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Supporting the Criminal Justice Reforms – Tackling the Criminal Aspects of the Judicial Reforms in Georgia

Guidebook for lawyers
on
Application of human rights standards in criminal proceedings

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A. INTRODUCTION

1. This guidebook focuses on practical aspects of the application of human rights standards in the context of criminal proceedings. It has been prepared for free legal aid service lawyers.

2. It deals with the use of the European Convention on Human Rights ("the European Convention") and the case law of the European Court of Human Rights ("the European Court") in the context of proceedings within Georgian context before considering various aspects of the criminal justice process that can give rise to particular difficulties.

3. It does this through either elaborating the key points relevant to the use of the European Convention and the case law of the European Court or highlighting some good practices that might usefully be emulated.

4. The specific topics addressed are: domestic violence; evidence gathering; the right to liberty; preventive measures and, in particular, pre-trial detention and bail; key aspects of the provision of legal assistance, particularly, legal aid lawyers, confidentiality of discussions, plea-bargaining and pre-trial measures; trial preparation and, in particular, access to the case file and adequate time; recusal of judges; admissibility, credibility and disclosure of evidence; the ability to summon and cross-examine witnesses; jury trials, particular as regards composition, the role of the lawyer and the closing speech; property rights in criminal proceedings; the right to appeal and preparation for its exercise; and the reopening cases due to newly discovered circumstances.

5. The case law of the European Court referred to are either the leading cases on a point or ones that are representative of the approach that is being instanced. They comprise judgments by Chambers of the European Court but also by its Grand Chamber or its former plenary formation, denoted respectively by "[GC]" and "[P]" after the case name. In addition, there are some admissibility decisions, indicated by "(dec.)" after the case name, as well as a few reports of the former European Commission of Human Rights, denoted by "(Rep.)" after the case name.

6. Where there is a need to follow up particular case law, the judgment, decision or report can be accessed through the European Court's HUDOC database (https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

B. APPLICATION OF THE EUROPEAN CONVENTION AND DECISIONS OF THE EUROPEAN COURT IN THE GEORGIAN LEGAL SYSTEM

7. The European Convention was ratified by Georgia in 1998 and, along with other international treaties, became part of its law pursuant to the under the Constitution and the Law of Georgia on Normative Acts.

8. As a practical matter, the rules of a treaty such as the European Convention may, if applied or given effect by Georgian courts, very well be determinative of the outcome of a dispute. Indeed, such courts may be the only bodies that are realistically in a position to apply the European Convention in specific situations.

Key points

9. In seeking to rely upon provisions in the European Convention and the case law of the European Court in criminal proceedings, you should have regard to the following:

- *International treaties enshrine international legal obligations of Georgia to be implemented in good faith*: International law requires a State that has assumed an international legal obligation to act in conformity with it.[1] Moreover, treaties must be performed in good faith,[2] and a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[3] This means that a State must give effect to such a legal obligation regardless of whether there is a domestic legal provision to the contrary effect or of whether there are no domestic institutional or procedural modalities to give effect to it. A State that is unwilling or unable to fulfil an international obligation will incur "international responsibility" for that "wrongful act."[4] International law does not, however, prescribe how a State must give effect to an international legal obligation, which is a matter for it to determine;[5]

- *International treaties of Georgia are an integral part of national law:* This entitles natural and legal persons to invoke them before Georgian courts and authorities;

- *International treaties of Georgia have priority over national legal acts:* When confronted with a possible conflict between a law (with the exception the Constitution and the Constitutional Agreement) and a provision of a treaty, national authorities must resolve it by interpreting that law – or a provision in it - in line with an international such as the European Convention. Thus, in order to benefit from the priority accorded by national legislation, the litigant must affirmatively request the judge to apply the rules or principles of the European Convention instead of the conflicting law or provision; and

- *The role of the case law of the European Court*: The judgments of the European Court serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the requirements of the European Convention, thereby contributing to the honouring by States of the commitments into which they have entered (*Ireland v. United Kingdom,* 18 January 1978, at para. 54) and determining issues on public-policy grounds in the common interest (*Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012, at para. 89). Accordingly, the Court provides the most authoritative interpretation of the requirements arising from the provisions of the European Convention;

- *Use of the European Convention*: This, together with the case law of the European Court shall be applied, *inter alia*, to interpret vague domestic law provisions; to prevent the conflict between the European Convention and domestic law and fill the gaps in

[1] International Law Commission Draft Articles on State Responsibility, (2001) 1 Y.B. Int'l L. Comm'n, arts. 1-3, 12 (adopted by ILC at its fifty-third session (2001)).
[2] Vienna Convention on the Law of Treaties art. 26, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
[3] Ibid, Article 27.
[4] International Law Commission Draft Articles on State Responsibility, supra note 2, Art. I.
[5] *Oppenheim's International Law,* (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992), pp. 82-86.

domestic legislation to develop the national human rights standards in line with the European standards; and

- *Use of the case law*: There will not always be a case dealing exactly with the particular situation that is of concern and for which it is thought or suggested that the European Convention is relevant. It is necessary, therefore, to bear in mind the following considerations that inform the interpretation and application of its provisions by the European Court – its doctrines and methodology – so that it is possible to work out how to resolve such problems where there is no case with absolutely identical facts which can be applicable:

    - The European Court it is not a fourth instance and it is required to observe the principles of subsidiarity and of the margin of appreciation;
    - The terms used in the European Convention are to be given an autonomous meaning; the bilingual nature of the text (English and French) must appreciated; and the application of a particular provision must be made in the light of the European Convention read as a whole;
    - The European Court has its own understanding as the meaning of "law", built upon the concept of "the rule of law" found in the preamble to the Convention, certain quality requirements (accessibility, foreseeability and precision) and concern about the arbitrary use of power;
    - There are implied limitations on many rights but also implied rights and duties, entailing both negative and positive obligations, as well as some procedural obligations;
    - In interpreting the European Convention, the European Court looks for the ordinary meaning of the words in their context and in the light of the object and purpose of a provision while seeking to ensure that its interpretation is practical and effective. At the same time, it will give a dynamic interpretation to provisions, informed by the existence or absence of a European consensus. In addition, the European Court will have regard to the preparatory work that led to the adoption of the European Convention and other international instruments, judgments and rulings. The European Court will generally follow its case law but there is no rigid adherence to precedent; and
    - Apart from the few rights that are absolute, the application of the Convention entails the striking of a fair balance between the rights and freedoms guaranteed by it and other competing rights and interests. The concern for a fair balance is relevant when judging both the admissibility of an interference with a right or freedom and what positive obligation might be required under such a right or freedom. In determining whether there is such a balance where there is a restriction on a right or freedom, the Court considers whether: a legitimate aim is being pursued,; there are relevant and sufficient reasons for the restrictions; and there is proportionality in the means being used to pursue. In assessing compliance with the latter two requirements, the margin of appreciation will be a relevant consideration. These two requirements may also be collectively referred to by the Court as a pressing social need. Wherever both those requirements are satisfied, it can be concluded that the restriction is necessary in a democratic society.

C. DOMESTIC VIOLENCE

10. The great majority of cases involving violence against women that have been considered by the European Court turn on procedural and positive obligations that arise under the right to life (Article 2), the prohibition of torture and inhuman and degrading treatment (Article 3), the prohibition of slavery and forced labour (Article 4) and the right to respect for private and family life (Article 8). However, some aspects of gender equality and the prohibition of discrimination (Article 14) can also be derived from the reasoning of the European Court in its application of those provisions.

Key points

11. In assessing the compliance by domestic authorities with the above-mentioned provisions of the European Convention, you should take account of the following factors:

- *An appropriate legal framework*: The protection afforded by the civil law in respect of the wrongdoing is unlikely to be adequate as effective deterrence may only be provided by criminal law provisions (*X. and Y. v. Netherlands*, no. 8978/80, 26 March 1985);

- *The taking of protective measures:* The reporting to the authorities of incidents of domestic violence can trigger an obligation to implement protective measures with a view to preventing further harm. For such a positive obligation to arise, it must be established that the authorities "knew or ought to have known" at the time of the existence of a "real and immediate risk" to the life or personal integrity of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Kontrová v. Slovakia*, no. 7510/04, 31 May 2007). Moreover, there should not be a discontinuance of proceedings simply because the victim withdraws her or his complaint where the authorities are aware of the violence that has been inflicted (*Opuz v. Turkey*, no. 33401/02, 9 June 2009). Furthermore, the absence of a sufficient commitment to take appropriate action to address domestic violence is likely to be regarded as a violation of Article 14, read in conjunction with Articles 2 and 3 (*Opuz v. Turkey*, no. 33401/02, 9 June 2009). In the case of aggressive conduct that does not reach a level sufficient to engage Articles 2 and 3, a failure to respond to it with appropriate administrative and policing measures could still be contrary to the State's positive obligations under Article 8 of the European Convention to secure respect for their private and family life (*Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008). In addition, delayed adoption of custody rulings for children in cases involving domestic violence may be inconsistent with the authorities' duty to secure respect for the victim's private and family life (*Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008);

- *The undertaking of a thorough and effective investigation*: Where domestic violence is alleged, such an investigation capable of leading to the identification and, as appropriate, to the punishment of the perpetrator is required as it lies at the core of the procedural obligations under Articles 2 and 3 of the European Convention. For this purpose, there should be:

- *Institutional independence:* The persons who are responsible for the investigation and who carry it should be independent from those implicated in the events (*Oğur v. Turkey* [GC], no. 21594/93, 20 May 1999 and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24 March 2011). This entails not only a lack of hierarchical or institutional connection but also a practical independence (*Güleç v. Turkey*, no. 21593/93, 27 July 1998, and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015) as this is essential for public confidence in the State's monopoly on the use of force (*Hugh Jordan v. United Kingdom*, no. 24746/94, 4 May 2001 and *Ramsahai and Others v. Netherlands* [GC], no. 52391/99, 15 May 2007);
- *Adequate steps:* The investigation must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible (*Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24 March 2011 and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015). However, this is not an obligation of result, but of means (*Nachova and Others v. Bulgaria* [GC], no. 43577/98, and *Jaloud v. Netherlands* [GC], no. 47708/08, 6 July 2005). It will require the authorities to have taken whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death (*Salman v. Turkey* [GC], no. 21986/93, 27 June 2000 (autopsies), *Tanrıkulu v. Turkey* [GC], no. 23763/94, 8 July 1999 (witnesses) and *Gül v. Turkey*, no. 22676/93, 14 December 2000 (forensic examinations)). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk not being regarded as adequate (*Avşar v. Turkey*, no. 25657/94, 10 July 2001);
- *Victim involvement*: *T*he investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case (*Güleç v. Turkey,* no. 21593/93, 27 July 1998, victim's father was not informed of the decision not to prosecute, and *Oğur v. Turkey* [GC], no. 21594/93, 20 May 1999, the family of the victim had no access to the investigation or the court documents). At the same time, given the vulnerability of victims of domestic violence, as well as their feelings of embarrassment and humiliation where sexual violence is involved, investigating authorities need to show the utmost sensitivity in dealing with such cases and to respect for the victim's natural wish to protect her or his personal integrity;
- *Promptness and reasonable expedition:* Such a requirement is implicit in this context (see *Yaşa v. Turkey*, no. 22495/93, 2 September 1998), although it is accepted that there may be obstacles or difficulties which can prevent progress. A prompt response may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (*McKerr v. United Kingdom*, no. 28883/95, 4 May 2001 and *Opuz v. Turkey*, no. 33401/02, 9 June 2009);
- *Punishment:* Articles 2 and 3 of the European Convention do not entail the right to have third parties prosecuted or sentenced for a criminal offence (*Mastromatteo v. Italy* [GC], no. 37703/97, 24 October 2002) or an absolute

obligation for all prosecutions to result in conviction, or indeed in a particular sentence (*Zavoloka v. Latvia*, no 58447/00, 7 July 2009). Nevertheless, the European Court will intervene where there is a manifest disproportion between the gravity of the act and the punishment imposed (*Kasap and Others v. Turkey*, no. 8656/10, 14 January 2014 and *A. v. Croatia*, no. 55164/08, 14 October 2010); and

- *Access to civil remedies:*. Those that can allow a victim of domestic violence to escape this situation through, inter alia, divorce or separation proceedings must be accessible and effective, which may require that her or him to be afforded legal aid on account of the complexity of the case, her or his unfamiliarity with such proceedings and her or his weakened capacity to represent her or himself owing to her or his emotional involvement (*Airey v. Ireland*, no. 6289/73, 9 October 1979).

D. EVIDENCE: GATHERING

12. The use of coercive and covert investigative methods, such as search, requirements to provide information, surveillance and undercover operations, are a source of concern for a number of reasons. In particular, there is concern whether the formal requirements are being observed, the nature of their impact on the individuals affected and the way in which the evidence thereby obtained is used in subsequent criminal proceedings.

13. Resort to the use of such methods has the potential to engage a wide range of rights and freedoms under the European Convention. Their principal impact will be on the right to respect for private life, home and correspondence under Article 8. However, their use also has the potential to violate the prohibition on torture and inhuman and degrading treatment and of the right to a fair trial under Articles 3 and 6 respectively, as well as the right to freedom of expression under Article 10 and of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

14. This section is concerned with the requirements relating to coercive and covert investigative methods under all these provisions – other than the right to a fair trial, which is considered in the section on admissibility of evidence – and the key points to focus on where there is concern about the use of these methods.

15. However, a point of general application to keep in mind is the need for a legal basis for the particular measure involved (*Bykov v. Russia* [GC], no. 4378/02, 10 March 2009) and its use on the occasion concerned (*Heglas* v. Czech Republic, no. 5935/02, 1 March 2007), which also entails the accessibility of the relevant rules (*Mikhaylyuk and Petrov v. Ukraine*, no. 11932/02, 10 December 2009).

Search and seizure

16. A search should generally require prior judicial authorisation, given on the basis of a reasonable suspicion that (a) an offence has been committed by the person under investigation and (b) that that offence is one of sufficient gravity to justify the interference

with the right guaranteed by Article 8. Moreover, consideration should be given as to whether a search is really required, taking into account the possibility of achieving its objectives through a request for assistance or some other means and there should be some checking of the information or evidence relied upon.

17. The scope of the authorisation should not be broadly drawn or interpreted, it should be served on those affected, the person whose premises are being searched should generally be present and the potential impact of searches affecting the media and lawyers on the respective rights to freedom of expression and to a fair trial, as well as on the reputation of all affected, should be considered.

18. The manner in which a search is carried out should not be intimidating, involve the use of excessive force, fail to take account of the presence of others than the defendant, accused or go beyond what is necessary. A record or description should be made of any item seized, the items seized should not exceed those actually needed and authorised and all items justifiably seized should not be kept for longer than necessary for the purpose of the relevant investigation or proceedings.

Key Points

19. In contesting any use of a search power, you should have regard to the following:

- *The premises and the material*: The protection of "home" in Article 8 extends to the registered office of a legal person and its branches and other business premises (*Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013). "Correspondence" extends to any form of private communication, regardless of the technology involved and even though it is not personal (*Kennedy v. United Kingdom*, no.26839/05, 18 May 2010) and will also cover papers and files that include correspondence (*Elci and Others v. Turkey*, no. 23145/93, 13 November 2003);

- *The legal framework*: There must be an established legal framework for the conduct of a search that has taken account of developments in technology, such as making a mirror image copy of the content of a smart phone (*Saber v. Norway*, no. 459/18, 17 December 2020);

- *The persons affected*: An expectation of privacy will normally exist where an employee keeps her or his personal belongings (*Peev v. Bulgaria*, no. 64209/01, 26 July 2007) and may extend to the backup copy held on a company's server of personal e-mails and correspondence (*Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013). Particularly strong justification for a search is required where the person affected is not her or himself suspected of the offence concerned (*Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003).

