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Protecting **the right to a fair trial** under the European Convention on Human Rights

Council of Europe human rights handbooks

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Contents

Article 6 of the European Convention on Human Rights

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.

Introduction

The case-law of the European Court of Human Rights on Article 6 is a complex body of rules. The purpose of this handbook is to elucidate the subject to an extent that will allow readers to develop their own capacities as regards better structuring and reasoning of legal points in favour (or in defence) of an alleged violation of the Convention – at the national or international level, whether in the context of actual proceedings in Strasbourg or in a more hypothetical academic exercise.

It was written primarily with practising lawyers in mind. As a legal practitioner's tool, it includes a rather condensed summary of principles derived from the Court's very extensive case-law under Article 6, while using language and style reminiscent of the Court's own jurisprudence.

The authors have aimed to depict a coherent structure drawn from the wide array of express and implied rights enshrined in Article 6. At the same time, they have tried to cite as many cases as possible in order to show that the case-law is far from clear – or settled – in a number of instances.

Owing to the need to respect the required degree of brevity in the summaries, readers may be left with a feeling that they are prompted to do some additional research – which in fact the authors wholeheartedly encourage them to do by following up and examining every decision or judgment referred to here. The index of cases (page 102), together with the paragraph numbers of judgments cited in the text, will facilitate this task.

Role of Article 6, methods and principles of its interpretation

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

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

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

Article 6 must be interpreted in the light of the present-day conditions, while taking account the prevalent economic and social conditions; which is also known as the concept of "the Convention as a living organism" (*Marckx v. Belgium*, §41). In interpreting the Convention the Court may also take into account relevant rules and principles of international law appli-

1. Cases are cited for the first time by title (including respondent state), thereafter generally by applicant name only. An index of cases, with reference dates, appears on page 102.

cable in relations between the Contracting Parties (*Demir and Baykara v. Turkey* [GC], §§76-84).

Article 6 enjoys significant autonomy within the domestic law of the Contracting States, including its substantive as well as procedural provisions (*Khan v. the United Kingdom*, §§34-40). This implies that a procedural defect within the meaning of the national law will not necessarily amount to a breach of Article 6. At the same time, some elements of Article 6 are less autonomous in domestic law than others. For instance, a greater relevance of the domestic law has always been attached in the context of the applicability test (*Roche v. the United Kingdom* [GC], §§116-126), and, in some cases, also while examining the merits of Article 6, in order to reconcile the inherent differences of accusatorial and inquisitorial systems of proof, such as when the Court approved wider judicial discretion in continental legal systems in choosing which witnesses were to be called at trial (*Vidal v. Belgium*, §§32-35).[2] In certain contexts, a breach of the domestic law – or vagueness of the domestic provisions *per se* – was used by the Court as an additional argument pointing to a violation of Article 6 (*DMD Group, a.s. v. Slovakia*, §§62-72). Occasionally, to support its own finding under Article 6, the Court has also referred to domestic decisions acknowledging a breach of a constitutional provision identical to Article 6 (*Henryk Urban and Ryszard Urban v. Poland*, §§47-56).

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

In accordance with the principle of subsidiarity, Article 6 does not allow the Court to act as a court of fourth instance – namely to re-establish the facts of the case or to re-examine the alleged breaches of national law (*Bernard v. France*, §§37-41), nor to rule on the admissibility of evidence (*Schenk v. Switzerland*, §§45-49). States remain free to apply the criminal law to any act (insofar as it does not breach other rights protected under the Convention), and to define the constituent elements of the resulting offence. As a result, it is not the Court's role to dictate the content of domestic criminal law, including whether there should be any particular defence available to the accused (*G. v. the United Kingdom*, dec., §§28-30). In recent years, however, the Court has occasionally found violations of Article 6 on account of the persistence of conflicting court decisions on the same issue made within a single court of appeal (*Tudor Tudor v. Romania*, §§26-33), or by different district courts ruling on appeal (*Ştefănică and others v. Romania*, §§31-40), stressing that the "profound and long-standing" nature of the divergences at issue was incompatible with the principle of legal certainty in its broad meaning. At the same time, the Grand

2. See also page 23, **Access to a court**; page 35, **Tribunal "established by law"**; page 94, **Right to examine witnesses**.

Chamber recently stressed that it was not the Court's function under Article 6 to compare different decisions of national courts – even if given in apparently similar proceedings – save in cases of evident arbitrariness (*Nejdet Şahin and Perihan Şahin v. Turkey* [GC], §§59-96).

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

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

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

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

While the Court has rarely indicated that Article 6 rights are *qualified*, a more extensive overview of the Convention case-law attests that some elements of this provision – such as the right of access to a court (for example *Ashingdane v. the United Kingdom*, §§55-60) – are very close to being labelled as qualified in a similar vein as the rights guaranteed by Articles 8 to 11 of the Convention. In refining its construction of a qualified right under Article 6, the Court has stated that what constitutes a fair trial cannot be determined by a single unvarying principle but must depend on the circumstances of a particular case. As a result, a *sui generis* proportionality test under Article 6 has been applied on most occasions, also known as the *essence of the right* test – for instance, when a different degree of protec-

3. See below, page 23, **Access to a court**; and page 78, **Article 6 §2: presumption of innocence**.

tion of privilege against self-incrimination was established with regard to minor criminal offences (misdemeanours, or so-called "administrative offences" in some European legal systems) in contrast with the rules that apply to the investigation of more serious crime (*O'Halloran and Francis v. the United Kingdom* [GC], §§43-63); or when a lower degree of protection of equality of arms was confirmed in civil cases as compared with criminal ones (*Foucher v. France,* §§29-38; contrast with *Menet v. France*, §§43-53).

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

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

Scope of protection and applicability of Article 6

Summary

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

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

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

Somewhat different standards of applicability exist for Article 6 §2 as compared with Article 6 §1 and Article 6 §3.[4]

Civil rights and obligations

Summary

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

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

Dispute over a right based in domestic law

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

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

A "dispute" having a basis in domestic law entails the possibility of a claim recognised under the domestic law at least on argua-

4. See below, page 78, **Article 6 §2: presumption of innocence**.

Dispute over a right based in domestic law
Refusal of a licence to operate a gas-supply installation, the genuine and serious nature of the dispute being attested *inter alia* by the fact of previous long-term use of the object by the applicant (*Benthem*).
Out-of-time request for a lawyer's re-admission to the Bar (*H. v. Belgium*).
Temporary suspension of medical practice rights, despite the fact that the dispute affected the scope and manner of the exercise of the rights in question rather than their essence (*Le Compte, Van Leuven and De Meyere v. Belgium*).
Claim of a foreign-trained medic to become a registered doctor in another country, despite the applicable domestic legislation not being clear-cut as to the required qualifications (*Chevrol v. France*).
Claim for compensation for allegedly unlawful detention, even though the right to compensation was only available under the domestic law in principle, not in the particular circumstances of the applicant, a conscientious objector (*Georgiadis*).
Proceedings concerning a change of name, regardless of the domestic legislation affording a significant discretion to the administrative authorities in deciding on the applicant's *locus standi* for such an action (*Mustafa v. France*).
Inability to contest rejection of a construction tender on national security grounds, the domestic law imposing no substantive bar on such actions and allowing dispute rejections done in "bad faith" to be contested (*Tinnelly v. the United Kingdom*).

Dispute over a right based in domestic law
Where immunity of the police from suit in tort of negligence was affirmed by the United Kingdom courts with respect to the duty of crime prevention; yet the arguable basis for such a claim was still found by the European Court in view of the possibility of suing the police in other instances of malpractice, such as torture or unlawful detention (*Osman;* but see also *Roche*).

ble grounds (*Georgiadis v. Greece,* §§27-36). It is not sufficient for a right to exist *in abstracto*; the plaintiff should show some link to the specific claim he makes in the domestic proceedings.

The character of the legislation governing how the matter is to be determined (civil, commercial, administrative law, etc.) or the authority invested with jurisdiction in the matter (court, tribunal, local authority or professional body) is of little consequence. So long as that body has the power to determine the "dispute", Article 6 will apply (*Ringeisen*). At the same time, where the body examining the dispute does not have the necessary characteristics of a tribunal, a question may also arise under the heading of "impartiality" or "independence".[5]

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

5. See also below, page 35, **Independent and impartial tribunal established by law**.

No dispute over a right based in domestic law
Re-assessment of a professional certification akin to a school or university examination (*Van Marle v. the Netherlands*).
Challenge to the operation of a nuclear power station located close to the applicants' home, there being no sufficient reasonable link between the action in question and the impact on the applicants' physical integrity; lack of the element of decisiveness of the dispute (*Balmer-Schafroth and others v. Switzerland* [GC]).
Challenge to a presidential decree publishing a bilateral agreement to permit enlargement of an airport capable of affecting the applicants' property and business interests; another example of a lack of decisiveness (*Sarl du Parc d'activités de Blotzheim v. France*).
Challenge to the disclosure of medical records sent to an insurance institution for processing an injury claim, the statutory duty of disclosure clearly overshadowing the possibility of invoking confidentiality under domestic law (*M.S. v. Sweden*).
Inability to contest refusal of legal aid in relation to a minor offence, despite the domestic law allowing for a possibility (albeit not "right") for legal aid in relation to the offence in question (*Gutfreund v. France*).
Claim for nuisance caused by noise from a nearby airport having no basis in domestic law; example of a substantive bar (*Powell and Rayner v. the United Kingdom*).
Where immunity of the state from liability for damages for the allegedly adverse effects on former military conscripts of medical tests carried out in the 1950s was established by the highest domestic courts following a thorough examination; another example of a substantive bar (*Roche*).

No dispute over a right based in domestic law
Attempt to defend a trademark by reference to its alleged acquisition from a state company several years earlier. However, there was no evidence supporting the claim of corporate succession, so all the ensuing proceedings to defend the trademark had no basis in domestic law and fell outside of the scope of Article 6 (*OAO Plodovaya Kompaniya v. Russia*).

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

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

Civil rights and obligations

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

Article 6 applies irrespective of the status of the parties, and of the character of the legislation governing the determination of

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

The economic nature of the right is an important but not a decisive criterion in establishing the applicability of Article 6. The action itself must be at least pecuniary in nature and be founded on an alleged infringement of rights which are likewise pecuniary rights (*Procola v. Luxembourg,* §§37-40). The existence of a financial claim among the grievances of the applicant does not necessarily make the dispute "civil" (*Panjeheighalehei v. Denmark*, dec.).

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

Civil disputes
Disputes between private parties, such as actions in tort, contract and family law.
Involving right to earn a living by engaging in a liberal profession – e.g. practising as a medic (*Koenig v. Germany*), accountant (*Van Marle*), or advocate (*H. v. Belgium*).

Civil disputes
Right to engage in an economic activity restricted by an administrative regulation or withdrawal of a licence – e.g. to operate a taxi (*Pudas v. Sweden*) or gas-supply installation (*Benthem*), serve liquor (*Tre Traktörer AB v. Sweden*), or work a gravel pit (*Fredin v. Sweden*).
Monetary claim at the centre of the dispute, such as the annulment of an order for damages for improper termination of a construction tender (*Stran Greek Refineries and Stratis Andreadis v. Greece*).
Actions concerning pension entitlements, social, health and other benefits, regardless of whether the rights at issue are derived from contractual relations, previous personal contributions, or the public-law provisions on social solidarity – so long as the assessment of an amount of money is the object of the dispute (*Salesi*).
Employment disputes by public officials regarding their salary, pensions or related compensations – as long as the object of the action is not the dismissal itself or the refusal of access to the civil service, and the domestic law provides for access to a court in such matters (*Vilho Eskelinen*).
Employment disputes, including those concerning dismissal or salaries (*Kabkov v. Russia*).
Action in tort for alleged mismanagement of public funds brought by the public authorities against a former mayor (*Richard-Dubarry v. France*).
Action in tort of negligence directed against the police in relation to the function of crime prevention, where brought by a direct victim of the alleged negligence (*Osman*).

Civil disputes
Claim for access to information held by the public authorities, where such disclosure could influence significantly a person's private career prospects (*Loiseau v. France*).
Administrative decisions directly affecting property rights, including refusal of approval of a land-sale contract (*Ringeisen*), orders affecting applicants' capacity to administer their assets taken in the mental health (*Winterwerp v. the Netherlands*) and criminal (*Baraona*) spheres, proceedings relating to the right to occupy one's property (*Gillow v. the United Kingdom*), agricultural land consolidation (*Erkner and Hofauer v. Austria*), expropriation of land (*Sporrong and Lönnroth v. Sweden*), building permits (*Mats Jacobsson v. Sweden*), permission to retain assets acquired at auction (*Håkansson and Sturesson v. Sweden*), and various types of land compensation (*Lithgow and others v. the United Kingdom*) or restitution (*Jasiūnienė v. Lithuania*) proceedings.
Claim for compensation arising from unlawful detention (*Georgiadis*).
Claim for compensation for alleged torture, including where committed by private persons or abroad (*Al-Adsani v. the United Kingdom*).
Complaint about conditions of detention (*Ganci v. Italy*).
Claim for release from a psychiatric ward (*Aerts v. Belgium*).
Decision by the child-care authorities restricting parental access (*Olsson v. Sweden*)

Civil disputes
Claims of victims of alleged crime lodged in the context of criminal proceedings (*Saoud v. France*); rights of a widow in criminal proceedings against her (deceased) defendant (*Grădinar v. Moldova*), disciplinary proceedings in respect of a prisoner where they resulted in a restriction of the applicant's right to receive family visits in prison (*Gülmez v. Turkey*), or the right to a temporary leave for social reintegration (*Boulois v. Luxembourg*, pending before the Grand Chamber at the time of writing).

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

Disputes found not to be "civil"
Investigation by government inspectors into business takeover, despite tenuous consequences of their report on an applicant's reputation (*Fayed v. the United Kingdom*).

Disputes found not to be "civil"
Determination of the right to occupy a political office, such as sitting in the legislature (*Žđanoka v. Latvia*, dec.), becoming president (*Paksas v. Lithuania* [GC]) or mayor (*Cherepkov v. Russia*).
Proceedings for asylum, deportation and extradition (*Slivenko v. Latvia*, dec.; *Monedero Angora v. Spain*).
Proceedings concerning tax assessment (*Lasmane v. Latvia*, dec.), unless surcharges and penalties are involved, in which case Article 6 may apply under its "criminal" head (*Janosevic v. Sweden*); disputes concerning the lawfulness of search and seizure operations carried out by tax authorities are also civil (*Ravon and others v. France*).
Procedural challenges for withdrawal of a judge and composition of the court by a plaintiff in criminal proceedings (*Schreiber and Boetsch v. France,* dec.); there is thus no separate right of access to a court to complain about procedural decisions, but a single right of access aimed at obtaining determination of an ancillary civil or criminal case.
Actions alleging general incompetence of the authorities or improper execution of their official duties, as long as there is no sufficient reasonable link between the alleged actions or inactivity of the authorities on the one hand, and the applicant's private-law rights and obligations on the other (*mutatis mutandis*, *Schreiber and Boetsch,* dec.).
Disciplinary proceedings concerning dismissal of a military officer for belonging to an Islamic fundamentalist group, without a possibility of obtaining judicial review of the decisions of the military command (*Suküt v. Turkey*, dec.).
Proceedings within Evangelical Lutheran Church concerning transfer of priest to another parish, not amenable to judicial review under Finnish law (*Ahtinen v. Finland*).
Proceedings concerning internal administrative decisions of an international organisation, namely the European Patent Office (*Rambus Inc. v. Germany*, dec.).
Action in damages by asylum seeker for refusal to grant asylum (*Panjeheighalehei*, dec.);
Proceedings concerning rectification of personal data in the Schengen database (*Dalea v. France*, dec.).

Criminal charge

Summary

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

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

Not every decision taken by a judge in the course of criminal proceedings can be examined under the "criminal" limb of Article 6; only proceedings aimed at the determination of the criminal charge (i.e. which may result in a criminal conviction)

may fall within the ambit of Article 6 under this head; thus Article 6 does not apply to proceedings in which the judge decides on the eventual pre-trial detention of a suspect (*Neumeister v. Austria*, §§22-25).[6]

By contrast, Article 6 §2 can apply in the context of proceedings which are not "criminal" – neither by their domestic characterisation nor by their nature or penalty – where those proceedings contain a declaration of guilt (in the criminal sense) of the applicant (*Vassilios Stavropoulos v. Greece*, §§31-32).[6]

Categorisation in domestic law

The question is whether the offence is defined by the domestic legal system as criminal, disciplinary, or concurring (*Engel*).

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

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

6. See below, page 78, **Article 6 §2: presumption of innocence**.

Nature of the offence

It is a weightier criterion than the first one – categorisation in domestic law (*Weber*, §32).

It entails a comparison of the domestic law and the scope of its application with other, criminal offences within that legal system (*Engel*, §§80-85).

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

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

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

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

Where domestic law provides even a theoretical possibility of concurrent criminal and disciplinary liability, it is an argument

Offences of "criminal" nature
Summoning an applicant before members of parliament to investigate publishing of an article allegedly amounting to a defamatory libel, in view *inter alia* of the relevant legislation being directed at the population at large (*Demicoli*).
Administrative fine for taking part in an unauthorised demonstration on the basis of the legislation for a breach of public order, relevant factors being *inter alia* a brief custody and questioning of the applicant by criminal investigators leading to imposition of the fine, and the fact that those types of cases were heard by criminal chambers of the domestic courts (*Ziliberberg*).
Reprimanding prisoners for gross personal violence to prison officers and mutiny could amount to a crime only in the prison context (not an offence under the general criminal law); but underlying facts could find reflection in the ordinary crimes of causing bodily harm and conspiracy, these being relevant factors in the cumulative finding of the "criminal" charge against the prisoners, alongside the especially grave character of the accusations (*Campbell and Fell*).
Reprimanding prisoners for using threatening words against a probation officer and a minor assault against a prison warden was deemed to be "mixed" in nature, but was eventually classified as "criminal" following a cumulative analysis of the penalties (additional days of custody) involved (*Ezeh and Connors*).
Punishment of a lawyer for contempt of court following insulting remarks *vis-à-vis* the judges, in the context of the very wide field of application of the impugned law (*Kyprianou*, §31 of the Chamber judgment).

