to submit supplementary pleadings to cassation court (*Wynen v. Belgium*)
- ▶ Denial of access to certain evidence relied upon by opposing party in civil case, coupled with procedural privilege given to that party to be heard as expert (*Yvon*)
- ▶ More substantive procedural role enjoyed by court-appointed expert – namely police officer lacking “neutrality” with regard to accused – in comparison with expert on behalf of defence who was not allowed to attend whole hearing (*Boenisch*; but see also *Brandstetter*)
- ▶ Sudden and complete change of position given by court-appointed expert in course of same hearing which had “decisive impact” on jury’s opinion – breach because of refusal of trial court to appoint alternative expert (*G.B. v. France*; but see *Boenisch*, *Brandstetter* for the more usual approach)
- ▶ Conflict of interest between medical experts and defendant in civil case, medical institution being suspected of malpractice (*Sara Lind Eggertsdóttir*)
- ▶ False denial by one party of existence of documents that would have assisted another party (*McGinley and Egan*; overlap with “adversarial” requirement)
- ▶ Denial of access to case file at pre-trial stage of criminal proceedings on ground that applicant had chosen to represent himself, in view of requirement of domestic law to have lawyer for that task (*Foucher*; but see *Menet*)
- ▶ Practical obstacles, applicant’s lawyer having been made to wait in court lobby in late hours before being allowed to plead only early in morning of next day (*Makhfi v. France*)³¹

32. See also below, Section 9.1.2, Adequate time and facilities to prepare defence.

- ▶ Law passed subsequent to dispute in order to influence outcome of proceedings (*Stran Greek Refineries and Stratis Andreadis*; albeit breach of this sort would more typically have to be looked at from prism of “independence” of court from other branches of power)
- ▶ Refusal by court to hear applicant’s witnesses while hearing witnesses proposed by opposing party, and admitting their evidence on topic which had earlier been defined by court as “clear” (*Perić v. Croatia*)
- ▶ Admission as evidence by court of written reports of questioning of several witnesses obtained by prosecution pre-trial – but refusal to admit written statements of witnesses obtained by defence – followed by court’s refusal to summon defence witnesses in open court – violation found in combination with Article 6 §3d (*Mirilashvili v. Russia*)
- ▶ Procedural difficulties for defendant to challenge findings of prosecution experts, when such findings subsequently formed the basis of the case against her (*Matytsina v. Russia*)
- ▶ Refusal of courts to examine authenticity of documents crucial for outcome of case (*Nichifor v. Moldova*)³²
- ▶ Decision by national court not to call defence expert as witness to testify at trial due to fact that expert’s written opinion had already been added to case file (*Khodorkovskiy and Lebedev v. Russia*).
- ▶ Public prosecutor intervening at appellate stage in case where opponents were state agencies (one of which was also represented by lawyer) – despite fact that prosecutor’s intervention was not on merits but was limited to request application of statute of limitations (*Korolev (No. 2) v. Russia*)

The requirement of “equality of arms” enjoys a significant autonomy but is not fully autonomous from the domestic law since Article 6 takes into account the inherent differences of accusatorial systems – for instance, to the extent that it is for the parties to decide in that system which evidence to present or witnesses to call at trial – and inquisitorial systems, where the court decides what type and how much of the evidence is to be presented at trial. An applicant in an inquisitorial system would not be able, in principle, to rely on the “equality of arms” or Article 6 §3d requirements in order to call any or every witness to testify at trial (*Vidal*).³⁴

33. See also below, Section 6, Fairness and judicial decision making.

34. See also below, Section 9.3, Examination of witnesses.

The case law on the question of experts is rather complicated, because on the one hand they appear to be treated as any other witness (*Mirilashvili*); on the other, certain additional requirements of neutrality may be expected of the experts who play a “more substantive procedural role” than a mere witness (*Boenisch v. Austria*, §§28-35; *Brandstetter*, §§41-69).

There is no unqualified right, as such, to appoint an expert of one’s choosing to testify at trial, or the right to appoint a further or alternative expert. Moreover, the Court has traditionally considered that there is no right to demand the neutrality of a court-appointed expert as long as that expert does not enjoy any procedural privileges which are significantly disadvantageous to the applicant (*Brandstetter*).

The requirement of neutrality of official experts, however, has been given more emphasis in the Court’s recent case law, especially where the opinion of the expert plays a determining role in the proceedings (*Sara Lind Eggertsdóttir v. Iceland*, §§41-55). The right to appoint a counter-expert may appear where the conclusions of the original expert commissioned by the police trigger a criminal prosecution, and there is no other way of challenging that expert report in court (*Stoimenov v. “the former Yugoslav Republic of Macedonia”*, §§38-43). The adversarial principle and equality of arms may also apply, to a limited extent, to the process of the preparation of the expert reports (*Mantovanelli v. France*).

Equality of arms: no violation

- ▶ Prosecution at criminal trial supported by very senior prosecuting officer, Deputy Prosecutor General (*Daktaras*, dec.)
- ▶ More substantive procedural role enjoyed by court-appointed expert who was deemed “neutral”, despite being member of institution that initiated report into applicant’s business activities triggering prosecution against him (*Brandstetter*; but see *Boenisch*)
- ▶ Denial of access to case file in civil case on ground that applicant had chosen to represent himself (*Menet*, but see also *Foucher*)
- ▶ Criminal defendant not served with written submissions in which complainant merely reproduced public prosecutor’s arguments (*Verdú Verdú*)
- ▶ Prosecutor’s presence at “information meeting” with jurors where – in presence of court president and advocate – prosecutor informed jurors about rules of procedure and their role (*Corcuff v. France*)
- ▶ Prosecutor representing state in civil proceedings involving private applicant and state-owned enterprise (*Batsanina*)

- ▶ Submission by prosecutor of list of witnesses to be summoned by court, whereas defence on each occasion had to ask for court's leave to call witness (*Ashot Harutyunyan v. Armenia*)

There could be other exceptional circumstances – such as a sudden and complete change of evidence given by a court-appointed expert in the course of the same hearing – where a problem of fairness and defence rights may arise if the court does not consider calling a further expert to testify (*G.B. v. France*, §§56-70). In less exceptional situations, the court should at least give the opportunity to the parties to react to such a change in the expert testimony, for instance by adjourning the hearing.

In a criminal trial, the requirement of equality of arms under Article 6 §1 sometimes overlaps with the defence rights under Article 6 §3, such as the right to question witnesses. Hence, alleged violations of these provisions are usually examined in conjunction (*Bricmont*).

In civil cases, equality of arms may tolerate more restrictions than in criminal trials, such as a restriction on access to the case file by reference to applicants' decisions to represent themselves (*Menet, Foucher*).

While the right to legal aid in civil matters cannot be derived, as such, from the requirements of "equality of arms" or "access to a court"³⁵ in some exceptional cases a violation of Article 6 §1 has been found where impecunious civil litigants were refused legal aid to answer a defamation case as defendants against a very wealthy claimant – a multinational corporation – backed by a team of lawyers (*Steel and Morris v. the United Kingdom*).

5.2. Participation and publicity

Key notions and principles

Although the right to a "public hearing" derives from the wording of Article 6, cases in this category are usually looked at under the more general heading of "fairness" (*Ekbatani*). This element of "fairness" consists of four implied rights:

- ▶ right to an oral hearing and personal presence by a civil litigant or criminal defendant before the court (*Ekbatani*);
- ▶ right to effective participation (*T. and V. v. the United Kingdom*, §§83-89);

35. See also above, Section 3.1, Access to court.

- ▶ right to publicity, or the right for the applicant to claim that third persons and media be allowed to attend the hearing (*Riepan*);
- ▶ right to publication of the court decision (*Pretto and others v. Italy*, §§20-28).

5.2.1. Oral hearing and personal presence

The absence of a party at an oral hearing may be looked at from the point of view of the guarantee of “equality of arms” (when the other party is present) or as a breach of a specific implied guarantee of “fairness”. Two main problems arise in the latter respect, including absence of a party at hearing for practical reasons though a waiver or lack of timely notification (*Yakovlev v. Russia*, §§ 17-23), and legal obstacles whereby the law provides for written examination or the court decides in discretion to dispense with a hearing.

There is no significant distinction in the Convention case law between situations involving merely a lawyer being present (*Kremzow v. Austria*, §§45-75, although those aspects may be relevant for the purpose of Article 6 §3b and c); and cases conducted by written procedure in the parties’ total absence (*Axen v. Germany*, §§28-32). The onus of this right is in the question: in which situations does Article 6 guarantee a right for the applicant to be present personally? This presence presupposes an oral hearing (as opposed to written proceedings); however, not every oral hearing must necessarily be public.³⁶

The physical presence of parties is required: a) to collect evidence from them where they are witnesses to the events important for the case (*Kovalev v. Russia*, §§30-38); b) to give the judge an opportunity to make conclusions about the applicants’ personality, abilities, etc. (*Shtukaturov v. Russia*, §§69-76).

While there is no right, as such, to be sent documents by registered post (*Bogonos v. Russia*), an applicant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare their case and to attend the court hearing (*Mokrushina v. Russia*, §§18-24). A formal dispatch of notification letter without any confidence that it will reach the applicant in good time cannot be considered as proper notification (*Gusak v. Russia*, §§25-30). Notification received 1 day before the hearing (*Igor Vasilchenko v. Russia*) or even 3 days before it (*Zagorodnikov v. Russia*, §§18-35) cannot be considered as served in good time, since it takes away the opportunity to properly prepare

36. See also below, Section 5.2.3, Public nature of hearing: attendance by third parties and media.

for the hearing (*Yakovlev v. Russia*, §§ 18-23). In addition, notification of merely the date of a hearing may not be sufficient, where the applicant has not been present at previous hearings and when the case file contains no additional information on previous relevant steps (*Kolegovy v. Russia*, §§38-45). Even if notification is sent in advance, domestic courts should take into account the practical context (such as geography), in order to evaluate how many days of advance notification is necessary to be considered as reasonable notice (*Shandrov v. Russia*, §§27-32). In any event the domestic courts observing that one of the parties is absent must verify, on the basis of available evidence, whether they received the information about the upcoming hearing and, if not, whether the hearing must be adjourned (*Gankin and Others v. Russia*).

The right to an oral hearing should not automatically involve physical presence, and video-conferencing (with a detention facility, etc.) may be an appropriate form of ensuring it (*Vladimir Vasilyev v. Russia*, §§81-90).

There is a fully autonomous requirement for a party to be present before at least one level of court jurisdiction (*Göç v. Turkey* [GC], §§43-52). The presence requirement at first instance is thus close to absolute, even though it has been stated hypothetically that “exceptional circumstances” may justify dispensing with it (*Allan Jacobsson (No. 2) v. Sweden*, §§46-49). In minor misdemeanour cases (speeding or other road traffic offences), as long as there was no need to assess the credibility of witnesses, the Court has accepted that no oral hearing was required and the proceedings could be written (*Suhadolc v. Slovenia*, dec.), as long as the relevant issues are “highly technical” or “purely legal” (*Koottummel v. Austria*, §§18-21).

Disputes concerning benefits under the social security scheme are considered by Swedish law as “technical” disputes, dealt with in writing (*Fexler v. Sweden*, §§55-68). Having regard to the demands of efficiency and economy, systematic holding of hearings could be an obstacle to the particular diligence required in social security cases, *inter alia*, capable of ultimately preventing compliance with the “reasonable time” requirement of Article 6 (*ibid.*).

In cases where the domestic courts had already held hearings of a preparatory nature and provisionally analysed the merits of the case, it might be considered fair not to hold a main oral hearing (*Sporer v. Austria*, §§45-54).

More stringent requirements can be imposed with regard to incarcerated persons in criminal proceedings. In these types of case, firstly the domestic courts must assess whether the nature of the dispute was such as to require personal presence and adopt a reasoned decision on this point, secondly, they must notify the party of that decision, and thirdly, they must put in place the procedural

arrangements aiming to compensate for the handicap which a detainee's absence from the courtroom could create (*Yevdokimov and Others v. Russia*).

By contrast, written proceedings on appeal are generally accepted as compatible with Article 6. An oral hearing may not be required on appeal where: a) no issues with the credibility of witnesses arise, b) facts are not contested, and c) parties are given adequate opportunities to put forward their cases in writing and challenge the evidence against them. At the same time it is for the Court to define, in the last instance, whether the proceedings before the court of appeal were indeed "highly technical" or "purely legal" (*Schlumpf v. Switzerland*, §§66-70; *Igual Coll v. Spain*, §§28-38).

Oral hearing and personal presence: violation

- ▶ Applicant not present before court – single and final level of jurisdiction – reviewing validity of executive decision concerning building permit (*Allan Jacobsson (No. 2)*)
- ▶ Absence of defendant in criminal case before appeal court dealing with questions of both fact and law (*Ekbatani*)
- ▶ Defendant in criminal case not present in person during hearing of his appeal against sentence, while appeal court examined prosecution request to impose more severe sentence (*Kremzow*)
- ▶ Absence at appeals level of parent seeking access to child (*X v. Sweden*, 1959)
- ▶ Absence of disqualified doctor from first-instance hearing, not redeemed by applicant's presence at appeal level which did not fully re-examine validity of first-instance decision (*Diennet*)
- ▶ Insufficiently established waiver of right to be present by defendant who had tried to defend himself in his mother tongue (non-official language of court), despite warning by court of risk of losing right to presence on wrong language grounds (*Zana v. Turkey*)
- ▶ Acquittal by lower court in oral proceedings finding no *mens rea*, but subsequent conviction by higher court without oral hearing, given that second instance involved examination of applicant's intent and conduct going beyond facts established during trial (*Igual Coll*)
- ▶ Owing to belated notification, applicant was deprived of opportunity to attend hearing of her appeal (*Mokrushina v. Russia*)
- ▶ Notification sent 12 days before hearing to person residing 1600 km away from court, coupled with lack of legal aid (*Shandrov v. Russia*)

While Article 6 does not guarantee as such the right to appeal in civil or criminal matters, it applies to appeal proceedings through a non-autonomous rule – i.e. where the right to appeal is guaranteed under domestic law;³⁷ whether the applicant’s presence before an appeals court is required depends on: a) the nature of the proceedings and the role of the appeals court (*Ekbatani*, §§24-33), and b) what is at stake for the applicant (*Kremzow*).

According to a traditional approach of the Court, presence before an appeal court will be required where it deals with questions of both fact and law and where it is fully empowered to quash or amend the lower decision (*Ekbatani*). To date the Court has found no fault, as such, with various appeals systems functioning by way of written procedure, especially in cases where the appeals court had been granted discretion by statute to decide whether or not to hold a hearing (*Súsanna Rós Westlund v. Iceland* §§33-42; *Manner v. Finland*). In addition, a higher necessity of holding an oral hearing on appeal has been established, generally, with regard to cases pertaining to the “hard core of criminal law”, with lesser necessity of holding a hearing in “other categories of criminal cases” or, for that matter, the civil cases procedure (*Jussila v. Finland* §§29-49; *Suhadolc v. Slovenia*; *Rippe v. Germany*).

Presence before an appeal court will also be required where an applicant risks a major detriment to their situation at the appeal level, even if the appeal court deals merely with points of law (*Kremzow*), or where, for instance, the assessment of the applicant’s character or state of health is directly relevant to the formation of the appeal court’s legal opinion (*Salomonsson v. Sweden*, §§34-40). Physical presence is also required where an appeal court reverses the acquittal by the trial court and re-assesses the evidence, especially where the defendant themselves is an important source of factual evidence (*García Hernández v. Spain*, §§26-36).

In civil matters, where appeals courts are dealing with questions of law, an applicant’s presence is generally not required, provided that an applicant was already present at first instance, or waived the right (*Keskinen and Veljekset Keskinen Oy v. Finland* §§31-44). As long as questions of a legal nature are to be determined, proceedings before constitutional courts can always be conducted in writing, even where Article 6 applies to those proceedings (*Kugler v. Austria* §§35-60).

Where proceedings at first instance were held in the applicant’s absence, this may be cured at the appeal level only if the appeal court is empowered to rule on questions of both fact and law and to fully re-examine the validity of the lower court’s decision (*Diennet v. France*, §§33-35).

37. See also above, Section 3.1, Access to court; and Article 2 of Protocol No. 7.

A person can waive the right to be present but that waiver must be made in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (*Poitrimol v. France*, §§29-39).

Oral hearing and personal presence: no violation

- ▶ Domestic courts managing to “gain ‘personal impression’” of both parties during preparatory hearings, justifying holding of first-instance examination in writing (*Sporer v. Austria*)
- ▶ Defendant in criminal case not present in person (but represented by lawyer) during appeal hearing of his plea of nullity (*Kremzow*)
- ▶ Examination of appeal on points of law in civil case in absence of parties (*Axen*)
- ▶ Defendant in civil case absent, taking into consideration that he was not available at address given by plaintiffs, and could not be traced, despite efforts by domestic authorities, *inter alia* by way of newspaper announcements and police enquiries (*Nunes Dias*, dec.)

The right of presence does not, however, mean an obligation on the authorities to bring applicants to a hearing if they do not themselves show sufficient efforts to participate in the proceedings (*Nunes Dias v. Portugal*, dec.). The authorities are obliged to inform applicants about forthcoming hearings; however, Article 6 does not confer on litigants an automatic right to obtain a specific form of service of court documents, such as by registered mail (*Bogonos v. Russia*, dec.).

Trials *in absentia* will only be allowed as long as: a) the authorities made best efforts to track down the accused and inform them of forthcoming hearings, and b) accused parties retain the right to full retrial in case of their re-appearance (*Colozza v. Italy*, §§26-33; *Krombach v. France*, §§82-91).

5.2.2. Effective participation

A civil litigant or criminal defendant must be able to participate effectively in a court hearing, which must be organised to take account of their physical and mental state, age and other personal characteristics (*Stanford v. the United Kingdom*, dec.).

There is a certain overlap of this requirement with Article 6 §3b, c and e of the Convention, given that assistance by a lawyer may counterbalance the applicant’s personal inability to participate effectively (*Stanford*).

A criminal defendant must feel sufficiently uninhibited by the atmosphere of the courtroom – especially when the case is surrounded by excessive public scrutiny – in order to be able to consult with their lawyers properly and participate effectively (*T. and V. v. the United Kingdom*).³⁸

In criminal cases involving minors, specialist tribunals must be set up to give full consideration to and make proper allowance for the handicaps under which those defendants labour, and adapt their procedure accordingly (*S.C. v. the United Kingdom*, §§27-37).

The circumstances of a case may require the contracting states to take positive measures in order to enable the applicant to participate effectively in the proceedings – yet this principle appears to be limited, in principle, to the need to ensure effective communication between the client and his lawyer rather than providing any financial or practical facilities to a sick, handicapped or otherwise disadvantaged applicant (*Liebreich v. Germany*, dec.).

A person is required to bring the question of his physical or other deficiency to the attention of the trial court, and the appeals court where a full appeal is concerned, to enable the court to choose the best means of ensuring effective participation (*Timergaliyev v. Russia*, §§50-60).