- *The authorisation*: In authorising a search, consideration ought to have been given as to whether or not a search was really required, taking into account the possibility of achieving its objectives through less intrusive means (*Zubal v. Slovakia*, no. 44065/06, 9 November 2010) and whether the information or evidence relied upon was checked (*Keegan v. United Kingdom*, no. 28867/03, 18 July 2006). Also appropriate consideration must be given to ensuring searches do not lead to the identification of a

journalist's sources (*Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003) or the disclosure of documents covered by lawyer-client privilege (*Mancevschi v. Moldova*, no. 33066/04, 7 October 2008). This can entail the need for safeguards such as:

- a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent, legally-qualified observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege (*Aleksanyan v. Russia*, no. 46468/06, 22 December 2008);
- a sifting procedure in respect of electronic data (*Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007); and special arrangements to ensure that any later examination of material removed does not infringe this privilege (*Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, 3 September 2015);
- any authorisation given should not be indefinite (*Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017) and execution should also not be unduly delayed (*Gerashchenko v. Ukraine*, no. 20602/05, 7 November 2013); and
- a search undertaken without prior judicial authorisation requires both that the police genuinely considered the actual need to act in this way (*Taraneks v. Latvia*, no. 3082/06, 2 February 2014) and that the court undertaking *ex post factum* judicial review of it shows through its reasoning that it was clearly satisfied that the police view as to necessity was in fact justified (*Prezhdarovi v. Bulgaria*, no. 8429/05, 30 September 2014);

- *The existence of parental consent*: Other than in cases of urgency, a child should not be examined for medical evidence relating to an offence without the consent of a parent or a court order where this has been refused (*M.A.K. and R.K. v. United Kingdom*, no. 45901/05, 23 March 2010); and

- *The manner of execution*: A search should not:

- be carried out in a manner that is intimidating (*Koval and Others v. Ukraine*, no. 22429/05, 15 November 2012);
- involve the use of excessive force (*Rachwalski and Ferenc v.* Poland, no. 44709/99, 28 July 2009 and *Vinks and Ribicka v. Latvia*, no. 28926/10, 30 January 2020);
- fail to take account of the presence of others than the defendant, accused (*Gutsanovi v. Bulgaria*, no. 34529/10, 15 October 2013);
- go beyond what is necessary (as in *Panteleyenko v. Ukraine*, no. 11901/02, 29 June 2006, where instead of selecting the evidence necessary for the investigation, the police seized all documents from the office and certain personal items belonging to the applicant which were clearly unrelated to the criminal case).

In addition:

- a record or description should be made of any item seized, the items seized should not exceed those actually needed and authorised (*Imakayeva v. Russia*, no. 7615/02, 9 November 2006 none seem to have been made) and all items justifiably seized should not be kept for longer than necessary for the purpose of the relevant investigation or proceedings (*Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008);
- searches of persons present during the search of premises will need either to be specifically authorised or be necessary for the execution of the authorisation to search them (*Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017); and
- no person should be forced to undress in public or in front of persons of the opposite sex (*Valašinas v. Lithuania*, no. 44558/98, 24 July 2001).

Providing information/material

20. A specific requirement to provide information or material – related to an investigation of a crime or the conduct of criminal proceedings – will be seen as serving a legitimate aim for the purpose of the European Convention. However, such a requirement must not be disproportionate in either its nature or effect.

21. Furthermore, due account thus needs to be taken of the possible impact of the requirement on the prohibition on self-incrimination as well of the importance of protecting intimate information from excessive disclosure.

22. Moreover, a compulsion for a journalist to identify her/his source – or to disclose documents or other material which might, upon examination, lead to such identification - will be very hard to justify and must always be based on prior judicial authorisation.

23. In addition, a lawyer should not be required to disclose information covered by legal professional privilege.

Key points

24. In contesting any requirement to provide information or material, you should have regard to the following:

- *The scope of the requirement*: It is unlikely to be problematic where this is strictly limited but enhanced protection will be required where it concerns intimate details or data closely linked to identity (*P G and J H v. United Kingdom*, no. 44787/98, 25 September 2001 and *G S B v. Switzerland*, no. 28601/11, 22 December 2015). Moreover, an overriding public interest will need to be demonstrated where it concerns access to a journalist's source (*Voskuil v. Netherlands*, no. 64752/01, 22 November 2007 and *Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010). The material covered by legal professional privilege held by lawyers will be protected except where they are taking part in money-laundering activities, their legal advice is provided for money-laundering purposes or they know that the client is seeking legal advice for money-laundering purposes and this protection does not extend

to tasks other than those relating to the defence of their clients *Michaud v. France*, no. 12323/11, 6 December 2012);

- *The persons affected*: It may be easier to justify where they are the subject of a criminal investigation (*M N v. San Marino*, no. 28005/12, 7 July 2015);

- *The relevance of the material*: It will be particularly significant where it is necessary for the determination of a criminal charge (*Z v. Finland*, no. 22009/93, 25 February 1997) or is needed to bring to justice an alleged perpetrator of offences such as those threatening a person's physical or moral integrity or involving the use of as hate speech to be identified and brought to justice (*K.U. v. Finland*, no. 2872/02, 2 December 2008) so long as it does not lead to self-incrimination (*Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996, *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010 and *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016). Compulsion to obtain material from a defendant, accused's body will not raise an issue under the European Convention where either this only requires a minor interference with her or his physical integrity to be passively endured (such as when blood or hair samples or bodily tissue are taken) or the active participation on her or his part only concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). However, the use of a significant degree of force to obtain material – such as drugs that have been followed – is likely to attains the minimum level of severity required to contravene Article 3, particularly where the procedure is not without risk to the person's health (*Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006);

- *The protection for confidentiality*: There is a need for limits as to what is made publicly available both during and after the proceedings (*Z v. Finland*, no. 22009/93, 25 February 1997); and

- *The existence of safeguards*: There will generally be a requirement for prior judicial authorisation (*Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010 and *Benedik v. Slovenia*, no. 62357/14, 24 April 2018) and the affected person should also have "effective control" over the disclosure requirement in the sense of being able to challenge the measure to which s/he has been subjected and, subsequent to the implementation of the order concerned, to have available to her or him some means for reviewing it (*Bernh Larsen Holding SA and Others v. Nor*way, no. 24117/08, 14 March 2013).

Surveillance

25. Legislation governing the use of surveillance measures must specify: the categories of persons and communications affected; the offences for which the measure may be used; the basis for applying such measures; the maximum duration of any measure; the procedure for examining, using and storing the data gathered; the permitted use of and access to the material gathered; the circumstances in which the material will be destroyed or erased; and the arrangements for record-keeping and independent supervision. In addition, there should be a requirement for judicial authorisation, except in genuinely urgent cases.

26. In addition, there should be effective protection for communications covered by legal professional privilege. Conversations and other communications with an accused person's lawyer should not generally be subject to surveillance unless there is a well-founded basis for believing that genuinely improper conduct is occurring.

Key Points

27. In contesting any use of surveillance, you should have regard to the following:

- *The method*: It need not be limited to audio or visual means but will need justification whatever form of technology is involved, including most recently Global Positioning Receivers (*Uzun v. Germany,* no. 35623/05, 2 September 2010);

- *Those performing it*: the requirements apply not to public officials but also to private individuals where they act either under the direction of those officials (*M.M. v. Netherlands*, no. 39339/98, 8 April 2003) or with their technical assistance (*Van Vondel v. Netherlands*, 38258/03, 25 October 2007) and also employers in respect of their employees (*López Ribalda and Others v. Spain* [GC], no. 1874/13, 17 October 2019);

- *The persons and communications affected*; the categories should be clearly defined in the law and the authorisation (*Iordachi and Others v. Moldova,* no. 25198/02, 10 February 2009). A procedure to safeguard the secrecy of lawyer-client communications should exist and have been observed (*Iordachi and Others v. Moldova* and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013), including both defence strategies (*S. v. Switzerland,* no. 12629/87, 28 November 1991) and possible proceedings that a person might bring (*Pawlak v. Poland*, no. 39840/05, 15 January 2008). Interference with this secrecy will only be justified where there is a well-founded basis for believing that genuinely improper conduct is occurring (*Versini-Campinchi and Crasnianski v. France,* no. 49176/11, 16 June 2016);

- *The offences concerned*: these should not comprise all or even the majority of them (*Iordachi and Others v. Moldova*);

- *The basis for undertaking it*: the degree of reasonableness of the suspicion against a person for the purpose of authorising an interception should be elaborated (*Iordachi and Others v. Moldova*), the need for the measure should be genuine (*Kvasnica v. Slovakia*, no. 72094/01, 9 June 2009) and there should be less intrusive means of investigation available (*Matanović v. Croatia*, no. 2742/12, 4 April 2017);

- *The proportionality of the intrusion*: the scope should be as limited as possible (*Uzun v. Germany)* and the duration should not be overly long (*Iordachi and Others v. Moldova*);

- *The exercise of judicial control*: <u>beforehand</u> – unless in a genuinely urgent situation - this should have ensured that it was not ordered haphazardly, irregularly or without due and proper consideration and <u>afterwards</u> a judge should both be acquainted with the results of the surveillance and review whether the requirements of the law had been complied with (*Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 and *Bălteanu v. Romania*, no. 142/04, 16 July 2013). Any interception of communication undertaken to discover journalistic sources requires prior judicial authorisation

(*Telegraaf Media Nederland Landelijke Media BV v. Netherlands,* no.39315/06, 22 November 2012);

- *The use of and access to the material gathered*: this should only be for the genuine performance of duties and no greater than required for this purpose (*Roman Zakharov v. Russia*). Moreover, personal material unrelated to the proceedings should not be disclosed in court or elsewhere (*Craxi v. Italy (No. 2*) no. 25337/94, 17 July 2003);

- *The retention of the material*: a six-month storage general time-limit could be reasonable but any data not relevant to the purpose for which they have been obtained should be destroyed immediately and material used in legal proceedings should be destroyed at their conclusion (*Roman Zakharov v. Russia*); and

- *The subsequent disclosure*: the person affected should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal (*Radzhab Magomedov v. Russia*, no. 20933/08, 20 December 2016).

Undercover operations

28. The use of undercover operations is recognised by the European Court as being a legitimate device since it is something that those engaging in criminal activities should expect to be employed by law enforcement bodies.

29. However, its concern is with whether the way in which evidence obtained through an undercover operation has rendered the proceedings unfair and thus in violation of Article 6(1) of the European Convention. This will occur where the person convicted was incited to commit the offence charged by the undercover officers, i.e., subjected to entrapment.

30. The crucial issue in determining whether there has been entrapment will the role of the police or other law enforcement officers; has it gone beyond either investigation – which is essentially a passive role with respect to the offence said to have been committed – or mere participation in the commission of an offence planned by others?

31. Entrapment will be regarded as occurring by the European Court where there is nothing to suggest that the accused person would have committed the offence concerned without the intervention of the undercover operatives.

32. It falls to the prosecution to prove that there was no entrapment, provided that the defendant's allegations are not wholly improbable.

33. Furthermore, there is always a need for the court trying a person to examine claims about entrapment as there will be a violation of the right to a fair trial not only where there was proof of its occurrence (a substantive violation) but also where there has been a failure to review the merits of a claim that such a technique had been employed to secure the commission of the offence (a procedural violation).

Key points

34. In contending that an undercover operation led to entrapment, you should have regard to the following:

- *the reasons for the operation*: it will be significant that there was there reason to doubt the information relied upon and, if so, its veracity was not checked (*Sandu v. Republic of Moldova*, no. 16463/08, 11 February 2014);

- *the accused's background and conduct*: the focus should be on whether s/he had a relevant criminal record, there independent evidence of a readiness to commit the offence concerned (*Shuvalov v. Estonia* (dec.), no. 39820/08, 30 March 2010 and *Butkevicius v. Lithuania* (dec.), no. 48297/99, 28 November 2000) or this was something for which s/he had no background in (*Teixeira de Castro v. Portugal*, no. 25829/94, 9 June 1998;

- *the involvement of the operatives*: consideration needs to be given to whether they just joined a criminal activity (*Miliniene v. Lithuania*, no. 74355/01, 24 June 2008) or they were responsible for initiating it (*Ramanauskas v. Lithuania* [GC], no. 74420/01, 5 February 2008) and/or they exerted pressure on the accused to commit the offence charged (*Teixeira de Castro v. Portugal*);

- *the procedure for authorising the operation*: it will be significant that there was a clear and foreseeable procedure for this purpose (*Yeremtsov and Others v. Russia*, no. 20696/06, 27 November 2014) but, even so, consideration needs to be given to whether it was undertaken by the police on their own initiative (*Ramanauskas v. Lithuania*) or its requirements were complied with so that the parameters applicable were clearly defined (*Vayser v. Estonia* (dec.), no. 7157/05, 5 January 2010), as well as whether its implementation was adequately supervised (*Miliniene v. Lithuania*);

- *the disclosure relating to the operation*: it should be clarified whether there was any refusal or limitation in this regard that might have affected the ability to mount an entrapment defence (*Edwards and Lewis v. United Kingdom* [GC], no. 39647/98, 27 October 2004); and

- *the approach of the courts*: attention should be given as to what extent they were prepared to examine whether the accused had been subjected to entrapment (*Akbay and Others v. Germany*, no. 40495/15, 15 October 2020).

E. THE RIGHT TO LIBERTY

35. Like other terms in the European Convention, this right is given an autonomous meaning so that the European Court does not consider itself bound by the assessment by domestic authorities as to whether there has been a deprivation of liberty. It undertakes, therefore, its owns assessment of the situation (*Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016).

36. In doing so, the European Court has regard to factors such as the type, duration, effects and manner of implementation of the measure in question (§ 80; *Guzzardi v. Italy* [P], no. 7367/76, 6 November 1980, *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010, *Creangă v. Romania* [GC], no. 29226/03, 23 February 2012 and *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017).

37. Moreover, account is also taken of considerations such as the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts (*Guzzardi v. Italy*, [P], no. 7367/76, 6 November 1980, *H.L. v. United Kingdom*, no. 45508/99, 5 October 2004 and *Storck v. Germany*, no. 61603/00, 16 June 2005).

38. Furthermore, an element of coercion in the exercise of police powers of stop and search will be regarded by the European Court as indicative of a deprivation of liberty, notwithstanding the short duration of the measure concerned (*Gillan and Quinton v. United Kingdom*, no. 4158/05, 12 January 2010, *Shimovolos v. Russia*, no. 30194/09, 21 June 2011 and *Krupko and Others v. Russia*, 26587/07, 26 June 2014).

Key points

39. In challenging the lawfulness of any deprivation of liberty, you should have regard to the following:

- *The exhaustive list of grounds:* Other than in respect taken pursuant to an emergency compatible with Article 15 of the European Convention, a deprivation of liberty will only be permissible if it falls within one of the grounds specified in sub-paragraphs (a) to (f) of Article 5(1) (*Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016 and *Aftanache v. Romania*, no. 999/19, 26 May 2020);

- *Compliance with national law:* A deprivation of liberty must always be "in accordance with a procedure prescribed by law" and the European Court can review whether national law has been observed (*Creangă v. Romania* [GC], no. 29226/03, 23 February 2012 and *Baranowski v. Poland*, no. 28358/95, 28 March 2000). Moreover, this requirement will not be satisfied merely through compliance with a provision of national law; that provision must itself be in conformity with the European Convention, including the general principles expressed or implied in it, particularly the principle of the rule of law. This entails both precision and foreseeability in the formulation of the law and the existence in national law of adequate legal protections and "fair and proper procedures" (*Creangă v. Romania* [GC], no. 29226/03, 23 February 2012 and *Plesó v. Hungary*, no. 41242/08, 2 October 2012). Furthermore, it is important to check that (a) there are no gaps in the applicable legislation being relied upon (*Chenyev v. Ukraine*, no. 46193/13, 9 October 2014), (b) the requirements of constitutional guarantees are observed (*Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018) and (c) any related limits on use of specific law - such as an amnesty, pardon or the operation of a limitation period – have duly been taken into account (*Gusinskiy v. Russia*, no. 70276/01, 19 May 2004). In addition, the provision being relied upon should not be being applied in manner that is either inconsistent with the principle of legal certainty or unreasonable (*Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019); and

- *The absence of arbitrariness:* in addition, any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (*Witold Litwa v. Poland*, no. 26629/95, 4 April 2000 and *S., V. and A. v. Denmark* [GC], no. 35553/12, 22 October 2018). A power will be exercised arbitrarily where it has been used for an improper purpose or there is an element of bad faith or deception on the part of the authorities (*Giorgi Nikolaishvili v. Georgia*, no. 37048/04, 13 January 2009 and *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012). Factors relevant to "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention *(J.N. v. the United Kingdom*, no. 37289/12, 19 May 2012).