Offences of "criminal" nature
Fine imposed on a plaintiff in criminal defamation proceedings for disclosure to the press of certain procedural documents about the pending investigation; the punishment was foreseen for parties to proceedings who were, according to the European Court of Human Rights, outside the narrow group of judges and lawyers coming within "the disciplinary sphere of the judicial system" (*Weber*, but see also *Ravnsborg*).

in favour of classifying the offence as *mixed*. The mixed nature criterion is important in cases of a more complicated cumulative analysis, such as those undertaken in relation to breaches of prison discipline (*Ezeh and Connors v. the United Kingdom*, §§103-130).

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

The Court takes "due allowance" of the prison context for "practical reasons of policy" when examining the applicability of Article 6 to a particular prison disciplinary regime (*Ezeh and Connors*, §104-106). It appears, therefore, that the Court takes a less stringent approach in regulating the state's discretion in placing the dividing line between the criminal and the disciplinary in the prison context, if compared to the military one, for instance.

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

Measures imposed by the courts for the purpose of good administration of justice, such as fines, warnings or other types of disciplinary reprimand directed strictly at lawyers, prosecutors (*Weber*) and parties to court proceedings (*Ravnsborg*) are not to be considered as "criminal" in nature unless the legislation protecting the courts' reputation is so wide that it permits the reprimanding of anyone outside the strict context of the specific proceedings – as is the case with the "contempt of court" provisions in some legal systems (*Kyprianou v. Cyprus*, §31 of the Chamber judgment; but see *Zaicevs v. Latvia*). A previous statement by the Court that "the parties to court proceedings ... do not come within the disciplinary sphere of the judicial system" (*Weber*, §33) appears to have been subsequently overruled in *Ravnsborg* and other cases (§34; see also boxed examples).

Offence found to be not "criminal" in nature
Fine levied by a court on a party to civil proceedings for improper statements for the purpose of good administration of justice, the parties to legal proceedings also being bound by the "disciplinary" powers of the courts (*Ravnsborg*).

Nature and degree of severity of the penalty

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

Cases involving "criminal" penalties
Committal to disciplinary unit involving deprivation of liberty for three to four months in military disciplinary proceedings (*Engel*).
Loss of a substantive period of remission of sentence for prison mutiny (*Campbell and Fell*).
At least seven "additional days" of custody in the context of prison disciplinary proceedings (*Ezeh and Connors*).
Sentence of up to one month's imprisonment (*Kyprianou*).
Fine of 500 Swiss francs theoretically convertible into a sentence of imprisonment at the rate of one day of detention per 30 Swiss francs, even though conversion could only be imposed by a court (*Weber*; but see also a contrasting decision in *Ravnsborg*).
Tax surcharges in addition to unpaid tax in tax assessment proceedings, in view of the punitive nature of the penalty involved (*Janosevic*).
Motoring offences punishable by a fine, including causing a traffic accident (*Öztürk*), flight from the scene (*Weh v. Austria)*, exceeding the speed limit (*O'Halloran and Francis*), in view of the punitive nature of the penalties involved.

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

Cases involving no "criminal" penalty
Light arrest (not involving deprivation of liberty) or a two-day period of strict arrest in military disciplinary proceedings (*Engel*).
Compulsory transfer of a military officer to the reserve list in military disciplinary proceedings (*Saraiva de Carvalho v. Portugal*).
Fine of 1 000 Swedish kronor, theoretically convertible into a sentence of imprisonment from fourteen days to three months; the Court considered that the possibility of such conversion was remote and would have necessitated a separate court hearing, with the result that the degree of severity of the penalty was not enough to be labelled as "criminal" (*Ravnsborg*; but see a contrasting decision in very similar circumstances in *Weber*).
Employment proceedings leading to dismissal of prosecutor in case of alleged bribery (*Ramanauskas*, dec.).
Dismissal of state officials under national security legislation on the grounds of alleged lack of loyalty to the state (*Sidabras and Džiautas v. Lithuania*, dec.).
Warning issued to lawyer in disciplinary proceedings (*X v. Belgium*, dec. 1980).
Fine imposed on teacher for having gone on strike (*S. v. Germany*, dec. 1984).
Compulsory residence order restricting to a particular locality a person whose alleged mafia-type connections constituted a threat to public order (*Guzzardi*).
Deportation on security grounds, even if based on suspicion of criminal activity (*Agee v. the United Kingdom*), or on grounds of illegal entry into to the country where it is an offence in itself (*Zamir v. the United Kingdom*).
Extradition proceedings, unless the question of a positive obligation arises under Article 6 in consideration of the likelihood of the "flagrant denial of justice in the country of destination" (*Mamatkulov and Askarov*).
Restrictions on insurance business on the ground that the controller was not a fit and proper person, even though the allegations against him at least arguably included allegations of criminal conduct (*Kaplan v. the United Kingdom*).
Fine imposed on a pharmacist for unethical behaviour involving irregular pricing of drugs (*M. v. Germany*, dec. 1984).

This element implies assessment of the maximum possible penalty liable to be imposed on the offender under the applicable law rather than the actual penalty imposed in the circumstances (*Ezeh and Connor*s).

The penalty needs to be punitive rather than merely deterrent to be classified as "criminal"; in view of the punitive nature of

the penalty involved, the possible degree of severity (amount) of the penalty becomes irrelevant (*Öztürk*).

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

Applicability of Article 6 to pre-trial investigation, appeal, constitutional and other review proceedings

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

Article 6 does not of itself demand that states set up courts of appeal and cassation. However, where such a system has been set up, it will apply as long as the domestic procedure accords the applicant an accessible legal remedy before a higher national court (*Chatellier v. France*, §§34-43).

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

The manner in which Article 6 applies at various appeal stages depends on the special factors of the proceedings concerned; account has to be taken of the entirety of proceedings in the domestic legal order – therefore, deficiencies at one stage may be compensated for at another stage (*Fejde v. Sweden,* §§31-34). However, the Court recently started to pay more attention to incidents at certain crucial moments in the proceedings, such as the absence of effective legal representation during the first questioning of the suspect (*Panovits*, §§66-77) or at the final stage of the trial (*Güveç v. Turkey*, §§125-133), which led to the conclusion that the proceedings as a whole were unfair, even where the lawyer was otherwise present.

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

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

- application for release on probation or parole (*X v. Austria*, dec., 1961);
- request for re-trial (*Franz Fischer v. Austria*, dec.);
- request for reduction of the sentence (*X v. Austria*, dec., 1962);
- proceedings after the applicant has been recognised as unfit for criminal trial (*Antoine v. the United Kingdom*, dec.);
- proceedings determining in which prison the sentence is to be served (*X v. Austria*, dec., 1977);
- determination of the security classification of prisoner (*X v. the United Kingdom*, dec., 1979);
- recall of a prisoner conditionally released (*Ganusauskas v. Lithuania*, dec.);
- extension of the sentence of a repeat offender at the disposal of the government (*Koendjbiharie v. the Netherlands*).

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

Article 6 is inapplicable to unsuccessful attempts to re-open criminal or civil proceedings – on the basis of new facts or by way of extraordinary or special review procedures on points of law – which are not directly accessible to the individual personally and of which the execution depends on the discretionary power of a specific authority (*Tumilovich v. Russia*, dec).

Article 6 will not apply as long as the domestic authorities do not agree to re-open the case, even where the applicant's request for re-opening was filed in the consequence of the judgment by the Court finding a violation of the Convention in connection with the impugned domestic proceedings (*Franz Fischer*, dec.).

However, once a case has been re-opened or the extraordinary review granted, the guarantees of Article 6 will apply to the ensuing court proceedings (*Vanyan v. Russia,* §§56-58).

Right to a court

Summary

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

- ✧ access to a court (*Golder*);
- ✧ finality of court decisions (*Brumărescu*);
- ✧ timely execution of final judgments (*Hornsby*).

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

Access to a court

Summary

The right of access to a court is concerned with 4 main problem areas:

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

Standing to bring proceedings, claim damages and obtain a court decision

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

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

It applies both to "civil" and "criminal" proceedings (*Deweer,* §§48-54).

It involves the right to obtain a court decision (*Ganci*).

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

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

At the same time, Article 6 does not provide, as such, a right to appeal to a higher court from a decision of a lower court; only where the domestic procedure foresees such a right, Article 6 will apply to the superior stages of court jurisdiction – the ability to apply for two or more stages of court review is therefore a non-autonomous requirement of Article 6 (*Delcourt*; but see *Gorou (No. 2) v. Greece*, §§27-36, where the Grand Chamber examined on the merits under Article 6 the refusal of the public prosecutor to lodge an appeal on points of law, even though Greek law did not provide the applicant with a direct possibility to obtain appellate review, leaving it at the prosecutor's discretion.

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

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

The right of access to a court is *qualified*: it is open to states to impose restrictions on would-be litigants, as long as these restrictions pursue a legitimate aim, are proportionate, and are not so wide-ranging as to destroy the very essence of the right (*Ashingdane*). The question remains whether restrictions acceptable under Article 6 must necessarily be "lawful", even though some cases suggest that they should be (*Kohlhofer and Minarik v. the Czech Republic,* §§91-102).

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

7. See also below, page 70, **Right to a reasoned decision and reliable evidence**.

The more distant the link between the alleged actions or inactivity of a defendant on one hand, and the private-law based rights and obligations of the claimant on the other, the less likely is it that the European Court of Human Rights will find a breach of the right of access to a court, if indeed it finds Article 6 applicable at all (*Schreiber and Boetsch*).[8]

Restrictions on access to a Court: violations
Impossibility for prisoner accused of assault in prison to bring proceedings for defamation (*Golder*).
No response by domestic court to relevant legal and factual issues raised by the applicant in a civil case, and unmotivated endorsement by the court of an opinion by the executive authorities on the merits of the case (*Chevrol*).
Impossibility for an engineer to bring an action to recover his fees due to the requirement that a professional organisation make a claim on his behalf (*Philis v. Greece*).
Inability to bring an appeal in cassation in a criminal case unless a person surrendered himself into custody (*Papon*).
A case where an applicant, a minority shareholder of a company, could not define the price of his shares in a forced buy-off by a majority shareholder otherwise than by appealing to an *ad-hoc* arbitration body, defined in a contract concluded between the company and the majority shareholder, whereas this arbitration body did not have characteristics of a lawfully established tribunal (*Suda v. the Czech Republic*).

Restrictions on access to a Court: violations
Criminal defendant persuaded by the authorities to withdraw an appeal on false assurances of a lesser penalty than that imposed by the trial court (*Marpa Zeeland BV and Metal Welding BV v. the Netherlands*).
Inability of a sole shareholder and managing director of a company to challenge a liquidation order on the company, where this right belonged only to an *ad hoc* representative (*Arma v. France*).
Impossibility for a plaintiff to make photocopies of a crucial document in the possession of the defendant, depriving her of the possibility to effectively present her case (*K.H. and others v. Slovakia;* but this case may probably be more properly looked at from the point of view of the requirement of equality of arms; see below, page 48).

Even where Article 6 is not violated or is inapplicable, other provisions of the Convention may come into play, offering rights comparable to that of access to a court, such as the guarantees afforded to victims of crime by way of the positive obligation to protect life (*Osman*, §§115-122) and investigate death (*Paul and Audrey Edwards v. the United Kingdom*, §§69-87) under Article 2; to protect from and investigate ill-treatment under Article 3 (*Z and others v. the United Kingdom*); to protect family life and home (for instance, *Fadeyeva v. Russia*, §§116-134, in relation to the inadequacy of domestic remedies in resettling a resident of an environmentally dangerous area); or to guarantee the right to an effective remedy (as a result of the

8. See also above, page 13, **Civil rights and obligations**.

limited scope of judicial review of the statutory schemes to increase air traffic in the vicinity of the applicants' homes (*Hatton v. the United Kingdom* [GC], §§116-130).

Restrictions on access to a Court: examples of non-violation
Limitation of the standing of mental patients to bring an action for damages against the medical staff for acts done in negligence or bad faith – including a cap on liability of the medical staff where such *locus standi* was allowed (*Ashingdane*).
Refusal to appoint a guardian for a person of unsound mind for the purpose of bringing an action deemed to have no prospect of success, where the mental patient was unable to bring such an action himself (*X and Y v. the Netherlands*, 1985).
Restrictions on access – due to the obligation to obtain special leave from a judge to bring an action – in order to prevent abuse of legal proceedings by a vexatious litigant (*H. v. the United Kingdom*, 1985).
Restriction on individual access by shareholders of a nationalised company – owing to the requirement to elect a representative of all shareholders to be recognised as a party to the proceedings – in order to avoid multiplicity of the same claims (*Lithgow and others*, but see *Philis*).
Impossibility for a member of parliament to require continuation of criminal proceedings against him, which had been suspended due to his parliamentary immunity (*Kart v. Turkey*).

Restrictions on access to a Court: examples of non-violation
The question of appropriateness of pecuniary or non-pecuniary damages awarded by the domestic courts will not raise issues under Article 6 where the domestic courts did not deal with the matter in an arbitrary or wholly unreasonable manner (*Živulinskas,* dec.).

Procedural obstacles: time-limits, court fees, jurisdiction and other formalities

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

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

It is not clear whether a right exists, as such, to be informed in a court decision of the applicable time-limits for an appeal; but such a right may exist where there exist two concurrent time-limits under the domestic law – such as one in regard to the appeal itself, and the another in regard to the time allowed to substantiate that appeal (*Vacher v. France*, §§22-31),[9] or where the appeals court fails to inform an applicant of a time-limit to

9. See also below, page 85, **Adequate time and facilities to prepare a defence**.

find a new lawyer, when the former legal-aid lawyer had refused to represent the applicant on appeal (*Kulikowski v. Poland*, §§60-71).

A detained criminal defendant may furthermore be required to show considerable diligence in finding out the reasons of the court decision one intends to appeal against; there is no right, as such, to be furnished with a written decision (*Jodko*, dec.).[10] However, where domestic law clearly establishes a duty for the competent authorities to serve a court decision, leave to appeal cannot be denied to an applicant if delays are caused by the authorities in the exercise of the duty of service, even if it was theoretically possible for the applicant to learn about the lower decision from other sources (*Davran v. Turkey*, §§31-47).

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

Continuation of civil proceedings may be conditioned by the claimant's fulfilling certain procedural requirements, such as personal presence. However, refusal of the court of appeal to

10. See also below, page 57, **Public nature of decision**.

Disproportionate restrictions on access to a court
Requirement to pay a significant amount of money as a court fee, constituting a proportion of the civil claim for damages against the defendant, a state authority (*Kreuz*, but see *Schneider v. France*, dec.).
Inability to have a time-limit for an appeal extended, or an appeal supplemented, where a written version of the impugned decision with the reasoning part was obtained more than one month after the pronouncement of the operative part, that is following the expiry of the time-limit of five days allotted by the law for appeal (*Hadjianastassiou*, but see also *Jodko* below).
Cassation appeal submitted in time but disallowed on the ground that the applicant had failed to substantiate it within a required time-limit, given the lack of knowledge by the applicant of the existence of two concurrent time-limits for lodging the cassation appeal on the one hand, and submitting reasons therefor on the other (*Vacher*).
Failure of appeal court to inform unrepresented defendant about a new time-limit for finding a lawyer in order to lodge an appeal (*Kulikowski*).
Action by an environmental NGO contesting urban planning permission disallowed on the ground that it the action did not describe the facts of the case, whereas the court was well aware of the facts from previous proceedings (*L'Erablière A.S.B.L. v. Belgium*).
Action disallowed as it was "impossible to grasp its meaning and scope" – violation found in view of lack of inquiry by the court *proprio motu* into vaguely formulated complaint (*Dattel (No. 2) v. Luxembourg*).

Disproportionate restrictions on access to a court
Inability of a civil defendant to appeal without paying a very significant sum awarded to the claimant at first instance, the first instance judgment being immediately executable (*Chatellier*).
Requirement for a civil complainant in criminal proceedings – discontinued under statute of limitations – to initiate a new case before civil courts (*Atanasova v. Bulgaria*).
Refusal of court to accept collective action in electronic format; if printed the materials would have amounted to 42 million pages (*Lawyer Partners, a.s. v. Slovakia*).
Refusal, for no apparent reason, to accept for examination on appeal the submissions by one party (*Dunayev v. Russia*).

consider an appeal where the plaintiff was absent for one day due to an illness, whereas his lawyer was present, was considered to be a "particularly rigid and heavy sanction" contrary to Article 6 §1 (*Kari-Pekka Pietiläinen v. Finland*, §§29-35).

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

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

Restrictions on access to a court found not disproportionate
Imposition by law, in principle, of various formal restrictions to bring action or appeal for the purpose of good administration of justice, such as the need to lodge an appeal with the proper court (*MPP "Golub" v. Ukraine*) and various time-limits for appeals (*Stubbings and others v. the United Kingdom*).
Time-limit for appeal missed owing to lack of diligence by the applicant in trying to obtain written version of impugned court decision (*Jodko,* dec.).
Significant amount of stamp duty representing 5% of the amount claimed in pecuniary damages in defamation proceedings, there being no stamp duty in relation to the amount of the non-pecuniary reward claimed by the applicant (*Jankauskas*, dec.).
Amount of court fee linked to a claim for pecuniary damage, even if it was likely that the claimant would receive much less than claimed due to the insolvency of the debtor (*Urbanek v. Austria*).
Fines for excessive speeding required to be deposited by applicant in advance in order to allow them to be contested in court – in view of the frequency of appeals against speeding and the need to prevent overloading of police courts (*Schneider,* dec., but see also *Kreuz*).

