The right to a fair trial

A guide to the implementation of Article 6 of the European Convention on Human Rights

Nuala Mole
and Catharina Harby

Human rights handbooks, No. 3

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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 accusations 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

This handbook is designed to provide readers with an understanding of how legal proceedings at national level must be conducted in order to conform with the obligations under Article 6 of the European Convention on Human Rights.

It is divided into chapters, each of which treats a different aspect of the guarantees contained in the article.

Article 6

As one can see from the text on p. 4, Article 6 guarantees the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him. The Court, and previously the Commission, have interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy. In the case of *Delcourt v. Belgium*, the Court stated that

> *In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.*[1]

The first paragraph of Article 6 applies to both civil and criminal proceedings, but the second and third paragraphs apply only to criminal proceedings. As will be explained later in this handbook, however, guarantees similar to those detailed in Article 6 (2) and 6 (3) may under certain circumstances apply also to civil proceedings.

The text of the article is, however, only the starting point as Article 6 has been extensively interpreted by the European Court of Human Rights in its case-law.[2] This case-law defines the content of the Convention rights, and the decisions of the Commission and Court will be discussed and analysed in this handbook.

A word of warning must be given about the Article 6 case-law. Since no complaint will be held admissible by the Court unless all domestic remedies have been exhausted,[3] almost all cases alleging violations of Article 6 will have proceeded to the highest national

1. *Delcourt v. Belgium*, 17 January 1970, para. 25.

2. Some references in this handbook are to decisions of the European Commission of Human Rights. The Commission was a first tier filter for complaints which was abolished when Protocol No. 11 to the Convention came into force in 1998. All decisions are now taken by the European Court of Human Rights.

3. See Article 35.

courts before reaching Strasbourg. The Court will frequently find no violation of Article 6 because it considers that the proceedings "taken as a whole" were fair, as a higher court was able to rectify the errors of the lower court. It is therefore all too easy to fall into the trap of thinking that a particular procedural defect complies with Convention standards because it was not found to violate the Convention by the Strasbourg Court. But this will often be because it was rectified, at least in part, by a higher court. Judges sitting in lower courts are responsible for ensuring compliance with Article 6 in the proceedings currently before them. They cannot rely on the possibility that a higher court may rectify their errors.

General overview

This brief overview is designed to introduce all those involved in the administration of justice to the guarantees contained in Article 6. The following chapters deal with each of these guarantees in more detail.

The text of the Article is merely a skeleton. It is the case-law of the Court, which is referred to extensively throughout this handbook, which provides the necessary detail to understand the nature of the rights. Although the article talks about the right to a fair trial the guarantees often apply long before an individual has been formally charged with a criminal offence, or, in civil cases, may apply to the administrative stages that precede the initiation of judicial proceedings. The guarantees do not stop at the delivery of a judgment but apply also to the execution phase. Many of the guarantees enshrined in Article 6, in particular the concept of fairness, apply to both criminal and civil proceedings. The terms "criminal" and "charge" as well as "civil rights and obligations" have an autonomous Convention meaning which is often different from the national definitions of those terms. Where civil rights or criminal charges, as defined by the Court's case-law, are involved everyone must have access to court, that is to an independent and impartial tribunal established by law whose decisions cannot be subordinated to any non-judicial authority. Much of the Court's case-law has examined what safeguards need to be in place to guarantee access to court. Once judicial proceedings are under way, they must normally be conducted in public and judgment must always be pronounced publicly. They must also be concluded by the delivery of a reasoned judgment within a reasonable time and compensation must be paid for undue delays. This obligation continues until the judgment is executed. There will have been no determination if the intended effect of the judgment can be altered by a non judicial authority to the detriment of one of the parties.[4] If the judgment is against a public body it must be exe-

4. *Van de Hurk v. the Netherlands*, 19 April 1994.

cuted automatically.[5] If against a private individual, it is permissible for further steps to be required to be taken by the successful party to enforce the judgment, so long as the State assumes the ultimate responsibility for ensuring its execution[6]. If no other officials of the justice system have been charged with this specific responsibility, it will remain with the judge who gave the judgment.

In the course of judicial proceedings, principles such as the presumption of innocence and of "equality of arms" must be observed. Children and other vulnerable parties must be accorded special protection. Specific rights apply only to those accused of criminal charges (Article 6 (3) *a* to *e*) but comparable guarantees where relevant have been found by the Court to be required in civil cases if the proceedings are to be adjudged "fair".

The State is under a positive obligation to take all the steps necessary to ensure that these rights are guaranteed in practice as well as in theory. This includes putting sufficient financial resources at the disposal of their systems for the administration of justice. What follows in this handbook is of particular importance to judges who are the primary guardians of Article 6 rights. It is their responsibility to ensure that proceedings in their court rooms, whether investigative, at trial or at the stage of the execution of judgments comply with the all specified standards. But they are not the only public officials with such responsibilities. The police and prosecutors are under a duty to the victims of crimes (or surviving family members) to ensure that they conduct an effective prosecution of the case. Public defenders, and legal aid lawyers in civil cases, who are charged with protecting the Article 6 rights of their clients, must carry out their professional responsibilities to a standard which makes the fair trial guarantees "practical and effective not theoretical and illusory". All those involved in the administration of criminal justice have a duty to respect the dignity of the accused and protect the safety of victims and witnesses. Lack of access to lawyers whilst in police custody or pre-trial detention may also prejudice the fairness of the trial. Ill-treatment in custody will raise issues under Article 3 (the prohibition on torture or inhuman and degrading treatment) or Article 8 (the right to "moral and physical integrity" protected under the private life rubric of that article). It may also prejudice the fairness of the trial. An arguable allegation of ill-treatment requires an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. Without this practical safeguard, the fundamentally important prohibition of torture would be ineffective in practice and it would be possible for agents of the State to abuse the rights of those within their control with impunity.[7] Obligations under other international instruments, such as the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treat-

5. *Hornsby v. Greece*, 19 March 1997, and *Burdov v. Russia*, 7 May 2002.
6. *Glaser v. the United Kingdom*, 19 September 2000.
7. *Assenov and others v. Bulgaria*, 28 October 1998, para. 102.

ment or Punishment form part of a state's obligations by virtue of Article 53 of the European Convention on Human Rights.

Public officials are frequently entrusted with the administration of procedures which have a decisive outcome for civil rights and obligations, for example the taking of children into public care, the registration of land transactions or the granting of licences. They too need to ensure that they act in accordance with the guarantees of Article 6

Finally, the application of Article 6 is not limited to national judicial procedures.The Court has also held that a State's obligations under Article 6 can be engaged by expelling or extraditing an individual to face a trial in another State if that trial is likely to lack the fundamental elements of due process.[8] This principle applies in reverse to giving effect to foreign judgments.

8. *Soering v. the United Kingdom*, 7 July 1989, and *Mamatkulov and Askarov v. Turkey*, 4 February 2005.

What kind of proceedings are regulated by Article 6?

In both criminal and civil cases, where either civil rights or criminal charges are being determined the individuals concerned must have "access to court" (see below, p. 38, *What does the notion of "fair hearing" include?*). The dispute or charge must be decided by a duly constituted tribunal (see below, p. 30, *What is required for a tribunal to be (1) independent and (2) impartial?*). However, the guarantees provided for in Article 6 apply not only to the court proceedings, but also to the stages which both **precede** and **follow** them.

In criminal cases, the guarantees cover pre-trial investigations carried out by the police. The Court stated in *Imbroscia v. Switzerland*[9] that the reasonable time guarantee starts running from when a charge[10] comes into being, and that other requirements of Article 6 – especially of paragraph 3 – may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.

The Court has also held that in cases concerning Article 8 of the Convention – **the right to family life** – Article 6 also applies to the **administrative stages of the proceedings**.[11]

Article 6 does not provide a right of **appeal**. This right is provided for in criminal cases in Article 2 of Protocol No. 7 to the Convention.

Even if Article 6 does not provide for a right of appeal, the Court has stated that when a State does provide in its domestic law for a

9. *Imbroscia v. Switzerland*, 24 November 1993, para. 36.

10. See below, p. 16, *What is a criminal charge?*, for an explanation of the term *charge*.

11. See e.g. *Johansen v. Norway*, 27 June 1996.

right of appeal, these proceedings are **covered by the guarantees in Article 6**.[12] The way in which the guarantees apply must, however, depend on the special features of such proceedings. Account must be taken of the entirety of the proceedings conducted in the domestic legal order, the functions in law and practice of the appellate body, and the powers and the manner in which the interests of the parties are presented and protected.[13] Therefore, there is no right under Article 6 to any particular kind of appeal or manner of dealing with appeals.

The Court has also stated that Article 6 applies to proceedings before a **constitutional court** if the outcome of these proceedings is directly decisive for a civil right or obligation.[14] The question of whether the fairness of the proceedings of the European Court of Justice (ECJ) can be reviewed by the European Court of Human Rights was raised in the case of *Emesa Sugar NV v. the Netherlands,*[15] but not answered as the case was declared inadmissible on other grounds. The ECJ has however held itself that Article 6 applies in Community Law proceedings.[16]

Article 6 also covers **post-trial procedures** such as the **execution** of a judgment. The Court held in *Hornsby v. Greece*[17] that the right to court as covered by Article 6 would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. This was affirmed in *Burdov v. Russia*, which concerned the non-execution of a judgment ordering compensation payment for the applicant's exposure to radioactive emissions. The Court emphasised that financial difficulties experienced by the State could not justify failing to honour a judgment debt.[18] In proceedings against the State where the State is the losing party, the execution of the judgment must occur automatically. In private law disputes, rules which require the successful party to take further steps to enforce the judgment do not *per se* violate Article 6 although the state remains ultimately responsible for ensuring compliance with a judgment and upholding the rule of law.[19]

The **state must not interfere** with the **outcome** of judicial proceedings (see in more detail below, p. 30, *What is required for a tribunal to be (1) independent and (2) impartial?*). The Court has stated that the intervention of the legislature to determine the outcome of the proceedings that are already before the courts by passing a law may violate the principle of equality of arms.[20] In

12. *Delcourt v. Belgium*, 17 January 1970, para. 25.
13. *Monnell and Morris v. the United Kingdom*, 2 March 1987, para. 56.
14. *Krcmar v. the Czech Republic*, 3 March 2000, para.36.
15. *Emesa Sugar NV v. the Netherlands*, admissibility decision of 13 January 2005.
16. See e.g. *Orkem v. Commission* (Case 374/87) 1989 ECR 3283, and *Limburgse Vinyl Maatschappij NV v. Commission* (Joined Cases T-305/94-T-335/94) 1999 ECR II-931, and *Baustahlgewebe v. Commission* (Case C-185/95) 1998 ECR I-8417.
17. *Hornsby v. Greece*, 19 March 1997, para. 40.
18. *Burdov v. Russia,* 7 May 2002, para 35. Non-execution of a final decision may also raise issues under Article 1 of Protocol No. 1, since a judgment debt is a possession for the purposes of that article.
19. *Glaser v. the United Kingdom*, 19 September 2000, and *Immobiliare Saffi v. Italy*, 28 July 1999.
20. *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, paras. 46-49. For more about the principle of equality of arms, see further below, p. 46, *Equality of arms and the right to adversarial proceedings*.

Van de Hurk v. the Netherlands the Court found that the power to give a binding decision which cannot be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notions of a "tribunal" and the word "determination".[21]

A common feature of certain States' legal proceedings is the initiating of a "**supervisory review**" or a "protest" of a judgment that has been delivered by a court and which is not subject to any further right of appeal. The compatibility of the supervisory procedure with the Convention was examined *in Ryabykh v. Russia*.[22] The applicant had brought proceedings against a bank and the State claiming that the value of her personal savings had significantly dropped following economic reform. The savings were the result of hard work, and she had intended to buy a flat. However, the State had not revalued the amounts on deposit to offset the effects of inflation, as it was required to by law. The District Court found in her favour and awarded her compensation. However, the President of the Regional Court lodged an application for supervisory review on the ground that the judgment conflicted with substantive laws. The judgment was set aside and the applicant's claims dismissed.

The Court reiterated its reasoning in *Burdov* and added that the right of a litigant to a Court would be equally illusory if a State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher Court, not by the exercise of any right to appeal, but on an application made by a State official. A violation of Article 6 was found.

The Court has also held that Article 6 can apply **extraterritorially**, that is to say a state's obligations under Article 6 may be engaged if an individual is expelled or extradited to face a trial which is seriously lacking in the guarantees of that provision.[23] Similarly, when giving effect to a foreign judgment a state is required to satisfy itself that the foreign judgment was reached by a procedure which complied with the basic standards of Article 6.[24]

21. *Van de Hurk v. the Netherlands*, 19 April 1994.
22. *Ryabykh v. Russia*, 24 July 2003.
23. *Soering v. the United Kingdom*, 7 July 1989, and *Mamatkulov and Askarov v. Turkey*, 4 February 2005.
24. *Pellegrini v. Italy*, 20 July 2001.

What are civil rights and obligations?

The guarantees of Article 6 apply only in the context of proceedings to determine **civil rights and obligations** or a criminal charge. The Court has an extensive body of case law on the meaning of the term civil rights and obligations for Convention purposes. The Convention meaning is often different from the meaning in national law of the term civil rights.

Although the Court has stated in some cases that the concept of civil rights and obligations is autonomous and cannot be interpreted solely by reference to the domestic law of the respondent state,[25] it has also stated that for Article 6 to apply there must be a **right in national law** which is capable of being classified by the European Court as civil.[26]

The Grand Chamber held in *Roche v. the United Kingdom*,[27] albeit by nine votes to eight, that **Article 6 will not apply** where the national courts have determined that **no right exists in domestic law,** even if the dispute relates to a claim that might otherwise have been classified under the Convention as the determination of a civil right. This principle has been applied to exclude the application of Article 6 to claims in negligence against public authorities where the national courts have held that no right to bring such a claim exists. Where this situation means that the state provides no redress to victims of violations of Convention rights, the Court has on several occasions found a violation of Article 13 (the right to an effective remedy). In those cases it considered that applicants should have had available to them a means of establishing that the acts or omissions of the public authorities were responsible for the violations suffered, and also a means of obtaining compensation for that damage.[28]

25. See e.g. *Ringeisen v. Austria*, 16 July 1971, para. 94, and *König v. the Federal Republic of Germany*, 28 June 1978, para. 88.
26. *Z and others v. the United Kingdom*, 10 May 2001, and *Roche v. the United Kingdom*, 19 October 2005.
27. *Roche v. the United Kingdom*, 19 October 2005.

Once it has been established that a right exists in national law the next step is to decide whether or not it is a **civil** right. Many Governments have sought to deny the applicability of Article 6 because they have claimed that the proceedings in question were administrative and did not determine a civil right. There is a substantial body of case law by the Court and the Commission as to what is and what is not a civil right or obligation, and the interpretation of the phrase by the Convention organs has been progressive. Matters which were once considered outside the scope of Article 6, such as social security, now generally fall within the civil rights and obligations rubric of Article 6.

A number of points must be considered in order to decide whether the right at issue is a civil right for Convention purposes.

Firstly, what is relevant is ***the character of the right*** itself rather than the character of the legislation.[29] The case of *Ringeisen v. Austria* concerned the administrative procedures for the registration of a land transaction. The Court stated,

> *The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.*[30]

28. *Z and others v. the United Kingdom*, 10 May 2001, *T.P. and K.M. v. the United Kingdom*, 10 May 2001.
29. *König v. the Federal Republic of Germany*, 28 June 1978, para. 90.
30. *Ringeisen v. Austria*, 16 July 1971, para. 94.

Accordingly, how the right or obligation is characterised in domestic law is not decisive. This guideline is specifically important for cases involving relations between an individual and the State. In such a situation, the Court has stated that whether the public authority in question had acted as a private person or in its sovereign capacity is not conclusive.[31] The key point in determining whether Article 6 is applicable or not is **whether the outcome of the proceedings is decisive for private law rights and obligations**.[32]

Secondly, any **uniform European notion** as to the nature of the right should be taken into consideration.[33]

Thirdly, the Court has stated that even though the concept of civil rights and obligations is autonomous, the **legislation of the state concerned is not without importance.** The Court held in *König v. the Federal Republic of Germany* that

> *Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the state concerned.*[34]

As stated above, the Court has taken the approach of deciding each case on its own particular circumstances and it is perhaps easier to look at examples of situations where the Court has, or has not, found a civil right or obligation to be involved.

Civil rights or obligations

The Court has first and foremost held that the rights and obligations of **private persons in their relations inter se** are in all cases civil rights and obligations. The rights of private persons, physical or legal, in their relations between themselves, in for instance contract law,[35] commercial law,[36] the law of tort,[37] family law,[38] employment law[39] and the law of property[40] are always civil.

Where a case involves the **relationship between an individual and the State**, the area is more problematic. The Court has recognised a number of such rights and obligations as being civil. Property is one area where the Court has held Article 6 to be applicable. In those stages in expropriation, consolidation and planning proceedings, and procedures concerning building permits and other real-estate permits, which have direct consequences for the right of ownership with respect to the property involved,[41] and also more general proceedings where the outcome has an impact of the use or the enjoyment of property,[42] the fair hearing guarantee applies.

31. *König v. the Federal Republic of Germany*, 28 June 1978, para. 90.
32. *H v. France*, 24 October 1989, para. 47.
33. *Feldbrugge v. the Netherlands*, 29 May 1986, para. 29.
34. *König v. the Federal Republic of Germany*, 28 June 1978, para. 89.
35. *Ringeisen v. Austria*, 16 July 1971.
36. *Edificaciones March Gallego S.A. v. Spain*, 19 February 1998.
37. *Axen v. the Federal Republic of Germany*, 8 December 1983, and *Golder v. the United Kingdom*, 21 February 1975.
38. *Airey v. Ireland*, 9 October 1979, and *Rasmussen v. Denmark*, 28 November 1984.
39. *Buchholz v. the Federal Republic of Germany*, 6 May 1981.
40. *Pretto v. Italy*, 8 December 1983.