F. PREVENTIVE MEASURES: PRE-TRIAL DETENTION; BAIL

40. Preventive measures are ones intended to ensure that a defendant, accused attends any criminal proceedings brought against her or him and that there is no improper interference with either the investigation of the offence concerned or the administration of justice in those proceedings. They may be imposed both following the initial apprehension of a defendant, accused and at any time until the conclusion of the proceedings against her or him, as well as modified or withdrawn in the course of those proceedings.

41. Such measures can involve deprivation of liberty ("pre-trial detention") or requirements as to conduct of a non-custodial nature. The former – which includes house arrest where there is a complete prohibition on leaving certain premises (*Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016) - has the potential to interfere with rights under the European Convention, particularly the right to liberty and security under Article 5.

42. There is thus a need to ensure that the imposition or continuation of pre-trial detention is always consistent with the requirements elaborated in the case law of the European Court.

43. Moreover, where this is not possible, resort to an alternative measure such as bail might be justified. However, it will need to be demonstrated that any pre-trial detention that results from a refusal of bail is itself compatible with Article 5 of the European Convention.

Pre-trial detention

44. The need to impose any preventive measures must always be first established before this occurs. Furthermore, the imposition/continuation of pre-trial detention as a preventive measure should be exceptional and should only occur if the imposition of non-custodial measures could not satisfactorily address the risk that makes the imposition of preventive measures necessary. Moreover, preventive measures should not continue any longer than necessary to address that risk and, in any event, no longer than is consistent with the right to trial within a reasonable time.

Key points

45. In contending that the imposition/continuation of pre-trial detention is contrary to Article 5 of the European Convention, you should have regard to the following:

- *Its lawfulness*: As to the requirements relevant to this, see para. 38 above;

- *Its reliance on a reasonable suspicion of having committed or having attempted to commit an offence*: This a precondition for any deprivation of liberty or other preventive measure in the criminal justice process and must, therefore, be fulfilled not only at the initial apprehension of such a person but also throughout her/his pre-trial detention or the imposition of any other preventive measure (*Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014). A reasonable suspicion will exist only where an objective link – as opposed to some belief, however genuine - can be shown between the person concerned and the offence supposed to have been committed or to be about to be committed that a person has committed an offence or was attempting to do so. Past convictions will not be sufficient for this purpose (*Fox, Campbell and Hartley v. United Kingdom*, *nos.* 12244/86 *et al*., 30 August 1990) but reliance can be placed on the specific conduct of the defendant, accused (*Punzelt v. Czech Republic*, no. 31315/96, 25 April 2000) or other concrete evidence such as witness statements (*Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014). The court must check the credibility of the evidence relied (*Stepuleac v. Moldova*, no. 8207/06, 6 November 2007) and ensure that the "facts" invoked actually amount to the constituent elements of an offence (*Kandzhov v. Bulgaria*, no. 68294/01, 6 November 2008). The non-fulfilment of the requirement of a reasonable suspicion at the time of imposing a preventive measure cannot be remedied by either the subsequent gathering of evidence or a subsequent conviction (*Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019), although the former could possibly contribute to justifying the imposition of preventive measure at a later point in time;

- *The existence of a relevant reason for a preventive measure*: Such a measure can only be imposed where, at the material time, there is a risk of flight (or of absconding), a risk to the administration of justice, such as through collusion, evidence being tampered with or pressure being brought to bear on witnesses or a risk of further offences. Any other reason (e.g., the lawfulness of the collected evidence (*Patsuria v. Georgia*, no. 30779/04, 6 November 2007), the need to conduct further investigations (*Piruzyan v. Armenia*, no. 33376/07, 26 June 2012) or a refusal to plead guilty (*Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012). Thus, the seriousness of the offence of which someone is accused can never be the sole basis for imposing such measures, even though this might still be relevant when considering whether there is a need for such measures (and, in particular, deprivation of liberty) to be imposed (*Mamedova v. Russia*, no. 7064/05, 1 June 2006). The European Court also recognises a threat to public order and the need for the protection of detainee as grounds for imposing preventive measures but this is not provided for in Georgian law;

- *The relevant reason has been sufficiently established*: It is not enough to invoke one or more of the three reasons since any claim that the defendant, accused could abscond, obstruct the proceedings or re-offend must also be shown to be well-founded. In the case of a risk of flight, account should be taken of links abroad (*W. v. Switzerland*, no. 14379/88, 26 January 1993), past attempts to flee (*Punzelt v. Czech Republic*, no.

31315/96, 25 April 2000), preparation to flee (*Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017) but also motivations to stay, such as the family situation (*Mamedova v. Russia*, no. 7064/05, 1 June 2006) and other personal circumstances (*Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009), as well as her/his readiness to participate in the proceedings and her/his good reputation (*Patsuria v. Georgia*, no. 30779/04, 6 November 2007 and *Khayredinov v. Ukraine*, no. 38717/04, 14 October 2010). For the purpose of determining whether there is a risk to the administration of justice, account should be taken of the potential of the defendant, accused to exercise influence over witnesses (*Saghinadze and Others v. Georgia*, no. 18768/05, 27 May 2010 and *Mikiashvili v. Georgia*, no. 18996/06, 9 October 2012), the actual feasibility of collusion or tampering with the evidence *Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016) and the need still to gather evidence (*Batiashvili v. Georgia*, no. 8284/07, 10 October 2019) but also the absence of any attempt to influence witnesses (*Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017). In the case of the risk of the further commission of offences, consideration should be given only to actual capacity of the defendant, accused to commit *similar* offences (*Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009);

- *Whether the risk could have been allayed by a measure other than pre-trial detention*: The court must not have started from the assumption that pre-trial detention is required where a relevant risk has been substantiated (*Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011) but should have considered whether the particular risk(s) could have been satisfactorily addressed through preventive measures not involving deprivation of liberty (*Khayredinov v. Ukraine*, no. 38717/04, 14 October 2010). In any event, deprivation of liberty should only ever be a measure of last resort where the defendant, accused is a minor (*Nart v. Turkey*, no. 20817/04, 6 May 2008) and the nature of the offence may mean that the use of a custodial preventive measure should generally be regarded as inappropriate (*Kovyazin and Others v. Russia*, no. 13008/13, 17 September 2015 -protest action that caused no lasting harm);

- *Whether the pre-trial detention has been unduly prolonged*: This will always be the case where the relevant risk and/or the reasonable suspicion no longer exists (*an der Tang v. Spain*, no. 19382/92, 13 July 1995). However, where these do exist, account must be taken of factors such as:

  - the difficulty of the investigation (*Contrada v. Italy*, no. 27143/95, 24 August 1998),
  - any international dimension of the alleged offence (*Chraidi v. Germany*, no. 65655/01, 26 October 2006),
  - the strength of the evidence for the measures imposed (*Labita v. Italy* [GC], no. 26772/95, 6 April 2000),
  - the existence of any periods of inactivity (*Punzelt v. Czech Republic*, no. 31315/96, 25 April 2000),
  - the age of the defendant, accused (*Assenov and Others v. Bulgaria*, no. 24760/94, 28 October 1998) and
  - the mere restatement of reasons without further reflection on its justifiability (*Makarenko v. Ukraine*, no. 622/11, 30 January 2018); and

- *The quality of the reasoning*: It is not enough for decisions concerning the imposition of preventive measures to have taken account of all the considerations that have been discussed above; the decision itself must also demonstrate that this is what actually occurred. This requires, therefore, that the submissions made by prosecutors in favour of the imposition (or continuation) of preventive measures be shown to have been carefully scrutinised and that there was neither an automatic acceptance of them nor any impression being given of this having occurred (*Magnitskiy and Others v. Russia,* no. 32631/09, 27 August 2019). As a result, there is a need for the court to have rejected submissions by the prosecution which were either not supported by compelling evidence or which had failed to respond in substantive terms to submissions made by the defence. Furthermore, in considering submissions made by the defence, account ought to have been taken of the limitations to which it might have been subject in adducing supporting evidence on account of it not having full access to the investigation file. In evaluating the submissions of both prosecution and the defence, the court ought to have used very specific argumentation (*Janiashvili v. Georgia*, no. 35887/05, 27 November 2012) and to have clearly responded to the submissions made by or on behalf of the defendant, accused (*Kuc v. Slovakia*, no. 37498/14, 25 July 2017). It is never sufficient for this purpose for the court to cite just the relevant legal provisions and possible fears (*Boicenco v. Moldova*, no. 41088/05, 11 July 2006), use formulaic reasoning (*Mamedova v Russia*, 7064/05, 1 June 2006), complete just a template form with pre-printed reasoning (*Saghinadze and Others v. Georgia*, no. 18768/05, 27 May 2010) or make virtually identical orders (not just in terms of their content – apart from the dates, the names of the judges and participants and the length of detention – but also in terms of their layout, including such details as the font used, the positioning of the text and the line spacing, as in *Svipsta v. Latvia*, no. 66820/01, 9 March 2006).

Bail

46. In connection with its stipulation that persons arrested or detained in connection with criminal proceedings “shall be entitled to trial within a reasonable time or to release pending trial”, Article 5(3) of the European Convention provides that “Release may be conditioned by guarantees to appear for trial”.

47. The nature of the guarantee can take many forms. Thus, it could include a requirement such as: compulsory residence; curfew; non-association with certain persons; police supervision;; surrender of passport; electronic tagging; and even one’s own recognisance, that is, just a written promise to show up for future court appearances and not engage in illegal activity. However, the provision of a financial guarantee – commonly referred to as “bail” – is a feature of many legal systems and State practice regarding its use has generated a significant body of case law.

Key points

48. In contending that the requirement to provide bail or the refusal to accept the financial guarantee offered has led to pre-trial detention contrary to Article 5 of the European Convention, you should have regard to the following:

- *The form of the guarantee*: It is well-established that the provision of cash is not the only acceptable method; other forms of guarantee such as the deposit of bonds or a mortgage on one's real estate can be used (*Iwańczuk v. Poland*, no. 25196/94, 15 November 2001);

- *The source of the guarantee*: This does not have to be provided by the defendant, accused, her or himself (*Fedorenko v. Russia*, no. 39602/05, 20 September 2011);

- *The amount required*: As the purpose of the guarantee is to ensure the presence of the defendant, accused at the hearing, the amount must primarily be set by reference to the person's assets, and with due regard to the extent to which the prospect of its loss will be a sufficient deterrent to bring about the risk considered to justify the imposition of a preventive measure (*Mangouras v. Spain* [GC], no. 12050/04, 28 September 2010). In fixing it, therefore, account must first have been taken of the capacity of the defendant, accused to pay the sum required (*Piotr Osuch v. Poland*, no. 30028/06, 3 November 2009 and *Gafà v. Malta*, no. 54335/14, 22 May 2018). However, a defendant, accused cannot maintain that her or his detention has been prolonged by the demand for excessive bail when s/he has failed to furnish the information essential – that can be checked if need be - for the fixing of its amount (*Bonnechaux v. Switzerland* (Rep.), no. 8224/78, 5 December 1979). The amount can be significant where necessary to allay the risk so long as it is within the means of the defendant, accused (*Punzelt v. Czech Republi*c, no. 31315/96, 25 April 2000) or it is relevant to take account of her or his relationship with the persons providing it (*Mangouras v. Spain* [GC], no. 12050/04, 28 September 2010);

- *The possibility of paying the amount required*: There must be arrangements in place that enable the defendant, accused actually to pay the amount of bail set (*Kolesin v. Russia*, no. 72885/10, 28 November 2017); and

- *The timing of release*: This should occur once payment of the amount set has been received and the relevant authorities become aware of that fact (*Navushtanov v. Bulgaria*, no. 57847/00, 24 May 2007). It is possible to make release conditional on receipt of payment (*Nikolishen v. Ukraine*, no. 65544/11, 15 April 2021) but this is not a requirement under the European Convention. Moreover, the fact that a defendant, accused remains in custody for a significant period after bail has been granted is likely to be seen as an indication that the court had not taken the necessary care in fixing appropriate amount (*Mikalauskas v. Malta*, no. 4458/10, 23 July 2013).

49. It should be noted, however, that a requirement to provide bail, as it is not a permanent deprivation of property and only prevents a person from temporarily enjoying and disposing of the property concerned in the general interest is unlikely to be regarded as a violation of the right to property under Article 1 of Protocol No. 1 (*Jedamski v. Poland* (dec.), no. 29691/96, 4 March 1998).

50. Moreover, while it can be appropriate to sanction a breach of the conditions ancillary to the financial guarantee that are imposed on a defendant, accused when granting her or him bail, this must not be disproportionate, such as prolonged detention (*Gatt v. Malta*, no. 28221/08, 27 July 2010).

51. Forfeiture of any sum paid following non-attendance at the trial is acceptable where this strikes a "fair balance" between the demands of the general interest of the community and the requirements of the defendant, accused's rights in the circumstances of the case (*Lavrechov v. Czech Republic*, no. 57404/08, 20 June 2013) and this occurs at the conclusion of fully adversarial proceedings (*Koval v. Ukraine* (dec.), no. 65550/01, 30 March 2004).

G. LEGAL ASSISTANCE: ACCESS; LEGAL AID LAWYERS: CONFIDENTIALITY OF DISCUSSIONS: PLEA BARGAINING; PRE-TRIAL MEASURES

52. Article 6(3)(c) of the European Convention expressly guarantees persons charged with a criminal offence the right to defend her/himself in person or through legal assistance of her/his own choosing or, if s/he has not sufficient means to pay for legal assistance, to be given it. However, although this guarantee might seem to be concerned just with the trial process, the European Court has come to recognise that the outcome of a trial can be determined in the course of interrogation at the very beginning of the proceedings. Moreover, it can be relevant even when someone has not been formally charged.

53. The guarantee in Article 6(3)(c) is not only concerned with access to legal assistance but also with the conditions under which such access occurs.

54. In addition, it can be relevant to the role of legal aid lawyers in the absence of the lawyer of the defendant, accused, the conduct of plea bargaining and the imposition of pre-trial measures.

Key points

55. In challenging any limitations on access to legal assistance at the pre-trial stage and the conditions under which it can occur, you should have regard to the following points:

- *The need for legal assistance*: The guarantees of Article 6 are applicable from the moment that a "criminal charge" exists, i.e., from the moment that an individual is officially notified by the competent authority of an allegation that s/he has committed a criminal offence, or from the point at which her/his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against her/him (*McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010). As a result, they may therefore be relevant during pre-trial proceedings, including investigation and the conduct of investigative measures, 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 (*Imbrioscia v. Switzerland*, no. 13972/88, 24 November 1993 and *Dvorski v. Croatia* [GC], 25703/11, 20 October 2015). Moreover, the need for legal assistance also applies where someone voluntarily surrenders to custody (*Yuriy Volkov v. Ukraine*, no. 45872/06, 19 December 2013), where a suspect takes part in confrontations at an early stage of the proceedings (*Vanfuli v. Russia*, no. 24885/05, 3 November 2011 and *Şiray v. Turkey*, no. 29724/08, 11 February 2014) and to procedural acts involving reconstruction of events and

probably the conduct of identification parades (*Galip Doğru v. Turkey*, no. 36001/06, 28 April 2015 and *Dzhulay v. Ukraine*, no. 24439/06, 3 April 2014);

- *The need for notification*: It is now well-established that once there is a suspicion of an offence against someone, it becomes incumbent on the police to inform her or him of the privilege against self-incrimination, the right to silence and the right to legal assistance (*Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016 and *Simeonovi v. Bulgaria* [GC], no. 21980/04, 17 May 2017);

- *The position of witnesses*: In view of the foregoing, the right of access to legal assistance will also apply once it becomes clear that a person is suspect and not a witness or someone detained for other reasons (*Shabelnik v. Ukraine*, no. 16404/03, 19 February 2009, *Krivoshey v. Ukraine*, no. 7433/05, 23 June 2016 and *Zakshevskiy v. Ukraine*, no. 7193/04, 17 March 2016) or is so regarded when questioned under an international letter of request (*Stojkovic v. France and Belgium*, no. 25303/08, 27 October 2011). It will be important, therefore, to try to establish the attitude of those interrogating a supposed "witness" as to their actual views regarding her/his involvement in the offence being investigated;

- *Any delay in access*: The European Court recognises that there is scope for access to legal advice to be, exceptionally, delayed where there are compelling reasons for doing so. Such a restriction his should be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. In particular, the European Court considers that there will be a compelling reason where it is convincingly demonstrated that there is an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case but not a non-specific claim of a risk of leaks (*Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016);

- *Respect for confidentiality*: Legal assistance generally requires unimpeded communication between the accused and the lawyer. As a result, listening to discussions at meetings will not normally be justifiable (*Brennan v. United Kingdom*, no. 39846/98, 16 October 2001, *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013 and *Yaroslav Belousov v. Russia*, no. 2653/13, 4 October 2016). This is equally true of any interception of correspondence and telephone calls (*Lanz v. Austria*, no. 24430/94, 31 January 2002, *Zagaria v. Italy*, no. 58295/00, 27 November 2007, *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013) and the search of offices and files *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013). Such activity not only interferes with the right to a fair trial of the defendant, accused but also of the rights of both her/him and the lawyer concerned under Article 8 of the European Convention (*Schönenberger and Durmaz v. Switzerland*, no. 11368/85, 20 June 1988). These interferences could, however, be regarded as compatible with these rights where there is a well-founded basis for believing that genuinely improper conduct was occurring (*Brennan v. United Kingdom*, no. 39846/98, 16 October 2001 and *Laurent v. France*, no. 28798/13, 24 May 2018) or for reasons of national security (*R.E. v. United Kingdom*, no. 62498/11, 27 October 2015);

- *Impact on overall fairness*: A lack of compelling reasons for restricting access to legal advice is not, in itself, sufficient to lead to a violation of Article 6 since it must also be established that the overall fairness of the trial was irretrievably prejudiced by the restriction on access to legal advice. In determining the impact of such a denial on the fairness of the proceedings the European Court considers that the following factors should be taken into account:

  - Whether the defendant, accused was particularly vulnerable, which will be the case when those being are interrogated are children (*Blokhin v. Russia* [GC], no. 47152/06, 23 March 2016), non-native speakers (*Elawa v. Turkey*, no. 36772/02, 25 January 2011) or have a low level of education (*Kaçiu and Kotorri v. Albania*, no. 33192/07, 25 June 2013);
  - The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
  - Whether the defendant, accused had the opportunity to challenge the authenticity of the evidence and oppose its use;
  - The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
  - Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another provision in the European Convention , the nature of the violation found;
  - In the case of a statement, its nature and whether it was promptly retracted or modified;
  - The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
  - Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions;
  - The weight of the public interest in the investigation and punishment of the particular offence in issue; and
  - Other relevant procedural safeguards afforded by domestic law and practice.

