

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

## Guide on Article 6 of the European Convention on Human Rights

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Right to a fair trial  
(criminal limb)

Updated on 31 December 2019

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## Note to readers

This guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular guide analyses and sums up the case-law on the criminal limb of Article 6 of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.\*

The Court’s judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, and, more recently, *Jeronovičs v. Latvia* [GC], § 109).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 156).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a *List of keywords*, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The *HUDOC database* of the Court’s case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the *HUDOC user manual*.

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\* The case-law cited may be in either or both of the official languages (English and French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was finalised are marked with an asterisk (\*).

## Article 6 of the Convention – Right to a fair trial

“1. 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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) 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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

## HUDOC keywords

Civil proceedings (6) – Criminal proceedings (6) – Administrative proceedings (6) – Constitutional proceedings (6) – Disciplinary proceedings (6) – Enforcement proceedings (6) – Expulsion (6) – Extradition (6)

1. Civil rights and obligations (6-1): Determination (6-1) – Dispute (6-1); Criminal charge (6-1): Determination (6-1) – Access to court (6-1) – Fair hearing (6-1): Adversarial trial (6-1); Equality of arms (6-1); Legal aid (6-1) – Public hearing (6-1): Oral hearing (6-1); Exclusion of press (6-1); Exclusion of public (6-1) – Necessary in a democratic society (6-1): Protection of morals (6-1); Protection of public order (6-1); National security (6-1); Protection of juveniles (6-1); Protection of private life of the parties (6-1); Extent strictly necessary (6-1); Prejudice interests of justice (6-1) – Reasonable time (6-1) – Independent tribunal (6-1) – Impartial tribunal (6-1) – Tribunal established by law (6-1) – Public judgment (6-1)

2. Charged with a criminal offence (6-2) – Presumption of innocence (6-2) – Proved guilty according to law (6-2)

3. Charged with a criminal offence (6-3) – Rights of defence (6-3)

(a) Information on nature and cause of accusation (6-3-a) – Prompt information (6-3-a) – Information in language understood (6-3-a) – Information in detail (6-3-a)

(b) Preparation of defence (6-3-b) – Adequate time (6-3-b) – Adequate facilities (6-3-b) – Access to relevant files (6-3-b)

(c) Defence in person (6-3-c) – Defence through legal assistance (6-3-c) – Legal assistance of own choosing (6-3-c) – Insufficient means (6-3-c) – Free legal assistance (6-3-c) – Required by interests of justice (6-3-c)

(d) Witnesses (6-3-d) – Examination of witnesses (6-3-d) – Obtain attendance of witnesses (6-3-d) – Same conditions (6-3-d)

(e) Free assistance of interpreter (6-3-e)

## I. General considerations of Article 6 in its criminal aspect

1. The key principle governing the application of Article 6 is fairness (*Gregačević v. Croatia*, § 49). However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (*Ibrahim and Others v. the United Kingdom* [GC], § 250).

2. In each case, the Court's primary concern is to evaluate the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (*ibid.*, § 250). Moreover, the cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken alone, would not have convinced the Court that the proceedings were unfair (*Mirilashvili v. Russia*, § 165).

3. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Nevertheless, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration. Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights (*Ibrahim and Others v. the United Kingdom* [GC], § 252).

4. Requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6 (*Moreira Ferreira v. Portugal (no. 2)* [GC], § 67; *Carmel Saliba v. Malta*, § 67). However, the criminal-law guarantees will not necessarily apply with their full stringency in all cases, in particular those that do not belong to the traditional categories of criminal law such as tax surcharges proceedings (*Jussila v. Finland* [GC], § 43), minor road traffic offences proceedings (*Marčan v. Croatia*, § 37) or proceedings concerning an administrative fine for having provided premises for prostitution (*Sancaklı v. Turkey*, §§ 43-52).

5. Article 6 does not guarantee the right not to be criminally prosecuted (*International Bank for Commerce and Development AD and Others v. Bulgaria*, § 129). Nor does it guarantee an absolute right to obtain a judgment in respect of criminal accusations against an applicant, in particular when there is no fundamental irreversible detrimental effect on the parties (*Kart v. Turkey* [GC], § 113).

6. A person may not claim to be a victim of a violation of his or her right to a fair trial under Article 6 of the Convention which, according to him or her, occurred in the course of proceedings in which he or she was acquitted or which were discontinued (*Khlyustov v. Russia*, § 103). Indeed, the dismissal of charges against an applicant deprives him or her of the victim status for the alleged breaches of the Article 6 rights (*Batmaz v. Turkey*, § 36). Moreover, the Court has held that an applicant cannot complain of a breach of his or her Article 6 rights if the domestic courts only applied a measure suspending the pronouncement of a criminal sanction against him or her (*Kerman v. Turkey*, §§ 100-106).

7. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (*Pfeifer and Plankl v. Austria*, § 37). In addition, it must not run counter to any important public interest (*Hermi v. Italy* [GC], § 73; *Sejdovic v. Italy* [GC], § 86; *Dvorski v. Croatia* [GC], § 100).

8. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen the consequences of his conduct (*Hermi v. Italy* [GC], § 74; *Sejdovic v. Italy* [GC], § 87). Some Article 6 guarantees, such as the right to counsel, being a fundamental right among those which constitute the notion of a fair trial and ensuring the effectiveness of the rest of the guarantees set forth in Article 6 of the Convention, require the special protection of the “knowing and intelligent waiver” standard established in the Court’s case-law (*Dvorski v. Croatia* [GC], § 101; *Pishchalnikov v. Russia*, § 77-79).<sup>1</sup> Likewise, waiver of the right to examine a witness, a fundamental right among those listed in Article 6 § 3 which constitute the notion of a fair trial, must be strictly compliant with the standards on waiver under the Court’s case-law (*Murtazaliyeva v. Russia* [GC], § 118).

9. Lastly, it should be noted that a trial of a dead person runs counter to the Article 6 principles, because by its very nature it is incompatible with the principle of the equality of arms and all the guarantees of a fair trial. Moreover, it is self-evident that it is not possible to punish an individual who has died, and to that extent at least the criminal justice process is stymied. Any punishment imposed on a dead person would violate his or her dignity. Lastly, a trial of a dead person runs counter to the object and purpose of Article 6 of the Convention, as well as to the principle of good faith and the principle of effectiveness inherent in that Article (*Magnitskiy and Others v. Russia*, § 281; see also, *Grădinar v. Moldova*, §§ 90-104, concerning proceedings after the death of an accused conducted upon the request of his wife with an intention to obtain confirmation that her husband had not committed the offence, which the Court examined under the civil limb of Article 6).

10. On the other hand, Article 6 does not prohibit a fine to be imposed on the surviving company in respect of an infringement committed by its merged subsidiary, where the core business is continued by the parent company (*Carrefour France v. France* (dec.)).

## II. Scope: the notion of “criminal charge”

### Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by [a] tribunal ...”

### HUDOC keywords

Criminal proceedings (6) – Administrative proceedings (6) – Constitutional proceedings (6) – Disciplinary proceedings (6) – Enforcement proceedings (6) – Expulsion (6) – Extradition (6)

Criminal charge (6-1): Determination (6-1)

### A. General principles

11. The concept of a “criminal charge” has an “autonomous” meaning, independent of the categorisations employed by the national legal systems of the member States (*Blokhin v. Russia* [GC], § 179; *Adolf v. Austria*, § 30). This is true both for the determination of the “criminal” nature of the charge and for the moment from which such a “charge” exists.

12. In using the terms “criminal charge” and “charged with a criminal offence”, the three paragraphs of Article 6 refer to identical situations. Therefore, the test of applicability of Article 6 under its criminal head will be the same for the three paragraphs.

1. See further Section Legal assistance.



## 1. The existence of a “charge”

13. The concept of “charge” has to be understood within the meaning of the Convention. The Court takes a “substantive”, rather than a “formal”, conception of the “charge” contemplated by Article 6 (*Deweere v. Belgium*, § 44). Charge may thus be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (*ibid.*, §§ 42 and 46; *Eckle v. Germany*, § 73, and also *Ibrahim and Others v. the United Kingdom* [GC], § 249; *Simeonovi v. Bulgaria* [GC], § 110).

14. The Court held that a person arrested on suspicion of having committed a criminal offence (*Heaney and McGuinness v. Ireland*, § 42; *Brusco v. France*, §§ 47-50), a suspect questioned about his involvement in acts constituting a criminal offence (*Aleksandr Zaichenko v. Russia*, §§ 41-43; *Yankov and Others v. Bulgaria*, § 23; *Schmid-Laffer v. Switzerland*, §§ 30-31) and a person who has been questioned in respect of his or her suspected involvement in an offence (*Stirmanov v. Russia*, § 39), irrespective of the fact that he or she was formally treated as a witness (*Kalēja v. Latvia*, §§ 36-41) as well as a person who has been formally charged with a criminal offence under procedure set out in domestic law (*Pélissier and Sassi v. France* [GC], § 66; *Pedersen and Baadsgaard v. Denmark* [GC], § 44) could all be regarded as being “charged with a criminal offence” and claim the protection of Article 6 of the Convention. On the other hand, a person questioned in the context of a border control, in the absence of a need to determine the existence of a reasonable suspicion that she had committed an offence, was not considered to be under a criminal charge (*Beghal v. the United Kingdom*, § 121).

15. In *Deweere v. Belgium* (§§ 41-47), a letter sent by the public prosecutor advising the applicant of the closure of his business establishment and soliciting him to pay a sum of money as a settlement for avoiding prosecution amounted to the existence of a “criminal charge” triggering the applicability of Article 6 of the Convention.

16. Similarly, in *Blaj v. Romania* (§§ 73-74), the Court examined the context in which actions were taken against the applicant who had been caught in the very act of committing an offence of a corruptive nature (*in flagrante delicto*). For the Court, the taking of forensic samples on the crime scene and from the applicant and inviting the applicant to open an envelope in his office suggested that the authorities had treated the applicant as a suspect. In these circumstances, the information communicated to the applicant during the ensuing questioning had implicitly and substantially affected his situation, triggering the applicability of Article 6.

## 2. The “criminal” nature of a charge

17. As regards the autonomous notion of “criminal”, the Convention is not opposed to the moves towards “decriminalisation” among the Contracting States. However, offences classified as “regulatory” following decriminalisation may come under the autonomous notion of a “criminal” offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention (*Öztürk v. Germany*, § 49).

18. The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in *Engel and Others v. the Netherlands* (§§ 82-83):

1. classification in domestic law;
2. nature of the offence;
3. severity of the penalty that the person concerned risks incurring.

19. The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.

20. In evaluating the second criterion, which is considered more important (*Jussila v. Finland* [GC], § 38), the following factors can be taken into consideration:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character (*Bendenoun v. France*, § 47);
- whether the proceedings are instituted by a public body with statutory powers of enforcement (*Benham v. the United Kingdom*, § 56);
- whether the legal rule has a punitive or deterrent purpose (*Öztürk v. Germany*, § 53; *Bendenoun v. France*, § 47);
- whether the legal rule seeks to protect the general interests of society usually protected by criminal law (*Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, § 42);
- whether the imposition of any penalty is dependent upon a finding of guilt (*Benham v. the United Kingdom*, § 56);
- how comparable procedures are classified in other Council of Europe member States (*Öztürk v. Germany*, § 53).

21. The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (*Campbell and Fell v. the United Kingdom*, § 72; *Demicoli v. Malta*, § 34).

22. The second and third criteria laid down in *Engel and Others v. the Netherlands* are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as “criminal” from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (*Lutz v. Germany*, § 55; *Öztürk v. Germany*, § 54). The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (*ibid.*, § 53; *Nicoleta Gheorghe v. Romania*, § 26).

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*Bendenoun v. France*, § 47).

## B. Application of the general principles

### 1. Disciplinary proceedings

23. Offences against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months, fall within the ambit of the criminal head of Article 6 of the Convention (*Engel and Others v. the Netherlands*, § 85). On the contrary, strict arrest for two days has been held to be of too short a duration to belong to the “criminal law” sphere (*ibid.*).

24. With regard to professional disciplinary proceedings, in *Albert and Le Compte v. Belgium* (§ 30) the Court considered it unnecessary to give a ruling on the matter, having concluded that the proceedings fell within the civil sphere. It stressed, however, that the two aspects, civil and criminal, of Article 6 are not necessarily mutually exclusive (*ibid.*).

25. In *Müller-Hartburg v. Austria* (§§ 42-49), which concerned disciplinary proceedings against a lawyer, the Court did not find the criminal limb of Article 6 to be applicable. It took into account the fact that the applicable disciplinary provision did not address the general public but the members of a professional group possessing a special status and that it was intended to ensure that members of the bar comply with the specific rules governing their professional conduct. It thus did not have the elements of a criminal but rather disciplinary nature. Moreover, the deprivation of liberty was never at stake for the applicant and the fine which he risked incurring, although reaching the amount which could be regarded as punitive, was not in itself sufficient to qualify the measure as criminal.

The same was true for the sanction of striking the applicant off the register of lawyers, which did not necessarily have a permanent effect and did not render the charges “criminal” in nature.

26. In the case of disciplinary proceedings resulting in the compulsory retirement or dismissal of a civil servant, the Court has found that such proceedings were not “criminal” within the meaning of Article 6, inasmuch as the domestic authorities managed to keep their decision within a purely administrative sphere (*Moulet v. France* (dec.); *Trubić v. Croatia* (dec.), § 26). It has also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline (*Suküt v. Turkey* (dec.)) as well as military disciplinary proceedings for the imposition of a promotion ban and a salary cut (*R.S. v. Germany* (dec.), § 33).

27. The Court also held that proceedings concerning the dismissal of a bailiff (*Bayer v. Germany*, § 37) and a judge (*Oleksandr Volkov v. Ukraine*, §§ 93-95; *Kamenos v. Cyprus*, §§ 51-53) did not involve the determination of a criminal charge, and thus Article 6 was not applicable under its criminal head. Similarly, disciplinary proceedings against a judge where the imposition of a substantial fine was at stake did not amount to the determination of a criminal charge (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 124-128).

28. While making “due allowance” for the prison context and for a special prison disciplinary regime, Article 6 may apply to offences against prison discipline, on account of the nature of the charges and the nature and severity of the penalties (forty and seven additional days’ custody respectively in *Ezeh and Connors v. the United Kingdom* [GC], § 82; conversely, see *Štitić v. Croatia*, §§ 51-63). However, proceedings concerning the prison system as such do not in principle fall within the ambit of the criminal head of Article 6 (*Boulois v. Luxembourg* [GC], § 85). Thus, for example, a prisoner’s placement in a high-supervision unit does not concern a criminal charge; access to a court to challenge such a measure and the restrictions liable to accompany it should be examined under the civil head of Article 6 § 1 (*Enea v. Italy* [GC], § 98).

29. Measures ordered by a court under rules concerning disorderly conduct in proceedings before it (contempt of court) are normally considered to fall outside the ambit of Article 6, because they are akin to the exercise of disciplinary powers (*Ravnsborg v. Sweden*, § 34; *Putz v. Austria*, §§ 33-37). However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court (*Mariusz Lewandowski v. Poland*, §§ 29-31, concerning the sentence of solitary confinement against a prisoner), particularly when classified in domestic law as a criminal offence (*Kyprianou v. Cyprus* [GC], §§ 61-64, concerning a penalty of five days’ imprisonment).

30. With regard to contempt of Parliament, the Court distinguishes between the powers of a legislature to regulate its own proceedings for breach of privilege applying to its members, on the one hand, and an extended jurisdiction to punish non-members for acts occurring elsewhere, on the other hand. The former might be considered disciplinary in nature, whereas the Court regards the latter as criminal, taking into account the general application and the severity of the potential penalty which could have been imposed (imprisonment for up to sixty days and a fine in *Demicoli v. Malta*, § 32).

## 2. Administrative, tax, customs, financial and competition-law proceedings and other special proceedings

31. The following administrative offences may fall within the ambit of the criminal head of Article 6:

- road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications (*Lutz v. Germany*, § 182; *Schmautzer v. Austria*; *Malige v. France*; *Marčan v. Croatia*, § 33; *Igor Pascari v. the Republic of Moldova*, §§ 20-23);
- minor offences of causing a nuisance or a breach of the peace (*Lauko v. Slovakia*; *Nicoleta Gheorghe v. Romania*, §§ 25-26);

- offences against social-security legislation (*Hüseyin Turan v. Turkey*, §§ 18-21, for a failure to declare employment, despite the modest nature of the fine imposed);
- administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question (*Balsytė-Lideikienė v. Lithuania*, § 61);
- administrative offence related to the holding of a public assembly (*Kasparov and Others v. Russia*, § 39-45; *Mikhaylova v. Russia*, §§ 50-75).

32. Article 6 does not apply to ordinary tax proceedings, which do not normally have a “criminal connotation” (*Ferrazzini v. Italy* [GC], § 20). However, Article 6 has been held to apply to tax surcharges proceedings (*Jussila v. Finland* [GC], § 38; *Steininger v. Austria*, §§ 34-37; *Chap Ltd v. Armenia*, § 36).

33. When deciding on the applicability of the criminal limb of Article 6 to tax surcharges, the Court in particular took into account the following elements:

- the law setting out the penalties covered all citizens in their capacity as taxpayers;
- the surcharge was not intended as pecuniary compensation for damage but essentially as punishment to deter reoffending;
- the surcharge was imposed under a general rule with both a deterrent and a punitive purpose;
- the surcharge was substantial (*Bendenoun v. France*; conversely, see the interest for late payment in *Mieg de Boofzheim v. France* (dec.)).

The criminal nature of the offence may suffice to render Article 6 applicable, notwithstanding the low amount of the tax surcharge (10% of the reassessed tax liability in *Jussila v. Finland* [GC], § 38).

34. Article 6 under its criminal head has been held to apply to customs law (*Salabiaku v. France*), to penalties imposed by a court with jurisdiction in budgetary and financial matters (*Guisset v. France*), and to certain administrative authorities with powers in the spheres of economic, financial and competition law (*Lilly France S.A. v. France* (dec.); *Dubus S.A. v. France*; *A. Menarini Diagnostics S.r.l. v. Italy*; *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, §§ 45-46) including market manipulations (*Grande Stevens and Others v. Italy*, §§ 94-101).

35. In *Blokhin v. Russia* [GC] (§§ 179-182) the Court found Article 6 to be applicable in the proceedings for placement of a juvenile in a temporary detention centre for juvenile offenders. It took into account the nature, duration and manner of execution of the deprivation of liberty that could have been, and which actually was, imposed on the applicant. The Court stressed that the applicant’s deprivation of liberty created a presumption that the proceedings against him were “criminal” within the meaning of Article 6 and that such a presumption was rebuttable only in entirely exceptional circumstances and only if the deprivation of liberty could not be considered “appreciably detrimental” given its nature, duration or manner of execution. In the case at issue, there were no such exceptional circumstances capable of rebutting that presumption.

36. In some instances, the criminal limb of Article 6 may be applicable to the proceedings for placement of mentally disturbed offenders in a psychiatric hospital. This will depend on the special features of domestic proceedings and the manner of their operation in practice (*Kerr v. the United Kingdom* (dec) and *Antoine v. the United Kingdom* (dec.)), where the criminal limb did not apply; contrast them with *Valeriy Lopata v. Russia*, § 120 and *Vasenin v. Russia*, § 130, where the criminal limb did apply).

37. Lastly, the criminal limb of Article 6 does not apply to private criminal prosecution. The right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic

law, even if only to secure symbolic reparation or to protect a civil right such as the right to “good reputation” (*Perez v. France* [GC], § 70; *Arlewin v. Sweden*, §§ 51-52).

### 3. Political issues

38. Article 6 has been held not to apply in its criminal aspect to proceedings concerning electoral sanctions (*Pierre-Bloch v. France*, §§ 53-60); the dissolution of political parties (*Refah Partisi (the Welfare Party) and Others v. Turkey* (dec.)); parliamentary commissions of inquiry (*Montera v. Italy* (dec.)); public finding of a conflict of interests in elected office (*Cătănciu v. Romania* (dec.), §§ 38-41); and to impeachment proceedings against a country’s President for a gross violation of the Constitution (*Paksas v. Lithuania* [GC], §§ 66-67, by contrast, *Haarde v. Iceland*, concerning the proceedings against a former Prime Minister in the Court of Impeachment).

39. With regard to lustration proceedings, the Court has held that the predominance of aspects with criminal connotations (nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period) could bring those proceedings within the ambit of the criminal head of Article 6 of the Convention (*Matyjek v. Poland* (dec.); conversely, see *Sidabras and Diatas v. Lithuania* (dec.), and *Polyakh and Others v. Ukraine\**, §§ 56-59).

### 4. Expulsion and extradition

40. Procedures for the expulsion of aliens do not fall under the criminal head of Article 6, notwithstanding the fact that they may be brought in the context of criminal proceedings (*Maaouia v. France* [GC], § 39). The same exclusionary approach applies to extradition proceedings (*Peñafiel Salgado v. Spain* (dec.)) or proceedings relating to the European arrest warrant (*Monedero Angora v. Spain* (dec.)).

41. Conversely, however, the replacement of a prison sentence by deportation and exclusion from national territory for ten years may be treated as a penalty on the same basis as the one imposed at the time of the initial conviction (*Gurguchiani v. Spain*, §§ 40 and 47-48).

### 5. Different stages of criminal proceedings, ancillary proceedings and subsequent remedies

42. Measures adopted for the prevention of disorder or crime are not covered by the guarantees in Article 6 (*Raimondo v. Italy*, § 43 and *De Tommaso v. Italy* [GC], § 143, for special supervision by the police; *R. v. the United Kingdom* (dec.), for or a warning given by the police to a juvenile who had committed indecent assaults on girls from his school).

43. As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole, including the pre-trial stage of the proceedings (*Dvorski v. Croatia*, § 76). In its early jurisprudence, the Court stressed that some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (*Imbrioscia v. Switzerland*, § 36). Although investigating judges do not determine a “criminal charge”, the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply (*Vera Fernández-Huidobro v. Spain*, §§ 108-114).

44. Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any “criminal charge”, including the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set, in *Phillips v. the*

*United Kingdom*, § 39). Article 6 may also be applicable under its criminal limb to proceedings resulting in the demolition of a house built without planning permission, as the demolition could be considered a “penalty” (*Hamer v. Belgium*, § 60). However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code (*Nurmagomedov v. Russia*, § 50), although it may apply to the procedure for rectification of a sentence if that affects the overall length of an applicant’s imprisonment (*Kereselidze v. Georgia*, §§ 32-33).

45. Proceedings concerning the execution of sentences – such as proceedings for the application of an amnesty (*Montcornet de Caumont v. France* (dec.)), parole proceedings (*A. v. Austria*, Commission decision), transfer proceedings under the Convention on the Transfer of Sentenced Persons (*Szabó v. Sweden* (dec.)), but see, for a converse finding, *Buijen v. Germany*, §§ 40-45) – and *exequatur* proceedings relating to the enforcement of a forfeiture order made by a foreign court (*Saccoccia v. Austria* (dec.)) do not fall within the ambit of the criminal head of Article 6.

46. In principle, forfeiture measures adversely affecting the property rights of third parties in the absence of any threat of criminal proceedings against them do not amount to the “determination of a criminal charge” (seizure of an aircraft in *Air Canada v. the United Kingdom*, § 54; forfeiture of gold coins in *AGOSI v. the United Kingdom*, §§ 65-66). Such measures instead fall under the civil head of Article 6 (*Silickienė v. Lithuania*, §§ 45-46).

47. The Article 6 guarantees apply in principle to appeals on points of law (*Meftah and Others v. France* [GC], § 40), and to constitutional proceedings (*Gast and Popp v. Germany*, §§ 65-66; *Caldas Ramírez de Arrellano v. Spain* (dec.)) where such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons.

48. Lastly, Article 6 does not normally apply to proceedings concerning extraordinary remedies, such as the reopening of a case. The Court reasoned that a person whose sentence has become final and who applies for his case to be reopened is not “charged with a criminal offence” within the meaning of that Article (*Moreira Ferreira v. Portugal (no. 2)* [GC], §§ 60-61; *Fischer v. Austria* (dec.)). Only the new proceedings, after the request for reopening has been granted, can be regarded as concerning the determination of a criminal charge (*Löffler v. Austria*, §§ 18-19). This approach was also followed in cases concerning a request for the reopening of criminal proceedings following the Court’s finding of a violation (*Öcalan v. Turkey* (dec.)).

49. However, should an extraordinary remedy lead automatically or in the specific circumstances to a full reconsideration of the case, Article 6 applies in the usual way to the “reconsideration” proceedings. Moreover, the Court has held that Article 6 is applicable in certain instances where the proceedings, although characterised as “extraordinary” or “exceptional” in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability. In sum, the nature, scope and specific features of the relevant extraordinary procedure in the legal system concerned may be such as to bring that procedure within the ambit of Article 6 § 1 (*Moreira Ferreira v. Portugal (no. 2)* [GC], §§ 60-72).

50. Similarly, supervisory review proceedings resulting in the amendment of a final judgment do fall under the criminal head of Article 6 (*Vanyan v. Russia*, § 58).

### III. Right of access to a court

#### Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by [a] tribunal ...”

#### HUDOC keywords

Access to court (6-1)

51. The “right to a court” is no more absolute in criminal than in civil matters. It is subject to implied limitations (*Deweert v. Belgium*, § 49; *Kart v. Turkey* [GC], § 67).

52. However, these limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (*Guérin v. France* [GC], § 37; *Omar v. France* [GC], § 34, citing references to civil cases).

#### Limitations

53. Limitations on the right of access to a court may result from:

##### 1. Parliamentary immunity

54. The guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve the same need – that of ensuring the independence of Parliament in the performance of its task. Without a doubt, inviolability helps to achieve the full independence of Parliament by preventing any possibility of politically motivated criminal proceedings and thereby protecting the opposition from pressure or abuse on the part of the majority (*Kart v. Turkey* [GC], § 90, citing references to civil cases). Furthermore, bringing proceedings against members of parliament may affect the very functioning of the assembly to which they belong and disrupt Parliament’s work. This system of immunity, constituting an exception to the ordinary law, can therefore be regarded as pursuing a legitimate aim (*ibid.*, § 91).

55. However, without considering the circumstances of the case no conclusions can be drawn as to the compatibility with the Convention of this finding of the legitimacy of parliamentary immunity. It must be ascertained whether parliamentary immunity has restricted the right of access to a court in such a way that the very essence of that right is impaired. Reviewing the proportionality of such a measure means taking into account the fair balance which has to be struck between the general interest in preserving Parliament’s integrity and the applicant’s individual interest in having his parliamentary immunity lifted in order to answer the criminal charges against him in court. In examining the issue of proportionality, the Court must pay particular attention to the scope of the immunity in the case before it (*ibid.*, §§ 92-93). The less the protective measure serves to preserve the integrity of Parliament, the more compelling its justification must be. Thus, for example, the Court has held that the inability of a member of parliament to waive his immunity did not infringe his right to a court, since the immunity was simply a temporary procedural obstacle to the criminal proceedings, being limited to the duration of his term of parliamentary office (*ibid.*, §§ 92-93, 95 and 111-113).

## 2. Procedural rules

56. These are, for example, the admissibility requirements for an appeal. Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation (*Dorado Baúlde v. Spain* (dec.), § 18). However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to an applicant an effective right of access to the court (*Maresti v. Croatia*, § 33; *Reichman v. France*, § 29).

57. Although the right of appeal may of course be subject to statutory requirements, when applying procedural rules the courts must avoid excessive formalism that would infringe the fairness of the proceedings (*Walchli v. France*, § 29; *Evaggelou v. Greece*, § 23). The particularly strict application of a procedural rule may sometimes impair the very essence of the right of access to a court (*Labergère v. France*, § 23), particularly in view of the importance of the appeal and what is at stake in the proceedings for an applicant who has been sentenced to a long term of imprisonment (*ibid.*, § 20).