Article 6 also covers the right to engage in commercial activity. Cases in this area have involved the withdrawal of an alcohol licence from a restaurant,[43] the licence to run a medical clinic[44] and to grant permission to run a private school.[45] Disputes determining the right to practise a profession such as medicine or law are also covered by Article 6.[46]

The Court has further held that in proceedings involving the mutual enjoyment by parent and child of each other's company are at issue, Article 6 applies to public as well as private family law. Examples in this area are decisions to place children in care,[47] concerning parental access to children,[48] placing children for adoption[49] or fostering.[50]

As mentioned above, in its earlier case-law the Court held that proceedings concerning welfare benefits were not covered by Article 6. However, the Court has now made clear that Article 6 covers proceedings in which a decision is taken on entitlement, under a social security scheme, to health insurance benefits,[51] to welfare (disability) allowances,[52] and to State pensions.[53] In the case of *Schuler-Zgraggen v. Switzerland*, which concerned invalidity pensions, the Court stated in general that "the development in the law… and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 (1) does apply in the field of social insurance, including even welfare assistance".[54] Article 6 further covers proceedings in which a decision is taken on the obligation to pay contributions under a social security scheme.[55]

The guarantee in Article 6 applies to proceedings against the public administration concerning contracts,[56] damages in administrative proceedings[57] or in criminal proceedings.[58] It applies to proceedings where a claim is made for compensation for unlawful detention under Article 5 (5) following acquittal in criminal proceedings.[59] Although disputes over taxation are not regulated by Article 6, the right to recover monies paid in tax is covered.[60]

41. See e.g. *Sporrong and Lönnroth v. Sweden*, 23 September 1982, *Poiss v. Austria*, 23 April 1987, *Bodén v. Sweden*, 27 October 1987, *Håkansson and Sturesson v. Sweden*, 21 February 1990, *Mats Jacobsson v. Sweden*, 28 June 1990, and *Ruiz-Mateos v. Spain*, 12 September 1993.
42. E.g. *Oerlamans v. the Netherlands*, 27 November 1991 and *De Geoffre de la Pradelle v. France*, 16 December 1992.
43. *Tre Traktörer Aktiebolag v. Sweden*, 7 July 1989.
44. *König v. the Federal Republic of Germany*, 28 June 1978.
45. *Jordebro Foundation v. Sweden*, 6 March 1987, Commission Report, 51 DR 148.
46. *König v. the Federal Republic of Germany*, 28 June 1978, and *H v. Belgium*, 30 November 1987.
47. *Olsson v. Sweden*, 24 March 1988.
48. *W v. the United Kingdom*, 8 July 1987; *P, C, and S v. the United Kingdom*, 16 July 2002.
49. *Keegan v. Ireland*, 26 May 1994.
50. *Eriksson v. Sweden*, 22 June 1989.
51. *Feldbrugge v. the Netherlands*, 29 May 1986.
52. *Salesi v. Italy*, 26 February 1993.
53. *Lombardo v. Italy*, 26 November 1992.
54. *Schuler-Zgraggen v. Switzerland*, 24 June 1993, para. 46.
55. *Schouten and Meldrum v. the Netherlands*, 9 December 1994.
56. *Philis v. Greece*, 27 August 1991.
57. See e.g. *Editions Périscope v. France*, 26 March 1992, *Barraona v. Portugal*, 8 July 1987, and *X v. France*, 3 March 1992.
58. *Moreira de Azevedo v. Portugal*, 23 October 1990.
59. *Georgiadis v. Greece*, 29 May 1997.
60. *National & Provincial Building Society and others v. the United Kingdom*, 23 October 1997.

Further, an individual's right to respect for his reputation by a private person is considered to be a civil right.[61]The Court has also held that where the outcome of constitutional or public law proceedings may be decisive for civil rights and obligations, these proceedings are covered by the fair trial guarantee in Article 6.[62]

In a case from 2004, the Court stated that it wanted to end the uncertainty surrounding the applicability of Article 6 to the joining of a victim of crime as a civil party in criminal proceedings. It held that a criminal complaint accompanied by an application to join the proceedings as a civil party did fall within the scope of Article 6. However there was no independent right under Article 6 to have particular third parties prosecuted or sentenced for a crime.[63]

Not civil rights and obligations

In accordance with the Commission's and the Court's approach which is to rule on each case on its particular circumstances, the Strasbourg organs have also declared certain areas of law as **not** falling within the remit of Article 6 (1). This means that even claims relating to disputes over a right which is guaranteed by the Convention will not automatically attract the protection of Article 6. However, Article 13 (the right to an effective remedy) will always apply, and this may require a remedy or procedural safeguards akin to those found in Article 6 (1).[64]

The following are examples of issues that have **not** been regarded as involving the determination of civil rights and obligations. However some of these decisions are very old, and may need to be re-visited in the light of more recent developments in the wider case law of the Court.

General taxation and custom issues and taxation assessments[65]

In *Ferrazzini v. Italy*[66] the Grand Chamber expressly revisited the whole question of the applicability of Article 6 to disputes between citizens and public authorities as to the lawfulness of a decision of the tax authorities. The majority (consisting of eleven judges) voted to maintain the existing approach and held that Article 6 was not applicable. However, six judges considered that "there were no convincing arguments for maintaining the present case-law of the Court that proceedings regarding taxation do not determine civil rights and obligations". (See above, p. 10, *What are civil rights and obligations?*, for a different approach to tax fines.) The judgment of the Grand Chamber in *Jusilla v. Finland*, Appl. No. 73053/01, which was heard on 5 July 2006, was awaited at the time of going to press.

61. See e.g. *Fayed v. the United Kingdom*, 21 September 1994.
62. *Ruiz-Mateos v. Spain*, 12 September 1993.
63. *Perez v. France,* 12 February 2004.
64. *Z and others v. the United Kingdom*, 10 May 2001, and *T.P. and K.M. v. the United Kingdom*, 10 May 2001.
65. *Emesa Sugar NV v. the Netherlands*, admissibility decision of 13 January 2005 and e.g. *X v. France*, Appl. No. 9908/82 (1983), 32 DR 266. See however, p. 13, footnote 42.
66. *Ferrazzini v. Italy*, 12 July 2001.

Matters of immigration and nationality[67]

In *Maaouia v. France*[68] the Grand Chamber held that proceedings resulting in a deportation order were not criminal nor did they determine a civil right, even when the deportation order was imposed as a direct consequence of a criminal conviction. In *Mamatkulov and Askarov v. Turkey*[69] the Court similarly stated that extradition proceedings to face criminal charges in another state were neither civil nor criminal for the purpose of ensuring that an individual whose extradition was sought could benefit from the safeguards of Article 6 in those proceedings.

Employment disputes concerning public officials whose posts involve the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State such as the armed forces or the police[70]

Liability for military service[71]

Cases concerning the reporting of court proceedings

An example is the case *of Atkinson Crook and the Independent v. the United Kingdom*,[72] which concerned three applicants, two journalists and one newspaper, who complained that their Article 6 right of "access to court" had been violated because they could not challenge a decision to hold sentencing proceedings in camera in a case which they wanted to report. The Commission held that there was no indication that the applicants enjoyed a "civil right" under domestic law to report on the sentencing proceedings, and accordingly found that the applicants' complaints did not involve a civil right or obligation within the meaning of Article 6.

The right to stand for public office.[73]

The right to state education.[74]

The refusal to issue a passport.[75]

Issues concerning legal aid in civil cases[76]

See, however, also below, p. 38, *What does the notion of "fair hearing" include?*.

The right to State medical treatment[77]

This decision may need to be re-visited in the light of the decision in *Schuler-Zgraggen v. Switzerland*.[78] Where the State chooses to provide public medical care through private health insurance companies Article 6 will apply.[79] In *Ashingdane v. the United*

67. *P v. the United Kingdom*, Appl. No. 13162/87 (1987), 54 DR 211, and *S v. Switzerland*, Appl. No. 13325/87 (1988), 59 DR 256.
68. *Maaouia v. France,* 5 October 2000.
69. *Mamatkulov and Askarov v. Turkey,* 4 February 2005.
70. *Pellegrin v. France,* 18 December 1999, and *Frydlender v. France,* 27 June 2000.
71. *Nicolussi v. Austria*, Appl. No. 11734/85 (1987), 52 DR 266.
72. *Atkinson Crook and The Independent v. the United Kingdom*, Appl. No.13366/87 (1990), 67 DR 244.
73. *Habsburg-Lothringen v. Austria*, Appl. No. 15344/89 (1989), 64 DR 210.
74. *Simpson v. the United Kingdom*, Appl. No. 14688/89 (1989), 64 DR 188.
75. *Peltonen v. Finland*, Appl. No. 19583/92 (1995), 80-A DR 38.
76. *X v. the Federal Republic of Germany*, Appl. No. 3925/69 (1974), 32 CD 123.
77. *L v. Sweden*, Appl. No. 10801/84 (1988), 61 DR 62.
78. *Schuler-Zgraggen v. Switzerland*, 24 June 1993.
79. *Van Kuck v. Germany,* 12 June 2003.

Kingdom[80] the civil right at issue was the "right" of a mental patient to be transferred to a different psychiatric hospital in order to receive necessary pre-release treatment.

80. *Ashingdane v. the United Kingdom*, 28 May 1985.

The unilateral decision of the State to compensate the victims of a natural disaster[81]

This decision may need to be re-visited in the light of the judgment in *Burdov v. Russia*.

Applications for patents[82]

81. *Nordh and others v. Sweden*, Appl. No. 14225/88 (1990), 69 DR 223.
82. *X v. Austria*, Appl. No. 7830/77 (1978), 14 DR 200. Disputes over ownership of patents have, however, been held to be civil rights. (*British American Tobacco v. the Netherlands*, Appl. No. 19589/ 92, 20 November 1995).

What is a criminal charge?

The guarantees contained in this rubric of Article 6 apply only in the context of "criminal" proceedings and only to those who have been "charged". The Court has an extensive body of case law on the meaning of the terms **"criminal"** and **"charge"** for Convention purposes. The Convention meaning is often different from the meaning in national law.

Meaning of "criminal"

Although states have a wide margin of appreciation in deciding what conduct will constitute a criminal offence, the normal exercise of Convention rights, for example freedom of speech or freedom of expression, cannot be a criminal offence. However some conduct, such as serious sexual assault, must carry a criminal sanction if the victim's rights are to be protected.[83]

As the Court stated in the case of *Engel and others v. the Netherlands,*[84] State Parties are free to designate matters in their domestic law as either criminal, disciplinary or administrative, as long as this distinction does not in itself contravene the Convention. In that case, the Court **established criteria** for deciding whether a charge is "criminal" in the sense of Article 6 or not. These principles have been confirmed in later case-law.

Four points are relevant here: The classification in domestic law, the nature of the offence, the purpose of the penalty and the nature and the severity of the penalty.

83. *X and Y v. the Netherlands*, 26 March 1985.
84. *Engel and others v. the Netherlands*, 8 June 1976, para. 81.

Domestic classification

If the charge is classified as criminal in the domestic law of the respondent state, Article 6 will apply automatically to the proceedings and the considerations set out below do not apply. However, if the charge **is not classified as criminal**, this will not automatically mean that the fair trial guarantees in Article 6 do not apply. If this was the case, the Contracting States could evade the application of the fair trial guarantee by decriminalising or re-classifying criminal offences. As the Court stated in the case of *Engel and others v. the Netherlands*,

> *If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.*[85]

A similar approach was adopted by the Court in the case of *Lauko v. Slovakia*[86] to situations where offences which the Court found were criminal in character, were classified as "administrative" rather than criminal in national law. Courts trying "administrative" offences that are criminal in nature must comply with all the requirements in Article 6.

Nature of the offence

If the norm in question only applies to a restricted group of people, such as a profession, this would indicate that it is a disciplinary and not a criminal norm. However, if the norm is of **general effect** it is likely to be criminal for the purposes of Article 6. In the case of *Weber v. Switzerland*, the applicant had filed a criminal complaint of defamation, and held a press conference to inform the public of his complaint. He was then fined for breaching the secrecy of the investigation. The applicant complained of a violation of Article 6 when his appeal against the conviction was dismissed without a public hearing. The Court therefore had to rule on whether this concerned a criminal matter, and stated:

> *Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct. Furthermore, in the great majority of the Contracting States disclosure of information about an investigation still pending constitutes an act incompatible with such rules and punishable under a variety of provisions. As persons who above all others are bound by the confidentiality of an investigation, judges, lawyers and all those closely associated with the functioning of the courts are liable in such an event, independently of any criminal sanctions, to disciplinary measures on account of their profession. The parties, on the other hand, only take part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come*

85. *Engel and others v. the Netherlands*, 8 June 1976, para. 81.
86. *Lauko v. Slovakia*, 2 September 1998.

> *within the disciplinary sphere of the judicial system. As Article 185, however, potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a "criminal" one for the purposes of the second criterion.*[87]

Therefore, since the provision was not restricted to a group of persons in one or more specific capacities, it was not exclusively disciplinary in character.

Similarly, in the case of *Demicoli v. Malta*,[88] which concerned a journalist who published an article severely criticising two members of parliament, the breach of privilege proceedings against him was not considered a matter of internal parliamentary discipline, since the relevant provision potentially affected the whole population.

However, in the case of *Ravnsborg v. Sweden*,[89] the Court noted that the fines imposed were for statements the applicant had made as a party to court proceedings. It held that measure taken to ensure orderly conduct of court procedures were more akin to disciplinary sanctions than criminal charges. Article 6 was therefore held not to be applicable.

87. *Weber v. Switzerland*, 22 May 1990, para. 33.
88. *Demicoli v. Malta*, 27 August 1991.
89. *Ravnsborg v. Sweden*, 21 February 1994.

The purpose of the penalty

This criterion serves to **distinguish criminal from purely administrative sanctions**.

In the case of *Öztürk v. the Federal Republic of Germany*[90] the Court considered a case concerning careless driving which was decriminalised in Germany. However, the Court made clear that it was still "criminal" under Article 6. The norm still had the characteristics that were the hallmark of a criminal offence. It was of general application as it applied to all "road users" and not a particular group (see above), and carried out with a sanction (a fine) of a punitive and deterrent kind. The Court also noted that the great majority of States Parties treated minor road traffic offences as criminal. In *Ezeh and Connors v. the United Kingdom*[91] the Grand Chamber found that Article 6 was applicable to prison disciplinary proceedings where the charges against the applicants amounted to offences under the criminal law and where additional days could be and were imposed for punitive reasons by the prison governor after finding of culpability.

When the penalty in question is not imprisonment or threat of imprisonment but **fines**, the Court gives consideration to whether they are intended as pecuniary compensation for damage or essentially as a punishment to deter re-offending. Only in case of the latter will they be considered as belonging to the criminal sphere.[92]

90. *Öztürk v. the Federal Republic of Germany*, 21 February 1984.
91. *Ezeh and Connors v. the United Kingdom*, 9 October 2003.

The nature and severity of the penalty

This criterion is distinct from the purpose of the penalty (see above). If the purpose of the penalty does not make Article 6 applicable, the Court will then have to look at its nature and severity which can render the fair trial guarantee applicable.

Deprivation of liberty as a penalty generally makes a norm criminal rather than disciplinary. The Court stated in *Engel and others v. the Netherlands* that

> *in a society subscribing to the rule of law, there belong to the "criminal" sphere deprivation of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so.*[93]

In *Benham v. the United Kingdom*, the Court held that "where deprivation of liberty is at stake, the interests of justice in principle call for legal representation".[94]

In *Campbell and Fell v. the United Kingdom*[95] the Court declared that loss of remission of almost three years, even though in English law this was a privilege rather than a right, was to be taken into account since it had the effect of causing the detention to continue after the point where the prisoner could expect to be released. As indicated in the quotation from *Engel and others v. the Netherlands* above, not every deprivation of liberty makes Article 6 applicable. The Court has held that the duration of a prison sentence of two days was insufficient for it to be regarded as a criminal sentence.

The mere possibility of imprisonment as a sanction can also make Article 6 applicable. In *Engel and others v. the Netherlands*, the fact that one of the applicants eventually received a penalty which did not amount to deprivation of liberty did not affect the Court's assessment when the outcome could not diminish the importance of what was initially at stake.

Meaning of "charge"

Article 6 guarantees a fair trial in the determination of a criminal **charge** against a person, and its guarantees apply from the moment a person is charged. What is then meant by "criminal charge"?

"Charge" is an **autonomous concept** under the Convention which applies irrespective of the definition of a "charge" in domestic law. In the case of *Deweer v. Belgium* the Court stated that the word "charge" should be given a substantive rather than a formal meaning, and it felt compelled to look behind the appearances and investigate the realities of the procedure in question. The Court then went on to state that "charge" could be defined as

92. E.g. *Bendenoun v. France*, 24 February 1994, and *Västberga Taxi Aktierbolag and Vulic v. Sweden*, 23 July 2002.
93. *Engel and others v. the Netherlands*, 8 June 1976, para. 82.
94. *Benham v. the United Kingdom*, 10 June 1996, para. 61.
95. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 72.

> *the official notification given to an individual by the competent authority of an allegation that he is suspected of having s committed a criminal offence,*

or, where

> *the situation of the [suspect] has been substantially affected because of that same suspicion.*[96]

In the above-mentioned case, following a report that the applicant had breached certain price regulations, a prosecutor ordered the provisional closure of his shop. As a matter of Belgium law, criminal proceedings were never instituted against him since the applicant accepted a settlement offer. The Court nevertheless considered that the applicant had been under a criminal charge.

Following are some further **examples** of what constitutes a "charge":

- When a person is first questioned as a suspect.[97]
- When a person's arrest for a criminal offence is ordered.[98]
- When a person is officially informed of the prosecution against him.[99]
- When authorities investigating custom offences require a person to produce evidence and freeze his bank account.[100]
- When a person has appointed a defence lawyer after the opening of a file by the public prosecutor's office following a police report against him.[101]

As noted above, although the criteria set out in *Deweer v. Belgium* would appear to be met in extradition proceedings, the Court has held that Article 6 does not apply to them.[102]

Article 6 does apply to the legal proceedings involved in determining the proposition of a sentence that the convicted person must serve.[103]

Once it has been established that an individual is the object of a criminal charge, all the guarantees of Article 6 will apply.

96. *Deweer v. Belgium*, 27 February 1980, paras. 42, 44 and 46.
97. *Hozee v. the Netherlands*, 22 May 1998.
98. *Wemhoff v. the Federal Republic of Germany*, 27 June 1968.
99. *Neumeister v. Austria*, 27 June 1986.
100. *Funke v. France*, 25 February 1993.
101. *Angelucci v. Italy*, 19 February 1991.
102. *Salgado v. Spain*, 16 April 2002, *Mamtkulov and Askarov v. Turkey*, 4 February 2005.
103. *T v. the United Kingdom*, *V v. the United Kingdom*, both of 16 December 1999, and *Stafford v. the United Kingdom*, 28 May 2002.