When informed about a serious physical or mental impairment, the trial court must ask for a medical expert opinion to rule on the applicant's readiness to participate effectively (*Timergaliyev*).

A defendant may participate in a hearing by video-conference, but it should be justified by compelling reasons (for example, security considerations). The system should function properly to ensure confidentiality of communication between defendants and lawyers, enabling the contact which is unfettered by any practical or other obstacle (*Marcello Viola v. Italy*, §§63-77; *Golubev v. Russia*, dec.).

Effective participation: violation

- ▶ Case of 11-year-old applicants tried for murder in ordinary criminal proceedings, their situation being aggravated by excessive publicity surrounding trial and applicants' post-traumatic stress disorder (*T. and V. v. the United Kingdom*)
- ▶ Applicant with hearing deficiency not provided with hearing aid at appeals level, coupled with failure of his court-appointed lawyers to appear for appeal hearing (*Timergaliyev*; but see *Stanford*)

38. See also above, on the impact of excessive publicity surrounding a trial, Section 4.2, Impartial tribunal.

- ▶ Cumulative assessment of negative impact of trial hearings every weekday lasting all day with little or no adjournments, restricted lawyer's visits on weekends, also reduced communication with lawyer at trial through bars of metal cage in close proximity to other trial participants (*Insanov v. Azerbaijan*; but also see *Yaroslav Belousov v. Russia* and *Simon Price v. the United Kingdom*)

Effective participation: no violation

- ▶ Applicant with hearing deficiency unable to hear some of evidence given at trial due to poor acoustics in courtroom – no breach as he was seated farther from witnesses in order to ensure confidential exchange of instructions with his defence counsel (*Stanford*; but see *Timergaliyev*)
- ▶ Applicant under effect of antidepressant medication participating in trial, taking into account his ability to consult freely with lawyer (*Liebreich, dec.*)
- ▶ Communication with lawyer at trial through bars of metal cage – while placement in cage was considered violation of Article 3, it was not found to have adverse effect on fairness of proceedings (*Ashot Harutyunyan v. Armenia*; essentially same conclusions with regard to glass cages at trial in *Yaroslav Belousov v. Russia* and *Simon Price v. the United Kingdom*)

5.2.3. Public nature of hearing: attendance by third parties and media

The purposes of this rule are to protect civil litigants and criminal defendants from secret administration of justice and to ensure greater visibility of justice, maintaining the confidence of society in the judiciary (*Axen*). With the help of this provision, the media can exercise their function of public watchdog, which is also guaranteed by Article 10 of the Convention. Article 6, however, is *lex specialis* in respect of restrictions on media attendance at trials.

It is clearly a qualified right, as the wording of Article 6 §1 spells out exceptions; but presumption must always be in favour of a public hearing, and the exclusion must be strictly required by the circumstances of the case – a strict necessity test (*Campbell and Fell*, §§86-92).

Merely the “technical” character of a case is not a good reason to exclude the public (*Vernes v. France*).

In family cases involving children in particular, it is essential that the parties and witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment (*B. and P. v. the United Kingdom*, §§32-49).

While prison disciplinary cases will in most cases justify holding a hearing in camera, cases concerning fresh criminal charges against prisoners will not (*Campbell and Fell*). In prison disciplinary cases, in particular, the Court has recognised a certain margin of discretion for the authorities, in order not to place a “disproportionate burden” on them (*Campbell and Fell*).

Where a fresh criminal trial is to take place within the confines of a prison, the authorities must take special measures to ensure that the public is informed of the trial, its whereabouts and the fact that the public are entitled to attend (*Riepan*, §§25-41).

Apart from prison disciplinary cases, no proceedings should be held in camera by default; a court must individualise its decision to exclude the public even in cases involving a litigant belonging to a group sensitive to publicity: general reference to a legal provision protecting the medical secrets of patients, for instance, is not sufficient to exclude the public in a medical malpractice case, unless a reasonable link is established between the object of the particular case and the applicant’s status as member of the publicity-sensitive group (*Diennet*).

Failure to hold a public hearing at first instance will not be remedied by opening the appeal to the public, unless the appeal court has full review jurisdiction (*Diennet*). At the same time, there is no right to a public hearing on appeal where the first instance has been public, unless it is a full appeal and not merely an appeal on points of law (*Axen*).

Public hearing: violation

- ▶ Exclusion of public by default in disciplinary proceedings against doctor by general reference to risk of disclosure of medical secrets, with no account taken of fact that case concerned applicant’s general practice of appointments by correspondence, not particular file of any patient – breach because of lack of individualisation of situation by court (*Diennet*)
- ▶ Exclusion of public by default in proceedings concerning confiscation of assets of presumed *mafioso*, where proceedings were closed in accordance with statutory requirement (*Bocellari and Rizza v. Italy*)
- ▶ Closed trial on fresh charges against convicted prisoner, no steps having been taken by authorities to inform public of date and place of trial in prison (*Riepan*)
- ▶ Hearing held in high-security prison – the public were required to obtain permission to attend from prison authorities and undergo a body search (*Hummatov v. Azerbaijan*)

Public hearing: no violation

- ▶ Closed hearing of family case determining residence of children, in view of need for parties and witnesses to speak about highly personal issues (*P. and B. v. the United Kingdom*)
- ▶ Disciplinary cases against prisoners held in camera by default, in view of security and practical considerations that would make another approach impracticable and would place disproportionate burden on authorities (*Campbell and Fell*)
- ▶ Appeal on points of law heard in camera, first-instance proceedings having been public (*Axen*)

5.2.4. Public nature of court decision

There is no obligation for a court to read out its full judgment in open court, as publishing it in writing is sufficient (*Pretto and others*).

The decision must however be available for consultation in the court's registry (*Pretto and others*).

The fact that a court hearing in camera is justified under Article 6 may also imply limited access to the court decision taken in those proceedings, provided this is followed by sufficient safeguards allowing *ad hoc* requests for access by a member of the public (*P. and B. v. the United Kingdom*).

The state is not obliged to pay for making a written copy of the court judgment or to furnish the applicant with a written version of the court decision. The onus is on the applicant to show considerable diligence in their efforts to discover the reasons for the contested decision, involving enquiries to their own lawyer or the court registry, if needed (*Jodko v. Lithuania*). In this respect, the level of diligence expected from entities engaged in commercial activities may be higher than is required from a natural person (*Elcomp sp. z.o.o. v. Poland* §§40-45).³⁹

Domestic law is thus not required by Article 6 to provide for service of the decision (*Jakelaitis v. Lithuania*). Systems can be created where parties are obliged to take care of obtaining the court decision themselves. What is more, domestic courts are not obliged by Article 6, by default, to prepare detailed written grounds for their judgments (*Pietka v. Poland*). In that case, no fault was found in that the applicant did not avail of the right to request that detailed written grounds for the judgment be prepared in their entirety, including factual and legal grounds.

39. See also above, Section 3.1.2, Procedural obstacles to access to court.

Public decision: violation

- ▶ Court reading out only operative part of decision during public hearing and sending full written copy of a judgment with reasoning part exclusively to parties later on, coupled with lack of access of public to archives at court registry (*Ryakib Biryukov v. Russia*)
- ▶ Judgment unavailable at court registry or on its website, nor allowing defendant to obtain copy for considerable period of time, as a result of automatic classification of entire file as secret, coupled with no assessment of proportionality of measure by domestic courts (*Nikolova and Vandova v. Bulgaria*, §§75-85)

Public decision: no violation

- ▶ Failure to pronounce judgment of court of cassation in public hearing (*Pretto and others v. Italy*)
- ▶ Limited access by public to court's decision in child residence case – no breach as courts were entitled, however, to grant leave on request to member of public who had shown “established interest” (*P. and B. v. the United Kingdom*)
- ▶ Both trial and appeals courts justified in dispensing with public hearing, where full reasoning part of judgment could be pronounced in camera (*Welke and Bialek v. Poland*)
- ▶ Failure to deliver written version of court judgment to prison where applicant was being held, in view of established lack of due diligence / best effort by applicant to obtain that decision (*Jodko*, dec.)

5.3. Specifics of fairness of criminal proceedings

Key notions and principles

Three problem areas make up the additional implied requirements of “fairness” in criminal matters:

- ▶ entrapment defence (*Ramanauskas*);
- ▶ right to silence and not to incriminate oneself (*Saunders*);
- ▶ right not to be expelled or extradited to a country where one may face a “flagrant denial of justice” (*Mamatkulov and Askarov*).

5.3.1. Entrapment defence

The Court's case law uses the term "entrapment" (*Khudobin v. Russia*, §§128-137) interchangeably with the phrase "police incitement" (*Ramanauskas*) – the latter being derived from the French term *provocation policière* (*Teixeira de Castro v. Portugal*, §§34-39) – but these terms appear to be construed in an equivalent way for Convention purposes.

Although the Court's case law also uses, interchangeably – and somewhat confusingly – the terms "police incitement" and "incitement" in the same case, it is obvious that there is a key difference between them in the sense both of the legal status of the subject (police incitement relates to instigation of crime only in the context of an officially-run or officially-sanctioned investigation) and in terms of the factual intensity – while one offer of a bribe may amount to incitement, it does not necessarily amount to entrapment (*Miliniene v. Lithuania*, §§35-41).

First recognised in *Teixeira de Castro*, entrapment was held from the outset, and definitively, to deprive a person of the right to a fair trial (§39). The notion of entrapment was later defined in *Ramanauskas* (§55) as occurring where state agents do not confine themselves to investigating criminal activity in an "essentially passive manner" but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to provide evidence and institute a prosecution.

In *Khudobin* the Court further mentioned that all evidence obtained by entrapment must be excluded (§§133-135; see, by contrast, the usual, much more reserved approach to admissibility of other types of improper evidence in *Schenk, Khan and Bykov v. Russia* [GC], §§88-105).

While the Court's case law does not state expressly that a conviction by entrapment is a wrongful one, it can be counted as one of the rare breaches of the requirement of "fairness" that has warranted awards for pecuniary damage (loss of earnings) alongside non-pecuniary damage under Article 41 (*Ramanauskas*, §§87-88).

The protection against entrapment is of an absolute nature, as even the public interest in fighting organised crime, drug-trafficking or corruption cannot justify conviction based on evidence obtained by entrapment (*Teixeira de Castro*, §36; *Ramanauskas*, §§49-54).

The initial approach by the Court in examining entrapment is characterised by a mixed test incorporating subjective elements – asking whether the

applicant had been predisposed to commit an offence before the intervention of the undercover agents, placing the onus on the development of the target's subjective predisposition under the influence of the secret investigation – as well as objective elements, such as the existence of procedural safeguards and the intrusiveness of methods used by the law-enforcement agents exposing the failure by the police to act in an “essentially passive manner” (*Teixeira de Castro*, §§36-39).

Since the *Ramanauskas* judgment (§56), the subjective test appears to have been definitely abandoned, as the Court held it irrelevant whether the target had had a latent criminal intent – or had been “predisposed” – before the agents' intervention. The focus in *Ramanauskas* was rather on the question whether the target had “started acting upon his latent criminal intent” before the commencement of the undercover operation. There is thus no difference for entrapment purposes between the creation by the state of a criminal intent that had previously been absent, and the exposure of a latent pre-existing criminal intent. This makes the Court's approach essentially objective, focusing on the behaviour of the law-enforcement authorities to prevent the risk of crime to be committed by any reasonable person, rather than the development of the criminal intent in the mind of the particular target.

In the subsequent *Bannikova v. Russia* judgment (§§66-79), the Court proposed a two-step test, consisting of: a) a substantive element (with the objective approach), the relevant question being whether the undercover agents remained within the limits of “essentially passive” behaviour or had gone beyond them; and b) a procedural element, the question being whether the applicant had been able to raise the issue of entrapment effectively during the domestic proceedings, and how the domestic courts had dealt with that plea.

Entrapment defence: violation

- ▶ Unsupervised investigation in which two policemen procured small amount of drugs from applicant without previous criminal record, and where no good law-enforcement ground existed to carry out operation (*Teixeira de Castro*)
- ▶ Conviction of drug offences by exploiting humanitarian instincts of applicants to help those suffering from withdrawal symptoms (*Vanyan; Lagutin and Others v. Russia*)
- ▶ No good law-enforcement ground for launching investigation, applicant being incidental and not prior-defined target of drug-purchase operation (*Khudobin*)

- ▶ Conviction for attempted sale of drugs in large quantities, in view of absence of applicant's prior involvement in drug dealing and offer of sale significantly higher than market value (*Malininas v. Lithuania*)
- ▶ No relevance attached by domestic courts to role played in investigation by informant (acting privately) who had instigated bribery offence against applicant (himself prosecutor), before informing authorities and subsequently obtaining licence to act as undercover agent (*Ramanauskas*, but see *Miliniene*)
- ▶ Bribing medical professional to produce expert opinion in drunk-driving traffic case, given lack of verified information on prior involvement in similar activities and lack in scope and extent of domestic courts' review of entrapment pleas (*Nosko and Nefedov v. Russia*)
- ▶ Absence of adequate regulatory framework for covert operations, which allowed informal and spontaneous ordering and implementation of sting operations to purchase drugs (*Veselov and Others v. Russia*)
- ▶ Initiating imitation of criminal enterprise without good law-enforcement grounds (*Sepil v. Turkey*)
- ▶ Private individual under police supervision offering bribe to incite veterinarian to expedite issuance of pet vaccination certificate, given that possible ulterior motives of police informant were not investigated by authorities conducting investigation (*Sandu v. Moldova*)

The "substantive" element of the analysis leads to a re-examination by the Court of the facts of the case and the quality of domestic legal provisions regulating undercover operations. The Court's objective approach results in a rather complicated cumulative analysis of various elements involving a factual inquiry – focusing on whether the authorities created a risk that an ordinary reasonable person would commit an offence under the influence of the investigation in question – as well as a more strictly normative inquiry, preventing the authorities from using improper methods that might result in entrapment and requiring a more active role of the domestic courts in safeguarding against it (*Ramanauskas*, §§49-74; *Bannikova*). The most relevant elements to be taken into account in this respect are:

- ▶ whether the special activities by undercover agents leading to the commission of an offence were properly supervised, preferably by a judge (*Teixeira de Castro*, §§37-38);
- ▶ whether the authorities had a good law-enforcement ground to commence the investigation, such as having a specific, previously defined,

and not incidental target (*Khudobin*, §134); and furthermore, having information giving good reason to suspect the target of being involved in crime (*Teixeira de Castro*, §§37-38);

- ▶ an in-depth analysis of the reasons for the law-enforcement agencies' planning and carrying out the covert operation – and of the existence of verifiable information giving rise to those reasons – should therefore be undertaken, in order to establish the presence of “concrete and objective evidence” showing that “initial steps” had been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted (*Nosko and Nefedov v. Russia*, §52);
- ▶ whether the target had started performing criminal acts – which would have eventually formed part of the evidence against him – before the authorities' intervention (*Eurofinacom v. France*, dec.);
- ▶ whether the authorities remained “essentially passive” in the course of the investigation – to be established by looking, first and foremost, into the factual extent of the authorities' involvement (*Ramanauskas*, §71);
- ▶ where the authorities have used a privately acting informant as an agent in the course of the investigation, whether they assume responsibility in relation to that person's motives and actions, in order to prevent “privatisation of entrapment” (*Ramanauskas*, §§62-65);
- ▶ where a private informant takes the initiative to apply to the authorities complaining about the target's alleged inclination to crime, a proper verification of the absence of ulterior motives by the informant is called for (*Miliniénè*, §§37-41);
- ▶ when a private informant is used, the whole factual background should be examined, going back to the very beginning of the criminal enterprise, regardless of the stage of the official intervention by the state; while it has been stated that the authorities cannot make *ex post facto* use of results of privately-instigated crime (*Ramanauskas*, §§62-65), it remains unclear what is the permissible extent of incentives allowed by a private informant in the initial phase before the authorities' intervention, and whether that permissible extent is different (less stringent) from the one allowed in investigations carried out without the participation of private informants (*Miliniénè*, §§37-41);
- ▶ whether the authorities remained “essentially passive” may also be established by taking account of the absence of improper methods of exerting pressure employed by the law-enforcement agencies, such as:
 - blatant prompting (*Ramanauskas*, §67);

- appeals to humanitarian instincts and sense of compassion (*Vanyan*, §§46-47; *Veselov*, §92);
 - inducements targeted merely to obtain a more severe conviction (*Vanyan*); and
 - promises of excessive financial gain (*Malininas v. Lithuania*);
- ▶ offering the target inducements necessary for completing the commission of an offence – such as money in order to record the alleged practice of the target in accepting bribes – does not, as such, breach the “essentially passive” requirement of the investigation (*Miliniene*, §§37-41).

If the above “substantive” element of the analysis proves to be inconclusive (*Bannikova*), only then will the Court undertake a “procedural” overview of the applicant’s ability to raise an entrapment defence before the domestic courts, the relevant aspects to be taken into account being:

- ▶ the applicant must be enabled by the domestic law to raise the issue of entrapment during his trial, whether by means of an objection, affirmative defence or otherwise (*Ramanauskas*, §69); the courts must have the capacity to verify whether an arguable complaint of entrapment constitutes a substantive defence under domestic law, or give grounds for the exclusion of evidence obtained by entrapment; if the latter approach is taken by the domestic law, the courts must carry out a careful examination of the material in the file with a view to excluding evidence obtained by entrapment (*Khudobin*, §§133-135);
- ▶ it is incumbent upon the applicant to raise *prima facie* the entrapment defence (*Khudobin*, §69); the burden of proof then passes onto the prosecution to counter the allegations (*Ramanauskas*, §70);
- ▶ a high standard of proof is required from the prosecution to show that the applicant’s allegations of entrapment are “wholly improbable”; in case of doubt, the domestic courts must draw inferences from facts that have not been clearly specified (*Ramanauskas*, §70) but which tend to indicate a presumption of entrapment when sufficiently supported by the applicant’s *prima facie* case; it appears that the standard of proof for the prosecution lies somewhere between “the balance of probabilities” and “beyond a reasonable doubt”, reaching at least the standard of clear and convincing evidence;
- ▶ examination before the domestic courts must be “adversarial, thorough, comprehensive and conclusive” on the issue of entrapment; in assessing the entrapment plea, the domestic courts should not reach their conclusions by relying on unverified information in the exclusive possession of the prosecution (*Baltiņš v. Latvia*, §§ 63-65);

- ▶ there can be no exclusion of entrapment-related evidence on considerations of public interest or any other immunity grounds (*Edwards and Lewis v. the United Kingdom*, §§49-59);⁴⁰
- ▶ safeguards should be put in place, such as a possibility of having *ex parte* proceedings whereby the judge must determine which matters will come to the full hearing and which aspects may be relevant for the defence lawyers (*Bannikova*, § 63).