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

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

Practical obstacles: lack of legal aid

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

- the domestic procedure compels an applicant to be represented by a lawyer before a certain (higher) stage of jurisdiction, such as a court of cassation; or
- by reason of the complexity of the procedure or the case.

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

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

Disproportionate restrictions on granting legal aid
Substantial delay in allowing a prisoner access to legal advice with a view to instituting proceedings for personal injury (*Campbell and Fell*).
Refusal of legal aid to impecunious applicant in divorce proceedings, where personal representation was impracticable (*Airey*, but see also *Webb* and *Granger* below).
Practical obstacles facing applicant in suing lawyer after a number of legal aid lawyers withdrew from the case, being unwilling to participate in the suit against their colleague (*Bertuzzi v. France*).
Legal aid refused by a court without a preliminary hearing, the refusal not being subject to appeal (*Bakan v. Turkey*).

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

Restrictions on granting legal aid found not disproportionate
Refusal of legal aid in civil case on the ground of lack of prospect of success or the frivolous or vexatious nature of the claim (*Webb*, dec.).
Statutory exclusion of certain types of civil dispute from the legal aid scheme (*Granger*).
Imposition of small fines to discourage vexatious litigants from filing frivolous demands for rectification in the judgments (*Toyaksi and others v. Turkey*).

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

Immunity of defendant in civil case

The position as to immunities enjoyed by certain domestic or foreign authorities from civil actions is rather unclear, since in some similar cases brought against the United Kingdom, for instance, the Court has found a violation of Article 6 (*Osman*); in others it has found no violation (*Z and others v. the United Kingdom*); while in still others it has found Article 6 inapplicable altogether (*Roche*).[11]

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

Disproportionate application of immunity
Immunity enjoyed by police in regard to an action in tort of negligence in regard to the investigative function, in view of the alleged failure to protect the life and health of a family harassed by mentally deranged person (*Osman*, but see also *Z and others v. the United Kingdom*).
Member of parliament benefiting from immunity in connection with statements lacking any substantial connection with parliamentary activities (*Cordova v. Italy*, but see also *A v. the United Kingdom*).
Civil claim against member of parliament in connection with his public statement, disallowed by a court on the ground of the defendant's immunity, despite the fact that the statement was made outside the context of parliamentary debate (*C.G.I.L. and Cofferati*).
Immunity enjoyed by a foreign embassy in view of an allegedly discriminatory dismissal, given the essentially private-law contractual relationships at stake (*Cudak v. Lithuania* [GC]; *Sabeh El Leil v. France*, but see also *Fogarty*).

11. See also above, page 11, **Dispute over a right based in domestic law**.

Where Article 6 is applicable, distinction must be made between functional immunity – namely immunity from a certain type of suit, such as that accorded to the police in regard to the investigative function (*Osman*), and a more general structural immunity from legal liability, such as that enjoyed by a foreign embassy (*Fogarty*) or another state (*Al-Adsani*, §§52-67); the immunity must by preference be functional rather than structural: the nature of the dispute rather than the legal status of the parties must determine whether the immunity is justified (*Fogarty*, §§32-39).

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

In assessing such proportionality, a margin of appreciation is accorded to the respondent state (*Fogarty*, §§32-39). Despite this margin, the Court is more and more eager to review various decisions of national authorities – including parliaments – on whether or nor immunity is justified (see *C.G.I.L. and Cofferati v. Italy*, §§63-80, where the Court disagreed with the Italian Chamber of Deputies as to whether or not a statement by one of its members was made in the exercise of his functions as MP).

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

Application of immunity found not disproportionate
Immunity enjoyed by local authority from action in negligence with respect to its failure to take positive action to remove certain children from the care of abusive parents (*Z and others v. the United Kingdom*, but see also *Osman*).
Immunity attaching to statements made during parliamentary debates in legislative chambers, designed to protect the interests of Parliament as a whole, as opposed to those of individual parliamentarians (*A v. the United Kingdom*, 2002, but see also *Cordova* and *C.G.I.L. and Cofferati*).
Immunity enjoyed by foreign embassy in context of allegedly discriminatory recruitment practices, given the essentially public-law relationships at stake (*Fogarty*, but see also *Cudak* and *Sabeh El Leil*).
Immunity of foreign state from action for damages for alleged torture occurring in that foreign country, in view *inter alia* of certain practical considerations, such as the impossibility of eventually obtaining execution of any possible decision (*Al-Adsani*).
Inability to sue a judge for decisions taken by him in the capacity of court in another set of legal proceedings (*Schreiber and Boetsch*; *Esposito v. Italy*, dec.; see also above, page 13).

The proportionality test of immunity involves the balancing of the existence of competing public-interest considerations in order to prevent blanket immunities, in which respect the nature of the dispute, the analysis of what is at stake for the

claimant, and the gravity of the alleged act or omission by the defendant must be taken into account (*Osman*, §151).

At the end of the day, even a functional immunity can violate Article 6 if it is too widely construed by the domestic authorities (*Osman*), while even a structural immunity can still be compatible with Article 6 if, among other reasons, there would be no practical result in allowing such an action (*Al-Adsani*).

Finality of court decisions – res judicata

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

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

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

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

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

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

The *res judicata* principle does not in itself require the domestic courts to follow precedents in similar cases; achieving consistency of the law may take time, and periods of conflicting case-law may therefore be tolerated without undermining legal

certainty. This means that two courts, each with its own area of jurisdiction, may decide similar (on facts and law) cases by arriving at divergent but nevertheless rational and reasoned conclusions (*Nejdet Şahin and Perihan Şahin*, §§61-96).

Timely enforcement of a final court decision

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

The state cannot cite a lack of funds as an excuse for not honouring a debt incurred as a result of a judgment ordered against a state authority (*Burdov v. Russia*, §§34-38). However, the lack of funds may justify failure to enforce a final judgment against a private individual or a company (*Bobrova v. Russia*, §§16-17). In such "horizontal" disputes (where the opposing parties are private), the role of the authorities is to reasonably assist successful claimants in enforcing the judgment in their favour, but not to guarantee its enforcement in all circumstances (*Fuklev v. Ukraine*, §§84-86).

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

Violation of the right to enforcement
Lack of payment of compensation awarded by the domestic courts against the social security authorities, despite the execution order obtained by the applicant some six years later (*Burdov*).
Refusal by authorities to execute court judgments ordering shutdown of thermal power plants (*Okyay and others v. Turkey*).
Delay of seven years on the part of the authorities in complying with planning decision favourable to applicants (*Kyrtatos v. Greece*).
Failure to implement, after more than eight years, court judgment obliging the authorities to award a plot of land in compensation under the special domestic legislation on restitution of property rights (*Jasiūnienė*, but see *Užkurėlienė*).
Failure to release the applicant from detention upon acquittal (*Assanidze v. Georgia*).

The criteria for assessing the appropriateness of a delay in execution of a court decision are not equivalent to the more stringent requirements of a "reasonable time"; the latter test applies only in regard to the court proceedings determining the dispute itself,[12] although some elements, such as the complexity of the

12. See also page 73, **Trial within a reasonable time**.

case and the behaviour of the parties, are relevant under both tests (*Užkurėlienė and others v. Lithuania*, §§31-37).

Since the enforcement of a court decision to award a plot of land involves more than a one-off act such as a payment of money (as in *Burdov*), substantively longer delays in execution may be acceptable under Article 6 in the former cases (*Užkurėlienė*).

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

No violation of right to enforcement
Delay of four years in enforcing court decision in land restitution proceedings, in view of the complexity of the steps needed to be taken and the somewhat ambivalent attitude of the applicants in the process (*Užkurėlienė*; see also *Jasiūnienė*).
Failure by the state to pay the amounts ordered in the applicant's favour by the domestic courts against bankrupt private defendant (*Shestakov,* dec.).

Independent and impartial tribunal established by law

Summary

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

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

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

Requirements of "impartiality", "independence" and "establishment by law" are applicable only to judicial bodies.

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

Tribunal "established by law"

This provision deals, in principle, with the question whether a certain disciplinary or administrative body determining a dispute has the characteristics of a "tribunal" or "court" within the autonomous meaning of Article 6, even if it is not termed a "tribunal" or "court" in the domestic system (*H. v. Belgium*, §§50-55). This is the only provision of Article 6 which explicitly refers back to domestic law, warranting a certain degree of inquiry into "lawfulness" from the Court. At the same time, there is a strong presumption that domestic courts know the rules of jurisdiction better, and if the matter of jurisdiction is properly discussed at the domestic level the Court would tend to agree with the domestic courts in a decision on competence to hear the case (*Khodorkovskiy (No. 2) v. Russia*, dec.).[13]

The point of departure is the function of the body to determine matters in its competence on the basis of the rule of law (*Belilos*

13. See also above, page 23, **Standing to bring proceedings, claim damages and obtain a court decision**; and page 26, **Procedural obstacles: time-limits, court fees, jurisdiction and other formalities**.

Bodies found not to be "a tribunal established by law"
Lay judges elected to sit in a particular case without the statutory requirement of drawing of lots and past the applicable time-limits (*Posokhov v. Russia*, but see *Daktaras*, dec., for a more usual interpretation of this heading).
Pending case assigned by president of a court to himself, and decided on the same day, on unclear grounds and by way of procedure lacking transparency (*DMD Group, a.s.*).
Where the law on lay judges was abrogated, and no new law adopted, during which time the lay judges continued to decide cases in accordance with established tradition (*Pandjikidze and others*).

v. Switzerland, §§62-73), the latter denoting primarily the absence of unfettered discretion of the executive (*Lavents v. Latvia*, §§114-121).

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

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

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

Bodies found to be "a tribunal established by law"
Various professional disciplinary bodies, such as the Council of the Bar, despite their overlapping self-regulatory, administrative, advisory, disciplinary and adjudicative functions (*H. v. Belgium*).
Military and prison disciplinary bodies (*Engel*).
Administrative bodies dealing with questions pertaining to land sale (*Ringeisen)* and land reform (*Ettl*).
Arbitration bodies dealing with compensation for nationalisation and compulsory purchase of shares (*Lithgow and others*).
A labour court in regard to which a minister was competent, by way of delegated legislation, to make provision as to where it should be established and what its territorial jurisdiction should be (*Zand,* dec.);
Particular criminal court, despite the contested territorial jurisdiction in the circumstances of the specific case (*Daktaras*, dec.; but see also *Posokhov* as a rather exceptional example).
German court trying a person for the acts of genocide committed in Bosnia (*Jorgic v. Germany*).
Special court established for trying corruption and organised crime (*Fruni v. Slovakia*).

The jurisdiction of the tribunal should be defined by statute; it is not necessary, however, that every detail of judicial organisation should be regulated by primary legislation (*Zand v. Aus-*

tria, dec.). At the same time, it is unacceptable if the position and the role of a judge is regulated only by custom (*Pandjikidze and others v. Georgia*, §§103-111).

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

Only in some very exceptional cases does the Court undertake to examine the notion of a "tribunal established by law" as including domestic lawfulness of the composition of the bench; the standard of proof in this respect is very stringent, and a total absence of domestic statutory basis – rather than a mere doubt or insufficiency of competence by a particular body or its member – must be shown by the applicant (*Lavents*).

"Independent" tribunal

The notion of independence of the tribunal somewhat overlaps with the first element ("tribunal established by law") as it entails the existence of procedural safeguards to separate the judiciary from other powers, especially the executive (*Clarke v. the United Kingdom*, dec.). Independence is also often analysed in conjunction with "objective impartiality", no clear distinction being made between these two aspects (*Moiseyev v. Russia*, §§175-185).[14]

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

The mere chance of the executive being able to change a decision of the body or suspend its enforcement deprives the body of the characteristics of an "independent" tribunal (*Van de Hurk v. the Netherlands*, §§45-55).

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

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

14. See also page 39, **"Impartial" tribunal**.

Bodies found not to be an "independent" tribunal
Courts martial with jurisdiction over civilians (*Incal*).
Single police officer sitting as a tribunal, in view of the theoretical subordination of the officer – merely as a matter of appearance – to the superiors of the police force who brought proceedings against the applicant (*Belilos*, even though the question of appearance is usually considered under the objective "impartiality" test; see below, page 39).
Two lay assessors sitting on a tribunal revising a lease, who had been appointed by associations having an interest in the continuation of the existing terms of that lease (*Langborger v. Sweden*; see also the "impartiality" test, below, page 39).
Mixed court involving lay judges (judicial assistants) with no sufficient guarantees as to their independence, such as the protection against premature termination of duties or restrictions from deciding cases involving parties on whose behalf they had been appointed (*Luka v. Romania*).
Military tribunal where judges were appointed by the defendant (the Ministry of Defence), and were dependent financially on it, in view in particular of the ministry's role in distributing housing among officers (*Miroshnik v. Ukraine*).
Special commission, combining investigative and adjudicative functions, conducting disciplinary proceedings against a financial company (*Dubus S.A. v. France*).
Assessors in Polish courts who could be removed from office by decision of the Ministry of Justice, given no adequate guarantees protecting the assessors against the arbitrary exercise of that power by the minister (*Henryk Urban and Ryszard Urban*).

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

A system allowing a mixed court involving professional judges and lay judges (judicial assistants) will be compatible with the independence requirement only as long as sufficient guarantees as to the lay judges' independence are afforded, including protection against premature termination of duties or restrictions from deciding cases involving parties who may have played a role in the lay judges' appointment (*Luka v. Romania*, §§55-61).

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

The procedure of appointing judges to sit on the bench in a particular case may also cast a doubt on their independence. In *Moiseyev* (§§175-185) the Court found a breach of the "independence" and "impartiality" requirements because the composition of the court was modified (by decision of the court president) eleven times, while only on two occasions reasons

for such modification were given. In *DMD Group, a.s.* (§§62-72) a very similar situation was analysed under the heading of "tribunal established by law".

Bodies found to be an "independent" tribunal
Industrial tribunal, the implementation of whose decision was subject to executive discretion (*Van de Hurk*).
Prison disciplinary body whose members were appointed by minister, but not subject to any instructions as to their adjudicatory role (*Campbell and Fell*).
Compensation tribunal, two members of which were appointed by minister – himself respondent in the impugned proceedings – where the parties were consulted prior to and made no disagreement as to the appointment (*Lithgow and others*).
Specialised land tribunal involving civil servants under statutory obligation to act independently (*Ringeisen*).
Military tribunal with jurisdiction over the parties who are members of the military (*Incal v. Turkey*; but compare with *Miroshnik v. Ukraine*).
Mixed court martial involving a civil judge, the accused being entitled to object to certain appointments to the body (*Cooper v. the United Kingdom*).

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

Where the independence and impartiality of a court president are questioned there would be no breach of Article 6 §1 if the president did not participate personally in the examination of the case and did not give specific instructions on application of the law to other judges, even if he oversaw the implementation of strict rules of distribution of cases and assigning of rapporteurs and also played an important role in the performance assessment and disciplinary process.[15]

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

"Impartial" tribunal

While the notion of the "independence" of the tribunal involves a structural examination of statutory and institutional safeguards against interference in the judicial matters by other branches of power, "impartiality" entails inquiry into the court's independence *vis-à-vis* the parties of a particular case (*Piersack*). The presence of even one biased judge on the bench

15. *Parlov-Tkalčić v. Croatia*, §§81-97, although this case was examined under the head of "impartiality", in a similar way to *Daktaras* and other comparable cases mentioned below, page 39 *ff.*

may lead to a violation of the impartiality requirement, even if there are no reasons to doubt the impartiality of other (or a majority of other) judges (*Sander v. the United Kingdom*, §§18-35).

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

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

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

Tribunals found to be lacking in impartiality (objective test)
Judge sitting in criminal case who had formerly been head of the section of the prosecution department responsible for the prosecution of the accused (*Piersack*).
Judge hearing the merits of a criminal case who had previously acted as investigating judge in the case (*De Cubber*).
Trial judge who had previously taken orders extending detention on remand by reference to the strength of evidence against the applicant (*Hauschildt*); but impartiality is not called into question on the mere ground of having previously extended detention itself (*Perote Pellon v. Spain*).
Judges acting both as accusers and adjudicators in a summary offence of contempt of court (*Kyprianou*).
Interference by a superior judge who appointed the chamber at cassation level, submitted a *sui generis* appeal in the case but did not sit himself (*Daktaras*).
Lack of sufficient guarantees to protect a lower court from pressure to adopt a certain decision by the higher courts (*Salov*).
Court adjudicating on a law whose members had previously participated in drafting the law and had ruled on it in an advisory capacity (*Procola*, but see *Kleyn*).
Judge who at a higher level had previously acted as legal counsel for applicants' opponents in lower set of same proceedings (*Mežnarić v. Croatia*).
Judge previously involved in settling applicant's husband's financial problems with a bank examining claim against same bank (*Sigurdsson*, but see *Pullar,* dec.).