What does the right to a public hearing entail?

Article 6 guarantees to everyone a public hearing in the determination of his civil rights and obligations or of any criminal charge against him. Article 6 further states that 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 require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. This provision requires that in principle, there should be an oral hearing attended in criminal cases by the prosecutor and the accused, and in civil cases by the parties, and that this hearing should be open to the public.

A public hearing is an **essential feature** of the right to a fair trial. As the Court stated in *Axen v. the Federal Republic of Germany*,

> *The public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.*[104]

A public hearing is generally needed to satisfy the requirements of Article 6 (1) before courts of first instance or only instance. However, in technical matters a public hearing may sometimes not be required.[105]

If a public hearing is not held in first instance, this can be **cured** by the holding of a public hearing at a higher instance. However, if the appeal court does not consider the merits of the case or is not competent to deal with all aspects of the matter, there will still have been a violation of Article 6. In the case of *Diennet v. France*[106] the Court held that where there had been no public hearing at a disciplinary body, this was not cured by the fact that the medical appeal body held its hearing in public since it was not regarded as a judicial body with full jurisdiction, in particular, it did not have the power to assess whether the penalty in question was proportionate to the misconduct. It will require **exceptional reasons** to justify that no public hearing is held if there has not been one at the first instance.[107]

The right to a public hearing generally includes a right to **an oral hearing**, if there are not any exceptional circumstances.[108]

There is no general requirement for an oral hearing at the appeal court. In e.g. the case of *Axen v. the Federal Republic of Germany*[109] the Court held that in criminal cases an oral hearing was unnecessary when the appeal court in question dismissed the appeal solely on grounds of law. However, where the appeal court has to look at facts and law, and decide on the guilt or innocence of the person charged, or assess the accused's character when reviewing a sentence an oral hearing is necessary.[110] In civil cases, oral hearing at

104. *Axen v. the Federal Republic of Germany*, 8 December 1983, para. 25.
105. *Schuler-Zgraggen v. Switzerland*, 24 June 1993, para. 58 – the applicant's right to invalidity pension.
106. *Diennet v. France*, 26 September 1995, para. 34.
107. *Stallinger and Kuso v. Austria*, 23 April 1997, para. 51.
108. *Fischer v. Austria*, 26 April 1995, para. 44.
109. *Axen v. the Federal Republic of Germany*, 8 December 1983, para. 28.

appeal level has been held to be unnecessary. In the case of *K v. Switzerland*[111] the applicant was involved in lengthy proceedings with a firm he had contracted to do extension work on his house. The first instance court gave judgment against the applicant in favour of the firm, and the Court of Appeal confirmed this decision. The applicant then appealed to the Federal Court, who rejected the appeal without a hearing and without asking for written observations.

The Commission stated that

> *Moreover, insofar as the applicant complains that the judges of the Federal Court did not deliberate and vote in public on his civil law appeal, the Commission observes that no such right is enshrined in the Convention.*

Regarding this issue, see further below, p. 44, *Presence at the proceedings*.

It is in certain cases possible for the applicant to waive his right to a public hearing. As the Court stated in *Håkansson and Sturesson v. Sweden*,

> *admittedly neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public… However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest.*[112]

In the case of *Deweer v. Belgium*,[113] the applicant had accepted an out of court settlement of a criminal case by payment of a fine. He would otherwise have had to face the closure of his business pending criminal proceedings. The Court held that the waiver of the hearing, i.e. the applicant accepting to pay the fine, had been tainted by constraint and this amounted to a violation of Article 6 (1).

In the case of *Håkansson and Sturesson v. Sweden* mentioned above, the Court held that the applicants tacitly waived their right to a public hearing as they had not requested that one should be held when such a possibility was expressly provided for by Swedish legislation.

The Court has stated that prison disciplinary hearings can be held in private. In the case of *Campbell and Fell v. the United Kingdom*[114] the Court declared that consideration must be given to the public order and security problems that would be involved if these proceedings were conducted in public. This would impose a disproportionate burden on the authorities of the State.

The Court has held that although a complete ban can not be justified, professional disciplinary proceedings may be held in private depending on the circumstances. Factors that should be taken into account when deciding if a public hearing is necessary are con-

110. *Ekbatani v. Sweden*, 26 May 1988, and *Cooke v. Austria*, 8 February 2000.
111. See e.g. *K v. Switzerland*, 41 DR 242.
112. *Håkansson and Sturesson v. Sweden*, 21 February 1990, para. 66.
113. *Deweer v. Belgium*, 27 February 1980, paras. 51-54.
114. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 87.

sideration for professional secrecy and the private lives of clients or patients.[115]

In the cases of *B. and P v. the United Kingdom*,[116] the Court found no violation of Article 6 when hearings under the Children Act had to be held in camera when determining the residence of each of the applicants' sons. This was so even when this meant that close family members who were not parties to the proceedings but whose rights *vis-à-vis* the children were also being determined were excluded – the law did not permit the judge to exercise any discretion to admit anyone other than the formal parties.

115. *Albert and Le Compte v. Belgium*, 10 February 1983, para. 34, and *H v. Belgium*, 30 November 1987, para. 54.
116. *B v. the United Kingdom* and *P v. the United Kingdom,* 24 April 2001.

What is meant by "pronounced publicly"?

Article 6 states that judgment shall be pronounced publicly. This provision is **not subject to any exceptions** of the kind permitted under the rule that hearings should be held in public (see above, p. 20, *What does the right to a public hearing entail?*). It is however also intended to contribute to a fair trial through public scrutiny.

The Court has stated that "pronounced publicly" does not necessarily mean that the judgment has always to be read out in court. In the case of *Pretto and others v. Italy* the Court declared that

> *it considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent state must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 (1).*[117]

117. *Pretto and others v. Italy*, 8 December 1983, para. 26.

In this case the Court held that, having regard to the appeal court's limited jurisdiction, depositing the judgment in the court registry, which made the full text of the judgment available to everyone, was sufficient to satisfy the requirement of being "pronounced publicly".

Further, the Court held in *Axen v. the Federal Republic of Germany*[118] that public oral delivery of a judgment of the Supreme Court was unnecessary given that the judgments of the lower courts had been pronounced publicly.

Also, in the *Sutter v. Switzerland*[119] case, the Court held that public delivery of a decision of an appeal military court was not necessary, as public access to that decision was ensured by other means, especially the possibility of seeking a copy of the judgment from

118. *Axen v. the Federal Republic of Germany*, 29 June 1982, para. 32.
119. *Sutter v. Switzerland*, 22 February 1984, para. 34.

the court registry and its subsequent publication in an official collection of case-law.

The above-mentioned cases all concerned judgments from hearings in higher instances of the judicial system, and the Court held that there was no violation in these cases. However, in the cases of *Werner v. Austria*[120] and *Szucs v. Austria*,[121] where judgment was not given in public either by the courts of first instance or the courts of appeal, nor were the full texts of their judgments openly available to the public in their registries, and access was limited to those with a "legitimate interest", the Court found that there had been a violation of Article 6.

120. *Werner v. Austria*, 24 November 1997.
121. *Szucs v. Austria*, 24 November 1997.

The Court also found a violation in *Campbell and Fell v. the United Kingdom*,[122] where in prison disciplinary hearings the Board of Visitors did not pronounce their judgment publicly and also took no steps to make the decision public.

In the cases of *B* and *P v. the United Kingdom*[123] discussed above, the Court observed that anyone who could establish an interest was able to consult or obtain a copy of the full text of the orders and/or judgments of first instance courts in child residence cases, and that the judgments of the Court of Appeal and of first instance courts in cases of special interest were routinely published, enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. There had therefore been no violation of Article 6.

122. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 92.
123. *B v. the United Kingdom* and *P v. the United Kingdom*, 24 April 2001.

What is the meaning of the reasonable time guarantee?

A very large number of cases that are submitted to the Court concern the right guaranteed by Article 6 to a hearing within a reasonable time. This single issue accounts for more judgments of the Court than any other. In 1999 the Grand Chamber of the Court found in the cases of *Ferrari, A.P., Di Mauro and Bottazi v. Italy*,[124] that the systemic delays in the Italian judicial system constituted an administrative practice that was incompatible with the Convention. The Italians introduced a new law that would enable victims of these violations of the Convention to obtain compensation domestically for undue length of proceedings. However five years after the 1999 judgments, in the case of *Apicella v. Italy*,[125] the Court found that the compensation awarded by the Italian author-

124. *Ferrari, A.P., Di Mauro and Bottazi v. Italy*, 28 July 1999.
125. *Apicella v. Italy*, 10 November 2004.

ities under the new law was derisory. It considered that applicants should receive compensation in the region of €1000-€1500 for each year the procedure had lasted. The sum could be reduced to take into account the standard of living in the state concerned, but increased (by €2000) if the case concerned an issue where particular diligence was required. In the subsequent Grand Chamber judgments in the cases of *Apicella*, *Scordino* and several others the Court did not repeat the sums the Chamber had set out. Instead it stated that it was not possible to translate into figures all aspects and situations that might arise; however, all the necessary elements could be found in its previous decisions. The Court did take the opportunity to send a sharp message to member states:

> *… although the existence of a remedy is necessary, it is not in itself sufficient. The domestic courts must be able, under domestic law, to apply the European case-law directly and their knowledge of this case-law has to be facilitated by the State in question.*

The Court also emphasised that States had a general obligation to solve the systemic problems underlying violations found by the Court of the reasonable time guarantee.

The Court has stated that the purpose of the reasonable time guarantee is to protect "all parties to court proceedings… against excessive procedural delays".[126] The guarantee further "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility".[127] The purpose of the reasonable time requirement is therefore to guarantee that within a reasonable time and by means of a judicial decision, an end is put to the insecurity into which a person finds himself/herself as to his/her civil law position or on account of a criminal charge against him/her: this is in the interest of the person in question as well as of legal certainty.

How is time calculated?

The **time** to be taken into consideration **starts running** with the institution of proceedings (administrative or judicial depending on the kind of case) in civil cases, and in criminal cases with the charge (as defined above).[128] Time **ceases to run** when the proceedings have been concluded at the highest possible instance, when the determination becomes final[129] and the judgment has been executed. The Court will examine the length of proceedings from the date on which a Contracting State ratified the Convention but will take into account the state and progress of the case at that date.[130]

The Court has established in its case-law that when assessing whether a length of time can be considered reasonable, the following factors should be taken into account: **the complexity of the**

126. *Stögmüller v. Austria*, 10 November 1969, para. 5.

127. *H v. France*, 24 October 1989, para. 58.
128. *Scopelliti v. Italy*, 23 November 1993, para. 18, and *Deweer v. Belgium*, 27 February 1980, para. 42.
129. See e.g. *Scopelliti v. Italy*, 23 November 1993, para. 18, and *B v. Austria*, 28 March 1990, para. 48.
130. *Proszak v. Poland*, 16 December 1997, paras. 30-31, and *Sahini v. Croatia*, 19 June 2003

case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant.[131]

The Court has regard to the particular circumstances of the case, and has not established an absolute time- limit. In some cases the Court makes an overall assessment rather than referring directly to the above-mentioned criteria.

Complexity of the case

All aspects of the case are relevant in assessing whether it is complex. The complexity may concern questions of fact as well as legal issues.[132] The Court has attached importance to e.g. the nature of the facts that are to be established,[133] the number of accused persons and witnesses,[134] international elements,[135] the joinder of the case to other cases,[136] and the intervention of other persons in the procedure.[137]

A case that is very complex may sometimes justify long proceedings. For example, in the case of *Boddaert v. Belgium*,[138] six years and three months was not considered unreasonable by the Court since it concerned a difficult murder enquiry and the parallel progression of two cases. The case of *Tričković v. Slovenia*[139] concerned proceedings in relation to an advance on the applicant's military pension. After the break up of the former Yugoslavia, the Slovenian Government took over the responsibility for payment of military pensions. The Court considered that the subject-matter of the litigation was of considerable complexity. The case was the first of a large number of constitutional appeals concerning the pensions of former Yugoslav military personnel, and as such, the domestic court had to examine its merits in detail. As the Constitutional Court had not acted unreasonably, no violation of Article 6 was found. However, even in very complex cases unreasonable delays can occur. In the case of *Ferantelli and Santangelo v. Italy*[140] the Court held that sixteen years was unreasonable in the case, which concerned a complex, difficult murder trial and which involved sensitive problems of dealing with juveniles.

The conduct of the applicant

If the applicant has caused a delay, this obviously weakens his complaint. However, an applicant can not have it held against him/her that full use has been made of the various procedures available to pursue his/her defence. An applicant is not required to co-operate actively in expediting the proceedings which might lead to his/her own conviction.[141] If applicants try to expedite the

131. See e.g. *Buchholz v. the Federal Republic of Germany*, 6 May 1981, para. 49.
132. See *Katte Klitsche de la Grange v. Italy*, 27 October 1994, para. 62, where the case would have important repercussions on national case-law and environmental law.
133. *Triggiani v. Italy*, 19 February 1991, para. 17.
134. *Angelucci v. Italy*, 19 February 1991, para. 15 and *Andreucci v. Italy*, 27 February 1992, para. 17.
135. See e.g. *Manzoni v. Italy*, 19 February 1991, para. 18.
136. *Diana v. Italy*, 27 February 1992, para. 17.
137. *Manieri v. Italy*, 27 February 1992, para. 18.
138. *Boddaert v. Belgium*, 12 October 1992.
139. *Tričković v. Slovenia*, 12 June 2001.
140. *Ferrantelli and Santangelo* v. Italy, 7 August 1996.
141. *Eckle v. the Federal Republic of Germany*, 15 July1982, para. 82.

proceedings, this will be held in their favour but a failure to apply for the proceedings to be expedited is not necessarily crucial.[142]

The Court stated in *Unión Alimentaria Sanders SA v. Spain* that the applicant's duty is only to "show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings".[143]

The case of *Ciricosta and Viola v. Italy*[144] concerned an application to suspend works likely to interfere with property rights. Because the applicants had requested at least 17 adjournments and not objected to six others requested by other party, the Court held that 15 years was not unreasonable. In view of the approach now being taken by the Court to the endemic delays in the Italian system it is questionable whether such a decision would be made today. In *Beaumartin v. France*,[145] however, even where the applicants had contributed to the delay by bringing the case in the wrong court and in submitting pleadings four months after lodging their appeal, the Court held that the authorities were more at fault, the domestic court taking over five years to hold the first hearing and the respondent ministry taking twenty months to file its pleadings.

142. See e.g. *Ceteroni v. Italy*, 15 November 1996.
143. *Unión Alimentaria Sanders SA v. Spain*, para. 35.
144. *Ciricosta and Viola v. Italy*, 4 December 1995.
145. *Beaumartin v. France*, 24 November 1994.

The conduct of the authorities

Only delays that are attributable to the State may be taken into account when determining whenever the reasonable time guarantee has been complied with. The State is, however, responsible for delays caused by all its administrative or judicial authorities.

When dealing with cases concerning length of proceedings, the Court has had regard to the principle of the proper administration of justice, namely, that domestic courts are under a duty to deal properly with the cases before them.[146] Decisions concerning adjourning for particular reasons or the taking of evidence may therefore be of some importance. In *Ewing v. the United Kingdom*[147] the joining of three cases which delayed the trial was not considered arbitrary or unreasonable or as causing undue delay giving account to the due administration of justice.

The Court has made clear that the efforts of the judicial authorities to expedite the proceedings as much as possible play an important part in ensuring that applicants receive the guarantees contained within Article 6.[148] **A special duty therefore rests upon the domestic court to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay.**

Delays that have been held by the Strasbourg organs to be attributable to the State include, in civil cases, the adjournment of proceedings pending the outcome of another case, delay in the

146. *Boddaert v. Belgium*, 12 October 1992, para. 39.
147. *Ewing v. the United Kingdom*, 56 DR 71.
148. See e.g. *Vernillo v. France*, 20 February 1991, para. 38.

conduct of the hearing by the court or in the presentation or production of evidence by the State, or delays by the court registry or other administrative authorities. In criminal cases, they include the transfer of cases between courts, the hearing of cases against two or more accused together, the communication of judgment to the accused and the making and hearing of appeals.[149]

The Court held in the case of *Zimmerman and Steiner v. Switzerland* that states have a duty to "organise their legal systems so as to allow the courts to comply with the requirements of Article 6 (1) including that of trial within a reasonable time".[150]

In the above-mentioned case, the Court found that where the reason for a delay was a long-term backlog of work in the State's court system, there was a violation of the reasonable time guarantee in Article 6 as the State had not taken adequate measures to cope with the situation. Adequate measures can include the appointment of additional judges or administrative staff. However, a violation will not normally be found where the backlog is only temporary and exceptional and the State has taken necessary remedial action reasonably promptly. When making this assessment the Court is prepared to take into account the political and social background in the state concerned.[151] In *Guincho v. Portugal* the courts had become overburdened as a result in the increase in litigation which followed the return to democracy. The Court nevertheless stated that states were under an obligation to put sufficient resources at the disposal of their systems for the administrations of justice to ensure that unacceptable delays did not occur.[152]

What is at stake for the applicant

Because what is at stake for the applicant is taken into consideration when assessing whether the reasonable time guarantee has been met, criminal proceedings will generally be expected to be pursued more expeditiously than civil, particularly where an accused person is held in pre-trial detention. The reasonable time requirement under Article 6 is closely linked to the reasonable time requirement under Article 5 (3).[153] The Court has explained that if the proceedings are unduly prolonged, pre-trial detention will become unlawful. Detention can not be considered as being for the purpose set out in Article 5 (3) if the time framework is no longer reasonable. The Court has set out in several cases, for example in *Jablonski v. Poland*,[154] the principles that must be applied by a judge in relation to the authorisation of pre-trial detention in connection with the length of time it takes a case to come to trial. A reasonable suspicion, which must be based on

149. See e.g. *Zimmerman and Steiner v. Switzerland*, 13 July 1983, *Guincho v. Portugal*, 10 July 1984 and *Buchholz v. the Federal Republic of Germany*, 6 May 1981.
150. *Zimmerman and Steiner v. Switzerland*, 13 July 1983, para. 29.
151. See e.g. *Milasi v. Italy*, 25 June 1987, para. 19, and *Unión Alimentaria Sanders SA v. Spain*, 7 July 1989, para. 38.
152. *Guincho v. Portugal*, 10 July 1984.
153. Article 5 (3) stipulates in relevant parts that "Everyone arrested or detained in accordance with the provisions of paragraph 1.*c* of the Article shall be brought promptly by a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."
154. *Jablonski v. Poland*, 21 December 2000.

objectively verifiable facts, that a person has committed an offence is always a necessary element of detention under Article 5 (1) *c* and Article 5 (3). It is however not in itself sufficient to justify pre-trial detention, even where a person has been caught *in flagrante delicto*. This would be a violation of Article 6 (2) (the presumption of innocence, see below, p. 30). **Objectively** verifiable grounds to support the deprivation of liberty such as a fear of absconding, or interfering with witnesses or evidence must also be produced. The safeguards of regular review contained in Article 5 (3) require the judge who authorises the prolonged detention to be satisfied **on each occasion** that relevant and sufficient reasons to justify a deprivation of liberty continue to exist. It is **not** sufficient for the judge to be satisfied that they existed at the time of the original detention, that the case is still not ready to come to trial and that the delay is reasonable. It is of course clear that if the judge considers that the delays are not reasonable the detention automatically becomes unlawful and the detainee must be released. In any event in order to justify prolonged detention judges will also need to show that they have satisfied themselves that there is no alternative measure less severe than detention (for example a measure restricting freedom of movement) which could meet any concerns of the prosecutor. In *Jablonski v. Poland* the Court found that, although the applicant's conduct contributed to the prolongation of the proceedings, it did not account for the entire length (over five years) for which the authorities had to bear responsibility. Both Article 5 and Article 6 were violated in this case.