58. The right of access to a court is also fundamentally impaired by a procedural irregularity, for example where a prosecution service official responsible for verifying the admissibility of appeals against fines or applications for exemptions acted *ultra vires* by ruling on the merits of an appeal himself, thus depriving the applicants of the opportunity to have the “charge” in question determined by a community judge (*Josseume v. France*, § 32).

59. The same applies where a decision declaring an appeal inadmissible on erroneous grounds led to the retention of the deposit equivalent to the amount of the standard fine, with the result that the fine was considered to have been paid and the prosecution was discontinued, making it impossible for the applicant, once he had paid the fine, to contest before a “tribunal” the road-traffic offence of which he was accused (*Célice v. France*, § 34).

60. A further example: the applicant suffered an excessive restriction of his right of access to a court where his appeal on points of law was declared inadmissible for failure to comply with the statutory time-limits, when this failure was due to the defective manner in which the authorities had discharged their obligation to serve the lower court’s decision on the applicant (*Davran v. Turkey*, §§ 40-47; *Maresti v. Croatia*, §§ 33-43, contrast with *Johansen v. Germany*, §§ 46-57).

## 3. Requirement of enforcement of a previous decision

61. As regards the automatic inadmissibility of appeals on points of law lodged by appellants who have failed to surrender to custody although warrants have been issued for their arrest:

- where an appeal on points of law is declared inadmissible on grounds connected with the applicant’s having absconded, this amounts to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society (*Poitrimol v. France*, § 38; *Guérin v. France*, § 45; *Omar v. France*, § 42);
- where an appeal on points of law is declared inadmissible solely because the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time-limit for lodging an appeal has expired. This imposes a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and the exercise of the rights of the defence on the other (*ibid.*, §§ 40-41; *Guérin v. France*, § 43).



62. The same applies where the right to appeal on points of law is forfeited because of failure to comply with the obligation to surrender to custody (*Khalifaoui v. France*, § 46; *Papon v. France (no. 2)*, § 100).

63. However, the requirement to lodge a deposit before appealing against a speeding fine – the aim of this requirement being to prevent dilatory or vexatious appeals in the sphere of road-traffic offences – may constitute a legitimate and proportionate restriction on the right of access to a court (*Schneider v. France* (dec.)).

#### 4. Other restrictions in breach of the right of access to a court

64. They may occur, for example, where an accused person is persuaded by the authorities to withdraw an appeal on the basis of a false promise of remission of the sentence imposed by the first-instance court (*Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands*, §§ 46-51); or where a court of appeal has failed to inform an accused person of a fresh time-limit for lodging an appeal on points of law following the refusal of his officially assigned counsel to assist him (*Kulikowski v. Poland*, § 70).

65. There will also be a restriction on access to court if an applicant is unable to challenge a fine imposed by an administrative authority before a tribunal having sufficient power of review of the administrative decision (*Julius Kloiber Schlachthof GmbH and Others v. Austria*, §§ 28-34).<sup>2</sup>

## IV. General guarantees: institutional requirements

### Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ...”

### HUDOC keywords

Independent tribunal (6-1) – Impartial tribunal (6-1) – Tribunal established by law (6-1)

66. Thus, for instance, it is immaterial in the Court’s assessment whether the violations of the applicable rules in the process of the appointment of judges had an impact on the fairness of an applicant’s trial. The mere fact that a judge, whose position is not established by law within the meaning of Article 6 § 1 of the Convention, determines a criminal charge, suffices for a finding of a violation of that provision in conformity with the fundamental principle of the rule of law (*ibid.*, § 114).

### A. The notion of a “tribunal”

67. A disciplinary or administrative body can have the characteristics of a “tribunal” within the autonomous meaning of Article 6, even if it is not termed a “tribunal” or “court” in the domestic system. In the Court’s case law a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’

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2. See Section General guarantees: institutional requirements.

terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself (*Belilos v. Switzerland*, § 64; *Coëme and Others v. Belgium*, § 99; *Richert v. Poland*, § 43).

68. Conferring the prosecution and punishment of minor “criminal” offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (*Öztürk v. Germany*, § 56; *A. Menarini Diagnostics S.R.L. v. Italy*; *Flisar v. Slovenia*, § 33). Therefore, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent review by a “judicial body that has full jurisdiction”. The defining characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below (*Schmautzer v. Austria*, § 36; *Gradinger v. Austria*, § 44; *Grande Stevens and Others v. Italy*, § 139): for instance, administrative courts carrying out a judicial review that went beyond a “formal” review of legality and included a detailed analysis of the appropriateness and proportionality of the penalty imposed by the administrative authority (*A. Menarini Diagnostics S.R.L. v. Italy*, §§ 63-67, in respect of a fine imposed by an independent regulatory authority in charge of competition). Similarly, a judicial review may satisfy Article 6 requirements even if it is the law itself which determines the sanction in accordance with the seriousness of the offence (*Malige v. France*, §§ 46-51, in respect of the deduction of points from a driving licence).

69. The power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of “tribunal” (*Findlay v. the United Kingdom*, § 77).

## B. Tribunal established by law

70. Under Article 6 § 1 of the Convention, a tribunal must always be “established by law”. This expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols (*Jorgic v. Germany*, § 64; *Richert v. Poland*, § 41). Indeed, an organ not established according to the legislation would be deprived of the legitimacy required, in a democratic society, to hear individual complaints (*Lavents v. Latvia*, § 114; *Gorgiladze v. Georgia*, § 67; *Kontalexis v. Greece*, § 38).

71. “Law”, within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs (*Lavents v. Latvia*, § 114; *Richert v. Poland*, § 41; *Jorgic v. Germany*, § 64) but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case unlawful (*Pandjigidze and Others v. Georgia*, § 104; *Gorgiladze v. Georgia*, § 68). The phrase “established by law” covers not only the legal basis for the very existence of a tribunal, but also compliance by the tribunal with the particular rules that govern it (*ibid.*), and the composition of the bench in each case (*Posokhov v. Russia*, § 39; *Fatullayev v. Azerbaijan*, § 144; *Kontalexis v. Greece*, § 42).

72. Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not “established by law” within the meaning of Article 6 § 1 (*Richert v. Poland*, § 41; *Jorgic v. Germany*, § 64).

73. The object of the term “established by law” in Article 6 “is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament” (*Richert v. Poland*, § 42; *Coëme and Others v. Belgium*, § 98). Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret relevant domestic legislation (*ibid.*; *Gorgiladze v. Georgia*, § 69).

74. In principle, a violation of the domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is therefore competent

to examine whether the national law has been complied with in this respect. However, having regard to the general principle that it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court may not question their interpretation unless there has been a flagrant violation of domestic law (*Coëme and Others v. Belgium*, § 98 *in fine*; *Lavents v. Latvia*, § 114). The Court’s task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (*Jorgic v. Germany*, § 65).

75. Examples where the Court found that the body in question was not “a tribunal established by law”:

- the Court of Cassation which tried co-defendants other than ministers for offences connected with those for which ministers were standing trial, since the connection rule was not established by law (*Coëme and Others v. Belgium*, §§ 107-108);
- a court composed of two lay judges elected to sit in a particular case in breach of the statutory requirement of drawing of lots and the maximum period of two weeks’ service per year (*Posokhov v. Russia*, § 43);
- a court composed of lay judges who continued to decide cases in accordance with established tradition, although the law on lay judges had been repealed and no new law had been enacted (*Pandjigidze and Others v. Georgia*, §§ 108-111);
- a court whose composition was not in accordance with the law, since two of the judges were disqualified by law from sitting in the case (*Lavents v. Latvia*, § 115);

76. The Court found that the tribunal was “established by law” in the following cases:

- a German court trying a person for acts of genocide committed in Bosnia (*Jorgic v. Germany*, §§ 66-71);
- a special court established to try corruption and organised crime (*Fruni v. Slovakia*, § 140).

## C. Independence and impartiality

77. The right to a fair trial in Article 6 § 1 requires that a case be heard by an “independent and impartial tribunal” established by law. There is a close link between the concepts of independence and objective impartiality. For this reason the Court commonly considers the two requirements together (*Findlay v. the United Kingdom*, § 73).

The principles applicable when determining whether a tribunal can be considered “independent and impartial” apply equally to professional judges, lay judges and jurors (*Holm v. Sweden*, § 30).

78. However, the guarantees of independence and impartiality under Article 6 § 1 concern only the body called upon to decide on the criminal charge against an applicant and do not apply to the representatives of the prosecution who are only parties to the proceedings (*Kontalexis v. Greece*, § 57; *Haarde v. Iceland*, § 94; *Thiam v. France*, § 71).

### 1. Independent tribunal

#### a. General principles

79. Article 6 § 1 of the Convention requires independence from the other branches of power – that is, the executive and the legislature – and also from the parties (*Ninn-Hansen v. Denmark* (dec.)).

80. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court’s case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction. The question is always whether,

in a given case, the requirements of the Convention are met (*Henryk Urban and Ryszard Urban v. Poland*, § 46).

## **b. Criteria for assessing independence**

81. Compliance with the requirement of independence is assessed, in particular, on the basis of statutory criteria (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 221). In determining whether a body can be considered to be “independent” the Court has had regard to the following criteria (*Findlay v. the United Kingdom*, § 73):

- i. the manner of appointment of its members and
- ii. the duration of their term of office;
- iii. the existence of guarantees against outside pressures;
- iv. whether the body presents an appearance of independence.

### **i. Manner of appointment of a body’s members**

82. The mere appointment of judges by Parliament cannot be seen to cast doubt on their independence (*Filippini v. San Marino* (dec.); *Ninn-Hansen v. Denmark* (dec.))

83. Similarly, appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (*Henryk Urban and Ryszard Urban v. Poland*, § 49; *Campbell and Fell v. the United Kingdom*, § 79; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], § 49).

84. Although the assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality (*Moiseyev v. Russia*, § 176).

### **ii. Duration of appointment of a body’s members**

85. No particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that other necessary guarantees are present (*Campbell and Fell v. the United Kingdom*, § 80).

86. The presence of seconded international judges for a renewable two year term of office on the bench of a court ruling on war crimes was considered understandable given the provisional nature of the international presence in the country and the mechanics of international secondments (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], § 51).

### **iii. Guarantees against outside pressure**

87. Judicial independence demands that individual judges be free from undue influences outside the judiciary, and from within. Internal judicial independence requires that they be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant’s doubts as to the independence and impartiality of a court may be said to have been objectively justified (*Parlov-Tkalčić v. Croatia*, § 86; *Daktaras v. Lithuania*, § 36; *Moiseyev v. Russia*, § 184).

#### iv. Appearance of independence

88. In order to determine whether a tribunal can be considered to be “independent” as required by Article 6 § 1, appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (*Şahiner v. Turkey*, § 44).

89. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether his doubts can be held to be objectively justified (*Incal v. Turkey*, § 71). No problem arises as regards independence when the Court is of the view that an “objective observer” would have no cause for concern about this matter in the circumstances of the case at hand (*Clarke v. the United Kingdom* (dec.)).

90. Where a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, the accused may entertain a legitimate doubt about those persons’ independence (*Şahiner v. Turkey*, § 45).

91. In *Thiam v. France*, § 75-85, the Court did not consider that the applicant’s fear of a lack of independence and impartiality of a tribunal called upon to examine a criminal charge against him for an offence committed to the detriment of the President of the Republic, who joined the proceedings as a civil party, was justified due to the very fact that the President was involved in the appointment and promotion of judges. The Court noted that the independence of the judges’ tenure was constitutionally guaranteed and it protected them from possible attacks on their independence. Moreover, judges were not subordinate to the Ministry of Justice and were not subject to any pressure or instructions in the exercise of their judicial functions, including instructions by the President. Further, the Court had regard to the fact that decisions affecting the appointment of members of the judiciary and their career progress, transfer and promotions were taken following the intervention of the National Legal Service Commission (*Conseil supérieur de la magistrature*) and after adversarial proceedings. Moreover, the nomination of judges was not a discretionary matter and was subject to control by the Council of State. The Court also noted that the applicant had not submitted any concrete evidence capable of showing that he could objectively have feared that the judges in his case were under the President’s influence. In particular, the case bore no connection with the President’s political functions and he had neither instituted the proceedings nor provided evidence intended to establish the applicant’s guilt; the domestic courts had duly examined all the applicant’s arguments; and the subsequent constitutional amendments had excluded the President’s involvement in the appointment of judges to their posts.

## 2. Impartial tribunal

92. Article 6 § 1 of the Convention requires a tribunal falling within its scope to be “impartial”. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways (*Kyprianou v. Cyprus* [GC], § 118; *Micallef v. Malta* [GC], § 93).

### a. Criteria for assessing impartiality

93. The Court has distinguished between:

- i. a *subjective approach*, that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case;
- ii. an *objective approach*, that is, determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (*Kyprianou v. Cyprus* [GC], § 118; *Piersack v. Belgium*, § 30; *Grievés v. the United Kingdom* [GC], § 69; *Morice v. France* [GC], § 73).

94. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct (*Kyprianou v. Cyprus* [GC], §§ 119 and 121).

### i. Subjective approach

95. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (*Kyprianou v. Cyprus* [GC], § 119; *Hauschildt v. Denmark*, § 47).

96. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons (*De Cubber v. Belgium*, § 25).

97. Although in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee. The Court has indeed recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and has therefore in the vast majority of cases focused on the objective test (*Kyprianou v. Cyprus* [GC], § 119; *Morice v. France* [GC], § 75).

### ii. Objective approach

98. Under the objective test, when applied to a body sitting as a bench, it must be determined whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality (*Castillo Algar v. Spain*, § 45).

99. In deciding whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (*Ferrantelli and Santangelo v. Italy*, § 58; *Padovani v. Italy*, § 27).

100. The objective test mostly concerns hierarchical or other links between the judge and other persons involved in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (*Micallef v. Malta* [GC], § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (*Pullar v. the United Kingdom*, § 38).

101. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (*Castillo Algar v. Spain*, § 45; *Morice v. France* [GC], § 78; *Škrlić v. Croatia*, § 43).

102. Account must also be taken of questions of internal organisation (*Piersack v. Belgium*, § 30 (d)). The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Micallef v. Malta* [GC], § 99; *Mežnarić v. Croatia*, § 27; *Harabin v. Slovakia*, § 132).

103. The Court will take such rules ensuring impartiality into account when making its own assessment as to whether a “tribunal” was impartial and, in particular, whether the applicant’s fears can be held to be objectively justified (*Pfeifer and Plankl v. Austria*, § 6; *Oberschlick v. Austria (no. 1)*, § 50; *Pescador Valero v. Spain*, §§ 24-29). Thus, applicants are expected to avail themselves of those rules existing in the relevant domestic law (*Zahirović v. Croatia*, §§ 31-37).

104. As regards the procedure to decide upon challenges for bias, the Court found, in particular, that the participation of judges in a decision concerning challenges against one of their colleagues can affect the impartiality of each of the challenged members if identical challenges have been directed against them. However, the Court has considered that such a procedure did not affect the impartiality of the judges concerned in the specific circumstances of a case in which the applicant had based his motions for bias on general and abstract, almost identical grounds, without making any reference to specific, material facts that could have revealed personal animosity or hostility towards him. It noted in that context that the exclusion of all challenged judges from the decisions concerning those challenges would have paralysed the whole judicial system at issue (*A.K. v. Liechtenstein*, § 68).

105. On the other hand, a failure of the national courts to examine a complaint of a lack of impartiality, which does not immediately appear to be manifestly devoid of merit, may lead to a breach of Article 6 § 1 of the Convention, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction (*Remli v. France*, § 48).

106. Moreover, it is possible that a higher or the highest court might, in some circumstances, make reparation for defects in the first-instance proceedings. However, when the higher court declines to quash the decision of a lower court lacking impartiality and upholds the conviction and sentence, it cannot be said that it cured the failing in question (*Kyprianou v. Cyprus* [GC], § 134; *De Cubber v. Belgium*, § 33; *Findlay v. the United Kingdom*, §§ 78-79).

107. Lastly, the Court takes the view that when an issue of impartiality of a tribunal arises with regard to a judge’s participation in the proceedings, the fact that he or she was part of an enlarged bench is not in itself decisive for the objective impartiality issue under Article 6 § 1 of the Convention. Considering the secrecy of the deliberations, it may be impossible to ascertain a judge’s actual influence in the decision-making and the impartiality of the court could be open to genuine doubt (*Morice v. France* [GC], § 89; *Otegi Mondragon v. Spain*, § 67).

## **b. Situations in which the question of a lack of judicial impartiality may arise**

108. There are two possible situations in which the question of a lack of judicial impartiality arises (*Kyprianou v. Cyprus* [GC], § 121):

- i. the first is *functional in nature* and concerns, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links with another person involved in the proceedings;
- ii. the second is *of a personal character* and derives from the *conduct of the judges* in a given case.

109. Moreover, there may be instances of a structural lack of impartiality of a particular court as a whole. This was the case in *Boyan Gospodinov v. Bulgaria* (§§ 54-60) where the criminal court trying the applicant in criminal proceedings was at the same time defendant in a separate set of civil proceedings for damages instituted by the applicant.

## i. Situations of a functional nature

### *α. The exercise of different judicial functions*

110. The mere fact that a judge in a criminal court has also made pre-trial decisions in the case, including decisions concerning detention on remand, cannot be taken in itself as justifying fears as to his lack of impartiality; what matters is the extent and nature of these decisions (*Fey v. Austria*, § 30; *Sainte-Marie v. France*, § 32; *Nortier v. the Netherlands*, § 33). When decisions extending detention on remand required “a very high degree of clarity” as to the question of guilt, the Court found that the impartiality of the tribunals concerned was capable of appearing open to doubt and that the applicant’s fears in this regard could be considered objectively justified (*Hauschildt v. Denmark*, §§ 49-52). In each case, the relevant question is the extent to which the judge assessed the circumstances of the case and the applicant’s responsibility when ordering his or her detention on remand (*Jasiński v. Poland*, §§ 54-58, where the Court found no violation of Article 6 § 1 of the Convention, and *Romenskiy v. Russia*, §§ 28-30, where the Court found a violation of Article 6 § 1 of the Convention).

111. When an issue of bias arises with regard to a judge’s previous participation in the proceedings, a time-lapse of nearly two years since the earlier involvement in the same proceedings is not in itself a sufficient safeguard against partiality (*Dāvidsons and Savins v. Latvia*, § 57).

112. The fact that a judge was once a member of the public prosecutor’s department is not a reason for fearing that he lacks impartiality (*Paunović v. Serbia\**, §§ 38-43). Nevertheless, if an individual, after holding in that department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality (*Piersack v. Belgium*, § 30 (b) and (d)).

113. The successive exercise of the functions of investigating judge and trial judge by one and the same person in the same case has also led the Court to find that the impartiality of the trial court was capable of appearing to the applicant to be open to doubt (*De Cubber v. Belgium*, §§ 27-30).

114. However, where the trial judge’s participation in the investigation had been limited in time and consisted in questioning two witnesses and had not entailed any assessment of the evidence or required him to reach a conclusion, the Court found that the applicant’s fear that the competent national court lacked impartiality could not be regarded as objectively justified (*Bulut v. Austria*, §§ 33-34). Thus, assessment of the individual circumstances of each case is always needed in order to ascertain the extent to which an investigating judge dealt with the case (*Borg v. Malta*, § 89).

115. The absence of a prosecutor during the criminal trial, which may put the judge in the position of the prosecuting authority while conducting the questioning and adducing evidence against an applicant, raises another issue concerning impartiality. In this regard, the Court has explained that the judge is the ultimate guardian of the proceedings and that it is normally the task of a public authority in case of public prosecution to present and substantiate the criminal charge with a view to adversarial argument with the other parties. Therefore, confusing the two roles in the proceedings is a potential breach of the requirement of impartiality under Article 6 § 1 of the Convention (*Karelin v. Russia*, §§ 51-85).

116. Similarly, the Court has examined the question of compliance with the principle of impartiality in a number of cases concerning alleged contempt by the applicant in court, where the same judge then took the decision to prosecute, tried the issues arising from the applicant’s conduct, determined his guilt and imposed the sanction. The Court has emphasised that, in such a situation, the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the



impartiality of the bench (*Kyprianou v. Cyprus* [GC], § 126-128; *Słomka v. Poland*, §§ 44-51; *Deli v. the Republic of Moldova*\*, § 43).

117. No question of a lack of judicial impartiality arises when a judge has already delivered purely formal and procedural decisions in other stages of the proceedings; however, problems with impartiality may emerge if, in other phases of the proceedings, a judge has already expressed an opinion on the guilt of the accused (*Gómez de Liaño y Botella v. Spain*, §§ 67-72).

118. The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on that judge's impartiality in a subsequent case (*Kriegisch v. Germany* (dec.); *Khodorkovskiy and Lebedev v. Russia*, § 544). It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings (*Poppe v. the Netherlands*, § 26; *Schwarzenberger v. Germany*, § 42; *Ferrantelli and Santangelo v. Italy*, § 59). Similarly, when the presiding judge of a tribunal had been previously declared biased against the applicant in a previous set of criminal proceedings concerning similar charges, an objective and justified fear of a lack of impartiality may arise both with regard to the applicant and his co-accused (*Otegi Mondragon v. Spain*, §§ 58-69).

119. The obligation to be impartial cannot be construed so as to impose an obligation on a superior court which sets aside an administrative or judicial decision to send the case back to a different jurisdictional authority or to a differently composed branch of that authority (*Marguš v. Croatia* [GC], §§ 85-89; *Thomann v. Switzerland*, § 33; *Stow and Gai v. Portugal* (dec.)). However, if such an obligation is provided under the relevant domestic law, the question of whether a tribunal has been established by law arises (*Lavents v. Latvia*, § 115).

120. The fact that an applicant was tried by a judge who herself raised doubts about her impartiality in the case may raise an issue from the perspective of the appearance of a fair trial (*Rudnichenko v. Ukraine*, § 118). This, however, will not be sufficient to find a violation of Article 6 § 1 of the Convention. In each case, the applicant's misgivings about the impartiality of the judge must be objectively justified (*Dragojević v. Croatia*, §§ 116-123).

### ***β. Hierarchical or other links with another participant in the proceedings***

#### *• Hierarchical links*

121. The determination by military service tribunals of criminal charges against military service personnel is not in principle incompatible with the provisions of Article 6 (*Cooper v. the United Kingdom* [GC], § 110). However, where all the members of the court martial were subordinate in rank to the convening officer and fell within his chain of command, the applicant's doubts about the tribunal's independence and impartiality could be objectively justified (*Findlay v. the United Kingdom*, § 76; *Miller and Others v. the United Kingdom*, §§ 30-31). Similarly, when a military court has in its composition a military officer in the service of the army and subject to military discipline and who is appointed by his or her hierarchical superior and does not enjoy the same constitutional safeguards provided to judges, it cannot be considered that such a court is independent and impartial within the meaning of Article 6 of the Convention (*Gürkan v. Turkey*, §§ 13-20).

122. The trial of civilians by a court composed in part of members of the armed forces can give rise to a legitimate fear that the court might allow itself to be unduly influenced by partial considerations (*Incal v. Turkey*, § 72; *Ibrahim Ülger v. Turkey*, § 26). Even when a military judge has participated only in an interlocutory decision in proceedings against a civilian that continues to remain in effect, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court (*Öcalan v. Turkey* [GC], § 115).

123. Situations in which a military court has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. A judicial

system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence (*Ergin v. Turkey (no. 6)*, § 49).

124. The determination of criminal charges against civilians in military courts could be held to be compatible with Article 6 only in very exceptional circumstances (*Martin v. the United Kingdom*, § 44; see also *Mustafa v. Bulgaria\**, §§ 28-37).

- *Other links*

125. Objectively justified doubts as to the impartiality of the trial court presiding judge were found to exist when her husband was the head of the team of investigators dealing with the applicants' case (*Dorozhko and Pozharskiy v. Estonia*, §§ 56-58).

126. Family affiliation between judges deciding on a case at different levels of jurisdiction may give rise to doubts as to the lack of impartiality. However, in *Pastörs v. Germany\**, §§ 58-70, where two judges who dealt with the applicant's case at the first and third level of jurisdiction were married, the Court found no violation of Article 6 § 1 of the Convention on the grounds that the applicant's complaint of bias had been submitted to a subsequent control of a judicial body with sufficient jurisdiction and offering the guarantees of Article 6 of the Convention. The Court also noted that the applicant had not given any concrete arguments why a professional judge – being married to another professional judge – should be biased when deciding on the same case at a different level of jurisdiction which did not, moreover, entail direct review of the spouse's decision.

127. Further, family affiliation with one of the parties could give rise to misgivings about the judge's impartiality. The Court has held that such misgivings must nonetheless be objectively justified. Whether they are objectively justified would very much depend on the circumstances of the specific case, and a number of factors are taken into account in this regard. These include, *inter alia*, whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) to be conferred on the relative (*Nicholas v. Cyprus*, § 62, concerning the civil limb). In small jurisdictions, where an issue of family affiliation may often arise, that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case (*ibid.*, § 64).

128. The fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case does not necessarily mean that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (*Pullar v. the United Kingdom*, § 38, concerning the presence in the jury of an employee of one of the two key prosecution witnesses; *Hanif and Khan v. the United Kingdom*, § 141, concerning the presence of a police officer in the jury, and contrast, *Peter Armstrong v. the United Kingdom*, §§ 39-45).

129. A criminal trial against an applicant in a court where the victim's mother worked as a judge was found to be in breach of the requirement of impartiality under Article 6 § 1 (*Mitrov v. the former Yugoslav Republic of Macedonia*, §§ 49-56).

## ii. Situations of a personal nature

130. The judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of

justice and the elevated nature of judicial office which impose that duty (*Lavents v. Latvia*, § 118; *Buscemi v. Italy*, § 67).

131. Thus, where a court president publicly used expressions implying that he had already formed an unfavourable view of the applicant’s case before presiding over the court that had to decide it, his statements objectively justified the accused’s fears as to his impartiality (*ibid.*, § 68; see also *Lavents v. Latvia*, § 119, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty).

132. No violation of Article 6 was found in relation to statements made to the press by a number of members of the national legal service and a paper published by the National Association of judges and prosecutors criticising the political climate in which the trial had taken place, the legislative reforms proposed by the Government and the defence strategy, but not making any pronouncement as to the applicant’s guilt. Moreover, the court hearing the applicant’s case had been made up entirely of professional judges whose experience and training enabled them to rise above external influence (*Previti v. Italy* (dec.), § 253). The Court also did not find lack of impartiality in a case in which a juror had made comments about the case in a newspaper interview after sentencing (*Bodet v. Belgium* (dec.), §§ 24-38; *Haarde v. Iceland*, § 105). Conversely, in *Kristiansen v. Norway* (§§ 56-61) the presence on the jury of a juror who knew the victim and commented on her character in circumstances which could be perceived as a comment or reaction to her oral evidence led to a breach of the principle of impartiality under Article 6 § 1.

133. Publicly expressed support of a judge who brought the criminal case against the applicant by a judge sitting in a cassation court’s panel in the case amounted to a violation of Article 6 § 1 of the Convention (*Morice v. France* [GC], §§ 79-92).

134. The fact of having previously belonged to a political party is not enough to cast doubt on the impartiality of a judge, particularly when there is no indication that the judge’s membership of the political party had any connection or link with the substance of the case (*Otegi Mondragon and Others v. Spain* (dec.), §§ 25-29).

## V. General guarantees: procedural requirements

### A. Fairness

#### Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair... hearing ... by [a] tribunal ...”