Tribunals found to be lacking in impartiality (objective test)
A few jurors in defamation trial who were members of the political party which had been the principal target of the allegedly defamatory material (*Holm*, but see *Salaman,* dec.).
A jury where certain members had previously made racist jokes concerning the applicant, despite the fact that those damaging statements were subsequently rebutted as improper by an individual juror who had made them and by the jury itself (*Sander*).
Prosecutor speaking to jurors informally during a trial break, the presiding judge failing to inquire from the jurors on the nature of the remarks exchanged and the possible influence they might have had on the jurors' opinions (*Farhi*).
Close family ties (uncle-nephew) between a judge and lawyer of the opposite party (*Micallef v. Malta*).
Two members of a trial court who had earlier set or varied remand – including detention – referring to justification which had not been based on the prosecutor's request for detention and which had implied admission of sufficiency of evidence against the applicant (*Cardona Serrat v. Spain*).
Extremely virulent press campaign surrounding trail of two minor co-accused, coupled with the lack of effective participation by the defendants (*T. and V. v. the United Kingdom,* §§83-89; see also the effective participation requirement, page 54 below).

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

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

Nonetheless, a sufficiently strong causal link must be shown between a feature alleged to call into question the objective impartiality of the tribunal on the one hand, and, on the other, the facts to be assessed (*Kleyn v. the Netherlands*, §§190-202) or the persons (*Sigurdsson*) involved in the particular case. As a

result, the mere affiliation by the member of the tribunal to a certain social group or association – such as belonging to the same political party or religious confession as one of the parties in the case – is not sufficient to sustain the legitimacy of the doubt under the objective test; a sufficient degree of individualisation/causal link of the alleged bias of the tribunal is necessary even under the objective test (compare, for instance, the different conclusions in similar circumstances in *Holm* and *Salaman v. the United Kingdom,* dec.; *Sigurdsson* and *Pullar v. the United Kingdom*, dec.; see the boxed examples).

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

Tribunals found not to be lacking in impartiality
where the same judge examined the case at first instance in view of the referral back from the appeal court (*Stow and Gai v. Portugal*);
where members of the court adjudicating on a law had previously advised on the bill leading to its adoption, but not on the aspects of the bill that had a reasonable link to the subsequent dispute (*Kleyn*);
participation in a medical disciplinary tribunal of medical practitioners who were members of a professional body which the defendants objected to joining (*Le Compte, Van Leven and De Meyere*);
where a court had previously dealt in succession with similar or related cases and may have established a certain practice in that respect (*Gillow*);
where a judge belonging to the Freemasons was called upon to examine the validity of a will drawn up by a Freemason in favour of another member of the lodge, and not the applicant (*Salaman*, dec.; but see *Holm*);
where one of the jurors had previously been employed by the leading prosecution witness in a criminal trial – lack of a sufficient causal link, given in particular that the juror had been dismissed from that job (*Pullar*, dec., but see *Sigurdsson*);
where a judge gave the jurors full and unequivocal directions to ignore the adverse publicity about the applicant (*Mustafa Kamal Mustafa (Abu Hamza) (No. 1)*, dec.);
where one of the lay judges, whose impartiality was at issue, sat on the bench for a short period of time and was soon removed from the proceedings, which resulted in a decision taken without that lay judge (*Procedo Capital Corporation v. Norway*);
where a judicial assistant to a chief judge had earlier worked as a consultant for one of the parties, given a lack of evidence that the assistant had any relation to that particular case (*Bellizzi*).

While it has been stated, in principle, that an extremely virulent press campaign surrounding a criminal trial may adversely affect fairness of proceedings and impartiality of the jury (*Hauschildt v. Denmark,* §§45-53), and to a lesser extent the impartiality of the professional courts (*Butkevičius v. Lithuania,*

dec.), a test as to what kind of positive obligation arises for the courts or other authorities in this respect has not yet been elaborated.[16] Where a presiding judge instructs the jury to ignore the media coverage of the events and the image of the accused's personality concocted by the press – whilst also issuing repeated warnings to the media to respect fairness and the presumption of innocence – no problem under Article 6 arises (*Mustafa Kamal Mustafa (Abu Hamza) (No. 1) v. the United Kingdom*, dec., §§36-40).

Unequivocal declaration of guilt made by a judge before conviction serves as evidence of a violation of Article 6 §1 under the heading of subjective impartiality and also a violation of the presumption of innocence under Article 6 §2 (*Lavents*; *Kyprianou*.[17] In most cases, however, a violation of Article 6 §2 resulting from a statement of a judge would take precedence as *lex specialis* and make an examination under Article 6 §1 unnecessary, unless the statement in question did not amount to an unequivocal declaration of guilt; in which case the examination of impartiality would be more relevant (*Kyprianou*).

Suspicion expressed in a judicial statement, the wording of which is not strong enough to amount to a violation of the presumption of innocence under Article 6 §2, may still be sufficient to disqualify the judge as biased from the objective standpoint under Article 6 §1 (*Hauschildt*) or even from the subjective standpoint where the statement is directed at some personal characteristics of the defendant and goes beyond the usual procedural requirements (*Kyprianou*).[18]

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

16. See also, on the impact of excessive publicity, the *T. and V. v. the United Kingdom* case (§§83-89); and page 54, **Effective participation**, below.
17. See also below, page 78, **Article 6 §2: presumption of innocence**.
18. See also below, page 78, **Article 6 §2: presumption of innocence**.

"Fair" trial

Summary

The main difference of the requirement of "fairness" from all the other elements of Article 6 is that it covers proceedings as a whole, and the question whether a person has had a "fair" trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (*Monnell and Morris v. the United Kingdom,* §§55-70); but see also above, p. 9).

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

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

In accordance with the principle of subsidiarity, Article 6 does not allow the European Court of Human Rights to act as a court of fourth instance – namely to re-establish the facts of the case or to re-examine the alleged breaches of national law (*Bernard*, §§37-41), nor to rule on admissibility of evidence (*Schenk*, §§45-49).

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

In refining its construction of a qualified right under Article 6, the Court applies a *sui generis* proportionality test, also known as the *essence of the right* test – for instance, when a different degree of protection of privilege against self-incrimination is established with regard to minor criminal offences (misdemeanours, or so-called "administrative offences" in some European legal systems) in contrast to the rules that apply in the investigation of more serious crime (*O'Halloran and Francis*, §§43-63); or when a lower degree of protection of equality of

arms was confirmed in civil cases compared to criminal ones (*Foucher,* §§29-38; to be contrasted with *Menet*, §§43-53).

"Fairness" within the meaning of Article 6 essentially depends on whether applicants are afforded sufficient opportunities to state their case and contest the evidence that they consider false; and not with whether the domestic courts reached a right or wrong decision (*Karalevičius*, dec.).

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

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

"Fairness" furthermore includes additional implied requirements in criminal matters:

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

The "adversarial" principle

The requirement of "adversarial" proceedings under Article 6 entails having an opportunity to know and comment at trial on the observations filed or evidence adduced by the other party. "Adversarial" essentially means that the relevant material or evidence is made available to both parties (*Ruiz-Mateos v. Spain*). This rather narrow understanding by the Court of "adversarial" (*adversaire*) proceedings derives from the French legal system, and does not require creation of fully adversarial systems (or, in criminal sphere, accusatorial systems) of presenting proof and handling evidence, similar to those existing in common-law countries. While the Court has many times affirmed the ability of adversarial and inquisitorial legal systems to co-exist in compliance with various Article 6 standards, some specifics of inquisitorial systems – for instance, in relation to the limited ability of parties to summon witnesses at trial – have nonetheless given rise to breaches of the principle of "fairness" (*Vidal,* §§32-35).[19]

While it is for the national law to lay down the rules on admissibility of evidence and it is for the national courts to assess evidence, the nature of the evidence admitted and the way in which it is handled by the domestic courts are relevant under Article 6 (*Schenk*).[20]

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

19. See also below, page 48, **Equality of arms**; and page 94, **Right to examine witnesses**.
20. See also below, page 70, **Right to a reasoned decision and reliable evidence**.

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

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

The use of confidential material may be unavoidable, for instance, where national security or anti-terrorism measures are at stake (*Khan,* §§34-40). However, whether or not to disclose materials to the defence cannot be decided by the prosecution alone. To comply with Article 6, the question of non-disclosure must be: a) put before the domestic courts at every level of jurisdiction, b) approved by the domestic courts by way of the balancing exercise between the public interest and the interest of the defence – and only where strictly necessary (*Rowe and Davis*).

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

Violations of the "adversarial" requirement
Denial of request to make submissions in "civil" proceedings that applied to the review of the case before the constitutional court (*Ruiz-Mateos*).
Lack of access by the applicants to social reports held to be "vital" in the context of child-care proceedings and examined by the courts (*McMichael*).
Trial judge denied opportunity to examine confidential evidence in order to approve its non-disclosure, despite the fact that this could be remedied on appeal (*Dowsett v. the United Kingdom*).
Failure of appeal judges to examine confidential evidence to rule on its non-disclosure (*Rowe and Davis*).
Destruction before the trial of originals of allegedly fraudulent cheques – certified copies of which served as a "crucial piece of evidence" against the applicant (*Georgios Papageorgiou*).
Failure of trial judge to order at least partial disclosure of the materials which might have cast doubt on the lawfulness of the wiretapping used against the applicant (*Mirilashvili v. Russia*; see also below, page 48).
Significant part of case-file classified "top secret" by a prosecutor, the defence being unable to review it otherwise than in the registry and without a possibility of making copies or notes (*Matyjek v. Poland;* see also below, page 48).

The "adversarial" requirement within the meaning of Article 6 thus usually entails an analysis of the quality of the domestic procedure – such as the ability for the defence to put arguments against non-disclosure before the courts at both first and

appeal instances (*Rowe and Davis*) and the domestic courts' obligation to carry out a balancing exercise – but not an examination of the appropriateness of the domestic courts' decision on non-disclosure, since the Court itself is not in a position to decide on strict necessity without having sight of the secret material in question (*Fitt*).

At the same time, the strict necessity test of non-disclosure – coupled with the established restrictions on the use of other forms of secret evidence such as anonymous witnesses (*Doorson v. the Netherlands,* §§66-83) – suggests that any non-disclosure will only be compatible with the "adversarial" requirement so long as that piece of evidence is not used to a decisive extent to found the conviction (*Doorson*), or is not a crucial piece of evidence in the case (*Georgios Papageorgiou v. Greece,* §§35-40).[21]

Where full disclosure of the material used against the defendant is impossible (for example, where it runs counter a serious public interest such as in the context of fight against terrorism), the rights of the defence may be counterbalanced by the appointment of a special advocate, enabled to represent the defendant without, however, communicating him the "secret" elements of the material the prosecution wants to withhold. At least some core information about the incriminating material should be made available both to the advocate and the accused.[22]

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

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

"Adversarial" requirement not violated
Non-disclosure of evidence scrutinised by the trial and appeal judges and forming no part of the prosecution case (*Fitt*).
Partial disclosure of secret materials to special advocate in terrorism-related proceedings, where the open material available to the defence was sufficiently detailed to permit the applicants to defend themselves effectively (*A. and others v. the United Kingdom* [GC].[22]

21. See, however, *Al-Khawaja and Tahery v. the United Kingdom*, §§120-165; and page 94, **Right to examine witnesses**.

22. See, in the context of the "adversarial" requirement as part of implied provisions of the right to speedy review of detention under Article 5 §4 of the Convention, *A. and others v. the United Kingdom* [GC], §§212-224; *Kurup v. Denmark* , dec.; and below, page 88, **Legal representation or defence in person**, for other justified restrictions on communication between a client and his lawyer.

Equality of arms

"Equality of arms" requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage *vis-à-vis* another party (*Brandstetter*).

While "equality of arms" essentially denotes equal procedural ability to state the case, it usually overlaps with the "adversarial" requirement – the latter in accordance with the rather narrow understanding of the Court concerning the access to and knowledge of evidence[23] – and it is not clear on the basis of the Court's consistent case-law whether these principles in fact have independent existence from each other (but see *Yvon v. France,* §§29-40). It can safely be said that issues with non-disclosure of evidence to the defence[24] may be analysed both from the standpoint of the requirement of adversarial character of the proceedings (ability to know and test the evidence before the judge) and the "equality of arms" guarantee (ability to know and test evidence on equal conditions with the other party).

In some civil cases it would not appear inappropriate to also look at the question of the ability to access and contest evidence as part of the general requirement of "access to a court" (*McGinley and Egan v. the United Kingdom*).[25] In *Varnima Corporation International S.A. v. Greece* (§§28-35), for instance, the domestic courts applied two different limitation periods to the respective claims of each party (the applicant company and the state), disallowing the applicant's claim while admitting the one filed by the authorities).

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

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

The opposing party must not be given additional privileges to promote its view, such as the right to be present before a court while the other party is absent (*Borgers v. Belgium,* §§24-29).

The presence of a prosecutor in civil proceedings opposing two private parties can be justified if the dispute affects also the public interest or if one of the parties belongs to a vulnerable group in need of special protection (*Batsanina v. Russia*, §§20-28).

23. See above, page 45, **The "adversarial" principle**.
24. See above, p. 46.
25. See also above, page 23, **Access to a court**.

Violations of "equality of arms"
State representative allowed to make submissions to a court of cassation in the absence of the defence (*Borgers*).
Unequal application of time-limits for different parties to submit supplementary pleadings to a cassation court (*Wynen v. Belgium*).
Denial of access to certain evidence relied upon by the opposing party in a civil case, coupled with a procedural privilege given to that party to be an expert in the case (*Yvon*, overlap with the "adversarial" requirement – see also above, page 45).
More substantive procedural role enjoyed by a court-appointed expert (a police officer lacking neutrality with regard to the accused) in comparison with the expert on behalf of the defence, the latter not being allowed to attend the whole hearing (*Boenisch*; but see also *Brandstetter* and page 94 below).
Sudden and complete change of evidence given by court-appointed expert in the course of the same hearing which had a decisive impact on the jury's opinion, in view of the refusal of the trial court to appoint an alternative expert (*G.B. v. France*; but see *Boenisch, Brandstetter* for the more usual approach).
Conflict of interest between medical experts and defendant in civil case, the medical institution being suspected of malpractice (*Sara Lind Eggertsdóttir*).
False denial by one party of the existence of documents that would have assisted another party (*McGinley and Egan* – overlap with the "adversarial" requirement – see also above, page 45);

Violations of "equality of arms"
Denial of access to the case-file at the pre-trial stage of criminal proceedings on the ground that the applicant had chosen to represent himself, the domestic law requiring a lawyer for the exercise of that (*Foucher*, but see *Menet*; see also pages 85 and 88).
Practical obstacles, the applicant's lawyer having been made to wait in the lobby in the late hours before being allowed to plead early in the morning (*Makhfi v. France*; see also page 85).
Law passed subsequent to the dispute in order to influence the outcome of the proceedings (*Stran Greek Refineries and Stratis Andreadis*).
Refusal by court to hear applicant's witnesses while hearing witnesses proposed by opposing party and admitting their evidence on the topic which had earlier been defined by the court as "clear" (*Perić v. Croatia*).
Admission as evidence by a court of written reports of the questioning of several witnesses obtained by the prosecution pre-trial, but refusal to admit written statements of witnesses obtained by the defence, followed by the court's refusal to summon the defence witnesses in open court – violation found in combination with Article 6 §3d (*Mirilashvili*).

The requirement of "equality of arms" enjoys a significant autonomy but is not fully autonomous from the domestic law since Article 6 takes into account the inherent differences of accusatorial systems – for instance, to the extent that it is for the parties to decide in that system which evidence to present or witnesses to call at trial – and inquisitorial systems, where

the court decides what type and how much of the evidence is to be presented at trial. An applicant in an inquisitorial system, for instance, cannot rely on the principle of the "equality of arms" or Article 6 §3d in order to call any witness of his choosing to testify at trial (*Vidal*).[26]

The case-law on the question of experts is rather complicated, because on the one hand they appear to be treated as any other witness (*Mirilashvili*); on the other, certain additional requirements of neutrality may be levelled at the experts who play a "more substantive procedural role" than a mere witness (*Boenisch v. Austria*, §§28-35; *Brandstetter,* §§41-69).[26]

It may be stated that there is no unqualified right, as such, to appoint an expert of one's choosing to testify at trial, or the right to appoint a further or alternative expert. Moreover, the Court has traditionally considered that there is no right to demand the neutrality of a court-appointed expert as long as that expert does not enjoy any procedural privileges which are significantly disadvantageous to the applicant (*Brandstetter*).[26]

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

26. See also below, page 94, **Right to examine witnesses**.

"Equality of arms" not violated
Prosecution at criminal trial supported by very senior prosecuting officer (*Daktaras*, dec.).
More substantive procedural role enjoyed by court-appointed expert who was deemed "neutral", despite being member of an institution that initiated a report into the applicant's business activities triggering prosecution against him (*Brandstetter*; but see *Boenisch*).
Denial of access to the case-file in a civil case on the ground that the applicant had chosen to represent himself (*Menet*, but see also *Foucher*; and pages 85 and 88).
Criminal defendant not served with written submissions in which a complainant merely reproduced the public prosecutor's arguments (*Verdú Verdú*).
Prosecutor's presence at an "information meeting" with the jurors where, in the presence of a court president and an advocate, he informed the jurors about the rules of procedure and their role (*Corcuff v. France*).
Prosecutor representing the state in civil proceedings involving private applicant and state-owned enterprise (*Batsanina*).
Submission by prosecutor of list of witnesses to be summoned by court, whereas defence on each occasion had to ask for court's leave to call witness (*Ashot Harutyunyan v. Armenia*).

There could be other exceptional circumstances – such as a sudden and complete change of evidence given by a court-appointed expert in the course of the same hearing – where a problem of fairness and defence rights may arise if the court does not consider calling a further expert to testify (*G.B. v. France*, §§56-70).

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

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

While the right to legal aid in civil matters cannot be derived, as such, from the requirements of "equality of arms" or "access to a court",[27] in some exceptional cases a violation of Article 6 §1 has been found where impecunious civil litigants were refused legal aid to answer a defamation case as defendants against a very wealthy claimant – a multinational corporation – backed by a team of lawyers (*Steel and Morris v. the United Kingdom*).