Going back to the reasonable time requirement in Article 6 in relation to civil proceedings, these may also call for expedition on the part of the authorities, especially where the proceedings are critical to the applicant and/or have a particular quality or irreversibility.[155] The following are some examples:

Child care cases

In *Hokkanen v. Finland* the Court stated that "… it is essential that custody cases be dealt with speedily".[156] In *Ignaccolo-Zennide v. Romania*[157] the Court emphasised that decisions about children must not be determined by the mere effluxion of time.

Employment disputes

In *Obermeier v. Austria* the Court declared that

> *… an employee who considers that he has been wrongly suspended by his employer has an important personal interest in securing the judicial decision on the lawfulness of that measure promptly.*[158]

Personal injury cases

In the case of *Silva Pontes v. Portugal*[159] the Court stated there was a need for special diligence where the applicant was claiming compensation for serious injuries in a road traffic accident.

155. *H v. the United Kingdom*, 8 July 1988, para. 85.
156. *Hokkanen v. Finland*, 23 September 1994, para. 72.
157. *Ignaccolo-Zenide v. Romania*, 25 January 2000.
158. *Obermeier v. Germany*, 28 June 1990, para. 72.
159. *Silva Pontes v. Portugal*, 23 March 1994, para. 39.

Other cases where speed is obviously of the essence

In *X v. France*[160] the applicant contracted HIV from an infected blood transfusion and instituted compensation proceedings against the State. With regard to the applicant's condition and life expectancy, the Court held that the proceedings that lasted for two years were unreasonably long. The domestic courts had failed to use their power to expedite the hearing. In *A and others v. Denmark*, the Court held that "… the competent administrative and judicial authorities were under a positive obligation under Article 6 (1) to act with the exceptional diligence required by the court's case-law in disputes of this nature".[161]

160. *X v. France*, 23 March 1991, paras. 47-49.

161. *A and others v. Denmark*, 8 February 1996, para. 78.

What is required for a tribunal to be (1) independent and (2) impartial?

Article 6 states that everyone is entitled to a hearing by an independent and impartial tribunal established by law. The two requirements of independence and impartiality are interlocked, and the Court often considers them together.

Independence

Courts will normally be considered to be independent and the independence of judicial bodies is rarely challenged except in situations where they are being asked to consider the decisions of non-judicial bodies. Bodies which are not courts may exercise functions which are determinative of civil rights or criminal charges. This is acceptable so long as they comply with the requirements of independence and impartiality.

When deciding whether a tribunal is independent, the European Court considers:

- the manner of appointment of its members,
- the duration of their office,
- the existence of guarantees against outside pressures and
- the question whether the body presents an appearance of independence.[162]

The Court has held that the tribunal must be independent of both the executive and the parties.[163]

Composition and appointment

The Court has held that the presence of judicial or legally qualified members in a tribunal is a strong indication of its independence.[164]

162. See e.g. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 78.
163. *Ringeisen v. Austria*, 16 July 1971, para. 95.
164. *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, para. 57.

In the case of *Sramek v. Austria*[165] the Court found that the tribunal in question (the Regional Real Property Transactions Authority) was not independent. The government was a party to the proceedings, and the representative of the government was the hierarchical supervisor of the rapporteur of the tribunal.

The fact that the members of a tribunal are appointed by the executive, does not in itself violate the Convention.[166] For there to be a violation of Article 6, the applicant would need to show that the practice of appointment as a whole was unsatisfactory or that the establishment of the particular tribunal deciding a case was influenced by motives suggesting an attempt to influence its outcome.[167]

Further, if the members of a tribunal are appointed for fixed terms, this is seen as a guarantee of independence. In the case of *Le Compte v. Belgium*,[168] fixed six-year terms for Appeal Council members was found to provide a guarantee of independence. In *Campbell and Fell v. the United Kingdom*[169] Prison Board of Visitors members were appointed for three years. This was considered rather short but it was acknowledged that the posts were unpaid and it was difficult to get volunteers, and it was not considered a violation of Article 6.

165. *Sramek v. Austria*, 22 October 1984.
166. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 79.
167. *Zand v. Austria*, 15 DR 70, para. 77.
168. *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981.
169. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 80.

Although there is no reason in principle why Article 6 guarantees cannot be observed in courts martial the Court has found a number of violations in respect of military tribunals. Where civilians are on trial for offences against national security the presence of military judges on State Security Courts has been held to violate Article 6 because, *inter alia*, the judges remained subject to military discipline.[170] Several cases have been decided concerning courts martial which try military personnel for offences which the Convention classifies as criminal. In *Grieves v. the United Kingdom*[171] the Grand Chamber found that British Navy's court martial system violated Article 6 because of the *ad hoc* appointments of presidents for each court martial and the fact that judge advocates were serving naval officers. In *Cooper v. the United Kingdom*,[172] however, the Grand Chamber found that in army courts martial the presence of a civilian judge advocate and a permanent president did provide sufficient guarantees to comply with Article 6, particularly since the judicial decision-making of the military members of the tribunal was not subject to supervision and career assessment by senior officers.

Appearances

Suspicions as to the appearance of independence must to some extent be objectively justified. In the case of *Belilos v. Switzerland*[173] a local "Police Board" which adjudicated certain

170. See e.g. *Incal v. Turkey*, 9 June 1998.
171. *Grieves v. the United Kingdom*, 16 December 2003.
172. *Cooper v. the United Kingdom*, 16 December 2003.

minor offences consisted of only one member – a policeman acting in his personal capacity. Although he was not subject to orders, took an oath and could not be dismissed, he was later to return to departmental duties and would tend to be seen as a member of the police force subordinate to superiors and loyal to colleagues, and it could therefore undermine the confidence which a tribunal should inspire. There were legitimate doubts as to the independence and organisational impartiality at the Police Board, which did not satisfy the requirements of Article 6 (1). In *Procola v. Luxembourg*[174] the same judges had performed both advisory and judicial roles in the case. In *McGonnell v. the United Kingdom*[175] the judge who presided over a planning appeal had also participated in the parliamentary debate on the adopting of the development scheme. In both case Article 6 was held to have been violated. In contrast in *Kleyn v. the Netherlands*[176] a similar situation was found not to violate Article 6 on the somewhat tenuous grounds that although the same judges had dealt with the two procedures (advisory and judicial) the advisory role was much broader than the specific decision they made judicially (see also below, *Impartiality*).

Subordination to other authorities

The tribunal must have the power to give a binding decision which can not be altered by a non-judicial authority.[177] Courts martial and other military disciplinary bodies have been found to violate Article 6 in this context. The executive may issue guidelines to members about the general performance of their functions, as long as any such guidelines are not in reality instructions as to how specific cases are to be decided.[178]

Impartiality

The Court held in *Piersack v. Belgium* that

> *whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 (1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.*[179]

For **subjective** impartiality to be made out, the Court requires proof of actual bias. Personal impartiality of a duly appointed judge is presumed until there is evidence to the contrary.[180] This is

173. *Belilos v. Switzerland*, 29 April 1988, paras. 66-67.
174. *Procola v. Luxembourg*, 28 September 1995.
175. *McGonnell v. the United Kingdom*, 8 February 2000.
176. *Kleyn v. the Netherlands*, 6 May 2003.
177. *Van de Hurk v. the Netherlands*, 8 April 1994, and *Findlay v. the United Kingdom*, 25 February 1997, para. 77.
178. *Campbell and Fell v. the United Kingdom*, 28 June 1984, para. 79; *Sovtransavto Holdings v. Ukraine*, 25 July 2002.
179. *Piersack v. Belgium*, 1 October 1982, para. 30.

a very strong presumption and in practice it is very difficult to prove personal bias. In *Lavents v. Latvia*[181] the Court criticised the presiding judge for making comments about the case to the press before the trial had been concluded. The requirement of impartiality was violated by the judge referring to the possibility of conviction or partial acquittal but leaving out the possibility of total acquittal.

As to the **objective** test, the Court stated in *Fey v. Austria* that

> *under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.*[182]

The Court has made clear that any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw.[183]

The Court reiterated this principle in the case of *Sigurdsson v. Iceland*.[184] The husband of one of the judges deciding the applicant's case against a bank had financial links with that bank. These favourable arrangements made the Court conclude that whilst there was no suggestions of actual bias, the applicant's complaints about the lack of objective impartiality were justified and there had been a violation of Article 6.

In *Kleyn and others v. the Netherlands*[185] the Court examined a complaint about an authority, the Council of State, which exercised both advisory and judicial functions. No violation was found in this particular case, as the advisory role it had played in relation to the Transport Infrastructure Planning Bill and its role in the applicants' proceedings relating to a "Routing Decision" was not found to involve the "same" case or decision.

In the case of *Salov v. Ukraine*,[186] which concerned criminal proceedings against the applicant, the Court examined the wider judicial and financial background to a decision allowing a prosecution protest and remittal of the applicant's case. When doing so the Court noted, *inter alia*, a decision by the Ukrainian Constitutional Court from 1999 which had found that the Cabinet of Ministers had acted unconstitutionally when drastically reducing the State budget for the judicial system – this was found to have exerted

180. *Hauschildt v. Denmark*, para. 47.
181. *Lavents v. Latvia*, 28 November 2002.
182. *Fey v. Austria*, 24 February 1993, para. 30.
183. *Piersack v. Belgium*, para. 30, *Nortier*, para. 33, *Hauschildt*, para. 48.
184. *Sigurdsson v. Iceland*, 10 July 2003.
185. *Kleyn and others v. the Netherlands*, 6 May 2003. However, see also *Procola v. Luxembourg*, 29 September 1995, and *McGonnell v. the United Kingdom*, 8 February 2000.
186. *Salov v. Ukraine*, 6 September 2005.

financial influence on the courts and infringed the citizens' right to judicial protection. The European Court also noted a Resolution adopted by the Ukrainian Council of Judges in 2000, finding that the decisions of the Cabinet of Ministers to lower judicial salaries were contrary to the principle of the independence of the judiciary. Taking these into account, together with the organisational structure of the courts (in particular the relationship between the Presidium of the Regional Court and the District Court), the Court held that the applicant's doubts as to the impartiality of the judge could be said to have objectively justified.

The existence of **national procedures for ensuring impartiality** are also relevant here. Whilst the Convention does not expressly stipulate that there must be mechanisms whereby parties to proceedings are able to challenge impartiality, violations of Article 6 are more likely to occur if they are absent. If a defendant raises the issue of impartiality, it must be investigated unless it is "manifestly devoid of merit".[187]

The issue has been raised most often in the Strasbourg courts in the context of racism. Both the principles set out in the cases below apply equally to other kinds of prejudice or impartiality.

In the case of *Remli v. France*[188] a statement made by one of the jurors saying "What's more, I'm a racist" was overheard by a third person. The domestic court decided that it was not able to take formal note of events alleged to have occurred out of its presence. The European Court noted that the national court had not made any check to verify the impartiality, thereby depriving the applicant of the opportunity of remedying a situation that was contrary to the requirements of the Convention. The Court therefore found a violation of Article 6.

Where the domestic court has **clearly conducted a proper inquiry into an allegation of bias** and concluded that the trial in question was fair, the European Court will be reluctant to question its conclusion. In the case of *Gregory v. the United Kingdom*[189] a note was passed to the judge from the jury stating "Jury showing racial overtones. 1 member to be excused." The judge showed the note to the prosecution and the defence. He also warned the jury to try the case according to the evidence and put aside any prejudice. The Court held that this was sufficient for Article 6 purposes. It found it significant that the defence counsel had not pressed for discharge of the jury or for asking them in open court whether they were capable of continuing and returning a verdict on the evidence alone. The trial judge had made a clear, detailed and forceful statement instructing the jury to put out of their minds "any thoughts or prejudice of one form or another". The Court further held in comparison to the case of *Remli v. France*, that

> *In that case, the trial judges failed to react to an allegation that an identifiable juror had been overheard to say that he was racist. In the present case, the judge was faced with an allega-*

187. *Remli v. France*, 23 April 1996, para. 48.
188. *Remli v. France*, 23 April 1996.
189. *Gregory v. the United Kingdom*, 25 February 1997.

> *tion of jury racism which, although vague and imprecise, could not be said to be devoid of substance. In the circumstances, he took sufficient steps to check that the court was established as an impartial tribunal within the meaning of Article 6 (1) of the Convention and had offered sufficient guarantees to dispel any doubts in this regard.*[190]

In the later case of *Sander v. the United Kingdom*, however, the Court considered that **where the judge's response to similar evidence of racism amongst the jury had been inadequate** a violation of Article 6 had occurred. The Court stated that

> *… the judge should have reacted in a more robust manner than merely seeking vague assurances that jurors could set aside their prejudices and try the case solely on the evidence. By failing to do so, the judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court. It follows that the court that condemned the applicant was not impartial from an objective point of view.*[191]

Differing roles of the judge

A lot of the case-law on impartiality concerns situations where a judge plays different procedural roles in the course of the proceedings. In the case of *Piersack v. Belgium*[192] the judge who tried the applicant had previously been a member of the department which had investigated the applicant's case and initiated the prosecution against him. The Court found a violation of Article 6.

In *Hauschildt v. Denmark*[193] the Court found a violation where the presiding judge had taken decisions on pre-trial detention. This had been subject to a special feature, meaning that on nine occasions in deciding on remand he referred to a "particularly strong suspicion" of the applicant's guilt. The Court held that the difference with the issue to be settled at the trial was tenuous and the applicant's fear objectively justified.

Another example is that of the case of *Ferrantelli and Santangelo v. Italy*,[194] where the Court found a breach of Article 6 when the presiding judge on an appeal court had been involved in convicting a co-accused in another judgment. This judgment contained numerous references to the applicants and their respective involvement in the case. Furthermore, the judgment of the appeal court convicting the applicants cited numerous extracts from the previous judgment concerning the applicants' co-accused. The Court found these circumstances sufficient to hold the applicants' fears as to the lack of impartiality of the appeal court to be objectively justified.

Oberschlick (No. 1) v. Austria[195] concerned proceedings before the court of appeal, where three judges had participated also in the

190. *Gregory v. the United Kingdom*, 25 February 1997, para. 49.
191. *Sander v. the United Kingdom*, 9 May 2000.
192. *Piersack v. Belgium*, 1 October 1982.
193. *Hauschildt v. Denmark*, 24 May 1984.
194. *Ferrantelli and Santangelo v. Italy*, 7 August 1996.
195. *Oberschlick (No. 1) v. Austria*, 23 May 1991.

judgment in the first instance court. The European Court found this to be a violation of the right to an impartial tribunal.

In *De Haan v. the Netherlands*[196] the judge presiding over an appeals tribunal was called upon to decide on an objection to a decision for which he was himself responsible. The Court found that the applicant's fears regarding the objective impartiality of the presiding judge were justified, and found a violation of Article 6.

In a case against Switzerland[197] the Court found a violation of Article 6 (1) where the applicant was involved in proceedings in a court which was composed of five judges. Two were part-time judges who had acted as representative of the other party in separate proceedings brought by the same applicant. The Court noted that legislation and practice on part-time judiciary could in general be framed so as to be compatible with Article 6, and what was at stake was solely the manner in which the proceedings were conducted in the case. While there was no material link between the applicant's case and the separate proceedings in which the two lawyers had acted as legal representatives, there was in fact an overlap in time. The applicant could therefore have reason for concern that the judge in question would continue to see him as the opposing party and this situation could have raised legitimate fears that the judge was not approaching the case with the requisite impartiality. In *Kyprianou v. Cyprus*[198] the Grand Chamber found that Article 6 (1) had been violated when judges who alleged that the applicant's conduct had constituted contempt for their court initiated and adjudicated the contempt charges themselves. Review of their decision by the Supreme Court did not remedy this defect.

The mere fact that the judge has previously been involved with the applicant is not sufficient to in itself violate Article 6 (1). Special features, as those in the cases described above, are required beyond the judge's knowledge of the file.

Rehearings

If a decision is quashed on appeal and returned to the first instance for a new decision, there is not an automatic violation of Article 6 because the same body, with or without the same membership, decides the matter again.[199] In the case of *Thomann v. Switzerland*[200] the applicant was re-tried by the court that had convicted him *in absentia*. The Court did not consider that this disclosed a violation of Article 6, since the judges would be aware that they had reached their first decision on limited evidence and would undertake fresh consideration of the case on the comprehensive, adversarial basis.