  For illustrations of the application of these factors, see, e.g., *Sitnevskiy and Chaykovskiy v. Ukraine*, no. 48016/06, 10 November 2016, *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, *Doyle v. Ireland*, no. 51979/17, 23 May 2019 and *Ayetullah Ay v. Turkey*, no. 29084/07, 27 October 2020. Where there are no compelling reasons for restricting access to legal advice, the onus will be on the State to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. Furthermore, the European Court has underlined that a failure to notify a person of the right to legal advice will make it even more difficult to rebut the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice or to show, even where there are compelling reasons for the delay, that the proceedings as a whole were fair (*Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016). Similarly, the European Court will conclude that there has been

a violation of Article 6(3)(c) where it finds that a restriction on the confidentiality of communication between a defendant, accused and her or his lawyer has prevented the receipt of practical and effective legal assistance and that restriction was neither necessary nor proportionate (*Brennan v. United Kingdom*, no. 39846/98, 16 October 2001 and *Khodorkovskiy and Lebedev v. Russia (No. 2*), no. 51111/07, 14 January 2020); and

- *Restrictions on discussion*: In addition, a bar on a defendant, accused discussing with her or his lawyer certain matters relevant to her or his defence is likely to lead to a finding that the fairness of the proceedings was irretrievably compromised in the absence of adequate and sufficient safeguards against abuse (*M. v. Netherlands*, no. 2156/10, 25 July 2017).

56. In considering the role that should be played by a legal aid lawyer where the lawyer of the defendant, accused does not appear at certain proceedings in the criminal process, it is important to keep in mind the following points:

- *Choice of lawyer*: In general, an interference with the free choice of defence counsel will entail a violation of Article 6(1) 1 together with paragraph (3)(c) of the European Convention if this were to adversely affect the defence of the defendant, accused, regard being had to the proceedings as a whole (*Croissant v. Germany*, no. 13611/88, 25 September 1992 and *Zagorodniy v. Ukraine*, no. 27004/06, 24 November 2011). However, the State may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice, such as where the defendant, accused would not be adequately represented (*Meftah and Others v. France* [GC], no. 32911/96, 26 July 2002 and *Klimentyev v. Russia*, no. 46503/99, 16 November 2006). Nonetheless, a firm relationship of trust between the defendant, accused could outweigh reasons that might otherwise be relevant and sufficient (*Prehn v. Germany* (dec.), no. 40451/06, 24 August 2010);

- *The duty to provide legal assistance*: The duty of the State in this respect depends not only on the means of the individual defendant, accused but also on her/his capacity, the nature of the issues and the penalties that can be imposed (*Zdravko Stanev v. Bulgaria*, no. 32238/04, 6 November 2012 and *Mikhaylova v. Russia*, no. 46998/08, 19 November 2015). However, the fulfilment of that duty requires that the assistance provided is actually effective (*Pavlenko v. Russia*, no. 42371/02, 1 April 2010) and that may require intervention by the authorities and the courts where it is evident that this is not the case (*Daud v. Portugal*, no. 22600/93, 21 April 1998 and *Kemal Kahraman and Ali Kahraman v. Turkey*, no. 42104/02, 26 April 2007);

- *The need for an informed choice*: The imposition of a lawyer will not be justified in the absence of relevant and sufficient reasons for doing so nor where the defendant, accused is not informed that the lawyer of her/his choosing is ready and able to provide the legal assistance required (*Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015). Moreover, it should not be assumed that the lawyer of the defendant, accused is unwilling or unable to act simply because s/he does not attend a particular hearing (*Vamvakas v. Greece (No. 2),* no. 2870/11, 9 April 2015); and

- *Impact on overall fairness*: In the absence of relevant and sufficient grounds for overriding or obstructing the wish of a defendant, accused as to her or his choice of

legal representation, the European Court's determination as to whether there has been a violation of Article 6(3)(c) will be based on an assessment as to whether, in the light of the proceedings as a whole, the rights of the defence were adversely affected by the denial of choice in respect of a lawyer to such an extent as to undermine their overall fairness (*Lobzhanidze and Peradze v. Georgia*, no. 21447/11, 27 February 2020).

57. In the conduct of plea-bargaining, a defendant, accused must be legally assisted throughout the process as this is essential for the fulfilment of the conditions considered by the European Court to be applicable to the conclusion of such bargains on account of the waiver that they entail of the right to have the criminal case against her or him examined on the merits: (a) the bargain must be accepted in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties must be subject to sufficient judicial review.

58. In this connection, it is essential that: (a) the lawyer explains the legal consequence of the plea bargain to the defendant, accused; (b) the judge approving the bargain enquires of the defendant, accused's lawyer as to whether s/he had been subjected to any kind of undue pressure during the negotiations with the prosecutor; and (c) the lawyer also signs the agreement reached (*Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014, *Leuska and Others v. Estonia*, no. 64734/11, 7 November 2017, *Kadagishvili v. Georgia*, no. 12391/06, 14 May 2020 and *V.C.L. and A.N. v. United Kingdom*, no. 77587/12, 16 February 2021).

59. It is vital that, in the course of this process, that the defence lawyer does act as a mouthpiece for the prosecution in any advice given to the defendant, accused. This is a prerequisite for ensuring that any acceptance of a plea bargain is both informed and voluntary.

60. There is no absolute requirement under the European Convention to be legally represented in either form of proceedings so that a judge will not necessarily have to wait until a defendant, accused avails her/himself of legal assistance or have to ensure that s/he is provided with free legal aid.

61. However, paragraph 25 in the Appendix to Recommendation Rec(2006)13 of the Committee of Ministers to member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, with emphasis on the presumption in favour of liberty and the adverse impact of remand in custody provides that: "[2] The person whose remand in custody will be sought shall have the right to assistance from a lawyer in the remand proceedings and to have an adequate opportunity to consult with his or her lawyer in order to prepare their defence. The person concerned shall be advised of these rights in sufficient time and in a language which he or she understands so that their exercise is practicable. [3] Such assistance from a lawyer shall be provided at public expense where the person whose remand in custody is being sought cannot afford it".

62. Moreover, legal representation should not be prevented where a defendant, accused already has it in place or where this might be required by the circumstances of the case (*Lebedev v. Russia*, no. 4493/04, 25 October 2007).

63. Furthermore, the legal assistance available to a defendant, accused must always be effective and so should not be undermined by a police officer listening to discussions at meetings (*Brennan v. United Kingdom*, no. 39846/98, 16 October 2001) or being able to overhear conversations on account of being close to him in the courtroom (*Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011)

64. There is no specific framework in European standards regarding discussions between the prosecution and defence lawyers regarding the imposition of pre-trial measures in a case. However, the very fact that legal assistance is considered in such proceedings to be both appropriate and often necessary is a clear indication that such discussions can take place so long as the professional obligations of the defence lawyer to the defendant, accused are observed.

65. Such discussions could certainly be a useful means of providing the prosecution with information that it might not otherwise have. Indeed, if the prosecution were to make known to the defence lawyer its initial thoughts regarding pre-trial measures in a particular case, these could then be discussed with the defendant, accused prior to the hearing and thereby ensure that the defence was then in a position to provide any relevant information for the decision that will be taken by the court.

66. As with the role played in plea-bargaining, a defence lawyer must act as an entirely independent adviser for the defendant, accused.

H. TRIAL PREPARATION: ACCESS TO THE CASE FILE; ADEQUATE TIME

67. Article 6(3)(b) of the European Convention concerns two elements of a proper defence, namely, those relating to facilities and to time. This provision implies that the substantive defence activity on the defendant, accused's behalf may comprise everything which is "necessary" to prepare for the trial. In particular, the defendant, accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (*Gregačević v. Croatia*, no. 58331/09, 10 July 2012).

68. The issue of adequacy of the time and facilities afforded to a defendant, accused is to be assessed in the light of the circumstances of each particular case (*Galstyan v. Armenia*, no. 26986/03, 15 November 2007 and *Iglin v. Ukraine*, no. 39908/05, 12 January 2012).

Key points

69. In assessing whether the defendant, accused had adequate facilities for the preparation of his defence, particular regard should be had to:

- *Access to a lawyer*: The defendant, accused should be able to confer with his defence counsel (*Bonzi v. Switzerland* (dec.), no. 7854/77, 12 July 1978 Commission decision; *Can v. Austria* (Rep.), no. 9300/81, 12 July 1984). There should not be physical barriers to effective consultation with a lawyer (*Yaroslav Belousov v. Russia*, no. 2653/13, 4 October 2016, placement in a glass cabin). See further para. 55 above;

- *Access to the case file*: The defendant, accused should be able to acquaint her or himself with the results of investigations carried out throughout the proceedings (*Huseyn and Others v. Azerbaijan*, no. 35485/05, 26 July 2011 and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011). In addition, the defendant, accused should be able to obtain copies of relevant documents from the case file and to compile and use any notes taken (*Matyjek v. Poland*, no. 38184/03, 24 April 2007, *Seleznev v. Russia*, no. 15591/03, 26 June 2008, *Rasmussen v. Poland*, no. 38886/05, 28 April 2009 and *Moiseyev v. Russia*, no. 62936/00, 9 October 2008, § 59). On the admissibility of restrictions imposed on access to the case file, see para. 87 below; and

- *The conditions of detention*: Where a defendant, accused is detained, the conditions of her or his detention, as well as transport, catering and other similar arrangements will be relevant factors to consider. In particular, it will be relevant to consider whether these conditions are such as to permit the defendant, accused to read and write with a reasonable degree of concentration (*Mayzit v. Russia*, no. 63378/00, 20 January 2005 and *Moiseyev v. Russia*, no. 62936/00, 9 October 2008). Moreover, it is crucial that both the defendant, accused and her or his lawyer should be able to participate in the proceedings and make submissions without suffering from excessive tiredness (*Barberà, Messegué and Jabardo v. Spain*, no. 10590/83, 6 December 1988, *Makhfi v. France*, no. 59335/00, 19 October 2004 and *Fakailo (Safoka) and Others v. France*, no. 2871/11, 2 October 2014). In addition, account should be taken of the cumulative effect of exhaustion caused by lengthy prison transfers, in poor conditions, to and from court over a prolonged period (*Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, no. 75734/12, 19 November 2019).

70. In assessing whether a defendant, accused had adequate time for the preparation of his defence, particular regard should be had to:

- *Complexity of the case*: Account should be taken of the volume of material to be studied (*Galstyan v. Armenia*, no. 26986/03, 15 November 2007 and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011) but also the extent of the familiarity of the defendant, accused with the relevant material and the size of her or his legal team (*Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013);

- *The workload of the lawyer*: Although this is relevant, the European Court considers that it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case (*Mattick v. Germany* (dec.), no. 62116/00, 31 March 2005); and

- The time allowed: Particular significance will be attached to the limited time for the inspection of the case file (*Huseyn and Others v. Azerbaijan*, no. 35485/05, 26 July 2011 and *Iglin v. Ukraine*, no. 39908/05, 12 January 2012) or a short period between the notification of charges and the holding of the hearing (*Vyerentsov v. Ukraine*, no. 20372/11, 11 April 2013). Furthermore, the defence must be given additional time after certain occurrences in the proceedings that require it to adjust its position, prepare a request, lodge an appeal, etc. (*Miminoshvili v. Russia*, no. 20197/03, 28 June 2011). Such “occurrences” could include, for example, changes in the indictment (*Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999) and the introduction of new

evidence by the prosecution or a sudden and drastic change in the opinion of an expert during the trial (*G.B. v. France*, no. 44069/98, 2 October 2001).

I. RECUSAL OF JUDGES

71. The right to a fair trial in Article 6(1) requires that a case be heard by an "independent and impartial tribunal" established by law. The principles applicable when determining whether a tribunal can be considered "independent and impartial" apply equally to professional judges, lay judges and jurors (*Holm v. Sweden*, no. 14191/88, 25 November 1993; see further para. 114 below as to jurors).

72. In order to be independent, a court must be independent not only of the executive but also of the parties. A court will satisfy the requirement of impartiality where there is a lack of prejudice or bias on the part of its members. This is understood in two ways; there is actual personal bias (a subjective test) and the circumstances give rise to doubts as to impartiality that can be objectively justified (an objective test).

73. However, as there is a close link between the concepts of independence and objective impartiality, the European Court often regards it appropriate not to make a distinction between these two requirements when it considers whether there has been compliance with them (*Findlay v. United Kingdom*, no. 22107/93, 25 February 1997).

Key points

74. In considering whether to call into question the independence of a court, you should have regard to the following factors:

- *The manner of appointment*: The appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (*Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30 November 2010 and *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], no. 2312/08, 18 July 2013);

- *The duration of an appointment*: No particular term of office has been specified as a necessary minimum and an appointment for a limited period is not necessarily objectionable (*Campbell and Fell v. United Kingdom*, no. 7819/77, 28 June 1984). However, irremovability of judges during their term of office is, in general, considered to be a corollary of their independence. Nonetheless, the absence of any formal recognition in this regard is not necessarily problematic so long as it recognised in fact and other necessary guarantees are present (*Campbell and Fell v. United Kingdom*, no. 7819/77, 28 June 1984);

- *Guarantees against outside pressures*: Judicial independence requires that individual judges to free from undue influences whether coming from outside the judiciary or within it. The former means that they should be protected from removal during their term office (*Engel v. Netherlands* [P], no. 5100/71, 8 June 1976), they should not be subject to instructions from the executive (*Campbell and Fell v. United Kingdom*, no.

7819/77, 28 June 1984) and their functions should not be undermined through the grant of an amnesty or pardon (*The Greek Case* (Rep.), no. 3321/67, 5 November 1969). Internal judicial independence requires that judges be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. (*Daktaras v. Lithuania*, n. 42095/98, 10 October 2000, *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 and *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009); and

- *An appearance of independence*: The courts in a democratic society must inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (*Şahiner v. Turkey*, no. 29279/95, 25 September 2001). A legitimate reason to fear that a particular court lacks independence (or impartiality) may stem from a continued connection with an executive body (*Belilos v. Switzerland* [P], no. 10328/83, 29 April 1988, subordination of its members to a non-member with an interest in the proceedings (*Findlay v. United Kingdom*, no. 22107/93, 25 February 1997 and *Şahiner v. Turkey*, no. 29279/95, 25 September 2001) and the absence of any legal or judicial experience in determining complex issues of fact and law (*Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013).