Entrapment defence: no violation

- ▶ Authorities having good reason to suspect applicant to be involved in operation and no pressure put on him to carry out drug smuggling in context of properly supervised investigation (*Sequiera*, dec.)
- ▶ Where offers by investigating officers to accept illegal prostitution services advertised by defendant (media outlet) formed only part of evidence against it; furthermore, those offers were made after defendant had already taken steps for which it was eventually prosecuted (*Eurofinacom*, dec.)
- ▶ Bribe accepted by judge which was instigated by financial inducements offered by private informant acting as undercover agent, in view of good law-enforcement grounds for commencing investigation – namely, complaint by informant about applicant’s demand of bribe, followed by proper inquiry into absence of ulterior motives by informant, and properly supervised investigation, albeit by prosecution and not by courts (*Miliniénè*, but see *Ramanauskas*)
- ▶ Police informant “joining in” and taking part in purchase of drugs, where authorities possessed recordings of applicant’s conversations with third party concerning planned deal, and in view of in-depth investigation of allegations of entrapment by domestic courts (*Bannikova*; also see *Baltiņš v. Latvia*)

5.3.2. Right to silence and privilege against self-incrimination

5.3.2.1. General principles: burden and standards of proof

The right to remain silent and not to incriminate oneself under Article 6 §1 prevents the prosecution from obtaining evidence by defying the will of

40. See also above, Section 5.1.1, Adversarial principle.

the accused not to testify against themselves. The right to silence cannot be confined to direct admission of wrongdoing, but any statement which may later be deployed in criminal proceedings in support of the prosecution case (*Aleksandr Zaichenko v. Russia*, §§52-60).

The privilege against self-incrimination does not protect from the making of an incriminating statement per se but rather against the obtaining of evidence by coercion or oppression (*Ibrahim and Others v. the United Kingdom*).

The Court's case law shows three main types of situation involving defying the will of accused persons who had decided not to testify: a) obligations to testify imposed by law under a threat of sanction (*Saunders*); this category also involves improper reversal of burden of proof when the accused is required to prove their innocence; b) coercion, which may be physical (*Jalloh v. Germany*, §§103-123; *Ashot Harutyunyan*, §§58-66) or psychological (*Gäfgen v. Germany*, §§169-188); and c) coercion by trickery involving use of covert investigation techniques (*Allan v. the United Kingdom*, §§45-53).

The standard of proof required from the prosecution to prove a criminal defendant guilty must be, as a rule, that of beyond reasonable doubt (*Barberà, Messegué and Jabardo*).

The right to silence overlaps with the presumption of innocence under Article 6 §2. Some cases have been examined under the latter heading (*Salabiaku v. France*, §§26-30), but most other cases under the first paragraph of Article 6 (*Funke v. France*, §§41-45).

The fourth-instance doctrine does not allow, as a rule, re-examination under Article 6 of the admissibility of evidence (*Schenk*), apart from exceptional cases such as those involving entrapment⁴¹ or the manifestly arbitrary admission of evidence by the domestic courts (*Osmanağaoğlu v. Turkey*, §§47-52).

While the Court's case law has rarely implied that the right to a fair trial under Article 6 is an unqualified right, the Court's actual approach – at least under the heading of the right to silence – is more qualified, usually requiring a test to establish whether or not the “essence of the right” was infringed. Under this “essence of the right” analysis, what constitutes a fair trial cannot be the subject of a single unvarying rule but depends to

41. See also above, Section 5.3.1, Entrapment defence.

a certain extent on the circumstances of the particular case. As a result, at times it involves a *sui generis* proportionality test, especially in relation to minor offences, to justify a finding of no violation of Article 6 (*O'Halloran and Francis*).

This “essence of the right” test employs three main criteria to establish whether the coercion or oppression of the will of the accused is permissible under Article 6: a) nature and degree of compulsion used to obtain the evidence; b) weight of the public interest in the investigation and punishment of the offence at issue; c) existence of any relevant safeguards in the procedure, and the use to which any material so obtained is put (*Jalloh*, §117).

As a general rule, evidence obtained by compulsion must not carry a “decisive” or “crucial” weight in the architecture of the inculpatory judgment (*Saunders*). The admission of supplementary or non-essential evidence – except where obtained by ill-treatment – may not warrant a finding of a violation of Article 6 even if that evidence was obtained in breach of domestic law (*Khan*, §§35-37) or the autonomous requirements of the Convention (*Gäfgen*).⁴²

Evidence obtained by torture will not be admissible under any circumstances, even where it does not constitute crucial or decisive key evidence against the accused, provided the fact of the torture is established by the Court (*Yusuf Gezer v. Turkey*, §§40-45).

However, exclusion of evidence obtained against the will of the accused is not always required by Article 6 where the coercion only remotely related to the inculpatory evidence on which the conviction was based. Thus, the use of material evidence discovered by the police with the help of information obtained as a result of threats of ill-treatment was not found to be contrary to Article 6 §1 where the defendant, on the strength of all evidence against him, admitted his guilt in the domestic proceedings once again at a later stage of the proceedings, and where the coercion was used not to prove the guilt but to save the victim of the crime (*Gäfgen*).

It is implied from the Court’s case law that a suspect should be notified of the right to silence and the privilege not to incriminate himself. However, should the authorities fail to do so, the fairness of the “trial as a whole” still has to be scrutinised (*Ibrahim and Others v. the United Kingdom*). Immediate access to a lawyer appears to be one of the measures capable of remedying potential unfairness in such situations (*ibid.*).

42. See also below, Section 5.3.2.3, Intrusive investigation methods.

Where a conviction is based on testimony obtained from one co-defendant – involving a serious breach of his right to silence – it may also compromise the “fairness” of proceedings in respect of another defendant (*Lutsenko v. Ukraine*, §§44-53). At the same time, in practice these types of case have been few and far between.

5.3.2.2. Statutory obligations and assumptions

The Convention, including Articles 3, 5 and 6, allows the existence of laws that impose “civic obligations”, including the duties to provide various types of information to the state under a threat of sanction. For example: to inform the police of one’s identity (*Vasileva v. Denmark*, §§32-43) – further supported by an obligation to submit to arrest without questioning police authority, failure of which may even have negative repercussions on the applicant’s complaints about the use of force under Article 3 (*Berlinski v. Poland*, §§59-65); to declare income to the tax authorities (*Allen v. the United Kingdom*, dec.); or to give evidence as a witness at a trial (*Serves v. France*, §§43-47).

While presumptions of fact and law, such as those imposed by way of statutes of strict liability, exist in most legal systems, they must be placed under reasonable limits (*Salabiaku* §28).

Under the first heading of the permissible coercion or oppression test – namely the “nature and degree of compulsion” – more attention should be paid where direct compulsion, such as the risk of a fine for a failure to testify, is involved (*O’Halloran and Francis*, §57).

More leeway was accorded under Article 6 where the police had limited scope under the law when asking the potential suspect to give precise information, such as providing the identity of a driver (*O’Halloran and Francis*, §58); conversely, in a case where the applicant was required to provide papers of “any kind of interest to the investigators” (*Funke*, §30), less leeway was given to the state.

Under the second element of the test – the “public-interest consideration” – emphasis should be placed on the severity of the offence under investigation and the nature and scope of the penalty that the offence might incur, with the result that the less severe the offence and the possible penalty, the more compulsion under Article 6 may be permitted (*O’Halloran and Francis*, §58); at the same time, if a fine is imposed outside the context of the underlying criminal proceedings, even a fine of an insignificant amount may not prevent a finding of a violation of Article 6 (*Funke*), regardless of the eventual acquittal of the original charges (*Shannon v. the United Kingdom*, §§26-40).

In relation to more severe crimes, while a civil obligation to testify at trial may be imposed on a witness for the purpose of good administration of justice (*Serves v. France*, §§43-47), the authorities should not, as a rule, expect collaboration on the part of the accused (*Funke*; *Shannon*, §§32-41), unless minor offences are involved (*O'Halloran and Francis*).

**Privilege against self-incrimination
(statutory obligations and assumptions): violation**

- ▶ Accused of various fraudulent offences and fined under administrative law for failure to: produce various financial statements (*Funke*); provide documents attesting investments (*J.B. v. Switzerland*); give interview to investigator (*Shannon*) – even though fines were imposed outside context of criminal proceedings and were insignificant in value, and regardless of eventual dropping of original charges or acquittal
- ▶ Applicant legally compelled to co-operate with government inquiry into business dealings of company, and subsequently convicted of fraud with considerable reliance on statements given during original inquiry (*Saunders*)
- ▶ Reversal of burden of proof – obligation on owner of vehicle involved in hit-and-run incident to disclose identity of driver (*Telfner*; but see *O'Halloran and Francis*).

The Court's case law concerning the permissible compulsion is rather complicated in relation to minor crimes, such as road traffic offences, where various notions of public interest – for instance, the need to ensure public safety by preventing excessive speeding – have sometimes been accorded more weight in allowing the almost complete reversal of the burden of proof against the accused (*O'Halloran and Francis*); while at other times a similar reversal has not been justified (*Telfner v. Austria*, §§15-20).

In the context of the third element of the test – namely the applicable “procedural safeguards” – the main criterion is whether the evidence was of crucial or decisive importance in founding the defendant's conviction (*Saunders*).

More scrutiny will always be attached to crimes of strict liability rather than offences that do not operate by automatic presumptions (*O'Halloran and Francis*, §59; *Salabiaku*; §§26-30).

Predictability of the legal regime making testimony obligatory – under which a person buying a car was ruled to have, in a sense, consented to an obligation to testify in relation to some road traffic offences involving his

vehicle – was also mentioned as a relevant factor in making the compulsion to testify permissible (*O'Halloran and Francis*, §§57-62), even though it is hard to see how, in the case of more serious offences, such as murder or any offences against another person, this linking of the ownership of the weapon used with the legal obligation to testify could be sustained.

In cases where the acts of a defendant may be qualified as a number of different but related offences, it is permissible to apply reversal of the burden of proof against him in relation to the ancillary offence, provided that the commission of the primary offence is proven by the accusation beyond a reasonable doubt and given that the presumption in relation to the ancillary offence is not irrefutable (*Salabiaku*).

It is further permissible for a judge to leave the jury an option to draw adverse inferences from the defendant's silence as part of the reasons supporting the conviction, provided that the judge also instructs the jury about all the prior procedural steps that may allow it to see that the reasons for the defendant's silence may be genuine and honest (*Beckles v. the United Kingdom*, §§57-66).

Many European jurisdictions have now introduced crime-prevention tools targeting proceeds of crime *in rem*, in parallel to – or as an alternative to – pursuing *in personam* criminal cases against perpetrators. The law in this type of regulation basically makes a statutory assumption of various kinds: a) “unexplained accumulation of wealth” of a public official is attributable to corruption; b) assets of an individual who has supported a criminal organisation are considered to be at the disposal of the criminal organisation (Switzerland); c) “social danger” of person convicted of certain serious offences (Italy); d) all assets acquired or expenditures made six years before a conviction (of certain serious offences) are considered proceeds of crime (Netherlands); e) “lifestyle” not commensurate with official earnings or business activities attests unlawful earnings (United Kingdom); f) presumptions based on “structured bank deposit”, deviations from regular bank transactions, transfers to insider third parties etc. (see *Riela v. Italy* (dec.), *Walsh v. the United Kingdom*, *Gogitidze and Others v. Georgia*, *Dassa Foundation v. Liechtenstein*, *Phillips v. the United Kingdom*, *Van Offeren v. the Netherlands*). While the Court has been somewhat inconsistent in determining clear scope under the Convention for examining this line of cases – dealing with them occasionally under the headings of Article 6 §1 (privilege against incrimination), Article 6 §2 (presumption of innocence), Article 7 (no punishment without law), or Article 1 of Protocol No. 1 (proportionality of interference with property rights) – the crux of the Court's attention has always been at the distribution of the burden of proof and the national court's handling of evidence in the given procedural context to prove or disprove a particular statutory assumption.

In such situations, the burden of proof may inevitably be reversed at some point – after conviction in cases of extended confiscation, or right from the outset in cases of non-conviction-based confiscation – against the suspect or third party owner to prove legitimacy of the source of their assets or expenditure. The Court does not find a problem with these novel approaches to crime prevention, in principle, as long as the “adequate procedural safeguards” are provided to the owners, including most notably clear and foreseeable standards of proof (ibid.). Hence an acceptable regime from the Article 6 standpoint includes reverse onus on the convicted person to provide proof of legitimacy of the sources of their assets for the purpose of extended confiscation in the context of a conviction in organised crime offences (*Phillips v. the United Kingdom* §§ 40-47). The same reverse onus can also be applied in calculating the amount of a fine or confiscation order by analysing the convict’s assets or even expenditure in the years leading to the offence (*Grayson and Barnham v. the United Kingdom* §§37-50).

The standard of proof required from the government to prove the illicit origin of assets for the purpose of an *in rem* confiscation order may be as low as “balance of probabilities” (ibid.), even though the majority of Convention jurisdictions opt for a more stringent standard (“beyond a reasonable doubt” or “intimate conviction” of professional judge) to obtain a domestic confiscation order, especially where criminal rather than civil process is employed. One way or the other, clarification of the standards of proof both for the government and the suspect / third party owner – regardless of the eventual regime chosen (i.e. what standard is to be applied) – appears to be a key element in providing “adequate procedural safeguards” within the meaning of Article 6 (ibid.).

There is no issue, in principle, with putting in place non-conviction-based confiscation (“civil recovery”, “administrative confiscation” etc.) regimes to forfeit assets of a suspected *mafioso* (*Riela*) or other suspect owner (*Walsh*). At the same time, even if the simultaneous application of both non-conviction-based confiscation and ordinary criminal proceedings cannot be excluded, it can be inferred from the *Saunders* case (ibid.) that any compelled information from the suspect property owner in the context of a non-conviction-based confiscation case cannot be used against them in the eventual criminal prosecution. Retroactive and extraterritorial application of *in rem* confiscation regimes is also allowed, in principle, based on the philosophy that illicit assets are never properly and lawfully “acquired” and hence must be confiscated in spite of the original source (*mutatis mutandis*, *Gogitidze and Others v. Georgia*, 12 May 2015, §§126).

At the same time, in some exceptional cases the Court has found a breach of the presumption of innocence on narrow grounds in the particular

circumstances in the case of improper handling of statutory assumptions (such as in *Geerings v. the Netherlands*, 1 March 2007).⁴³ It may thus be argued that the Court's approach to conviction-based or non-conviction-based asset-recovery regimes is not, at this stage, perfectly crystallised from the point of view of the requirements of the right to a fair trial.

**Privilege against self-incrimination
(statutory obligations and assumptions): no violation**

- ▶ Legal obligation on owners of vehicles photographed by radar to disclose details of driver at time of speeding or risk being fined – no breach in view of account taken of minor nature of offence and penalty, public interest in ensuring road safety, and fact that application of regulatory regime imposing obligation to testify might have been foreseen when buying vehicle (*O'Halloran and Francis*; but see *Telfner*)
- ▶ Fine imposed on owner of vehicle that had exceeded speed limit for misleading investigators by indicating non-existent person as driver at time of offence – no presumptions in regard to speeding offence itself held against applicant (*Weh*)
- ▶ Fine imposed on witness for refusal to testify in criminal trial of third party, justified for reasons of good administration of justice (*Serves*)
- ▶ Reversal of burden of proof against applicant caught with drugs at airport in relation to *mens rea* of offences of smuggling and importation (ancillary offences), provided that both *actus reus* and *mens rea* of possession of drugs (primary offence) had been proven beyond reasonable doubt, and given that presumption created by law in regard to ancillary offences was not irrefutable (*Salabiaku*)
- ▶ Shifting of burden of proof on to defendant for purpose of calculating amount of confiscation order in drug-trafficking case (*Grayson and Barnham v. the United Kingdom*), or requiring convicted drug-dealer to prove legitimacy of sources of his assets in order to determine amount of confiscation (*Phillips*) – in both cases defendants could prove legitimacy of their assets/expenditure by standard of balance of probabilities
- ▶ Use of “property analysis method” by application of presumption of illegitimacy of sources of assets obtained in period of few years preceding conviction – shifting burden of proof against convict who was not placed at disproportionate burden to refute prosecution allegations (*Van Offeren v. Netherlands*)

43. See also below, Section 8, Presumption of innocence.

- ▶ Confiscation of high-level officials' property which was incommensurate with their official salary levels by way of non-conviction-based confiscation (*in rem*) proceedings – Article 6 was held applicable under “civil” heading, and reversal of burden of proof against applicants was acceptable (*Gogitidze and Others v. Georgia*)

5.3.2.3. Intrusive investigation methods

The Court's traditional position has been that evidence obtained under compulsion must not carry a “decisive” or “crucial” weight in the architecture of the inculpatory judgment (*Saunders*, §§67-76). In recent years, however, the Court has tended to consider that even admission of supplementary or non-essential evidence may discredit the overall “fairness” of the proceedings, as long as that evidence was obtained by ill-treatment within the meaning of Article 3 (*Levinta v. Moldova*, §§101-106). In such cases it is immaterial whether the evidence was crucial or decisive for the conviction (*Ashot Harutyunyan*, §§58-66).

Other than a more stringent approach to the admission of inculpatory evidence obtained by ill-treatment, the case law does not indicate a substantive difference between the degree of protection when the compulsion is a result of obligations imposed by law (see section above), and practical compulsion as a result of intrusive methods of investigation (*O'Halloran and Francis*, §54).

Seriously intrusive behaviour on the part of the authorities may not necessarily breach the privilege against self-incrimination, provided there is a good law-enforcement ground and no bad faith involved, and so long as the acts in question do not amount to the most severe form of a violation of Article 3 – namely torture – even though they may amount to a lesser form of ill-treatment (*Jalloh*, §§103-123; see also *Bogumil v. Portugal*, §§43-50).

A breach of fairness can be found not only where the fact of ill-treatment is proven at the domestic level (or by the Court by way of a separate analysis), but where a serious suspicion of ill-treatment was not dismissed following domestic proceedings (*Gladyshev v. Russia*, §§76-80).

A certain degree of physical compulsion may be allowed by Article 6 to extract material, or “real” evidence, where that evidence has existence independent of the will of the accused – such as breath, urine, finger, voice, hair, tissue samples for DNA purposes – but not to extract a confession or documentary evidence nor to extract material evidence by sufficiently serious intrusion into the physical autonomy of the accused (*Jalloh*, §§103-123).

In the extraction of material evidence, such as drugs, against the will of the suspect, medical reasons and medical procedures for extraction must prevail over law-enforcement grounds in order to comply with Article 6 (*Bogumil*).