Specialist tribunals

The Court recognises that there may be good reasons for holding hearings before special adjudicatory bodies where specialist tech-

196. *De Haan v. the Netherlands*, 26 August 1997.
197. *Wettstein v. Switzerland*, 21 December 2000.
198. *Kyprianou v. Cyprus*, 15 November 2005.
199. *Ringeisen v. Austria*, 16 July 1971, para. 97.
200. *Thomann v. Switzerland*, 10 June 1996.

nical knowledge is required. This may involve appointing tribunal members who are practitioners in the specialist field in question, for example medical disciplinary tribunals. Where there are direct links between members of the tribunal and any of the parties those members should stand down. Once a legitimate doubt is raised, it may not be enough to point to the presence of judicial members or a judicial casting vote. The case of *Langborger v. Sweden*[201] concerned a hearing in the Housing and Tenancy Court. This was made up of two professional judges and two lay assessors nominated by property owners and tenant association. The lay assessors had close links with the two associations which sought to maintain a clause the applicant was challenging. Legitimate fear that their interests were contrary to his own, meant that it was not sufficient that the judicial president had the casting vote.

Juries

The above-mentioned principles apply equally to juries[202] and to lay judges who sit with a professional judge in ordinary criminal and civil cases.[203] Where the lay judges can outvote the professional judge their independence will come under particular scrutiny.

201. *Langborger v. Sweden*, 22 June 1989.
202. *Sander v. the United Kingdom*, 9 May 2000.
203. *Lavents v. Latvia*, 28 November 2002.

Waiver

The Court has not set down clear guidelines as to the extent to which an accused may waive his right to an independent and impartial tribunal. The Court has however stated, that to the extent that a waiver is possible it must be limited and minimum guarantees must remain that can not depend on the parties alone. **The waiver must be established in an unequivocal manner.** The parties must have been aware of the doubts as to impartiality, have had the opportunity to raise the issue and have declared their satisfaction with the composition of the court. **A mere failure to object will not suffice to establish waiver** of this fundamental requirement**.** The Court held in *Pfeiffer and Plankl v. Austria*[204] that a failure to object to two court judges who had been investigating judges and disqualified to sit as judges was not sufficient to be considered as a waiver. In *Oberschlick (No. 1) v. Austria*[205] the presiding judge over an appeal court had participated in previous proceedings and was not supposed to sit under the Criminal Procedure Code. The applicant did not challenge the judge's presence, but he was unaware of the fact that two other judges were similarly disqualified. The Court found that he had not waived his right to an impartial tribunal.

204. *Pfeiffer and Plankl v. Austria*, 25 February 1992.
205. *Oberschlick (No. 1) v. Austria*, 23 May 1991.

Established by law

As to the requirement that a tribunal shall be established by law, the Commission held in *Zand v. Austria* that

> *It is the object and purpose of the clause in Article 6 (1) requiring that the courts shall be "established by law" that the judicial organisation in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, this does not mean that delegated legislation is as such unacceptable in matters concerning the judicial organisation. Article 6 (1) does not require the legislature to regulate each and every detail in this field by formal Act of Parliament, if the legislature establishes at least the organisational framework for the judicial organisation.*[206]

The requirement that a tribunal is established by law applies not only to the institutional establishment, but also to the specific composition in a particular case.

In *Lavents v. Latvia*[207] the tribunal was found not to have been established by law. It included two lay judges whose previous decisions in the case had been quashed by a higher Court. Latvian law did not permit them to sit on the case again. The tribunal was therefore not constituted in accordance with the law.

The Court found a violation of this provision in the case of *Posokhov v. Russia*,[208] where the applicant also alleged that he was convicted by a court composed in breach of relevant domestic law. Lay judges' names should have been drawn by lot, and the Court stated that it was particularly struck by the fact that Neklinovskiy District Authority – the body responsible for the appointment of lay judges – had confirmed that it had no list of lay judges appointed at the time of the applicant's conviction. The authority had thus failed to present any legal grounds for the participation of the two lay judges in the administration of justice on the day of the applicant's trial.

206. *Zand v. Austria*, 15 DR 70.

207. *Lavents v. Latvia*, 28 November 2002.
208. *Posokhov v. Russia,* 4 March 2003.

What does the notion of "fair hearing" include?

Article 6 states that everyone is entitled to a fair hearing. This expression incorporates many aspects of the due process of the law, such as the right of access to court, a hearing in the presence of the accused, freedom from self-incrimination, equality of arms, the right to adversarial proceedings and a reasoned judgment. These essential elements of a fair hearing are not immediately obvious from reading only the text of Article 6. It is important for all professionals involved in the administration of justice to be

aware of the detailed elements of the notion of "fair hearing" which have been developed by the Court.

Access to court

There is no express guarantee of the right of access to a court in the text of Article 6, but the European Court has held that this provision secures to everyone the right to have any claim relating to his/her civil rights and obligations brought before a court or tribunal. Article 6 embodies the right to a court, of which the right to access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.

The Court held in *Golder v. the United Kingdom* that

> *were Article 6 (1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent of the Government… It would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.*[209]

However, **the right of access to court is not an absolute right**. The Court went on to state in *Golder v. the United Kingdom* that its very nature calls for regulation (which may vary in time and place according to the needs and resources of the community and of individuals) by the State, though such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention.

In its case-law the Court has further held that any limitation will only be compatible with Article 6

- if it pursues a legitimate aim; and
- if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[210]

The case of *Golder v. the United Kingdom* concerned a prisoner who had been refused permission to contact his solicitor with a view to bringing a civil action for libel against a prison officer. The Court held that this was a violation of Article 6 – the right of access to court must not only exist, it must also be effective. The Court has also held that the inability of a prisoner to have confidential out of hearing consultations with a lawyer denied him effective access to court.[211]

209. *Golder v. the United Kingdom*, 21 February 1975, para. 35.
210. *Ashingdane v. the United Kingdom*, 28 May 1985, para. 57.
211. *Campbell and Fell v. the United Kingdom*, 28 June 1984, paras. 111-113.

Access to court – the nature of the litigant

In some cases access to court is refused because of the nature of the litigant. The Court has acknowledged that limitations on access for minors, persons of unsound mind, bankrupts and vexatious litigants do pursue a legitimate aim.[212] In the case of *Canea Catholic Church v. Greece*[213] a court had ruled that the applicant church did not have legal personality in Greek law. This led to the dismissal of action brought to assert its property rights. The European Court stated, however, that this had impaired the substance of the right to a court, and that there had been a violation of Article 6. The Court has also found a violation where legal proceedings could only be taken by another body in spite of the applicants' direct interest in the proceedings. In the case of *Philis v. Greece*[214] the applicant who was an engineer by profession sought remuneration for work done. This could only be pursued by the Technical Chamber of Greece. The Court held that while this procedure might have provided engineers with the benefit of experienced legal representation for little expense, it was insufficient to justify removing the applicant's capacity to pursue and act in his own claim.

212. *M v. the United Kingdom*, 52 DR 269.
213. *Canea Catholic Church v. Greece*, 16 December 1997.
214. *Philis v. Greece*, 27 August 1991.

Access to court and legal aid

In some jurisdictions of the Council of Europe, e.g. Cyprus, there is no legal aid scheme for civil cases but *ex-gratia* payment can be made by the state in suitable cases.[215] Whether or not the lack of a legal aid scheme leads to a violation of the Convention will depend on the facts of the case. In *Airey v. Ireland* a wife who was indigent was refused legal aid to bring proceedings to separate from her husband. The Court held that

> *Article 6 (1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.*[216]

The Court found that the applicant in this case did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation. There is however no general right to legal aid *per se* in civil cases. Legal aid is required only when legal representation is compulsory or because of the complexity or nature of the proceedings. In *Aerts v. Belgium* the Court found a violation where legal aid in proceedings for compensation for unlawful detention was not available but legal representation was obligatory for proceedings in the Court of Cassation.[217] In the case of *P., C. and S. v. the United Kingdom*[218]

215. *Andronicou and Constantinou v. Cyprus*, 9 October 1997.
216. *Airey v. Ireland*, 9 October 1979, para. 26.

the first applicant did initially have lawyers representing her in proceedings concerning the removal of her daughter for adoption. However, her lawyers withdrew from the case and she was not given time by the domestic court to find alternative representation. The European Court found this constituted a violation of Article 6 as legal representation was indispensable due to the complexity proceedings, and bearing in mind was what at stake for the applicant.

The case of *Steel and Morris v. the United Kingdom*[219] has provided the most extensive analysis of the right to legal aid in civil cases. In that case the Court held that the lack of civil legal aid was a violation of Article 6. The fast food chain McDonalds brought libel proceedings against the two applicants claiming compensation for damage caused by a leaflet allegedly written by the applicants which severely criticised the practices and food of McDonalds. The applicants were refused legal aid and so represented themselves throughout the trial and appeal, with only some help from volunteer lawyers. The trial lasted for 313 court days and was the longest in English legal history. The Court noted that the case was factually and legally complex. It held that in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel. The very length of the proceedings was, to a certain extent, a testament to the applicants' lack of skill and experience. Finally the Court also pointed to the fact that it was McDonalds, and not the applicants, who had instituted the proceedings.

Access to court and immunities

The right of access to court may sometimes be violated where **an immunity** exists that is effectively preventing a claim from being pursued. *Ashingdane v. the United Kingdom*[220] concerned an immunity created by a statute barring civil actions by mental patients against staff or health authorities unless bad faith or lack of reasonable case was alleged. Even then a High Court judge had to give leave and had to be satisfied a *prima facie* case of bad faith or negligence had been made out. The Court held that the restrictions imposed in the case, in limiting any liability of the responsible authorities, did not impair the very essence of the applicant's right to court or transgress the principle of proportionality. The Court further held in this case that the applicant could have taken proceedings for negligence since he could, with leave, have brought a claim if bad faith or negligence was alleged.

The case of *Osman v. the United Kingdom*[221] concerned a public policy immunity from suit in negligence for the police acting in an investigative or preventative capacity. The Court held that the aim

217. *Aerts v. Belgium*, 30 July 1998.
218. *P., C. and S. v. the United Kingdom,* 16 July 2002.
219. *Steel and Morris v. the United Kingdom*, 15 February 2005.
220. *Ashingdane v. the United Kingdom*, 28 May 1985.
221. *Osman v. the United Kingdom*, 28 October 1998.

of the exclusionary rule might be accepted as legitimate since it was directed to the maintenance of police efficiency in the prevention of disorder and crime. However, the application of the rule without further inquiry into competing public interest considerations served to confer a blanket immunity on the police for their acts and omissions. This amounted to an unjustifiable restriction on an individual's right to have a determination on the merits of a claim. The Court therefore found a violation of Article 6. This approach was subsequently reversed in the cases of *Z and others v. the United Kingdom* and *T.P. and K.M. v the United Kingdom*.[222] The Court found that the same exclusionary rule as operated in *Osman* had been applied to actions which children and their parents attempted to bring against local authorities. Reversing *Osman*, the Court held that application of the exclusionary rule meant that there was no right in English law and Article 6 did not therefore apply (see above, p. 10, *What are civil rights and obligations?*).

The case of *Roche v. the United Kingdom*,[223] following *Z and others* and *T.P and K.M.*, found no violation of the right of access to court when servicemen were prevented from bringing claims in negligence in situations which were covered by a no-fault invalidity pension scheme. There was no "right" in English law at stake and Article 6 did not therefore apply.

In *Ernst v. Belgium*,[224] the immunity given to a magistrate from civil claims in damages was found justified, but the Court placed weight on the fact that there were other means by which the applicants could protect their interests. In *Al Adsani v. the United Kingdom*[225] the Court found Article 6 applicable to proceedings brought against the Kuwaiti Government because, had the State waived immunity the claim for personal injury could have gone to trial. Accepting Kuwait's sovereign immunity was in accordance with international law (see also *Fogarty v. the United Kingdom*[226]).

In determining whether granting international organisations immunity from national jurisdiction violates Article 6, the Court has held that the existence of reasonable alternative means to protect effectively the rights were available.[227]

The Court has also examined immunities in the context of parliamentary debates. In *A v. the United Kingdom*[228] the applicant was named by her MP (Member of Parliament) as being a "neighbour from hell", but she could not bring proceedings as the MP was protected by absolute parliamentary privilege. The European Court found that this restriction on access was justified by the fundamental importance of protecting free debate in Parliament. However, the Court came to a different conclusion in the case of *Cordova v. Italy*[229] where the applicant, who was a prosecutor, had

222. *Z and others v. the United Kingdom*, 10 May 2001, and *T.P. and K.M. v. the United Kingdom*, 10 May 2001.
223. *Roche v. the United Kingdom*, 19 October 2005.
224. *Ernst v. Belgium*, 15 July 2003.
225. *Al Adsani v. the United Kingdom*, 21 November 2001.
226. *Fogarty v. the United Kingdom*, 21 November 2001.
227. *Waite and Kennedy v. Germany*, 18 February 1999. See also *Prince Hans-Adam II of Liechtenstein v. Germany*, 12 July 2001.
228. *A v. the United Kingdom*, 17 December 2002.

instituted proceedings for damage to his reputation as a result of statements by two MPs. These proceedings were terminated as they were covered by parliamentary immunity. The Court found that the statement had been made in a personal rather than professional context, and as the decision to limit the applicant's access to court had been made by political bodies, this constituted an disproportionate interference.

Access to court and limited jurisdiction

The Court may also find a violation of the right to access to court where the domestic court or tribunal in question does not have **full jurisdiction** over the facts and legal issues in the case before it. When assessing whether there has been a violation, the Court will take into account the subject-matter of the dispute, whether the court may, even with limited competence, adequately review the disputed issues, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of the action or appeal.

In the case of *Bryan v. the United Kingdom*[230] the issue at stake was enforcement proceedings for breach of planning permission. The Court held that even though the appeal to the High Court was restricted to points of law and therefore its jurisdiction over the facts was limited, this did not amount to a violation of Article 6. The Court stressed the specialised character of planning, which was considered to be typical example of the exercise of discretionary judgment of the authorities in the regulation of citizen's conduct. The scope of review of the High Court was therefore held to be sufficient.

However, in the case of *Vasilescu v. Romania*[231] the Court did find a violation of Article 6, where the domestic courts did not have jurisdiction to examine a claim made for the restitution of property confiscated during the Communist regime. The Court accepted the interpretation of domestic procedural law by the Supreme Court of Justice of Romania, which ruled that no court in fact had jurisdiction to rule on the applicant's claim. The only available procedures were before the Procurator General's Department. The Court in Strasbourg found that Department not to be an independent tribunal within the meaning of Article 6 (1).

Access to court and execution of the judgment

As mentioned above (see p. 9), the right of access to court also includes the right of a final determination of the dispute, such as in the case of *Burdov v. Russia*[232] and *Jasiuniene v. Lithuania*.[233] In addition, the Court has held in a number of cases against Croatia, that Article 6 was violated when proceedings have been stayed for a long time pending new legislation which was not adopted within the time frame set out by the Government.[234]

229. *Cordova v. Italy,* 30 January 2003.
230. *Bryan v. the United Kingdom*, 22 November 1995, para. 45.
231. *Vasilescu v. Romania*, 22 May 1998.
232. *Burdov v. Russia,* 7 May 2002.
233. *Jasiuniene v. Lithuania*, 6 March 2003.
234. See e.g. *Kutić v. Croatia*, 1 March 2002.

Presence at the proceedings

The Court has held that the accused in criminal proceedings must be present at the trial hearing.[235] The object and purpose of Article 6 (1) and 6 (3) *c-e* presuppose the presence of the accused.

As regards civil cases, the requirement that the parties be present at the proceedings only extends to certain kinds of cases, such as cases which involve an assessment of a party's personal conduct.

A criminal **trial in the absence of the accused or a party** may be allowed in certain exceptional circumstances, if the authorities have acted diligently but not been able to notify the relevant person of the hearing[236] and may be permitted in the interests of the administration of justice in some cases of illness.[237]

A party may waive the right to be present at an oral hearing, but only if the waiver is unequivocal and "attended by minimum safeguards commensurate to its importance".[238] However, if the accused in criminal cases waive their right, they must still be permitted legal representation.[239]

In the case of *F.C.B. v. Italy*,[240] an Italian court held a retrial in the applicant's absence although informed by his counsel that he was detained abroad. The Court stated that the applicant had not expressed the wish to waive attendance and did not accept the argument submitted by the Government that he had used deliberate delaying tactics in not providing the Italian authorities with his address. The Italian authorities were aware that the applicant was subject to proceedings abroad and it was hardly compatible with the diligence required in ensuring defence rights were effectively exercised to continue trial without taking further steps to clarify the position.

The **right of a person to be present at the appeal** will depend on the nature and scope of the hearing. The Court considers that a hearing in the presence of the accused is not as crucial at an appeal hearing as it is at the trial. If the appeal court will only consider points of law, a hearing in the presence of the accused will not be necessary. The situation is different, however, if the appeal court will also consider the facts of the case. In determining whether the accused has a right to be present, the Court will take into consideration what is at stake for him/her and the appeal court's need for the accused's presence to determine the facts.

In the case of *Kremzow v. Austria*[241] the applicant was excluded from a hearing on points of law, and the Court found that his presence was not required by Article 6 (1) or 6 (3) *c* since his lawyer was able to attend and make points on his behalf. However, the Court found a violation when the applicant was excluded from the hearing of the appeal on sentence, which involved an increase in

235. *Ekbatani v. Sweden*, 26 May 1988, para. 25.
236. *Colozza v. Italy*, 22 January 1985.
237. See e.g. *Ensslin and others v. the Federal Republic of Germany*, 14 DR 64, where the applicants were unfit to attend after a hunger strike. The Commission emphasised, however, the fact that the applicants' lawyers were present.
238. *Poitrimol v. France*, 23 November 1993.
239. See e.g. *Pelladoah v. the Netherlands*, 22 September 1994, where the Court found a violation of Article 6 (1) and Article 6 (3) *c*.
240. *F.C.B. v. Italy*, 28 August 1991.
241. *Kremzow v. Austria*, 21 September 1993.

sentence to life imprisonment and committal to special prison and a ruling on the motive for the crime which the jury had been unable to establish. The Court held that since the assessment of the applicant's character, state of mind and motivation were significant to the proceedings, and there was much at stake for the applicant, he should be able to be present and participate as well as his lawyer.[242]

Freedom from self-incrimination

The Court has held that the right to a fair trial in criminal cases includes "the right of anyone charged with a criminal offence … to remain silent and not to contribute to incriminating himself".[243]

In the case of *Saunders v. the United Kingdom* the Court stated that

> *although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 … The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 (2) of the Convention.*
>
> *The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*[244]

This case concerned a company director, who was required by law to answer questions by government inspectors regarding a company take-over on pain of criminal sanction. The transcripts of the interview was later admitted as evidence against him at a trial where he was convicted. The Court considered this to be a violation of Article 6.