#### HUDOC keywords

Fair hearing (6-1); Adversarial trial (6-1); Equality of arms (6-1); Legal aid (6-1)

### 1. Effective participation in the proceedings

135. Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial (*Murtazaliyeva v. Russia* [GC], § 91). In general this includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (*Stanford v. the United Kingdom*, § 26).

Accordingly, poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article 6 (§ 29).

136. The Court also held that an accused's effective participation in his or her criminal trial must equally include the right to compile notes in order to facilitate the conduct of the defence (*Pullicino v. Malta* (dec.); *Moiseyev v. Russia*, § 214). This is true irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence. The dialogue between the lawyer and his client should not be impaired through divesting the latter of materials which set out his own views on the strengths and weaknesses of the evidence adduced by the prosecution. However, the Court stressed that different considerations may apply to the actual use of notes by an accused during his examination-in-chief or cross-examination. The credibility of an accused may be best tested by how he reacts in the witness box to questioning. A domestic court may therefore be justified in preventing an accused's reliance on written recollections of events or the reading out of notes in a manner which suggests that the evidence given has been rehearsed (*Pullicino v. Malta* (dec.)).

137. An issue concerning lack of effective participation in the proceedings may also arise with regard to a failure of the domestic authorities to accommodate the needs of juvenile defendants in trial proceedings. The Court has held that the criminal proceedings must be so organised as to respect the principle of the best interests of the child. It is essential that a child charged with an offence is dealt with in a manner which fully takes into account his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (*V. v. the United Kingdom* [GC], §§ 85-86). The right of a juvenile defendant to effectively participate in his criminal trial requires that the authorities deal with him with due regard to his vulnerability and capacities from the first stage of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible the child's feelings of intimidation and inhibition and to ensure that he has a broad understanding of the nature of the investigation and the stakes, including the significance of any potential penalty as well as his rights of defence and, in particular, his right to remain silent (*Blokhin v. Russia* [GC], 195).

138. A measure of confinement in the courtroom may also affect the fairness of a hearing by impairing an accused's right to participate effectively in the proceedings (*Svinarenko and Slyadnev v. Russia* [GC], § 134). The degrading treatment of a defendant during judicial proceedings caused by confinement in an overcrowded glass cabin in breach of Article 3 of the Convention would be difficult to reconcile with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, and above all in the accused (*Yaroslav Belousov v. Russia*, § 147).

139. Nevertheless, security concerns in a criminal court hearing may involve, especially in a large-scale or sensitive case, the use of special arrangements, including glass cabins. However, given the importance attached to the rights of the defence, any measures restricting the defendant's participation in the proceedings or imposing limitations on his or her relations with lawyers should only be imposed to the extent necessary, and should be proportionate to the risks in a specific case (*ibid.*, § 150). In *Yaroslav Belousov v. Russia* (§§ 151-154), the Court declared as violations of Article 6 § 1 the applicant's inability to have confidential exchanges with his legal counsel during the trial due to his placement in a glass cabin, and the trial court's failure to recognise the impact of these courtroom arrangements on the applicant's defence rights.

## 2. Equality of arms and adversarial proceedings

140. Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage

*vis-à-vis* his opponent (*Öcalan v. Turkey* [GC], § 140; *Foucher v. France*, § 34; *Bulut v. Austria*; *Faig Mammadov v. Azerbaijan*, § 19). Equality of arms requires that a fair balance be struck between the parties, and applies to criminal and civil cases.

141. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (*Brandstetter v. Austria*, § 67). The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of Article 6 § 1 looking at the two concepts together.

142. There has been a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (*Borgers v. Belgium*, § 24).

143. In criminal cases Article 6 § 1 overlaps with the specific guarantees of Article 6 § 3, although it is not confined to the minimum rights set out therein. Indeed, the guarantees contained in Article 6 § 3 are constituent elements, amongst others, of the concept of a fair trial set forth in Article 6 § 1 (*Ibrahim and Others v. the United Kingdom* [GC], § 251). The Court has dealt with the issues of equality of arms and adversarial trial in a variety of situations, very often overlapping with the defence rights under Article 6 § 3 of the Convention.

#### a. Equality of arms

144. A restriction on the rights of the defence was found in *Borgers v. Belgium*, where the applicant was prevented from replying to submissions made by the *avocat général* before the Court of Cassation and had not been given a copy of the submissions beforehand. The inequality was exacerbated by the *avocat général's* participation, in an advisory capacity, in the court's deliberations. Similar circumstances have led to the finding of a violation of Article 6 § 1 concerning the failure to communicate the higher prosecutor's observations on appeal to the defence (*Zahirović v. Croatia*, §§ 44-50).

145. The Court has found a violation of Article 6 § 1 combined with Article 6 § 3 in criminal proceedings where a defence lawyer was made to wait for fifteen hours before finally being given a chance to plead his case in the early hours of the morning (*Makhfi v. France*). Equally, the Court found a violation of the principle of equality of arms in connection with a Supreme Court ruling in a criminal case. The applicant, who had been convicted on appeal and had requested to be present, had been excluded from a preliminary hearing held *in camera* (*Zhuk v. Ukraine*, § 35). The same is true for instances in which an applicant is not allowed to be present at a hearing before the appeal court while the representative of the prosecution is present (*Eftimov v. the former Yugoslav Republic of Macedonia*, § 41).

146. In contrast, a complaint concerning equality of arms was declared inadmissible as being manifestly ill-founded where the applicant complained that the prosecutor had stood on a raised platform in relation to the parties. The accused had not been placed at a disadvantage regarding the defence of his interests (*Diriöz v. Turkey*, § 25).

147. The failure to lay down rules of criminal procedure in legislation may breach equality of arms, since their purpose is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules (*Coëme and Others v. Belgium*, § 102).

148. Witnesses for the prosecution and the defence must be treated equally; however, whether a violation is found depends on whether the witness in fact enjoyed a privileged role (*Bonisch v. Austria*, § 32; conversely, see *Brandstetter v. Austria*, § 45). In *Thiam v. France*, §§ 63-68, the Court did not consider that the participation of the President of the Republic as a victim and civil party in the proceedings disturbed the principle of equality of arms although he could not be questioned as a

witness in the proceedings due to a constitutional prohibition. The Court stressed that such a constitutional prohibition did not in itself contravene Article 6. It also noted, in particular, that in convicting the applicant, the national courts had not referred to any evidence against him adduced by the civil party that required them to test its credibility and reliability by hearing the President. The Court also noted that the nature of the case, the evidence available and the non-conflicting versions of the applicant and the civil party did not in any event require that the latter party be questioned. In addition, the Court had regard to the fact there was no indication in the case file that the President's involvement had encouraged the public prosecutor's office to act in a way that would have unduly influenced the criminal court or prevented the applicant from bringing an effective defence.

149. Refusal to hear any witnesses or examine evidence for the defence but examining the witnesses and evidence for the prosecution may raise an issue from the perspective of equality of arms (*Borisova v. Bulgaria*, §§ 47-48; *Topić v. Croatia*, § 48). The same is true if the trial court refuses to call defence witnesses to clarify an uncertain situation which constituted the basis of charges (*Kasparov and Others v. Russia*, §§ 64-65). Thus, in all such instances, in determining whether the proceedings were fair, the Court may need to apply the relevant test set out in the *Murtazaliyeva* case, which aims to determine (1) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (2) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (3) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings (*Abdullayev v. Azerbaijan*, §§ 59-60).<sup>3</sup>

150. The principle of equality of arms is also relevant in the matters related to the appointment of experts in the proceedings. The mere fact that the experts in question are employed by one of the parties does not suffice to render the proceedings unfair. The Court has explained that although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion. In ascertaining the experts' procedural position and their role in the proceedings, the Court takes into account the fact that the opinion given by any court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence (*Shulepova v. Russia*, § 62; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, § 94).

151. The Court has found that if a bill of indictment is based on the report of an expert who was appointed in the preliminary investigations by the public prosecutor, the appointment of the same person as expert by the trial court entails the risk of a breach of the principle of equality of arms, which however can be counterbalanced by specific procedural safeguards (*J.M. and Others v. Austria*, § 121).

152. In this regard, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial. The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence (*Huseyn and Others v. Azerbaijan*, § 196; *Khodorkovskiy and Lebedev v. Russia*, §§ 718 and 721; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, § 95).

153. Similarly, under Article 6 it is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not. The domestic judge normally has wide discretion in choosing amongst conflicting expert opinions and picking one which he or she

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3. See Section Examination of witnesses (Article 6 § 3 (d)).

deems consistent and credible. However, the rules on admissibility of evidence must not deprive the defence of the opportunity to challenge the findings of an expert effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances, the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (*Stoimenov v. the former Yugoslav Republic of Macedonia*, § 38; *Matytsina v. Russia*, § 169) as it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field (*Khodorkovskiy and Lebedev v. Russia*, § 187).

154. Equality of arms may also be breached when the accused has limited access to his case file or other documents on public-interest grounds (*Matyjek v. Poland*, § 65; *Moiseyev v. Russia*, § 217).

155. The Court has found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed in favour of finding that the principle of equality of arms had been breached (*Beraru v. Romania*, § 70). In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice. Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence from being made available to the accused before the trial and the accused from being given an opportunity to comment on it through his lawyer in oral submissions (*Öcalan v. Turkey* [GC], § 140). In some instances, however, an accused may be expected to give specific reasons for his request to access a particular document in the file (*Matanović v. Croatia*, § 177).

156. Non-disclosure of evidence to the defence may breach equality of arms as well as the right to an adversarial hearing (*Kuopila v. Finland*, § 38, where the defence was not given an opportunity to comment on a supplementary police report).

## **b. Adversarial hearing (disclosure of evidence)**

157. As a rule, Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (*Rowe and Davis v. the United Kingdom* [GC], § 60). In this context, the relevant considerations can also be drawn from Article 6 § 3 (b), which guarantees to the applicant “adequate time and facilities for the preparation of his defence” (*Leas v. Estonia*, § 80).<sup>4</sup>

158. An issue with regard to access to evidence may arise under Article 6 insofar as the evidence at issue is relevant for the applicant’s case, specifically if it had an important bearing on the charges held against the applicant. This is the case if the evidence was used and relied upon for the determination of the applicant’s guilt or it contained such particulars which could have enabled the applicant to exonerate oneself or have the sentence reduced. The relevant evidence in this context is not only evidence directly relevant to the facts of the case, but also other evidence that might relate to the admissibility, reliability and completeness of the former (*Rowe and Davis v. the United Kingdom* [GC], § 66; *Mirilashvili v. Russia*, § 200; *Leas v. Estonia*, § 81; *Matanović v. Croatia*, § 161).

159. The accused may, however, be expected to give specific reasons for his or her request for access to evidence, and the domestic courts are entitled to examine the validity of these reasons (*C.G.P. v. the Netherlands*, Commission decision; *Janatuinen v. Finland*, § 45; *Leas v. Estonia*, § 81; *Matanović v. Croatia*, § 157). In any case, in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6 § 1 (*Natunen v. Finland*, §§ 47-49; *Matanović v. Croatia*, §§ 158, 181-182).

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4. See Section Preparation of the defence (Article 6 § 3 (b)).

160. However, the entitlement to disclosure of relevant evidence is not an absolute right. In criminal proceedings there may be competing interests, such as national security or the need to protect witnesses who are at risk of reprisals or to keep secret the methods used by the police to investigate crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (*Van Mechelen and Others v. the Netherlands*, § 58; *Paci v. Belgium*, § 85). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Rowe and Davis v. the United Kingdom* [GC], § 61; *Doorson v. the Netherlands*, § 72)

161. In many cases where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the relevant interest involved against that of the accused without having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (*Dowsett v. the United Kingdom*, §§ 42-43; *Leas v. Estonia*, § 78).

162. In making its assessment of the relevant procedural guarantees, the Court must also have regard to the importance of the undisclosed material and its use in the trial (*Jasper v. the United Kingdom* [GC], §§ 54-55; *M v. the Netherlands*, § 69, where the non-disclosed information could not have been in itself of any assistance to the defence). It must in particular satisfy itself that the domestic procedure allowed that the impact of the relevant material on the safety of the conviction be considered in the light of detailed and informed argument from the defence (*Rowe and Davis v. the United Kingdom* [GC], § 66).

163. For instance, in *Rowe and Davis v. the United Kingdom* [GC], the Court found a violation of Article 6 § 1 on account of the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure, thereby depriving the applicants of a fair trial. However, in *Jasper v. the United Kingdom* [GC] (§ 58), the Court found no violation of Article 6 § 1, relying on the fact that the material which was not disclosed formed no part of the prosecution case whatsoever, and was never put to the jury. In *Edwards and Lewis v. the United Kingdom* [GC], the applicants were denied access to the evidence, and hence it was not possible for their representatives to argue the case on entrapment in full before the judge. The Court accordingly found a violation of Article 6 § 1 because the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms, nor did it incorporate adequate safeguards to protect the interests of the accused.

164. In the context of disclosure of evidence, complex issues may arise concerning the disclosure of electronic data, which may constitute a certain mass of information in hands of the prosecution. In such a case, an important safeguard in the sifting process is to ensure that the defence is provided with an opportunity to be involved in the laying-down of the criteria for determining what might be relevant for disclosure (*Sigurður Einarsson and Others v. Iceland*, § 90; see also *Rook v. Germany*, §§ 67 and 72). Moreover, as regards identified or tagged data, any refusal to allow the defence to have further searches of such data carried out in principle raises an issue with regard to the provision of adequate facilities for the preparation of the defence (*Sigurður Einarsson and Others v. Iceland*, § 91).

165. A breach of the right to an adversarial trial has also been found where the parties had not received the reporting judge's report before the hearing, whereas the advocate-general had, nor had they had an opportunity to reply to the advocate-general's submissions (*Reinhardt and Slimane-Kaïd v. France*, §§ 105-106).



### 3. Reasoning of judicial decisions

166. According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (*Moreira Ferreira v. Portugal (no. 2)* [GC], § 84; *Papon v. France* (dec.)).

167. Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. National courts should indicate with sufficient clarity the grounds on which they base their decision. The reasoned decision is important so as to allow an applicant to usefully exercise any available right of appeal (*Hadjianastassiou v. Greece*). However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case (*Ruiz Torija v. Spain*, § 29).

168. While courts are not obliged to give a detailed answer to every argument raised (*Van de Hurk v. the Netherlands*, § 61), it must be clear from the decision that the essential issues of the case have been addressed (*Boldea v. Romania*, § 30) and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the case (*Moreira Ferreira v. Portugal (no. 2)* [GC], § 84; *S.C. IMH Suceava S.R.L. v. Romania*, § 40, concerning contradictions in the assessment of evidence). Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical (*Moreira Ferreira v. Portugal (no. 2)* [GC], § 84). In sum, an issue with regard to a lack of reasoning of judicial decisions under Article 6 § 1 of the Convention will normally arise when the domestic courts ignored a specific, pertinent and important point raised by the applicant (*Nechiporuk and Yonkalo v. Ukraine*, § 280; see, in this context, *Rostomashvili v. Georgia*, § 59; *Zhang v. Ukraine*, § 73).

169. With regard to the manner in which the domestic judicial decisions are reasoned, a distinct issue arises when such decisions can be qualified as arbitrary to the point of prejudicing the fairness of proceedings. However, this will be the case only if no reasons are provided for a decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a “denial of justice” (*Moreira Ferreira v. Portugal (no. 2)* [GC], § 85; *Navalnyy and Ofitserov v. Russia*, § 119, concerning a politically motivated prosecution and conviction; and *Navalnyy v. Russia* [GC], § 83).

#### Reasons for decisions given by juries

170. The Court has noted that several Council of Europe member States have a lay jury system, which is guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. However, there is no right under Article 6 § 1 of the Convention to a jury trial (*Twomey, Cameron and Guthrie v. the United Kingdom* (dec.), § 30). Juries in criminal cases rarely give reasoned verdicts and the relevance of this to fairness has been touched upon in a number of cases, first by the Commission and latterly by the Court.

171. The Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict (*Saric v. Denmark* (dec.)). Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness (*Taxquet v. Belgium* [GC], § 92; *Legillon v. France*, § 53).

172. In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions. In these circumstances, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to

understand the reasons for his conviction (*Lhermitte v. Belgium* [GC], § 68). Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers (*R. v. Belgium*, Commission decision; *Zarouali v. Belgium*, Commission decision; *Planka v. Austria*, Commission decision; *Papon v. France* (dec.)). Where an assize court refuses to put distinct questions in respect of each defendant as to the existence of aggravating circumstances, thereby denying the jury the possibility of determining the applicant's individual criminal responsibility the Court has found a violation of Article 6 § 1 (*Goktepe v. Belgium*, § 28).

173. In *Bellerín Lagares v. Spain* (dec.) the Court observed that the impugned judgment – to which a record of the jury's deliberations had been attached – contained a list of the facts which the jury had held to be established in finding the applicant guilty, a legal analysis of those facts and, for sentencing purposes, a reference to the circumstances found to have had an influence on the applicant's degree of responsibility in the case at hand. It therefore found that the judgment in question had contained sufficient reasons for the purposes of Article 6 § 1 of the Convention. In *Matis v. France* (dec.), the Court held that a document that gave reasons for the judgment (*feuille de motivation*) by setting out the main charges which were debated during the proceedings, developed during the deliberations and ultimately formed the basis for the finding of guilt satisfied the requirements of sufficient reasoning.

174. Regard must be had to any avenues of appeal open to the accused (*Taxquet v. Belgium* [GC], § 92). In this case only four questions were put as regards the applicant; they were worded in identical terms to the questions concerning the other co-accused and did not allow him to determine the factual or legal basis on which he was convicted. Thus, his inability to understand why he was found guilty led to an unfair trial (*ibid.*, § 100).

175. In *Judge v. the United Kingdom* (dec.), the Court found that the framework surrounding a Scottish jury's unreasoned verdict was sufficient for the accused to understand his verdict. Moreover, the Court was also satisfied that the appeal rights available under Scots law would have been sufficient to remedy any improper verdict by the jury. Under the applicable legislation, the Appeal Court enjoyed wide powers of review and was empowered to quash any conviction which amounts to a miscarriage of justice.

176. In *Lhermitte v. Belgium* [GC] (§§ 75-85) the Court noted the following factors on the basis of which it found no violation of Article 6 § 1: procedural safeguards put in place during the trial (in particular, the applicant's effective participation in the examination of evidence and the fact that the questions put by the president to the jury had been read out and the parties had been given a copy), the combined impact of the facts set out in the indictment and the nature of the questions put to the jury, the proper presentation of the sentencing judgment, and the limited impact of the expert opinions which had been at odds with the jury's findings.

177. Similarly, in *Ramda v. France* (§§ 59-71), concerning the reasoning of a judgment delivered by a special anti-terrorist assize court, the Court found no violation of Article 6 § 1 in light of the combined examination of the three carefully reasoned committal orders, the arguments heard both at first instance and on appeal, as well as the many detailed questions put to the Assize Court, which allowed the applicant to understand the guilty verdict against him.

### Reasons for decisions given by superior courts

178. In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (*García Ruiz v. Spain* [GC], § 26; *Stepanyan v. Armenia*, § 35). With regard to the decision of an appellate court on whether to grant leave to appeal, the Court has held that

Article 6 § 1 cannot be interpreted as requiring that the rejection of such leave be subject itself to a requirement to give detailed reasons (*Sawoniuk v. the United Kingdom* (dec.)).

179. Nevertheless, when an issue arises as to the lack of any factual and/or legal basis of the lower court's decision, it is important that the higher court gives proper reasons of its own (*Tatishvili v. Russia*, § 62, concerning the civil limb). Moreover, in case of an explicit objection to the admissibility of evidence, the higher court cannot rely on that evidence without providing a response to such an argument (*Shabelnik v. Ukraine (no. 2)*, §§ 50-55, concerning the reliance on an accused's statements made in the context of a psychiatric examination).

180. In *Baydar v. the Netherlands* (§§ 45-53), in the context of a decision by the domestic superior court refusing to refer a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling (the relevant principles set out in the context of the civil limb in *Dhahbi v. Italy*, § 31), the Court had regard to the principle according to which courts of cassation comply with their obligation to provide sufficient reasoning when they base themselves on a specific legal provision, without further reasoning, in dismissing cassation appeals which do not have any prospects of success (*Talmane v. Latvia*, § 29). It held that this case-law was in line with the principles set out in *Dhahbi v. Italy*, and concluded that a reference to the relevant legal provision by the superior court, with an indication that there was no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined, provided for an implied acknowledgment that a referral to the CJEU could not lead to a different outcome in the case. The Court thus considered that this satisfied the requirement of a sufficient reasoning under Article 6 § 1.

## 4. Right to remain silent and not to incriminate oneself

### a. Affirmation and sphere of application

181. Anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself (*Saunders v. the United Kingdom* [GC] § 60; *O'Halloran and Francis v. the United Kingdom* [GC], § 45; *Funke v. France*, § 44). Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (*John Murray v. the United Kingdom* [GC], § 45; *Bykov v. Russia* [GC], § 92).

182. The right not to incriminate oneself applies to criminal proceedings in respect of all types of criminal offences, from the most simple to the most complex (*Saunders v. the United Kingdom* [GC] § 74).

183. The right to remain silent applies from the point at which the suspect is questioned by the police (*John Murray v. the United Kingdom* [GC], § 45). In particular, a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of his or her privilege against self-incrimination (*Ibrahim and Others v. the United Kingdom* [GC], § 272).

### b. Scope

184. The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (*Saunders v. the United Kingdom* [GC], § 68; *Bykov v. Russia* [GC], § 92).

185. The privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has

been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence (*Ibrahim and Others v. the United Kingdom* [GC], § 267).

186. Through its case-law, the Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies as a result (*Saunders v. the United Kingdom* [GC], *Brusco v. France*) or is sanctioned for refusing to testify (*Heaney and McGuinness v. Ireland*; *Weh v. Austria*). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (*Jalloh v. Germany* [GC]; *Gäfgen v. Germany* [GC]). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (*Allan v. the United Kingdom*; contrast with *Bykov v. Russia* [GC], §§ 101-102).

187. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating (*Ibrahim and Others v. the United Kingdom* [GC], § 268).

188. However, the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing (*Saunders v. the United Kingdom* [GC], § 69; *O'Halloran and Francis v. the United Kingdom* [GC], § 47). Moreover, the Court held that confronting the accused in criminal proceedings with their statements made during asylum proceedings could not be considered as the use of statements extracted under compulsion in breach of Article 6 § 1 (*H. and J. v. the Netherlands* (dec.)).

189. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In order for the right to a fair trial under Article 6 § 1 to remain sufficiently “practical and effective”, access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (*Salduz v. Turkey* [GC], §§ 54-55; *Ibrahim and Others v. the United Kingdom* [GC], § 256).

190. Persons in police custody enjoy both the right not to incriminate themselves and to remain silent and the right to be assisted by a lawyer whenever they are questioned; that is to say, when there is a “criminal charge” against them (*Ibrahim and Others v. the United Kingdom* [GC], § 272). These rights are quite distinct: a waiver of one of them does not entail a waiver of the other. Nevertheless, these rights are complementary, since persons in police custody must *a fortiori* be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent (*Brusco v. France*, § 54; *Navone and Others v. Monaco*, § 74). The importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent and if his decision has been taken without the assistance of counsel (*ibid.*; *Stojkovic v. France and Belgium*, § 54).

191. The right to remain silent and the privilege against self-incrimination serve in principle to protect the freedom of a suspect to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which the suspect has

elected to remain silent during questioning and the authorities use subterfuge to elicit confessions or other statements of an incriminatory nature from the suspect which they were unable to obtain during such questioning (in this particular case, a confession made to a police informer sharing the applicant's cell), and where the confessions or statements thereby obtained are adduced in evidence at trial (*Allan v. the United Kingdom*, § 50).

192. Conversely, in the case of *Bykov v. Russia* [GC] (§§ 102-103), the applicant had not been placed under any pressure or duress and was not in detention but was free to see a police informer and talk to him, or to refuse to do so. Furthermore, at the trial the recording of the conversation had not been treated as a plain confession capable of lying at the core of a finding of guilt; it had played a limited role in a complex body of evidence assessed by the court.

### c. A relative right

193. The right to remain silent is not absolute (*John Murray v. the United Kingdom* [GC], § 47; *Ibrahim and Others v. the United Kingdom* [GC], § 269).

194. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements:

- the nature and degree of compulsion;
- the existence of any relevant safeguards in the procedure;
- the use to which any material so obtained is put (*Jalloh v. Germany* [GC], § 101; *O'Halloran and Francis v. the United Kingdom* [GC], § 55; *Bykov v. Russia* [GC], § 104; *Ibrahim and Others v. the United Kingdom* [GC], § 269).

195. On the one hand, a conviction must not be solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the right to remain silent cannot prevent the accused's silence – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. It cannot therefore be said that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications (*John Murray v. the United Kingdom* [GC], § 47).

196. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the weight attached to such inferences by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (*ibid.*, § 47). In practice, adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6. In jury trials, the trial judge's direction to the jury on adverse inferences is of particular relevance to this matter (*O'Donnell v. the United Kingdom*, § 51).

197. Furthermore, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual's interest in having the evidence against him gathered lawfully. However, public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination (*Jalloh v. Germany* [GC], § 97). The public interest cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings (*Heaney and McGuinness v. Ireland*, § 57).

## 5. Administration of evidence

198. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law

(*Schenk v. Switzerland*, §§ 45-46; *Moreira Ferreira v. Portugal (no. 2)* [GC], § 83; *Heglas v. the Czech Republic*, § 84).

199. It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the alleged unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (*Khan v. the United Kingdom*, § 34; *P.G. and J.H. v. the United Kingdom*, § 76; *Allan v. the United Kingdom*, § 42).

200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (*Bykov v. Russia* [GC], § 89; *Jalloh v. Germany* [GC], § 96). In this connection, the Court also attaches weight to whether the evidence in question was or was not decisive for the outcome of the criminal proceedings (*Gäfgen v. Germany* [GC], § 164).

201. As to the examination of the nature of the alleged unlawfulness in question, the above test has been applied in cases concerning complaints that evidence obtained in breach of the defence rights has been used in the proceedings. This concerns, for instance, the use of evidence obtained through an identification parade (*Laska and Lika v. Albania*), an improper taking of samples from a suspect for a forensic analysis (*Horvatić v. Croatia*), exertion of pressure on a co-accused (*Erkapić v. Croatia; Dominka v. Slovakia* (dec.)), use of planted evidence against an accused (*Layijov v. Azerbaijan*, § 64; *Sakit Zahidov v. Azerbaijan*, §§ 46-49; *Kobiashvili v. Georgia*, §§ 56-58), unfair use of other incriminating witness and material evidence against an accused (*Ilgar Mammadov v. Azerbaijan (no. 2)*); use of self-incriminating statements in the proceedings (*Belugin v. Russia\**, § 68-80); and use of expert evidence in the proceedings (*Erduran and Em Export Diş Tic A.Ş. v. Turkey*, §§ 107-112; see also *Avagyan v. Armenia*, § 41).

202. The same test has been applied in cases concerning the question whether using information allegedly obtained in violation of Article 8 as evidence rendered a trial as a whole unfair under the meaning of Article 6. This concerns, for instance, cases related to the use of evidence obtained by unlawful secret surveillance (*Bykov v. Russia* [GC], §§ 69-83; *Khan v. the United Kingdom*, § 34; *Dragojević v. Croatia*, §§ 127-135; *Nițulescu v. Romania; Dragoș Ioan Rusu v. Romania*, §§ 47-50), and search and seizure operations (*Khodorkovskiy and Lebedev v. Russia*, §§ 699-705; *Prade v. Germany*).

203. However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (*Jalloh v. Germany* [GC], §§ 99 and 105; *Harutyunyan v. Armenia*, § 63; see, by contrast, *Mehmet Ali Eser v. Turkey\**, § 41, where no statements obtained by coercion were in fact used in the applicant's conviction).