75. In considering whether to call into question the impartiality of a court or of one or more of its members, you should have regard to the existence of the following:

- *Actual personal bias*: There is a presumption that judges are impartial in the absence of proof to the contrary which is generally difficult to demonstrate. However, it may be seen in a lack of detachment in responding to conduct seen as insulting (*Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005) or evidence of a personal conviction relevant to the determination of the proceedings (*Werner v. Poland*, no. 26760/95, 15 November 2001); and

- *Reasons for doubting impartiality*: Under the objective test, it must be determined whether - quite apart from the personal conduct of any of the members of the court - there are ascertainable facts which may raise doubts as to its impartiality sufficient for a fear in this respect to be objectively justified. This can be the situation where:

    - There are hierarchical or other links between the judge and other persons involved in the proceedings which objectively justify misgivings as to the impartiality of the tribunal (*Micallef v. Malta* [GC], no. 17056/06, 15 October 2009). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (*Pullar v. United Kingdom*, no. 22399/93, 10 June 1996);
    - The judge(s) were involved in the proceedings at an earlier stage. This might result from previously having had a prosecutorial role or a connection with the prosecutor in a case (*Piersack v. Belgium*, no.) or having acted as an investigating judge (*De Cubber v. Belgium*, no). However, the making of pre-trial measures in a case will not be sufficient for this purpose unless these required a view to be taken of the guilt or innocence of the defendant, accused concerned (*Nortier v. Netherlands*, no. 13924/88, 24 August 1993 and *Ekeberg and Others v. Norway*, no. 11106/04, 31 July 2007) and, depending on the facts, a similar view may be taken of involvement in related civil proceedings or the

separate trial of another defendant, accused that concerned the same events (*Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013 and *Ferrantelli and Santangelo v. Italy*, no. 19874/92, 7 August 1996). Moreover, the re-hearing of a case referred back by an appellate court is not sufficient to satisfy the objective test (*Thomann v. Switzerland*, no. 17602/91, 10 June 1996) but a judge should not take part in two different appellate stages relating to the same case (*Oberschlick v. Austria* [P], no. 11662/85, 23 May 1995) or in an appeal against her or his own ruling (*De Haan v. Netherlands*, no. 22839/93, 26 August 1997);

- The judge has an interest in the proceedings. This might because the judge had a role in instituting the proceedings (*Demicoli v. Malta*, no. 13057/87, 27 August 1991 and *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005), was in some way targeted by the offence being tried (*Lindon, Otchakovsky-Laurens and July v. France* [GC], no. 21279/02, 22 October 2007) or was the object of civil proceedings brought by the defendant, accused (*Boyan Gospodinov v. Bulgaria*, no. 28417/07, 5 April 2018); or
- This is effect of either the judge's conduct in court (*Sofri and Others v. Italy* (dec.), no. 37235/97, 27 May 2003) or of statements made outside it (*Lavents v. Latvia*, no. 58442/00, 28 November 2002).

76. In assessing whether the objective test has been satisfied, it should be borne in mind that account will be taken of:

- *Appearances*: It is the responsibility of the individual judge to identify any impediments to her or his participation and either to withdraw or, when faced with a situation in which it is arguable that s/he should be disqualified - although not unequivocally excluded by law - to bring the matter to the attention of the parties in order to allow them to challenge the participation of the judge (*Sigríður Elín Sigfúsdóttir v. Iceland*, no. 41382/17, 25 February 2020).

77. The situations in which a tribunal may not be regarded as one established by law will include ones where:

- The court had acted outside its jurisdiction (*Coëme and Others v. Belgium*, no. 32492/96, 22 June 2000);
- The provisions for assigning a case to a particular judge or court had not been observed (*Chim and Przywieczerski v. Poland*, no. 36661/07, 12 April 2018);
- A judge had been replaced without providing an adequate reason (*Kontalexis*,v. Greece, no. 59000/08, 31 May 2011);
- The judge's term of office had been tacitly extended after it had expired (*Gurov v. Moldova,* no. 36455/02, 11 July 2006;
- Some members of the bench had been disqualified by law from sitting in the case (*Zeynalov v. Azerbaijan*, no. 31848/07, 30 May 2013);
- There had been no legal basis for the exercise of judicial functions by a lay judge (*Gorguiladze v. Georgia*, no. 4313/04, 20 October 2009); and
- The trial had been by lay judges who had not been appointed in compliance with the prescribed procedure (*Ilatovskiy v. Russia*, no. 6945/04, 9 July 2009).

78. However, irregularities in a judicial appointment procedure will only be considered a violation of the right to a "tribunal established by law where the following cumulative

criteria are fulfilled: (a) a manifest breach of the law; (b) the impact on the ability of the judiciary to perform its duties free of undue interference, such as the appointment of a person as a judge who did not fulfil the relevant eligibility criteria – or a grave irregularity (rather than a mere technical or procedural one) that goes to the essence of the right to a "tribunal established by law"; and (c) the assessment by national courts as to the legal consequences of the breach unless their findings are arbitrary or manifestly unreasonable (*Guðmundur Andri Ástráðsson v. Iceland* [GC] no. 26374/18, 1 December 2020).

J. EVIDENCE: ADMISSIBILITY; RELIABILITY; DISCLOSURE

79. The use of evidence is central to all trial processes. It is not a matter that is specifically regulated in the provisions of the European Convention and the starting point of the European Court when there is some dispute before it regarding an evidential point is that this is primarily a matter for national law.

80. However, it is concerned about issues involving the use of evidence that might affect the right relating to fair trial. Such issues arise, in particular, where evidence is obtained in certain ways, doubts relating to its reliability are not explored adequately or at all and the defence does not have access to everything gathered by the prosecution.

Admissibility

81. Although the European Court has repeatedly emphasised that Article 6 of the European Convention does not lay down any rules on the admissibility of evidence (see, e.g., *Garcia Ruiz v. Spain* [GC], no. 30544/96, 21 January 1999), it has concluded that the admissibility of evidence obtained in certain ways may render the proceedings unfair.

Key points

82. In contesting the admissibility of particular evidence from the perspective of the European Convention (bearing in mind that national rules may be stricter), you should have regard to the existence of the following:

- *Illegal means:* the mere reliance on evidence that has been obtained in this way will not lead to the proceedings concerned being regarded as unfair (*Parris v. Cyprus* (dec.), 56354/00, 4 July 2002, an illegal post-mortem;

- *Violation of Article 8*: the mere reliance on evidence that has been obtained in this way will also not lead to the proceedings concerned being regarded as unfair (*Schenk v. Switzerland,* telephone interception; *Khan v. United Kingdom*, no. 35394/97, 12 May 2000, covert listening device; *Perry v. United Kingdom* (dec.), 63737/00, 26 September 2002, video surveillance; and *Lee Davies v. Belgium*, no. 18704/05, 28 July 2009, search). However, a breach of this provision may be relevant for disputing the credibility of that evidence (see below);

- *Self-incrimination*: the use of statements by a defendant, accused which are directly incriminating or which can be used to undermine her/his credibility (*Saunders v. United*

Kingdom [GC], no. 19187/91, 17 December 1996) where these were obtained through compulsion or coercion – whether involving the threat of sanctions (*Brusco v. France*, no. 1466/07, 14 October 2010 and *Heaney and McGuinness v. Ireland*, no. 34720/97, 21 December 2000), the use of physical or psychological pressure (*Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006 and *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010) or the use of subterfuge (*Allan v. United Kingdom*, no. 48539/99, 5 November 2002) - will render a trial unfair. Confessions or incriminating statements are also likely to be regarded as rendering a trial unfair where the defendant, accused was not notified of the privilege against self-incrimination and the right to remain silent (*Aleksandr Zaichenko v. Russia*, 39660/02, 18 February 2010) or was denied access to a lawyer (*Dvorski v. Croatia* [GC], 25703/11, 20 October 2015).

However, in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, there is a need to take account of factors such as:

- the vulnerability of the defendant, accused;
- the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial;
- an opportunity to challenge the authenticity of the evidence and oppose its use;
- the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- any unlawfulness in obtaining the evidence and the nature of any violation of a provision in the European Convention;
- the nature of the statement and whether it was promptly retracted or modified; the use to which the evidence was put, and in particular whether it formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
- whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
- the weight of the public interest in the investigation and punishment of the particular offence in issue; and
- other relevant procedural safeguards afforded by domestic law and practice (*Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016 and *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018). It is possible that a similar approach will be taken of the use against a defendant, accused of evidence obtained from witnesses who did not have access to legal assistance during interrogation (*Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011, *Erkapić v. Croatia*, no. 51198/08, 25 April 2013 and *Borg v. Malta*, no. 37537/13, 12 January 2016);

- *Incitement*: in the event of an arguable claim of incitement to commit an offence and of either a finding of such incitement or of the prosecution failing to prove that it occurred, the courts are under a duty to either stay the proceedings as an abuse of process or to

exclude any evidence obtained by entrapment or to bring about similar consequences (*Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008 and Akbay and Others v. Germany, no. 40495/15, 15 October 2020);

- *Torture*: all evidence obtained by torture must be inadmissible (*Hajrulahu v. "the former Yugoslav Republic of Macedonia"*, no. 37537/07, 29 October 2015), regardless of against whom such torture has been used (*Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012) or in which country where that torture actually occurred (*El Haski v. Belgium*, no. 649/08, 25 September 2012); and

- *Ill-treatment*: a confession obtained through the use of inhuman and degrading treatment should not be admitted (*Hajnal v. Serbia*, no. 36937/06, 19 June 2012) and the use of other evidence obtained through such treatment will in certain circumstances also be regarded as rendering a trial unfair (*Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006) but not be so if that evidence does not actually have a bearing on the outcome of the proceedings against the defendant, accused that is, an impact on his or her conviction or sentence (*Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010). However, reliance on evidence may even be considered unfair where there has not been proper consideration as to whether it was obtained through ill-treatment notwithstanding that its occurrence is not established before the European Court (*Jannatov v. Azerbaijan*, no. 32123/07, 31 July 2014).

83. Moreover, it should be noted that the European Court expects a court always to have made – and be shown to have been made – a thorough assessment as to whether or not the means by which particular evidence has been obtained would render unfair its use in the trial which it is conducting. It also expects any use of unlawful methods to obtain evidence to be condemned as a preliminary matter (*Hulki Güneş v. Turkey*, 28490/95, 19 June 2003).

Credibility

84. The assessment of evidence is primarily a matter for the national courts before which the relevant proceedings are conducted. However, their failure to take account of factors that could undermine its credibility may lead the European Court to conclude that those proceedings have been rendered unfair for the purpose of Article 6 of the European Convention.

Key points

85. In contesting the admissibility of particular evidence from the perspective of the European Convention, you should have regard to the existence of the following:

- *The nature of the evidence*: hearsay evidence might justifiably be excluded on account of the difficulties in assessing its credibility (*Thomas v. United Kingdom* (dec.), no. 19354/02, 10 May 2005);

- *The circumstances involved*: The reliability and authenticity of physical evidence can be justifiably doubted where procedural requirements are not followed (*Sakit Zahidov v. Azerbaijan*, 51164/07, 12 November 2015 and *Budak v. Turkey*, no. 69762/12, 16 February 2021) or it was gathered in the absence of the defendant, accused or independent witnesses (*Lisica v. Croatia*, no. 20100/06, 25 February 2010). This will

also be the case with the conduct of an identification parade which makes the selection of the defendant, accused inevitable (*Laska and Lika v. Albania*, no. 12315/04, 20 April 2010) and the reconstruction of events occurring without the presence of the defendant, accused's lawyer (*Galip Doğru v. Turkey*, no. 36001/06, 28 April 2015);

- *Technical doubts*: The possibility that the authenticity of the evidence has been compromised in some way should not be ignored (*Botea v. Romania*, no. 40872/04, 10 December 2013 and *Beraru v. Romania*, no. 40107/04, 18 March 2014); and

- *The ability to challenge the evidence*: No unfairness is likely to be considered to have occurred where such a challenge was possible, whether in the form of cross-examination of a witness and/or the calling of other witnesses (*Tsonyo Tsonev v. Bulgaria (No. 3)*, no. 21124/04, 16 October 2012 and *Pichugin v. Russia*, no. 38623/03, 23 October 2012) or through questions on behalf of the defendant, accused were posed by the judge where the evidence was not given directly in court but the demeanour of the witness when answering could still be observed (*Accardi and Others v. Italy* (dec.), no. 30598/02, 20 January 2005 and *Bocos-Cuesta v. Netherlands*, no. 54789/00, 10 November 2005).

Disclosure

86. The right to a fair trial under Article 6 entails proceedings that are adversarial. This has implications for access both to material in the hands of the prosecution and that which is otherwise obtained by the court.

Key points

87. In contesting the withholding of any material by the prosecution or the non-disclosure of material considered by the court, you should have regard to the existence of the following:

- *A restriction on access to the case file*: The prosecution is generally required to disclose to the defence all material evidence in its possession, whether this is for or against the defendant, accused (*Miailhe v. France (No. 2)*, no. 18978/91, 23 September 1996 and *Foucher v. France*, no. 22209/93, 18 March 1997). This includes the possibility of obtaining copies of relevant documents and both making notes and retaining these afterwards (*Moiseyev v. Russia*, no. 62936/00, 2008). The duty of disclosure extends, in principle, to all material that has *been gathered, including any that might have subsequently been destroyed (Natunen* v. *Finland*, no. 2102/04, 31 March 2009). However, the prosecution may withhold access to evidence – not only direct evidence but also that concerning the manner in which that evidence had been obtained - where this is strictly necessary to preserve the fundamental rights of another person (such as an informer) or to safeguard an important public interest (such as undercover activities and national security)(*Edwards and Lewis v. United Kingdom* [GC], no. 39647/98, 27 October 2004). Such withholding of access must always have a legal basis (*Moiseyev v. Russia*, no. 62936/00, 2008). Furthermore, the material withheld must be laid before the trial court so that it can rule both on whether the reasons for the withholding the material were relevant and sufficient and on its relevance to the defence, thereby weighing the interest of the defendant, accused in disclosure against the public interest in concealment. The court thus needs to assess whether the material was relevant, or likely to be relevant to the defence and this assessment should continue to be made

throughout the trial since the presentation of the prosecution case may ultimately lead to a need for disclosure. (*Edwards and Lewis v. United Kingdom* [GC], no. 39647/98, 27 October 2004 and *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008). Non-disclosure will be not be problematic where the material concerned did not form part of the prosecution case (*Jasper v. United Kingdom* [GC], no. 27052/95, 16 February 2000) but it will be where it handicapped a defence being advanced (*Edwards and Lewis v. United Kingdom* [GC], no. 39647/98, 27 October 2004, entrapment);

- *A unilateral inquiry by the court*: In the event of the court undertaking its own inquiry as regards disputed facts – whether these facts relate to a point of procedure rather than the alleged offence as such and regardless of whether the prosecution were unaware of this inquiry – the defendant, accused should be given an opportunity to comment on the evidence so obtained ,even if that was not the primary basis for the ruling (*Kamasinski v. Austria*, no. 9783/82, 19 December 1989); and

- *A receipt of undisclosed material*: In the event of the court receiving any material - regardless of whether this had been solicited by it – and had then taken it into account in its ruling, this material should have been disclosed to the defendant, accused. It does matter that the material received did not present any fact or argument which had not already been submitted as it is for the parties to decide whether it called for their comments (*Nideröst-Huber v. Switzerland*, no. 18990/91, 18 February 1997).

K. WITNESSES: ABILITY TO SUMMON; CROSS-EXAMINATION

88. A key element of the right to fair trial is – as is made clear in Article 6(3)(d) of the European Convention - the possibility for the defendant to examine or have examined witnesses against her or him and to obtain the attendance and examination of witnesses on her/his behalf under the same conditions as witnesses against her/him.

89. A "witness" for this purpose is a term covering anyone whose statement is taken into account by a court trying someone, including any co-accused and experts (*Windisch v. Austria*, no. 12489/86, 27 September 1990, *Rudnichenko v. Ukraine*, no. 2775/07, 11 July 2013 and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013).