27. See above, page 23, **Access to a court**.

Personal presence and publicity

Summary

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

- right to an oral hearing and personal presence by a civil litigant or criminal defendant before the court (*Ekbatani*);
- right to effective participation (*T. and V. v. the United Kingdom,* §§83-89);
- right to publicity, or the right for the applicant to claim that third persons and media be allowed to attend the hearing (*Riepan*);
- right to publication of the court decision (*Pretto and others v. Italy,* §§20-28).

Oral hearings and physical presence

There is no significant distinction in the Convention case-law between situations involving merely a lawyer being present (*Kremzow v. Austria,* §§45-75, although those aspects may be relevant for the purpose of Article 6 §3b and c); and cases conducted by written procedure in the parties' total absence (*Axen v. Germany,* §§28-32). The onus of this right is in which situations does Article 6 guarantee a right for the applicant to be present personally. This presence presupposes an oral hearing

(as opposed to written proceedings); however, not every oral hearing must necessarily be public.[28]

Where the case is to be heard before one instance only, and where the issues are not "highly technical" or "purely legal", there must be an oral hearing, and written proceedings will not suffice (*Koottummel v. Austria*, §§18-21).

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

There is a fully autonomous requirement for a party to be present before at least one level of court jurisdiction (*Göç v. Turkey* [GC], §§43-52).

The presence requirement at first instance is close to absolute, even though it has been stated hypothetically that "exceptional circumstances" may justify dispensing with it (*Allan Jacobsson (No. 2) v. Sweden,* §§46-49). In minor misdemeanour cases (speeding or other road traffic offences), as long as there was no need to assess the credibility of witnesses, the Court has accepted that no oral hearing was required and the proceedings could be written (*Suhadolc v. Slovenia*, dec.).

Violations of the oral hearing or presence requirements
Applicant not present before a court – the single and final level of jurisdiction – reviewing validity of an executive decision concerning a building permit (*Allan Jacobsson (No. 2)*).
Absence of defendant in criminal case before appeal court dealing with both questions of fact and law (*Ekbatani*).
Defendant in criminal case not present in person during hearing of his appeal against sentence while appeal court examined prosecution request to impose a more severe sentence (*Kremzow*).
Absence at appeal level of parent seeking access to a child (*X v. Sweden*, 1959).
Absence at appeal level of person seeking disability benefits (*Salomonsson*).
Absence of disqualified doctor from first-instance hearing, not redeemed by applicant's presence at appeal level, since the latter instance involved no full re-examination of the validity of the first-instance decision (*Diennet*).
Insufficiently established waiver of right to be present by criminal defendant who had tried to defend himself in his mother tongue (non-official language of court), having been warned by the trial court of the possibility of losing the right to presence on the language ground (*Zana v. Turkey*).

28. See below, page 55, **Public nature of hearing – attendance by third parties and the media**.

Violations of the oral hearing or presence requirements
Acquittal by lower court in oral proceedings finding no *mens rea*, but subsequent conviction by higher court without oral hearing, involving examination of the applicant's intent and conduct going beyond facts established during trial (*Igual Coll*).

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

While Article 6 does not guarantee as such the right to appeal in civil or criminal matters, it applies to appeal proceedings through a non-autonomous rule – i.e. where the right to appeal is guaranteed under domestic law;[29] whether the applicant's presence before an appeals court is required depends on: a) the nature of the proceedings and the role of the appeals court (*Ekbatani,* §§24-33), and b) what is at stake for the applicant (*Kremzow*).

Presence before an appeal court will be required where it deals both with questions of fact and law and where it is fully empowered to quash or amend the lower decision (*Ekbatani*).

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

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

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

No violation of oral hearing or presence requirements
Defendant in criminal case not present in person (but represented by a lawyer) during appeal hearing of his plea of nullity (*Kremzow*).
Examination of appeal on points of law in civil case in the absence of the parties (*Axen*).

29. See above, page 23, **Access to a court**; and also Article 2 of Protocol No. 7.

No violation of oral hearing or presence requirements

Defendant in civil case absent, taking into consideration that he was not available at address given by the plaintiffs, and could not be traced, despite efforts by domestic authorities, *inter alia* by way of newspaper announcements and police enquiries (*Nunes Dias*, dec.).

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

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

Effective participation

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

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

A criminal defendant must feel sufficiently uninhibited by the atmosphere of the courtroom – especially when the case is surrounded by excessive public scrutiny – in order to be able to consult with his lawyers properly and participate effectively (*T. and V. v. the United Kingdom*).[30]

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

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

A person is required to bring the question of his physical or other deficiency to the attention of the trial court, and the

30. Concerning the impact of excessive publicity surrounding trial see also, above, page 39, **"Impartial" tribunal**.

appeals court where full appeal is concerned, to enable the court to choose the best means of ensuring effective participation (*Timergaliyev v. Russia,* §§50-60).

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

A defendant may participate in a hearing by video-conference, but it should be justified by compelling reasons (for example, security considerations). The system should also function properly and ensure confidentiality of communication between defendants and lawyers (*Marcello Viola v. Italy,* §§63-77; *Golubev v. Russia,* dec.).

Violations of effective participation requirement
11-year-old applicants tried for murder in ordinary criminal proceedings, situation aggravated by excessive publicity surrounding trial and applicants' post-traumatic stress disorder (*T. and V. v. the United Kingdom*).
11-year-old criminal defendant with mental incapacity having little understanding of nature of proceedings or what was at stake (*S.C. v. the United Kingdom*).
Applicant with hearing deficiency not provided with a hearing aid at appeal level, coupled with failure of his court-appointed lawyers to appear for appeal hearing (*Timergaliyev*; but see *Stanford*).

Effective participation requirement not violated
Applicant with hearing deficiency unable to hear some of the evidence given at trial due to poor acoustics in courtroom; but seated farther from witnesses in order to ensure confidential exchange of instructions with defence counsel (*Stanford*; but see *Timergaliyev*).
Applicant under the effect of antidepressant medication participating at trial, taking into account the ability to consult freely with lawyer (*Liebreich*, dec.).

Public nature of hearing – attendance by third parties and the media

The purposes of this rule are to protect civil litigants and criminal defendants from secret administration of justice and to ensure greater visibility of justice, maintaining the confidence of the society in the judiciary (*Axen*).

With the help of this provision, the press can exercise its function of public watchdog, which is also guaranteed by Article 10 of the Convention.

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

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

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

While prison disciplinary cases will in most cases justify holding a hearing *in camera*, cases concerning fresh criminal charges against prisoners will not (*Campbell and Fell*).

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

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

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

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

Publicity requirement not violated
Closed hearing of family case determining residence of children, in view of the need for the parties and witnesses to speak about highly personal issues (*P. and B. v. the United Kingdom*).
Disciplinary cases against prisoners held *in camera* by default, in view of the security and practical considerations that would make another approach impracticable – disproportionate burden concept (*Campbell and Fell*).
Appeal on points of law heard *in camera*, first-instance proceedings having been public (*Axen*).

Public nature of decision

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

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

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

This requirement does not imply any financial or other positive obligation on the state to pay for a written copy of the court judgment or to furnish the applicant with a written version of the court decision; the onus is thus on the applicant to show *considerable diligence* in his efforts to discover the reasons for the contested decision, involving enquiries to his lawyer or the court registry, if needed (*Jodko*, dec.).[31]

Example of a violation of the requirement of the public nature of the decision

- ✧ court reading out only operative part of the decision during a public hearing and sending a full written copy of a judgment (with the reasoning part) exclusively to the parties later on; the public did not have access to the archives of the court registry (*Ryakib Biryukov v. Russia*).

Examples of no violation of the publicity of decision requirement

- ✧ failure to pronounce judgment of the court of cassation in a public hearing (*Pretto and others*);
- ✧ limited access by the public to the court's decision in a child residence case, the courts being entitled, however, to grant leave on request to a member of the public having shown an established interest (*P. and B.*);
- ✧ failure to deliver a written version of the court judgment to the prison where the applicant was being held, in view of the established lack of activity on his own part to obtain that decision (*Jodko*, dec.).

Specifics of "fairness" in criminal proceedings

Summary

Three problem areas make up additional implied requirements of "fairness" in criminal matters:

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

31. See also, above, page 26, **Procedural obstacles: time-limits, court fees, jurisdiction and other formalities**

Entrapment defence

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

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

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

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

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

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

The initial approach by the Court in examining entrapment is characterised by a mixed test incorporating subjective elements – asking whether the applicant had been predisposed to commit an offence before the intervention of the undercover agents, placing the onus on the development of the target's subjective predisposition under the influence of the secret investigation – as well as objective elements, such as the lack of judicial supervision of the investigation and the failure by the police to investigate in an essentially passive manner (*Teixeira de Castro*, §§36-39).

Since the *Ramanauskas* judgment (§56), the subjective test appears to be definitely abandoned, as the Court held it irrelevant whether the target had had a latent criminal intent (whether he had been predisposed) before the agents' intervention; the relevant element was whether he had started acting upon his latent criminal intent before the investigation. There is thus no difference for entrapment purposes between the creation of a criminal intent that had previously been absent and the exposure of a latent pre-existing criminal intent, making the Court's approach essentially objective.

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

Examples of entrapment
Unsupervised investigation in which two policemen procured small amount of drugs from applicant without previous criminal record, where no good law-enforcement reason existed to carry out the operation (*Teixeira de Castro*).
Conviction on drug offence by using appeals to humanitarian instincts of the applicant (*Vanyan*).
No good law-enforcement ground for launching investigation, the applicant being an incidental and not previously defined target of drug-purchase operation (*Khudobin*).
No relevance attached by domestic courts to the part played in investigation by informant acting privately who had instigated bribery offence against the applicant, a prosecutor, before informing the authorities and subsequently obtaining licence to act as an agent (*Ramanauskas*, but see *Milinienė*).

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

- ✧ whether the special activities by undercover agents leading to the commission of an offence were properly supervised, preferably by a judge (*Teixeira de Castro*, §§37-38);

- ✧ whether the authorities had a good law-enforcement ground to commence the investigation, such as having a specific, previously defined, and not incidental target (*Khudobin*, §134); and furthermore, having information giving good reason to suspect the target of being involved in crime (*Teixeira de Castro*, §§37-38);
- ✧ whether the target had started performing criminal acts – which would have eventually formed part of the evidence against him – before the authorities' intervention (*Eurofinacom v. France,* dec.);
- ✧ whether the authorities remained essentially passive in the course of the investigation – to be established by looking, first and foremost, into the factual extent of the authorities' involvement (*Ramanauskas*, §71);
- ✧ where the authorities have used a privately acting informant as an agent in the course of the investigation, whether they assume responsibility in relation to that person's motives and actions, in order to prevent privatisation of entrapment (*Ramanauskas*, §§62-65);
- ✧ where a private informant takes the initiative to apply to the authorities complaining about the target's alleged inclination to crime, a proper verification of the absence of ulterior motives by the informant is called for (*Milinienė*, §§37-41);
- ✧ when a private informer is used, the whole factual background should be examined going back to the very beginning of the criminal enterprise, regardless of the stage of the official intervention by the state; while it has been stated that the authorities cannot make *ex post facto* use of results of privately instigated crime (*Ramanauskas*, §§62-65), it remains unclear what is the permissible extent of instigating actions undertaken by a private informant in the initial phase before the authorities' intervention, and whether that permissible extent is different (less stringent) from the one allowed in investigations carried out without participation of private informants (*Milinienė*, §§37-41);
- ✧ whether the authorities remained essentially passive may also be established by taking account of the absence of improper methods of exerting pressure, such as:
  - blatant prompting (*Ramanauskas*, §67);
  - appeals to humanitarian instincts (*Vanyan*, §§46-47);
  - inducements targeted merely to obtain a more severe conviction (*Vanyan*); and, possibly,
  - promises of exorbitant gain;
- ✧ offering the target inducements necessary for completing the commission of an offence – such as money in order to record the alleged practice of the target in accepting bribes – does not, as such, breach the essentially passive requirement of the investigation (*Milinienė*, §§37-41).
- ✧ If the above "substantive" element of the analysis proves to be inconclusive (*Bannikova*), only then will the Court undertake a "procedural" overview of the applicant's ability to raise entrapment defence before the domestic courts, the relevant aspects to be taken into account being:

- the applicant must be enabled by the domestic law to raise the issue of entrapment during his trial, whether by means of an objection, affirmative defence or otherwise (*Ramanauskas*, §69); the domestic courts must carry out a careful examination of the material in the file with a view to excluding evidence obtained by entrapment (*Khudobin*, §§133-135);
- it is incumbent upon the applicant to raise prima facie entrapment defence (*Khudobin*, §69); the burden of proof then passes onto the prosecution to counter his allegations (*Ramanauskas*, §70);
- a high standard of proof is required from the prosecution to show that the applicant's allegations of entrapment are wholly improbable; in case of doubt, the domestic courts must draw inferences that have not been clearly specified (*Ramanauskas*, §70), but which likely suppose a certain presumption of entrapment when sufficiently supported by the applicant's *prima facie* case; it appears that the standard of proof for the prosecution lies somewhere between that of beyond a reasonable doubt, or at least, that of clear and convincing evidence.

Examples of no entrapment
Authorities had good reason to suspect applicant to be involved in the operation and no pressure put on him to carry out drug smuggling in the context of properly supervised investigation (*Sequiera*, dec.).
Offers by investigating officers to accept illegal prostitution services advertised by applicant company formed only part of the evidence against it; furthermore, those offers were made after defendant company had already taken steps to commit acts for which it was eventually prosecuted (*Eurofinacom*, dec.).
Bribe accepted by a judge which was instigated by financial inducements offered by private informant acting as undercover agent, in view of good law-enforcement grounds for commencing the investigation: namely, complaint by informant about applicant demanding a bribe, followed by proper inquiry into absence of ulterior motives by informant; supervised investigation – albeit by prosecution and not by courts; and possibility for applicant to raise entrapment defence during trial (*Milinienė*, but see *Ramanauskas*).
a police informant "joining in" and taking part in the purchase of drugs in the context of the authorities' prior possession of recordings of the applicant's conversations with a third party concerning the planned deal, and in view of an in-depth investigation of the allegations of entrapment by the domestic courts (*Bannikova*).

Right to silence and not to incriminate oneself; coerced confession

General principles

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

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

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

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

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

The fourth instance doctrine does not allow, as a rule, re-examination under Article 6 of the admissibility of evidence (*Schenk*), apart from exceptional cases such as those involving entrapment[32] or manifestly arbitrary admission of evidence by the domestic courts (*Osmanağaoğlu v. Turkey*, §§47-52).

While the Court's case-law has rarely implied that the right to a fair trial under Article 6 is an unqualified right, the Court's actual approach – at least under the heading of the right to silence – is more qualified, usually requiring a test to establish whether or not the essence of the right was infringed upon. Under this essence of the right analysis, what constitutes a fair trial cannot be the subject of a single unvarying rule but depends to a certain extent on the circumstances of the particular case. As a result, at times it involves a *sui generis* proportionality test, especially in relation to minor offences, to justify a finding of no violation of Article 6 (*O'Halloran and Francis*).

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

As a general rule, evidence obtained by compulsion must not carry a decisive or crucial weight in the architecture of the inculpating judgment (*Saunders*). The admission of supplementary or non-essential evidence – except where where

32. See above, page 58, **Entrapment defence**.

obtained by ill-treatment – may not warrant a finding of a violation of Article 6 even if that evidence was obtained in breach of domestic law (*Khan*, §§35-37) or the autonomous requirements of the Convention (*Gäfgen*).[33]

Evidence obtained by torture will not be admissible under any circumstances, even where it does not constitute crucial or decisive key evidence against the accused, provided the fact of the torture is established by the Court (*Yusuf Gezer v. Turkey*, §§40-45). However, exclusion of evidence obtained against the will of the accused is not always required by Article 6 where the coercion only remotely related to the inculpating evidence on which the conviction was based. Thus, the use of material evidence discovered by the police with the help of information obtained as a result of threats of ill-treatment was not found to be contrary to Article 6 §1 where the defendant, on the strength of all evidence against him, admitted his guilt in the domestic proceedings once again at a later stage of the proceedings, and where the coercion was used not to prove the guilt but to save the victim of the crime (*Gäfgen*).

It is not clear whether the police always have to warn the suspect of his right to silence. It appears that a formal warning is required before the first questioning, where there are chances that the person being questioned can become a suspect and the questioning takes place in stressful or intimidating situation and without a lawyer. Given such proper safeguards, a subsequent waiver of the right to silence is immaterial (*Aleksandr Zaichenko v. Russia*, §§52-60).

Where conviction is based on testimony obtained from one co-defendant – involving a serious breach of his right to silence – it may perturb the "fairness" of proceedings in respect of another defendant (*Lutsenko v. Ukraine*, §§44-53).

Obligations imposed by law

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

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

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

33. See more on this point below, page 66, **Intrusive methods of investigation**.

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

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

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

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

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

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

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

Foreseeability of the legal regime making testimony obligatory – under which a person buying a car was ruled to have, in a sense, consented to an obligation to testify in relation to some road traffic offences involving his vehicle – was also mentioned as a relevant factor in making the compulsion to testify permissible (*O'Halloran and Francis*, §§57-62), even though it is hard to see how, in the case of more serious offences, such as murder or any offences against another person, this linking of the ownership of the weapon used with the legal obligation to testify could be sustained.

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

It is permissible for a statute to reverse the burden of proof in regard to various actions *in rem* directed at property and not a person, by requiring proof of legitimacy of sources of property in the context of a conviction for an offence such as drug dealing (*Phillips v. the United Kingdom,* §§40-47); or where administrative measures are applied against a suspected *mafioso* (*Riela v. Italy*, dec.), as long as the standard of proof on that person is more lax than that of "beyond a reasonable doubt" – such as the balance of probabilities (preponderance of evidence).