204. Therefore, the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6 (*Gäfgen*

*v. Germany* [GC], § 166; *Ibrahim and Others v. the United Kingdom* [GC], § 254; *El Haski v. Belgium*, § 85; *Cēsnieks v. Latvia*, §§ 67-70).

205. This also holds true for the use of real evidence obtained as a direct result of acts of torture (*Gäfgen v. Germany* [GC], § 167; *Jalloh v. Germany* [GC], § 105). The admission of such evidence obtained as a result of an act classified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6 if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence (*Gäfgen v. Germany* [GC], § 178; *El Haski v. Belgium*, § 85).

206. These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (*ibid.*, § 85; *Urazbayev v. Russia\**, § 73). In particular, the Court has found that the use in a trial of evidence obtained by torture would amount to a flagrant denial of justice even where the person from whom the evidence had thus been extracted was a third party (*Othman (Abu Qatada) v. the United Kingdom*, §§ 263 and 267; *Kaçiu and Kotorri v. Albania*, § 128; *Kormev v. Bulgaria*, §§ 89-90).

207. In this connection, it should be noted that the Court has held that the absence of an admissible Article 3 complaint does not, in principle, preclude it from taking into consideration the applicant's allegations that the police statements had been obtained using methods of coercion or oppression and that their admission to the case file, relied upon by the trial court, therefore constituted a violation of the fair trial guarantee of Article 6 (*Mehmet Duman v. Turkey*, § 42).

208. Lastly, an issue related to the administration of evidence in the proceedings arises also with regard to the admission of evidence provided by witnesses cooperating with the prosecution. In this connection, the Court has held that the use of statements made by witnesses in exchange for immunity or other advantages may put in question the fairness of the hearing granted to an accused and is capable of raising delicate issues since, by their very nature, such statements are open to manipulation and may be made purely in order to obtain advantages or for personal revenge. However, use of this kind of statement does not in itself suffice to render the proceedings unfair (*Verhoek v. the Netherlands* (dec.); *Cornelis v. the Netherlands* (dec.)). In each case, in making its assessment, the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims in the proper prosecution of the crime and, where necessary, to the rights of witnesses (*Habran and Dalem v. Belgium*, § 96).

209. In *Adamčo v. Slovakia\**, §§ 56-71, concerning the conviction based to a decisive degree on statements by an accomplice arising from a plea-bargaining arrangement, the Court found a violation of Article 6 of the Convention having regard to the following considerations: the statement constituted, if not the sole, then at least the decisive evidence against the applicant; the failure by the domestic courts to examine the wider context in which the witness obtained advantages from the prosecution; the fact that the plea-bargaining agreement with the prosecution was concluded without the judicial involvement; and the domestic courts' failure to provide the relevant reasoning concerning the applicant's arguments.

## 6. Entrapment

### a. General considerations

210. The Court has recognised the need for the authorities to have recourse to special investigative methods, notably in organised crime and corruption cases. It has held, in this connection, that the use of special investigative methods – in particular, undercover techniques – does not in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits (*Ramanauskas v. Lithuania* [GC], § 51).

211. While the rise of organised crime requires the States to take appropriate measures, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (*ibid.*, § 53). In this connection, the Court has emphasised that the police may act undercover but not incite (*Khudobin v. Russia*, § 128).

212. Moreover, while the Convention does not preclude reliance, at the preliminary investigation stage and where this may be warranted by the nature of the offence, on sources such as anonymous informants, the subsequent use of such sources by the trial court to found a conviction is a different matter (*Teixeira de Castro v. Portugal*, § 35). Such a use can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (*Ramanauskas v. Lithuania* [GC], § 51). As to the authority exercising control over undercover operations, the Court has considered that, while judicial supervision would be the most appropriate means, other means may be used provided that adequate procedures and safeguards are in place, such as supervision by a prosecutor (*Bannikova v. Russia*, § 50; *Tchokhanelidze v. Georgia*, § 51).

213. While the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as this would expose the accused to the risk of being definitely deprived of a fair trial from the outset (*Ramanauskas v. Lithuania* [GC], § 54). The undercover agents in this context may be the State agents or private parties acting under their instructions and control. However, a complaint related to the incitement to commit an offence by a private party, who was not acting under the instructions or otherwise control of the authorities, is examined under the general rules on the administration of evidence and not as an issue of entrapment (*Shannon v. the United Kingdom* (dec.)).

214. The prohibition of entrapment also extends to the recourse to operation techniques involving the arrangement of multiple illicit transactions with a suspect by the State authorities. The Court has held that such operation techniques are recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise. However, in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement. Accordingly, when State authorities use an operational technique involving the arrangement of multiple illicit transactions with a suspect, the infiltration and participation of an undercover agent in each illicit transaction must not expand the police's role beyond that of undercover agents to that of *agents provocateurs*. Moreover, any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime (*Grba v. Croatia*, §§ 99-101).

215. In particular, as a result of improper conduct of undercover agents in one or more multiple illicit transactions or involvement in activities enlarging the scope or scale of the crime, the State authorities might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Should it be established that this was the case, the relevant inferences in accordance with the Convention must be drawn either with regard to the particular illicit transaction effected by means of improper conduct of State authorities or with regard to the arrangement of multiple illicit transactions as a whole. As a matter of fairness, the sentence imposed should reflect the offence which the defendant was actually planning to commit. Thus, although it would not be unfair to convict the person, it would be unfair for him or her to be



punished for that part of the criminal activity which was the result of improper conduct on the part of State authorities (*ibid.*, §§ 102-103).

216. In its case-law on the subject of entrapment, the Court has developed criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations. The Court has explained that whereas it is not possible to reduce the variety of situations which might occur in this context to a mere checklist of simplified criteria, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement (*Matanović v. Croatia*, § 122; *Ramanauskas v. Lithuania (no. 2)*, § 55).

## **b. The substantive test of incitement**

217. The Court has defined entrapment,<sup>5</sup> as opposed to a legitimate undercover investigation, as a situation where the officers involved - whether members of the security forces or persons acting on their instructions – 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 make it possible to establish the offence, that is to provide evidence and institute a prosecution (*Ramanauskas v. Lithuania* [GC], § 55).

218. In deciding whether the investigation was “essentially passive” the Court examines the reasons underlying the covert operation and the conduct of the authorities carrying it out. In particular, it will determine whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (*Bannikova v. Russia*, § 38).

219. In its assessment the Court takes into account a number of factors. For example, in the early landmark case of *Teixeira de Castro v. Portugal* (§§ 37-38) the Court took into account, *inter alia*, the fact that the applicant had no criminal record, that no investigation concerning him had been opened, that he was unknown to the police officers, that no drugs were found in his home and that the amount of drugs found on him during arrest was not more than the amount requested by the undercover agents. It found that the agents' actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention the offence in question would have been committed.

220. A previous criminal record is not by itself indicative of a predisposition to commit a criminal offence (*Constantin and Stoian v. Romania*, § 55). However, the applicant's familiarity with the modalities of the offence (*Virgil Dan Vasile v. Romania*, § 53) and his failure to withdraw from the deal despite a number of opportunities to do so or to report the offence to the authorities, have been considered by the Court to be indicative of pre-existing criminal activity or intent (*Gorgievski v. the former Yugoslav Republic of Macedonia*, § 53; *Matanović v. Croatia*, §§ 142-143).

221. Another factor to be taken into account is whether the applicant was pressured into committing the offence in question. Taking the initiative in contacting the applicant in the absence of any objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (*Burak Hun v. Turkey*, § 44; *Sepil v. Turkey*, § 34), reiterating the offer despite the applicant's initial refusal, insistent prompting (*Ramanauskas v. Lithuania* [GC], § 67, contrast *Ramanauskas v. Lithuania (no. 2)*, § 68, where the applicant himself asked to be contacted), raising the price beyond average (*Malininas v. Lithuania*, § 37) and appealing to the applicant's compassion by mentioning withdrawal symptoms (*Vanyan v. Russia*, §§ 11 and 49) have been regarded by the Court as conduct which can be deemed to have pressured the applicant

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5. The terms entrapment, police incitement and *agent provocateurs* are used in the Court's case-law interchangeably.

into committing the offence in question, irrespective of whether the agent in question was a member of the security forces or a private individual acting on their instructions.

222. A further question of importance is whether the State agents can be deemed to have “joined” or “infiltrated” the criminal activity rather than to have initiated it. In the former case the action in question remains within the bounds of undercover work. In *Miliniénė v. Lithuania* (§§ 37-38) the Court considered that, although the police had influenced the course of events, notably by giving technical equipment to the private individual to record conversations and supporting the offer of financial inducements to the applicant, their actions were treated as having “joined” the criminal activity rather than as having initiated it as the initiative in the case had been taken by a private individual. The latter had complained to the police that the applicant would require a bribe to reach a favourable outcome in his case, and only after this complaint was the operation authorised and supervised by the Deputy Prosecutor General, with a view to verifying the complaint (for similar reasoning, see *Sequeira v. Portugal* (dec.); *Eurofinacom v. France* (dec.)).

223. The manner in which the undercover police operation was launched and carried out is relevant in assessing whether the applicant was subjected to entrapment. The absence of clear and foreseeable procedures for authorising, implementing and supervising the investigative measure in question tips the balance in favour of finding that the acts in question constitute entrapment: see, for example, *Teixeira de Castro v. Portugal*, § 38, where the Court noted the fact that the undercover agents’ intervention had not taken place as part of an official anti-drug-trafficking operation supervised by a judge; *Ramanauskas v. Lithuania* [GC], § 64, where there was no indication of what reasons or personal motives had led the undercover agent to approach the applicant on his own initiative without bringing the matter to the attention of his superiors; and *Tchokhonelidze v. Georgia*, § 51, where there was no formal authorisation and supervision of the undercover operation in question.

224. In *Vanyan v. Russia* (§§ 46-47), where the Court noted that the police operation had been authorised by a simple administrative decision by the body which later carried out the operation, that the decision contained very little information as to the reasons for and purposes of the planned test purchase, and that the operation was not subject to judicial review or any other independent supervision. In this connection, the “test purchase” technique used by the Russian authorities was closely scrutinised in the case of *Veselov and Others v. Russia* (§ 127) where the Court held that the procedure in question was deficient and that it exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them. It further found that the domestic courts had also failed to adequately examine the applicants’ plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants *vis-à-vis* the applicants.

### **c. Judicial review of the entrapment defence**

225. In cases raising issues of entrapment, Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. The mere fact that general safeguards, such as equality of arms or the rights of the defence, have been observed is not sufficient (*Ramanauskas v. Lithuania* [GC], § 69). In such cases the Court has indicated that it falls to the prosecution to prove that there was no incitement, provided that the defendant’s allegations are not wholly improbable.

226. If a plea of entrapment is made and there is certain *prima facie* evidence of entrapment, the judicial authorities must examine the facts of the case and take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention (*ibid.*, § 70). The mere fact that the applicant pleaded guilty to the criminal charges does not dispense the trial court from the duty to examine allegations of entrapment (*ibid.*, § 72).

227. In this connection the Court verifies whether a prima facie complaint of entrapment constitutes a substantive defence under domestic law or gives grounds for the exclusion of evidence or leads to similar consequences (*Bannikova v. Russia*, § 54). Although it is up to the domestic authorities to decide what procedure is appropriate when faced with a plea of incitement, the Court requires the procedure in question to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment (*ibid.*, § 57). Moreover, in the context of non-disclosure of information by the investigative authorities, the Court attaches particular weight to compliance with the principles of adversarial proceedings and equality of arms (*ibid.*, § 58).

228. Where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards (*Ramanauskas v. Lithuania* [GC], § 60). In such a system the judicial examination of an entrapment plea provides the only effective means of verifying the validity of the reasons for the undercover operations and ascertaining whether the agents remained “essentially passive” during those operations (*Lagutin and Others v. Russia*, § 119). It is also imperative that the domestic courts’ decisions dismissing an applicant’s plea of entrapment are sufficiently reasoned (*Sandu v. the Republic of Moldova*, § 38; *Tchokhnelidze v. Georgia*, § 52)

229. If the available information does not enable the Court to conclude whether the applicant was subjected to entrapment, the judicial review of the entrapment plea becomes decisive in accordance with the methodology of the Court’s assessment of entrapment cases (*Edwards and Lewis v. the United Kingdom* [GC], § 46; *Ali v. Romania*, § 101; see also, *Khudobin v. Russia*, where the domestic courts failed to analyse the relevant factual and legal elements to distinguish entrapment from a legitimate form of investigative activity; *V. v. Finland*, where it was impossible for the applicant to raise the defence of entrapment).

#### **d. Methodology of the Court’s assessment of entrapment cases**

230. In the application of the substantive and procedural tests of entrapment, the Court must first satisfy itself that the situation under examination falls prima facie within the category of “entrapment cases”. If the Court is satisfied that the applicant’s complaint falls to be examined within the category of “entrapment cases”, it will proceed, as a first step, with the assessment under the substantive test of incitement. Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant’s activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1.

231. However, if the Court’s findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties’ interpretations of events, or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement contrary to Article 6 § 1, it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement. The Court has explained that it applies this test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts, and whether in the case of a finding that there has been incitement or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention. The proceedings against an applicant would be deprived of the fairness required by Article 6 of the Convention if the actions of the State authorities had the effect of inciting the applicant to commit the offence for which he or she was convicted, and the domestic courts did not appropriately address the allegations of

incitement (*Matanović v. Croatia*, §§ 131-135; *Ramanauskas v. Lithuania (no. 2)*, § 62; *Virgil Dan Vasile v. Romania*, §§ 47-50).

## 7. The principle of immediacy

232. The Court has held that an important element of fair criminal proceedings is also the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case. Such a principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Therefore, normally a change in the composition of the trial court after the hearing of an important witness should lead to the rehearing of that witness (*P.K. v. Finland* (dec.)).

233. However, the principle of immediacy cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case. Very clear administrative or procedural factors may arise, rendering a judge's continued participation in a case impossible. The Court has indicated that measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available where the credibility of the witness concerned is not at issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court (*Cutean v. Romania*, § 61).

234. In *P.K. v. Finland*, the Court did not consider that non-compliance with the principle of immediacy could in itself lead to a breach of the right to a fair trial. The Court took into account the fact that, although the presiding judge had changed, the three lay judges remained the same throughout the proceedings. It also noted that the credibility of the witness in question had at no stage been challenged, nor was there any indication in the file justifying doubts about her credibility. Under these circumstances, the fact that the new presiding judge had had at his disposal the minutes of the session at which the witness had been heard to a large extent compensated for the lack of immediacy of the proceedings. The Court further noted that the applicant's conviction had not been based solely on the evidence of the witness in question and that there was nothing suggesting that the presiding judge had changed in order to affect the outcome of the case or for any other improper motive. Similar considerations have led the Court to find no violation of Article 6 § 1 in *Graviano v. Italy* (§§ 39-40) and *Škaro v. Croatia* (§§ 22-31).

235. Conversely, in *Cutean v. Romania* (§§ 60-73), the Court found a violation of Article 6 when none of the judges in the initial panel who had heard the applicant and the witnesses at the first level of jurisdiction had stayed on to continue with the examination of the case. It also noted that the applicant's and the witnesses' statements constituted relevant evidence for his conviction which was not directly heard by the judge. In these circumstances, the Court held that the availability of statement transcripts cannot compensate for the lack of immediacy in the proceedings (also *Beraru v. Romania*, § 66).

236. In *Cerovšek and Božičnik v. Slovenia* (§§ 37-48) the Court found a violation of Article 6 because the reasons for the verdicts against the applicants, that is, their conviction and sentence, had not been given by the single judge who had pronounced them but by other judges, who had not participated in the trial (see also *Svanidze v. Georgia*, §§ 34-38, concerning the replacement of the trial judge by a substitute judge who did not participate in the examination of evidence).

237. An issue related to the principle of immediacy may also arise when the appeal court overturns the decision of a lower court acquitting an applicant of the criminal charges without a fresh examination of the evidence, including the hearing of witnesses (*Hanu v. Romania*, § 40; *Lazu v. the Republic of Moldova*, § 43). Similarly, the principle of immediacy is relevant in case of a change in the composition of the trial court when the case is remitted for retrial before a different judge.

Moreover, in such a situation, the principles of the Court’s case-law concerning the right to examine witnesses for the prosecution are of relevance (*Famulyak v. Ukraine* (dec.), §§ 36-38).<sup>6</sup>

## 8. Legal certainty and divergent case-law

238. The principle of legal certainty requires domestic authorities to respect the binding nature of a final judicial decision. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings under Article 6 (*Bratyakin v. Russia* (dec.)).

239. However, the requirements of legal certainty are not absolute. In criminal cases, they must be assessed in the light of, for example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case. Nevertheless, compliance with Article 4 of Protocol No. 7 is not in itself sufficient to establish compliance with the requirements of a fair trial under Article 6 (*Nikitin v. Russia*, § 56).

240. Certain special circumstances of the case may reveal that the actual manner in which the procedure for reopening of a final decision was used impaired the very essence of a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct such a procedure was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice (*ibid.*, § 57).

241. The principle of legal certainty also guarantees certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law. However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law, and case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (*Borg v. Malta*, § 107).

242. In its assessment of whether conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6 § 1, the Court applies the test first developed in civil cases (*Nejdet Şahin and Perihan Şahin v. Turkey* [GC], § 53), which consist of establishing whether “profound and long-standing differences” exist in the case-law of a supreme court, whether the domestic law provides tools for overcoming these inconsistencies, whether such tools have been applied, and, if appropriate, to what effect (*Borg v. Malta*, § 108).

## 9. Prejudicial publicity

243. The Court has held that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, the jurors called upon to decide the guilt of an accused (*Akay v. Turkey* (dec.); *Craxi v. Italy (no. 1)*, § 98; *Beggs v. the United Kingdom* (dec.), § 123). In this way, a virulent press campaign risks having an impact on the impartiality of the court under Article 6 § 1 as well as the presumption of innocence enshrined in Article 6 § 2 (*Ninn-Hansen v. Denmark* (dec.); *Anguelov v. Bulgaria* (dec.)).<sup>7</sup>

244. At the same time, press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention (*Bédat v. Switzerland* [GC], § 51). If there is a virulent

6. See Section Right to examine witnesses.

7. See Section Adverse press campaign.

press campaign surrounding a trial, what is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his or her fears can be held to be objectively justified (*Włoch v. Poland* (dec.); *Daktaras v. Lithuania* (dec.); *Priebke v. Italy* (dec.); *Butkevičius v. Lithuania* (dec.); *G.C.P. v. Romania*, § 46; *Mustafa (Abu Hamza) v. the United Kingdom* (dec.), §§ 37-40).

245. Some of the factors identified in the case-law as relevant to the Court's assessment of the impact of such a campaign on the fairness of the trial include: the time elapsed between the press campaign and the commencement of the trial, and in particular the determination of the trial court's composition; whether the impugned publications were attributable to, or informed by, the authorities; and whether the publications influenced the judges or the jury and thus prejudiced the outcome of the proceedings (*Beggs v. the United Kingdom* (dec.), § 124; *Abdulla Ali v. the United Kingdom*, §§ 87-91; *Paulikas v. Lithuania*, § 59).

246. Moreover, in the context of a trial by jury, the content of any directions given to the jury is also a relevant consideration (*Beggs v. the United Kingdom* (dec.), § 124). National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence (*Craxi v. Italy (no. 1)*, § 104; *Mircea v. Romania*, § 75).

## 10. Plea bargaining

247. The Court has noted that it can be considered a common feature of European criminal-justice systems for an accused to receive a lesser charge or a reduced sentence in exchange for a guilty or *nolo contendere* plea in advance of trial, or for providing substantial cooperation with the investigative authority (*Natsvlishvili and Togonidze v. Georgia*, § 90). There cannot therefore be anything improper in the process of charge or sentence bargaining in itself (*ibid.*), or in the pressure an individual to accept pre-trial resolution of the case by the fact that he or she would be required to appear in court (*Deweert v. Belgium*, § 51). For the Court, plea bargaining, apart from offering important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners (*Natsvlishvili and Togonidze v. Georgia*, § 90).

248. The Court has also noted that the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, which amounts, in substance, to a waiver of a number of procedural rights (*Navalnyy and Ofitserov v. Russia*, § 100). This cannot be a problem in itself, since neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards by free will.<sup>8</sup> Thus, by analogy with the principles concerning the validity of waivers, the Court has found that a decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review (*Natsvlishvili and Togonidze v. Georgia*, §§ 91-92).

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8. See Section General considerations of Article 6 in its criminal aspect.

## B. Public hearing

### Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... public hearing ... by [a] tribunal .... 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.”

### HUDOC keywords

Public hearing (6-1); Oral hearing (6-1); Exclusion of press (6-1); Exclusion of public (6-1)

Necessary in a democratic society (6-1); Protection of morals (6-1); Protection of public order (6-1); National security (6-1); Protection of juveniles (6-1); Protection of private life of the parties (6-1); Extent strictly necessary (6-1); Prejudice interests of justice (6-1)

Public judgment (6-1)

### 1. The principle of publicity

249. The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society (*Riepan v. Austria*, § 27; *Krestovskiy v. Russia*, § 24; *Sutter v. Switzerland*, § 26).

250. The principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments (*ibid.*, § 27 ; *Tierce and Others v. San Marino*, § 93).

### 2. The right to an oral hearing and presence at the hearing

#### a. Right to an oral hearing

251. The entitlement to a “public hearing” in Article 6 § 1 necessarily implies a right to an “oral hearing” (*Döry v. Sweden*, § 37).

252. The obligation to hold a hearing is, however, not absolute in all cases falling under the criminal head of Article 6. In light of the broadening notion of a “criminal charge” to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there are “criminal charges” of differing weights. While the requirements of a fair hearing are the strictest concerning the hard core of criminal law, the criminal-head guarantees of Article 6 do not necessarily apply with their full stringency to other categories of cases falling under that head yet not carrying any significant degree of stigma (*Jussila v. Finland* [GC], §§ 41-43).

253. Nevertheless, refusing to hold an oral hearing may be justified only in exceptional cases (*Grande Stevens and Others v. Italy*, §§ 121-122). The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required

where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses, and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy (*Jussila v. Finland* [GC], §§ 41-43 and 47-48, concerning tax-surcharge proceedings; *Suhadolc v. Slovenia* (dec.), concerning a summary procedure for road traffic offences; *Sancaklı v. Turkey*, § 45, concerning an administrative fine on a hotel owner for using the premises for prostitution). However, in cases where the impugned offence has been observed by a public officer, an oral hearing may be essential for the protection of the accused person's interests in that it can put the credibility of the officers' findings to the test (*Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, § 54).

254. Moreover, in some instances, even where the subject matter of the case concerns an issue of a technical nature, which could normally be decided without an oral hearing, the circumstances of the case may warrant, as a matter of fair trial, the holding of an oral hearing (*Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, § 37).

## **b. Presence at the trial**

255. The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance (*Jussila v. Finland* [GC], § 40; *Tierce and Others v. San Marino*, § 94; *Igor Pascari v. the Republic of Moldova*, § 27, concerning the applicant's exclusion from the proceedings in which his guilt for a road traffic accident had been determined).

256. Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, namely the right to "defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6 (*Hermi v. Italy* [GC], §§ 58-59; *Sejdovic v. Italy* [GC], §§ 81 and 84; *Arps v. Croatia*, § 28).

257. Moreover, the right to be present at the hearing allows the accused to verify the accuracy of his or her defence and to compare it with the statements of victims and witnesses (*Medenica v. Switzerland*, § 54). Domestic courts must exercise due diligence in securing the presence of the accused by properly summoning him or her (*Colozza v. Italy*, § 32; *M.T.B. v. Turkey*, §§ 49-53) and they must take measures to discourage his unjustified absence from the hearing (*Medenica v. Switzerland*, § 54).

258. While Article 6 § 1 cannot be construed as conferring on an applicant the right to obtain a specific form of service of court documents such as by registered post, in the interests of the administration of justice, the applicant should be notified of a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing (*Vyacheslav Korchagin v. Russia*, § 65).

259. A hearing may be held in the accused's absence, if he or she has waived the right to be present at the hearing. Such a waiver may be explicit or implied thorough one's conduct, such as when he or she seeks to evade the trial (*Lena Atanasova v. Bulgaria*, § 52). However, any waiver of guarantees under Article 6 must satisfy the test of a "knowing and intelligent" waiver as established in the Court's case-law (*Sejdovic v. Italy* [GC], §§ 86-87).<sup>9</sup>

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9. See Section General considerations of Article 6 in its criminal aspect.



260. Relatedly, the Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from one's status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that the defendant had waived the right to appear at trial and defend oneself. Moreover, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure. At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (*ibid.*, § 87).

261. The Court has also held that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution, or miscarriage of justice (*Colozza v. Italy*, § 29). Thus, holding a hearing in an accused's absence is not in itself contrary to Article 6. However, when domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in the applicant's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge (*Sanader v. Croatia*, §§ 77-78)

262. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (*Sejdovic v. Italy* [GC], § 82). This is because the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during original proceedings or at a retrial – ranks as one of the essential requirements of Article 6 (*Stoichkov v. Bulgaria*, § 56).

263. In *Sanader v. Croatia* (§§ 87-88) the Court held that the requirement that an individual tried *in absentia*, who had not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal proceedings in order to be able to request a retrial, was disproportionate. This was particularly so because once the defendant is under the jurisdiction of the domestic authorities, he would be deprived of liberty on the basis of the conviction *in absentia*. In this regard, the Court stressed that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention. It explained, however, that this did not call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law. Such measures, if applicable, would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of "relevant and sufficient reasons" for his detention.

264. Lastly, an issue with regard to the requirement of presence at the hearing arises when an accused is prevented from taking part in his trial on the grounds of his improper behaviour (*Idalov v. Russia* [GC], § 175; *Marguš v. Croatia* [GC], § 90; *Ananyev v. Russia*, § 43).

265. In this context, the Court has held that it is essential for the proper administration of justice that dignity, order and decorum be observed in the courtroom as the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither can nor should be tolerated. However, when an applicant's behaviour might be of such a nature as to justify his removal and the continuation of his trial in his absence, it is incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to the decision to order his removal from the courtroom (*Idalov v. Russia* [GC], §§ 176-177). Moreover, the relevant consideration is whether the

applicant's lawyer was able to exercise the rights of the defence in the applicant's absence (*Marguš v. Croatia* [GC], § 90) and whether the matter was addressed and if appropriate remedied in the appeal proceedings (*Idalov v. Russia* [GC], § 179).

### c. Presence at the appeal hearing

266. The principle that hearings should be held in public entails the right of the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights (*Tierce and Others v. San Marino*, § 95). Thus, when an accused provides justification for his or her absence from an appeal hearing, the domestic courts must examine that justification and provide sufficient reasons for their decision (*Henri Rivière and Others v. France*, § 33).

267. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing. The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (*Hermi v. Italy* [GC], § 60).

268. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance (*Monnell and Morris v. the United Kingdom*, § 58, as regards the issue of leave to appeal; *Sutter v. Switzerland*, § 30, as regards the court of cassation).

269. Even where the court of appeal has jurisdiction to review the case both as to the facts and as to the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (*Fejde v. Sweden*, § 31). In order to decide this question, regard must be had to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (*Seliwiak v. Poland*, § 54; *Sibgatullin v. Russia*, § 36).

270. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (*Dondarini v. San Marino*, § 27; *Popovici v. Moldova*, § 68; *Lacadena Calero v. Spain*, § 38). This is particularly so where the appellate court is called upon to examine whether the applicant's sentence should be increased (*Zahirović v. Croatia*, § 57; *Hokkeling v. the Netherlands*, § 58).