90. The possibility of summoning witnesses and of subjecting witnesses for the prosecution to cross-examination is crucial for advancing the case for the defence and undermining that for the prosecution. Although neither are absolute rights, it is necessary to subject all limitations on them to close scrutiny.

Summoning witnesses

91. The ability of a defendant, accused to have witnesses examined on her or his behalf can be affected by both their failure to appear in court and the refusal of the court to allow them to be heard. Both these circumstances can entail a violation of the right under Article 6(3)(d) but will not necessarily do so.

92. In general the ability of a defendant to seek the attendance of witnesses in proceedings against him or her is subject to the right of the court to determine whether their participation would be relevant to the proceedings (*Bricmont v. Belgium*, no. 10857/84, 7 July 1989 and *Perna v. Italy* [GC], no. 48898/99, 6 May 2003). Thus, in contesting a refusal by the court to allow a witness on behalf of the defendant, accused, you should have regard to whether the following occurred:

- *The substantiation of the purpose*: The defendant, accused cannot simply complain that s/he has not been allowed to question certain witnesses; s/he must, in addition, support her/his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth (*Laukkanen and Manninen v. Finland*, no. 50230/99, 3 February 2004, *Koval v. Ukraine*, no. 65550/01, 19 October 2006 and *X v. Finland*, no. 34806/04, 3 July 2012);

- *The compelling nature of the purpose*: A refusal may be seen as justified where the testimony of a witness would

  - not be of high probative value (*Dorokhov v. Russia*, no. 66802/01, 14 February 2008) or
  - not be relevant to the outcome of the case (*Jorgic v. Germany*, no. 74613/01, 12 July 2007, *Kostecki v. Poland*, no. 14932/09, 4 June 2013 and *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013) or
  - not add to matters already established (*Gregačević v. Croatia*, no. 58331/99, 10 July 2012).

  Nonetheless, a refusal to summon or allow the re-examination of a witness would not be justified where s/he could

  - support the alii of a defendant, accused (*Popov v. Russia*, no. 26853/04, 13 July 2006) or
  - be useful for a line of defence being advanced (*Miminoisvili v. Russia*, no. 20197/03, 28 June 2011 and *Khayrov v. Ukraine*, no. 19157/06, 15 November 2012) or
  - otherwise cast doubt on the credibility of the evidence adduced by the prosecution (*Iljazi v. "the former Yugoslav Republic of Macedonia"*, no. 56539/08, 3 October 2013, *Topić v. Croatia*, no. 51355/10, 10 October 2013 and *Duško Ivanovski v. "the former Yugoslav Republic of Macedonia"*, no. 10718/05, 24 April 2014).

  Moreover, the rehearing of witnesses will almost certainly be required where there is a prospect of an appellate court overturning an acquittal at first instance (*Lazu v. Republic of Moldova*, no. 46182/08, 5 July 2016);

- *The reasons for the refusal*: A refusal to call a particular witness must always be reasoned (*Vidal v. Belgium*, no. 12351/86, 22 April 1992), the reasons must be substantive (*Topić v. Croatia*, no. 51355/10, 10 October 2013) and, in particular, the court must have considered the relevance of the potential testimony (*Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018); and

- *The overall impact on the fairness of the proceedings*: The European Court now considers that the examination of the impact which a decision refusing to examine a defence witness at the trial has on the overall fairness of the proceedings is indispensable in every case (*Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018). In its view, while the conclusions under the preceding points will generally be strongly indicative as to whether the proceedings were fair, it would not exclude that in certain, exceptional, cases considerations of fairness might warrant the opposite conclusion.

93. Moreover, a judge will be expected to summon the victim and her/his guardian in the event of a failure by state-appointed lawyer to do so where the proceedings could entail serious consequences for the defendant, accused (*Blokhin v. Russia* [GC], no. 47152/06, 23 March 2016).

94. However, it is admissible for persons to refuse to testify because of their family relationship with the defendant (*Asch v. Austria*, no. 12398/86, 26 April 1991) and also where this would result in their incriminating themselves (*Unterpertinger v. Austria*, no. 9120/80, 24 November 1986, *Kaste and Mathisen v. Norway*, no. 18885/04, 9 November 2006 and *Vidgen v. Netherlands*, no. 29353/06, 10 July 2012). Nonetheless, in the latter situation, this should only concern the refusal to answer specific questions rather than to testify at all (*Serves v. France*, no. 20225/92, 20 October 1997).

95. The nature of the case may require the appointment of an expert to address a submission of the defendant (*Bracci v. Italy*, no. 36822/02, 13 October 2005, DNA). Moreover, there should not be any automatic exclusion of the examination of experts who have submitted (*Eskelinen and Others v. Finland*, no. 43803/98, 8 August 2006 and *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 4 November 2008).

96. Furthermore, the equality of arms may require that a defendant, accused should be able to secure the appointment or attendance of an alternative expert witness (*Khodorkovskiy and Lebedev v. Russia,* no. 11082/06, 25 July 2013 and *Matytsina v. Russia*, no. 58428/10, 27 March 2014).

97. While the State cannot not be held responsible simply because a witness has failed to respond to a summons, due diligence must also have been demonstrated by the authorities in seeking to secure her or his attendance.

98. In contesting that there was an absence of due diligence to secure the attendance of a witness, you should have regard to the following:

- *The efforts to locate*: The authorities should make every reasonable effort to secure the appearance of a witness for direct examination before the trial court which entails not only summoning her/him (*Paić v. Croatia*, no. 47082/12, 29 March 2016) but also taking positive steps for this purpose (*Makeyev v. Russia*, no. 13769/04, 5 February 2009). In particular, efforts should be made (a) to clarify the circumstances when told that a witness is absent from home and take follow-up action (*Aleksandr Valeryevich Kazakov v. Russia*, no. 16412/06, 4 December 2014) (b) to use international legal assistance mechanisms to find witnesses abroad (*Colac v. Romania*, no. 26504/06, 10

February 2015). The absence of a permanent abode will not be a sufficient excuse for not trying to find a witness (*Bonev v. Bulgaria*, no. 60018/00, 8 June 2006). Furthermore, A hearing should not proceed without hearing the results of a search that has been undertaken (*Kononenko v. Russia*, no. 33780/04, 17 February 2011); and

- *The efforts to conduct an examination:* The existence and use of powers to compel attendance (*Mild and Virtanen v. Finland*, no. 39481/98, 26 July 2005). In addition, where compulsion is not an option, there should be a readiness to meet any expenses involved (*Simon Price v. United Kingdom*, no. 15602/07, 15 September 2016 and *Ter-Sargsyan v. Armenia*, no. 27866/10, 27 October 2016). Furthermore, efforts should be made to examine foreign victims or witnesses in their country when they have returned there (*Breukhoven v. Czech Republic*, no. 44438/06, 21 July 2011 and *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015).

Conducting a cross-examination

99. Cross-examination can be a vital part of the defence as it is an opportunity to undermine evidence being relied upon by the prosecution, whether by showing that is not credible or the unreliability of the person who has given it. However, it is important to appreciate that, without careful consideration before any cross-examination, this is a process that could instead be damaging for the defendant, accused.

100. In conducting any cross-examination, there is a need to keep the following points in mind:

- *The necessity of cross-examination*: It should not be undertaken where it is unlikely that this could result in anything that might benefit the case of the defendant, accused and certainly not if it is clear that it could harm it. Moreover, it is unnecessary if the witness has said nothing that harms the defendant, accused. In that case, it may be helpful to state clearly that there is no need to cross-examine such a witness, thereby indicating that her/his testimony is of no consequence for the case of the defendant, accused;

- *The goals to be achieved*: These might be just to confirm certain facts or to strengthen a particular defence being advanced but they could also be to inconsistencies in the version of events given by the witness, to separate opinion from fact, to draw out helpful points from an earlier statement that have not been mentioned or even to reveal reasons for doubting his/her testimony. Being clear about the goals at the outset will make it easier to plot the approach to take in questioning the witness concerned;

- *The nature of the questions*: It is fundamental never to ask questions for which you do not know the answer as you do not want to be surprised by an answer that can be damaging for the defendant, accused. The questions should be leading ones – “It was dark that evening, was it not?” – so that you can nudge the witness in a particular direction and at the same time limit the scope of what they can say. They should only ever be succinct, dealing with just one issue as this makes it difficult to evade answering without losing credibility. Moreover, questions should always concern facts and not the opinions of the witness (Not “Was the policeman angry?” but “The policeman tore up

the permit of the defendant, accused after s/he said he was entitled to sell food in the square, didn't?"

- *The approach required*: It is possible to use cross-examination to build up the defence of the defendant, accused ("constructive") or to damage the credibility of the witness ("deconstructive"), although there may be a need to use both with some witnesses. Cross-examination in the former case should seem like a conversation and has the potential to get facts helpful for the defendant, accused, which have the potential to carry greater weight because this comes from a prosecution witness. In the latter case, the aim is to damage the credibility of the witness by unravelling the evidence previously given in a point by point basis until s/he is seen effectively to concede the weakness of an assertion that was previously strongly made. In all cases, maintain eye contact with the witness as that will keep her/him focused and concerned. However, it is important not to intrude on the witness's space as that will seem aggressive and belligerent;

- *Familiarity with the testimony/statements*: In order to achieve the goal set for the cross-examination of a particular witness, it is essential to know her/his testimony inside out. A cursory knowledge will not allow you to recover from an answer to a question that conflicts with what was expected. In such a case, it will be vital to bring the witness back to testimony or statements previously given in the investigation so that it can then be shown how what was just said conflicts with other accounts by her/him. In addition, it may be helpful to have checked out the background of witnesses (Do they have reasons to bear a grudge against the defendant, accused? Are they likely to benefit from a conviction? Have they given different testimony in other proceedings?); and

- *Remaining cool: Despite all the planning*, there will always be witnesses who are not prepared to give the "yes" or "no" answer being sought but who will start challenging the questions and the questioner. In such cases, it is crucial to stay calm and professional. By politely reminding the witness that they should just answer with only a "yes" or a "no" and, if this fails, by requesting the judge to tell the witness to answer the question, it will become clear that s/he is not being cooperative and will damage her/his credibility. Never interrupt the witness, just go back and repeat the question that has not been answered; never rephrase it but repeat it verbatim.

Limits on cross-examination

101. The right to cross-examine witnesses does not necessarily mean that there cannot be some restrictions on the conduct of the questioning or that in some circumstances it may not happen at all.

Key points

102. In challenging restrictions on the conduct of the questioning, you should be aware that some may be permissible in respect of the following:

- *The questions to be put*: The European Court has upheld restrictions where the questions were considered not to concern any relevant facts (*Von Hoffen v. Liechtenstein*, no.

5010/04, 27 July 2006) and has indicated that the trial court should intervene where cross-examination was used as a means of intimidating or humiliating witnesses or was aimed at denigrating a witness's character rather than attacking her or his credibility (*Y. v. Slovenia*, no. 41107/10, 28 May 2015). The overriding consideration will be whether or not such restrictions prevent a defence from being advanced (and so a defendant should not be prevented from questioning a witness about factors that might challenge her or his credibility (*Oyston v. United Kingdom* (dec.), no. 42011/98, 22 January 2002 and *Pichugin v. Russia*, no. 38623/03, 23 October 2012). However, questioning should not be allowed in respects of matters about which a witness relies upon the privilege against self-incrimination (*Unterpertinger v. Austria*, no. 9120/80, 24 November 1986, *Serves v. France*, no. 20225/92, 20 October 1997, *Kaste and Mathisen v. Norway*, no. 18885/04, 9 November 2006, *Vidgen v. Netherlands*, no. 29353/06, 10 July 2012 and *El Khoury v. Germany*, no. 8824/09, 9 July 2015);

- *The questioner*: There may be circumstances where a relationship between a witness and the defendant, accused will make it inappropriate to allow the latter to conduct the examination her/himself (*Y. v. Slovenia*, no. 41107/10, 28 May 2015);

- *The ability to see*: Where there is a justified need to protect her or his anonymity, it may not always be possible to be see the witness while he or she is being examined (*Van Mechelen v. Netherlands*, no. 21363/93, 23 April 1997); and

- *The presence of the defendant, accused and/or her/his lawyer*: A disruptive defendant, accused may be removed from the courtroom and thus prevented from being present when witnesses are being examined but this should only occur after a warning and there should be subsequent inquiries to establish whether s/he would agree to conduct her/himself in an orderly manner so as to permit her/ his return to the trial (*Idalov v. Russia* [GC], no. 5826/03, 22 May 2012 and *Karpyuk and Others v. Ukraine*, no. 30582/04, 6 October 2015). Moreover, the defendant, accused and her/his lawyer may be precluded from being in the same room while the questioning takes place to protect a witness's anonymity (*Pesukic v. Switzerland*, no. 25088/07, 6 December 2012) or to protect persons who are particularly vulnerable, especially in cases involving sexual assault (*S.N. v. Sweden*, no. 34209/96, 2 July 2002)

103. It is possible that the quality of the interpretation provided in a particular case will be regarded by the European Court - but it has not yet so found - as having imposed an unjustified restriction on the ability to question witnesses (*Kamasinski v. Austria*, no. 9783/82, 19 December 1989).

104. In challenging a conviction where reliance has been placed on (a) the pre-trial statement of a witness who has not been examined by or on behalf of the defendant, accused or (b) the testimony of a witness who remained anonymous or (c) the witness could not be examined directly by the defendant, accused and/or her/his lawyer, you should first have regard to the possibility of:

- *The existence of a waiver*: The right to cross-examination may be waived (*B. v. Finland*, no. 17122/02, 24 April 2007, *Dončev and Burgov v. "the former Yugoslav Republic of Macedonia"*, no. 30265/09, 12 June 2014 and *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018) but this must be established in an unequivocal manner and must not be contrary to any public interest (*Rudnichenko v. Ukraine*, no. 2775/07,

11 July 2013). However, such a waiver will be considered to exist where a witness is afraid because of fear generated by acts of the accused or someone acting for her or him (*Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011].

105. In the absence of a waiver, you should then have regard to the following three considerations:

- *The existence of a good reason*: The justifiable reasons why it is not possible for a witness to attend the proceedings or to be questioned directly despite the importance of the defendant, accused being able to examine or cross-examine her or him or her will include:

    - death (*Ferrantelli v. and Santangelo v. Italy*, no. 19874/92, 7 August 1996);
    - fear (*Horncastle and Others v. United Kingdom*, no. 4184/10, 16 December 2014 and *Scholer v. Germany*, no. 14212/10, 18 December 2014);
    - illness (*Efendiyev v. Azerbaijan*, no. 27304/07, 18 December 2014 and *Chukayev v. Russia*, no. 36814/06, 5 November 2015);
    - the need for anonymity (*Balta et Demir v. Turkey*, no. 47628/12, 23 June 2015 and *Bátěk and Others v. the Czech Republic*, no. 54146/09, 12 January 2017); and
    - the need to protect the victim (*Rosin v. Estonia*, no. 26540/08, 19 December 2013).

    However, there needs to have been a proper consideration by the court concerned as to whether such a justification genuinely exists (*Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011);

- *The importance of the statement or testimony*: The European Court will be concerned if it was the sole or decisive basis for the conviction (*Paić v. Croatia*, no. 47082/12, 29 March 2016 and *Poletan and Azirovik v. "the former Yugoslav Republic of Macedonia"*, no. 26711/07, 12 May 2016) or, if not, its weight was significant or its admission was such that it may have handicapped the defence (*Štulíř v. Czech Republic*, no. 36705/12, 12 January 2017). The latter test reflects a recognition of the difficulty for a trial court in determining whether evidence would be decisive without having the advantage of examining and weighing in the balance the totality of evidence that has been adduced in the course of the trial;

- *The existence of counterbalancing factors*; It is essential that such factors be sufficient counterbalancing factors to compensate for the handicaps under which the defence has laboured. The counterbalancing factors required by the European Court are ones that will permit a fair and proper assessment of the reliability of that evidence. At a minimum, this means that the untested evidence of an absent witness must have been approached with caution, with the court showing that an awareness that it carries less weight and giving detailed reasoning as to why it is considered reliable and, at the same time, having regard also to the other evidence available (*Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015 and *N.K. v. Germany*, no. 59549/12, 26 July 2018). Additional safeguards identified by the European Court include:

    - the showing at the trial hearing of a video recording of the absent witness's questioning at the investigation stage in order to allow the court, prosecution

and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability (*B. v. Finland*, no. 17122/02, 24 April 2007 and *Balta et Demir v. Turkey*, no. 47628/12, 23 June 2015);

- the availability at the trial of corroborative evidence supporting the untested witness statement (such as statements made at the trial by persons to whom the absent witness reported the events immediately after their occurrence, further factual evidence secured in respect of the offence, including forensic evidence, expert opinions on a victim's injuries or credibility and strong similarities between the absent witness's description of the alleged offence committed against him or her and the description, given by another witness with whom there was no evidence of collusion, of a comparable offence committed by the same defendant, particularly where that witness's reliability is tested by cross-examination) (*Gani v. Spain*, no. 61800/08, 19 February 2013 and *Dmitrov and Momin v. Bulgaria*, no. 35132/08, 7 June 2018);
- the possibility offered to the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial (*Bátěk and Others v. the Czech Republic*, no. 54146/09, 12 January 2017);
- the giving to the accused or defence counsel an opportunity to question the witness during the investigation stage particularly where the investigating authorities have already taken the view at the investigation stage that a witness will not be heard at the trial or there is a risk of the witness not being available to give testimony at the trial (*B. v. Finland*, no. 17122/02, 24 April 2007); and
- the defendant is afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses (*Constantinides v. Greece*, no. 76438/12, 6 October 2016).