**Privilege against self-incrimination
(intrusive investigation methods): violation**

- ▶ Forced administration of emetics on applicant to extract material evidence of offence (drugs) from stomach, manner of which also breached Article 3 (*Jalloh*; but see also *Bogumil*)
- ▶ Admission of incriminating statements obtained from third party by torture rendering proceedings unfair, irrespective of whether such evidence was decisive for securing conviction (*Kaciu and Kotorri v. Albania*)
- ▶ Adverse inferences drawn by jury from defendant's silence as one of reasons for convicting him, given failure by trial judge to instruct jury on certain procedural steps before trial that might have allowed it to see that reasons for silence were genuine (*Beckles*; but see also more traditional approach to non-essential evidence in *Gäfgen*)
- ▶ Adverse inferences drawn from silence of unrepresented defendant during initial interrogation following arrest, subsequently used as basis for conviction (*John Murray*)
- ▶ Confession obtained immediately after arrest in intimidating circumstances and without right of access to lawyer (*Magee v. the United Kingdom*)
- ▶ Denial of access to lawyer (based on legislative provisions) in early questioning of terror suspect (*Salduz v. Turkey*; but see *Ibrahim and Others v. the United Kingdom*)
- ▶ Confession obtained from witness in absence of lawyer and subsequent conviction mainly on that basis (*Shabelnik*)
- ▶ Absence of possibility to contact lawyer before making "surrender and confess" statement while in police custody, where latter factor was decisive despite applicant having no formal suspect status when making confession (*Turbylev v. Russia*)
- ▶ Conviction based on statement made "under oath" by witness in police custody, without legal assistance and without proper warning about right to remain silent (*Brusco*)
- ▶ Use of private informant infiltrated as cellmate of applicant detained on remand to obtain evidence of offence of robbery, given that most of applicant's admissions were provoked by persistent questioning which informant had been trained for by investigators (*Allan*; but see *Bykov* for less stringent standards for similar trickery if carried out outside prison context)

Article 6 does not allow as evidence a confession obtained during interviews conducted in intimidating circumstances immediately following an arrest or when the accused was denied access to a lawyer (*John Murray*), unless defendants have not shown reasonable efforts/considerable diligence in availing themselves of their procedural rights while making the confession (*Zhelezov v. Russia*, dec.; *Latimer v. the United Kingdom*, dec.)⁴⁴

Restrictions by law on access to a lawyer at the very early stages of the proceedings, such as immediately following the arrest, may result in a violation of Article 6 §§1 and 3c (*Salduz v. Turkey*), especially if these restrictions contribute to an otherwise suspect factual setting being tainted by the alleged ill-treatment and subsequent confessions (*Turbylev v. Russia*).⁴⁵

It is not always clear whether a person is being questioned as a witness or a suspect, the latter having the right to silence, and the former not. In analysing such cases the Court takes into account not only the formal status of the person being questioned, but also the factual circumstances surrounding the questioning, in order to establish whether or not the person concerned could reasonably be considered as a potential suspect, in which case the right to silence may also be claimed (*Brusco v. France*, §§44-55).

No pressure to confess should be placed upon an unrepresented person even if they do not yet have the formal status of a suspect during the impugned questioning (*Shabelnik v. Ukraine*, §§51-60).

A confession obtained by threat of torture (rather than actual ill-treatment), or material evidence collected as a direct result of that confession (the concept of the “fruits of a poisonous tree”), may breach the right to silence where the confession or the material evidence played a decisive or crucial part in the inculpatory judgment (*Gäfgen*).

Convictions based on witness evidence obtained from them by torture or threats thereof may also breach Article 6 in regard to the defendant (*Osmanağaoğlu v. Turkey*, *Lutsenko*, §§44-53).⁴⁶

44. See also below, Section 9.2, Legal representation or defence in person.

45. See also below, Section 9.2, Legal representation or defence in person.

46. See also below, Section 9.3, Examination of witnesses.

Privilege against self-incrimination (statutory obligations and assumptions): no violation

- ▶ Extraction of drugs hidden in body – relevant decision taken by doctors and not police officers – which did not constitute substantial piece of evidence in case, and in view of primary obligation to protect applicant's health (*Bogumil*; but see *Jalloh*)
- ▶ Confession made under threat of torture eventually excluded from evidence by trial court – whereas some material evidence collected and used in result of impugned confession was not excluded – given that material evidence only had supplementary, non-essential influence on conviction (*Gäfgen*)
- ▶ Questioning of suspects immediately after attempted terrorist attack in urgent "safety interviews" before their having access to legal advice – concept of "compelling reasons" for restrictions coupled with adequate procedural safeguards at trial (*Ibrahim and Others v. the United Kingdom*; but see *Salduz*)
- ▶ Confession obtained immediately after arrest used as part of basis of conviction, where accused did not show best efforts / due diligence to avail himself of procedural rights, including right to lawyer (*Zhelezov, dec.*; *Latimer, dec.*)
- ▶ Use of secret recordings as additional evidence to support conviction – despite fact that evidence was obtained in breach of domestic procedure and private life requirement under Article 8 (*Schenk*; *Khan*)
- ▶ Cannabis found during partly improper search, without warrant, involving intrusion into applicant's private property, constituting decisive piece of evidence for eventual conviction (*Lee Davies*)
- ▶ Use of private informant to trick applicant into admitting organisation of murder and subsequent staging of alleged murder and to obtain further inculpatory admissions – despite fact that those admissions formed decisive piece of evidence for applicant's eventual conviction for attempted murder (*Bykov*; but see also *Allan* for more stringent standards applied to similar trickery if carried out within confines of a prison)

Secret surveillance or the use of secret recordings will not breach Article 6, even if those acts may breach the domestic law or Article 8 of the Convention, as long as evidence so obtained is not used to a decisive or crucial extent to convict the defendant (*Khan*, §§35-37).

Similarly, evidence collected as a result of a partly improper search may not be in violation of Article 6 even if it is decisive for the conviction. The crux is not the admissibility of evidence under domestic law but the procedural possibilities open to the defendant, at trial and on appeal, of contesting the way it is obtained and used (*Lee Davies v. Belgium*, §§40-54).⁴⁷

Using a private informant who tricks the accused into a confession – even if that confession forms a decisive piece of evidence in the case – will be compatible with the right to silence, as long as it is obtained in the context of public activity (*Bykov*, §§94-105; *Heglas v. the Czech Republic*, §§89-93) and not within the confines of a prison (*Allan*, §§42-47). At the same time, investigative trickery may only be used to obtain evidence of a past offence, not to create a fresh offence.⁴⁸

5.3.3. Risk of flagrant denial of justice abroad

The Court's case law has recognised that the risk of flagrant denial of a fair trial abroad imposes a positive obligation under Article 6 on a state not to expel or extradite an applicant suspected of a criminal offence (*Mamatkulov and Askarov*).

At the same time, the burden and standard of proof on the applicant to demonstrate that risk is very exacting. In *Mamatkulov and Askarov* the applicants' removal to Uzbekistan was not found to involve a breach of Article 6 by Turkey, despite the fact that the applicants were eventually convicted in Uzbekistan without having access to a lawyer and in closed proceedings.

Where an applicant faces extradition to another country which is a contracting party to the Convention, the presumption is that the person will receive a fair trial, given in particular the existence of remedies against any eventual unfairness in that country, including a possible application to the European Convention of Human Rights (*Stapleton v. Ireland*, dec.).

The Court found a violation of Article 6 under this heading, for the first time, in a deportation context in *Othman (Abu Qatada) v. the United Kingdom* §§258-287) by reference to the risk of admission of inculpatory evidence at the possible future retrial of the applicant obtained by torture of third persons in Jordan. The test of risk of flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures, such as those that might occur within a Convention state. What is required is a breach of the principles of fair trial

47. See also above, Section 5.2.1, Oral hearing and personal presence; and Section 5.2.2, Effective participation.

48. See also above, Section 5.3.1, Entrapment defence.

that is so fundamental as to amount to nullification, or destruction of the very essence, of the rights guaranteed by Article 6 (*Othman (Abu Qatada)*, §260).

The findings in *Othman (Abu Qatada)* (§§258-287) were developed in *El Haski v. Belgium* (§§90-99), which confirmed that where the judicial system of a non-Convention state offered no meaningful guarantees of an independent, impartial and serious examination of allegations of torture or inhuman and degrading treatment it would not be necessary for an applicant to show an individualised risk in their particular case and that it would be unfair to impose any higher burden of proof on them (§88).

Chapter 6

Fairness and judicial decision making

6.1. Reasoned decision

The right to a reasoned decision is rooted in a more general principle embodied in the Convention, which protects an individual from arbitrariness; the domestic decision should contain reasons that are sufficient to reply to the essential aspects of the party's factual and legal – substantive or procedural – argument (*Ruiz Torija v. Spain*, §§29-30).

Reasoned decision: violation

- ▶ Failure by domestic courts to reply to applicant's argument that appeal brought by other party in lease dispute must have been time-barred (*Ruiz Torija*)
- ▶ Failure by appeal court to determine whether applicant's trademark had been "established", first-instance court having covered that same question and having found for applicant on that basis (*Hiro Balani v. Spain*)
- ▶ Lack of elaboration in particular decision or domestic case law of notion of "exceptional circumstances" which ought to be demonstrated under law for applicant to claim re-admission to Bar after expiry of statutory limitation of 10 years (*H. v. Belgium*)
- ▶ Brevity of reasoning in deciding on applicant's entitlement to disability pension, whereby only partial disability was awarded despite fact that deteriorating state of his health was also established (*Hirvisaari*)
- ▶ "Unsafe conviction" based on results of identity parade during which defendant had been distinguished from other participants by blue mask – instead of black mask as for other participants (*Laska and Lika v. Albania*)
- ▶ Inconsistent interpretation of law by county courts sitting as courts of final instance in collective dismissal cases (*Ştefănică and others*)
- ▶ Inadequate procedural safeguards to enable accused to understand reasons for jury's guilty verdict in assize court, in absence of detailed bill of indictment or directions or questions to jurors (*Taxquet v. Belgium* [GC])

- ▶ First-instance court basing judgment, *inter alia*, on international treaty without elaborating on relevant circumstances, such as nationality of party (*Tatishvili v. Russia*)
- ▶ Domestic court extending time limit for authorities to request review before higher court, without providing any reasons for such decision (*Agurđino S.R.L. v. Moldova*)

Although at times this right is examined from the point of view of “fairness” of proceedings (*Hirvisaari*, §§30-33), structurally it also fits within the concept of the right to a court because they both require determination of the relevant factual and legal questions raised by the applicant in a particular case (*Chevroł*).⁴⁹

The aim of the right to a reasoned decision is to demonstrate to the parties that they have been actually heard (*Fomin v. Moldova* §§22-34). Moreover, a reasoned decision affords a party the possibility of appealing against it, as well as the possibility of having the decision reviewed by the appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (*Suominen v. Finland* §§25-38).

The right to be heard therefore includes not only the possibility of making submissions to the court, but also a corresponding duty of the court to show, in its reasoning, the reasons for which the relevant submissions were accepted or rejected. This duty is always subject to the provision that a court may consider it unnecessary to respond to arguments which are clearly irrelevant, unsubstantiated, abusive or otherwise inadmissible owing to clear legal provisions or well-established judicial practice in respect of similar types of argument (*Fomin v. Moldova* §§22-34).

In general, every decision should be clear and allow everyone involved to understand why the court is supporting a certain position (*Seryavin and others v. Ukraine* §§55-62).

Reasons should also be provided if a decision is taken re-instituting proceedings or extending procedural privileges to another party (*Agurđino S.R.L. v. Moldova* §§18-36).

According to the traditional approach to the “fourth-instance” doctrine, Article 6 was always held to allow no complaint about the fact-finding and legal competence of domestic courts to allege that they reached a wrong decision (*Karalevičius*, dec.). Hence the reasoned decision test was rather reduced to a quantitative and not a qualitative assessment; as long as some reasons were

49. See also above, Section 3.1.1, Substantive obstacles to access to court.

given, the decision in question would in principle be compatible with Article 6 (*García Ruiz v. Spain*, §§26-30). Only in a few exceptional cases under the traditional approach the Court was faced not with a complete absence of reasons but with their manifest incoherence (*Tatishvili v. Russia*, §§59-63; *Antică and "R" company v. Romania*, §§32-39), which was regarded as another example of arbitrariness. For a few years now, however, the Court has departed from the traditional quantitative approach under Article 6 and more frequently looks into the quality of judicial decision, from both its factual and legal aspects.⁵⁰

The right to a reasoned decision does not require a detailed answer in the judgment to every argument raised by the parties; it furthermore allows higher courts simply to endorse the reasons given by the lower courts without repeating them (*Hirvisaari*, §32).

An appeal court may remedy a lack of reasons at first instance (*Hirvisaari*). And, vice versa, very brief reasoning in disallowing leave to appeal – referring fully to the findings of the lower court – does not breach the right to a reasoned decision (*Gorou (No. 2)*, §§38-42).

Reasons do not have to be given in a particular (written) form. It is perfectly acceptable for a court to pronounce reasons for its decision some time after its adoption, as long as this does not deny an applicant's right to effectively exercise their right to lodge an appeal (*Hadjianastassiou; Jodko*, dec.).⁵¹

Absence of reasons in a jury verdict may be excusable where those reasons can be ascertained from other materials of the case, namely the charge sheet and the questions and directions of the president to the jury (compare *Taxquet v. Belgium* [GC] and *Judge v. the United Kingdom*, dec.).

Reasoned decision: no violation

- ▶ Only brief reasoning of domestic courts as to facts of case, in which applicant unsuccessfully claimed to have performed certain paid services for civil defendant, while first-instance findings were endorsed by higher courts (*García Ruiz*)
- ▶ Absence of reasons in jury verdict counterbalanced by procedural safeguards, given that reasons could be ascertained from addresses by parties and presiding judge's charge to jury, and given that judge accepted duty to explain law to jury and could declare that there was no case to answer (*Judge*, dec.)

50. See also below, Section 6.2, Unreliable evidence; and Section 6.3, Inconsistent domestic jurisprudence.

51. See also above, Section 3.1.2, Procedural obstacles to access to court; and Section 5.2.4, Public nature of court decision.

6.2. Unreliable evidence

Where conviction is to a crucial or decisive extent based on evidence obtained unfairly from the standpoint of autonomous principles of Article 6 – for example, where the confession was obtained in breach of the privilege against self-incrimination – the proceedings would be unfair.⁵²

However, reliance by the domestic courts on evidence obtained in breach of another article of the Convention (for example, Article 8) does not necessarily infringe the fairness of the proceedings under Article 6 (*Khan*, §§34-40; *Bykov*, §§94-105). At the same time, use of evidence obtained by means involving a breach of Article 3 is likely to be contrary to Article 6, especially if torture was involved.

In accordance with the principle of subsidiarity, and the implied doctrine which prevents the Court from acting as a court of fourth instance in matters of Article 6, use of evidence obtained in breach of the domestic substantive or procedural rules is not, as such, contrary to the “fairness” requirement. Where the courts rely on evidence obtained unlawfully, the Court will verify: a) whether the “unlawfulness” in the domestic terms did not coincide with the “unfairness” in the autonomous terms of the Convention; b) whether the applicant had an opportunity to raise the matter before the domestic courts (*Schenk v. Switzerland*, §§47-51; *Heglas*, §§89-93).

Similarly, questions of the assessment of fact, stemming mostly from alleged unreliability of evidence, are almost always left by the Court to the discretion of the national judge. Where serious doubts exist as to the quality of evidence produced by the prosecution in criminal cases, the Court takes into account procedural safeguards surrounding the taking and examination of such evidence rather than re-assessing the evidence itself (*Cornelis v. the Netherlands*, dec.).

Only in a very few exceptional cases has the Court been prepared to conclude, contrary to the stance taken by the national court, that a piece of evidence was totally unreliable owing to the suspicious circumstances in which it had been obtained (*Lisica v. Croatia*, §§47-62). In *Laska and Lika v. Albania* (§§63-72), for instance, the applicant’s conviction was based on the results of an identity parade during which the applicant was wearing a white and blue balaclava mask (identical to those used by the alleged criminals), whereas other participants in the identity parade were wearing black

52. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

masks. In such a setting it was natural for the victim to identify the applicant as the perpetrator. The Court concluded that an identity parade organised in such a manner could not have any evidential value, and therefore that the conviction was wholly unsafe. However, such cases remain exceptionally rare, and apart from inquiries into entrapment,⁵³ no other category of case, as a rule, warrants the Court's re-examination under Article 6 of facts established by the domestic courts.

Unreliable evidence: violation

- ▶ Important (non-circumstantial) evidence obtained during warrantless vehicle search in absence of suspect or his counsel, police having shown no necessity to act with haste, particularly when identity of perpetrators was known and evidence sought was not of perishable nature (*Lisica v. Croatia*)
- ▶ Evidence allegedly planted in applicant's car, relevant factors being ill-treatment upon arrest by police, search of car one hour after arrest, lack of paperwork to document arrest and failure of domestic courts to consider relevant complaints (*Layijov v. Azerbaijan*)
- ▶ Failure of authorities to carefully review credibility and corroborate by sufficient evidence testimony of witness, foreign national (*Tseber v. Czech Republic*)

Unreliable evidence: no violation

- ▶ Use of evidence obtained from witness who had made deal for immunity with prosecution, given that sufficient opportunities to challenge that evidence were provided to applicant, while courts assessed its admissibility in much detail (*Cornelis v. the Netherlands*, dec.)
- ▶ Despite some evidence being obtained under unlawful search warrant (in separate set of criminal proceedings), no breach in view of careful consideration of applicant's complaints by domestic courts and considerations of public interest in combatting drug-related crime (*Prade v. Germany*)

53. See also above, Section 5.3.1, Entrapment defence.

6.3. Inconsistent domestic jurisprudence

Article 6 is essentially concerned with whether an applicant was afforded ample opportunities to state their case and contest the evidence that they considered false, and not with whether the domestic courts reached a right or wrong decision (*Karalevičius v. Lithuania*, dec.). In accordance with the principle of subsidiarity, Article 6 does not allow the Court to act as a court of fourth instance – namely to re-establish the facts of the case or to re-examine the alleged breaches of national law (*Bernard v. France*, §§37-41). States remain free to apply the criminal law to any act (insofar as it does not breach other rights protected under the Convention), and to define the constituent elements of the resulting offence. As a result, it is not the Court's role to dictate the content of domestic criminal law, including whether there should be any particular defence available to the accused (*G. v. the United Kingdom*, dec., §§28-30).

In recent years, however, the Court has occasionally found violations of Article 6 on account of the persistence of conflicting court decisions on the same issue made within a single court of appeal (*Tudor Tudor v. Romania*, §§26-33), or by different district courts ruling on appeal (*Ștefănică and others v. Romania*, §§31-40), stressing that the “profound and long-standing” nature of the divergences at issue was incompatible with the principle of legal certainty in its broad meaning. Moreover, the Court has determined that achieving consistency of the law may take time, and periods of conflicting case law may therefore be tolerated without undermining legal certainty (*Albu and others v. Romania*, §42). At the same time, the Grand Chamber recently stressed that any Convention judicial system should allow for a mechanism to promote legal certainty, even if it was not the Court's function under Article 6 to compare different decisions of national courts per se – save in cases of evident arbitrariness (*Nejdet Şahin and Perihan Şahin v. Turkey* [GC], §§59-96).

The existence of several supreme courts – not subject to any common judicial hierarchy in a legal system – cannot demand the implementation of a vertical review mechanism of possibly different legal approaches those courts have chosen to take. The Court has therefore tried to avoid going into the question of organisation of the contracting states' judicial systems. Responsibility for the consistency of domestic decisions lies with the domestic courts, and any intervention by the Court in this respect should remain exceptional (*Nejdet Şahin and Perihan Şahin v. Turkey* [GC]).