271. As a rule, when an appellate court overturns an acquittal at first instance, it must take positive measures to secure the possibility for the accused to be heard (*Botten v. Norway*, § 53; *Dănilă v. Romania*, § 41; *Gómez Olmeda v. Spain*, § 32). In the alternative, the appeal court must limit itself to quashing the lower court's acquittal and referring the case back for a retrial (*Július Þór Sigurþórsson v. Iceland*, § 38).

272. However, an accused may waive his right to participate or be heard in the appeal proceedings, either expressly or by his conduct (*Kashlev v. Estonia*, §§ 45-46; *Hernández Royo v. Spain*, § 39; *Bivolaru v. Romania (no. 2)*, §§ 138-146). In each case it is important to establish whether the relevant court did all what could reasonably be expected of it to secure the applicant's participation in the proceedings. Questioning via video-link could be a measure ensuring effective participation in the proceedings (*Ibid.*, §§ 138-139, 144-145).

273. The Court's case-law on this matter seems to draw a distinction between two situations: on the one hand, where an appeal court, which reversed an acquittal without itself hearing the oral evidence on which the acquittal was based, not only had jurisdiction to examine points of fact and

law but actually proceeded to a fresh evaluation of the facts; and, on the other hand, situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/or its application to the established facts, even if it also had jurisdiction in respect of the facts. For example, in the case of *Igual Coll v. Spain*, § 36, the Court considered that the appeal court had not simply given a different legal interpretation or made another application of the law to facts already established at first instance, but had carried out a fresh evaluation of facts beyond purely legal considerations (see also *Spînu v. Romania*, §§ 55-59; *Andreescu v. Romania*, §§ 65-70; *Almenara Alvarez v. Spain*). Similarly, in *Marcos Barrios v. Spain*, §§ 40-41), the Court held that the appeal court had expressed itself on a question of fact, namely the credibility of a witness, thus modifying the facts established at first instance and taking a fresh position on facts which were decisive for the determination of the applicant's guilt (see also *García Hernández v. Spain*, §§ 33-34).

274. By contrast, in *Bazo González v. Spain*, the Court found that there had not been a violation of Article 6 § 1 on the ground that the aspects which the appeal court had been called on to analyse in order to convict the applicant had had a predominantly legal character, and its judgment had expressly stated that it was not for it to carry out a fresh evaluation of the evidence; rather, it had only adopted a legal interpretation different to that of the lower court.

275. However, as explained by the Court in *Suuripää v. Finland*, § 44), it should be taken into account that the facts and the legal interpretation can be intertwined to an extent that it is difficult to separate the two from each other.

### 3. Exceptions to the rule of publicity

276. A trial complies with the requirement of publicity if the public is able to obtain information about its date and place, and if this place is easily accessible to the public (*Riepan v. Austria*, § 29).

277. The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that “the press and public may be excluded from all or part of the trial ... where the interests of juveniles or 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”. Holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case (*Welke and Biatek v. Poland*, § 74; *Martinie v. France* [GC], § 40).

278. If there are grounds to apply one or more of these exceptions, the authorities are not obliged, but have the right, to order hearings to be held in camera if they consider that such a restriction is warranted (*Toeva v. Bulgaria* (dec.)).

279. Although in criminal proceedings there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (*B. and P. v. the United Kingdom*, § 37).

280. Security problems are a common feature of many criminal proceedings, but cases in which security concerns alone justify excluding the public from a trial are nevertheless rare (*Riepan v. Austria*, § 34). Security measures should be narrowly tailored and comply with the principle of necessity. The judicial authorities should consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve the same purpose (*Krestovskiy v. Russia*, § 29).

281. Considerations of public order and security problems may justify the exclusion of the public in prison disciplinary proceedings against convicted prisoners (*Campbell and Fell v. the United Kingdom*, § 87).

282. The holding of a trial in ordinary criminal proceedings in a prison does not necessarily mean that it is not public. However, in order to counter the obstacles involved in having a trial outside a regular courtroom, the State is under an obligation to take compensatory measures so as to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access (*Riepan v. Austria*, §§ 28-29).

283. The mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with national-security concerns. Before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest, and must limit secrecy to the extent necessary to preserve such an interest (*Belashev v. Russia*, § 83; *Welke and Biatek v. Poland*, § 77).

284. Lastly, when deciding to hold a hearing in camera, the domestic courts are required to provide sufficient reasoning for their decision demonstrating that closure is strictly necessary within the meaning of Article 6 § 1 (*Chaushev and Others v. Russia*, § 24).

#### 4. Public pronouncement of judgments

285. The Court has not felt bound to adopt a literal interpretation of the words “pronounced publicly” (*Sutter v. Switzerland*, § 33; *Campbell and Fell v. the United Kingdom*, § 91).

286. Despite the wording, which would seem to suggest that reading out in open court is required, other means of rendering a judgment public may be compatible with Article 6 § 1. As a general rule, the form of publication of the “judgment” under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 § 1 in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial. In making this assessment, account must be taken of the entirety of the proceedings (*Welke and Biatek v. Poland*, § 83, where limiting the public pronouncement to the operative part of the judgments in proceedings held in camera did not contravene Article 6). Thus, providing the judgment in the court’s registry and publishing in official collections could satisfy the requirement of public pronouncement (*Sutter v. Switzerland*, § 34).

287. Complete concealment from the public of the entirety of a judicial decision cannot be justified. Legitimate security concerns can be accommodated through certain techniques, such as classification of only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others (*Raza v. Bulgaria*, § 53; *Fazliyski v. Bulgaria*, §§ 67-68).

288. The right to a public hearing and the right to public pronouncement of a judgment are two separate rights under Article 6. The fact that one of these rights is not violated does not in itself mean that the other right cannot be breached. In other words, public pronouncement of the sentence is incapable of remedying the unjustified holding of hearings in camera (*Artemov v. Russia*, § 109).

## C. Reasonable time

### Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ...”

### HUDOC keywords

Reasonable time (6-1)

### 1. Determination of the length of proceedings

289. In criminal matters, the aim of Article 6 § 1, by which everyone has the right to a hearing within a reasonable time, is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined (*Wemhoff v. Germany*, § 18; *Kart v. Turkey* [GC], § 68).

#### a. Starting-point of the period to be taken into consideration

290. The period to be taken into consideration begins on the day on which a person is charged (*Neumeister v. Austria*, § 18).

291. The “reasonable time” may begin to run prior to the case coming before the trial court (*Deweert v. Belgium*, § 42), for example from the time of arrest (*Wemhoff v. Germany*, § 19), the time at which a person is charged (*Neumeister v. Austria*, § 18), the institution of the preliminary investigation (*Ringeisen v. Austria*, § 110; *Šubinski v. Slovenia*, §§ 65-68), or the questioning of an applicant as a witness suspected of commission of an offence (*Kalēja v. Latvia*, § 40). However, in any event, the relevant moment is when the applicant became aware of the charge or when he or she was substantially affected by the measures taken in the context of criminal investigation or proceedings (*Mamič v. Slovenia (no. 2)*, §§ 23-24; *Liblik and Others v. Estonia*, § 94).

292. “Charge”, in this context, has to be understood within the autonomous meaning of Article 6 § 1 (*McFarlane v. Ireland* [GC], § 143).<sup>10</sup>

#### b. End of the period

293. The Court has held that in criminal matters the period to which Article 6 is applicable covers the whole of the proceedings in question (*König v. Germany*, § 98), including appeal proceedings (*Delcourt v. Belgium*, §§ 25-26; *König v. Germany*, § 98; *V. v. the United Kingdom* [GC], § 109). Article 6 § 1, furthermore, indicates as the final point the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge (*Neumeister v. Austria*, § 19).

294. The period to be taken into consideration lasts at least until acquittal or conviction, even if that decision is reached on appeal. There is furthermore no reason why the protection afforded to those concerned against delays in judicial proceedings should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared (*Wemhoff v. Germany*, § 18).

295. In the event of conviction, there is no “determination ... of any criminal charge”, within the meaning of Article 6 § 1, as long as the sentence is not definitively fixed (*Eckle v. Germany*, § 77; *Ringeisen v. Austria*, § 110; *V. v. the United Kingdom* [GC], § 109).

10. See Section The existence of a “charge”.

296. The execution of a judgment given by any court must be regarded as an integral part of the trial for the purposes of Article 6 (*Assanidze v. Georgia* [GC], § 181). The guarantees afforded by Article 6 of the Convention would be illusory if a Contracting State's domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted. Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision to acquit (*ibid.*, § 182). If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees previously enjoyed by the defendant during the judicial phase of the proceedings would become partly illusory (*ibid.*, § 183).

297. Lastly, decisions to discontinue criminal proceedings, even with the possibility of resuming them at a later stage, mean that the subsequent period is not taken into consideration when calculating the length of the criminal proceedings if a decision to discontinue criminal enquiries is made, the person ceases to be affected and is no longer suffering from the uncertainty which the respective guarantee seeks to limit (*Nakhmanovich v. Russia*, § 89). The person ceases to be so affected only, however, from the moment that decision is communicated to the person concerned (*Borzonov v. Russia*, § 38; *Niedermeier v. Germany* (dec.)).

## 2. Assessment of a reasonable time

### a. Principles

298. The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment (*Boddaert v. Belgium*, § 36). Where certain stages of the proceedings are in themselves conducted at an acceptable speed, the total length of the proceedings may nevertheless exceed a "reasonable time" (*Dobbartin v. France*, § 44).

299. Article 6 requires judicial proceedings to be expeditious, but it also lays down the more general principle of the proper administration of justice. A fair balance has to be struck between the various aspects of this fundamental requirement (*Boddaert v. Belgium*, § 39).

### b. Criteria

300. When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities (*König v. Germany*, § 99; *Neumeister v. Austria*, § 21; *Ringeisen v. Austria*, § 110; *Pélissier and Sassi v. France* [GC], § 67; *Pedersen and Baadsgaard v. Denmark*, § 45; *Chiarello v. Germany*, § 45; *Liblik and Others v. Estonia*, § 91).

301. *The complexity of a case*: it may stem, for example, from the number of charges, the number of people involved in the proceedings, such as defendants and witnesses, or the international dimension of the case (*Neumeister v. Austria*, § 20, where the transactions in issue had ramifications in various countries, requiring the assistance of Interpol and the implementation of treaties on mutual legal assistance, and 22 persons were concerned, some of whom were based abroad). A case may also be extremely complex where the suspicions relate to "white-collar" crime, that is to say, large-scale fraud involving several companies and complex transactions designed to escape the scrutiny of the investigative authorities, and requiring substantial accounting and financial expertise (*C.P. and Others v. France*, § 30).

302. Even though a case may be of some complexity, the Court cannot regard lengthy periods of unexplained inactivity as "reasonable" (*Adiletta v. Italy*, § 17, where there was an overall period of thirteen years and five months, including a delay of five years between the referral of the case to the investigating judge and the questioning of the accused and witnesses, and a delay of one year and nine months between the time at which the case was returned to the investigating judge and the

fresh committal of the applicants for trial). Moreover, although the complexity of the case could justify a certain lapse of time, it may be insufficient, in itself, to justify the entire length of the proceedings (*Rutkowski and Others v. Poland*, § 137).

303. *The applicant's conduct*: Article 6 does not require applicants to cooperate actively with the judicial authorities. Nor can they be blamed for making full use of the remedies available to them under domestic law. However, their conduct constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account in determining whether or not the length of the proceedings exceeds what is reasonable (*Eckle v. Germany*, § 82, where the applicants increasingly resorted to actions likely to delay the proceedings, such as systematically challenging judges; some of these actions could even suggest deliberate obstruction; *Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal*, § 48).

304. One example of conduct that must be taken into account is the applicant's intention to delay the investigation, where this is evident from the case file (*I.A. v. France*, § 121, where the applicant, among other things, waited to be informed that the transmission of the file to the public prosecutor was imminent before requesting a number of additional investigative measures).

305. An applicant cannot rely on a period spent as a fugitive, during which he sought to avoid being brought to justice in his own country. When an accused person flees from a State which adheres to the principle of the rule of law, it may be presumed that he is not entitled to complain of the unreasonable duration of proceedings after he has fled, unless he can provide sufficient reasons to rebut this presumption (*Vayıç v. Turkey*, § 44).

306. *The conduct of the relevant authorities*: Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements (*Abdoella v. the Netherlands*, § 24; *Dobbertin v. France*, § 44).

307. Although a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take remedial action, with the requisite promptness, to deal with an exceptional situation of this kind (*Milasi v. Italy*, § 18; *Baggetta v. Italy*, § 23), the heavy workload referred to by the authorities and the various measures taken to redress matters are rarely accorded decisive weight by the Court (*Eckle v. Germany*, § 92).

308. Similarly, domestic courts bear responsibility for the non-attendance of the relevant participants (such as witnesses, co-accused, and representatives), as a result of which the proceedings had to be postponed (*Tychko v. Russia*, § 68). On the other hand, domestic courts cannot be faulted for a substantial delay in the proceeding caused by an applicant's state of health (*Yaikov v. Russia*, § 76).

309. What is at stake for the applicant must be taken into account in assessing the reasonableness of the length of proceedings. For example, where a person is held in pre-trial detention, this is a factor to be considered in assessing whether the charge has been determined within a reasonable time (*Abdoella v. the Netherlands*, § 24, where, the time required to forward documents to the Supreme Court on two occasions amounted to more than 21 months of the 52 months taken to deal with the case (*Starokadomskiy v. Russia (no. 2)*, §§ 70-71). However, the very fact that the applicant is a public figure and that the case attracted significant media attention does not, in itself, warrant a ruling that the case merited priority treatment (*Liblik and Others v. Estonia*, § 103).

### 3. Several examples

#### a. Reasonable time exceeded

- 9 years and 7 months, without any particular complexity other than the number of people involved (35), despite the measures taken by the authorities to deal with the court's exceptional workload following a period of rioting (*Milasi v. Italy*, §§ 14-20).

- 13 years and 4 months, political troubles in the region and excessive workload for the courts, efforts by the State to improve the courts’ working conditions not having begun until years later (*Baggetta v. Italy*, §§ 20-25).
- 5 years, 5 months and 18 days, including 33 months between delivery of the judgment and production of the full written version by the judge responsible, without any adequate disciplinary measures being taken (*B. v. Austria*, §§ 48-55).
- 5 years and 11 months, complexity of case on account of the number of people to be questioned and the technical nature of the documents for examination in a case of aggravated misappropriation, although this could not justify an investigation that had taken five years and two months; also, a number of periods of inactivity attributable to the authorities. Thus, while the length of the trial phase appeared reasonable, the investigation could not be said to have been conducted diligently (*Rouille v. France*, § 29).
- 12 years, 7 months and 10 days, without any particular complexity or any tactics by the applicant to delay the proceedings, but including a period of two years and more than nine months between the lodging of the application with the administrative court and the receipt of the tax authorities’ initial pleadings (*Clinique Mozart SARL v. France*, §§ 34-36).

#### **b. Reasonable time not exceeded**

- 5 years and 2 months, complexity of connected cases of fraud and fraudulent bankruptcy, with innumerable requests and appeals by the applicant not merely for his release, but also challenging most of the judges concerned and seeking the transfer of the proceedings to different jurisdictions (*Ringeisen v. Austria*, § 110).
- 7 years and 4 months: the fact that more than seven years had already elapsed since the laying of charges without their having been determined in a judgment convicting or acquitting the accused certainly indicated an exceptionally long period which in most cases should be regarded as in excess of what was reasonable; moreover, for 15 months the judge had not questioned any of the numerous co-accused or any witnesses or carried out any other duties; however, the case had been especially complex (number of charges and persons involved, international dimension entailing particular difficulties in enforcing requests for judicial assistance abroad etc.) (*Neumeister v. Austria*, § 21).

## **VI. Specific guarantees**

### **A. The presumption of innocence (Article 6 § 2)**

#### **Article 6 § 2 of the Convention**

“2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

#### **HUDOC keywords**

Charged with a criminal offence (6-2) – Presumption of innocence (6-2) – Proved guilty according to law (6-2)



## 1. Scope of Article 6 § 2

### a. Criminal proceedings

310. Paragraph 2 of Article 6 embodies the principle of the presumption of innocence. It requires, *inter alia*, that: (1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused (*Barberà, Messegué and Jabardo v. Spain*, § 77).

311. Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, amongst others, the burden of proof (*Telfner v. Austria*, § 15); legal presumptions of fact and law (*Salabiaku v. France*, § 28; *Radio France and Others v. France*, § 24); the privilege against self-incrimination (*Saunders v. the United Kingdom*, § 68); pre-trial publicity (*G.C.P. v. Romania*, § 46); and premature expressions, by the trial court or by other public officials, of a defendant's guilt (*Allenet de Ribemont*, §§ 35-36, *Nešťák v. Slovakia*, § 88).

312. Article 6 § 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge, *Poncelet v. Belgium*, § 50; *Minelli v. Switzerland*, § 30; *Garycki v. Poland*, § 68). Consequently, the presumption of innocence applies to the reasons given in a judgment acquitting the accused in its operative provisions, from which the reasoning cannot be dissociated. It may be breached if the reasoning reflects an opinion that the accused is in fact guilty (*Cleve v. Germany*, § 41).

313. However, the presumption of innocence does not normally apply in the absence of a criminal charge against an individual, such as, for instance, concerning the application of measures against an applicant preceding the initiation of a criminal charge against him or her (*Gogitidze and Others v. Georgia*, §§ 125-126; *Larrañaga Arando and Others v. Spain* (dec.), §§ 45-46; see, by contrast, *Batiashvili v. Georgia\**, § 79, where Article 6 § 2 exceptionally applied to an instance of a purported manipulation of evidence, in order to insinuate the existence of a crime, before charges had been formally brought, which charges were then laid against the applicant very close in time to this noted manipulation). Once applicable, the presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant's conviction when the proceedings are continuing on appeal (*Konstas v. Greece*, § 36).

314. Once an accused has properly been proved guilty, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process (*Bikas v. Germany*, § 57), unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning (*Böhmer v. Germany*, § 55; *Geerings v. the Netherlands*, § 43; *Phillips v. the United Kingdom*, § 35).

315. Nevertheless, a person's right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 of the Convention which applies to a sentencing procedure (*ibid.*, §§ 39-40; *Grayson and Barnham v. the United Kingdom*, §§ 37 and 39).

316. The fundamental rule of criminal law, to the effect that criminal liability does not survive the person who committed the criminal acts, is a guarantee of the presumption of innocence enshrined in Article 6 § 2 of the Convention. Accordingly, Article 6 § 2 will be breached if an applicant did not stand trial and was convicted posthumously (*Magnitskiy and Others v. Russia*, § 284, with further references).

## b. Parallel proceedings

317. Article 6 § 2 may apply to court decisions rendered in proceedings that were not directed against an applicant as “accused” but nevertheless concerned and had a link with criminal proceedings simultaneously pending against him or her, when they imply a premature assessment of his or her guilt (*Böhmer v. Germany*, § 67; *Diamantides v. Greece (no. 2)*, § 35). Thus, for instance, the presumption of innocence may apply with regard to the court decisions in the extradition proceedings against an applicant if there was a close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicant in the requesting State (*Eshonkulov v. Russia*, §§ 74-75).

318. Moreover, the Court has considered Article 6 § 2 to apply with regard to the statements made in parallel criminal proceedings against co-suspects that are not binding with respect to the applicant, insofar as there was a direct link between the proceedings against the applicant with those parallel proceedings. The Court explained that even though statements made in the parallel proceedings were not binding with respect to the applicant, they may nonetheless have a prejudicial effect on the proceedings pending against him or her in the same way as a premature expression of a suspect’s guilt made by any other public authority in close connection with pending criminal proceedings (*Karaman v. Germany* § 43; *Bauras v. Lithuania*, § 52).

319. In all such parallel proceedings, courts are obliged to refrain from any statements that may have a prejudicial effect on the pending proceedings, even if they are not binding. In this connection, the Court has held that if the nature of the charges makes it unavoidable for the involvement of third parties to be established in one set of proceedings, and those findings would be consequential on the assessment of the legal responsibility of the third parties tried separately, this should be considered as a serious obstacle for disjoining the cases. Any decision to examine cases with such strong factual ties in separate criminal proceedings must be based on a careful assessment of all countervailing interests, and the co-accused must be given an opportunity to object to the cases being separated (*Navalnyy and Ofitserov v. Russia*, § 104).

320. The Court has further found Article 6 § 2 to be applicable in the proceedings for revoking a decision on the suspension of prison sentence on probation in which reference was made to the fresh criminal investigation proceedings pending against the applicant (*El Kaada v. Germany*, § 37).

321. The Court also considered that Article 6 § 2 applied with regard to the statements made in the parallel disciplinary proceedings against an applicant when both criminal and disciplinary proceedings against him had been initiated on suspicion that he had committed criminal offences and where the disciplinary sanction gave substantial consideration to whether the applicant had in fact committed the offences he was charged with in the criminal proceedings (*Kemal Coşkun v. Turkey*, § 44).

322. Similarly, Article 6 § 2 applies where two sets of criminal proceedings are in parallel pending against the applicant. In such cases, the presumption of innocence precludes a finding of guilt for a particular offence outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in the parallel proceedings and notwithstanding general considerations of expediency. Thus, considering in one set of proceedings concerning a particular offence that an applicant has committed another offence which is subject to a trial in a parallel set of proceedings, is contrary to the applicant’s right to be presumed innocent with respect to that other offence (*Kangers v. Latvia*, §§ 60-61).

323. Lastly, the Court found Article 6 to apply to the parliamentary inquiry proceedings conducted in parallel to the criminal proceedings against the applicant. In such circumstances, the Court stressed that the authorities responsible for setting up and deciding in the parliamentary inquiry proceedings were bound by the obligation to respect the principle of the presumption of innocence (*Rywin v. Poland*, § 208).

### c. Subsequent proceedings

324. The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public (*Allen v. the United Kingdom* [GC], § 94). To a certain extent, the protection afforded under Article 6 § 2 in this connection may overlap with the protection afforded by Article 8 (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], § 314).

325. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt (*Allen v. the United Kingdom* [GC], § 104; see also *Martínez Agirre and Others v. Spain* (dec.), §§ 46-52, where no link was established between the subsequent compensation proceedings and the earlier criminal investigations).

326. The Court has considered the applicability of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings concerning, *inter alia* (*Allen v. the United Kingdom* [GC], § 98 with further references):

- a former accused's obligation to bear court costs and prosecution costs;
- a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings, it being understood that Article 6 § 2 does not guarantee the right to compensation for pre-trial detention in the case of dismissal of charges or acquittal, and thus the mere refusal of compensation does not in itself raise an issue from the perspective of the presumption of innocence (*Cheema v. Belgium*, § 23);
- a former accused's request for defence costs;
- a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution;
- imposition of civil liability to pay compensation to the victim;
- refusal of civil claims lodged by the applicant against insurers;
- maintenance in force of a child care order, after the prosecution decided not to bring charges against the parent for child abuse;
- disciplinary or dismissal issues (*Teodor v. Romania*, §§ 42-46, concerning civil dismissal proceedings);
- revocation of the applicant's right to social housing;
- request for conditional release from prison (*Müller v. Germany*, § 35);
- proceedings for reopening of criminal proceedings, following the Court's finding of a violation of the Convention in an earlier case, where the applicants were treated as convicted persons and their criminal record for the initial conviction was kept (*Dicle and Sadak v. Turkey*, §§ 61-66);
- confiscation of an applicant's land even though the criminal case against him had been dismissed as statute-barred (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], §§ 314-318);

- conviction in the subsequent administrative proceedings (qualified as “criminal” within the autonomous meaning of the Convention) following an applicant’s acquittal on the same charges in the criminal proceedings (*Kapetanios and Others v. Greece*, § 88);
- dismissal by domestic courts of an applicant’s appeal against the prosecutor’s decision considering that he was guilty of the offences for which he had been indicted even though the criminal proceedings initiated against him had been discontinued as time-barred (*Caraian v. Romania*, §§ 74-77).

327. The Court has also found Article 6 § 2 to be applicable in relation to the doubt casted on the applicants’ innocence by the adoption of an Amnesty Act and discontinuation of the criminal proceedings against the applicants under that Act. However, on the facts of the case, the Court found no violation of Article 6 § 2 on the grounds that no wording in the Amnesty Act had linked the applicants themselves by name to the crime described therein and that no other circumstances allowed doubt to be cast on the applicants’ innocence (*Béres and Others v. Hungary*, §§ 27-34).

## 2. Prejudicial statements

328. Article 6 § 2 is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation and adequate access to court to determine civil rights, raising potential issues under Articles 8 and 6 of the Convention (*Zollmann v. the United Kingdom* (dec.); *Ismoilov and Others v. Russia*, § 160; *Mikolajová v. Slovakia*, §§ 42-48; *Larrañaga Arando and Others v. Spain* (dec.), § 40). Moreover, the prejudicial statements must concern the same criminal offence in respect of which the protection of the presumption of innocence in the context of the latter proceedings is claimed (*Ibid.*, § 48).

329. When the impugned statements are made by private entities (such as newspapers), and do not constitute a verbatim reproduction of (or an otherwise direct quotation from) any part of official information provided by the authorities, an issue does not arise under Article 6 § 2 but may arise under Article 8 of the Convention (*Mityanin and Leonov v. Russia*, §§ 102 and 105).

330. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question (*Ismoilov and Others v. Russia*, § 166; *Nešťák v. Slovakia*, § 89). The latter infringes the presumption of innocence, whereas the former has been regarded as unobjectionable in various situations examined by the Court (*Garycki v. Poland*, § 67).

331. Whether a statement by a judge or other public authority is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (*Daktaras v. Lithuania*, § 42; *A.L. v. Germany*, § 31).

332. Statements by judges are subject to stricter scrutiny than those by investigative authorities (*Pandy v. Belgium*, § 43). With regard to such statements made by investigative authorities, it is open to the applicant to raise his or her complaint during the proceedings or appeal against a judgment of the trial court insofar as he or she believes that the statement had a negative impact on the fairness of the trial (*Czajkowski v. Poland* (dec.)).

333. The voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation (*Sekanina v. Austria*, § 30). However, once an acquittal has become final, the voicing of any suspicions of guilt is incompatible with the presumption of innocence (*Rushiti v. Austria*, § 31; *O. v. Norway*, § 39; *Geerings v. the Netherlands*, § 49; *Paraponiaris v. Greece*, § 32). Nevertheless, in this context, in cases of unfortunate language the Court has considered it necessary to look at the context of the proceedings as a whole and their special features. These features became decisive

factors in the assessment of whether that statement gave rise to a violation of Article 6 § 2 of the Convention. The Court considered that these features were also applicable where the language of a judgment might be misunderstood but can, on the basis of a correct assessment of the domestic law context, not be qualified as a statement of criminal guilt (*Fleischner v. Germany*\*, § 65).

### a. Statements by judicial authorities

334. The presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty (see, as the leading authority, *Minelli v. Switzerland*, § 37; and, more recently, *Nerattini v. Greece*, § 23; *Didu v. Romania*, § 41; *Gutsanovi v. Bulgaria*, §§ 202-203). A premature expression of such an opinion by the tribunal itself will inevitably fall foul of this presumption (*Nešťák v. Slovakia*, § 88; *Garycki v. Poland*, § 66). Thus, an expression of “firm conviction that the applicant had again committed an offence” during the proceedings for suspension of a prison sentence on probation violated Article 6 § 2 (*El Kaada v. Germany*, §§ 61-63).