106. The foregoing three considerations are interrelated and, taken together, are considered by the European Court as serving to establish whether the criminal proceedings in issue have, as a whole, been fair. They should normally be addressed in the order set out above (*Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015).

107. An indication should be given in any judgment as to the weight given to the testimony of any absent witness as this is a matter which the European Court will consider when evaluating the adequacy of any counterbalancing factors in the case concerned. Moreover, it is not enough that the court had regard to what was necessary by way of ensuring that adequate safeguards existed. It will also be essential that it will have demonstrated that such regard actually occurred and what were its reasons for considering the particular safeguards relied upon to be adequate (*Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015). It should not, however, have been too readily assumed that particular safeguards, not least given that the judges of the European Court can themselves be quite divided as the effectiveness of those being relied upon.

108. Cross-examination must (normally) be before the judge deciding the case but exceptions can be made where there is a slight change in the court's composition (*Graviano v. Italy*, no. 10075/02, 10 February 2005).

L. JURY TRIALS: COMPOSITION AND FUNCTIONING; ROLE OF LAWYER; CLOSING SPEECH

109. Jury trials are a feature of criminal proceedings in many countries, not only those whose jurisdictions are based on the common law but also those based on civil law. The specific arrangements can vary – in some instances with the jurors sitting in a panel with professional judges and in most instances sitting separately from them – but.in all cases they are performing an adjudicative function.

110. It is now well-established in the case law of the European Court that the adjudication of a trial need not only be by professional judges. As a result, complaints that applicants had been tried by a jury composed of laymen without legal experience have been considered to be manifestly ill-founded (*Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994).

111. A requirement to perform jury service should normally be regarded as corresponding to the notion of a "normal civic obligation", which Article 4(3)(d) of the European Convention deems not to constitute forced labour and so fall under the prohibition on it in Article 4(2). However, a difference in treatment between groups of persons as to their obligation to perform jury service will be in violation of the prohibition on discrimination in Article 14 when taken in conjunction with Article 4(3)(d) where there has no objective and reasonable justification (*Zarb Adami v. Malta*, no. 17209/02, 20 June 2006).

112. The role of the lawyer in jury trials is not fundamentally different from that in other trials except for two points; their participation in the composition of the jury and the need to keep in mind the nature of the jury in their presentation of the case, with this being especially important when it comes to the closing speech.

Composition and functioning

113. As jurors are performing an adjudicative function, the requirement in Article 6 of the European Convention for a fair trial by an independent and impartial tribunal established by law" will apply to their composition and functioning.

Key points

114. In monitoring and, if necessary, challenging the composition and functioning of a jury, you should have regard to the following:

- *The compliance with selection rules*: A failure to comply with applicable national rules regarding the selection of the jury will almost certainly lead to a finding that the requirement that the tribunal be "established by law" has been violated as can be seen in cases concerned with the comparable arrangements for the appointment of lay judges (*Fedotova v. Russia*, no. 73225/01, 13 April 2006). However, the making of certain more procedural mistakes may not be regarded as problematic in this regard where these cannot be shown to have adversely affected the proceedings against the accused person concerned (*Pesti and Frodl v. Austria* (dec.), no. 27618/95, 18 January 2000 and *Pichugin v. Russia*, no. 38623/03, 23 October 2012);

- *The length of the process*: Delays resulting from difficulties that may arise in forming a competent jury are likely to be regarded as attributable to the State for the purpose of determining whether or not the length of the proceedings will be regarded as reasonable for the purpose of Article 6(1) (*Polonskiy v. Russia*, no. 30033/05, 19 March 2009);

- *The safeguarding of independence*: The requirements generally expected to be observed in order to safeguard judicial independence – in particular, as regards the manner of their appointment, pressure against outside influence, the appearance of independence and protection from removal during their period of appointment – should be observed in the case of jurors as much as professional judges. Importance will be attached to whether jurors were given suitable guidance as to their role and responsibilities and they took an oath in that respect (*Cooper v. United Kingdom* [GC], no. 48843/99, 16 December 2003);

- *The compliance with qualification requirements by individual jurors*: Due consideration must have been given as to whether someone is disqualified from serving on a jury as this is critical for ensuring the independence and impartiality of the jury. However, this does not mean that the parties must have been able to participate in the selection of the jury in a case, unless this is provided for in the law (*Pichugin v. Russia*, no. 38623/03, 23 October 2012). Moreover, there is no right under Article 6(1) of the European Convention to have an inquiry made into the political, religious and moral beliefs of prospective jurors (*Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994);

- *The observance of impartiality*: This is relevant to both initial selection and to conduct in the course of the proceedings. It will always be very difficult to prove actual bias or subjective impartiality but the appearance of bias or objective impartiality may be more readily demonstrated (*Pullar v. United Kingdom*, no. 22399/93, 10 June 1996). However, the factors relevant to the existence or appearance of bias will include:

    - the actual or possible familiarity or family relationship of jury members with one of the parties or a witness (*Kristiansen v. Norway*, no. 1176/10, 17 December 2015);
    - their political affiliation (*Holm v. Sweden*, no. 14191/88, 25 November 1993) or employment (*Danilov v. Russia*, no. 88/05, 1 December 2020);
    - prior involvement in the proceedings (*Ekeberg and Others v. Norway*, no. 11106/04, 31 July 2007); and
    - attitudes to the race or other characteristics of a defendant *(Remli v. France*, no. 16839/90, 23 April 1996 and *Sander v. United Kingdom*, no. 34129/96, 9 May 2000).

    However, the fact that some such factor exists does not necessarily mean that there must be considered to be a lack of impartiality on the part of the tribunal for the purpose of Article 6(1) of the European Convention. In each case it will be a question of assessing whether or not the exact nature and degree of the factor is such that possible misgivings about the impartiality of the tribunal can be regarded as being objectively justified, particularly when other safeguards are taken into account. It will be relevant to consider the actual significance of the impugned factor (*Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002), the advice given to jury members before or at the time of their appointment (*Pullar v. United Kingdom*, no. 22399/93, 10 June 1996); and the response when issues of impartiality

emerge after the trial gets under way, whether this was because a jury member only subsequently became aware of the problem, it is a consequence of conduct involving one or more jury members in the course of the proceedings or there have been attempts to influence jury members;

- *The response to impartiality issues*: In cases where issues of impartiality emerge after the trial gets under way, it will be necessary to establish whether the source of the problem was more apparent than real *(Corcuff v. France*, no. 16290/04, 4 October 2007) or has then been satisfactorily remedied, such as by:

    - the jury member's unilateral removal of a potentially prejudicial factor *(Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002),
    - the removal of the juror concerned before s/he could be regarded as having contaminated the proceedings *(Kristiansen v. Norway*, no. 1176/10, 17 December 2015*)* and
    - other measures taken by the court *(Peter Armstrong v. United Kingdom*, no. 65282/09, 9 December 2014).

    However, there is a need for clear that the court has undertaken a proper investigation into an alleged problem and given an adequate response to it (*Remli v. France*, no. 16839/90, 23 April 1996 and *Sander v. United Kingdom*, no. 34129/96, 9 May 2000) Moreover, in some cases an issue affecting impartiality may only be satisfactorily addressed by the judge by discharging the entire jury and constituting a new one (*Kristiansen v. Norway*, no. 1176/10, 17 December 2015);

- *The protection of the jury*: It is recognised that, given the need to ensure that jurors are not prejudiced by media coverage of proceedings, it may be compatible with the right to freedom of expression to impose restrictions on what may be published during the course of the trial proceedings *(Hodgson, Woolf Productions Ltd and National Union of Journalists v. United Kingdom* (dec.), no. 11553/85, 9 March 1987). However, it should be noted that there has been no instance so far in which the European Court has actually found hostile media coverage to have caused jurors to be prejudiced in a particular case. Moreover, apart from the judge's direction to the jury regarding the media coverage and the other such safeguards in the trial process discussed above, particular indicia that the jury has not been affected by hostile media coverage will be: the length of time the jury in the case have deliberated (*Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000); the manner in which they have deliberated (*Mustafa (Abu Hamza) v. United Kingdom* (dec.), no. 31411/07, 18 January 2011); and whether they have returned different verdicts on the charges faced by the applicant and, where relevant, his co-defendants (*Mustafa (Abu Hamza) v. United Kingdom* (dec.), no. 31411/07, 18 January 2011); and

- *The need for a reasoned verdict*: The European Court does not require that the verdict of a jury be itself reasoned but the accused and the public must be able to understand the verdict that has been given. This may be achieved through precise, unequivocal questions being put to the jury by the judge, forming a framework on which the verdict is based (*Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010 and *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016) or by the directions given by the judge on the issues to be resolved by the jury. In either case, it must be possible to ascertain from a combined examination of the indictment and the questions or directions which of the items of evidence and factual circumstances discussed at the

trial had ultimately caused the jury to reach its verdict and, if necessary, to determine why it had concluded that certain co-defendants bore less responsibility and discern why aggravating factors had been taken into account.

The role of the lawyer

115. The role of the lawyer is to ensure that the rights and interests of her/his client are duly observed in the course of the proceedings. This is in part about using all the possibilities in this regard that are afforded by the Criminal Procedure Code but the way in which this done is probably even more important.

116. In performing the role of lawyer in jury trials, as well as ensuring that obstacles are not placed in so doing, you should have regard to the following:

- *The need to appreciate the lay character of jurors*: In order to engage the attention of jurors and ensure that they appreciate the points being made - whether in the course of specific submissions to the court or in the examination and cross-examination of witnesses - it is important to use simple and straightforward language and to keep the focus on the issues that are most important for the defence of the accused. This is because the potential for confusing or losing the attention of jurors will increase the more an argument or question strays from simplicity. Even where there is some complexity to a defence, there should always be clarity in the stages on which it is built so that the jurors are convinced by the time of its conclusion. Moreover, ensuring the chronology of events is always clear is important in helping jurors form a picture of what did or did not happen;

- *The need to be clear as to the nature of the defence*: This should be presented at the earliest opportunity so the jurors can understand your objective as you cross-examine prosecution witnesses and examine defence witnesses. The aim should be to place the defence within a framework of common sense, experience and fairness so that jurors can readily identify with it;

- *The need to be engaging*: It is important not to bore jurors by being long-winded or to be off-putting through the use of empty rhetoric;

- *The need to lead the jurors to the conclusion you want*: The aim of all examination and cross-examination of witnesses should be an outcome that supports the defence being advanced, whether by undermining the credibility of testimony that might implicate the accused or by contributing to the essential basis for claiming s/he did not commit the offence alleged. The conclusion should come from what you elicit from the witness rather than any assertion that you might make. Moreover, the strength or weakness of a witness's assertion that something happened will be determined by exploring the basis on which s/he is confident about it (e.g., how did s/he know something occurred at a particular time?);

- *The need to be organised*: It is essential to be prepared to examine a witness, which means analysing any statement given beforehand and annotating it and any other relevant material so that you can draw upon it as and when necessary. Although you may have a plan for the examination, there is a need to be ready to depart from it in the

event of unexpected developments. In such circumstances, good organisation allows for a flexible response. If you appear disorganised and cannot find the material you need, jurors will not be impressed and are unlikely to be convinced by the case you are advancing;

- *The need to deal effectively with any weaknesses*: It is likely that there will be some in your case – whether the nature of certain defence witnesses or the existence of certain evidence – and these should in a way that undermines their importance. If they are ignored or there is an attempt to hide them, you risk coming across as untrustworthy;

- *The need to ensure that jurors do not become alienated from an accused*: The offence being tried may involve conduct for which there is no or little sympathy. However, the position of an accused might be worsened by a lawyer who comes across as conceited, arrogant, oppressive or unpleasant. Although in cross-examination of prosecution witnesses, the aim will be to cast doubt on their testimony, it is important to remain polite and respectful while still leading them to reveal the weaknesses and inconsistencies of what they have said. Similarly, a judge or the prosecutor might put difficulties in the way of your submissions but you should demonstrate the unfairness of this to the jurors without appearing aggressive or petulant. At all times, the aim should be to come across as someone who can be trusted, who shows objectivity and consistency and who is committed to defending her/his client only in accordance with the law. It is crucial that the force of the position being advanced is not undermined by the jurors lacking or losing sympathy with your character – and then viewing your client in the same way - on account of your conduct of the proceedings;

- *The need to ensure that jurors are not exposed to prejudicial material*: Jurors should not see or hear evidence that is inadmissible but it is important to be alert to the possibility of this occurring by accident as much as design in the course of testimony being given by a witness. Where it appears that this could either be the consequence of a particular line of questioning or of the way in which a witness appears to be answering a question that is not, in itself, improper, it is essential to raise an objection straightaway so that the judge rules that the particular matter has no bearing on the determination of the case; and

- *The need to be alert to possible prejudice on the part of individual jurors*: Where any of the factors that might justify a conclusion that there is a risk to the independence or impartiality of jurors become apparent, it is essential to raise them straightaway with the court and to argue for appropriate action to be taken, whether the giving of instructions to the jury as a whole, the removal of an individual juror or the discharge of the whole jury. A failure to act promptly runs the serious risk that any subsequent complaint about unfairness will be seen as having been compromised by this delay

The closing speech

117. In making a closing speech, the objective is simple; to persuade the jury that the correct verdict should be one of Not Guilty. Making a compelling closing speech is a vital part of any advocate's job on behalf of her or his client.

118. In making a closing speech to the jury, you should have regard both to the points made above but also to the following:

- *The need to take the time to prepare at least an outline*: Some can deliver speeches extempore but most of those that appear to be given that way will be based on some kind of written structure, even if this is not visible to those listening. Doing this will help you focus on the key issues and ensure that you use the evidence effectively, without misrepresenting anything. Without a plan, you are at risk of rambling on in an unfocused or repetitive fashion about a particular issue, with the likely result of losing the attention of those you are trying to persuade and making them more receptive to the submissions of the prosecution. You should beware of jurors staring vacantly into space as that points to a loss of interest in what you are saying. At the same time you use the plan as a guide and not something to read from beginning to end;

- *The need for a structure*: You need to identify the key basis for the defence, state it at the outset, illustrate it with examples from the evidence and repeat it at the end;

- *The need not to be too long*: The attention of those listening to you cannot be taken for granted and it may wander if your speech is unduly prolonged. It is important to cover the key points while being sure not to lose the interest of jurors in what you are saying;

- *The need to focus on your key objective:* This is to raise doubt about the prosecution case. Where jurors are convinced that there is such a doubt then it will be impossible for them to be sure of your client's guilt and s/he should be acquitted. This requires attention to be given to factors relevant to some or all of the following: the reliability of prosecution witnesses; the honesty of prosecution witnesses; the authority of expert evidence that might be disputed; and the correctness of an interpretation being given to events that are accepted as having occurred. You should, however, bear in mind that it is likely to be easier for a jury to accept that a witness is mistaken than that s/he is deliberately lying. You should not, therefore, allege that a witness is dishonest if her or his unreliability is equally explicable by an honest mistake. The important thing, however, is to concentrate only on such matters as can undermine the prosecution case. In doing so, you should acknowledge the points in the prosecution case that seem strong but indicate how they can be answered. At all times be realistic in your submissions as jurors will not be impressed if you spend time on points that are essentially silly;

- *The need to emphasise the burden and the standard of proof*: These are matters to be emphasised throughout your speech. Jurors should be reminded that their role is not to decide whether your client is innocent but whether they are satisfied that the prosecution has proved her/his guilt. You should emphasise that this means that they can only convict where they are sure beyond a reasonable doubt on the evidence submitted by the prosecution that your client committed the offence of which s/he has actually been indicted. You should make it clear that being "sure" does not mean thinking that your client committed the offence, probably did so or being "almost sure" in this regard. The jurors need to appreciate that if there is a possibility that they could be mistaken about your client's guilt then they are not sure, and the proper verdict is one of not guilty. So you need to emphasise the following: the jurors should only find your client guilty *only* if the prosecution evidence is so overwhelming that it allows of no other explanation; a "not guilty" verdict does *not* mean that the complainant is lying since being almost sure that s/he is telling the truth is still not sufficient to convict. A similar

principle will apply to any evidence given by your client; unless the jurors are sure that s/he is lying, s/he is not guilty. They can only find her/him guilty if they are sure that s/he is lying.