Divergence in practice cannot be considered as breaching Article 6 if an effective method of settling them is promptly (i.e. within one year) employed by a court of higher instance to unify the diverging practice (*Albu and others v. Romania* §§35-44).

However, profound and long-standing variations in the practice of the highest domestic court may in themselves be contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law (*Vrabec v. Slovakia*, §27). Finally, the Court has also accepted that cases when two national courts – each within its own area of jurisdiction – reach divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised in similar factual circumstances, are inevitable and, as such, do not violate Article 6 of the Convention (*Stoilkovska v. “the former Yugoslav Republic of Macedonia”, §46*).

Inconsistent domestic jurisprudence: violation

- ▶ In the context of restitution of nationalised property, lack of legislative coherence and conflicting case law on interpretation of certain aspects of legislation in highest court, creating general climate of lack of legal certainty – absence of mechanisms before Supreme Court to resolve conflict between decisions of lower courts (*Tudor Tudor v. Romania*)
- ▶ Failure by Constitutional Court to address inconsistency of Supreme Court jurisprudence in cases concerning restitution of property (*Vrabec v. Slovakia*)

Inconsistent domestic jurisprudence: no violation

- ▶ High Court assessing matter regarding allowances to public servants promptly and giving unequivocal guidelines on correct interpretation of statute, effectively removing divergence to allow domestic courts' interpretation of law to become uniform (*Albu and others v. Romania*)
- ▶ Supreme Administrative Court and Supreme Military Court (highest-instance courts in administrative and military court systems co-existing in Turkey and not sharing common court of last resort) passing different judgments in similar cases involving two victims of same crash, given that procedures before them were fair and decisions not arbitrary (*Nejdet Şahin and Perihan Şahin v. Turkey*)
- ▶ Refusal to follow established domestic jurisprudence on application of principles in European Court of Human Rights case law (*Salduz v. Turkey*)⁵³ in view of sufficient reasoning given for departure (*Borg v. Malta*)

54. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination; and below, Section 9.2, Legal representation or defence in person.

Chapter 7

Trial within reasonable time

Key notions and principles

What time is “reasonable” is assessed by a cumulative test involving three main criteria (*Pretto and others*, §§30-37):

- ▶ nature and complexity of the case;
- ▶ conduct of the applicant;
- ▶ conduct of the authorities.

7.1. General principles

This right derives both from the wording of Article 6 and from the principle of effectiveness (*H. v. France*, 1989).

Article 6 is fully autonomous from the way the domestic procedure determines the length of procedural actions, with the result that a breach of the domestic time limit will not necessarily show a breach of Article 6. Unlike in many national systems, under the Court’s case law there is no fixed time limit for any particular type of the proceedings, and all situations are examined on a case-by-case basis.

The “reasonable time” requirement applies both to civil and to criminal cases. It must not be confused with the more stringent length-of-detention test that applies only as long as the person is deprived of their liberty pre-trial. Standards for acceptable duration of the entirety of criminal proceedings are less severe than “reasonable time” of remand in custody (*Smirnova*, §§67-88).

Length cases are the first area where the Court has issued pilot judgments addressing not the circumstances of a particular case but rather the notion of systematic violations in the country concerned (*Kudła v. Poland*, §§119-131).

A positive obligation arises for the state under Article 13 of the Convention to create a remedy within any civil or criminal case to enable speeding up of a protracted procedure for the purpose of Article 6 (*Kudła*).

The beginning of the period to be taken into account for the purpose of the “reasonable time” requirement is determined by:

- ▶ in a civil case: the date the claim is lodged, unless the applicant is prevented by law from lodging it – for instance, an application where an action contesting the withdrawal of a licence to practise medicine could not be filed pending a certain preliminary administrative investigation – in which case the time would start running from the moment the first objection is expressed (*Koenig*, §§97-111);
- ▶ in a criminal case: the date the “charge” was notified; for instance, the date of opening of investigations indicating the applicant as a suspect, unless the applicant’s situation was substantially affected before the formulation of the “charge” – in which case the date of arrest, search or questioning, even as a witness, could be taken as the start date (*Eckle*, §§73-74).

The end of the period for the purpose of the “reasonable time” requirement is the date of notification of the final domestic decision determining the dispute by a higher court, excluding the enforcement proceedings (*Burdov*), but including constitutional review proceedings where they directly affect the outcome of a dispute (*Buchholz v. Germany*, §§46-63). The Court has changed its initial approach since the 1980s, when it used to take into account the enforcement proceedings (*Martins Moreira v. Portugal*, §44). A delay in implementing a judgment is currently being looked at as a separate problem, namely as a possible breach of the right to timely execution under the heading of the right to a court.⁵⁵

Where a case is closed and then re-opened – for example, for supervisory review – the period when no proceedings had been pending is to be excluded from the calculation of the overall period (*Skorobogatova v. Russia*, §§37-42).

While there is no established general guidance on the time allowed by Article 6, it depends primarily on the number of court instances involved. As a rule, more scrutiny will be given to cases that last more than three years at one instance (*Guincho v. Portugal*, §§29-41), five years at two instances, and six years at three levels of jurisdiction.

Assessment of “reasonable time” varies greatly depending on the circumstances of the case. The shortest time limit leading to a finding of a violation is 2 years and 4 months at two instances in a case concerning a compensation claim by the applicant infected with HIV (*X v. France*, 1982), while the longest period resulting in a finding of non-violation may be as long as eight years at two instances.

55. See also above, Section 3.2, Finality and enforcement of court decision.

Examples of a period that was considered in itself to breach the “reasonable time” requirement without a more detailed analysis of any other aspect:

- ▶ ten years at one instance in criminal proceedings (*Milasi v. Italy*), or 13 years including first instance and appeal (*Baggetta v. Italy*);
- ▶ four years of appeal proceedings (*Capuano v. Italy*).

7.2. Nature and complexity of case

The Court takes into account what is at stake for the applicant in the domestic proceedings. Cases requiring special diligence, where the nature of the case itself requires speeding up of the procedure, include:

- ▶ child-care proceedings (*H. v. the United Kingdom*, 1987);
- ▶ compensation claim for blood tainted with HIV (*X v. France*, 1992);
- ▶ action for serious injury in a traffic accident (*Martins Moreira*, 1990).

Nature and complexity of case: violation

- ▶ Period of 2 years and 7 months at two instances in case concerning adoption and parental access, account taken also of special diligence required (*H. v. the United Kingdom*)
- ▶ Period of 3 years and 10 months at one instance in compensation case regarding road traffic incident (*Guincho*)
- ▶ Period of 3 years and 6 months at appeal in nuisance case concerning air pollution (*Zimmermann and Steiner v. Switzerland*)

By contrast, the complexity of a case allows more leeway to the authorities in justifying a longer delay.

Complexity denotes primarily numerous factual elements to be determined, such as in cases involving a vast number of charges to be determined in criminal cases that are joined together (*Vaivada v. Lithuania*, dec.), or a large number of defendants in a case (*Meilus v. Lithuania*, §25). Cases concerning tax evasion, company fraud, money laundering etc., are often complex, but if the pending proceedings preclude a company from operating normally, special diligence is required from the authorities (*De Clerk v. Belgium*, §§53-73).

Legal complexity, such as uncertainty of the domestic case law in view of the need to apply recent legislation, can also justify a longer delay (*Preto and others v. Italy*, §§30-37).

Nature and complexity of case: no violation

- ▶ Period of 5 years and 2 months in fraud case involving re-hearing at first instance after successful appeal (*Ringeisen*)
- ▶ Period of 7 years and 4 months in criminal case concerning tax fraud, where domestic authorities encountered various difficulties with communication involving authorities and persons abroad (*Neumeister*)

7.3. Conduct of parties: delays by authorities

The Court takes into account only delays (sometimes called “substantial periods of inactivity”) attributable to the authorities. Delays attributable to the applicant, whether caused deliberately or not, will not be taken into account in assessing “reasonable time” (*H. v. the United Kingdom*). At the same time, the government cannot excuse the overall length of proceedings by citing the applicant’s appeals, motions, requests, etc., to the extent that these procedural steps were not abusive. The defendant cannot be blamed for taking full advantage of the resources and tools afforded by national law in the defence of their interests (*Kolomiyets v. Russia*, §§25-31).

Reasonable diligence will be required from the authorities in each procedural step, such as filing evidence and submitting observations, in all criminal cases and when they are one of the parties in a civil case (*Baraona*, §§46-57).

Delays by authorities: violation

- ▶ Repeated return of case to investigators – on same grounds – for fresh investigations to be carried out (*Šleževičius v. Lithuania*).
- ▶ Unsuccessful repeated attempts to summon same witnesses at trial (*Kuvikas v. Lithuania*)
- ▶ Jurisdictional dispute involving prosecution and trial court (*Simonavičius v. Lithuania*)
- ▶ Jurisdictional dispute between appeal court and lower court, which had referred case to each other until Supreme Court determined that appeal court had jurisdiction to rule on merits of dispute (*Gheorghe v. Romania*).
- ▶ Frequent changes in composition of trial court (*Simonavičius v. Lithuania*)
- ▶ Time taken by judge between hearing parties and making decision (*Martins Moreira*), or between deciding case and producing full written version of judgment (*B. v. Austria*, 1990)
- ▶ Delays in sending case from first instance to appeal court (*Martins Moreira*)

Delays by authorities: no violation

- ▶ Delays in undertaking necessary medical examinations, even where there was no lack of reasonable diligence but where blame could be laid on work overload and lack of resources (*Martins Moreira*)

Where another private party has caused a delay in a civil case, the court has to take steps to expedite the proceedings and not to extend time limits at that party's convenience without good reason (*Guincho*).

Suspension of proceedings to await the outcome of a related case (*Zand*, Commission report) or the determination of the constitutionality of a legal act is acceptable in principle, provided that the adjournment is granted only with the aim of causing the least possible delay.

Even in pursuing the interest of the protection of defence rights, such as the need to summon witnesses on behalf of the defence at trial, the authorities may be in breach of the "reasonable time" requirement if not carrying out the task with reasonable diligence (*Kuvikas v. Lithuania*, §50).

General delays caused occasionally by the courts' case-load may be acceptable as long as they are not prolonged in time, and where reasonable steps are being taken by the authorities to prioritise cases based on their urgency and importance (*Zimmerman and Steiner*, §§27-32).

At the same time, the contracting states are required by Article 1 of the Convention to organise their legal systems so as to ensure compliance with Article 6, and no reference to financial or practical difficulties can be permitted to justify a structural problem with excessive length of proceedings (*Salesi*, §§20-25).

Where a case is repeatedly re-opened or remitted from one court to another (the so-called "yo-yo practice"), the Court tends to regard it as a serious aggravating circumstance, which may result in a violation being found even if the overall duration of the proceedings does not seem excessive (*Svetlana Orlova v. Russia*, §§42-52).

Following the introduction of dedicated remedies in various Convention states to compensate for and speed up court proceedings in the aftermath of the *Kudła v. Poland* judgment, the Court has developed an approach whereby an applicant may lose their victim status in cases where a breach of the reasonable time requirement was examined at the domestic level and a sufficient degree of redress – including the possibility to speed up the proceedings by way of specific performance orders – was accorded to the applicant.

Chapter 8

Presumption of innocence

This provision primarily disallows premature declarations of guilt by any public official. Declarations of guilt may take the form of: a) statement to the press about a pending criminal investigation (*Allenet de Ribemont v. France*, §§39-41); b) procedural decision within criminal or even non-criminal proceedings (*Daktaras v. Lithuania*, §§42-45); or c) even a particular security arrangement during the trial (*Samoilă and Cionca v. Romania*, §§93-101, where the applicant was shown to the public in prison garments during the bail proceedings).

A “public official” need not be an already elected representative or employee of the public authorities at the material time. Exceptionally, the notion may include persons of recognised public standing, from having held a public position of importance in the past or from running for elected office (*Kouzmin v. Russia*, §§59-69).

Most examples of indirect interference with the presumption of innocence, such as shifting the burden of proof on to the accused, have rarely been examined under this heading (*Salabiaku*), having been dealt with from the more general angle of the right to silence and not to incriminate oneself under Article 6 §1.⁵⁶

Article 6 §2 applies not only to “criminal” proceedings in their entirety but also pre-trial and after the criminal proceedings are over, and irrespective of their stage or even their outcome (*Minelli v. Switzerland*, §§25-41); the standard of application of Article 6 §2 is thus different from that to be used when applying Article 6 §1.⁵⁷ A breach of Article 6 §2 can occur even in absence of a final conviction.

56. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

57. See also above, Section 2.2, Criminal charge.

Article 6 §2 applies to civil actions such as compensation claims by former criminal suspects or defendants as a result of discontinued proceedings (*Lutz v. Germany*, §§50-64), acquittal (*Sekanina v. Austria*, §§20-31) or civil or disciplinary proceedings, provided that those civil actions are a consequence of or concomitant with the prior criminal proceedings (*O. v. Norway*, §§33-41; contrast with *Agosi v. the United Kingdom*, §§64-67).

There will be a breach of Article 6 §2 if a person acquitted in criminal proceedings lodges a civil claim seeking compensation for pre-trial detention, but the compensation is denied on the ground that the acquittal had been for "lack of sufficient evidence". Without qualifications, such a statement casts a doubt on the applicant's innocence (*Tendam v. Spain*, §§35-41). At the same time, refusal to reimburse legal costs after dismissal of criminal charges on the grounds that, by their conduct, the defendants had brought the prosecutions upon themselves, does not breach the presumption of innocence (*Ashendon and Jones v. the United Kingdom*, dec., §§50-55).

Presumption of innocence: violation

- ▶ Minister of Interior and two senior police officers stating in televised press conference that applicant had been "instigator" of murder (*Alenet de Ribemont*)
- ▶ Speaker of Parliament publicly stating that "bribe-taker" had been apprehended immediately after arrest of applicant, Member of Parliament (*Butkevičius*)
- ▶ Public statements made by well-known former general who was candidate for elections at material time – binding nature of doctrine of presumption of innocence on *quasi*-public persons (*Kouzman*)
- ▶ Public statements by trial judge assessing quality of defence and prospects of outcome of criminal case (*Lavents*)
- ▶ Court-ordered revocation of suspended sentence by reference to "further crimes" committed in breach of probation – in fact at time only charges were pending (*Bohmer v. Germany*)
- ▶ Persistence of suspicion expressed in dismissing compensation claim following acquittal (*Sekanina*, but see *Lutz*)
- ▶ In civil procedure for damages, former criminal defendant had to show – on balance of probabilities – to same bench that had examined criminal charges against him, that he had not committed offence; civil procedure was thus concomitant with underlying criminal procedure (*O. v. Norway*, but see also *Ringvold*)

- ▶ Following unsuccessful complaint by applicant against her former boss for sexual assault, latter succeeded in civil action for malicious prosecution – breach was found because domestic courts held that earlier failure of applicant to prove sexual assault automatically made her accusations false (*Klouvi*)
- ▶ Applicant's property confiscated as "illegally obtained advantage" despite his acquittal of theft and burglary (*Geerings v. Netherlands*)
- ▶ Domestic courts' property seizure order, while applicant was not found guilty in any criminal proceedings (*Paraponiaris v. Greece*)
- ▶ Revocation of suspended sentence during probation because of confession concerning another offence, prior to commission of that offence being proven by final judgment (*Kaada v. Germany*)
- ▶ Prosecutor's and court's statements regarding applicant's guilt despite criminal proceedings against him being time-barred (*Caraian v. Romania*)
- ▶ Extradition decision containing statement that applicant "committed crimes" in absence of final judgment in extraditing state (*Eshonkulov v. Russia*)

Article 6 §2 does not apply to civil procedures for compensation that may be brought following an acquittal by alleged victims where such claims are based on different evidential standards from those applying in criminal law, such as the standards pertaining to law of tort. In a case of this type a former criminal defendant merely has the guarantees of Article 6 §1 as a "civil" party to those proceedings but not as a "criminal" defendant (*Ringvold v. Norway*, §§36-42).

Article 6 §2 does not entail a positive obligation on the state concerning statements of guilt made by private persons and the media. Issues in this area may, however, arise incidentally under Article 6 §1 when seen from certain angles (*Hauschildt; Butkevičius, dec.; T. and V. v. the United Kingdom*).⁵⁸

A violation of Article 6 §2 may also serve as evidence of a violation of Article 6 §1 under the heading of subjective impartiality where the impugned statement was made by a judge (*Lavents*).⁵⁹ In most cases however, a violation of Article 6 §2 involving a statement of a judge would take precedence as *lex specialis* and make an examination under Article 6 §1 unnecessary.

58. See also above, Section 4.2, Impartial tribunal; and Section 5.2.2, Effective participation.

59. See also above, Section 4.2, Impartial tribunal.

Presumption of innocence: no violation

- ▶ Words “guilt proved” used by prosecutor in response to applicant’s contrary allegations, expressed in procedural decision referring to evidence collected during investigation, in order to support prosecutor’s personal conviction that case must proceed to trial and not be discontinued (*Daktaras*)
- ▶ Loss of applicant’s victim status, declared guilty by prime minister during press conference, after constitutional court accepted violation of presumption of innocence and brought its judgment to attention of trial court (*Arrigo and Vella*)
- ▶ Absence of compensation or refund of costs for wrongful prosecution for discontinued proceedings, owing to strength of suspicion persistent at time of investigation (*Adolf v. Austria*)
- ▶ Persistence of suspicion expressed in dismissing compensation claim following discontinued investigation (*Lutz*; but see *Sekanina*)
- ▶ Permanent use of metal cage as security measure during appeal hearings (*Ashot Harutyunyan*)
- ▶ Refusal to cover legal costs following applicant’s acquittal, where he had brought suspicion upon himself and misled prosecution into believing that case against him was stronger than it actually had been (*Ashendon and Jones*)
- ▶ Article 6 §2 held not to apply following rejection of civil claim brought by alleged victim demanding compensation from applicant (former criminal defendant) under law of tort (*Ringvold*; but see also *O. v. Norway*)
- ▶ Conviction under law making sexual intercourse with minor of certain age automatically illegal, irrespective of whether wrongdoer had realised minor age of victim – no breach as solution proposed by domestic law to focus on subjective test and not to make available defence based on reasonable belief (objective test) was acceptable (*G. v. the United Kingdom*).
- ▶ Preventive provisional seizures of property in criminal proceedings do not as such disturb presumption of innocence, since Article 6 under its criminal head was considered inapplicable to those interim decisions (*Dassa Foundation v. Liechtenstein*)
- ▶ Filming of applicant’s arrest by journalists from private television station did not breach Article 6 or amount to “virulent media campaign”, specifically in absence of any evidence that it had been instigated by authorities (*Natsvlishvili and Togonidze v. Georgia*)

Suspicion expressed in a judicial statement, the wording of which is not strong enough to amount to a violation of the presumption of innocence under Article 6 §2, may still be sufficient to disqualify the judge as biased from the objective standpoint under Article 6 §1 (*Hauschildt*) or even from the subjective standpoint where the statement is directed at some personal characteristics of the defendant and goes beyond the usual procedural requirements (*Kyprianou*).