The Court has taken a different view when it comes to rules permitting the **drawing of adverse inferences** from the silence of an accused during interrogation or trial. The Court held in the case of *John Murray v. the United Kingdom*[245] that "the right to silence" is not an absolute right. Even though it is incompatible with this

242. See e.g. *Cooke v. Austria*, 8 February 2000.
243. *Funke v. France*, 25 February 1993, para. 44.
244. *Saunders v. the United Kingdom*, 17 December 1996, paras. 68- 69.
245. *John Murray v. the United Kingdom*, 8 February 1996.

immunity to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions, it is obvious that this privilege does not prevent an accused's silence being taken into account in situations which clearly call for an explanation. The Court found in this case that the legislation applied did not violate Article 6. The applicant had not been subject to direct coercion, being neither fined nor threatened with imprisonment. The Court further found that the use of inferences was an expression of the common sense implication drawn where an accused fails to provide an innocent explanation for his actions or behaviour. There were sufficient safeguards to comply with fairness and the general burden of proof remained with the prosecution who had to establish a prima facie case before the inference could be of relevance.

The Court held, however, in the case of *Condron v. the United Kingdom*,[246] that the jury needs to be properly directed by the trial judge when deciding whether or not to draw an adverse inference from an applicant's silence, in order not to constitute a violation of Article 6.

The State's use of informers may in certain situations violate the right to remain silent. In *Allan v. the United Kingdom*[247] an informer was placed in the same police cell and prison cell as the applicant, with the specific purpose of obtaining evidence against him. The Court found that even though there had been no direct coercion, the applicant's admissions had been the product of persistent questioning and he had been subject to psychological pressures which impinged on the voluntariness of the statements.

246. *Condron v. the United Kingdom*, 2 May 2000.
247. *Allan v. the United Kingdom*, 5 November 2002.

Equality of arms and the right to adversarial proceedings

The right to a fair hearing incorporates the principle of equality of arms.

This means that **everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent.** A fair balance must be struck between the parties.[248]

The right to a fair hearing also incorporates the right to adversarial proceedings, which means in principle the opportunity for parties to a criminal or civil trial to have **knowledge of and comment on all evidence adduced or observations filed**.[249] In this context particular importance is to be attached to the appearance of the fair administration of justice.[250]

These principles apply to **both criminal and civil proceedings**.

In criminal cases, they overlap with some of the specific guarantees of Article 6 (3), but are not confined to those aspects of the proceedings. For example, the Court held in the case of *Bönisch v.*

248. See e.g. *De Haes and Gijsels v. Belgium*, 24 February 1997.
249. *Ruiz-Mateos v. Spain*, 23 June 1993, para. 63.
250. *Borgers v. Belgium*, 30 October 1991, para. 24.

Austria[251] that when an expert witness appointed by the defence is not accorded the same facilities as one appointed by the prosecution or the court, there is a violation of Article 6 (1).

Further, the Commission held, in *Jespers v. Belgium*,[252] that the equality of arms principle read together with Article 6 (3) *b* imposes an **obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence.** This principle extends to material which might undermine the credibility of a prosecution witness. In *Foucher v. France*[253] the Court held that where a defendant who wished to represent himself was denied access by the prosecutor to the case file and not permitted copies of documents contained in it and thereby was unable to prepare an adequate defence, this was a violation of the principle of equality of arms read together with Article 6 (3).

The case of *Rowe and Davis v. the United Kingdom*[254] concerned the trial of the two applicants and a third man, who were charged with murder, assault occasioning grievous bodily harm and three counts of robbery. The prosecution relied substantially on evidence given by a small group of people who were living with the applicants, and that of the girlfriend of one of the applicants. The three men were convicted of the charges, and the Court of Appeal upheld the convictions.

During the applicants' trial at the first instance the prosecution decided, without notifying the judge, to withhold certain evidence on the grounds of public interest. At the commencement of the applicants' appeal the prosecution notified the defence that certain information had been withheld, without revealing the nature of this material. Further, on two occasions the Court of Appeal reviewed the undisclosed evidence in *ex parte* hearings with submissions from the prosecution but in the absence of the defence. The Court decided in favour of non-disclosure.

The European Court pointed out that the entitlement to disclosure of relevant evidence is not an absolute right and that there may be competing interests such as protecting witnesses or keeping secret police methods of investigation of crime. However, the only measures restricting the rights of the defence which are permissible under Article 6 are those which are strictly necessary. The Court held that the prosecution's assessment of the importance of concealed information did not comply with the principles of adversarial proceedings and equality of arms. The procedure before the appeal court was not sufficient to remedy the unfairness that had been caused. This was because the judges there were dependent for their understanding of the possible relevance of the undisclosed material on transcripts from the first trial and on the account of the issues given to them by the prosecution alone. The Court accordingly found a violation of Article 6 (1).

251. *Bönisch v. Austria*, 6 May 1985.
252. *Jespers v. Belgium*, 27 DR 61.
253. *Foucher v. France*, 18 March 1997.
254. *Rowe and Davis v. the United Kingdom*, 16 February 2000.

In civil proceedings, Article 6 will in certain circumstances require that the parties should be entitled to cross-examine witnesses.[255] The principle of equality of arms is also violated when a party is prevented from replying to written submissions to the national court made by counsel for the State.[256] In *Dombo Beheer BV v. the Netherlands*[257] the applicant, a limited company, instituted civil proceedings against a bank to prove that there was an oral agreement between it and the bank to extend certain credit facilities. Only two persons had been present at the meeting where the agreement had allegedly been reached, one person representing the applicant and one person representing the bank.

However, only the person representing the bank had been allowed by the domestic court to be heard as a witness. The applicant company had been denied the possibility of calling the person who had represented it, because the court had identified him with the applicant company itself.

The European Court however found that during the relevant negotiations the two representatives acted on an equal footing, both being empowered to negotiate on behalf of their respective parties, and it was difficult to see why they should not both have been allowed to give evidence. The applicant company was therefore put at a substantial disadvantage *vis-à-vis* the bank and there had been a violation of Article 6 (1).

However, the Court held in *Ankerl v. Switzerland*[258] that there was no violation of Article 6 (1). This case also concerned the calling of witnesses, and the applicant complained that the refusal of a court to allow his spouse to give evidence on oath in support of his claim in civil proceedings was a breach of the principle of equality of arms, in light of the fact that the applicant's opponent was able to produce a witness who gave evidence on oath.

The Court held that it could not see how the fact of the applicant's wife giving evidence on oath could have influenced the outcome of the proceedings. This was so since the court could have taken into account statements made by Mrs Ankerl, the fact that it did not appear that the court attached any particular weight to the testimony by the applicant's opponent, and the fact that the court relied on other evidence than just the statements in issue.

In the case of *T.P. and K.M. v. the United Kingdom*[259] the Court held that the public authorities were required to provide a mother with the video evidence on which they had based their removal of her child. This was so whether or not she had specifically asked for it.

The Court has also held that the principle of equality of arms was violated, where the national legislature of the State adopted legislation which was aimed at ensuring the defeat of the applicant's claim which was proceeding through the national courts.[260] The

255. *X v. Austria*, 42 CD 145.
256. *Ruiz-Mateos v. Spain*, 23 June 1993.
257. *Dombo Beheer BV v. the Netherlands*, 27 October 1993.
258. *Ankerl v. Switzerland*, 23 October 1996.
259. *T.P. and K.M. v. the United Kingdom*, 10 May 2001.
260. *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994.

case of *Van Orshoven v. Belgium*[261] concerned a medical doctor involved in disciplinary proceedings. The applicant appealed against a decision to strike him off the register, but the court dismissed the appeal.

He complained that at no stage of the proceedings before the appeal court had he been able to reply to the submissions of the procurator general, and these had not been communicated to him.

The Court held that, with regard being had to what was at stake for the applicant and to the nature of the submissions made by the procurator general, the fact that it was impossible for Mr Van Orshoven to reply to the submissions before the end of the hearing was a breach of his right to adversarial proceedings. This right, the Court stressed, meant the opportunity for both parties to a trial to have knowledge of and comment on all evidence adduced or observations filed. There had accordingly been a violation of Article 6 (1).

The case of *Krcmar v. the Czech Republic*[262] explains the difference between the two interlinked concepts of equality of arms and adversarial proceedings. It concerned proceedings before the Constitutional Court concerning the nationalisation and possible restitution of the applicants' property. The Constitutional Court had on its own initiative gathered additional evidence on which it based its decision. The European Court stated that as this evidence had not been communicated to either of the parties, no infringement of equality of arms had been established. However, there had been a violation of the right to adversarial proceedings, as the applicants had not been given the opportunity to comment on the evidence produced.

In several cases the Court has frequently found a violation in relation to the role played by the Advocate General or similar officers at the Court of Cassation or Supreme Court where there was a failure to disclose the opinions in advance or to provide the applicant with an opportunity to comment on them.[263]

Right to a reasoned judgment

Article 6 requires that the domestic courts give reasons for its judgment in both civil and criminal proceedings. Courts are not obliged to give detailed answers to every question,[264] but **if a submission is fundamental to the outcome of the case the court must then specifically deal with it in its judgment.** In *Hiro Balani v. Spain*[265] the applicant had made a submission to the court which required a specific and express reply. The court failed to give that reply making it impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it. This was found to be a violation of Article 6 (1).

261. *Van Orshoven v. Belgium*, 25 June 1997.
262. *Krcmar v. the Czech Republic*, 3 March 2000.
263. See e.g. *Borgers v. Belgium*, 30 October 1991, and *Meftah v. France*, 26 July 2002.
264. *Van de Hurk v. the Netherlands*, 19 April 1994, para. 61.
265. *Hiro Balani v. Spain*, 9 December 1994. See also *Ruiz Torija v. Spain*, 9 December 1994.

This right is particularly important in cases where the applicant wishes to exercise a right of appeal. In *Hadjianastassiou v. Greece*[266] Article 6 was violated because the court martial judgment given to the applicant was only a summary and by the time he received the full text he was barred from expanding his grounds of appeal.

One issue that has been considered by the Court is the **lack of reasoned verdicts by juries in criminal cases**. The Commission held in a case against Austria[267] that there was no violation since the jury were given detailed questions to answer, counsel could apply to make modifications and this specificity made up for lack of reasons. In addition to that, the applicant could and did file grounds of nullity on the basis that the judge had misdirected the jury as to the law.

266. *Hadjianastassiou v. Greece*, 16 December 1992.

267. Appl. No. 25852/94.

What special rights apply to juveniles?

The Court has long recognised that the fair trial rights enshrined in the Convention attach to children as well as adults, and in the case of *Nortier v. the Netherlands*[268] the Commission took the view that any suggestion that children who are tried for criminal offences should not benefit from the fair trial guarantees of Article 6 was unacceptable.

The leading cases of the rights of juveniles are *T* and *V v. the United Kingdom*,[269] which concerned two boys aged ten, who abducted a two-year-old boy from a shopping mall, battered him to death and left him on a railway line to be run over. The case caused enormous publicity and outrage in the United Kingdom. The boys were charged with murder and, because of the nature of the charge, were tried in an adult court. They were sentenced to an indeterminate period of detention in 1993, at the age of eleven.

Before the Court, the applicants submitted *inter alia* that they had been denied a fair trial since they were not able to participate effectively in the conduct of their case. The Court noted that there was no clear common standard amongst the States Parties as to the minimum age of criminal responsibility and that the attribution of criminal responsibility to the applicants did not in itself give rise to a breach of Article 6. It went on to state:

> *The Court does, however, agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are*

268. *Nortier v. the Netherlands*, Commission Report 9 July 1992, Appl. No. 13924/88, para. 60.

269. *T v. the United Kingdom* and *V v. the United Kingdom*, both 16 December 1999.

taken to promote his ability to understand and participate in the proceedings.

It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition.[270]

The Court further stated:

The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public.[271]

In addition to this, there was psychiatric evidence that in view of the applicant's immaturity, it was very doubtful that he understood the situation and was able to give informed instruction to his lawyers. The Court held:

Here, although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of co-operating with his lawyers and giving them information for the purposes of his defence.[272]

The Court therefore concluded that the applicant was unable to participate in the criminal proceedings against him and was denied a fair hearing in accordance with Article 6 (1).

Similarly, the Court found a violation in *SC v. the United Kingdom*[273] where an eleven year old was prosecuted for attempted robbery. The Court found that in view of his age and because of his limited intellectual ability, he had not been able to participate adequately in the proceedings.

The Court suggested in the cases of *Singh* and *Hussain v. the United Kingdom*[274] that a **life sentence with no possibility of early release** which was imposed on a juvenile might raise issues under

270. *V v. the United Kingdom*, 16 December 1999, paras 86-87.
271. *V v. the United Kingdom*, 16 December 1999, para. 88.
272. *V v. the United Kingdom*, 16 December 1999, para. 90.
273. *SC v. the United Kingdom*, 15 June 2004.
274. *Singh v. the United Kingdom and Hussain v. the United Kingdom*, both 21 February 1996.

Article 3 (freedom from torture and inhuman and degrading treatment or punishment).

Where **children** claim to have been **victims of violations** of Convention rights which are also civil rights they must have access to court to determine the liability of the authorities for those violations.[275] The Court has held that lawyers who acted in previous proceedings or parents who have been deprived of parental responsibility can bring cases to Strasbourg on behalf of their children if it would otherwise mean that the children's cases could not be heard.[276] There seems no reason why this principle should not also apply to cases in national courts.

All Convention rights must be read in conjunction with the relevant provisions of the Convention on the Rights of the Child (COROC) (for example, Article 40 in relation to criminal proceedings). The COROC is applicable under the European Convention by virtue of Article 53.[277]

275. *Osman v. the United Kingdom*, 28 October 1998.

276. See e.g *Scozzari and Giunta v. Italy*, 13 July 2000, *S.P., D.P. and A.T. v. the United Kingdom*, Appl. No. 23715/94, 20 May 1996.

277. See below, p. 56, footnote 289.

What is the situation regarding admissibility of evidence?

The European Court has frequently held that it is not its place to substitute its own view as to the admissibility of evidence for that of national courts, although it has examined the way in which the evidence was treated as an important matter in deciding whether or not a trial was fair.[278] The rules of evidence are thus principally the matter for the domestic courts in each Contracting State.

However the Convention has established some important guidelines.[279] The admission of ***unlawfully obtained evidence*** does not in itself violate Article 6, but the Court held in *Schenk v. Switzerland*[280] that it ***can give rise to unfairness*** on the facts of a particular case. In this case, which concerned the use of a recording, illegal in so far as it was not ordered by the investigating judge, the Court held that there was no violation of Article 6 (1) as the defence was able to challenge the use of the recording and there was other evidence supporting the conviction of the accused. In *Khan v. the United Kingdom*[281] the applicant had arrived in the United Kingdom on the same plane as his cousin, who was found to be in possession of heroin. No heroin was found

278. *Van Mechelen and others v. the Netherlands*, 18 March 1997, para. 50.

279. Much of what follows is also covered below, p. 65, *How shall the right to witness attendance and examination as covered by Article 6 (3) d be interpreted?*. Readers should also consult p. 46, *Equality of arms and the right to adversarial proceedings*.

280. *Schenk v. Switzerland*, 12 July 1988.

281. *Khan v. the United Kingdom*, 12 May 2000.

on the applicant. Five months later the applicant visited a friend who was under investigation for dealing in heroin. Without the friend's knowledge a listening device had been installed in his home. The police obtained a tape recording of a conversation between the applicant and his friend, where the former admitted he had been involved in the drug smuggling. He was arrested and charged, and finally convicted of drug offences.

Before the European Court he alleged violations of Articles 8, the right to respect for private life, and Article 6. The Court found a violation of Article 8 because no statutory system existed to authorise the use of the covert listening device. Although the surveillance had complied with internal Ministry Guidelines, the Court found that these were not legally binding nor were they directly publicly accessible. They thus lacked the "quality of law" which Article 8 requires for interferences to be justifiable. In relation to the Article 6 claim, the Court noted that the applicant had had ample opportunity to challenge both the authenticity and the use of the recording. The applicant did not challenge the authenticity, but did challenge the use. The fact that he was unsuccessful, the Court stressed, did not make a difference in the Court's assessment. The Court therefore found that the use of the material which had been obtained in violation of Article 8, did not conflict with the requirements of fairness incorporated in Article 6.

What the Court has not yet decided is whether evidence obtained in violation of domestic law and which constitutes the only or main evidence by which a person is found guilty is a violation of Article 6 of the Convention.

What is the situation regarding admissibility of evidence?

The use of "***agents provocateurs***" is a different matter. The case of *Teixeiro de Castro v. Portugal*[282] concerned two undercover police officers who approached an individual suspected of petty drug-trafficking in order to obtain heroin. Through another individual, contact was made with the applicant who agreed to produce the heroin. He obtained this through yet another person. When handing over the drugs to the police officers he was arrested.

The applicant complained that he had not had a fair trial in that he had been incited by plain-clothes police officers to commit an offence of which he was later convicted.

The Court pointed out that its task was not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. It noted that the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug-trafficking. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest in combating crime cannot justify the use of evidence obtained as a result of police incitement.

The Court considered that in this case the two police officers did not confine themselves to investigating the applicants' criminal capacity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence. It also noted

282. *Teixeira de Castro v. Portugal*, 9 June 1998.

that in their decisions the domestic courts said that the applicant had been convicted mainly on the basis of the statements of the two police officers.

The Court therefore concluded that the officers' action went beyond those of undercover agents because they instigated the offence and there was nothing to suggest that without their intervention it would have been committed. There had accordingly been a violation of Article 6 (1).

The admission of ***hearsay evidence*** is not in principle contrary to the fair trial guarantees,[283] but if there is no opportunity to cross-examine this may render the trial unfair if the conviction is based wholly or mainly on such evidence. In the case of *Unterpertinger v. Austria*[284] the applicant was charged with causing actual bodily harm to his wife and his step-daughter at two different incidents. The applicant pleaded not guilty. The police had prior to the hearing taken statements by the wife and the step-daughter. However, at the hearing, they declared that they wanted to avail themselves of the right to refuse to give evidence as close family members.

The prosecution was then granted the request that the statements the women had made prior to the trial should be read out in court.