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

No breach of the privilege against self-incrimination in context of obligations imposed by law
Legal obligation on owners of vehicles photographed by radar to disclose the details of the driver at the time of speeding or risk a fine; account taken of minor nature of offence and penalty, public interest in ensuring road safety, and fact that application of regulatory regime imposing obligation to testify might have been foreseen when buying vehicle (*O'Halloran and Francis*; but see *Telfner*).
Fine imposed on owner of vehicle that had exceeded the speed limit for misleading the investigators by indicating non-existent person as driver at the time of the offence – no presumptions in regard to speeding offence itself held against applicant (*Weh*).
Fine imposed on witness for refusal to testify in criminal trial of third party, justified for reasons of good administration of justice (*Serves*).

No breach of the privilege against self-incrimination in context of obligations imposed by law
Reversal of burden of proof against applicant caught with drugs at airport in relation to the *mens rea* of offences of smuggling and importation (ancillary offences), provided that both *actus reus* and *mens rea* of possession of drugs (primary offence) had been proven beyond reasonable doubt, and given that presumption created by law in regard to ancillary offences was not irrefutable (*Salabiaku*).
Partial shifting of burden of proof on to defendant for purpose of calculating amount of confiscation order in drug-trafficking case (*Grayson and Barnham v. the United Kingdom*); or requiring convicted drug-dealer to prove legitimacy of sources of property in order to determine amount of compensation (*Phillips*).

Restrictions by law on access to a lawyer at the very early stages of the proceedings, such as immediately following the arrest, may result in a violation of Article 6 §§1 and 3c where adverse inferences were drawn from his silence, resulting in the conviction of an unrepresented accused (*John Murray v. the United Kingdom*, §§44-58 and §§62-70).[34]

Intrusive methods of investigation

The Court's traditional position has been that evidence obtained under compulsion must not carry a decisive or crucial weight in the architecture of the inculpating judgment (*Saunders*, §§67-76).[35] In recent years, however, the Court has tended to consider that even admission of supplementary or non-essential evidence may discredit the overall "fairness" of the proceedings, as long as that evidence was obtained by ill-treatment within the meaning of Article 3 (*Levinta v. Moldova,* §§101-106). In such cases it is immaterial whether the evidence was crucial or decisive for the conviction (*Ashot Harutyunyan*, §§58-66).

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

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

A breach of fairness can be found not only where the fact of ill-treatment is proven at the domestic level (or by the Court by

34. See also below, page 88, **Legal representation or defence in person**.

35. See also above, page 61.

way of a separate analysis), but where a serious suspicion of ill-treatment was not dismissed following domestic proceedings (*Gladyshev v. Russia*, §§76-80).

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

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

Breaches of privilege against self-incrimination in context of intrusive methods of investigation
Forced administration of emetics on applicant to extract material evidence of offence – drugs – from stomach, the manner of which also breached Article 3 (*Jalloh*; but see also *Bogumil*).
Adverse inferences drawn by jury from defendant's silence as one of the reasons for convicting him, given failure by trial judge to instruct jury on certain procedural steps before trial that might have allowed it to see that reasons for the silence were genuine (*Beckles*; but see also a more recent approach to non-essential evidence in *Gäfgen*).

Breaches of privilege against self-incrimination in context of intrusive methods of investigation
Adverse inferences drawn from silence of unrepresented defendant during initial interrogation following arrest, subsequently used as a basis for conviction (*John Murray*).
Confession obtained immediately after arrest in intimidating circumstances and without right of access to lawyer (*Magee v. the United Kingdom*).
Confession obtained from witness in absence of lawyer and subsequent conviction on that basis (*Shabelnik*).
Conviction based on statement made "under oath" by witness in police custody, without legal assistance and without proper warning about right to remain silent (*Brusco*).
Use of private informant infiltrated as cellmate of applicant detained on remand to obtain evidence of offence of robbery, given that most of applicant's admissions were provoked by persistent questioning which informant had been trained in by investigators beforehand (*Allan*; but see *Bykov* for less stringent standards for similar trickery if carried out outside prison context).

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

confession (*Zhelezov v. Russia*, dec.; *Latimer v. the United Kingdom*, dec.[36]

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

No pressure to confess should be sought from an unrepresented person even if he does not have the formal status of a suspect during the impugned questioning – e.g. a witness, etc. (*Shabelnik v. Ukraine,* §§51-60).

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

Convictions based on witness evidence obtained from them by torture or threats thereof may also breach Article 6 in regard to the defendant (*Osmanağaoğlu v. Turkey*, *Lutsenko*, §§44-53.[37]

No breach of the privilege against self-incrimination in context of intrusive methods of investigation
Extraction of drugs hidden in body – relevant decision taken by doctors and not police officers – which did not constitute a substantial piece of evidence in case, and in view of the obligation to protect the applicant's health (*Bogumil*; but see *Jalloh*).
Confession made under threat of torture eventually excluded from evidence by trial court – whereas some material evidence collected and used as a direct result of the impugned confession was not excluded – in view of the fact that that material evidence only had supplementary, non-essential influence on conviction (*Gäfgen*).
Confession obtained immediately after arrest to partly base a conviction, where accused did not shown reasonable efforts/considerable diligence in availing himself of procedural rights, including right to lawyer (*Zhelezov*, dec.; *Latimer,* dec.).
Use of secret recordings as additional evidence to support conviction, although evidence obtained in breach of domestic procedure and of applicants' private life under Article 8 (*Schenk*; *Khan*).
Cannabis found during partly improper search, without a warrant, involving intrusion into applicant's private property, constituting decisive piece of evidence for eventual conviction (*Lee Davies*).

36. See also below, page 88, **Legal representation or defence in person**.
37. See also below, page 94, **Right to examine witnesses**.

No breach of the privilege against self-incrimination in context of intrusive methods of investigation

Use of private informant to trick applicant into admitting organisation of murder and subsequent staging by authorities of alleged murder to obtain further admissions from applicant, despite the fact that those admissions formed a decisive piece of evidence for his eventual conviction for attempted murder (*Bykov*; but see also *Allan* for more stringent standards applying to similar trickery if carried out within the confines of a prison).

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

Similarly, evidence collected as a result of partly improper search may not be in violation of Article 6 even if it is decisive for the conviction. The crux is not the admissibility of evidence under domestic law but the procedural possibilities open to the defendant, at trial and on appeal, of contesting the way it is obtained and used (*Lee Davies v. Belgium*, §§40-54).[38]

Using a private informant who tricks the accused into a confession – even if that confession forms a decisive piece of evidence in the case – will be compatible with the right to silence, as long as it is obtained in the context of public activity (*Bykov*, §§94-105; *Heglas v. the Czech Republic*, §§89-93) and not outside the confines of a prison (*Allan,* §§42-47). At the same time, investigative trickery may only be used to obtain evidence of a past offence, not create a fresh offence.[39]

Flagrant denial of a fair trial abroad

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

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

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

38. See also above, page 51, **Oral hearings and physical presence**; and page 54, **Effective participation**.

39. See above, page 58, **Entrapment defence**.

Right to a reasoned decision and reliable evidence

Reasoned decision

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

Violations of right to a reasoned decision
Failure by domestic courts to reply to applicant's argument that appeal brought by the other party in lease dispute must have been time-barred (*Ruiz Torija*).
Failure to reply to applicant's argument in appeal that composition of the lower court had been unconstitutional (*Luka v. Romania*).
Failure by appeal court to determine whether applicant's trademark had been "established", first instance court having covered that same question and having found for the applicant on that basis (*Hiro Balani v. Spain*).
Lack of elaboration in a particular decision or domestic case-law of the notion of "exceptional circumstances" which ought to be demonstrated under the law for applicant to claim re-admission to the Bar after expiry of statutory limitation of ten years (*H. v. Belgium*).

Violations of right to a reasoned decision
Brevity of reasoning in deciding on applicant's entitlement to disability pension, whereby only partial disability was awarded despite the fact that deteriorating state of his health was also established (*Hirvisaari*).
Inconsistent interpretation of law by county courts sitting as courts of final instance in collective dismissal cases (*Ştefănică and others*).
Inadequate procedural safeguards to enable accused to understand reasons for jury's guilty verdict in assize court, in absence of detailed bill of indictment or directions or questions to jurors (*Taxquet v. Belgium* [GC]).

Although at times this right is examined from the point of view of "fairness" of proceedings (*Hirvisaari,* §§30-33), structurally it also fits within the concept of the right to a court as they both require determination of the relevant factual and legal questions raised by the applicant in a particular case (*Chevrol*).[40]

Since Article 6 does not allow complaining about the fact-finding and legal competence of domestic courts by alleging that they reached a wrong decision (*Karalevičius*, dec.), the reasoned decision test is rather a quantitative and not a qualitative one: as long as some reasons are given, the decision in question will in principle be compatible with Article 6 (*García Ruiz v. Spain,* §§26-30). In a few cases, however, the Court has been

40. See above, page 23, **Standing to bring proceedings, claim damages and obtain a court decision**.

faced not with a complete absence of reasons but with their manifest incoherence (*Tatishvili v. Russia*, §§59-63; *Antică and "R" company v. Romania*, §§32-39), which was regarded by the Court as arbitrariness. Such cases, however, remain an exception, and recently the Grand Chamber confirmed that Article 6 does not guarantee perfect harmony in the domestic case-law (*Nejdet Şahin and Perihan Şahin*, §§96-68).

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

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

Reasons do not have to be given in a particular (written) form. It is perfectly acceptable for a court to pronounce reasons for its decision some time after its adoption, as long as this does not deny the applicant's right to effectively exercise his right to lodge an appeal (*Hadjianastassiou; Jodko*, dec.).[41]

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

Right to a reasoned decision not violated
No fault found with reasoning of domestic courts as to the facts of the case, in which the applicant unsuccessfully claimed for performing certain paid services against civil defendant, while first-instance findings were endorsed by higher courts (*García Ruiz*).
Absence of reasons in a jury verdict counterbalanced by procedural safeguards, given that reasons could be ascertained from addresses by parties and presiding judge's charge to the jury, and given that the judge accepted duty to explain law to jury and could declare that there was no case to answer (*Judge*, dec.).

Unlawful and unreliable evidence

Where conviction is to a crucial or decisive extent based on evidence obtained unfairly from the standpoint of autonomous principles of Article 6 – for example, where the confession was obtained in breach of the privilege against self-incrimination – the proceedings would be unfair.[42]

However, reliance by the domestic courts on evidence obtained in breach of another article of the Convention (for example, Article 8) does not necessarily infringe on fairness of the proceedings under Article 6 (*Khan*, §§34-40; *Bykov*, §§94-105). At

41. See also above, page 26, **Procedural obstacles: time-limits, court fees, jurisdiction and other formalities**; and page 57, **Public nature of decision**.

42. See above, page 61, **Right to silence and not to incriminate oneself; co-erced confession**.

the same time, use of evidence obtained by means involving a serious breach of Article 3 (such as torture) will in most circumstances be contrary to Article 6.[42]

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

Similarly, questions of the assessment of fact, stemming mostly from alleged unreliability of evidence, are almost always left by the Court to the discretion of the national judge. As a result, most complaints under Article 6 about unreliable evidence are rejected as being of fourth instance nature. Where serious doubts exist as to the quality of evidence produced by the prosecution in criminal cases, the Court takes into account procedural safeguards surrounding the taking and examination of such evidence rather than reassessing the evidence itself (*Cornelis v. the Netherlands*, dec.).

Only in a very few exceptional cases has the Court been prepared to conclude, contrary to the stance taken by the national court, that a piece of evidence was totally unreliable owing to the suspicious circumstances in which it had been obtained (*Lisica v. Croatia*, §§47-62). In *Laska and Lika v. Albania* (§§63-72), for instance, the applicant's conviction was based on the results of an identity parade during which the applicant was wearing a white and blue balaclava mask (identical to those used by the alleged criminals), whereas other participants in the identity parade were wearing black masks. In such a setting it was natural for the victim to identify the applicant as the perpetrator. The Court concluded that an identity parade organised in such a manner could not have any evidential value, and therefore that the conviction was totally unsafe. However, such cases remain exceptionally rare, and apart from inquiries into entrapment,[43] no other category of case, as a rule, warrants the Court's re-examination under Article 6 of facts established by the domestic courts.

43. See above, page 58, **Entrapment defence**.

Trial within a reasonable time

General principles

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

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

The "reasonable time" requirement applies both to civil and to criminal cases, but it must not be confused with the more stringent length of detention test that applies only as long as the person is deprived of his liberty pre-trial (*Smirnova v. Russia,* §§80-88). Duration of criminal proceedings should not, however, be confused with the length of detention on remand under Article 5 §3. Examination of the latter is usually subjected to more stringent standards (*Smirnova,* §§56-71).

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

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

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

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

tioning, even as a witness, could be taken as start date (*Eckle*, §§73-74).

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

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

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

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

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

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

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

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

Nature and complexity of the case

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

- ✧ child-care proceedings (*H. v. the United Kingdom*, 1987);

44. See above, page 33, **Timely enforcement of a final court decision**.

- ✧ compensation claim for blood tainted with HIV (*X v. France*, 1992);
- ✧ action for serious injury in a traffic accident (*Martins Moreira*).

Violations of "reasonable time" requirement found by reliance on the lack of complexity of the case
2 years and 7 months at two instances in a case concerning adoption and parental access, account taken also of the special diligence required (*H. v. the United Kingdom*).
3 years and 10 months at one instance in a compensation case regarding a road traffic incident (*Guincho*).
3 years and 6 months at appeal in a nuisance case concerning air pollution (*Zimmermann and Steiner v. Switzerland*).

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

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

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

Findings of no violation of "reasonable time" requirement by reference to the complexity of the case
5 years and 2 months in a fraud case involving a re-hearing at first instance after a successful appeal (*Ringeisen*).
7 years and 4 months in a criminal case concerning tax fraud, where the domestic authorities encountered various difficulties with communication involving authorities and persons abroad (*Neumeister*).

Conduct of the parties

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

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

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

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

Delay attributable to the authorities not considered to be in breach of "reasonable time" requirement
Delays in undertaking necessary procedural steps by the authorities, such as medical examinations, even where there was no lack of reasonable diligence but where blame could be laid on the work overload and lack of resources (*Martins Moreira*).

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

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

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

At the same time, the Contracting States are required by Article 1 of the Convention to organise their legal systems so

as to ensure compliance with Article 6, and no reference to financial or practical difficulties can be permitted to justify a structural problem with excessive length of proceedings (*Salesi,* §§20-25).

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

Article 6 §2: presumption of innocence

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

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

Most indirect interferences with the presumption of innocence, such as the shifting of the burden of proof on to the accused, have rarely been examined under this heading (*Salabiaku*), having been dealt with from the more general angle of the right to silence and not to incriminate oneself under Article 6 §1.[45]

Article 6 §2 applies not only to "criminal" proceedings in their entirety but also pre-trial and after the criminal proceedings are over, and irrespective of their stage or even their outcome (*Minelli v. Switzerland,* §§25-41); the standard of application of Article 6 §2 is thus different from that to be used when applying Article 6 §1.[46] A breach of Article 6 §2 can occur even in absence of a final conviction.

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

There will be a breach of Article 6 §2 if a person acquitted in criminal proceedings lodges a civil claim seeking compensation for pre-trial detention, but the compensation is denied on the ground that the acquittal had been for "lack of sufficient evidence". Without qualifications, such a statement casts a doubt

45. See also above, page 61, **Right to silence and not to incriminate oneself; coerced confession**; and below, page 82.
46. See above, page 16, **Criminal charge**.

on the applicant's innocence (*Tendam v. Spain*, §§35-41). At the same time, refusal to reimburse legal costs after dismissal of criminal charges on the grounds that, by their conduct, the defendants had brought the prosecutions upon themselves, does not breach the presumption of innocence (*Ashendon and Jones v. the United Kingdom*, dec., §§50-55).

Violations of the presumption of innocence
Minister of the Interior and two senior police officers stating in televised press conference that applicant had been "one of the instigators" of murder (*Allenet de Ribemont*).
Speaker of Parliament publicly stating that "a bribe-taker" had been apprehended immediately after arrest of applicant, then a Member of Parliament (*Butkevičius*).
Public statements made by well-known former general who was candidate for elections at material time – binding nature of doctrine of the presumption of innocence on quasi-public persons (*Kouzmin*).
Public statements by trial judge assessing quality of the defence and prospects of outcome of criminal case (*Lavents*).
Court-ordered revocation of suspended sentence by reference to "further crimes" committed in breach of probation – in fact at the time only charges pending (*Bohmer v. Germany*).
persistence of suspicion expressed in dismissing a compensation claim following the acquittal (*Sekanina*, but see *Lutz*);

Violations of the presumption of innocence
In a civil procedure for damages a former criminal defendant had to show on the balance of probabilities, to the same bench that had examined the criminal charges against him, that he had not committed the offence. The civil procedure was thus concomitant with the underlying criminal procedure (*O. v. Norway*, but see also *Ringvold*). Article 6 §2 was held to apply, and a violation was found owing to the expression of persistent suspicion;
Following an unsuccessful complaint by an applicant against her former boss for a sexual assault, the latter succeeded in a civil action against the applicant for malicious prosecution. The French courts held that, because of the earlier failure of the applicant to prove sexual assault, her accusations of conduct by her former boss were automatically false; such a construction was, in the eyes of the Court, contrary to the principle of the presumption of innocence (*Klouvi*).