A decision discontinuing the prosecution does not, as such, entitle a person to compensation for wrongful accusation or refund of costs, as long as suspicion against him was persistent at the time of the investigation (*Lutz*).

Like most restrictions on Article 6, the presumption of innocence may be remedied at the domestic level if adequate steps are taken by the authorities before the trial judgment to eliminate the negative effects of the damaging statement (*Arrigo and Vella v. Malta*, dec.).

In contrast to Article 6 §1, a breach of the presumption of innocence is not assessed against the background of the proceedings as a whole but rather as a separate procedural defect. Emphasis is placed on the phrase at issue by means of cumulative analysis of the following three elements: a) the procedural stage and context in which the statement was made, b) its wording, and c) its meaning (*Daktaras*, §§42-45).

Statements expressing a state of suspicion at the time of pre-trial investigation do not amount to a breach of the presumption of innocence (*Daktaras*), but public officials must choose their words carefully when expressing that suspicion (*Ismoilov and others v. Russia*, §§162-170); an unqualified statement to the press made by a prosecutor before the start of the proceedings is contrary to the presumption of innocence (*Fatullayev v. Azerbaijan*, §§159-163). Nonetheless, even the use of terms with very explicit wording, such as “guilt” and “proved”, may not amount to a violation of Article 6 §2 where their meaning in a particular non-mediatised or non-public context can reasonably be considered to denote something else – for instance, where they merely attest the prosecutor’s conviction of sufficiency of evidence to proceed from investigation to trial (*Daktaras*, §§42-45). Therefore the test of the meaning of the statement is an objective one.

Statements expressing persistent suspicion following a discontinued investigation do not necessarily breach Article 6 §2 (*Lutz*), but a referral to the persistence of suspicion after an acquittal may amount to a violation (*Sekanina*).

In regard to the context of the impugned statement, emphasis is placed on public statements by state officials, especially in the media, where significant restraint must be shown (*Alenet de Ribemont*). More leeway is accorded to statements made in the strict procedural context (*Daktaras; Mustafa Kamal Mustafa (Abu Hamza) (No. 1)*, dec., §41).

Discretion and circumspection are required from the authorities in informing the public about pending criminal investigations, in order to prevent declarations of guilt which are capable of encouraging the public to believe a suspect guilty and prejudging the assessment of the facts by the competent courts (*Alenet de Ribemont*).

The wording of the impugned statement must amount to an unequivocal declaration of guilt to raise issues under Article 6 §2 (*Butkevičius*, §§49-54); qualification or reservation with regard to the statement may call into question its unequivocal nature (*Alenet de Ribemont*).

The fact that a person has been convicted by a first-instance court does not deprive them of the guarantees of Article 6 §2 in the appeal proceedings (*Konstas v. Greece*, §§34-37). It remains unclear, however, whether the degree of protection of Article 6 §2 remains the same pending appeal or cassation proceedings, given that a “conviction by a competent court” within the meaning of Article 6 has already taken place. At any rate a reference to that conviction by the higher courts or other authorities would appear to be inappropriate.

A breach of the presumption of innocence may also occur in the event of certain procedural presumptions, which assume a person guilty without this being established in adversarial proceedings and according to a certain standard of proof (*Klouvi v. France*, §§42-54).

At the same time, the principle of the presumption of innocence cannot be interpreted as establishing substantive rules of criminal liability. The Court is thus not required to answer, for example, from the point of view of Article 6, whether strict liability – or, by contrast, the usual evaluation of *mens rea* alongside *actus reus* – is a more appropriate response of the domestic legislature to a certain illegal act, or whether an objective or subjective test should characterise the establishment of *mens rea* (*G. v. the United Kingdom*, §§28-30).

Having said that, the Court has found a rare violation of the presumption of innocence in a case by reason of the confiscation of property despite the applicant’s acquittal of the underlying criminal offences (*Geerings v. the*

Netherlands). This line of thinking will need at some point to be accommodated with the Court's different approach in allowing non-conviction-based confiscation (*Riela, Walsh, Gogitidze* cases) and extended confiscation (*Phillips, Grayson, Van Offeren* cases) – since an argument can be made that there is no essential difference in the authorities' choice to pursue one of the aforementioned statutory tools dealing with proceeds of crime before or after (and then in spite of) the eventual conviction or acquittal, given in particular that the Court has itself admitted that lower standards of proof can apply to the *in rem* tools in comparison with those applicable in the context of the traditional *in personam* criminal prosecution. A further clarification is therefore called for as to whether the protections of the presumption of innocence under Article 6 §2 are more related to the damaging words and their impact on the impartiality of the courts in the context of the particular case (this could be called a "subjective approach" to the presumption of innocence), or rather about the handling of the various statutory assumptions and reverse onus ("objective approach")⁶⁰ which are increasingly used in modern jurisdictions, especially for the purpose of crime prevention by dealing with the proceeds of crime.

60. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

Chapter 9

Defence rights

Key notions and principles

- ▶ minimum defence rights in criminal proceedings;
- ▶ alleged breach of defence rights under Article 6;
- ▶ §3 is often examined in conjunction with the right to a fair trial under Article 6 §1 (*T. v. Austria*, §§68-72);
- ▶ in order to prove a violation of one of their defence rights, applicants have to show the “irreparable effect” of the impugned restriction of the defence rights on the fairness of the criminal proceedings “as a whole”, including the appeal stages (*Dallos v. Hungary*, §§47-53).

The rights guaranteed in this provision can be viewed as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 §1. However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (*Ibrahim and Others v. the United Kingdom*). Accordingly, a violation would be found by the Court only if the breach of these specific guarantees impaired the overall fairness of the proceedings, including the appeal stages (*Dallos*).

9.1. Notification of charge and defence facilities

9.1.1. Notification of charge

There is a certain overlap between this right and the right to adversarial proceedings, which is an implied element of a fair trial under Article 6 §1,⁶¹ and the right to time and facilities to prepare for one’s defence under Article 6 §3b (see below).⁶²

There is also some overlap with the right to be informed of some factual basis for suspicion justifying detention under Article 5 §2, even though Article 6 §3a guarantees a broader right to know the possible legal classification

61. See also above, Section 5.1.1, Adversarial principle.

62. See also below, Section 9.1.2, Adequate time and facilities to prepare defence.

of the charge and more detailed factual information about it (*Pélissier and Sassi v. France*, §§45-63).

Notification of charge: violation

- ▶ Dates and place of alleged offence amended by prosecution several times before and during trial (*Mattoccia*)
- ▶ Fresh charge presented by prosecution on last day of trial, without possibility of preparing defence against new charge or submitting full appeal against judgment (*Sadak and others v. Turkey*; but see *Dallos*)
- ▶ Very belated reclassification of charges deep into trial (*Seliverstov v. Russia*)
- ▶ Reclassification by trial court with no prior adjournment, appeal courts having subsequently refused to examine “discretion” of trial court in reclassifying charge (*Pélissier and Sassi*)
- ▶ No full appeal (on points of fact as well as law) allowed following reclassification at trial (*T. v. Austria*)
- ▶ German charged in court’s language, Italian, who was not provided with translation into any other language, where there was no proof that he understood it sufficiently (*Brozicek*)

The “cause” in the information required under Article 6 §3a relates to the acts allegedly committed, and the “nature” refers to the definition of the offence in domestic law (*Pélissier and Sassi*).

The particulars of the offence are critically important, since it is from the moment the charge is served that the suspect is formally given notice of its factual and legal basis (*Pélissier and Sassi*). However, there is no requirement that the conclusions of the trial court as to the circumstances of the crime and the applicant’s role in it must always be identical to the bill of indictment as formulated by the prosecution (*Mirilashvili, dec.*).

Detailed information must be given under Article 6 §3a, sufficient to enable the accused to begin formulating their defence; however, full evidence against the accused is not required at that stage and may be presented later (*Pélissier and Sassi*).

At the same time, it would be incorrect to state that Article 6 §3a applies only to the initial stage of the proceedings, while Article 6 §3b supplements it at a later stage; the question remains open as to whether Article 6 §3a or Article 6 §3b is more appropriate to later stages of the proceedings such as

trial, either where the problem concerns a change in legal characterisation of the alleged offence (*Dallos*) or the insufficiency of factual information (*Mattoccia v. Italy*, §§58-72); it seems that applying both these provisions in conjunction, alongside Article 6 §1, would probably constitute the correct approach to analysing any lack of information at a trial stage.

The Convention allows inquisitorial systems to co-exist with accusatorial ones; legal reclassification of a charge is allowed at trial by the prosecution, or even in the judgment by the trial court, as long as proper time and facilities to prepare for defence are given, by way of an adjournment or full appeal on facts and law (*Dallos*).

There is nothing in the Court's case law requiring written notification of the "nature and cause of the accusation" as long as sufficient information is given orally (*Kamasinski v. Austria*, §§61-108).

Information must be submitted "promptly" enough to enable the accused to prepare a defence under Article 6 §3b; basic information about the accusation must be submitted at least prior to the first interview with the police (*Mattoccia*).

Information must be submitted in a language that accused persons "understand"; it does not necessarily have to be their mother tongue (*Brozicek v. Italy*, §§38-46).

However, where a foreign national requests translation of a charge, the authorities should comply with the request unless they are in a position to establish that the accused in fact has sufficient knowledge of the court language (*Brozicek*); an oral interpretation of the charge may suffice (*Kamasinski*).

The more serious the accusation, the more information will be required – subjective test (*Campbell and Fell*, §§95-102).

The onus is on the applicant to obtain information by attending hearings or making relevant requests, not on the authorities to provide it (*Campbell and Fell*).

Minor flaws in the notification arising from technical errors may not amount to a violation of this provision (*Gea Catalan v. Spain*, §§28-30).

Notification of charge: no violation

- ▶ Information about charge consisting of words "mutiny" – with mere indication of place and time of alleged crime – sufficient in context of prison disciplinary proceedings, in view of fact that applicant made no reasonable attempts to obtain further information (*Campbell and Fell*)

- ▶ Charge reclassified by court in first-instance judgment, where possibility existed to submit full appeal subsequently (*Dallos*; but see *Sadak and Others* and *Seliverstov*)
- ▶ Conduct of accused person was principal cause of his not receiving notification of charges against him (*Hennings v. Germany*)
- ▶ Minor discrepancies in re-statement of domestic law resulting from clerical error (*Gea Catalan*)
- ▶ Oral interpretation of charge against foreigner unable to understand court's language (*Kamasinski*)
- ▶ Conviction for abduction of person with help of "unidentified accomplices", whereas bill of indictment had identified them (*Mirilashvili, dec.*)

9.1.2. Adequate time and facilities to prepare defence

There is a certain overlap between this right and the right to adversarial proceedings and equality of arms, which are implied elements of the fair trial under Article 6 §1,⁶³ the right to be notified of the charge under Article 6 §3a,⁶⁴ the right to legal representation under Article 6 §3c,⁶⁵ and the right to call witnesses under sub-paragraph (d).⁶⁶

The inability to submit an appeal on time in view of the lack of reasons indicated in the lower judgment – or lack of information about time limits for appeal – may be considered to amount to a breach of the requirement to have adequate time and facilities to prepare for defence under Article 6 paragraph 3 (b), even though a more coherent approach to such situations entails looking at it from the perspective of access to a court.⁶⁷

In order to determine compliance with Article 6 §3b it is necessary to have regard to the general situation of the defence, including legal counsel, and not merely the situation of the accused in isolation (*Krempovskij v. Lithuania, dec.*).

The usual approach is to examine an alleged violation of Article 6 §3b together with Article 6 §3c, in order to show, by way of cumulative analysis of various

63. See also above, Section 5.1.1, Adversarial principle; and Section 5.1.2, Equality of arms.

64. See also above, Section 9.1.1, Notification of charge.

65. See also below, Section 9.2, Legal representation or defence in person.

66. See also below, Section 9.3, Examination of witnesses.

67. See also above, Section 3.1, Access to court.

difficulties experienced by the defence, the overall effect of those defects on fairness of the trial as a whole within the meaning of Article 6 §1 (*Kremnovskij*, dec.). The “adequacy” of arrangements for the preparation of a trial is usually assessed with reference to formal limitations imposed on the defence – for example, limiting access by the defence to “secret” parts of the case file and restrictions on copying. However, the Court also takes into account practical difficulties encountered by the defence, for example, connected to the conditions of detention and transport of the detained suspect (*Moiseyev*, §§208-225).

A delicate balance must be struck between the need to ensure trial within a reasonable time⁶⁸ and the need to allow enough time to prepare the defence, in order to prevent a hasty trial which denies the accused an opportunity to defend themselves properly (*Öcalan v. Turkey* [GC], §§130-149).

The test of what time is adequate is a subjective one, as various factors – the nature and complexity of the case, the stage of the proceedings and what is at stake for the applicant – have to be taken into account; in straightforward cases, such as disciplinary proceedings, a period of five days can be adequate from the moment the charge was brought until the hearing on the merits (*Campbell and Fell*).

An adjournment in a trial will be called for by Article 6 §3b depending on the nature and extent of the new evidence; minor new evidence, such as that concerning the defendant’s character and not the circumstances of the offences allegedly committed, may be presented at trial without any adjournment (*G.B. v. France*).

It is not clear whether there is a right, as such, to be informed in a court judgment of the applicable time limits for appeal, or whether it is matter for the defence to find out of its own accord; at the same time, a positive obligation under Article 6 §3b may exist to inform the defendant of the relevant time limits in complex procedural cases, such as where two concurrent time limits exist for lodging a cassation appeal on the one hand, and submitting the reasons for that appeal on the other (*Vacher*, §§22-31); it may further be noted that these types of situation may more appropriately be looked at under the heading of “access to a court” rather than defence rights.⁶⁹

The “adequate facilities” test is also a subjective one, depending on the particular circumstances and abilities of the applicant, who may be a professional lawyer, for example (*Trepashkin (No. 2) v. Russia*, §§159-168). Two main facilities will in

68. See also above, Section 7, Trial within reasonable time.

69. See also above, Section 3.1.2, Procedural obstacles to access to court.

most cases be required, however, namely: a) the possibility of communicating with the lawyer in a confidential (*Bonzi v. Switzerland*, dec.) and efficient (*Artico v. Italy*, §§29-38) manner (even though this right is more specifically covered by Article 6 §3 (c);⁷⁰ and b) access to the case file (*Kamasinski*).

At the same time, limited restrictions may be allowed preventing the applicant from seeing the lawyer at certain times (*Bonzi*) or imposing on the lawyer an obligation of non-disclosure in order to protect a witness at an early stage of the proceedings (*Kurup*, dec.).

Adequate time and facilities: violation

- ▶ Cumulative impact of several isolated restrictions, including lack of legal assistance during questioning in police custody, subsequent restrictions on number and length of meetings with defence counsel, inability to communicate with lawyers in private, and lack of full access to case file until very late stages of trial (*Öcalan*)
- ▶ Cassation appeal submitted in time but disallowed for failure to substantiate it within required time limit, coupled with lack of information given to applicant about existence of two concurrent time limits – namely, one for lodging a cassation appeal, and one for submitting reasons for it (*Vacher*)
- ▶ Denial of access to case file at pre-trial stage on ground that accused had chosen to represent himself, access being available only to lawyer under domestic law (*Foucher*; see also 5.1.2. Equality of arms, on page 49)
- ▶ Sudden and complete change of evidence given by court-appointed expert during same hearing, which had decisive impact on jury's opinion, and refusal of trial court to appoint alternative expert (*G.B. v. France*; but see *Boenisch, Brandstetter*)
- ▶ Belated receipt of written version of court judgment with reasoning part (more than 1 month after pronouncement of operative part), preventing applicant from submitting appeal in 5 days provided for by law for this purpose (*Hadjianastassiou*)
- ▶ Defence informed briefly about substance of documents submitted by police at final hearing in complex fraud case, with no time accorded to examine documents and prepare response (*Gregacevic v. Croatia*)
- ▶ The applicant charged with misdemeanour while in police custody and only hours before being brought to court (*Hakobyan and Others v. Armenia*)

70. See also below, Section 9.2, Legal representation or defence in person.

The right to “adequate facilities” includes the right of access to the case file after the pre-trial investigations are concluded; at the same time, access given only to the lawyer but not the applicant personally may suffice (*Kamasinski*). Where an accused has been granted the right to represent themselves, denial of access to the case file at the pre-trial stage will violate Article 6 (*Foucher*).⁷¹ In assessing a limitation on the defendant’s access to the case file, the Court takes into account in particular the duration of the limitation (*Trepashkin (No. 2)*, §§159-168).

The right of access to the case file is not absolute, and some exceptions are possible in order to protect a sensitive investigation method, or the identity of a witness or agent; the burden is on the applicant to show that access to any particular element of the case file was necessary for his defence rights (*Bricmont*).⁷²

The test of necessity of disclosure of any sensitive material has been delegated by the Court to the domestic courts, and no autonomous Convention assessment of the merits of the non-disclosure will be undertaken as long as the national courts themselves have carried out such an assessment under the domestic law (*Dowsett*). There could be a problem, however, where a national court is given no discretion by statute to decide whether or not to disclose the materials to the defence (*Mirilashvili*, §§200-209).

Adequate time and facilities: no violation

- ▶ Period of 5 days from moment charge brought until hearing on merits was “adequate time” to prepare defence in prison disciplinary case concerning charge of mutiny (*Campbell and Fell*); 15 days was similarly “adequate time” in professional disciplinary proceedings against doctor on charges of having improperly issued certificates of unfitness for work (*Albert and Le Compte v. Belgium*)
- ▶ Despite reclassification of crime by trial court, applicant had sufficient time to prepare his appeal within statutory time limits, given also that closing arguments of prosecutor allowed applicant to anticipate such reclassification (*Mulosmani v. Albania*)
- ▶ New minor evidence on defendant’s character submitted by prosecution at start of trial that lasted 3 days concerning sexual offences, despite lack of adjournment (*G.B. v. France*)

71. See also above, Section 5.1.2, Equality of arms.

72. See also above, Section 5.1.1, Adversarial principle.

- ▶ Accused placed in solitary confinement and prevented from communicating with lawyer for a few limited periods – although he had ability to communicate freely with lawyer rest of time (*Bonzi*, dec.)
- ▶ Defence counsel placed under obligation not to disclose identity of certain witness to client at early stage of proceedings, to protect witness from tampering (*Kurup*, dec.)
- ▶ Access to case file given to applicant’s lawyer rather than to him personally (*Kamasinski*)

The right to “adequate facilities” does not, as such, include the right to appoint an expert of one’s choosing to testify at trial, nor the right to appoint a further or alternative expert (*Boenisch v. Austria*, §§28-35; *Brandstetter*, §§41-69). In exceptional circumstances, such as a sudden and complete change of evidence given by a court-appointed expert in the course of the same hearing, a problem of fairness and defence rights may arise if the court does not consider calling a further expert to testify (*G.B. v. France*).

It may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively, the defence must have the same opportunity to introduce their own “expert evidence” (*Khodorkovskiy and Lebedev v. Russia*, §731). However, the question of experts should more appropriately be looked at from the point of view of Article 6 §3d and not 6 §3b.