The European Court stated that in itself, the reading out of statements in this way could not be regarded as a violation of the Convention. However, the use of them must comply with the rights of the defence. It went on to state that it was clear that the applicant's conviction was based mainly on the statements by the wife and step-daughter. The domestic court had not treated these simply as items of information but as proof of the truth of the accusations made by the women at the time. Bearing in mind that the applicant had not had an opportunity at any stage in the proceedings to question the persons whose statements were read out at the hearing, he had not had a fair hearing within the meaning of Article 6 (1) taken together with the principles in 6 (3) *d*.

The use of evidence obtained from **police informers, undercover agents and victims of crime** may sometimes require measures to protect them from reprisals or identification. In *Doorson v. the Netherlands* the Court stated: "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."[285] In this case, in order to take action against drug trafficking in Amsterdam, the police compiled sets of photographs of persons suspected of being drug dealers. The police received information that the applicant was engaged in drug trafficking, and his photograph was shown to a number of drug addicts who stated that they recognised him and that he sold drugs. A number of these remained anonymous. The applicant was arrested and later convicted of having committed drug offences.

The applicant complained that the taking of, hearing of and reliance on evidence from certain witnesses during the criminal pro-

283. *Blastland v. the United Kingdom*, 52 DR 273.
284. *Unterpertinger v. Austria*, 24 November 1986.
285. *Doorson v. the Netherlands*, 26 March 1996, para. 70.

ceedings against him infringed the rights of the defence in violation of Article 6. He stressed that during the first instance proceedings two anonymous witnesses had been questioned by the investigating judge in the absence of his lawyer.

The Court pointed out that the use of **anonymous witnesses** at trial will raise issues under the Convention, and that there have to be counterbalancing measures to ensure the rights of the defence. The Court noted that the witnesses were questioned at the appeal stage in the presence of the defence lawyer by an investigating judge who was aware of their identity. The lawyer had the opportunity to ask the witnesses whatever questions he considered to be in the interest of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered. The Court also noted that the national court did not base its findings of guilt solely or to a decisive extent on the evidence of the anonymous witnesses, and did therefore not find a violation of Article 6.

In *Kostovski v. the Netherlands*[286] the applicant had been identified to the police as having taken part in the robbery of a bank by two persons who wished to remain anonymous. Statements made by these witnesses were read out in court during the trial where the applicant was convicted of armed robbery.

Before the European Court the applicant complained that he had not had a fair trial because of the use as evidence of the reports of statements by two anonymous witnesses.

The Court noted that in principle all the evidence must be produced in the presence of the accused. However, to use as evidence statements obtained at the pre-trial stage is not in itself inconsistent with Article 6, as long as the rights of the defence have been respected. These rights require as a rule the opportunity for the accused to challenge and question a witness at some stage of the proceedings. In the present case, this opportunity was not afforded. The Court therefore found a violation of Article 6.

Different considerations will apply where the witnesses are ***police officers***. Because they

> *owe a general duty of obedience to the State's executive authorities and usually have links to the prosecution… their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties… may involve giving evidence in open court.*[287]

The Commission has held that the evidence of an **accomplice** who has been offered immunity from prosecution may be admitted without violating Article 6, provided the defence and the jury are made fully aware of the circumstances.[288]

Evidence obtained by maltreatment cannot be used as evidence in criminal proceedings. This prohibition is set out in Article 15 of the United Nations Convention against Torture which is applicable under the European Convention by virtue of Article 53 of the Convention.[289] In the case of *G v. the United Kingdom*[290] the

286. *Kostovski v. the Netherlands*, 20 November 1989.

287. *Van Mechelen and others v. the Netherlands*, 18 March 1997, para. 56.
288. *X v. the United Kingdom*, 7 DR 115.

Commission noted that early access to a lawyer is an important safeguard as to the reliability of confession evidence. It stated that when a charge is based solely on the confession of the accused, without the benefit of legal advice, a procedure must exist whereby the admissibility of such evidence can be examined.

The Court dealt with **confessions** obtained during incommunicado detention in the case of *Barberá, Messegué and Jabardo v. Spain*.[291] It expressed reservations about the use of such confessions, particularly where the authorities could not clearly demonstrate that the applicants had waived their right to legal assistance.

289. Article 53 ECHR states that "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be guaranteed under the laws of any High Contracting Party or under any other agreement to which it is a party". (All parties to the European Convention are also parties to the UNCAT.)
290. *G v. the United Kingdom*, 35 DR 75.
291. *Barberá, Messegué and Jabardo v. Spain*, 6 December 1988. On this case see further below, p. 56.

What actions might contravene the presumption of innocence?

Article 6 (2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. However, it also applies to the kinds of civil cases which the Convention regards as "criminal", such as professional disciplinary proceedings.[292]

The Court stated in the case of *Barberá, Messegué and Jabardo v. Spain* that the principle of the presumption of innocence

> *… requires,* inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.*[293]

However, Article 6 (2) does not prohibit rules which transfer the burden of proof to the accused to establish his/her defence, if the overall burden of establishing guilt remains with the prosecution. In addition, Article 6 (2) does not necessarily prohibit presumptions of law or fact, but any rule which shifts the burden of proof or which applies a presumption operating against the accused must be confined within "reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[294] In an old case from the United Kingdom, the

292. *Albert and Le Compte v. Belgium*, 10 February 1983.
293. *Barberá, Messegué and Jabardo v. Spain*, 6 December 1988, para. 77.
294. *Salabiaku v. France*, 7 October 1988, para. 28.

Commission held acceptable a presumption that a man proved to be living with or controlling a prostitute was living off immoral earnings.[295] In the case of *Salabiaku v. France*[296] the applicant took delivery of a loaded trunk which proved to contain drugs, and was subject to a presumption of responsibility. The Court held however, that since the domestic courts maintained a freedom of assessment and gave attention to the facts of the case, quashing one conviction, there was no violation. Statements to the press by a judge before a trial is concluded which suggest guilt with violate Article 6.[297]

Not only the courts but also **other State organs** are bound by the principle of presumption of innocence. In the case of *Allenet de Ribemont v. France*[298] the applicant, while in police custody, was pointed out at a press conference by a senior police officer as the instigator of a murder. The Court held that Article 6 (2) applied not only to courts but to other public authorities from the moment when an applicant was "charged with a criminal offence". The declaration of guilt was made by the police officer without any qualification or reservation and encouraged the public to believe that the applicant was guilty before the facts had been assessed by a competent court. This was held to be a violation of the principle of the presumption of innocence, and it was not cured by the fact that the applicant was later released by a judge for lack of evidence.

The presumption of innocence must equally be upheld **after acquittal** as before trial. The Court held in *Sekanina v. Austria*[299] that it is no longer admissible for the domestic courts to rely on suspicions regarding an applicant's guilt once an acquittal has become final. This means that Article 6 (2) applies to criminal proceedings in their entirety, and comments made by judges on the termination of proceedings or when the accused has been acquitted will violate the presumption of innocence. In the case of *Minelli v. Switzerland*[300] the prosecution of the applicant was stayed because of the expiry of a statutory limitation period. However, the domestic court ordered that he should pay part of the prosecution costs as well as compensation to the alleged victim as if it had not been for the time bar, the applicant would probably have been convicted. There had therefore been a violation of Article 6 (2) since the ruling of the domestic court was incompatible with the presumption of innocence.

In a number of Norwegian cases the Court found violations of the presumption of innocence where the applicants had brought compensation claims after acquittal, or where the alleged victims had lodged compensation claims against the applicants. Whilst the applicants had not been charged with a criminal offence in the compensation proceedings, Article 6 was applicable because of the

295. *X v. the United Kingdom*, 42 CD 135.
296. *Salabiaku v. France*, 7 October 1988.
297. See *Lavents v. Latvia*, 28 November 2002.
298. *Allenet de Ribemont v. France*, 10 February 1995.
299. *Sekanina v. Austria*, 25 August 1993, para. 30.
300. *Minelli v. Switzerland*, 21 February 1983.

link between the conditions for obtaining compensation and the issues of criminal responsibility. The reasoning of the domestic courts had cast into doubt the previous acquittals of the applicants, and therefore not complied with Article 6 (2).[301]

301. *O v. Norway*, *Hammern v. Norway*, and *Y v. Norway*, 11 February 2003. However, see also *Ringvold v. Norway*, where the Court found no violation.

What is the meaning of the right to prompt intelligible notification of charges as covered in Article 6 (3) a?

The list of minimum guarantees set out in Article 6 (3) *a-e* is not exhaustive. The guarantees identify key specific aspects of the right to a fair trial. The Court has held that the relationship between Article 6 (1) and Article 6 (3) "is that of the general to the particular". A criminal trial could therefore fail to fulfil the requirements of a fair trial, even if the minimum guarantees in Article 6 (3) are upheld.[302]

Article 6 (3) a states that everyone charged with a criminal offence has the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/ her. As with Article 6 (2) it also applies to the cases which the Convention regards as "criminal", such as professional disciplinary proceedings.[303]

This provision is aimed at the information **that is required to be given to the accused at the time of the charge**[304] **or the commencement of the proceedings**. As regards the relationship between this provision and Article 5 (2),[305] the latter generally requires less detail and is not as rigorous. In *Mattocia v. Italy* the accused was given insufficient information about the time and place of the offence he was alleged to have committed.[306]

In the case of *De Salvador Torres v. Spain*[307] the applicant complained that the domestic court had relied on an aggravating circumstance, not mentioned in the charge, to increase his sentence. However, the Court did not find a violation since the circumstance was an intrinsic element to the accusation against the appli-

302. See e.g. *Artico v. Italy*, 13 May 1980.
303. See above, p. 36, *Specialist tribunals*.
304. For what constitutes a charge, see above, p. 19, *Meaning of "charge"*.
305. Article 5 (2) reads "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him".
306. *Mattocia v. Italy*, 25 July 2000.
307. *De Salvador Torres v. Spain*, 24 October 1996.

cant and known by him from the start of the proceedings. In contrast, the Commission found a violation in *Chichlian and Ekindjian v. France*,[308] where the charge had been reclassified in a substantial sense. The applicants had been acquitted of a currency offence charged under one section of the relevant domestic law, but then convicted on appeal of the offence under another section. The Commission held that the material facts had always been known to the applicants but there was no evidence that the applicants had been informed by the relevant authority of the proposal to reclassify the offence before the appeal hearing.

It is essential that **the offence of which a person is convicted is the one with which he was charged**. In *Pélissier and Sassi v. France*[309] the accused were charged only with criminal bankruptcy but convicted of conspiracy to commit criminal bankruptcy. The court held that since the element of the two offences differed, this was a violation of the Convention.

The information about the charge must **be in a language that the accused understands**. In the case of *Brozicek v. Italy*[310] the accused was German, and did clearly express his language difficulties to the domestic court. The European Court held that the Italian authorities should have had the notification translated unless they were in a position to establish that he knew adequate Italian, which was not the case. Similarly, the Court held in *Kamasinski v. Austria*[311] that a defendant not conversant with the court's language may be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands.

308. *Chichlian and Ekindjian v. France*, Report of the Commission, 16 March 1989, Appl. No. 10959/84.
309. *Pélissier and Sassi v. France*, 25 March 1999.
310. *Brozicek v. Italy*, 19 December 1989.
311. *Kamasinski v. Austria*, 19 December 1989.

What is adequate time and facilities according to Article 6 (3) *b*?

Article 6 (3) *b* states that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his/her defence. This also applies in some civil cases as part of the general fairness requirement.[312]

The judge's key role in relation to this provision is to achieve the proper balance between this requirement and the obligation to ensure that trials are concluded within a reasonable time.[313] The provision is also closely related to Article 6 (3) *c*, the right to legal assistance and legal aid.

312. See above, p. 38, *What does the notion of "fair hearing" include?*.
313. See above, p. 24, *What is the meaning of the reasonable time guarantee?*.

Complaints on this point in relation to convictions have been declared inadmissible when they have been made by a person who has subsequently been acquitted on appeal in criminal proceedings or by a person who declares that he/she will not take any further part in the proceedings.[314] The judge's role is nevertheless to ensure that this safeguard is respected in the proceedings before him/her and not to rely on the possibility of the defect being made good on appeal.

The adequacy of the time will depend on all the circumstances of the case, including the **complexity** and the **stage** the proceedings have reached.[315]

A fundamental element is that the defence lawyer must have sufficient time to allow proper preparation to take place. Two weeks to prepare a 17 000-page file was found insufficient in the Grand Chamber judgment in *Öcalan v. Turkey*.[316]

This principle implies a presumption that the accused's lawyer has unrestricted and confidential access to any client held in pre-trial detention in order to discuss all elements of the case. A system which **routinely requires the prior authorisation** of the judge or procurator for legal visits will violate this provision. Judges should make it clear to all parties when authorising or prolonging pre-trial detention that their permission is NOT required for legal visits to take place. If the prosecutor seeks to assert the right to authorise or withhold legal visits not only will this provision be violated but the whole fairness of the trial may be questionable. It follows that the authorities in charge of the pre-trial detention institution cannot require any authority from the judge in order to facilitate legal visits. Furthermore they must ensure that adequate facilities are provided to enable legal visits to take place in confidence and out of hearing of the prison authorities.[317]

Where the accused, or his lawyers, allege that adequate facilities have not been provided the judge has the responsibility to decide whether or not the trial can go ahead without violating Article 6 (3) *b*. In doing so the judge will bear in mind that the right of the accused to communicate freely with his lawyer in the preparation of his defence is regarded as absolutely central to the concept of a fair trial.[318]

Certain restrictions may however be justified in exceptional circumstances. The admissibility decision in *Kröcher and Möller v. Switzerland*[319] concerned the detention of those classified as exceptionally dangerous prisoners and charged with particularly serious terrorist offences. The judge had ruled that they were unable to receive legal visits for three weeks, and only able to correspond with their lawyers under judicial supervision during that period. Once the legal visits had been authorised they were not monitored. The Commission did not consider that this disclosed a

314. *X v. the United Kingdom*, 19 DR 223, and *X v. the United Kingdom*, 21 DR 126.
315. See e.g. *Albert and Le Compte v. Belgium*, 10 February 1983, and *X v. Belgium*, 9 DR 169.
316. *Öcalan v. Turkey*, 12 May 2005.
317. See *Öcalan v. Turkey*, 12 May 2005 and *Can v. Italy*, Commission Report, 12 July 1984.
318. *Campbell and Fell v. the United Kingdom*, 28 June 1984.
319. *Kröcher and Möller v. Switzerland*, 26 DR 24.

violation of Article 6 (3) *b*. In other cases the Commission found no violation where the applicant was placed in solitary confinement and prevented from communicating with his lawyer for limited periods, since there was adequate opportunity to communicate with the lawyer at other times.[320] In *Kurup v. Denmark*[321] there was no violation when defence counsel was placed under an obligation not to disclose the identity of certain witnesses to his client. This was not a restriction that affected the applicant's right to prepare his defence to such an extent that it could amount to a violation of Article 6 (3) *b* or *d*.

Any such restrictions must be however be **no more than strictly necessary** and must be **proportionate to identified risks.**

The right to communicate with a lawyer also includes the right to correspond via letters. Most of these cases have been examined under Article 8 of the Convention (the right to respect for correspondence) as well as under Article 6 (3) *b*. In the case of *Domenichini v. Italy*[322] the Court held that the monitoring of the applicant's letters to his lawyer by the prison authorities constituted a violation of both Article 8 and Article 6 (3) *b*, especially because of a delay in sending one of his letters to the lawyer.

The Convention demands that any interferences with the rights of accused or detained person to communicate with their lawyers must be prescribed by a law which is "precise and ascertainable" and which clearly sets out the circumstances in which such interferences are permitted.

As regards the applicant's right to **access to evidence**, the Commission held in the case of *Jespers v. Belgium*[323] that

> *… the Commission takes the view that the "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has already recognised that although a right of access to the prosecution file is not expressly guaranteed by the Convention, such a right can be inferred from Article 6, paragraph 3.b … It matters little, moreover, by whom and when the investigations are ordered or under whose authority they are carried out.*

The Commission went on to state

> *In short, Article 6, paragraph 3.b, recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities.*

The Commission added that this right was restricted to those facilities which assist or may assist in defence.

The principle has in practice had a rather narrow interpretation. In the above-mentioned case of *Jespers v. Belgium*, the applicant

320. See e.g. *Bonzi v. Switzerland*, 12 DR 185.
321. *Kurup v. Denmark*, 42 DR 287.
322. *Domenichini v. Italy*, 15 November 1996.
323. *Jespers v. Belgium*, 27 DR 61.

alleged lack of access to a special folder of the public prosecutor. The Commission, although stressing that refusal of access would breach Article 6 (3) b if it contained anything enabling him to exonerate himself or reduce his sentence, found that there was no evidence from the applicant that it contained anything relevant and the Commission was not prepared to presume that the Government had not complied with its obligations.

In the judgment of *Öcalan v. Turkey*[324] the Grand Chamber found a number of violations of both Article 6 (3) *b* and *c*. The applicant had had no assistance from his lawyers during questioning in police custody, he had been unable to communicate with his lawyers out of hearing of third parties at any stage of the proceedings, he was unable to gain direct access to the case file until a very late stage, restrictions were imposed on the number and length of his lawyers' visits, and his lawyers were not given proper access to the case file until late in the day. Further, the Court has held that a state may restrict access to the file to the defendant's lawyer.[325] Limitations on the disclosure of evidence to the applicant have been found acceptable where there is a sound reason in the interests of the administration of justice, even though arguably the evidence was of significance to the defence.[326]

In *Rowe and Davis v. the United Kingdom* and *Fitt v. the United Kingdom* the Court looked at procedures for withholding evidence on public interest grounds and found that there would only be compliance with Article 6 if the trial judge could see the evidence and decide whether he could order disclosure. It was not enough for the Court of Appeal to be able to see the material.[327]

324. *Öcalan v. Turkey*, 12 May 2005.

325. *Kremzow v. Austria*, 21 September 1992.
326. *Kurup v. Denmark*, 42 DR 287. See also above, p. 52, *What is the situation regarding admissibility of evidence?*.
327. *Rowe and Davis v. the United Kingdom*, 16 February 2000, and *Fitt v. the United Kingdom*, 16 February 2000.

What is incorporated in the right to representation and legal aid according to Article 6 (3) c?

Article 6 (3) *c* provides for the accused the right to defend himself/herself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The rights set out in this provision are closely lined to those in Article 6 (3) *b*, see above.

The Court has held that the right to represent oneself **in person** is not an absolute right. In the case of *Croissant v. Germany*[328] it held

that the requirement that a defendant be assisted by a lawyer at the domestic court proceedings was not incompatible with Article 6 (3) *c*.