- *The need to respond to inconsistencies between prosecution assertions and the evidence actually submitted*: In doing this, you should not just focus on those in the closing speech but on any made from the outset of the prosecution case onwards as these may have influenced the approach of jurors. This requires a good note of the various assertions by the prosecution to have been made as they occurred; relying just on memory may lead to errors and will not play well with jurors; and

- *The need to establish the credibility of any positive defence advanced*: Where it is being advanced that your client acted in self-defence or had an alibi, it will be important to show why this credible. However, the jurors needs to understand that they do not have to be sure that s/he acted in self-defence or had an alibi; they need to appreciate that, if they can conclude that s/he *might* have been acting in self-defence or *might* have been elsewhere, this is sufficient for a verdict of not guilty because it means they are not 'sure' of her/his guilt.

M. PROPERTY RIGHTS IN CRIMINAL PROCEEDINGS

119. The concept of "possessions" in the first part of Article 1 of Protocol No. 1 is an autonomous one. It covers rights *in rem* and *in personam*, encompassing immovable and movable property and other proprietary interests, whether currently existing or involving claims in respect of which a person can argue that s/he has at least a legitimate expectation (*Pressos Compania Naviera S.A. and Others v. Belgium*, no. 17849/91, 20 November 1995 and *Von Maltzan and Others v. Germany* (dec.) [GC], no. 71916/01, 2 March 2005).

Key points

120. In assessing whether an interference with possessions in criminal proceedings is compatible with Article 1 of Protocol No. 1, you should have regard to whether:

- *It is lawful*: Any such interference must always meet the requirement of lawfulness (*Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25 March 2014 and *Béláné Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016). In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide freedom from or guarantees against arbitrarinesss (*East West Alliance Limited v. Ukraine*, no. 19336/04, 23 January 2014, *Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria*, no. 3503/08, 13 October 2015 and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25 March 2014). The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (*Beyeler v. Italy* [GC], no. 33202/96, 5 January 2000 and *Centro Europa 7 S.R.L. and di Stefano v. Italy* [GC], no. 38433/09, 7 June 2012);

- *It pursues a public or general interest:* Any interference by a public authority with the peaceful enjoyment of "possessions" can only be justified if it serves a legitimate public (or general) interest (*Béláné Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016

and *Lekić v. Slovenia* [GC], no. 36480/07, 11 December 2018). The following purposes have been found by the Court to fall within the notion of public interest within the meaning of this provision:

- Seizure of evidence for use in criminal proceedings (*G.S. and M. v. Austria* (dec.), no. 9614/81, 12 October 1983);
- A requirement to deposit property as a condition of granting bail (*Jedamski v. Poland* (dec.), no. 29691/96, 4 March 1998);
- Measures to combat drug trafficking and smuggling (*Butler v. United Kingdom* (dec.), no. 41661/98, 27 June 2002);
- Protection of the interests of the victims of the crime (*Šeiko v. Lithuania*, no. 82968/17, 11 February 2020);
- Measures to restrict the consumption of alcohol (*Tre Traktörer AB Sweden*, no. 10873/84, 7 July 1989);
- Control of legitimate origin of cars brought into circulation (*Sildedzis v. Poland*, no. 45214/99, 24 May 2005);
- Seizure of assets appearing to be the proceeds of unlawful activities pending trial (*Raimondo v. Italy*, no. 12954/87, 22 February 1994 and *Andrews v. United Kingdom* (dec.), no. 49584/99, 26 September 2002);
- Confiscation of monies acquired unlawfully (*Honecker and Others v. Germany* (dec.), no. 54999/00, 15 November 2011 and *Gogitidze v Georgia*, no 36862/05, 12 May 2015);
- Confiscation of a sum corresponding to the proceeds of crime assessed by the court to have been gained by the defendant, accused following her or his conviction for the offence concerned (*Phillips v. United Kingdom*, no. 41087/98, 5 July 2001);
- Confiscation of material constituting the offence of which the owner was convicted (*Handyside v. United Kingdom* [P], no. 5493/72, 7 December 1976) and of the means used to commit an offence (*Yildirim v. Italy* (dec.), no. 38602/02, 10April 2003); and
- The prevention of collusive practices and the protection of the public purse and promotion of fair competition (*Kurban v. Turkey*, no. 75414/10, 24 November 2020).;

- *It is proportionate*: In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1 of Protocol No. 1, an interference with the right to the peaceful enjoyment of "possessions", apart from being prescribed by law and in the public interest, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (*Beyeler v. Italy* [GC], no. 33202/96, 5 January 2000 § 107 and *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], no. 60642/08, 16 July 2014). In other words, in cases involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden. In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct (*Broniowski v. Poland* [GC], no. 31443/96, 22 June 2004); and

- *It is procedurally fair*: Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been construed to mean that persons affected by a measure interfering with their "possessions" must be afforded a reasonable opportunity to put their case to the responsible authorities for the purpose of effectively challenging those measures, pleading, as the case might be, illegality or arbitrary and unreasonable conduct (*G.I.E.M. S.R.L. and Others v. Italy (Merits)* [GC], no. 1828/06, 28 June 2018). These procedural guarantees are inherent in the principle of lawfulness (*Lekić v. Slovenia* [GC], no. 36480/07, 11 December 2018), as discussed above.

N. APPEALS: THE RIGHT; PREPARATION

121. The possibility of an appeal against conviction and/or sentence is a crucial feature of the criminal justice system. It should be a means of ensuring that any errors are corrected, whether in terms of reversing a finding of guilt or imposing a more appropriate sentence where a conviction is upheld or not challenged. As such, they are important not just for the person tried but for the general interest as both the proper application of the law and being able to see that this has occurred contributes to public confidence in the criminal justice system.

122. In order to appeal, there must be a right to do so but a successful outcome will turn on how well-prepared any appeal has been.

The Right

123. The primary requirements governing appeals will be those provided in national legislation.

124. However, in some instances, it might be appropriate to invoke the right of appeal is guaranteed by Article 2 of Protocol No. 4. In particular, there must be a clearly defined procedure and time-limits, which are consistently applied in practice (*Galstyan v. Armenia*, no. 26986/03, 15 November 2007).

125. Furthermore, restrictions on the right of appeal should not infringe the very essence of the right, such as where its exercise would prevent the first instance judgment becoming final and as a result allowing a preventive measure to be maintained despite the prison sentence imposed having already expired (*Ruslan Yakovenko v. Ukraine*, no. 5425/11, 4 June 2015). Moreover, the right will be breached where the appeal is determined only after the appellant's sentence has been served in full (*Shvydka v. Ukraine,* no. 17888/12, 30 October 2014)

126. In addition, where a right of appeal exists, the right to a fair trial under Article 6 of the European Convention is applicable. This means, in particular, that:

- *The requirement of impartiality must be respected* (*Daktaras v. Lithuania*, no. 42095/98, 10 October 2000 and *Morice v. France* [GC], no. 29369/10, 23 April 2015), which may result from the non-participation of the prosecution in the appeal (*Karelin v. Russia*, no. 926/08, 20 September 2016);

- *The due notice of the deadline for filing submissions* (*Vacher v. France*, no. 20368/92, 17 December 1996) and of the hearing itself (*Zaytsev v. Russia*, no. 22644/02, 16 November 2006);

- *An adequate opportunity to prepare*, especially where there is a re-characterisation of the charge (*Mattei v. France*, no. 34043/02, 19 December 2006 and *D.M.T. and D.K.I v. Bulgaria*, no. 29476/06, 24 July 2012);

- *The timely communication of the submissions of other parties* (*Reinhardt and Slimane-Kaid v. France*, no.23043/93, 31 March 1998);

- *The hearing of witnesses and the defendant where a different assessment is being made of the evidence presence* (*Sigurþór Arnarsson v. Iceland*, no. 44671/98, 15 July 2003); and

- *An adequately reasoned judgment* (*Gradinar v. Moldova*, no. 7170/02, 8 April 2008 and *Kashlev v. Estonia*, no. 22574/08, 26 April 2016)

127. Nonetheless, the right to appeal under Article 2 of Protocol No. 4 is subject to a number of limitations:

- *The implementation of the right can be restricted to just points of law* (*Dorado Baúlde v. Spain* (dec.), no. 23486/12, 1 September 2015) *and minor offences can be excluded (Kakabadze and Others v. Georgia,* no. 1484/07, 2 October 2012);

- *The observance of procedural requirements can be insisted upon* (*Poulsen v. Denmark* (dec.), no. 32092/96, 29 June 2000), including an application for leave requirement (*Lantto v. Finland* (dec.), no. 27665/95, 12 July 1999);

- *The acceptance of a plea bargain will be regarded as a waiver of the right to ordinary appellate review* (*Natsvlishvili and Togonidze v. Georgia,* no. 9043/05, 29 April 2014);

- *Minor modifications can be made to the indictment* (*Karlsen v. Denmark (*dec.), no. 23523/02, 1 February 2005);

- *There is no obligation to take further evidence* (*Dür v. Austria* (dec.), no. 22342/93, 16 January 1996); and

- It does not apply to a conviction on appeal following an acquittal at first instance (*Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, 10 April 2012).

Preparation

128. Appellate courts undoubtedly start from the presumption that a first instance ruling was properly made. It is important to keep this in mind when preparing an appeal and to ensure that the focus is on identifying those grounds which are likely to persuade the appellate court to depart from this presumption.

129. In preparing for an appeal, it will be useful to keep the following points in mind:

- *Do not wait until the conclusion of the trial*: Potentially relevant points – whether as regards compliance with matters of procedure or substance and/or requirements under the Constitution and the European Convention – should be noted as the trial proceeds so that they can readily be drawn up for the appeal. Such points will, however, only be useful if any opportunity to challenge the possible shortcoming has been exercised at the material time and the way in which that was done, as well as the response to it, should also be noted;

- *Identify the object of the appeal*: If, for example, it is only to obtain a reduction in the sentence imposed, it will be better to concentrate only on those points that have a genuine chance of persuading the court that this is appropriate. Submissions concerning anything else is likely to be a distraction. Moreover, where there is no dispute about particular findings of fact, it can be useful to acknowledge this so that the focus is only on the points that are disputed since the court is more likely to conclude that the appeal is a meritorious one. It can be useful to discuss this with the prosecution as that may lead to its recognition that certain points potentially favourable to your client are also not disputed;

- *Be realistic*: There may have been errors in the course of the trial, such as in the admission of certain evidence and the refusal to hear particular witnesses or to accept certain motions for the defence – but this does not necessarily mean that the outcome would have been different if they had not been made. It is important not to waste time complaining about particular errors where it cannot be demonstrated that they caused prejudice, particularly as national courts will be reinforced in rejecting submissions regarding them by the European Court's focus on the fairness of the trial overall (see para. 82 above). Even if a weak submission has to be made, it should not be the starting point as it could well colour the perception of the appellate court concerning the case;

- *Clarify any errors of fact and what is needed to correct them*: In particular, it will be necessary to determine whether any witnesses should be heard or any item of evidence in the case file examined. In such cases, there is need to prepare an argument as why this is required which is linked to the grounds of appeal and why the findings in the judgment are not sufficient for this purpose;

- *Prepare the appeal submissions in a user-friendly manner*: Article 293(2) requires that the appeal deal with the following matters: "d) the appealed provisions of the judgment; e) the essence of the unlawfulness and/or unreasonableness of the appealed provisions; f) the evidence confirming the appellant's position; g) the evidence, including new evidence, that is to be examined by the court of appeal; h) materials submitted additionally (if any)". This is undoubtedly appropriate but, if there are many grounds being relied upon, it would help if each one not only had the essential reasons for unlawfulness/unreasonableness but there was a clear link made to the relevant evidence – whether that which was simply ignored or that which was misunderstood at first instance - and any additional material being relied upon. This would ensure that the appellate court could readily appreciate the extent of the substantiation for the points being advanced. Moreover, when disputing particular findings of fact, an approach which deals each in an integrated way - covering the respective strengths and

weaknesses of witnesses as well as the contradictions between them – may be more compelling than dealing with the entire testimony of each witness in turn. It can also help to have a brief summary of the main submissions at the outset to strengthen the focus of the court on them. It is also important to ensure that particular submissions are placed in their appropriate context; it may be necessary to deal with one concerning the admissibility of evidence before addressing any shortcoming in the weight attached to that evidence; and

- *Look to the future*: Some points may only have a better chance of success, whether on cassation, in the Constitutional Court or in the European Court. It is important that these are still raised in an appeal court as otherwise the failure to do so may preclude them from being considered admissible in the subsequent proceedings.

O. REOPENING CASES DUE TO NEWLY DISCOVERED CIRCUMSTANCES

130. Although Article 3 of Protocol No. 7 provides a right to compensation where a final conviction is reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, a finding by the European Court of a violation of Article 6 of the European Convention does not automatically require the reopening of the domestic criminal proceedings (*Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017).

131. Nevertheless, it recognises that this is, in principle, an appropriate, and often the most appropriate, way of putting an end to the violation and affording redress for its effects (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], no. 32772/02, 30 June 2009).

132. Moreover, Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights states that the re-examination of a case or the reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*.[6]

133. The Recommendation encourages this to occur where the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening and the judgment of the European Court leads to the conclusion that either the impugned domestic decision is on the merits contrary to the European Convention or the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

134. Instances of the former situation are convictions contrary to the legitimate exercise of freedom of religion and expression under Articles 9 and 10 and of the latter one are cases

[6] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06.

where there was not adequate time and facilities to prepare a defence or the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying.

135. The reopening of proceedings is not incompatible with the *non bis in idem* principle enshrined in Article 4 of Protocol No. 7 as this does not prevent the reopening of a case in accordance with the law and penal procedure if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case (*Nikitin v. Russia*, no. 50178/99, 20 July 2004).

136. Examples of the latter could include: ignorance of the important substantive evidence, such as witnesses' statements corroborating the defendant's alibi, the selective and grossly inconsistent approach to the assessment of the circumstantial evidence, the overestimation of the evidential value of the victim's testimony and the defective understanding of the medical reports (*Lenskaya v. Russia*, no. 28730/03, 29 January 2009, and *Giuran v. Romania*, no. 24360/04, 21 June 2011)

137. However, where there is a reopening of proceedings, the requirements of Article 6 must be observed (*Löffler v. Austria*, no. 30546/96, 3 October 2000).

Key points

138. In assessing whether there has been a violation of Article 6 following the reopening of proceedings, you should have regard not only to the observance of all the requirements of that provision but also to:

- *The grounds for the reopening*: The review should not be treated as an appeal in disguise; the mere possibility of there being two views on the subject is not a ground for re-examination (*Bujniţa v. Moldova*, no. 36492/02, 16 January 2007 and *Bota v. Romania*, no. 16382/03, 4 November 2008). Furthermore, it should not be based on mistakes or errors by the prosecuting authority or the court; these must be borne by the state and the errors must not be remedied at the expense of the individual concerned.(*Radchikov v. Russia*, no. 65582/01, 24 May 2007 and *Ştefan v. Romania*, no. 28319/03, 6 April 2010); and

- Perpetuation of a previous violation: A fresh conviction should not, for example, be based on evidence previously found to have been obtained in violation of Article 6 (*Yaremenko v. Ukraine (No. 2)*, no. 66338/09, 30 April 2015).