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

Article 6 §2 does not entail a positive obligation on the state concerning statements of guilt made by private persons and the media. Issues in this area may, however, arise incidentally,

under Article 6 §1 when seen from certain angles (*Hauschildt*; *Butkevičius*, dec.; *T. and V. v. the United Kingdom*).[47]

A violation of Article 6 §2 may also serve as evidence of a violation of Article 6 §1 under the heading of subjective impartiality where the impugned statement was made by a judge (*Lavents*;).[48] In most cases however, a violation of Article 6 §2 involving a statement of a judge would take precedence as *lex specialis* and make an examination under Article 6 §1 unnecessary.

Right to presumption of innocence not violated
Words "guilt proved" used by prosecutor in response to applicant's allegations to the contrary, expressed in procedural decision referring to evidence collected during investigation, required to support prosecutor's conviction that case must proceed to trial and not be discontinued (*Daktaras*).
Loss of applicant's victim status, declared guilty by Prime Minister during a press conference, after constitutional court accepted violation of presumption of innocence and brought its judgment to the attention of trial court (*Arrigo and Vella*).

Right to presumption of innocence not violated
Absence of compensation or refund of costs for wrongful prosecution as a result of discontinued proceedings, owing to strength of suspicion persistent at the time of investigation (*Adolf v. Austria*).
Persistence of suspicion expressed in dismissing compensation claim following discontinued investigation (*Lutz*; but see *Sekanina*).
Permanent use of metal cage as a security measure during appeal hearings (*Ashot Harutyunyan*).
Refusal to cover legal costs following applicant's acquittal, where he had brought suspicion upon himself and misled the prosecution into believing that case against him was stronger than it actually had been (*Ashendon and Jones*).
Article 6 §2 held not to apply following rejection of civil claim brought by alleged victim demanding compensation from applicant (former criminal defendant) under law of tort (*Ringvold*; but see also *O. v. Norway*).
Conviction under a law making sexual intercourse with minor of a certain age automatically illegal, irrespective of whether the wrongdoer had realised the minor age of victim; Court concluded that solution proposed by domestic law – namely not to make available defence based on reasonable belief that victim was of a certain age – did not give rise to violation of Article 6 §2 (*G. v. the United Kingdom*).

Suspicion expressed in a judicial statement, the wording of which is not strong enough to amount to a violation of the pre-

47. See also above, page 39, **"Impartial" tribunal**; page 54, **Effective participation**; and *Kouzmin* (§§60-65), where a violation was found on account of the statement of a prominent political leader who did not at the time occupy any official position.
48. See also above, page 39, **"Impartial" tribunal**.

sumption of innocence under Article 6 §2, may still be sufficient to disqualify the judge as biased from the objective standpoint under Article 6 §1 (*Hauschildt*) or even from the subjective standpoint where the statement is directed at some personal characteristics of the defendant and goes beyond the usual procedural requirements (*Kyprianou*).[48]

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

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

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

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

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

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

Discretion and circumspection are required from the authorities in informing the public about pending criminal investigations, in order to prevent declarations of guilt which are capable of encouraging the public to believe a suspect guilty

and prejudging the assessment of the facts by the competent courts (*Allenet de Ribemont*).

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

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

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

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

Article 6 §3: defence rights

Summary

Main points:

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

Notification of the charge

There is a certain overlap between this right and the right to adversarial proceedings, which is an implied element of a fair trial under Article 6 §1,[49] and the right to time and facilities to prepare for one's defence under Article 6 §3b (see below).[50]

49. See also above, page 45, **The "adversarial" principle**.
50. See also below, page 85, **Adequate time and facilities to prepare a defence**.

There is also some overlap with the right to be informed of some factual basis for suspicion justifying detention under Article 5 §2, even though Article 6 §3a guarantees a broader right to know the possible legal classification of the charge and more detailed factual information about it (*Pélissier and Sassi v. France,* §§45-63).

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

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

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

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

At the same time, it would be incorrect to state that Article 6 §3a applies only to the initial stage of the proceedings, while Article 6 §3b supplements it at a later stage; the question remains open as to whether Article 6 §3a or Article 6 §3b is more appropriate to later stages of the proceedings such as trial, either where the problem concerns a change in legal characterisation of the alleged offence (*Dallos*) or the insufficiency of factual information (*Mattoccia v. Italy,* §§58-72); it looks like applying both these provisions in conjunction, alongside Article 6 §1, would probably constitute the correct approach to analysing any lack of information at a trial stage.

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

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

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

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

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

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

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

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

Right to be informed about charge not violated
Information about charge consisting of the words "mutiny" – with mere indication of place and time of alleged crime – sufficient in context of prison disciplinary proceedings, in view of the fact that applicant made no reasonable attempts to obtain further information (*Campbell and Fell*).
Charge reclassified by court in first-instance judgment, where possibility existed to submit full appeal subsequently (*Dallos*; but see *Sadak and others*).
Conduct of an accused person principal cause of his not receiving notification of charges against him (*Hennings v. Germany*).
Minor discrepancies in re-statement of domestic law resulting from clerical error (*Gea Catalan*).
Oral interpretation of charge against foreigner unable to understand the court's language (*Kamasinski*).
Conviction for abduction of person with the help of "unidentified accomplices", whereas the bill of indictment had identified alleged accomplices of applicant, who had also been accused of murder (*Mirilashvili*, dec.).

Adequate time and facilities to prepare a defence

There is a certain overlap between this right and the right to adversarial proceedings and equality of arms, which are implied elements of the fair trial under Article 6 §1,[51] the right to be notified of the charge under Article 6 §3a,[52] the right to legal representation under Article 6 §3c,[53] and the right to call witnesses under sub-paragraph (d).[54]

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

The usual approach is to examine an alleged violation of Article 6 §3b together with Article 6 §3c, in order to show, by way of cumulative analysis of various difficulties experienced by the defence, the overall effect of those defects on fairness of the trial as a whole within the meaning of Article 6 §1 (*Krempovskij,* dec.). The "adequacy" of arrangements for the preparation of a trial is usually assessed with reference to formal limitations imposed on the defence – for example, limiting access by the defence to "secret" parts of the case-file and restrictions on copying. However, the Court also takes into account practical

51. See page 45, **The "adversarial" principle**; and page 48, **Equality of arms**.
52. See page 83, **Notification of the charge**.
53. See page 88, **Legal representation or defence in person**.
54. See page 94, **Right to examine witnesses**.

difficulties encountered by the defence, for example, connected to the conditions of detention and transport of the detained suspect (*Moiseyev,* §§208-225).

A delicate balance must be struck between the need to ensure trial within a reasonable time[55] and the need to allow enough time to prepare the defence, in order to prevent a hasty trial which denies the accused an opportunity to defend himself properly (*Öcalan v. Turkey* [GC], §§130-149).

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

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

It is not clear whether there is a right, as such, to be informed in a court judgment of the applicable time-limits for appeal, or whether it is matter for the defence to find out of its own accord; at the same time, a positive obligation under Article 6 §3b may exist to inform the defendant of the relevant time-limits in complex procedural cases, such as where two concurrent time-limits exist for lodging a cassation appeal on the one hand, and submitting the reasons therefor on the other (*Vacher,* §§22-31); it may further be noted that these types of situation may more appropriately be looked at under the heading of "access to a court" rather than defence rights.[56]

The "adequate facilities" test is also a subjective one, depending on the particular circumstances and abilities of the applicant, who may be a professional lawyer, for example (*Trepashkin (No. 2) v. Russia*, §§159-168). Two main facilities will in most cases be required, however, namely: a) the possibility of communicating with the lawyer in a confidential (*Bonzi v. Switzerland,* dec.) and efficient (*Artico v. Italy,* §§29-38) manner (even though this right is more specifically covered by Article 6 §3 (c);[57] and b) access to the case-file (*Kamasinski*).

At the same time, limited restrictions preventing the applicant from seeing the lawyer at certain times (*Bonzi*) or imposing on the lawyer an obligation of non-disclosure in order to protect a witness at an early stage of the proceedings (*Kurup*, dec.) may be allowed.[57]

The right to "adequate facilities" includes the right of access to the case-file after the pre-trial investigations are concluded; at

55. See page 73, **Trial within a reasonable time**.

56. See page 26, **Procedural obstacles: time-limits, court fees, jurisdiction and other formalities**.

57. See below, page 88, **Legal representation or defence in person**.

Violations of the adequate time and facilities requirement
Cumulative impact of several isolated restrictions, including lack of legal assistance during questioning in police custody, subsequent restrictions on number and length of meetings with defence counsel, inability to communicate with lawyers in private, and lack of full access to case-file until very late stages of trial (*Öcalan*).
Cassation appeal submitted in time but disallowed on the ground that applicant had failed to substantiate it within required time-limit, considered together with lack of information given to applicant about existence of two concurrent time-limits – namely, for lodging the cassation appeal on the one hand, and submitting reasons therefor on the other (*Vacher*).
Denial of access to case-file at pre-trial stage on the ground that accused had chosen to represent himself, access being available only to lawyer under domestic law (*Foucher*; see also page 48).
Sudden and complete change of evidence given by court-appointed expert during the same hearing, which had decisive impact on jury's opinion, and refusal of trial court to appoint alternative expert (*G.B. v. France*; but see *Boenisch, Brandstetter*; see also page 48).
Belated receipt of written version of court judgment with reasoning part (more than one month after pronouncement of operative part), preventing applicant from submitting appeal in the five days provided for by law for this purpose (*Hadjianastassiou*; see also pages 26 and 70).

the same time, access given only to the lawyer but not the applicant personally may suffice (*Kamasinski*). Where an accused has been granted the right to represent himself, denial of access to the case-file at the pre-trial stage will violate Article 6 (*Foucher*).[58] In assessing a limitation on the defendant's access to the case-file, the Court takes into account in particular the duration of the limitation (*Trepashkin (No. 2)*, §§159-168).

The right of access to the case-file is not absolute, and some exceptions are possible in order to protect a sensitive investigation method, the identity of a witness or agent; the burden is on the applicant to show that access to any particular element of the case-file was necessary for his defence rights (*Bricmont*).[59]

The test of necessity of disclosure of any sensitive material has been delegated by the Court to the domestic courts, and no autonomous Convention assessment on the merits of the non-disclosure will be undertaken as long as the national courts themselves have carried out such an assessment under the domestic law (*Dowsett*).[59] There could be a problem, however, where a national court is given no discretion by statute to decide whether or not to disclose the materials to the defence (*Mirilashvili*, §§200-209).

The right to "adequate facilities" does not, as such, include the right to appoint an expert of one's choosing to testify at trial, nor the right to appoint a further or alternative expert.[58] In

58. See page 48, **Equality of arms**.
59. See page 45, **The "adversarial" principle**.

Adequate time and facilities requirement not violated
Five days from the moment charge brought until hearing on merits was "adequate time" to prepare defence in prison disciplinary case concerning charge of mutiny (*Campbell and Fell*); fifteen days was similarly "adequate time" in professional disciplinary proceedings against doctor on charges of having improperly issued certificates of unfitness for work (*Albert and Le Compte v. Belgium*).
New minor evidence on defendant's character submitted by prosecution at start of trial that lasted three days in a criminal case concerning sexual offences, despite lack of adjournment (*G.B. v. France*).
Accused placed in solitary confinement and prevented from communicating with lawyer for a few limited periods, inasmuch as he had the ability to communicate freely with lawyer the rest of the time (*Bonzi,* dec.; see also below, page 88).
Defence counsel placed under obligation not to disclose identity of a certain witness to client at an early stage of proceedings, to protect the witness from tampering (*Kurup*, dec.; see also below, page 88).
Access to case-file given to applicant's lawyer rather than to him personally (*Kamasinski*).

exceptional circumstances, such as a sudden and complete change of evidence given by a court-appointed expert in the course of the same hearing, a problem of fairness and defence rights may arise if the court does not consider calling a further expert to testify (*G.B. v. France*). however, the question of experts should more appropriately be looked at from the point of view of Article 6 §3d and not 6 §3b.

The right to know the reasons for the court judgment can also be considered as an aspect of Article 6 §3b. Reasons may be needed in order to prepare an appeal, for instance (*Hadjianastassiou*).[60]

Legal representation or defence in person

There is a certain overlap between this right and the rights to adversarial proceedings and equality of arms, which are implied elements of a fair trial under Article 6 §1,[61] the right to be notified of the charge under Article 6 §3a,[62] the right to adequate time and facilities to prepare one's defence under Article 6 §3b,[63] and the right to call witnesses under sub-paragraph (d).[64]

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

Article 6 §3c consists of four distinct elements, namely the right a) to defend oneself in person (*Foucher*), b) in certain circum-

60. See also page 26, **Procedural obstacles: time-limits, court fees, jurisdiction and other formalities**; and page 70, **Reasoned decision**.
61. See page 45, **The "adversarial" principle** and page 48, **Equality of arms**.
62. See page 83, **Notification of the charge**.
63. See page 88, **Legal representation or defence in person**.
64. See page 94, **Right to examine witnesses**.

stances, to choose a lawyer (*Campbell and Fell*), c) to free legal assistance where one has insufficient means and where the interests of justice so require (*John Murray*), and finally d) to practical and effective legal assistance (*Bogumil*, §§47-50).

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

At the same time, where an accused has been granted the right to represent himself, additional restrictions on his defence rights as a result of self-representation – such as denial of access to the case-file at the pre-trial stage – may result in a violation (*Foucher*).[65]

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

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

Inability to obtain free legal assistance usually arises in the context of minor criminal offences and administrative or disciplinary breaches that are considered "criminal" only under the autonomous meaning of Article 6 §1 but not under the provisions of domestic law; hence no automatic right to free legal advice may available to the applicant (*Engel*).[66]

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

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

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

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

It is compatible with the interests of justice that the accused in military or prison disciplinary proceedings involving very simple facts defend themselves in person and receive free legal

65. See also page 48, **Equality of arms**.

66. See also page 16, **Criminal charge**.

assistance limited to dealing with legal issues of appeal (*Engel,* §§89-91).

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

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

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

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

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

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

Restrictions on access to a lawyer at the very early stages of the proceedings, such as immediately following the arrest, may result in a violation of Article 6 §3c if a confession is obtained from an unrepresented accused, or if adverse inferences are drawn from the silence of the accused. At that particular stage the accused is considered to be most vulnerable to inappropriate pressure and requiring of legal assistance (*John Murray*; *Salduz* [GC], §§56-62), unless the right to a lawyer is explicitly and knowingly waived by the defendant (*Yoldaş v. Turkey*, §§46-55). Use of confession obtained from a detained suspect in the absence of a lawyer is, as a rule, contrary to Article 6 §3c, even where that evidence is obtained in a foreign state (*Stojkovic v. France and Belgium*, §§51-57).

No pressure to confess should be placed on unrepresented persons even if they do not have the procedural status of suspect during the impugned questioning, and are formally treated as witnesses at that stage (*Shabelnik*).[67]

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

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

67. See also page 61, **Right to silence and not to incriminate oneself; co-erced confession**.

the same time, the absence of a lawyer immediately following the arrest may not be held against the state – even where a confession is obtained in the aftermath – if the accused fails to make reasonable efforts/apply considerable diligence to be legally represented (*Zhelezov,* dec.; *Latimer,* dec.), and if the presence of a lawyer is not ruled out by the applicable legislation.

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

There is no steady case-law concerning the requirement for a lawyer to be present during investigative actions other than the initial questioning. It appears, however, that presence of a lawyer at the time of the accused confronting a non-key witness during the pre-trial stage is not an essential ingredient of the defence rights (*Isgrò v. Italy*, §§31-37).[68] At the same time, it appears that the presence of a lawyer may be required during an identity parade, especially where it plays a crucial role in the eventual conviction (*Laska and Lika*, §§63-72).

68. See also below, page 94, **Right to examine witnesses**.

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

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

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

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

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

Violations of Article 6 §3c
Denial of access to case-file at pre-trial stage on the ground that accused had chosen to represent himself, access being available under domestic law only to lawyer (*Foucher*); See also page 48.
Access to a lawyer prevented by discretionary decision of prison governor at hearing of disciplinary case against prisoners, while the right to consult the lawyer was granted during an adjournment (*Ezeh and Connors*).
Lawyer required to seek permission from investigator each time in order to consult with his client, measure without basis under domestic law (*Moiseyev*).
Delay of more than one year in response to the applicant's legal aid request, even though free legal assistance subsequently granted (*Berlinski*).
Failure of applicant's official counsel to appear at appeal level, coupled with applicant's inability to obtain a hearing-aid to allow him to participate effectively in appeal hearing despite hearing deficiency (*Timergaliyev*; see also page 54).
Lack of free legal aid in non-complex case, in view of cumulation of the facts that it involved a young foreigner lacking means and with history of drug-taking, who faced a real sentence of three years' imprisonment (*Quaranta*).

Violations of Article 6 §3c
Refusal of legal aid on appeal, despite the fact that substantial issues of law had arisen (*Pakelli*; but see *Monnell and Morris*).
Failure to reconsider interests of justice involved in granting legal aid, in view of complex legal questions arising during appeal hearing (*Granger*).
Lack of choice of lawyer granted to accused who absconded and was tried *in absentia* (*Karatas and Sari*).
Adverse inferences as to the guilt of unrepresented accused drawn from his silence during initial questioning immediately after arrest (*John Murray*; but see *Zhelezov* and *Latimer*, dec.; also page 61);
Confession obtained from unrepresented suspect immediately following arrest and later used to found conviction (*Magee*; see also page 61);
Confession obtained and used to found conviction from an unrepresented person who was formally a witness at the material time (*Shabelnik*; see also page 61).
Confession obtained from unrepresented person, where the police investigator manipulated the definition of the imputed crime in order to avoid affording suspect mandatory legal assistance, while exerting pressure to sign waiver of legal assistance (*Yaremenko v. Ukraine*).
Supervision by police of almost all meetings between applicant and lawyer at pre-trial stage in case involving sixteen other accused persons, despite reasonable possibilities that lawyer may have been involved in collusion (*S. v. Switzerland*; but see *Bonzi, Kurup*).