335. However, in a situation where the operative part of a judicial decision viewed in isolation is not in itself problematic under Article 6 § 2, but the reasons adduced for it are, the Court has recognised that the decision must be read with and in light of that of another court which has later examined it. Where such a reading demonstrated that the individual’s innocence was no longer called into question, the domestic case was considered to have ended without any finding of guilt and there was no need to proceed with any hearing in the case or examination of evidence for domestic proceedings to be found to be in accordance with Article 6 § 2 (*Adolf v. Austria*, § 40; *A. v. Norway* (dec.), § 40).

336. What is important in the application of the provision of Article 6 § 2 is the true meaning of the statements in question, not their literal form (*Lavents v. Latvia*, § 126). Even the regrettable use of some unfortunate language does not have to be decisive as to the lack of respect for the presumption of innocence, given the nature and context of the particular proceedings (*Allen v. the United Kingdom* [GC], § 126; *Lähteenmäki v. Estonia*, § 45). Thus, a potentially prejudicial statement cited from an expert report did not violate the presumption of innocence in proceedings for a conditional release from prison when a close reading of the judicial decision excluded an understanding which would touch upon the applicant’s reputation and the way he is perceived by the public. However, the Court stressed that it would have been more prudent for the domestic court to either clearly distance itself from the expert’s misleading statements, or to advise the expert to refrain from making unsolicited statements about the applicant’s criminal liability in order to avoid the misconception that questions of guilt and innocence could be in any way relevant to the proceedings at hand (*Müller v. Germany*, §§ 51-52).

337. The fact that the applicant was ultimately found guilty cannot vacate his initial right to be presumed innocent until proved guilty according to law (*Matijašević v. Serbia*, § 49; *Nešťák v. Slovakia*, § 90, concerning decisions prolonging the applicants’ detention on remand).

### b. Statements by public officials

338. The presumption of innocence may be infringed not only by a judge or court but also by other public authorities (*Allenet de Ribemont v. France*, § 36; *Daktaras v. Lithuania*, § 42; *Petyo Petkov v. Bulgaria*, § 91). This applies, for instance, to the police officials (*Allenet de Ribemont v. France*, §§ 37 and 41); President of the Republic (*Peša v. Croatia*, § 149); the Prime Minister or the Minister of the Interior (*Gutsanovi v. Bulgaria*, §§ 194-198); Minister of Justice (*Konostas v. Greece*, §§ 43 and 45); President of the Parliament (*Butkevičius v. Lithuania*, § 53); prosecutor (*Daktaras v. Lithuania*, § 42) and other prosecution officials, such as an investigator (*Khuzhin and Others v. Russia*, § 96).

339. On the other hand, statements made by the chairman of a political party which was legally and financially independent from the State in the context of a heated political climate could not be considered as statements of a public official acting in the public interest under Article 6 § 2 (*Mulosmani v. Albania*, § 141).

340. Article 6 § 2 prohibits statements by public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (*Ismoilov and Others v. Russia*, § 161; *Butkevičius v. Lithuania*, § 53).

341. However, the principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (*Fatullayev v. Azerbaijan*, § 159; *Allenet de Ribemont v. France*, § 38; *Garycki v. Poland*, § 69).

342. The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence (*Daktaras v. Lithuania*, § 41; *Arrigo and Vella v. Malta* (dec.); *Khuzhin and Others v. Russia*, § 94). For instance, in *Gutsanovi v. Bulgaria* (§§ 195-201) the Court found that statements of the Minister of the Interior following the applicant's arrest, but before his appearance before a judge, published in a journal in which he stressed that what the applicant had done represented an elaborate system of machination over a number of years, violated the presumption of innocence under Article 6 § 2. On the other hand, spontaneous statements of the Prime Minister in a television show related to the applicant's placement in pre-trial detention did not cast into doubt the applicant's presumption of innocence.

343. Prejudicial comments made by a prosecutor themselves raise an issue under Article 6 § 2 irrespective of other considerations under Article 6 § 1, such as those related to adverse pretrial publicity (*Turyev v. Russia*, § 21).

### 3. Adverse press campaign

344. In a democratic society, severe comments by the press are sometimes inevitable in cases concerning public interest (*Viorel Burzo v. Romania*, § 160; *Akay v. Turkey* (dec.)).

345. A virulent press campaign can, however, adversely affect the fairness of a trial by influencing public opinion and affect an applicant's presumption of innocence.<sup>11</sup>

346. In this connection, the Court has held that the press must not overstep certain bounds, regarding in particular the protection of the right to privacy of accused persons in criminal proceedings and the presumption of innocence (*Bédard v. Switzerland* [GC], § 51). The fact that everyone charged with a criminal offence has the right under Article 6 § 2 of the Convention to be presumed innocent until proven guilty is of relevance for the balancing of competing interests which the Court must carry out from the perspective of Article 10 (*Axel Springer SE and RTL Television GmbH v. Germany*, § 40, concerning the banning of the publication of images by which an accused could be identified). In this context, the fact that the accused had confessed to the crime does not in itself remove the protection of the presumption of innocence (*ibid.*, § 51).

347. The publication of photographs of suspects does not in itself breach the presumption of innocence (*Y.B. and Others v. Turkey*, § 47) nor does the taking of photographs by the police raise an issue in this respect (*Mergen and Others v. Turkey*, § 68). However, broadcasting of the suspect's images on television may in certain circumstances raise an issue under Article 6 § 2 (*Rupa v. Romania* (no. 1), § 232).

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11. See Section Prejudicial publicity.

#### 4. Sanctions for failure to provide information

348. The presumption of innocence is closely linked to the right not to incriminate oneself (*Heaney and McGuinness v. Ireland*, § 40).

349. The requirement for car owners to identify the driver at the time of a suspected traffic offence is not incompatible with Article 6 of the Convention (*O'Halloran and Francis v. the United Kingdom* [GC]).

350. Obliging drivers to submit to a breathalyser or blood test is not contrary to the principle of presumption of innocence (*Tirado Ortiz and Lozano Martin v. Spain* (dec.)).

#### 5. Burden of proof

351. The requirements related to the burden of proof from the perspective of the principle of the presumption of innocence provide *inter alia*, that it is for the prosecution to inform the accused of the case that will be made against him or her, so that he or she may prepare and present his or her defence accordingly, and to adduce evidence sufficient to convict him or her (*Barberà, Messegué and Jabardo v. Spain*, § 77; *Janosevic v. Sweden*, § 97).

352. The presumption of innocence is violated where the burden of proof is shifted from the prosecution to the defence (*Telfner v. Austria*, § 15). However, the defence may be required to provide an explanation after the prosecution has made a prima facie case against an accused (*ibid.*, § 18; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, §§ 63-67).

353. The Court has also held that the *in dubio pro reo* principle (doubts should benefit the accused) is a specific expression of the presumption of innocence (*Barberà, Messegué and Jabardo v. Spain*, § 77; *Tsalkitzis v. Greece (no. 2)*, § 60). An issue from the perspective of this principle may arise if the domestic courts' decisions finding an applicant guilty are not sufficiently reasoned (*Melich and Beck v. the Czech Republic*, §§ 49-55; *Ajdarić v. Croatia*, § 51), or if an extreme and unattainable burden of proof was placed on the applicant so that his or her defence does not have even the slightest prospect of success (*Nemtsov v. Russia*, § 92; *Topić v. Croatia*, § 45; *Frumkin v. Russia*, § 166).

354. The burden of proof cannot be reversed in compensation proceedings following a final decision to discontinue the proceedings (*Capeau v. Belgium*, § 25). Exoneration from criminal liability does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof (*Ringvold v. Norway*, § 38; *Y v. Norway*, § 41; *Lundkvist v. Sweden* (dec.)).

#### 6. Presumptions of fact and of law

355. A person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention (*Falk v. the Netherlands* (dec.)), concerning a fine on a registered car owner who had not been the actual driver at the time of the traffic offence). In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (*Salabiaku v. France*, § 27, concerning a presumption of criminal liability for smuggling inferred from possession of narcotics; *Janosevic v. Sweden*, § 100, concerning tax surcharges on the basis of objective grounds and enforcement thereof prior to a court determination).

356. However, Article 6 § 2 requires States to confine these presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (*Salabiaku v. France*, § 28; *Radio France and Others v. France*, § 24, concerning the presumption of criminal liability of a publishing director for defamatory statements made in radio programmes;

*Västberga Taxi Aktieföretag and Vulic v. Sweden*, § 113, concerning objective responsibility for tax surcharges; *Klouvi v. France*, § 41, regarding inability to defend a charge of malicious prosecution owing to a statutory presumption that an accusation against a defendant acquitted for lack of evidence was false; *Lasir v. Belgium*, § 30, concerning substantive presumptions on participation in an offence by co-accused; *Zschüschen v. Belgium* (dec.), § 22, concerning money laundering proceedings).

357. In employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved (*Janosevic v. Sweden*, § 101; *Falk v. the Netherlands* (dec.)).



## B. The rights of the defence (Article 6 § 3)

### Article 6 § 3 of the Convention

“3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) 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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

### HUDOC keywords

Charged with a criminal offence (6-3) – Rights of defence (6-3)

(a) Information on nature and cause of accusation (6-3-a) – Prompt information (6-3-a) – Information in language understood (6-3-a) – Information in detail (6-3-a)

(b) Preparation of defence (6-3-b) – Adequate time (6-3-b) – Adequate facilities (6-3-b) – Access to relevant files (6-3-b)

(c) Defence in person (6-3-c) – Defence through legal assistance (6-3-c) – Legal assistance of own choosing (6-3-c) – Insufficient means (6-3-c) – Free legal assistance (6-3-c) – Required by interests of justice (6-3-c)

(d) Witnesses (6-3-d) – Examination of witnesses (6-3-d) – Obtain attendance of witnesses (6-3-d) – Same conditions (6-3-d)

(e) Free assistance of interpreter (6-3-e)

358. The requirements of Article 6 § 3 concerning the rights of the defence are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (*Gäfgen v. Germany* [GC], § 169; *Sakhnovskiy v. Russia* [GC], § 94).

359. The specific guarantees laid down in Article 6 § 3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Article 6 § 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings (*Ibrahim and Others v. the United Kingdom* [GC], § 251; *Mayzit v. Russia*, § 77; *Can v. Austria*, Commission report, § 48).

## 1. Information on the nature and cause of the accusation (Article 6 § 3 (a))

### Article 6 § 3 (a) of the Convention

“3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;”

### HUDOC keywords

Charged with a criminal offence (6-3) – Rights of defence (6-3)

Information on nature and cause of accusation (6-3-a) – Prompt information (6-3-a) – Information in language understood (6-3-a) – Information in detail (6-3-a)

### a. General

360. The scope of Article 6 § 3 (a) must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (*Pélissier and Sassi v. France* [GC], § 52; *Sejdovic v. Italy* [GC], § 90; *Varela Geis v. Spain*, § 42).

361. Sub-paragraphs (a) and (b) of Article 6 § 3 are connected in that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence (*Pélissier and Sassi v. France* [GC], § 54; *Dallos v. Hungary*, § 47).

### b. Information about the charge

362. Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the “accusation” to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (*Pélissier and Sassi v. France* [GC], § 51; *Kamasinski v. Austria*, § 79).

363. Article 6 § 3 (a) affords the defendant the right to be informed not only of the “cause” of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the “nature” of the accusation, that is, the legal characterisation given to those acts (*Mattoccia v. Italy*, § 59; *Penev v. Bulgaria*, §§ 33 and 42).

364. The information need not necessarily mention the evidence on which the charge is based (*X. v. Belgium*, Commission decision; *Collozza and Rubinat v. Italy*, Commission report).

365. Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (*Pélissier and Sassi v. France* [GC], § 53; *Drassich v. Italy*, § 34; *Giosakis v. Greece (no. 3)*, § 29). In this connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her (*Kamasinski v. Austria*, § 79).

366. The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence (*Mattoccia v. Italy*, § 65; *Chichlian and Ekindjian v. France*, Commission report, § 71).

367. Information must actually be received by the accused; a legal presumption of receipt is not sufficient (*C. v. Italy*, Commission decision).

368. If the situation complained of is attributable to the accused's own conduct, the latter is not in a position to allege a violation of the rights of the defence (*Erdogan v. Turkey*, Commission decision; *Campbell and Fell v. the United Kingdom*, § 96).

369. In the case of a person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him (*Vaudelle v. France*, § 65).

### c. Reclassification of the charge

370. The accused must be duly and fully informed of any changes in the accusation, including changes in its "cause", and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (*Mattoccia v. Italy*, § 61; *Bäckström and Andersson v. Sweden* (dec.); *Varela Geis v. Spain*, § 54).

371. Information concerning the charges made, including the legal characterisation that the court might adopt in the matter, must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion from the prosecution as regards the qualification of an offence is clearly not sufficient (*I.H. and Others v. Austria*, § 34).

372. A reclassification of the offence is considered to be sufficiently foreseeable to the accused if it concerns an element which is intrinsic to the accusation (*De Salvador Torres v. Spain*, § 33; *Sadak and Others v. Turkey (no. 1)*, §§ 52 and 56; *Juha Nuutinen v. Finland*, § 32). Whether the elements of the reclassified offence were debated in the proceedings is a further relevant consideration (*Penev v. Bulgaria*, § 41).

373. In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time (*Pélissier and Sassi v. France* [GC], § 62; *Block v. Hungary*, § 24; *Haxhia v. Albania*, §§ 137-138; *Pereira Cruz and Others v. Portugal*, § 198).

374. Defects in the notification of the charge could be cured in the appeal proceedings if the accused has the opportunity to advance before the higher courts his defence in respect of the reformulated charge and to contest his conviction in respect of all relevant legal and factual aspects (*Dallos v. Hungary*, §§ 49-52; *Sipavičius v. Lithuania*, §§ 30-33; *Zhupnik v. Ukraine*, §§ 39-43; *I.H. and Others v. Austria*, §§ 36-38; *Gelenidze v. Georgia\**, § 30).

### d. "In detail"

375. The adequacy of the information must be assessed in relation to Article 6 § 3 (b), which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6 § 1 (*Mattoccia v. Italy*, § 60; *Bäckström and Andersson v. Sweden* (dec.)).

376. While the extent of the "detailed" information varies depending on the particular circumstances of each case, the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence (*Mattoccia v. Italy*, § 60). For instance, detailed information will exist when the offences of which the defendant is accused are sufficiently listed; the place and the date of the offence is stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned (*Brozicek v. Italy*, § 42).

377. Some specific details of the offence may be ascertainable not only from the indictment but also from other documents prepared by the prosecution in the case and from other file materials (*Previti v. Italy* (dec.), § 208). Moreover, factual details of the offence may be clarified and specified during the proceedings (*Sampech v. Italy* (dec.), § 110; *Pereira Cruz and Others v. Portugal*, § 198).

#### e. “Promptly”

378. The information must be submitted to the accused in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 § 3 (a) (*C. v. Italy*, Commission decision, where the notification of charges to the applicant four months before his trial was deemed acceptable; see, by contrast, *Borisova v. Bulgaria*, §§ 43-45, where the applicant had only a couple of hours to prepare her defence without a lawyer).

379. In examining compliance with Article 6 § 3 (a), the Court has regard to the autonomous meaning of the words “charged” and “criminal charge”, which must be interpreted with reference to the objective rather than the formal situation (*Padin Gestoso v. Spain* (dec.); *Casse v. Luxembourg*, § 71).

#### f. “Language”

380. If it is shown or there are reasons to believe that the accused has insufficient knowledge of the language in which the information is given, the authorities must provide him with a translation (*Brozicek v. Italy*, § 41; *Tabaï v. France* (dec.)).

381. Whilst Article 6 § 3 (a) does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, a defendant not familiar with the language used by the court may be at a practical disadvantage if he is not also provided with a written translation of the indictment into a language which he understands (*Hermi v. Italy* [GC], § 68; *Kamasinski v. Austria*, § 79).

382. However, sufficient information on the charges may also be provided through an oral translation of the indictment if this allows the accused to prepare his defence (*ibid.*, § 81; *Husain v. Italy* (dec.)).

383. There is no right under this provision for the accused to have a full translation of the court files (*X. v. Austria*, Commission decision).

384. The cost incurred by the interpretation of the accusation must be borne by the State in accordance with Article 6 § 3 (e), which guarantees the right to the free assistance of an interpreter (*Luedicke, Belkacem and Koç v. Germany*, § 45).

## 2. Preparation of the defence (Article 6 § 3 (b))

### Article 6 § 3 (b) of the Convention

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;”

### HUDOC keywords

Charged with a criminal offence (6-3) – Rights of defence (6-3)

Preparation of defence (6-3-b) – Adequate time (6-3-b) – Adequate facilities (6-3-b) – Access to relevant files (6-3-b)

### a. General considerations

385. The “rights of defence”, of which Article 6 § 3 (b) gives a non-exhaustive list, have been instituted above all to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence (*Mayzit v. Russia*, § 79).

386. Article 6 § 3 (b) of the Convention concerns two elements of a proper defence, namely the question of facilities and that of time. This provision implies that the substantive defence activity on the accused’s behalf may comprise everything which is “necessary” to prepare the trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (*Can v. Austria*, Commission report, § 53; *Gregačević v. Croatia*, § 51).

387. The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (*Iglin v. Ukraine*, § 65; *Galstyan v. Armenia*, § 84).

### b. Adequate time

388. When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings (*Gregačević v. Croatia*, § 51).

389. Article 6 § 3 (b) protects the accused against a hasty trial (*Kröcher and Möller v. Switzerland*, Commission decision; *Bonzi v. Switzerland*, Commission decision; *Borisova v. Bulgaria*, § 40; *Malofeyeva v. Russia*, § 115; *Gafgaz Mammadov v. Azerbaijan*, § 76-82). Although it is important to conduct proceedings at a good speed, this should not be done at the expense of the procedural rights of one of the parties (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 540).

390. In determining whether Article 6 § 3 (b) has been complied with, account must be taken also of the usual workload of legal counsel; however, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case (*Mattick v. Germany* (dec.)). In this context, in a case in which the applicant and his defence counsel had had five days to study a six-volume case file of about 1,500 pages, the Court did not consider that the time allocated to the defence to study the case file was enough to protect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b). The Court took into account the fact that in the appeal the applicant had analysed the case material in detail, that he had been represented before the appeal court by two lawyers, who confirmed that they had had

enough time to study the file, and that the applicant had not been limited in the number and duration of his meetings with the lawyers (*Lambin v. Russia*, §§ 43-48).

391. Article 6 § 3 (b) of the Convention does not require the preparation of a trial lasting over a certain period of time to be completed before the first hearing. The course of trials cannot be fully charted in advance and may reveal elements which had not hitherto come to light and require further preparation by the parties (*Mattick v. Germany* (dec.)).

392. An issue with regard to the requirement of “adequate time” under Article 6 § 3 (b) may arise with regard to the limited time for the inspection of a file (*Huseyn and Others v. Azerbaijan*, § 174-178; *Iglin v. Ukraine*, §§ 70-73), or a short period between the notification of charges and the holding of the hearing (*Vyarentsov v. Ukraine*, §§ 75-77). Furthermore, the defence must be given additional time after certain occurrences in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc. (*Miminoshvili v. Russia*, § 141). Such “occurrences” may include changes in the indictment (*Pélissier and Sassi v. France* [GC], § 62), introduction of new evidence by the prosecution (*G.B. v. France*, §§ 60-62), or a sudden and drastic change in the opinion of an expert during the trial (*ibid.*, §§ 69-70).

393. An accused is expected to seek an adjournment or postponement of a hearing if there is a perceived problem with the time allowed (*Campbell and Fell v. the United Kingdom*, § 98; *Bäckström and Andersson v. Sweden* (dec.); *Craxi v. Italy (no. 1)*, § 72), save in exceptional circumstances (*Goddi v. Italy*, § 31) or where there is no basis for such a right in domestic law and practice (*Galstyan v. Armenia*, § 85).

394. In certain circumstances a court may be required to adjourn a hearing of its own motion in order to give the defence sufficient time (*Sadak and Others v. Turkey (no. 1)*, § 57; *Sakhnovskiy v. Russia* [GC], §§ 103 and 106).

395. In order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision (*Hadjianastassiou v. Greece*, § 33). When a fully reasoned judgment is not available before the expiry of the time-limit for lodging an appeal, the accused must be given sufficient information in order to be able to make an informed appeal (*Zoon v. the Netherlands*, §§ 40-50; *Baucher v. France*, §§ 46-51).

396. States must ensure that everyone charged with a criminal offence has the benefit of the safeguards of Article 6 § 3. Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the “diligence” which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (*Vacher v. France*, § 28).

### c. Adequate facilities

397. The “facilities” which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (*Huseyn and Others v. Azerbaijan*, § 175; *OA O Neftyanaya Kompaniya Yukos v. Russia*, § 538).

398. The States’ duty under Article 6 § 3 (b) to ensure the accused’s right to mount a defence in criminal proceedings includes an obligation to organise the proceedings in such a way as not to prejudice the accused’s power to concentrate and apply mental dexterity in defending his position. Where the defendants are detained, the conditions of their detention, transport, catering and other similar arrangements are relevant factors to consider in this respect (*Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia\**, § 252).

399. In particular, where a person is detained pending trial, the notion of “facilities” may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration (*Mayzit v. Russia*, § 81; *Moiseyev v. Russia*, § 221). It is crucial that both the accused and his defence counsel should be able to participate in the proceedings and make submissions without suffering from excessive tiredness (*Barberà, Messegué and Jabardo v. Spain*, § 70; *Makhfi v. France*, § 40; *Fakailo (Safoka) and Others v. France*, § 50). Thus, in *Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia\**, §§ 253-254, the Court found that the cumulative effect of exhaustion caused by lengthy prison transfers – in poor conditions and with less than eight hours of rest, repeated for four days a week over a period of more than four months – seriously undermined the applicant’s ability to follow the proceedings, make submissions, take notes and instruct his lawyers. In these circumstances, and given that insufficient consideration had been given to the applicant’s requests for a hearing schedule that might have been less intensive, the Court considered that he had not been afforded adequate facilities for the preparation of his defence, which had undermined the requirements of a fair trial and equality of arms, contrary to the requirements of Article 6 §§ 1 and 3 (b) of the Convention.

400. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence (*Padin Gestoso v. Spain* (dec.); *Mayzit v. Russia*, § 79).

401. Article 6 § 3 (b) guarantees also bear relevance for an accused’s access to the file and the disclosure of evidence, and in this context they overlap with the principles of the equality of arms and adversarial trial under Article 6 § 1 (*Rowe and Davis v. the United Kingdom* [GC], § 59; *Leas v. Estonia*, § 76).<sup>12</sup> An accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives (*Kremzow v. Austria*, § 52). However, an accused’s limited access to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (*Öcalan v. Turkey* [GC], § 140).

402. When an accused has been allowed to conduct his own defence, denying him access to the case file amounts to an infringement of the rights of the defence (*Foucher v. France*, §§ 33-36).

403. In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file and compiling and using any notes taken (*Rasmussen v. Poland*, §§ 48-49; *Moiseyev v. Russia*, §§ 213-218; *Matyjek v. Poland*, § 59; *Seleznev v. Russia*, §§ 64-69).

404. “Facilities” provided to an accused include consultation with his lawyer (*Campbell and Fell v. the United Kingdom*, § 99; *Goddi v. Italy*, § 31). The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence (*Bonzi v. Switzerland*, Commission decision; *Can v. Austria*, Commission report, § 52). Thus, an issue under Article 6 § 3 (b) arises if the placement of an accused in a glass cabin during the hearing prevents his or her effective consultation with a lawyer (*Yaroslav Belousov v. Russia*, §§ 148-153).

405. Article 6 § 3 (b) overlaps with a right to legal assistance in Article 6 § 3 (c) of the Convention (*Lanz v. Austria*, §§ 50-53; *Öcalan v. Turkey* [GC], § 148; *Trepashkin v. Russia (no. 2)*, §§ 159-168).<sup>13</sup>

12. See Section Effective participation in the proceedings and Equality of arms and adversarial proceedings.

13. See Section Right to defend oneself in person or through legal assistance (Article 6 § 3 (c)).

### 3. Right to defend oneself in person or through legal assistance (Article 6 § 3 (c))

#### Article 6 § 3 (c) of the Convention

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) 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;”

#### HUDOC keywords

Charged with a criminal offence (6-3) – Rights of defence (6-3)

Defence in person (6-3-c) – Defence through legal assistance (6-3-c) – Legal assistance of own choosing (6-3-c) – Insufficient means (6-3-c) – Free legal assistance (6-3-c) – Required by interests of justice (6-3-c)

406. Article 6 § 3 (c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6 § 1 (*Dvorski v. Croatia* [GC], § 76; *Correia de Matos v. Portugal* (dec.); *Foucher v. France*, § 30). This sub-paragraph guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence (*Pakelli v. Germany*, Commission report, § 84). It comprises three separate rights: to defend oneself in person, to defend oneself through legal assistance of one’s own choosing and, subject to certain conditions, to be given legal assistance free (*Pakelli v. Germany*, § 31).

#### a. Scope of application

407. Any person subject to a criminal charge must be protected by Article 6 § 3 (c) at every stage of the proceedings (*Imbrioscia v. Switzerland*, § 37). This protection may thus become relevant even before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6 (*Öcalan v. Turkey* [GC], § 131; *Ibrahim and Others v. the United Kingdom* [GC], § 253; *Magee v. the United Kingdom*, § 41).

408. While Article 6 § 3 (b) is tied to considerations relating to the preparation of the trial, Article 6 § 3 (c) gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings (*Can v. Austria*, Commission report, § 54). Nevertheless, the manner in which Article 6 § 3 (c) is to be applied in the pre-trial phase (during the preliminary investigation) depends on the special features of the proceedings involved and on the circumstances of the case (*Ibrahim and Others v. the United Kingdom* [GC], § 253; *Brennan v. the United Kingdom*, § 45; *Berliński v. Poland*, § 75).

409. Similarly, the manner in which Article 6 § 3 (c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved (*Meftah and Others v. France* [GC], § 41). Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (*ibid.*; *Monnell and Morris v. the United Kingdom*, § 56). It is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the court of appeal, and the manner in which the applicant’s interests were actually presented and protected before the court of appeal (*ibid.*).



## b. Right to defend oneself

410. The object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing (*Zana v. Turkey* [GC], § 68; *Monnell and Morris v. the United Kingdom*, § 58).<sup>14</sup> Closely linked with this right Article 6 § 3 (c) offers the accused the possibility of defending himself in person. It will therefore normally not be contrary to the requirements of Article 6 if an accused is self-represented in accordance with his or her own will, unless the interests of justice require otherwise (*Galstyan v. Armenia*, § 91).

411. Article 6 §§ 1 and 3 (c) do not necessarily give the accused the right to decide the manner in which one's defence is assured (*Correia de Matos v. Portugal* (dec.)). The choice between two alternatives mentioned in Article 6 § 3 (c), namely, the applicant's right to defend oneself in person or to be represented by a lawyer of one's own choosing, or in certain circumstances one appointed by the court, depends in principle upon the applicable domestic law or rules of court. In making this decision, Member States enjoy a margin of appreciation, albeit limited (*Correia de Matos v. Portugal* [GC], § 122).

412. In light of these principles, the Court first examines whether relevant and sufficient grounds were provided for the legislative choice applied in the particular case. Second, even if relevant and sufficient grounds were provided, it is still necessary to examine, in the context of the overall assessment of fairness of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided relevant and sufficient grounds for their decisions. In the latter connection, it will be relevant to assess whether an accused was afforded scope in practice to participate effectively in his or her trial (*ibid.*, § 143).