Where the accused has the right to free legal assistance, he/she is entitled to legal assistance which is **practical and effective and not merely theoretical and illusory**. The Court held in *Artico v. Italy* that even if the authorities can not be held responsible for every shortcoming of a legal aid lawyer and the conduct of the defence, emphasising that:

> *… Article 6 (3) c speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.*[329]

In *Czekalla v. Portugal* the failure of a legal aid lawyer to complete the grounds of appeal with the necessary formal conclusions, which led to the rejection of the appeal, was held to have deprived the applicant of a practical and effective defence.[330] The Court further stated in the case of *Kamasinski v. Austria* that

> *… the competent national authorities are required under Article 6 (3) c to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.*[331]

Where it is clear that the lawyer representing the accused before the domestic court has not had the time and facilities to prepare the case properly, the presiding judge is under a **duty** to take measures of a positive nature to ensure that his/her obligations to the defendant are properly fulfilled. In such circumstances an adjournment would usually be called for.[332]

The Commission has held that the right to **choose** a lawyer arises only where the accused has sufficient means to pay the lawyer. A legally aided accused thus has no right to choose his representative, or to be consulted in the matter.[333] Even for those paying privately the right to choose is not absolute: the State is entitled to regulate the appearance of lawyers in the courts and in certain circumstances to exclude the qualifications of particular individuals.[334]

The **right to legal aid** for an accused depends on **two circumstances**. Firstly, that the accused **lacks sufficient means** to pay for legal assistance. Not many issues regarding this condition have arisen before the Convention organs, but it seems that the level of proof required for a defendant that he/she lacks resources should not be set too high.

328. *Croissant v. Germany*, 25 September 1992.
329. *Artico v. Italy*, 30 April 1980, para. 33.
330. *Czekalla v. Portugal*, 10 October 2002.
331. *Kamasinski v. Austria*, 19 December 1989, para. 65.
332. *Goddi v. Italy*, 9 April 1984, para. 31.
333. *M v. the United Kingdom*, 36 DR 155.
334. *Ensslin and others v. the Federal Republic of Germany*, 14 DR 64, and *X v. the United Kingdom*, 15 DR 242.

The second condition is that the **interests of justice** require legal aid to be granted. A number of factors are relevant here. The Court will have regard to the **complexity of the case** and the ability of the defendant to present the case adequately without assistance. In the case of *Hoang v. France*[335] the Court stated that where there are complex issues involved, and the defendant does not have the legal training necessary to present and develop appropriate arguments and only an experienced lawyer would have the ability to prepare the case, the interests of justice require that a lawyer be officially assigned to the case.

Finally, the **seriousness of any possible sanction** is also relevant to the question whether legal aid should be granted. The Court held in the case of *Benham v. the United Kingdom*[336] that **"where the deprivation of liberty is at stake, the interests of justice in principle call for legal representation"**. The Court however also emphasised that the proceedings were not straightforward. In *Biba v Greece*[337] the Court found a violation where no legal aid was available for the appeal to a higher court against a conviction for homicide.

In *Ezeh and Connors v. the United Kingdom* the Court found a violation of Article 6 (3) *c* as the applicants had been unrepresented in prison disciplinary proceedings before the prison governor.

In *Perks and others v. the United Kingdom*[338] the Court followed its decision in *Benham v. the United Kingdom*. This case concerned a number of applicants who were imprisoned for failure to pay a local community charge ("poll tax"). The Court held that having regard to the severity of the penalty risked by the applicants and the complexity of the applicable law, the interests of justice demanded that in order to receive a fair hearing, the applicants ought to have benefited from free legal representation.

Factors relevant to the question of legal aid may alter, and any refusal of legal aid must therefore be reviewable. In *Granger v. the United Kingdom*[339] the degree of complexity involved in one of the issues for determination only really became clear during the appeal hearing. The Court held that it would have been in the interests of justice for legal aid to have been available for that point on, and that in the absence of any review of the original decision there had been a breach of Article 6 (3) *c*.

The Court has emphasised that it is not necessary to prove that the absence of legal assistance had caused actual prejudice in order to establish a violation of Article 6 (3) *c*. If such proof were necessary, this would in large measure deprive the provision of its substance.[340]

The right to legal aid in civil cases is not expressly set out in the Convention but the Court has held that it must be available if the

335. *Hoang v. France*, 29 August 1992, paras. 40-41.
336. *Benham v. the United Kingdom*, 10 June 1996.
337. *Biba v. Greece*, 26 September 2000; see also *Twalib v. Greece*, 9 June 1998.
338. *Perks and others v. the United Kingdom*, 12 October 1999.
339. *Granger v. the United Kingdom*, 28 March 1990.
340. *Artico v. Italy*, 30 April 1980, para. 35.

interests of justice so require (see above, p. 39, *Access to court*, and p. 46, *Equality of arms and the right to adversarial proceedings*).[341]

341. *Airey v. Ireland*, 9 October 1979.

It is for the judge to assess whether the interests of justice require that an indigent litigant should be provided with legal assistance if he/she does not have the means to pay for it (see also p. 40, *Access to court and legal aid*).

How shall the right to witness attendance and examination as covered by Article 6 (3) *d* be interpreted?

Article 6 (3) d provides that the accused has the right to examine or have examined witnesses against him/ her, and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.[342]

The general principle is therefore that accused persons must be allowed to call and examine any witness whose testimony they consider relevant to their case, and must be able to examine any witness who is called, or whose evidence is relied on, by the prosecutor.

This provision does not give an accused an **absolute** right to call witnesses or a right to force the domestic courts to hear a particular witness. Domestic law can lay down conditions for the admission of witnesses and the competent authorities can refuse to allow a witness to be called if it appears that the evidence will not be relevant. The applicant must therefore establish that the failure to hear a particular witness prejudiced his/her case.[343] However, the procedure for summonsing and hearing of witnesses must be the same for the prosecution as the defence and equality of arms is required.

In principle, all evidence relied on by the prosecution should be produced in the presence of the accused at a public hearing with a view to adversarial argument.[344] Problems will therefore arise if the prosecution introduces written statements by a person who does not appear as a witness, for example because he/she fears reprisals from the accused or his/her associates.

Only **exceptional circumstances** will permit the prosecution to rely on evidence from a witness that the accused has been unable to cross examine. The determination by the judge of a criminal

342. Some of what follows here is also covered above, p. 52, *What is the situation regarding admissibility of evidence?*, and p. 46, *Equality of arms and the right to adversarial proceedings*.

343. *X v. Switzerland*, 28 DR 127.

344. *Barberá, Messegué and Jabardo v. Spain*, 6 December 1988, para. 78.

charge in reliance on the prosecutor's file, **but without the prosecutor being present** to answer any challenge by the accused, is **likely to give rise to the risk of violations** of this provision. The judge of course, cannot defend the prosecutor's case in his absence without compromising his impartiality.

Many Convention states have rules which excuse some witnesses, e.g. family members, from giving evidence. The Court stated in the case of *Unterpertinger v. Austria*[345] that such provisions are manifestly not incompatible with Article 6 (1) and 6 (3) *d*. However, in that case, the Court noted that the domestic court did not treat the statements by the applicant's former wife and step-daughter as items of information, but as proof of the truth of the accusations made by the women at the time. The applicant's conviction was based mainly on this evidence, and therefore the rights of the defence had not been sufficiently safeguarded.[346]

Problems will also arise if a witness falls seriously ill or dies. The Court has held that this can justify reliance on hearsay evidence so long as counterbalancing factors preserve the rights of the defence.[347] In regards to poor health issues, the Court will strongly consider the existence of alternatives which avoid recourse to hearsay evidence. In the case of *Bricmont v. Belgium*, the Prince of Belgium had brought charges against the applicants but not given evidence on medical grounds. The Court held that

> *in the circumstances of the case, the exercise of the rights of the defence – an essential part of the right to a fair trial – required in principle that the applicants should have the opportunity to challenge any aspect of the complainant's account during a confrontation or an examination, either in public or, if necessary, at his home.*[348]

In a recent decision against the Netherlands, the applicant had been convicted of having raped three drug-addicted street prostitutes. One of the women was heard by the appeal court as an injured party, but was not summoned to appear as a witness. The prosecutor submitted that summoning the other two witnesses would be pointless as their addresses were unknown. The appeal court nevertheless ordered the prosecutor to make all possible efforts to take evidence from the three women. The applicants conviction for rape was confirmed by the appeal court, which based its conviction inter alia on the applicant's own statements, the detailed statements by the three women to the police and a report on a medical examination of one of the women. The European Court found the application inadmissible, as there were no indication that the appeal Court had been negligent in trying to ensure the witnesses were heard.[349]

345. *Unterpertinger v. Austria*, 24 November 1986.
346. See also p. 54 above.
347. *Ferrantelli and Santangelo v. Italy*, 7 August 1996.
348. *Bricmont v. Belgium*, 7 July 1989, para. 81.
349. *C.R.R. Scheper v. the Netherlands*, admissibility decision of 5 April 2005. See also judgments in *Doorson v. the Netherlands*, 26 March 1996, and *Isgro v. Italy*, 19 February 1991.

A genuine fear of reprisals may in some circumstances justify reliance on hearsay evidence. However, there have to be counter-balancing procedures which preserve the rights of the defence.

In the case of *Saïdi v. France*, the applicant was convicted of drug trafficking on the basis of hearsay evidence from three anonymous identification witnesses. The Court held:

> *The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of everyone charged with a criminal offence.*[350]

The Court found that Article 6 (3) *d* had been violated since the identification evidence constituted the sole basis for the applicant's conviction.

As a general rule, the fear of reprisals relied upon to justify recourse to hearsay evidence does not have to be linked to any specific threat from the defendant. The Court held in *Doorson v. the Netherlands*[351] that although the two witnesses had never been threatened by the applicant, drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them.

A further problem with anonymous witnesses is that the defence is not able to challenge the credibility of the witness. The Court stated in *Kostovski v. the Netherlands*:

> *If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.*[352]

The counterbalancing procedures needed to ensure a fair trial will vary from case to case. Important factors include whether the accused or his/her lawyer was present when the witness was questioned, whether he/ she could ask questions and whether the trial judge was aware of the identity of the witness. As the Court stated in *Van Mechelen and others v. the Netherlands*

> *Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the right of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.*[353]

350. *Saïdi v. France*, 20 September 1993, para. 44.
351. *Doorson v. the Netherlands*, 20 February 1996, para. 71.
352. *Kostovski v. the Netherlands*, 20 November 1989, para. 42.
353. *Van Mechelen and others v. the Netherlands*, 18 March 1997, para. 58.

Finally, it is important to note that, even where there are sufficient counterbalancing procedures, a conviction should not be based either solely or to a decisive extent on evidence from anonymous witnesses.[354]

Although Article 6 (3) *d* applies only to criminal cases, the Court has found a violation of Article 6 (1) where there has been a failure to call necessary expert evidence.[355] However in *Sommerfeld v. Germany*[356] the Grand Chamber found – on the facts of the case before it – that the failure to call for expert psychological reports had not prejudiced the fairness of the proceedings.

In many jurisdictions expert evidence is only accepted from court appointed experts. In *Bönisch v. Austria*[357] the Court found a violation of Article 6 (3) *d* because the expert witness appointed was also the expert who had personally drafted and transmitted two reports leading to the prosecution. In *Brandstetter v. Austria*[358] the domestic court had appointed as an expert witness a person who worked for the same technical institute as had initiated the prosecution against the applicant. His report was unfavourable. The national court refused the defendant's request to appoint another expert. No violation of Article 6 (3) *d* was found.

354. *Doorson v. the Netherlands*, 20 February 1996, para. 76.
355. *Elholz v. Germany*, 13 July 2000.
356. *Sommerfeld v. Germany*, 8 July 2003.
357. *Bönisch v. Austria*, 6 June 1985.
358. *Brandstetter v. Austria*, 28 August 1991.

What does the right to an interpreter as covered by Article 6 (3) *e* incorporate?

Article 6 (3) *e* provides that the accused is entitled to **free assistance** of an interpreter if he/she can not understand or speak the language used in court.

The right to an interpreter is understood to extend to deaf people where the normal method of communication is for instance by sign language. It should be noted that, in contrast to the right to free legal assistance under Article 6 (3) *c* which is subject to a means test, the right to free interpretation applies to everyone charged with a criminal offence.

In the case of *Öztürk v. the Federal Republic of Germany*,[359] which is dealt with above, p. 18, in relation to what is a criminal charge, the issue of whether the act in question was or was not a criminal

359. *Öztürk v. the Federal Republic of Germany*, 21 February 1984.

charge arose because the German authorities wanted to make the applicant pay for his interpreter.

The Court held in *Luedicke, Belkacem and Koç v. the Federal Republic of Germany* that the provision absolutely prohibits a defendant being ordered to pay the costs of an interpreter since it provides "neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration". The Court further stated that this principle covered "those documents or statements in the proceedings instituted against him which is necessary for him to understand in order to have the benefit of a fair trial".[360] In *Brozicek v. Italy* a German national was charged in Italy. The Court held, in relation to Article 6 (3) *a*, that documents constituting an accusation should be provided in German "unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand … the purport of the letter notifying him of the charges brought against him".[361]

However, in *Kamasinski v. Austria* the Court adopted a more restrictive approach and held that although Article 6 (3) *e* applied to documentary material disclosed before trial, it did not require written translations of all such documentation. The Court noted here, however, that the defence counsel was competent in the applicant's mother tongue. The Court held that the assistance "should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events".[362]

The competent authorities' obligation is not limited to the mere appointment of an interpreter but may also extend to exercising a degree of control over the adequacy of the interpretation, if they are put on notice of the need to do so.

Two recent contrasting decisions are of interest. In *Lagerblom v. Sweden*[363] the Court found no violation as the Finnish applicant had been resident in Sweden for some years and the Court was satisfied that he could communicate with his Swedish lawyer sufficiently to participate in the proceedings and he did have the possibility to use Finnish for many parts of the proceedings. In contrast in *Cuscani v. the United Kingdom*[364] the applicant, an Italian also with some years of residence in the United Kingdom was denied official court interpretation and had to rely on his brother's "untested language skills". Importantly the Court noted that once it had been established that interpretation was required it was unlikely that informal and unprofessional assistance would be sufficient. One might speculate that, as with the right to legal representation, the quality of interpretation provided must ensure that the individual's ability to understand and follow the case against him practically and effectively is assured and does not remain theoretical and illusory.

360. *Luedicke, Belkacem and Koç v. the Federal Republic of Germany*, 28 November 1978, paras. 40 and 48.
361. *Brozicek v. Italy*, 19 December 1989, para. 41.
362. *Kamasinski v. Austria*, 19 December 1989, para. 74.
363. *Lagerblom v. Sweden*, 14 January 2003.
364. *Cuscani v. the United Kingdom*, 24 September 2002.

The supervisory role of the European Court of Human Rights

Article 34 of the Convention enables any persons (physical or legal), non-governmental organisations or groups of individuals claiming to be victims of a violation of their Convention rights to take their complaints to the European Court of Human Rights. Before embarking on such a course after reading this handbook, lawyers should be aware of the limited nature of the Court's powers.

The Court will decide if the complaint meets the detailed admissibility criteria set out in Article 35 and, if it finds a violation, will deliver a binding judgment. States have undertaken in Article 46 to abide by the Court's judgments. Many thousands of complaints are taken each year alleging violations of Article 6. Only a tiny handful are declared admissible. Of those, the majority are so called "clone" cases – such as the Italian undue length of proceedings cases. Under Protocol No. 14, which has yet to come into force, a Committee of the Court will be able to declare a case admissible and at the same time issue a judgment on the merits and award just satisfaction, if the underlying question in the case is already the subject of well established case-law.[365] In 2004 the Committee of Ministers of the Council of Europe adopted a Resolution on Judgments Revealing an Underlying Systemic Problem.[366] It invited the Court to identify such problems and to notify them to the Committee of Ministers, the Parliamentary Assembly, the Secretary General and the Commissioner for Human Rights. The Committee also adopted a Recommendation on the Improvement of Domestic Remedies which was also intended to reduce the number of cases going to the Court.[367]

The Court's role is primarily a declaratory one. It merely states whether or not it considers that the Convention has been violated and awards any compensation it considers appropriate. Pecuniary awards must be paid within three months of the date of the judgment. The sums it awards are modest and frequently, particularly in Article 6 cases, it makes no monetary award at all, holding that the finding of a violation constitutes sufficient just satisfaction. It has stated that the purpose of awarding sums by way of just satisfaction is "to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied".[368]

The European Court cannot quash a verdict of a national court, order a re-trial, or order the payment of a judgment debt, though in response to Resolution Res (2004) 3 it has recently taken to indicating to states the need for remedies for perceived systemic wrongs. In the case of *Assanidze v. Georgia* the applicant had remained in detention in the Ajarian province of Georgia three

365. Article 8 of Protocol No. 14.
366. Resolution Res (2004) 3, 12 May 2004.
367. Recommendation Rec (2004) 6, 12 May 2004.
368. *Scozzari and Giunta v. Italy*, 13 July 2000, para. 250.

years after the Supreme Court had ordered his release. The Grand Chamber found violations of Articles 5 and 6 and Court took the unprecedented step of ordering the respondent state to secure the applicant's release at the earliest possible date – but this was an exceptional case.[369]

Once the judgment has become final it is transmitted to the Committee of Ministers, which supervises the execution. Nevertheless the Court has made clear what the response of the State must be:

> *… a judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to the supervision of the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.*[370]

The responses of states have included, as individual measures, the re-opening of domestic procedures, the cancellation of a criminal record and an acquittal. The Committee of Ministers issued a Recommendation (R (2000) 2) in 2000 encouraging states to re-open cases where the Court has found a violation of the Convention. As far as general measures are concerned, these have included the introduction of new legislation, the dissemination of the Court's judgment to national authorities, and the education and training of Government officials.

Compliance, if not prompt compliance, with the judgments of the Court is the norm. Protocol No. 14 will nevertheless introduce a new provision which will allow the Committee of Ministers to refer a case back to the Court for a ruling as to whether the state has discharged its obligation under Article 46 to comply with the judgment.

369. *Assanidze v. Georgia*, 8 April 2004.

370. *Scozzari and Giunta v. Italy*, 13 July 2000, para. 249.

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These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and particularly judges, in mind, but are accessible also to other interested readers.