Violations of Article 6 §3c
Police supervision of first meeting between suspected terrorist and lawyer, at which they were also prevented from exchanging any names, in view of the lack of any reasonable allegations that lawyer may have been ready to pass any damaging information to suspects at large (*Brennan*).
Inability of legal aid lawyer to provide effective legal representation to foreign defendant, having been appointed only three days before appeal was heard by the Supreme Court (*Daud v. Portugal*; but see *Tripodi*).
Failure to replace legal aid defence counsel despite latter's manifest negligence, i.e. failure to substantiate the appeal by any legal arguments (*Czekalla*; but see *Tripodi*).
Refusal to replace legal aid counsel who failed to communicate with applicant in advance of last appeal hearing in murder case (*Sakhnovskiy*).
Interception of conversations held via video-conference between accused and lawyer (*Zagaria*).
Applicant first represented by trainee lawyer, then by more experienced lawyer (who did nothing save requesting to be removed from case), and then by third legal aid counsel who had been given only five hours to read case-file (*Bogumil*).

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

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

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

No violation of Article 6 §3c
Refusal of legal aid on appeal after consideration and decision that appeal would have no reasonable prospect of success (*Monnell and Morris*; but see *Granger* and *Pakelli*).
Inability to choose official defence counsel (*Krempovskij*, dec.).
Restriction on number of lawyers (limited to three for each defendant); exclusion of individual lawyers suspected of supporting criminal association in which accused was allegedly involved (*Ensslin and others*, dec.).

No violation of Article 6 §3c
Lack of reasonable efforts on the part of arrested person to defend himself after signing confession immediately following arrest while also stating that he needed no lawyer at that stage (*Zhelezov*, dec.; *Latimer*, dec., but see *John Murray*).
Accused placed in solitary confinement and prevented from communicating with lawyer for a few limited periods, given the ability to communicate freely with lawyer the rest of the time (*Bonzi*).
Defence counsel placed under obligation not to disclose identity of a certain witness to client at early stage of proceedings, in order to protect witness from interference (*Kurup*).
Lack of shortcomings imputable to the state where defence counsel could not attend hearing owing to sickness but made no reasonable efforts to be replaced (*Tripodi*).
Applicant charged with minor offence signing form refusing assistance of a lawyer, considered as valid waiver in absence of evidence of trickery by the police (*Galstyan v. Armenia*).
Legal aid refused but directions given by court how to supplement the case-file to defendant facing criminal proceedings relating to straightforward tax surcharges, there being no risk of applicant being deprived of liberty (*Barsom and Varli v. Sweden*, dec.).
Refusal by court to admit to proceedings a new, third, lawyer to advise applicant on matters relating to international law, considered not to be pertinent to case at issue (*Klimentyev v. Russia*).

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

Right to examine witnesses

There is a certain overlap between this provision and the rights to adversarial proceedings and particularly the equality of arms (*Vidal*), which are implied elements of the fair trial under Article 6 §1, the right to adequate time and facilities to prepare one's defence under Article 6 §3b (*G.B. v France*), and the right to legal representation under sub-paragraph (c) (*S.N. v. Sweden*).[69]

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

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

69. See also page 45, **The "adversarial" principle**; page 48, **Equality of arms**; page 85, **Adequate time and facilities to prepare a defence**; and page 88, **Legal representation or defence in person**.

difficulties experienced by the defence in regard to witnesses, the overall effect of those defects on fairness of the trial as a whole within the meaning of Article 6 §1 (*Vidal*). Non-appearance of a witness at a certain moment at the trial does not necessarily breach Article 6 §3d, provided that the witness has been questioned earlier with the participation of the defence, for example, at a face-to-face confrontation at the pre-trial stage (*Isgrò,* §§30-37), or in previous sets of related proceedings (*Klimentyev,* §§124-127). However, a pre-trial challenge of prosection witnesses by the defence will not be sufficient to full guarantee defence rights where it was not followed by proper procedural safeguards (*Melnikov v. Russia,* §§70-84), or where the witnesses subsequently changed their position (*Orhan Çaçan v. Turkey;* §§31-43; *Vladimir Romanov v. Russia*, §§97-106).

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

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

Article 6 §3d enjoys a significant autonomy but is not fully autonomous from the domestic law as this provision takes into account the inherent differences of accusatorial systems (the parties to decide which witnesses to call and witnesses are questioned solely by the parties or their representatives) and inquisitorial systems (the court decides which witnesses to call and questions them alongside the parties). An applicant in an inquisitorial system cannot therefore, as such, rely on Article 6 §3d to call any witness of his choosing to testify at trial (*Perna*; *Vidal*).[70]

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

It can be left for the trial court, as is usually the case in inquisitorial systems, to determine whether calling a particular witness to testify would be of relevance for the trial (*Perna v. Italy* [GC]). On some occasions, however, the Court was prepared, exceptionally, to review the findings of the domestic

70. See also page 48, **Equality of arms**.

courts as to the pertinence and importance of witness evidence proposed by the defence (*Olujić,* §§78-85).

Persons alleging a breach of Article 6 §3d must prove not only that they were not permitted to call a certain witness, but also that hearing the witness was absolutely necessary in order to ascertain the truth, and that the failure to hear the witness prejudiced the rights of the defence and fairness of the proceedings as a whole (*Butkevičius*, dec.; *Krempovskij,* dec.). The right to call witnesses for the defence may be interpreted broadly and also concern the right of the defence to seek examination of other evidence, including material evidence, expert reports, etc.

Only a key prosecution witness – whose evidence is used in its entirety, or to an decisive or crucial degree, to ground a conviction – can be required to be called as of right under Article 6 §3d (*Vidal*; *Doorson*).

A witness may also become key if his evidence is able only to confirm or counter a particular defence chosen by the applicant, such as an entrapment defence (*Ramanauskas*).[71]

The assessment as to who is a key witness could be made on the basis of the analysis of the importance attached to that particular evidence in the architecture of the bill of indictment or, subsequently, the inculpating judgment (*Birutis and others v. Lithuania,* §§28-35). In deciding whether or not a particular witness is key the Court may occasionally examine the quality and reliability of other evidence used against the accused. Thus, although the case-law does not exclude in absolute terms the use of hearsay, it cannot be relied upon in a situation where a direct eyewitness has not been not questioned (*V.D. v. Romania*, §§107-116). A similar logic applies to confessions of co-defendants, which may not be used as a foundation of a guilty verdict for the one who did not confess (*Vladimir Romanov v. Russia*, §§97-106). Written depositions retracted by a witness at the trial may also be considered as not sufficiently reliable to support an accusation where the key witness was not properly questioned (*Orhan Çaçan,* §§31-43).

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

Witnesses have a civil obligation to testify, and refusal to give evidence should not prevent the court from ordering them brought to the court, if needed (*Serves*).[72]

Only in exceptional circumstances, such as in cases involving sexual offences like the rape of a woman, or sexual abuse of a child, can the refusal of a key witness – the alleged victim – to

71. See also page 58, **Entrapment defence**.

72. See also page 61, **Right to silence and not to incriminate oneself; co-erced confession**.

testify serve as a legitimate ground for using testimony recorded pre-trial without summoning that witness. The aim here is consideration for the witness' mental state and the avoidance of undesired publicity at trial (*Scheper v. the Netherlands*, dec.; *S.N. v. Sweden*, dec.; but see *V.D. v. Romania*, §§107-116). Other similar circumstances may include situations where witnesses are absent, having fled abroad or disappeared, or where they required anonymity, exercised their right to silence or committed suicide. The question is whether the public interest considerations in detecting and punishing crime override the requirement that the defendant must have a fair trial (*Al-Khawaja and Tahery*, §§120-165).

A conviction based to a decisive extent on the statement of a key witness who is not questioned at trial would not automatically result in a breach of Article 6 §1, provided that strong procedural safeguards were in place. These include clear rules in domestic law limiting the discretion of the judge to admit evidence from the absent witness, existence of corroborating evidence, absence of evidence of collusion between other witnesses, and clear directions given by a judge to the jury as to the quality of the impugned written statement (*Al-Khawaja and Tahery*). It remains unclear, however, to what extent the Court will (if at all) depart from the rule that key witnesses must be questioned in open court, apart from the exceptional cases where that witness had been raped or killed.[73]

73. See also above, page 96.

The prosecution should make reasonable efforts/show considerable diligence in trying to summon a key witness whose address is unknown or who resides abroad; however, sending a fact-finding delegation to question the foreign witness at the pre-trial stage is sufficient, as long as the defence is also invited to take part in the fact-finding exercise (*Solakov v. "the former Yugoslav Republic of Macedonia"*, §§56-67; *Butkevičius*, dec.; *Thomas v. the United Kingdom*, dec.).

At the same time, the accused themselves must make reasonable efforts/show considerable diligence to enable the prosecution to know that they consider a certain witness to be key to be necessarily called at trial; summoning the witness only deep into the trial stage may occur too late to disclose a breach of Article 6 §3d (*Solakov*).

The authorities can protect the identity of a witness, such as a police agent or an informer, or of a particular sensitive investigating technique, by making witnesses anonymous; Article 6 §3d leaves it, in principle, to the discretion of the state to decide on the proportionality of recognising anonymous witnesses. But a balancing exercise must be carried out under Article 6 §3d in weighing the interest of the defence in examining the witness against the public interest to protect that person (*Van Mechelen and others v. the Netherlands*, §§59-65).

Even where anonymous witnesses are non-key, the defence must nonetheless be allowed to challenge their credibility by: a) putting written questions (*Kostovski*); b) inviting the lawyer to

participate at the questioning while also preventing disclosure of the witnesses' identity to the applicant (*Doorson*; *Kurup*);[74] or c) allowing the applicant to ask questions during a teleconference while disguising the witnesses' voice or appearance (*Birutis and others*).

Just as the defence should have a right to confront a key witness for the prosecution at trial, it must also have access to any other crucial or decisive evidence, including documentary or material evidence (*Mirilashvili*, §§200-209).[75]

Violations of the right to examine witnesses
Impossibility for defence to call any witnesses before appeal court, which convicted applicant while reversing factual findings in applicant's acquittal at first instance, mostly by fresh evaluation of witness statements and other factual findings made at trial (*Vidal*; but see *Scheper*; *S.N. v. Sweden*; and *Al-Khawaja and Tahery* for exceptional cases).
Inability to summon key witness who would have been able to confirm or counter applicant's entrapment allegations (*Ramanauskas*). See also page 58.
Conviction based entirely (*Birutis and others*) or to decisive extent (*Kostovsk; Van Mechelen and others*) on anonymous witness evidence (but see *Doorson*).

Violations of the right to examine witnesses
More substantive procedural role enjoyed by court-appointed expert (police officer lacking neutrality with regard to the accused) compared to expert appearing on behalf of defence, the latter not being allowed to attend whole hearing (*Boenisch*, but see *Brandstetter*). See also page 48.
Sudden and complete change of evidence given by court-appointed expert during same hearing which had decisive impact on jury's opinion, in view of refusal of the trial court to appoint an alternative expert (*G.B. v. France*, but see *Boenisch, Brandstetter* for the more usual approach; see also pages 48 and 85).
Inability of applicant to examine experts who prepared reports on which conviction was based (*Balsytė-Lideikienė v. Lithuania*).
Refusal of trial court to summon experts on behalf of applicant claiming need for gender re-assignment surgery (*Schlumpf v. Switzerland*).
Refusal of trial court to conduct DNA examination of sperm allegedly belonging to defendant accused of rape, the accusation being largely based on testimony of senile women unconfirmed at trial, other evidence being either inconclusive or hearsay (*V.D. v. Romania*).

Non-key witness statements may be recorded and used in trial, on condition that the rights of the defence are fully protected during the pre-trial stage; this requires that the accused is be given a proper chance to put questions to the witness to challenge the credibility of evidence. Such an opportunity could be

74. See also above, page 88, **Legal representation or defence in person**.
75. See also page 45, **The "adversarial" principle**; page 48, **Equality of arms**.

given either at the time the statement is made, or at some other stage before the trial (*Unterpertinger v. Austria*).

In a case where the accused confronts a non-key witness during the pre-trial stage the presence of a lawyer is not an essential ingredient of the defence rights (*Isgrò*).

Expert witnesses are, as a rule, treated by Article 6 §3d like any other witnesses (*Mirilashvili*, §§200-209), and are not required to conform with the criterion of neutrality. However, in certain circumstances the Court has noted that the absence of neutrality of an expert may raise an issue, for example where a court-appointed, or so-called official, expert enjoys procedural privileges *vis-à-vis* the defence or their privately employed expert (*Boenisch, Brandstetter*). The expert neutrality test appears to be more stringent for the applicant than the impartiality test under Article 6 §1, necessitating evidence of the expert's bias under the subjective test and not merely an appearance-based objective test (*Brandstetter*).[76]

In exceptional circumstances – such as a sudden and complete change of evidence given by a court-appointed expert in the course of the same hearing – a problem of fairness and defence rights may arise if the court does not consider calling a further expert to testify, replacing the manifestly incompetent expert (*G.B. v. France*).[77]

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

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

No violation of the right to examine witnesses

Fact-finding mission organised by prosecution to question key witness abroad at pre-trial stage in presence of accused's lawyer, without subsequently being able to obtain presence of witness in court (*Solakov*; *Butkevicius,* dec.).

76. See also above, page 39, **"Impartial" tribunal**; page 48, **Equality of arms**.
77. See also above, page 48, **Equality of arms**; page 85, **Adequate time and facilities to prepare a defence**.

No violation of the right to examine witnesses
Three key witnesses – all alleged victims of rape – refusing to testify at trial in order to avoid serious mental disturbances by confronting perpetrator, testimonies being recorded before trial and used for conviction (*Scheper v. the Netherlands*, dec.; but see *Vidal* for the more usual approach).
Key witness – child victim of alleged sexual abuse by a teacher – giving video-taped interview pre-trial in presence of defence lawyer, that evidence subsequently forming a basis for teacher's conviction (*S.N. v. Sweden*, dec.).
Suicide of key witness before trial, whose pre-trial statement was taken into account as decisive piece of inculpating evidence, counterbalanced by various procedural safeguards (*Al-Khawaja and Tahery*).
Key witness (victim of rape) dying before trial, conviction being based on her written statement to the police and corroborated by other evidence, including traces of applicant's sperm on her body (*Mika v. Sweden*, dec.).
Request to summon a key witness made by defendant only deep into trial stage (*Solakov*).
Appeal court deciding on its own discretion on relevance of need to summon certain witnesses, without reassessing findings of fact of lower court (*Perna*; but see *Vidal*).
Non-key anonymous witness questioned on appeal in presence of accused's lawyer (*Doorson*; but see *Kostovski*).

No violation of the right to examine witnesses
Confrontation between accused and non-key witness carried out pre-trial in absence of lawyer, and subsequent failure to locate witness, in view of the fact that witness evidence was subsequently used to found conviction but did not form essential/crucial basis thereof (*Isgrò*).
More substantive procedural role enjoyed by court-appointed expert who was deemed "neutral", despite being member of institution that initiated report into applicant's business activities triggering prosecution against him (*Brandstetter*; but see *Boenisch*).

Free assistance of an interpreter

There is a certain overlap between this provision and the rights to adversarial proceedings and the equality of arms, which are implied elements of the fair trial under Article 6 §1,[78] the right to notification of a charge in a language one understands (*Brozicek*),[79] the right to adequate time and facilities to prepare one's defence under Article 6 §3b, and the right to legal representation under sub-paragraph (c) (*Quaranta*; *Czekalla*).[80]

This provision guarantees the right to free interpretation for someone who does not understand the language of court, and not necessarily an assistance in mother tongue;[79] if interpretation is denied, the burden is on the authorities to prove that the

78. See also page 45, **The "adversarial" principle**; and page 48, **Equality of arms**.
79. See also page 83, **Notification of the charge**.
80. See also page 88, **Legal representation or defence in person**.

accused has sufficient knowledge of the court language (*Brozicek*).

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

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

Violations of free interpretation requirement
Failure to provide German defendant with any translation to any language of charge drafted in the court language, Italian, given lack of proof that he understood it sufficiently (*Brozicek*; see also page 83).
Trial judge failing to show considerable diligence in enquiring about difficulties in understanding court's language by Italian tried in United Kingdom for tax offences (*Cuscani*).
Absence of or inadequate legal representation of foreigners having difficulty in understanding court's language (*Quaranta*; *Czekalla*; See also page 88).

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

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

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

It may be argued that an inability to understand or speak arising from a physical disability, or a young or very old age, may also invoke application of the guarantees of Article 6 §3e, even though, following the *T. and V. v. the United Kingdom* case, this issue should more appropriately be looked at from the point of view of general fairness under paragraph 1 and the principle of effective participation as an element thereof (*Stanford*, dec.).[81]

No violation of free interpretation requirement
Oral interpretation of charge against foreigner not knowing the court language (*Kamasinski*; see also page 83).
Suspected heroin smuggler from France questioned by Swedish customs officer without interpreter during first interview in customs office, the customs officer having sufficient command of French (*Diallo v. Sweden*, dec.).

81. See also page 54, **Effective participation**.

Index of cases

Cases are cited with the date of the judgment or, where appropriate, the decision. Where both decision and judgment are referred to in the text, each date appears in the index entry.

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A

B

C

D

E

F

G

H

I

J

K

L

M

N, O

P

Q, R

S

T

U, V

W, X

Y, Z

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