413. In *Correia de Matos v. Portugal* [GC] (§§ 144-169) the Court took into account as a whole the procedural context in which the requirement of mandatory representation was applied, including whether the accused remained able to intervene in person in the proceedings. It further took into account the margin of appreciation enjoyed by the State and considered the reasons for the impugned choice of the legislature to be both relevant and sufficient. Since, in addition, there was no basis on which to find that the criminal proceedings against the applicant had been unfair, the Court concluded that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

414. Furthermore, where the accused chooses to defend himself, he deliberately waives his right to be assisted by a lawyer and is considered to be under a duty to show diligence in the manner in which he conducts his defence (*Melin v. France*, § 25). In particular, it would overstrain the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally aroused false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings (*Brandstetter v. Austria*, § 52). The mere possibility of an accused being subsequently prosecuted on account of allegations made in his defence cannot be deemed to infringe his rights under Article 6 § 3 (c). The position might be different if, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising his defence rights (*ibid.*, § 53).

## c. Legal assistance

### i. Access to a lawyer

#### α. Scope of the right

415. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (*Salduz v. Turkey* [GC], § 51; *Ibrahim and Others v. the*

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14. See Section The right to an oral hearing and presence at the hearing.

*United Kingdom* [GC], § 255; *Simeonovi v. Bulgaria* [GC], § 112; *Beuze v. Belgium* [GC], § 123). As a rule, a suspect should be granted access to legal assistance from the moment there is a “criminal charge” against him or her within the autonomous meaning of the Convention (*Simeonovi v. Bulgaria* [GC], § 110).<sup>15</sup> In this connection, the Court has stressed that a person acquires the status of a suspect calling for the application of the Article 6 safeguards not when that status is formally assigned to him or her, but when the domestic authorities have plausible reasons for suspecting that person’s involvement in a criminal offence (*Truten v. Ukraine*, § 66; *Knox v. Italy*, § 152; contrast *Bandaletov v. Ukraine*, §§ 61-66, concerning voluntary statements made by an applicant as a witness; and *Sršen v. Croatia* (dec.), §§ 43-45, concerning the obtaining of routine information, including the taking of blood samples, from the participants of a road accident).

416. Thus, for instance, the right of access to a lawyer arises not only when a person is taken into custody or questioned by the police (*Simeonovi v. Bulgaria* [GC], § 111; *Sîrghi v. Romania*, § 44;) but may also be relevant during procedural actions, such as identification procedures or reconstruction of the events and on-site inspections (*İbrahim Öztürk v. Turkey*, §§ 48-49; *Türk v. Turkey*, § 47; *Mehmet Duman v. Turkey*, § 41). Moreover, the right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal assistance, if necessary (*Lagerblom v. Sweden*, § 49; *Galstyan v. Armenia*, § 89). By the same token, the mere presence of the applicant’s lawyer cannot compensate for the absence of the accused (*Zana v. Turkey* [GC], § 72).

417. In *Beuze v. Belgium* [GC] (§§ 125-130), drawing on its previous case-law, the Court explained that the aims pursued by the right of access to a lawyer include the following: prevention of a miscarriage of justice and, above all, the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused; counterweight to the vulnerability of suspects in police custody; fundamental safeguard against coercion and ill-treatment of suspects by the police; ensuring respect for the right of an accused not to incriminate him/herself and to remain silent, which can – just as the right of access to a lawyer as such – be guaranteed only if he or she is properly notified of these rights. In this connection, immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights.

418. In *Beuze* (§§ 133-134) the Court also elaborated on the content of the right of access to a lawyer. It distinguished two minimum requirements as being: (1) the right of contact and consultation with a lawyer prior to the interview, which also includes the right to give confidential instructions to the lawyer, and (2) physical presence of the lawyer at the initial police interview and any further questioning during the pre-trial proceedings. Such presence must ensure legal assistance that is effective and practical.

419. In connection with the latter minimum requirement, it should be noted that in *Soytemiz v. Turkey*, (§§ 44-46, 27) the Court stressed that the right to be assisted by a lawyer requires not only that the lawyer is permitted to be present, but also that he is allowed to actively assist the suspect during, *inter alia*, the questioning by the police and to intervene to ensure respect for the suspect’s rights. The right to be assisted by a lawyer applies throughout and until the end of the questioning by the police, including when the statements taken are read out and the suspect is asked to confirm and sign them, as assistance of a lawyer is equally important at this moment of the questioning. Thus, the police are, in principle, under an obligation to refrain from or to adjourn questioning in the event that a suspect has invoked the right to be assisted by a lawyer during the interrogation until a lawyer is present and is able to assist the suspect. The same considerations also hold true in case the lawyer has to – or is requested to – leave before the end of the questioning of the police and before the reading out and the signing of the statements taken.

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15. See Section General principles.

420. In *Doyle v. Ireland* the applicant was allowed to be represented by a lawyer but his lawyer was not permitted in the police interview as a result of the relevant police practice applied at the time. The Court found no violation of Article 6 §§ 1 and 3 (c) of the Convention. It considered that, notwithstanding the impugned restriction on the applicant's right of access to a lawyer during the police questioning, the overall fairness of the proceedings had not been irretrievably prejudiced. In particular, it laid emphasis on the following facts: the applicant had been able to consult his lawyer; he was not particularly vulnerable; he had been able to challenge the admissibility of evidence and to oppose its use; the circumstances of the case had been extensively considered by the domestic courts; the applicant's conviction had been supported by significant independent evidence; the trial judge had given proper instructions to the jury; sound public-interest considerations had justified prosecuting the applicant; and there had been important procedural safeguards, namely all police interviews had been recorded on video and made available to the judges and the jury and, while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.

421. Further in *Beuze v. Belgium* [GC], (§ 135) the Court indicated, by way of example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings: (1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation, and (2) the non-participation of the lawyer in investigative actions, such as identity parades or reconstructions.

422. In addition, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (*Ibid.*, § 136).

423. The right to legal representation is not dependent upon the accused's presence (*Van Geyseghem v. Belgium* [GC], § 34; *Campbell and Fell v. the United Kingdom*, § 99; *Poitrimol v. France*, § 34). The fact that the defendant, despite having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right to be defended by counsel (*Van Geyseghem v. Belgium* [GC], § 34; *Pelladoah v. the Netherlands*, § 40; *Krombach v. France*, § 89; *Galstyan v. Armenia*, § 89). Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended (*Tolmachev v. Estonia*, § 48). Thus, an issue arises under Article 6 § 3 (c) if an applicant's defence counsel is unable to conduct the defence in the applicant's absence in a hearing before the relevant court, including an appellate court (*Lala v. the Netherlands*, §§ 30-35; *Tolmachev v. Estonia*, §§ 51-57).

424. For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so (*Van Geyseghem v. Belgium* [GC], § 33; *Pelladoah v. the Netherlands*, § 41).

### ***β. Restrictions on early access to a lawyer***

425. Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting

authorities and the accused (*Salduz v. Turkey* [GC], §§ 53-54; *Ibrahim and Others v. the United Kingdom* [GC], § 255; *Simeonovi v. Bulgaria* [GC], § 112).

426. However, it is possible for access to legal advice to be, exceptionally, delayed. Whether such restriction on access to a lawyer is compatible with the right to a fair trial is assessed in two stages. In the first stage, the Court evaluates whether there were compelling reasons for the restriction. Then, it weighs the prejudice caused to the rights of the defence by the restriction in the case. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair (*Ibrahim and Others v. the United Kingdom* [GC], § 257).

427. The Court has explained that the criterion of compelling reasons is a stringent one. Having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. When assessing whether compelling reasons have been demonstrated, it is relevant whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them (*Ibrahim and Others v. the United Kingdom* [GC], § 258).

428. Such compelling reasons will exist, for instance, when it has been convincingly demonstrated that there was an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular (*ibid.*, § 259; *Simeonovi v. Bulgaria* [GC], § 117). On the other hand, a general risk of leaks cannot constitute compelling reasons justifying a restriction on access to a lawyer (*Ibrahim and Others v. the United Kingdom* [GC], § 259) nor can compelling reasons exist when the restriction on access to a lawyer was the result of an administrative practice of the authorities (*Simeonovi v. Bulgaria* [GC], § 130).

429. In *Beuze v. Belgium* [GC] (§§ 142-144 and 160-165), the Court explained that a general and mandatory (in that case statutory) restriction on access to a lawyer during the first questioning cannot amount to a compelling reason: such a restriction does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. In any event, the onus is on the Government to demonstrate the existence of compelling reasons to restrict access to a lawyer.

430. However, the absence of compelling reasons does not lead in itself to a finding of a violation of Article 6 of the Convention. In assessing whether there has been a breach of the right to a fair trial, it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (*Ibrahim and Others v. the United Kingdom* [GC], § 262; *Simeonovi v. Bulgaria* [GC], § 118).

431. In particular, where compelling reasons are found to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were “fair” for the purposes of Article 6 § 1. Where, on the other hand, there are no compelling reasons for restricting access to legal advice, the Court applies a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). In such a case, the onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (*Ibrahim and Others v. the United Kingdom* [GC], §§ 264-265; *Dimitar Mitev v. Bulgaria*, § 71).

It is not for the Court to search on its own motion whether the compelling reasons existed in a particular case (*Rodionov v. Russia*, § 161).

432. In this context, the Court also takes into account the privilege against self-incrimination and the duty of the authorities to inform an applicant of these rights (*Ibrahim and Others v. the United Kingdom* [GC], §§ 266-273).<sup>16</sup> Where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (*Beuze v. Belgium* [GC], § 146). It should also be noted that an issue from the perspective of the privilege against self-incrimination arises not only in case of actual confessions or directly incriminating remarks but also with regard to statements which can be considered as “substantially affecting” the accused’s position (*ibid.*, § 178).

433. In *Beuze v. Belgium* [GC] (§§ 144, 160-165) the Court confirmed that the two-stage, test as elaborated in *Ibrahim and Others*, applied also to general and mandatory (in that case statutory) restrictions. In such circumstances, however, the Court applies very strict scrutiny to its fairness assessment and the absence of compelling reasons weighs heavily in the balance which may thus be tipped towards finding a violation of Article 6 §§ 1 and 3 (c) of the Convention.

434. When examining the proceedings as a whole, the following non-exhaustive list of factors should, where appropriate, be taken into account (*Ibrahim and Others v. the United Kingdom* [GC], § 274; *Beuze v. Belgium* [GC], § 150; *Sitnevskiy and Chaykovskiy v. Ukraine*, §§ 78-80):

- Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity;
- The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
- Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
- The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
- In the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
- The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
- Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions;
- The weight of the public interest in the investigation and punishment of the particular offence in issue;
- Other relevant procedural safeguards afforded by domestic law and practice.

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16. See Section Right to remain silent and not to incriminate oneself.

**χ. Waiver of the right of access to a lawyer**

435. Any purported waiver of a right of access to a lawyer must satisfy the “knowing and intelligent waiver” standard in the Court’s case-law (*Ibrahim and Others v. the United Kingdom* [GC], § 272; *Pishchalnikov v. Russia*, § 77).<sup>17</sup> In applying this standard, it is implicit that suspects must be aware of their rights, including the right of access to a lawyer (*Ibrahim and Others v. the United Kingdom* [GC], § 272; *Rodionov v. Russia*, § 151). Additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, there is a diminished chance of being informed of one’s rights and, as a consequence, a less chance of having those rights respected (*Pishchalnikov v. Russia*, § 78).

436. A suspect cannot be found to have waived one’s right to legal assistance if one has not promptly received information about this right after arrest (*Simeonovi v. Bulgaria* [GC], § 118). Similarly, in the context of procedural action taken without relevant procedural safeguards, waiver of the right to a lawyer by signing a pre-printed phrase “No lawyer sought” is of questionable value for the purpose of demonstrating the unequivocal character of the waiver by an applicant (*Bozkaya v. Turkey*, § 48; *Rodionov v. Russia*, § 155; contrast with *Sklyar v. Russia*, §§ 22-25, where the applicant clearly waived his right to a lawyer on the record). A possible earlier waiver, even if validly made, will no longer be considered valid if an applicant subsequently made an explicit request to access a lawyer (*Artur Parkhomenko v. Ukraine*, § 81). Moreover, if an applicant has been subjected to inhuman and degrading treatment by the police, it cannot be considered that in such circumstances he or she validly waived his right of access to a lawyer (*Turbylev v. Russia*, § 96).

437. More generally, the Court explained that it was mindful of the probative value of documents signed while in police custody. However, it stressed that as with many other guarantees under Article 6 of the Convention, those signatures are not an end in themselves and they must be examined in the light of all the circumstances of the case. In addition, the use of a printed waiver formula may represent a challenge in ascertaining whether the text actually expresses an accused’s free and informed decision to waive his or her right to be assisted by a lawyer (*Akdağ v. Turkey*, § 54).

438. In any event, it is in the first place the trial court’s duty to establish in a convincing manner whether or not an applicant’s confessions and waivers of legal assistance were voluntary. Any flaw in respect of the confessions and waivers should be rectified in order for the proceedings as a whole to be considered fair. A failure to examine the circumstances surrounding an applicant’s waiver would be tantamount to depriving the applicant of the possibility of remedying a situation, contrary to the requirements of the Convention (*Türk v. Turkey*, §§ 53-54; *Rodionov v. Russia*, § 167).

439. However, when a waiver of the right of access to a lawyer satisfies the “knowing and intelligent waiver” standard in the Court’s case-law, there will be no grounds for doubting the overall fairness of the criminal proceedings against the applicant (*Šarkienė v. Lithuania* (dec.), § 38; *Sklyar v. Russia*, § 26).

**ii. Right to a lawyer of one’s own choosing**

440. A person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing from the initial stages of the proceedings. This follows from the very wording of Article 6 § 3 (c), which guarantees that “[e]veryone charged with a criminal offence has the following minimum rights: ... to defend himself ... through legal assistance of his own choosing ...”, and is generally recognised in international human rights standards as a mechanism for securing an effective defence to the accused (*Dvorski v. Croatia* [GC], § 78; *Martin v. Estonia*, §§ 90-93).

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17. See Section General considerations of Article 6 in its criminal aspect.

441. However, the right of everyone charged with a criminal offence to be defended by counsel of his own choosing is not absolute (*Meftah and Others v. France* [GC], § 45; *Dvorski v. Croatia* [GC], § 79). Although, as a general rule, the accused's choice of lawyer should be respected (*Lagerblom v. Sweden*, § 54), the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (*Meftah and Others v. France* [GC], § 45; *Dvorski v. Croatia* [GC], § 79 *Croissant v. Germany*, § 29). For instance, the special nature of the proceedings, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations (*Meftah and Others v. France* [GC], § 47).

442. In this context, the Court has held that in contrast to cases involving denial of access to a lawyer, where the test of "compelling reasons" applies, the more lenient requirement of "relevant and sufficient" reasons needs to be applied in situations raising the less serious issue of "denial of choice". In such cases the Court's task will be to assess whether, in light of the proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness (*Dvorski v. Croatia* [GC], § 81).

443. In particular, in the first step the Court assesses whether it has been demonstrated that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court proceeds to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements; the circumstances surrounding the designation of counsel and the existence of opportunities to challenge this; the effectiveness of counsel's assistance; whether the accused's privilege against self-incrimination was respected; the accused's age; the trial court's use of any statements given by the accused at the material time; the opportunity given to the accused to challenge the authenticity of evidence and to oppose its use; whether such statements constituted a significant element on which the conviction was based; and the strength of other evidence in the case (*ibid.*, § 82).

#### **d. Legal aid**

444. The third and final right encompassed in Article 6 § 3 (c), the right to legal aid, is subject to two conditions, which are to be considered cumulatively (*Quaranta v. Switzerland*, § 27).

445. First, the accused must show that he lacks sufficient means to pay for legal assistance (*Caresana v. the United Kingdom* (dec.)). He need not, however, do so "beyond all doubt"; it is sufficient that there are "some indications" that this is so or, in other words, that a "lack of clear indications to the contrary" can be established (*Pakelli v. Germany*, Commission report, § 34; *Tsonyo Tsonov v. Bulgaria (no. 2)*, § 39). In any event, the Court cannot substitute itself for the domestic courts in order to evaluate the applicant's financial situation at the material time but instead must review whether those courts, when exercising their power of appreciation in assessing the evidence, acted in accordance with Article 6 § 1 (*R.D. v. Poland*, § 45).

446. Second, the Contracting States are under an obligation to provide legal aid only "where the interests of justice so require" (*Quaranta v. Switzerland*, § 27). This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case (*Granger v. the United Kingdom*, § 46).

447. In determining whether the interests of justice require an accused to be provided with free legal representation the Court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation (*Benham v. the United Kingdom* [GC], § 61; *Quaranta v. Switzerland*, § 33; *Zdravko Stanev v. Bulgaria*, § 38).

448. As a further condition of the “required by the interests of justice” test the Court considers the complexity of the case (*Quaranta v. Switzerland*, § 34; *Pham Hoang v. France*, § 40; *Twalib v. Greece*, § 53) as well as the personal situation of the accused (*Zdravko Stanev v. Bulgaria*, § 38). The latter requirement is looked at especially with regard to the capacity of the particular accused to present his case – for example, on account of unfamiliarity with the language used at court and/or the particular legal system – were he not granted legal assistance (*Quaranta v. Switzerland*, § 35; *Twalib v. Greece*, § 53).

449. When applying the “interests of justice” requirement the test is not whether the absence of legal aid has caused “actual damage” to the presentation of the defence but a less stringent one: whether it appears “plausible in the particular circumstances” that the lawyer would be of assistance (*Artico v. Italy*, §§ 34-35; *Alimena v. Italy*, § 20).

450. The right to legal aid is also relevant for the appeal proceedings (*Shekhov v. Russia*, § 46; *Volkov and Adamskiy v. Russia*, §§ 56-61). In this context, in determining whether legal aid is needed, the Court takes into account three factors in particular: (a) the breadth of the appellate courts’ power; (b) the seriousness of the charges against applicants; and (c) the severity of the sentence they face (*Mikhaylova v. Russia*, § 80).

451. Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel “of one’s own choosing” is necessarily subject to certain limitations where free legal aid is concerned. For example, when appointing defence counsel the courts must have regard to the accused’s wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (*Croissant v. Germany*, § 29; *Lagerblom v. Sweden*, § 54). Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced (*ibid.*, § 55). Furthermore, the interests of justice cannot be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 (*Monnell and Morris v. the United Kingdom*, § 67).

## e. Practical and effective legal assistance

### i. Confidential communication with a lawyer

452. The right to effective legal assistance includes, *inter alia*, the accused’s right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel (*Sakhnovskiy v. Russia* [GC], § 102). If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness (*S. v. Switzerland*, § 48; *Brennan v. the United Kingdom*, § 58). Any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled (*Sakhnovskiy v. Russia* [GC], § 102).

453. Examples of such limitations include the tapping of telephone conversations between an accused and his lawyer (*Zagaria v. Italy*, § 36); obsessive limitation on the number and length of lawyers’ visits to the accused (*Öcalan v. Turkey* [GC], § 135); lack of privacy in video-conference (*Sakhnovskiy v. Russia* [GC], § 104; *Gorbunov and Gorbachev v. Russia*, § 37); supervision of interviews by the prosecuting authorities (*Rybacki v. Poland*, § 58); surveillance by the investigating judge of detainee’s contacts with his defence counsel (*Lanz v. Austria*, § 52); supervision of communication between the accused and the lawyer in the courtroom (*Khodorkovskiy and Lebedev v. Russia*, §§ 642-647), and impossibility to communicate freely with a lawyer due to threat of sanction (*M v. the Netherlands*, § 92).

454. Limitations may be imposed on an accused’s right to communicate with his or her lawyer out of the hearing of a third person if a good cause exists, but such limitation should not deprive the



accused of a fair hearing (*Öcalan v. Turkey* [GC], § 133). A “good cause” in this context is one of “compelling reasons” justifying that limitation (*Moroz v. Ukraine*, §§ 67-70). “Compelling reasons” may exist when it has been convincingly demonstrated that the measures limiting the right of confidential communication with a lawyer were aimed at preventing a risk of collusion arising out of the lawyer’s contacts with the applicant, or in case of issues related to the lawyer’s professional ethics or unlawful conduct (*S. v. Switzerland*, § 49; *Rybacki v. Poland*, § 59), including suspicion of the abuse of confidentiality and risk to safety (*Khodorkovskiy and Lebedev v. Russia*, § 641). As to the effect of such limitations on the overall fairness of the proceedings, the length of time in which they were applied will be a relevant consideration (*Rybacki v. Poland*, 61) and, where appropriate, the extent to which the statements obtained from an accused, who had not benefited from a confidential communication with a lawyer, were put to use in the proceedings (*Moroz v. Ukraine*, § 72).

## ii. Effectiveness of legal assistance

455. Article 6 § 3 (c) enshrines the right to “practical and effective” legal assistance. Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting, or shirk his duties (*Artico v. Italy*, § 33; *Vamvakas v. Greece (no. 2)*, § 36).

456. However, a Contracting State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or chosen by the accused (*Lagerblom v. Sweden*, § 56; *Kamasinski v. Austria*, § 65). Owing to the legal profession’s independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention (*Imbrioscia v. Switzerland*, § 41; *Daud v. Portugal*, § 38). State liability may arise where a lawyer simply fails to act for the accused (*Artico v. Italy*, §§ 33 and 36) or where he fails to comply with a crucial procedural requirement that cannot simply be equated with an injudicious line of defence or a mere defect of argumentation (*Czekalla v. Portugal*, §§ 65 and 71).

457. The same considerations related to the effectiveness of legal assistance may exceptionally apply in the context of a privately hired lawyer. In *Güveç v. Turkey* (§ 131) the Court took into account the applicant’s young age (15 years old), the seriousness of the offences with which he was charged (carrying out activities for the purpose of bringing about the secession of national territory, which at the time was punishable by death), the seemingly contradictory allegations levelled against him by the police and a prosecution witness, the manifest failure of his lawyer to represent him properly (failure to attend multiple hearings) and the applicant’s many absences from the hearings. In these circumstances, the Court found that the trial court should have urgently reacted to ensure the applicant’s effective legal representation.

## 4. Examination of witnesses (Article 6 § 3 (d))

### Article 6 § 3 (d) of the Convention

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

**HUDOC keywords**

Charged with a criminal offence (6-3) – Rights of defence (6-3)

Witnesses (6-3-d) – Examination of witnesses (6-3-d) – Obtain attendance of witnesses (6-3-d) – Same conditions (6-3-d)

458. The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, and the Court’s primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and the victims in proper prosecution and, where necessary, to the rights of witnesses (*Schatschaschwili v. Germany* [GC], §§ 100-101).

**a. Autonomous meaning of the term “witness”**

459. The term “witness” has an autonomous meaning in the Convention system, regardless of classifications under national law (*Damir Sibgatullin v. Russia*, § 45; *S.N. v. Sweden*, § 45). Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (*Kaste and Mathisen v. Norway*, § 53; *Lucà v. Italy*, § 41). This may include, for instance, evidence provided by a person in the context of an identification parade or face-to-face confrontation with a suspect (*Vanfuli v. Russia*, § 110).

460. The term includes a co-accused (*Trofimov v. Russia*, § 37; *Oddone and Pecci v. San Marino\**, §§ 94-95), victims (*Vladimir Romanov v. Russia*, § 97); expert witnesses (*Doorson v. the Netherlands*, §§ 81-82) and police officers (*Ürek and Ürek v. Turkey*, § 50).

461. Article 6 § 3 (d) may also be applied to documentary evidence (*Mirilashvili v. Russia*, §§ 158-159; *Chap Ltd v. Armenia*, § 48), including reports prepared by an arresting officer (*Butkevich v. Russia*, §§ 98-99).

**b. Right to examine witnesses****i. General principles**

462. Given that the admissibility of evidence is a matter for regulation by national law and the national courts, the Court’s only concern under Articles 6 §§ 1 and 3 (d) of the Convention is to examine whether the proceedings have been conducted fairly (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 118).

463. Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings. Exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence (*Thomas v. the United Kingdom* (dec.)).

464. Pursuant to Article 6 § 3 (d), before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 118; *Hümmer v. Germany*, § 38; *Lucà v. Italy*, § 39; *Solakov v. the former Yugoslav Republic of Macedonia*, § 57). These

principles particularly hold true when using witness statements obtained during police inquiry and judicial investigation at a hearing (*Schatschaschwili v. Germany* [GC], §§ 104-105).

465. As for applicability in the diverse legal systems of Contracting States, and in particular in the context of both common-law and continental-law systems, the Court has stressed that while it is important for it to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Articles 6 §§ 1 and 3 (d) irrespective of the legal system from which a case emanates (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 130; *Schatschaschwili v. Germany* [GC], § 108).

## ii. Non-attendance of witnesses at trial

466. Considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied (*Van Mechelen and Others v. the Netherlands*, § 58). Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial (*Tarău v. Romania*, § 74; *Graviano v. Italy*, § 38).

467. In *Al-Khawaja and Tahery v. the United Kingdom* [GC] (§§ 119-147) the Court clarified the principles to be applied when a witness does not attend a public trial. These principles may be summarised as follows (*Seton v. the United Kingdom*, §§ 58-59; *Dimović v. Serbia*, §§ 36-40; *T.K. v. Lithuania*, §§ 95-96):

(i) The Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

(ii) When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iii) Admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings;

(iv) According to the “sole or decisive rule”, if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(v) However, as Article 6 § 3 of the Convention should be interpreted in a holistic examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(vi) In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

468. These principles have been further clarified in *Schatschaschwili v. Germany* [GC] (§§ 111-131) in which the Court confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d). Furthermore, The Court explained that given that its concern was to ascertain whether the proceedings as a whole were fair, it should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence.

#### *α. Good reason for non-attendance of a witness*

469. The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 120; *Gabrielyan v. Armenia*, §§ 78, 81-84). In this context, although it is not the Court's function to express an opinion on the relevance of the evidence produced, failure to justify a refusal to examine or call a witness can amount to a limitation of defence rights that is incompatible with the guarantees of a fair trial (*Bocos-Cuesta v. the Netherlands*, § 72).

470. However, as explained in *Schatschaschwili v. Germany* [GC] (§ 113) lack of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d).

471. Article 6 § 1 taken together with § 3 requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (*Trofimov v. Russia*, § 33; *Sadak and Others v. Turkey (no. 1)*, § 67; *Cafagna v. Italy*, § 42).

472. In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (*Karpenko v. Russia*, § 62; *Damir Sibgatullin v. Russia*, § 51; *Pello v. Estonia*, § 35; *Bonev v. Bulgaria*, § 43; *Tseber v. the Czech Republic*, § 48; *Lučić v. Croatia*, §§ 79-80). It is not for the Court to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a witness whom they finally considered to be unreachable. However, it is clear that they must have actively searched for the witness with the help of domestic authorities including the police and must, as a rule, have resorted to international legal assistance where a witness resided abroad and such mechanisms were available. Moreover, the need for all reasonable efforts on the part of the authorities to secure the witness's attendance at trial further implies careful scrutiny by domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness (*Schatschaschwili v. Germany* [GC], §§ 121-122).

473. However, *impossibilium nulla est obligatio*, provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (*Gossa v. Poland*, § 55; *Haas v. Germany* (dec.); *Calabrò v. Italy and Germany* (dec.); *Ubach Mertes v. Andorra* (dec.); *Gani v. Spain*, § 39).

474. Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at

trial. If there was a good reason for the witness's non-attendance in that sense, it follows that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence (*Schatschaschwili v. Germany* [GC], § 119).

475. There are a number of reasons why a witness may not attend trial, such as absence owing to death or fear (*Mika v. Sweden* (dec.), § 37; *Ferrantelli and Santangelo v. Italy*, § 52; *Al-Khawaja and Tahery v. the United Kingdom* [GC], §§ 120-125), absence on health grounds (*Bobes v. Romania*, §§ 39-40; *Vronchenko v. Estonia*, § 58), or the witness's unreachability (*Schatschaschwili v. Germany* [GC], §§ 139-140; *Lučić v. Croatia*, § 80), including his or her detention abroad (*Štefančič v. Slovenia*, § 39).