The right to know the reasons for the court judgment can also be considered as an aspect of Article 6 §3b. Reasons may be needed for an applicant in order to decide whether or not to appeal or prepare for the appeal proceedings (*Hadjianastassiou*).⁷³

9.2. Legal representation or defence in person

There is a certain overlap between this right and the rights to adversarial proceedings and equality of arms, which are implied elements of a fair trial under Article 6 §1,⁷⁴ the right to be notified of the charge under Article 6

73. See also above, Section 3.1.2, Procedural obstacles to access to court; and Section 6.1, Reasoned decision.

74. See also above, Section 5.1.1, Adversarial principle; and Section 5.1.2, Equality of arms.

§3a,⁷⁵ the right to adequate time and facilities to prepare one's defence under Article 6 §3b,⁷⁶ and the right to call witnesses under sub-paragraph (d).⁷⁷

The usual approach is to examine an alleged violation of Article 6 §3c together with Article 6 §3b, in order to show, by way of cumulative analysis of various difficulties experienced by the defence, the overall effect of those defects on fairness of the trial as a whole within the meaning of Article 6 §1 (*Öcalan*).

Article 6 §3c consists of four distinct elements, namely the right a) to defend oneself in person (*Foucher*), b) in certain circumstances, to choose a lawyer (*Campbell and Fell*), c) to free legal assistance where one has insufficient means and where the interests of justice so require (*John Murray*), and finally d) to practical and effective legal assistance (*Bogumil*, §§47-50).

The right to represent oneself is not absolute, and state authorities can deny an accused that right since in some situations the domestic law requires that the person be legally represented, in particular where serious alleged offences are at issue (*Kamasinski*).

At the same time, where an accused has been granted the right to represent themselves, additional restrictions on their defence rights as a result of self-representation – such as denial of access to the case file at the pre-trial stage – may result in a violation (*Foucher*).⁷⁸

Decision on whether or not to allow access to a lawyer – free or paid – must be subject to judicial control and must not be taken by an executive authority at its own discretion (*Ezeh and Connors*, §§100-108).

Absence of the right to have a lawyer at a hearing is likely to violate Article 6 §3c, even where such access was granted at prior stages of the proceedings (*Ezeh and Connors*).

Inability to obtain free legal assistance usually arises in the context of minor criminal offences and administrative or disciplinary breaches that are considered "criminal" only under the autonomous meaning of Article 6 §1 but not under the provisions of domestic law; hence no automatic right to free legal advice may available to the applicant (*Engel*).⁷⁹

75. See also above, Section 9.1.1, Notification of charge.

76. See also below, further in this section.

77. See also below, Section 9.3, Examination of witnesses.

78. See also above, Section 5.1.2, Equality of arms.

79. See also above, Section 2.2, Criminal charge.

In deciding whether to award free legal assistance, the authorities must take account of the financial means of the accused as well as the interests of justice, which include a consideration of the nature and complexity of the alleged offence, what is at stake for the accused, the severity of the penalty that might be imposed, other consequences such as the existence of criminal record, and the capacity of the accused to represent themselves adequately (*Timergaliyev*).

If the accused has sufficient means to pay for a lawyer, no consideration of the interests of justice need be undertaken for the purpose of granting the accused legal aid (*Campbell and Fell*).

Even in uncomplicated cases, the balance of the interests of justice will tip towards granting legal aid where the defendant risks a prolonged sentence of real imprisonment (*Quaranta v. Switzerland*, §§32-38).

The right to free legal assistance applies regardless of the stage of the proceedings, including pre-trial investigation (*Quaranta*).

It is compatible with the interests of justice that the accused in military or prison disciplinary proceedings involving very simple facts defend themselves in person and receive free legal assistance limited to dealing with legal issues of appeal (*Engel*, §§89-91).

The refusal of legal aid at the appeal stage may also be compatible with the interests of justice, as long as a consideration of reasonable prospect (objective likelihood) of success is carried out by the authority deciding on the legal aid (*Monnell and Morris*, §§55-70).

At the same time, refusal of legal aid at the appeal stage may be unacceptable where substantial issues of law arise on appeal (*Pakelli v. Germany*, §§31-40).

The review of the interests of justice must take place at each stage of the proceedings (*Granger*, §§43-48).

Only applicants with the means to pay for a lawyer have the right to select a person of their choice to represent them (*Campbell and Fell*); an applicant benefiting from legal aid has no right to choose a lawyer (*Kremovskij*, dec.). At the same time, where legal-aid lawyers manifestly fail to perform their duty, the authorities have a positive obligation to replace them (*Artico*, §§31-38).

The right to choose a lawyer is not an absolute one; restrictions can be properly placed for the purpose of good administration of justice on how many lawyers, with what qualifications and under what rules of conduct, can appear before the court (*Ensslin and others v. Germany*, dec. 1978).

A person tried *in absentia* must be enabled to be represented by a lawyer of choice (*Karatas and Sari v. France*, §§52-62).

Restrictions on access to a lawyer at the very early stages of the proceedings, such as immediately following the arrest, may result in a violation of Article 6 §3c if a confession is obtained from an unrepresented accused – relevant circumstances may include the evidence stemming from the confession and the adverse inferences drawn from the eventual silence of the accused. At that particular stage the accused is considered to be most vulnerable to inappropriate pressure and requiring legal assistance (*John Murray; Salduz* [GC], §§56-62), unless the right to a lawyer is explicitly and knowingly waived by the defendant (*Yoldaş v. Turkey*, §§46-55).

However, the Court has recently found that delayed access to a lawyer by certain persons suspected of terrorism in a “ticking bomb” situation, despite certain pressure exercised by the authorities and the use of their statements at trial, might be compatible with Article 6, if relevant factors show that the proceedings were overall fair (*Ibrahim and Others v. the United Kingdom*). Among the relevant factors in this respect are: a) particular vulnerability of a suspect; b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial; c) an opportunity to challenge the authenticity of the inculpatory evidence and oppose its use; d) the nature of statements and whether they were promptly retracted or modified; e) the weight of the public interest in the investigation; and f) punishment for the particular offence at issue.

As a general rule, accused persons must be entitled, as soon as they are taken into custody, to be assisted by a lawyer, and not only while being questioned in custody (*Dayanan*, §§29-34).

No pressure to confess should be placed on unrepresented persons even if they do not have the procedural status of suspect during the impugned questioning, and are formally treated as witnesses at that stage (*Shabelnik*).⁸⁰

Prompt access to a lawyer constitutes an important counterweight to the vulnerability of any suspects in police custody, providing a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributing to the prevention of miscarriages of justice (*Salduz v. Turkey*).

At the same time, the presence of a lawyer is not necessarily required if a person is questioned by the police without being detained, even if later that person becomes a suspect (*Aleksandr Zaichenko v. Russia*, §§46-51).

80. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

A waiver of legal assistance by a suspect made in suspicious circumstances may be considered invalid. If accused persons invoke the right to be assisted by a counsel during interrogation, a valid waiver cannot be established merely by showing that they responded to subsequent questions of the police, even if it is not disputed that the suspects had been advised of their rights (*Pishchalnikov*, §§72-91).

There is no firm case law concerning the requirement for a lawyer to be present during investigative actions other than the initial questioning. It appears, however, that the presence of a lawyer at the time of the accused confronting a non-key witness during the pre-trial stage is not an essential ingredient of the defence rights (*Isgrò v. Italy*, §§31-37).⁸¹ At the same time, it appears that the presence of a lawyer may be required during an identity parade, especially where it plays a crucial role in the eventual conviction (*Laska and Lika*, §§63-72).

The manner in which legal assistance is given – be it free or paid – must be “practical and effective” and not merely “theoretical and illusory” (*Artico v. Italy*, §§31-38).

There is no right, as such, to have access to a lawyer at all times of the proceedings, and restrictions may be placed on the number or duration of meetings, especially at the pre-trial stage (*Bonzi*), provided the crucial need of access to legal advice is respected immediately after the arrest (*John Murray*).

As a matter of principle, a criminal defendant has a right to communicate with their lawyer in private (*Sakhnovskiy* [GC], §§99-107), although visual observation of their contacts is permissible. However, the right to communicate with the lawyer in private is not an absolute one, and police supervision of client/lawyer meetings may be carried out at the pre-trial stage in order to prevent collusion (*S. v. Switzerland*, §§48-51) or fresh crimes (*Brennan v. the United Kingdom*, §§42-63), or to protect witnesses (*Kurup*, dec.).

The manner and duration of supervision of the communication between the accused and their lawyer must: a) have compelling reasons, that is, reasonable grounds to suspect not only the accused but also the lawyer concerned to be involved in or facilitating the occurrence of any damaging activities, the assessment being made under an objective test; and b) be a proportionate response to the perceived need (*S. v. Switzerland*, *Brennan*, *Kurup*). Such measures as eavesdropping on the defendant’s contacts with his lawyers will be legitimate only where they are “absolutely necessary”. Such measures may violate Article

81. See also below, Section 9.3, Examination of witnesses.

6 §3c even where they do not appear to have any direct bearing on the merits of the charges or the strategy of the defence (*Zagaria v. Italy*, §§32-36).

Legal representation: violation

- ▶ Denial of access to case file at pre-trial stage on ground that accused had chosen to represent himself, access being available under domestic law only to lawyer (*Foucher*)⁸¹
- ▶ Access to lawyer prevented by discretionary decision of prison governor at hearing of disciplinary case against prisoners, while right to consult lawyer was granted during adjournment (*Ezeh and Connors*)
- ▶ Lawyer required to seek permission from investigator each time in order to consult with his client, measure without basis under domestic law (*Moiseyev*)
- ▶ Failure of applicant's official counsel to appear at appeal level, coupled with applicant's inability on appeal to obtain hearing aid to allow him to participate effectively despite hearing deficiency (*Timergaliyev*)⁸²
- ▶ Refusal of legal aid on appeal, despite fact that substantial issues of law had arisen (*Pakelli*; but see *Monnell and Morris*)
- ▶ Failure to reconsider interests of justice involved in granting legal aid, in view of complex legal questions arising during appeal hearing (*Granger*)
- ▶ Lack of choice of lawyer granted to accused who absconded and was tried *in absentia* (*Karatas and Sari*)
- ▶ Confession obtained and used to found conviction from unrepresented person who was formally witness at material time (*Shabelnik*)⁸³
- ▶ Inability to retract initial confession obtained from unrepresented suspect, while he was provided with lawyer later but police instantly acted on it securing further evidence (*Truten v. Ukraine*)
- ▶ Confession obtained from unrepresented person where police investigator manipulated definition of imputed crime in order to avoid affording suspect mandatory legal assistance, while exerting pressure to sign waiver of legal assistance (*Yaremenko v. Ukraine*)
- ▶ Confession made by applicant represented by legally aided lawyer, given that he was not informed about another available lawyer hired by his parents and was thus unable to make informed choice (*Dvorski v. Croatia*)

82. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

- ▶ Absence of lawyer when applicant was held in custody due to statutory restrictions on access, despite him exercising his right to remain silent (*Dayanan v. Turkey*; but see *Simeonovi*)
- ▶ Supervision by police of almost all meetings between applicant and lawyer at pre-trial stage in case involving 16 other accused persons – violation found despite lawyer’s possible involvement in collusion (*S. v. Switzerland*; but see *Bonzi, Kurup*)
- ▶ Police supervision of first meeting between suspected terrorist and lawyer, at which they were also prevented from exchanging any names, given lack of any reasonable allegations that lawyer might have been ready to pass any damaging information to suspects at large (*Brennan*)
- ▶ Inability of legal-aid lawyer to provide effective legal representation to foreign defendant, having been appointed only three days before appeal was heard by Supreme Court (*Daud v. Portugal*; but see *Tripodi*)
- ▶ Failure to replace legal-aid defence counsel despite latter’s manifest negligence – failure to substantiate appeal by any legal arguments (*Czekalla*; but see *Tripodi*)
- ▶ Refusal to replace legal-aid counsel who failed to communicate with applicant in advance of last appeal hearing in murder case (*Sakhnovskiy*)
- ▶ Interception of conversations held via video-conference between accused and lawyer (*Zagaria*)
- ▶ Applicant first represented by trainee lawyer, then by more experienced lawyer (who did nothing save requesting to be removed from case), and then by third legal-aid counsel who had been given only five hours to read case file (*Bogumil*)

The possibility of co-ordination of defence strategy between a number of lawyers in cases involving multiple accused must not be confused by the authorities with an attempt on the lawyers’ behalf at collusion, and may not warrant continuous supervision of the client/lawyer meetings (*S. v. Switzerland*).

The need for supervision of initial meetings between the accused and the lawyer will be subjected to more intensive scrutiny (*Brennan*, contrast with *Kurup, Bonzi*).

83. See also above, Section 5.2.2, Effective participation.

84. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

States cannot normally be held responsible for the conduct of an accused's lawyer. At the same time, where failure of the counsel appointed under the legal-aid scheme to provide effective representation is manifest, there is a positive obligation on them to intervene by replacing any (legally aided) lawyer who acts improperly (*Czekalla v. Portugal*, §§59-71) or, alternatively, allowing the lawyer to carry out their functions effectively by way of an adjournment (*Artico, Sakhnovskiy* [GC], §§99-107). If the problem with legal representation is evident, the courts must take the initiative and solve it, for example, by ordering an adjournment to allow a newly appointed lawyer to acquaint themselves with the case file (*Bogumil*, §§47-50).

Legal representation: no violation

- ▶ Refusal of legal aid on appeal after consideration and decision that appeal would have no reasonable prospect of success (*Monnell and Morris*; but see *Granger* and *Pakelli*)
- ▶ Inability to choose legally aided defence counsel (*Kremrovskij*, dec.)
- ▶ Restriction on number of lawyers (limited to three for each defendant); exclusion of individual lawyers suspected of supporting criminal association in which accused was allegedly involved (*Ensslin and others*, dec.)
- ▶ Lack of reasonable efforts by arrested person to defend himself after signing confession immediately following arrest and stating that he needed no lawyer at that stage (*Zhelezov*, dec.; *Latimer*, dec., but see *John Murray* and *Dayanan*)
- ▶ Applicant not assisted by lawyer for first three days of his detention and exercising his right to remain silent, even if his initial confession was used as evidence, corroborated by other evidence at trial (*Simeonovi v. Bulgaria*; but see *John Murray* and *Dayanan*)
- ▶ Accused placed in solitary confinement and prevented from communicating with lawyer for few limited periods, given ability to communicate freely with lawyer rest of time (*Bonzi*)
- ▶ Defence counsel placed under obligation not to disclose identity of certain witness to client at early stage of proceedings, in order to protect witness from interference (*Kurup*)
- ▶ Lack of shortcomings imputable to state where defence counsel could not attend hearing owing to sickness but made no reasonable efforts to be replaced (*Tripodi*)
- ▶ Applicant charged with minor offence signing form refusing assistance of lawyer, considered as valid waiver in absence of evidence of trickery by police (*Galstyan v. Armenia*)

- ▶ Legal aid refused but directions given by court how to supplement case file to defendant facing criminal proceedings relating to straightforward tax surcharges, there being no risk of applicant being deprived of liberty (*Barsom and Varli v. Sweden*, dec.)
- ▶ Refusal by court to admit to proceedings new, third, lawyer to advise applicant on matters relating to international law, considered not to be pertinent to case at issue (*Klimentyev v. Russia*)
- ▶ Despite poor quality of performance by legally aided lawyer (lack of any factual or legal arguments in his closing speech, or involvement in drafting appeal), no manifest failure to provide legal assistance because lawyer filed certain motions and tried to secure applicant's release from detention at least once (*Gabrielyan v. Armenia*)

However, the test of manifest negligence is rather stringent, given that an isolated example of the lack of reasonable efforts/considerable diligence on behalf of the lawyer may not be sufficient to give rise to the state's positive obligation to make up for the lawyer's shortcomings (*Tripodi v. Italy*, §§27-31).

9.3. Examination of witnesses

There is a certain overlap between this provision and the rights to adversarial proceedings and particularly the equality of arms (*Vidal*), which are implied elements of the fair trial under Article 6 §1, the right to adequate time and facilities to prepare one's defence under Article 6 §3b (*G.B. v. France*), and the right to legal representation under sub-paragraph (c) (*S.N. v. Sweden*).⁸⁵

Article 6 §3d consists of three distinct elements, namely the right to: a) challenge witnesses for the prosecution (or test other evidence submitted by the prosecution in support of their case, or challenge witnesses summoned to testify during trial on court's order); b) in certain circumstances, call a witness of one's choosing to testify at trial, i.e. witnesses for the defence (*Vidal*); and c) examine prosecution witnesses on the same conditions as those afforded to the defence witnesses.

The usual approach is to examine an alleged violation of Article 6 §3d, in order to show, by way of cumulative analysis of various difficulties experienced

85. See also above, Section 5.1.1, Adversarial principle; and Section 5.1.2, Equality of arms; and Section 9.1.2, Adequate time and facilities to prepare defence; and Section 9.2, Legal representation or defence in person.

by the defence in regard to witnesses, the overall effect of those defects on fairness of the trial as a whole within the meaning of Article 6 §1 (*Vidal*).

In accordance with the subsidiarity principle, the right to examine witnesses does not permit complaints alleging wrong assessment by the courts of evidence given by witnesses or of other findings of fact (*Perna v. Italy* [GC], §§29-32), provided that no grossly unfair or arbitrary conclusions are reached by the courts in that respect (*Scheper v. the Netherlands*, dec.).

The right to examine witnesses does not preclude a trial court from examining in parallel and relying on written witness statements made at the pre-trial stage, provided that the defence has had a chance to confront the witness at a certain point in the proceedings (*Bracci*, §§54-61; cf. *Orhan Çaçan*, §§31-43). Moreover, oral testimony given by a witness at trial should not necessarily prevail over their earlier testimony recorded by the police.

Article 6 §3d enjoys a significant autonomy but is not fully autonomous from the domestic law as this provision takes into account the inherent differences between accusatorial systems (the parties decide which witnesses to call, and witnesses are questioned solely by the parties or their representatives) and inquisitorial systems (the court and/or the prosecutor decide which witnesses to call and question). An applicant in an inquisitorial procedural set-up cannot therefore, as such, rely on Article 6 §3d to call any witness of their choosing to testify at trial (*Perna*; *Vidal*).⁸⁶

However, the word “witness” itself in Article 6 §3d has a fully autonomous meaning and applies not only to persons called to give evidence at trial. It includes: authors of statements recorded pre-trial and read out in court (*Kostovski v. the Netherlands*, §§38-45); depositions of the co-accused (*Luca v. Italy*, §§38-45); and persons having specific status, such as experts (*Boenisch*, *Brandstetter*).

It can be left for the trial court, as is usually the case in inquisitorial systems, to determine whether calling a particular defence witness to testify would be of relevance for the trial (*Perna v. Italy* [GC]). On some occasions, however, the Court was prepared, exceptionally, to review the findings of the domestic courts as to the pertinence and importance of witness evidence proposed by the defence (*Olujić*, §§78-85).