476. Lastly, different considerations apply with regard to the questioning of attesting witnesses for a search, when their testimony has been adduced by the prosecution (*Murtazaliyeva v. Russia* [GC], §§ 136-137). Attesting witnesses act as neutral observers of an investigative measure and, unlike material witnesses, they are not expected to have any knowledge of the case. Thus, they do not testify about the circumstances of the case or the defendants' guilt or innocence. Accordingly, their attendance at the hearing will only be necessary exceptionally, such as if the domestic courts rely on their statements in a substantial manner or that their testimony in court could otherwise influence the outcome of the criminal proceedings against the applicant (*Shumeyev and Others v. Russia* (dec.), § 37). In other words, the absence of attesting witnesses from criminal trials does not infringe the guarantees of Article 6 §§ 1 and 3 (d) of the Convention insofar as their testimony is limited to the manner of conducting investigative measures and is, in essence, redundant evidence (*Murtazaliyeva v. Russia* [GC], § 136).

477. Nevertheless, when the domestic trial court specifically refers to the statements of the attesting witnesses in convicting the applicant and lists them as elements of evidence separate from the relevant police reports which those witnesses certified, then it is appropriate to examine the matter of non-attendance of those witnesses at the trial and reliance on their pre-trial statements in light of the *Al-Khawaja and Tahery* and *Schatschaschwili* principles (*Garbuz v. Ukraine*, § 40). On the other hand, when the defence intends to rely on the testimony of attesting witnesses, such witnesses are to be considered as "witnesses on behalf" of the defence within the meaning of Article 6 § 3 (d) of the Convention (*Murtazaliyeva v. Russia* [GC], § 138).<sup>18</sup>

### ***β. The importance of the witness statement for the conviction***

478. An issue concerning admission into evidence of statements of witnesses who did not attend the trial arises only if the witness statement is the "sole" or "decisive" evidence, or it it "carried significant weight" in the applicant's conviction (*Seton v. the United Kingdom*, § 58; *Sitnevskiy and Chaykovskiy v. Ukraine*, § 125, where the witness statement was not of any such importance).

479. The "sole" evidence is to be understood as the only evidence against the accused. The term "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive. The evidence that carries "significant weight" is such that its admission may have handicapped the defence (*Schatschaschwili v. Germany* [GC], §§ 116 and 123).

480. In this context, as it is not for the Court to act as a court of fourth instance, its starting point for determining the importance of a witness statement for an applicant's conviction is the judgment of the domestic courts. The Court must review the domestic courts' evaluation in light of its standards for the assessment of importance of a witness statement as evidence and decide whether the

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18. See Section Right to call witnesses for the defence.

domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary. It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear (*ibid.*, § 124).

#### *χ. Counterbalancing factors*

481. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence (*ibid.*, § 116 and 125).

482. In *Schatschaschwili v. Germany* [GC] (§§ 126-131, with further references) the Court identified certain elements that may be relevant in this context:

- Whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available (*Przydział v. Poland*, § 53; *Daştan v. Turkey*, § 31). Any directions given to the jury by the trial judge regarding the absent witnesses' evidence is another important consideration (*Simon Price v. the United Kingdom*, § 130);
- Existence of a video recording of the absent witness's questioning at the investigation stage;
- Availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; further factual evidence, forensic evidence and expert reports; similarity in the description of events by other witnesses, in particular if such witnesses are cross-examined at trial;
- The possibility for the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial, or, where appropriate, in the pre-trial stage of the proceedings (*Paić v. Croatia*, § 47);
- Possibility for the applicant or defence counsel to question the witness during the investigation stage. These pre-trial hearings are an important procedural safeguard which can compensate for the handicap faced by the defence on account of absence of a witness from the trial (*Palchik v. Ukraine*, § 50). Moreover, the Court has accepted that in exceptional circumstances there may be reasons for hearing evidence from a witness in the absence of the person against whom the statement is to be made on the condition that his lawyer was present during the questioning (*Šmajgl v. Slovenia*, § 63);
- The defendant must be afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness. However, this cannot, of itself, be regarded a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured (*Palchik v. Ukraine*, § 48). Moreover, domestic courts must provide sufficient reasoning when dismissing the arguments put forward by the defence (*Prăjină v. Romania*, § 58). Also, in some instances, an effective possibility to cast doubt on the credibility of the absent witness evidence may depend on the availability to the defence of all the material in the file related to the events to which the witness' statement relates (*Yakuba v. Ukraine*, §§ 49-51).

483. In view of the autonomous meaning given to the term "witness", the above principles concerning absent witnesses are accordingly applicable in cases of absent expert witnesses. In this context, the Court has stressed that the opinion of an expert appointed by the competent court to

address the questions raised by the case is likely to have a significant impact on that court's assessment of the case. However, the situation of an absent expert witness is not the same as the absence of a witness who gave evidence on matters he or she had seen or learned by hearsay. Thus, when an expert report has been drawn up by an independent expert appointed by judicial authorities during the investigation with the aim of providing the court with information on a technical aspect of the case, and the findings of that report were scrutinised by an expert instructed by the defence, that will be an important counterbalancing factor in the assessment of the overall fairness of the proceedings (*Constantinides v. Greece*, §§ 37-52).

### iii. Other restrictions on the right to examine witnesses

484. The above principles related to absent witnesses are accordingly applicable to other instances in which a defendant was not in a position to challenge the probity and credibility of witness evidence, including its truthfulness and reliability, by having the witnesses orally examined in his or her presence, either at the time the witness was making the statement or at some later stage of the proceedings.

485. This may concern the admission into evidence of statements made by witnesses whose full identity is concealed from the accused (anonymous testimony) (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 127; *Scholer v. Germany*, § 51; *Balta and Demir v. Turkey*, §§ 36-41, ; *Asani v. the former Yugoslav Republic of Macedonia*, §§ 36-37); witnesses, including the co-accused, who refuse to testify at trial or to answer questions from the defence (*Craxi v. Italy (no. 1)*, § 88; *Vidgen v. the Netherlands*, § 42, concerning co-accused; *Sofri and Others v. Italy* (dec.); *Sievert v. Germany*, §§ 59-61, *Cabral v. the Netherlands*, § 33, *Breijer v. the Netherlands* (dec.), §§ 32-33, concerning witnesses), and other witnesses who are questioned under special examination arrangements involving, for instance, impossibility for the defence to attend the witnesses' questioning (*Papadakis v. the former Yugoslav Republic of Macedonia*, § 89) or impossibility for the defence to have access to sources on which a witness based his or her knowledge or belief (*Donohoe v. Ireland*, §§ 78-79).

486. However, when a witness makes a statement at the pre-trial stage of the proceedings and then retracts it or claims to have no longer any recollection of facts when cross-examined at the trial, the principles related to absent witnesses will not necessarily apply. In other words, a change of attitude on the part of a witness does not of itself give rise to a need for compensatory measures. Indeed, the Court has refused to hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict. In such a situation, the Court will seek to determine whether the proceedings as a whole, including the way in which evidence was taken, were fair (*Vidgen v. the Netherlands* (dec.), §§ 38-41; see also *Makeyan and Others v. Armenia*\*, §§ 40-48).<sup>19</sup> Moreover, in such instances, other procedural guarantees may be of importance such as, for instance, the principle of equality of arms between the prosecution and the defence in examining a witness who has retracted his or her statement that was of a decisive importance for the applicant's conviction (*Bonder v. Ukraine*, §§ 79-81).

#### α. Anonymous witnesses

487. While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 127; *Asani v. the former Yugoslav Republic of Macedonia*, § 33).

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19. See Section Administration of evidence.

488. In particular, the Court has held that precise limitations on the defence's ability to challenge a witness in proceedings differ in the two cases (anonymous and absent witnesses). Absent witnesses present the problem that their accounts cannot be subjected to searching examination by defence counsel. However, their identities are known to the defence, which is therefore able to identify or investigate any motives for falsification. On the other hand, anonymous witnesses about whom no details are known as to their identity or background, present a different problem: the defence faces the difficulty of being unable to put to the witness, and ultimately to the jury, any reasons which the witness may have for lying. However, in practice, some disclosure takes place which provides material for cross-examination. The extent of the disclosure has an impact on the extent of the handicap faced by the defence. Thus, given the underlying concern in both types of cases, the Court has consistently taken a similar approach in the context of anonymous witnesses to that which it has followed in cases involving absent witnesses (*ibid.*, § 36).

489. The use of statements made by anonymous witnesses to convict is not under all circumstances incompatible with the Convention (*Doorson v. the Netherlands*, § 69; *Van Mechelen and Others v. the Netherlands*, § 52; *Krasniki v. the Czech Republic*, § 76).

490. While Article 6 does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as with interests coming generally within the ambit of Article 8 of the Convention. Contracting States should organise their criminal proceedings so that those interests are not unjustifiably impaired. The principles of a fair trial therefore require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (*Doorson v. the Netherlands*, § 70; *Van Mechelen and Others v. the Netherlands*, § 53).

491. Domestic authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses (*Doorson v. the Netherlands*, § 71; *Visser v. the Netherlands*, § 47; *Sapunarescu v. Germany* (dec.); *Dzelili v. Germany* (dec.); *Scholer v. Germany*, §§ 53-56).

492. The Court's case-law shows that it is more common for witnesses to have a general fear of testifying, rather than that fear being directly attributable to threats made by the defendant or his agents. For instance, in many cases, the fear has been attributable to the notoriety of the defendant or his associates. There is, therefore, no requirement that a witness' fear be attributable directly to threats made by the defendant in order for that witness to be excused from presenting evidence at trial. Moreover, fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should be required to give oral evidence. This does not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine, first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 124; *Balta and Demir v. Turkey*, § 44).

493. The Court has also held that the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the State's police force. Although their interests – and indeed those of their families – also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. On the other hand, the Court has recognised that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities for his own or his family's protection and to not impair his usefulness for future operations (*Van Mechelen and Others v. the Netherlands*, §§ 56-57; *Bátěk and Others v. the Czech Republic*, § 46; *Van Wesenbeeck v. Belgium*, §§ 100-101).



494. If the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. In such cases, the handicap faced by the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Doorson v. the Netherlands*, § 72; *Van Mechelen and Others v. the Netherlands*, § 54; *Haas v. Germany* (dec.); *Asani v. the former Yugoslav Republic of Macedonia*, § 37).

#### **β. Witnesses in sexual abuse cases**

495. Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In assessing whether the accused received a fair trial, the right to respect for the private life of the alleged victim must be taken into account. Therefore, in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with the adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicap under which the defence operates (*Aigner v. Austria*, § 37; *D. v. Finland*, § 43; *F and M v. Finland*, § 58; *Accardi and Others v. Italy* (dec.); *S.N. v. Sweden*, § 47; *Vronchenko v. Estonia*, § 56).

496. Having regard to the special features of criminal proceedings concerning sexual offences, Article 6 § 3 (d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel through cross-examination or by other means (*S.N. v. Sweden*, § 52; *W.S. v. Poland*, § 55). Relatedly, the Court has held that since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims risks further traumatising of the victim, personal cross-examination by defendants should be subject to the most careful assessment by the national courts, the more so the more intimate the questions are (*Y. v. Slovenia*, § 106).

497. However, this does not mean that measures related to the protection of victims, particularly the non-attendance of a witness to give evidence at the trial, are applicable automatically to all criminal proceedings concerning sexual offences. There must be relevant reasons adduced by domestic authorities for applying such measures and, as regards the possibility of excusing a witness from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 125; *Lučić v. Croatia*, § 75).

498. The accused must be able to observe the demeanour of the witnesses under questioning and to challenge their statements and credibility (*Bocos-Cuesta v. the Netherlands*, § 71; *P.S. v. Germany*, § 26; *Accardi and Others v. Italy* (dec.); *S.N. v. Sweden*, § 52).

499. The viewing of a video recording of a witness account cannot alone be regarded as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account was given by the authorities (*D. v. Finland*, § 50; *A.L. v. Finland*, § 41).

#### **χ. Witnesses who refuse to testify in court**

500. In some instances, a witness' refusal to give a statement or answer questions in court may be justified in view of the special nature of the witness' position in the proceedings. This will be the case, for instance, if a co-accused uses one's right to protection against self-incrimination (*Vidgen v. the Netherlands*, § 42). The same is true for a former co-suspect refusing to give a statement or answer questions at the hearing as a witness (*Sievert v. Germany*, §§ 59-61), or a former co-suspect who is facing the charges of perjury for trying to change his initial statement inculcating the applicant (*Cabral v. the Netherlands*, § 34). Moreover, this may concern a witness who relied on testimonial privilege in order to not testify at the trial due to her relationship with one of the co-

accused (*Sofri and Others v. Italy* (dec.)) or a witness who refused to give a statement due to a fear of reprisals (*Breijer v. the Netherlands* (dec.), §§ 32-33).

501. In each of these cases, the Court must assess whether the proceedings as a whole were fair and whether there was a possibility of putting the incriminating statement of a witness to the test in order to satisfy itself that the defence's handicap was offset by effective counterbalancing measures (*Sievert v. Germany*, § 67; *Cabral v. the Netherlands*, § 37; *Breijer v. the Netherlands* (dec.), § 35).

### c. Right to call witnesses for the defence

502. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter (*Perna v. Italy* [GC], § 29; *Murtazaliyeva v. Russia* [GC], § 139; *Solakov v. the former Yugoslav Republic of Macedonia*, § 57).

503. Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts to decide whether it is necessary or advisable to examine a witness (*S.N. v. Sweden*, § 44; *Accardi and Others v. Italy* (dec.)). However, when a trial court grants a request to call a defence witness, it is obliged to take effective measures to ensure the witnesses' presence at the hearing (*Polufakin and Chernyshev v. Russia*, § 207) by way of, at the very least, issuing a summons or by ordering the police to compel a witness to appear in court (*Murtazaliyeva v. Russia* [GC], § 147).

504. There may be exceptional circumstances which could prompt the Court to conclude that the failure to examine a person as a witness was incompatible with Article 6 (*Murtazaliyeva v. Russia* [GC], § 148; *Dorokhov v. Russia*, § 65; *Popov v. Russia*, § 188; *Bricmont v. Belgium*, § 89; *Pereira Cruz and Others v. Portugal*, §§ 220-232, concerning the refusal by an appellate court to question a witness for the defence who had retracted his incriminating statement against the applicant).

505. It is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence (*Perna v. Italy* [GC], § 29; *Băcanu and SC « R » S.A. v. Romania*, § 75). If the statement of witnesses the applicant wished to call could not influence the outcome of his or her trial, no issue arises under Articles 6 §§ 1 and 3 (d) if a request to hear such witnesses is refused by the domestic courts (*Kapustyak v. Ukraine*, §§ 94-95).

506. When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his or her acquittal, the domestic authorities must provide relevant reasons for dismissing such a request (*Vidal v. Belgium*, § 34; *Polyakov v. Russia*, §§ 34-35; *Sergey Afanasyev v. Ukraine*, § 70; *Topić v. Croatia*, § 42).

507. Having regard to the above considerations in its case-law, in *Murtazaliyeva v. Russia* [GC] (§ 158) the Court has formulated the following three-pronged test for the assessment of whether the right to call a witness for the defence under Article 6 § 3 (d) has been complied with: (1) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (2) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (3) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.

508. In respect of the first element the Court held that it is necessary to examine whether the testimony of witnesses was capable of influencing the outcome of a trial or could reasonably be expected to strengthen the position of the defence. The “sufficiency” of reasoning of the motions of the defence to hear witnesses will depend on the assessment of the circumstances of a given case, including the applicable provisions of the domestic law, the stage and progress of the proceedings, the lines of reasoning and strategies pursued by the parties and their procedural conduct (*Ibid.*, §§ 160-161).

509. As to the second element of the test, the Court explained that generally the relevance of testimony and the sufficiency of the reasons advanced by the defence in the circumstances of the case will determine the scope and level of detail of the domestic courts’ assessment of the need to ensure a witness’ presence and examination. Accordingly, the stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts if they refuse the defence’s request to examine a witness (*Ibid.*, § 166).

510. With regard to the overall fairness assessment as the third element of the test, the Court stressed that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident. While the conclusions under the first two steps of that test would generally be strongly indicative as to whether the proceedings were fair, it cannot be excluded that in certain, admittedly exceptional, cases considerations of fairness might warrant the opposite conclusion (*Ibid.*, §§ 167-158).

## 5. Interpretation (Article 6 § 3 (e))

### Article 6 § 3 (e) of the Convention

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

### HUDOC keywords

Charged with a criminal offence (6-3) – Rights of defence (6-3)

Free assistance of interpreter (6-3-e)

511. The requirements of paragraph 3 (e) of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1. The Court thus examines complaints regarding effective interpretation under both provisions taken together (*Baytar v. Turkey*, § 48).

512. It is important that the suspect be aware of the right to interpretation, which means that one must be notified of such a right when “charged with a criminal offence. This notification should be done in a language the applicant understands (*Vizgirda v. Slovenia*, §§ 86-87).

513. Like the assistance of a lawyer, that of an interpreter should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right. In the absence of interpretation, whether an accused was able to make informed choices during the proceedings can be cast into doubt. Therefore, initial defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole (*Baytar v. Turkey*, §§ 50, 54-55).

### a. If the accused “cannot understand or speak the language used in court”

514. The right to free assistance of an interpreter applies exclusively in situations where the accused cannot understand or speak the language used in court (*K. v. France*, Commission decision *Baytar v. Turkey*, § 49). An accused who understands that language cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, including a language of an ethnic minority of which he is a member (*Bideault v. France*, Commission decision; *Lagerblom v. Sweden*, § 62).

515. The fact that a defendant has basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence (*Vizgirda v. Slovenia*, § 83).

516. Where the accused is represented by a lawyer, it will generally not be sufficient that the accused’s lawyer, but not the accused, knows the language used in court. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence (*Kamasinski v. Austria*, § 74; *Cuscani v. the United Kingdom*, § 38).

517. Article 6 § 3 (e) does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge (*X. v. Austria*, Commission decision). However, impossibility of an applicant to communicate with his or her lawyer due to linguistic

limitations may give rise to an issue under Article 6 §§ 3 (c) and (e) of the Convention (*Lagerblom v. Sweden*, §§ 61-64; *Pugžlys v. Poland*, §§ 85-92).

518. The right to an interpreter may be waived, but this must be a decision of the accused, not of his lawyer (*Kamasinski v. Austria*, § 80).

## b. Protected elements of the criminal proceedings

519. Article 6 § 3 (e) guarantees the right to the free assistance of an interpreter for translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial (*Luedicke, Belkacem and Koç v. Germany*, § 48; *Ucak v. the United Kingdom* (dec.); *Hermi v. Italy* [GC], § 69; *Lagerblom v. Sweden*, § 61).

520. Article 6 § 3 (e) applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings (*Kamasinski v. Austria*, § 74; *Hermi v. Italy* [GC], § 70; *Baytar v. Turkey*, § 49).

521. However, it does not go so far as to require a written translation of all items of written evidence or official documents in the proceedings (*Kamasinski v. Austria*, § 74). For example, the absence of a written translation of a judgment does not in itself entail a violation of Article 6 § 3 (e) (*ibid.*, § 85). The text of Article 6 § 3 (e) refers to an “interpreter”, not a “translator”. This suggests that oral linguistic assistance may satisfy the requirements of the Convention (*Hermi v. Italy* [GC], § 70; *Husain v. Italy* (dec.)).

522. In sum, the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his or her version of the events (*Hermi v. Italy* [GC]; *Kamasinski v. Austria*, § 74; *Güngör v. Germany* (dec.); *Protopapa v. Turkey*, § 80; *Vizgirda v. Slovenia*, § 79).

## c. “Free” assistance

523. The obligation to provide “free” assistance is not dependent upon the accused's means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice. However, an accused may be charged for an interpreter provided for him at a hearing that he fails to attend (*Fedele v. Germany* (dec.)).

524. The costs of interpretation cannot be subsequently claimed back from the accused (*Luedicke, Belkacem and Koç v. Germany*, § 46). To read Article 6 § 3 (e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article (*ibid.*, § 42; *Işyar v. Bulgaria*, § 45; *Öztürk v. Germany*, § 58).

## d. Conditions of interpretation

525. The obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation. Thus, a failure of the domestic courts to examine the allegations of inadequate services of an interpreter may lead to a violation of Article 6 § 3 (e) of the Convention (*Knox v. Italy*, §§ 182-187).

526. Nevertheless, it is not appropriate to lay down any detailed conditions under Article 6 § 3 (e) concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's

conduct must not be of such a nature as to impinge on the fairness of the proceedings (*Ucak v. the United Kingdom* (dec.)).

#### e. Obligation to identify interpretation needs

527. The verification of the applicant's need for interpretation facilities is a matter for the judge to determine in consultation with the applicant, especially if he has been alerted to counsel's difficulties in communicating with the applicant. The judge has to reassure himself that the absence of an interpreter would not prejudice the applicant's full involvement in a matter of crucial importance for him (*Cuscani v. the United Kingdom*, § 38).

528. While it is true that the conduct of the defence is essentially a matter between the defendant and his counsel (*Kamasinski v. Austria*, § 65; *Stanford v. the United Kingdom*, § 28), the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts (*Cuscani v. the United Kingdom*, § 39; *Hermi v. Italy* [GC], § 72; *Katritsch v. France*, § 44).

529. The defendant's linguistic knowledge is vital and the court must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court (*Hermi v. Italy* [GC], § 71; *Katritsch v. France*, § 41; *Saman v. Turkey*, § 30; *Güngör v. Germany* (dec.)).

530. Specifically, it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether fairness of the trial requires, or required, the appointment of an interpreter to assist the defendant. This duty is not confined to situations where the foreign defendant makes an explicit request for interpretation. The Court has held that in view of the prominent place the right to a fair trial holds in a democratic society, the obligation arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted. It also arises when a third language is envisaged to be used for the interpretation. In such circumstances, the defendant's competency in the third language should be ascertained before the decision to use it for the purpose of interpretation is made (*Vizgirda v. Slovenia*, § 81).

531. It is not for the Court to set out in any detail the precise measures that should be taken by domestic authorities with a view to verifying the linguistic knowledge of a defendant who is not sufficiently proficient in the language of the proceedings. Depending on different factors, such as the nature of the offence and the communications addressed to the defendant by the domestic authorities, a number of open-ended questions might be sufficient to establish the defendant's language needs. However, the Court attaches importance to noting in the record any procedure used and decision taken with regard to the verification of interpretation needs, notification of the right to an interpreter and the assistance provided by the interpreter, such as oral translation or oral summary of documents, so as to avoid any doubts in this regard raised later in the proceedings (*ibid.*, § 85).

532. In view of the need for the right guaranteed by Article 6 § 3(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (*Kamasinski v. Austria*, § 74; *Hermi v. Italy* [GC], § 70; *Protopapa v. Turkey*, § 80).

## VII. Extra-territorial effect of Article 6

533. The Convention does not require the Contracting Parties to impose its standards on third States or territories (*Drozd and Janousek v. France and Spain*, § 110). As a rule, the Contracting Parties are not obliged to verify whether a trial to be held in a third State following extradition, for example, would be compatible with all the requirements of Article 6.

### A. Flagrant denial of justice

534. According to the Court’s case-law, however, an issue might exceptionally arise under Article 6 as a result of an extradition or expulsion decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial, i.e. a flagrant denial of justice, in the requesting country. This principle was first set out in *Soering v. the United Kingdom* (§ 113) and has subsequently been confirmed by the Court in a number of cases (*Mamatkulov and Askarov v. Turkey* [GC], §§ 90-91; *Al-Saadoon and Mufdhi v. the United Kingdom*, § 149; *Ahorugeze v. Sweden*, § 115; *Othman (Abu Qatada) v. the United Kingdom*, § 258).

535. The term “flagrant denial of justice” has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (*Sejdovic v. Italy* [GC], § 84; *Stoichkov v. Bulgaria*, § 56; *Drozd and Janousek v. France and Spain*, § 110). Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

- conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge (*Einhorn v. France* (dec.), § 33; *Sejdovic v. Italy* [GC], § 84; *Stoichkov v. Bulgaria*, § 56);
- a trial which is summary in nature and conducted with a total disregard for the rights of the defence (*Bader and Kanbor v. Sweden*, § 47);
- detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed (*Al-Moayad v. Germany* (dec.), § 101);
- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (*ibid.*);
- use in criminal proceedings of statements obtained as a result of a suspect’s or another person’s treatment in breach of Article 3 (*Othman (Abu Qatada) v. the United Kingdom*, § 267; *El Haski v. Belgium*, § 85);
- trial before a military commission that did not offer guarantees of impartiality of independence of the executive, did not have legitimacy under national and international law where a sufficiently high probability existed of admission of evidence obtained under torture in trials before the commission (*Al Nashiri v. Poland*, §§ 565-569; *Husayn (Abu Zubaydah) v. Poland*, §§ 555-561; *Al Nashiri v. Romania*, §§ 719-722).

536. It took over twenty years from the *Soering v. the United Kingdom* judgment – that is, until the Court’s 2012 ruling in the case of *Othman (Abu Qatada) v. the United Kingdom* – for the Court to find for the first time that an extradition or expulsion would in fact violate Article 6. This indicates, as is also demonstrated by the examples given in the preceding paragraph, that the “flagrant denial of justice” test is a stringent one. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial proceedings such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (*Ahorugeze v. Sweden*, § 115; *Othman (Abu Qatada) v. the United Kingdom*, § 260).

## B. The “real risk”: standard and burden of proof

537. When examining whether an extradition or expulsion would amount to a flagrant denial of justice, the Court considers that the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (*Saadi v. Italy* [GC], § 129; *J.K. and Others v. Sweden* [GC], § 91; *Ahorugeze v. Sweden*, § 116; *Othman (Abu Qatada) v. the United Kingdom*, §§ 272-280; *El Haski v. Belgium*, § 86).

538. In order to determine whether there is a risk of a flagrant denial of justice, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (*Saadi v. Italy* [GC], § 130; *Al-Saadoon and Mufdhi v. the United Kingdom*, § 125). The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion (*Saadi v. Italy* [GC], § 133; *Al-Saadoon and Mufdhi v. the United Kingdom*, § 125). Where the expulsion or transfer has already taken place by the date on which it examines the case, however, the Court is not precluded from having regard to information which comes to light subsequently (*Mamatkulov and Askarov v. Turkey* [GC], § 69; *J.K. and Others v. Sweden* [GC], § 83; *Al-Saadoon and Mufdhi v. the United Kingdom*, § 149).

539. Lastly, in the context of a European Arrest Warrant (EAW) between the EU member States, the Court has held that in cases in which the State did not have any margin of manoeuvre in applying the EU law, the principle of “equivalent protection”, as developed in the Court’s case-law (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], §§ 149-158; *Avotiņš v. Latvia* [GC], §§ 115-116), applied. This is the case where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another member State has been sufficient. As envisaged by the EAW framework, the domestic court is thus deprived of discretion in the matter, leading to automatic application of the presumption of equivalence. However, any such presumption can be rebutted in the circumstances of a particular case. Even taking into account, in the spirit of complementarity, the manner in which mutual recognition mechanisms operate and in particular the aim of effectiveness which they pursue, the Court must verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights (*Pirozzi v. Belgium*, § 62).

540. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, such as the EAW, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law. In such instances, they must apply the EU law in conformity with the Convention requirements (*ibid.*, §§ 63-64).



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Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that were not final within the meaning of Article 44 of the Convention when this update was finalised are marked with an asterisk (\*) in the list below. Article 44 § 2 of the Convention provides: “The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”. In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the Commission (decisions and reports), and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the “Language versions” tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

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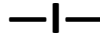
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