Persons alleging a breach of Article 6 §3d must prove not only that they were not permitted to call a certain witness, but also that hearing the witness was absolutely necessary to allow the domestic court to decide on the merits,

86. See also above, Section 5.1.2, Equality of arms.

and that the failure to hear the witness prejudiced the rights of the defence and fairness of the proceedings as a whole (*Butkevičius*, dec.; *Kremppovskij*, dec.). The right to call witnesses for the defence may be interpreted broadly and may also concern the right of the defence to seek examination of other evidence, including material evidence, expert reports, etc.

Despite the usual considerations by the Court of “peaceful co-existence” of inquisitorial and adversarial (accusatorial) systems within the framework of Article 6, the case law position has gradually changed with the recent jurisprudence. Following adoption of two subsequent Grand Chamber judgments in *Al-Khawaja and Tahery v. the United Kingdom* and *Schatschaschwili v. Germany*, a strong presumption for required presence of all prosecution witnesses at trial has been created, thus limiting what was traditionally reserved as a prerogative of prosecution or courts in inquisitorial systems. In case of absence of any witness summoned by defence, the fairness of the proceedings is evaluated on the basis of a three-step test: a) was there a good reason for the witness absence? b) were the statements of that witness the “sole” evidence or “decisive” evidence used for the conviction? and c) whether the use of these statements was remedied by sufficient “counter-balancing factors”, including the existence of adequate “procedural safeguards”. Importantly – and in contrast to earlier case law – none of the answers to the above questions is, on its own, capable of determining a conclusion about the eventual fairness of the proceedings. The evaluation of the above three factors should therefore be cumulative.

There is no exhaustive list of reasons for the absence of a witness, and each reason needs to be evaluated in the specific circumstances of a case, having regard to the authorities’ duty to take “reasonable measures” to secure attendance (*Nechto v. Russia*).

Among “good reasons” for the absence of a witness recognised by the Court are: a) death of the witness (*Al-Khawaja and Tahery*); b) active but unsuccessful attempts to locate and summon the witness with the help of the police, including the use of international legal assistance instruments, or issuing a fine for the failure to appear at trial (*Chmura v. Poland*, *Sellick and Sellick v. the United Kingdom*, *Prăjină v. Romania*); c) possible extremely adverse psychological effect of the examination at trial on a victim of sexual crime (*Gani v. Spain*).

The evaluation of whether statements of a certain witness were “sole” or “decisive” evidence essentially depends on the specific circumstances of the case. However, considering the approach in *Schatschaschwili*, the absence at trial

of any other witness does not absolve the authorities of the duty to take all reasonable measures to secure attendance, while the absence of a non-decisive witnesses might also lead to a violation of Article 6 by reason of the other two criteria (no “good reason” or lack of adequate “procedural safeguards”).

The assessment of the significance of a witness could be made on the basis of analysing the importance attached to that particular evidence in the architecture of the bill of indictment or, subsequently, the judgment pronouncing the conviction (*Birutis and Others v. Lithuania*, §§28-35). A witness may also become a “key witness” if their evidence is the only evidence able to confirm or counter a particular defence chosen by the applicant, such as in cases of entrapment defence (*Ramanauskas*).⁸⁷ In reaching this decision, the Court may occasionally examine the quality and reliability of other evidence used against the accused. Thus, although the case law does not exclude in absolute terms the use of hearsay, this type of evidence cannot be relied upon in a situation where a direct eyewitness has not been questioned (*V.D. v. Romania*, §§107-116). A similar logic applies to confessions of co-defendants, which may not be used as a foundation of a guilty verdict for the one who did not confess (*Vladimir Romanov v. Russia*, §§97-106). Written depositions retracted by a witness at the trial may also be considered as not sufficiently reliable to support an accusation where the key witness was not properly questioned (*Orhan Çaçan*, §§31-43).

The sufficient “counter-balancing factors” (substantive or procedural) must be case-specific. The domestic courts must be aware of the need to approach the evidence from an absent witness with “caution” (*Ellis and Simms v. the United Kingdom* and *Martin v. the United Kingdom*). They must provide a “detailed reasoning” as to why they decided to consider such evidence reliable (*Sievert v. Germany*). Such counter-balancing factors may include: a) instruction to the jury to treat such evidence with caution (*Beggs v. the United Kingdom*); b) availability of direct and conclusive corroborative evidence (*Tseber v. the Czech Republic*); c) opportunity for the defence to point out incoherences and cast doubt on credibility of a witness (*Aigner v. Austria*, *Garofolo v. Switzerland*); d) examination of video-recordings of an interrogation (*D.T. v. the Netherlands*), etc.

Examination of witnesses at pre-trial stages of the proceedings – for example, at a face-to-face confrontation (*Isgro*, §§30-37), or in the previous sets of related proceedings (*Klimentyev*, §§124-127) – might be a relevant factor remedying the absence of a witness at trial. However, a pre-trial challenge of prosecution witnesses by the defence might not be sufficient to fully guarantee defence

87. See also above, Section 5.3.1, Entrapment defence.

rights where the witnesses subsequently changed their position (*Orhan Çağan v. Turkey*; §§31-43; *Vladimir Romanov v. Russia*, §§97-106).

The right to call a witness to testify applies both to trial and appeal stages as long as the questions of fact are examined at the second level of jurisdiction (*Vidal*). Calling a witness on appeal may be required where the appeal court could reverse the first-instance judgment by newly evaluating factual statements heard before the first-instance court (*García Hernández v. Spain*, §§26-36).

Witnesses have a civil obligation to testify, and refusal to give evidence should not prevent the court from ordering them brought to the court, if needed (*Serves*).⁸⁸

The authorities can protect the identity of a witness, such as a police agent or an informant, or of a particular sensitive investigating technique, by making witnesses anonymous; Article 6 §3d leaves it, in principle, to the discretion of the state to decide on the proportionality of recognising anonymous witnesses. But a balancing exercise must be carried out under Article 6 §3d in weighing the interest of the defence in examining the witness against the public interest to protect that person (*Van Mechelen and others v. the Netherlands*, §§59-65). In the recent *Pesukic v. Switzerland* and *Scholer v. Germany* cases, the Court concluded that the test to be used for the above balancing exercise must be essentially the same as in *Al-Khawaja*, necessitating: a) review of the reasons for anonymity (as much as possible without compromising protection of identity); b) significance of testimony; and c) counter-balancing factors put in place by the domestic authorities.

In any event, the defence must be allowed to challenge the anonymous witness's credibility by: a) putting written questions (*Kostovski*); b) inviting the lawyer to participate in the questioning while also preventing disclosure of the witness's identity to the applicant (*Doorson; Kurup*);⁸⁹ or c) allowing the applicant to ask questions during a video-conference while disguising the witness's voice or appearance (*Birutis and Others*).

Just as the defence should have a right to confront a key witness for the prosecution at trial, it must also have access to and the ability to challenge any other "crucial" or "decisive" evidence, including documentary or material evidence (*Mirilashvili*, §§200-209).⁹⁰

88. See also above, Section 5.3.2, Right to silence and privilege against self-incrimination.

89. See also above, Section 9.2, Legal representation or defence in person.

90. See also above, Section 5.1.1, Adversarial principle; and Section 5.1.2 Equality of arms.

Examination of witnesses: violation

- ▶ Impossibility for defence to call any witnesses before appeals court – which convicted applicant while reversing factual findings in applicant’s acquittal at first instance – mostly by fresh evaluation of witness statements and other factual findings made at trial (*Vidal*; but see *Scheper*; *S.N. v. Sweden*; *Al-Khawaja and Tahery* for exceptional cases of acceptable absence of key witness at trial)
- ▶ Inability to summon witness who would have been able to confirm or counter applicant’s entrapment allegations (*Ramanauskas*)⁹⁰
- ▶ Failure of courts to carefully and critically scrutinise reasons advanced by police concerning lack of possibility to ensure witnesses’ presence at trial (*Nechto v. Russia*)
- ▶ Failure of courts to examine new witnesses and verify credibility of absent foreign witness’s pre-trial testimony (*Prăjină v. Romania*; but see *Garofolo, Solakov*)
- ▶ Conviction based entirely (*Birutis and Others*) or to decisive extent (*Kostovski*; *Van Mechelen and Others*) on anonymous witness evidence (but see *Doorson*)
- ▶ More substantive procedural role enjoyed by court-appointed expert – police officer lacking neutrality with regard to accused – compared to expert appearing on behalf of defence, latter not being allowed to attend whole hearing (*Boenisch*, but see *Brandstetter*)
- ▶ Sudden and complete change of evidence given by court-appointed expert during same hearing which had decisive impact on jury’s opinion, in view of refusal of trial court to appoint alternative expert (*G.B. v. France*, but see *Boenisch, Brandstetter* for more usual approach)⁹¹
- ▶ Inability of applicant to examine experts who prepared reports on which conviction was based (*Balsytė-Lideikienė v. Lithuania*)
- ▶ Refusal of trial court to summon experts on behalf of applicant claiming need for gender re-assignment surgery (*Schlumpf v. Switzerland*)
- ▶ Refusal of trial court to conduct DNA examination of sperm allegedly belonging to defendant accused of rape, accusation being largely based on testimony of senile women unconfirmed at trial, other evidence being either inconclusive or hearsay (*V.D. v. Romania*)
- ▶ Imbalance between defence and prosecution in collecting, adducing and contesting “expert evidence” (*Khodorkovskiy and Lebedev v. Russia*, §735)

- ▶ Even if court hearing could cause considerable psychological trauma to victim and consistency of victim statements could not be guaranteed in stressful situations, it was essential to at least give defendants opportunity to have questions put to victim during pre-trial investigation (*Vronchenko v. Estonia; Rosin v. Estonia*)
- ▶ No attendance at trial for robbery of two foreign victims (prostitutes), and no “counter-balancing measures” taken by authorities to allow defence to question them pre-trial, given knowledge of their possible departure from trial country in view of their way of life (*Schatschaschwili v. Germany*)

Expert witnesses are, as a rule, treated by Article 6 §3d like any other witnesses (*Mirilashvili*, §§200-209), and are not required to conform with the criterion of neutrality. However, in certain circumstances the Court has noted that the absence of neutrality of an expert may raise an issue, for example where a court-appointed, or so-called official, expert enjoys procedural privileges *vis-à-vis* the defence or their privately employed expert (*Boenisch, Brandstetter*). The expert neutrality test appears to be more stringent for the applicant than the impartiality test under Article 6 §1, necessitating evidence of the expert’s bias under the subjective test and not merely an appearance-based objective test (*Brandstetter*).⁹³

In exceptional circumstances – such as a sudden and complete change of evidence given by a court-appointed expert in the course of the same hearing – a problem of fairness may arise if the court does not allow the defence to determine its position, and does not consider calling a further expert to testify, replacing the manifestly incompetent expert (*G.B. v. France*).⁹⁴

It may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively, the defence must have the same opportunity to introduce their own “expert evidence” (*Khodorkovskiy and Lebedev v. Russia*, §731). It remains unclear, however, to what extent the Convention

91. See also above, Section 5.3.1, Entrapment defence.

92. See also above, Section 5.1.2, Equality of arms.

93. See also above, Section 4.2, Impartial tribunal; and Section 5.1.2, Equality of arms.

94. See also above, Section 5.1.2, Equality of arms; and Section 9.1.2, Adequate time and facilities to prepare defence.

may require the expenses of certain experts (crucial for the determination of the dispute) to be covered under the legal-aid scheme.

The right to call witnesses for the defence is sometimes interpreted in a broader sense, as a right of the defence to collect and introduce other exculpatory evidence, such as documents, expert reports, etc. Whereas it is primarily for the national courts to decide whether such evidence proposed by the defence is necessary and sufficient, the Strasbourg Court may disagree with the decisions of the domestic courts not to admit evidence where: a) those decisions: are not sufficiently motivated; b) exculpatory evidence may indeed seriously undermine the case of the prosecution; and c) the evidential basis of the prosecution case is weak (*V.D. v. Romania*, §§107-116).

Where the results of an expert examination are crucial for the outcome of the case, the defence may have a right not only to challenge the conclusions of the expert report in court, but also to have the opportunity to attend and effectively participate in the examination of the expert at the pre-trial stage, for example, by putting additional questions to the expert (*Cottin v. Belgium*, §§31-33; *Mantovanelli v. France*, §§31-36).

Examination of witnesses: no violation

- ▶ Fact-finding mission organised by prosecution to question key foreign witness at pre-trial stage in presence of accused's lawyer, without subsequently being able to obtain presence of witness in court (*Solakov*; *Butkevičius*, dec.)
- ▶ Key foreign witness not heard during trial but only by investigating judge abroad with defence counsel present (*Šmajgl v. Slovenia*)
- ▶ Absence of key foreign witness at trial concerning organised criminal offences – use of video-recordings of pre-trial interviews and genuine attempts to ensure presence including international co-operation measures considered as sufficient “counter-balancing” factors (*Chmura v. Poland*)
- ▶ Reference to foreign (hospitalised) witness's pre-trial statements to found conviction, corroborated by other evidence (*Garofolo v. Switzerland*, but see *Prăjină v. Romania*)
- ▶ Request to summon key foreign witness made by defendant too deep into trial stage (*Solakov*)

- ▶ Three key witnesses – all alleged victims of rape – refusing to testify at trial in order to avoid serious mental disturbances by confronting perpetrator, testimonies being recorded before trial and used for conviction (*Scheper v. the Netherlands*, dec.)
- ▶ Absence of key witness – attempted rape victim – at trial, as transcripts of pre-trial adversarial examination were admitted as evidence (*Aigner v. Austria*)
- ▶ Absence of key witness – minor victim of alleged sexual abuse by teacher – at trial, given his video-taped pre-trial interview in presence of defence lawyer, that evidence forming basis for teacher’s conviction (*S.N. v. Sweden*, dec.)
- ▶ Absence of key witness – minor victim of alleged sexual offence – at trial, in view of available video-recordings of pre-trial interviews, examination of experts and other corroborative evidence (*D.T. v. the Netherlands*)
- ▶ Suicide of key witness before trial, whose pre-trial statement was taken into account as decisive piece of inculpatory evidence, counterbalanced by various procedural safeguards (*Al-Khawaja and Tahery*)
- ▶ Admission of deceased non-key witness’s pre-trial statements, with “counter-balancing factors” in place, including careful directions to jury (*Beggs v. the United Kingdom (No. 2)*)
- ▶ Key witness (victim of rape) dying before trial, conviction being based on her written statement to police and corroborated by other evidence, including traces of applicant’s sperm on her body (*Mika v. Sweden*, dec.)
- ▶ Appeals court deciding on its own discretion on relevance of need to summon certain witnesses, without re-assessing findings of fact of lower court (*Perna*)
- ▶ Non-key anonymous witness questioned on appeal in presence of accused’s lawyer (*Doorson*; but see *Kostovski*)
- ▶ Interrogation of anonymous witness in separate room, as judge and jury could observe, and defence communicated via sound-link distorting voice (*Pesukic v. Switzerland*)
- ▶ Admission of anonymous witness testimonies during trials for gang-related offences, due to witnesses’ reasonable fear of repercussions (*Ellis and Simms v. the United Kingdom* and *Martin v. the United Kingdom*; *Scholer v. Germany*)

- ▶ Key witness refusal to answer questions by defence at trial – use of previous (pre-trial) statements, which were carefully examined as to their reliability by court and other “counter-balancing factors” (*Sievert v. Germany*)
- ▶ Confrontation between accused and non-key witness carried out pre-trial in absence of lawyer, and subsequent failure to locate witness, given that witness evidence was subsequently used to found conviction but did not form essential/crucial basis thereof (*Isgrò*)
- ▶ More substantive procedural role enjoyed by court-appointed expert who was deemed “neutral”, despite being member of institution that initiated report into applicant’s business activities triggering prosecution against him (*Brandstetter*; but see *Boenisch*)

Interpretation

There is a certain overlap between this provision and the rights to adversarial proceedings and the equality of arms, which are implied elements of a fair trial under Article 6 §1,⁹⁵ the right to notification of a charge in a language one understands (*Brozicek*),⁹⁶ the right to adequate time and facilities to prepare one’s defence under Article 6 §3b, and the right to legal representation under sub-paragraph (c) (*Quaranta; Czekalla*).⁹⁷

This provision guarantees the right to free interpretation for someone who does not understand the language of court, though not necessarily assistance in their mother tongue (*Brozicek v. Italy*, §§38-46). If interpretation is denied, the burden is on the authorities to prove that the accused has sufficient knowledge of the court language (*Brozicek*).

Free interpretation has to be provided to a degree sufficient to ensure a fair trial (*Cuscani v. the United Kingdom*, §§38-40).

The onus is on the trial judge to show considerable diligence in ascertaining that the absence of an interpreter would not prejudice the applicant’s full involvement in matters of crucial importance for them (*Cuscani*). This obligation of the authorities is not limited to the mere appointment of an interpreter but also to exercising a degree of control over the adequacy of the interpretation (*Cuscani; Kamasinski*).

95. See also above, Section 5.1.1, Adversarial principle; and Section 5.1.2, Equality of arms.

96. See also above, Section 9.1.1, Notification of charge.

97. See also above, Section 9.2, Legal representation or defence in person.

Interpretation: violation

- ▶ Failure to provide German defendant with translation from language of charge, Italian, given lack of proof that he understood it sufficiently (*Brozicek*)
- ▶ Trial judge failing to show considerable diligence in enquiring about difficulties in understanding court's language by Italian tried in the United Kingdom for tax offences (*Cuscani*)
- ▶ Absence of adequate legal representation of foreigners having difficulty in understanding court's language (*Quaranta; Czekalla*)⁹⁷

Article 6 §3e extends to cover the translation of some material, but not all the relevant documentation; it covers the translation or interpretation only of documents or statements – such as the charge, bill of indictment, key witness testimony, etc. – which are necessary for the defendant to have the benefit of a fair trial (*Kamasinski*).

It is crucial, therefore, that free translation or interpretation for a foreigner be adequately supplemented by legal assistance of sufficient quality (*Quaranta; Czekalla*).

The word “free” means that the authorities cannot recover the costs of interpretation at the end of the proceedings, regardless of their outcome (*Işyar v. Bulgaria*, §§46-49).

It may be argued that an inability to understand or speak arising from a physical disability, or a young or very old age, may also invoke application of the guarantees of Article 6 §3e, even though, following the *T. and V. v. the United Kingdom* case, this issue should more appropriately be looked at from the point of view of general fairness under paragraph 1 and the principle of effective participation as an element thereof (*Stanford*, dec.).

Interpretation: no violation

- ▶ Oral interpretation of charge against foreigner not knowing court language (*Kamasinski*)
- ▶ Suspected heroin smuggler from France questioned by Swedish customs officer without interpreter during first interview in customs office, customs officer having sufficient command of French (*Diallo v. Sweden*, dec.)
- ▶ Applicant, speaking only Lithuanian and Russian, tried in Poland and assisted by defence lawyer speaking only Polish – as interpreter was present during all hearings and meetings with lawyer (*Pugžyls v. Poland*)

98. See also above, Section 9.2, Legal representation or defence in person.

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