Thematic factsheet[1]
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FAIRNESS OF CRIMINAL PROCEEDINGS AGAINST MEDIA REPRESENTATIVES

According to Article 6 of the Convention, journalists and other media representatives (fixers, cameramen, sound engineers etc) are entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law.

If they are charged with criminal offence, they shall be presumed innocent until proved guilty and have the following minimum rights:

- be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against them

- have adequate time and the facilities for the preparation of their defence;

- defend themselves in person or through legal assistance of their own choosing or, if they have not sufficient means to pay for legal assistance, be given it free when the interests of justice so require;

- examine or have examined the accusation witnesses and obtain the attendance and examination of witnesses on their behalf under the same conditions;

- have the free assistance of an interpreter if they cannot understand or speak the language used in court.

Any sanctions eventually imposed by the domestic courts should not be disproportionate and should not dissuade the press from taking part in the discussion of matters of legitimate public concern.

The imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.

Administrative arrest of a journalist at an anti-globalism march: Failure by trial court to afford defence opportunity to question arresting officers

Butkevich v. Russia - 5865/07
Judgment 13.2.2018

The applicant, a journalist, was arrested by two police officers at an anti-globalism march in St Petersburg, where he was taking photographs. He was subsequently prosecuted for disobeying police orders and brought before a court in an expedited procedure under the Code of Administrative Offences. He was convicted and sentenced to three days' detention, reduced to two days on appeal.

The European Court of Human Rights found that there had been some safeguards in the applicant's case. In particular, there had been an oral hearing, the applicant had been assisted by his lawyer, the

[1] This document presents a non-exhaustive selection of the CoE instruments and of the ECHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of Article 10 of the Convention. This information is not a legal assessment of the alerts and should not be treated or used as such.

trial court had heard representations from the applicant and his lawyer and had granted a request by the defence to examine a witness present in the courtroom.

However, central to the applicant's case was the use of the pre-trial reports produced by the two arresting officers and the lack of an opportunity to question them. The Court considered that there was no good reason for the non-attendance of the two officers at the trial. Despite their classification as neither witnesses nor victims under the domestic law, the officers had to be regarded as witnesses for the purposes of Article 6 § 3 (d) of the Convention. Their adverse testimony was, at the very least, decisive. They were at the origin of the proceedings against the applicant and belonged to the authority which had initiated them. They were eyewitnesses to the applicant's alleged participation in an unlawful public event and his alleged refusal to comply with their related orders.

The Court was thus not satisfied that the applicant's conviction was the result of a fair hearing, as it was based on untested evidence produced by the police officers who were at the origin of the proceedings and belonged to the authority initiating the case. The counterbalancing factors (the questioning of the defence witness at the trial) were not sufficient.

Conclusion: violation of Article 6 § 1 of the Convention

Independent tribunal: Criminal trial presided by same judge as in prior civil proceedings

Fatullayev v. Azerbaijan - 40984/07
Judgment 22.4.2010

The applicant, a newspaper editor, was sentenced to a total of eight and a half years' imprisonment for having criticised in his articles the Azeri Government's foreign and domestic political moves.

The applicant had complained that the judge who had sat in the first set of criminal proceedings had previously sat in the civil action. The European Court noted that both sets of proceedings had concerned exactly the same allegedly defamatory statements and the judge had been called upon to assess essentially the same or similar evidence. Having decided the civil case, the judge had already reached the conclusion that the applicant's statements constituted false information. Accordingly, legitimate doubts could have been raised as to the appearance of impartiality of the judge at the subsequent criminal trial. In the light of the special features of the case, the applicant's fear of the judge's lack of impartiality could therefore be considered as objectively justified.

Conclusion: violation of Article 6 § 1 (independent and impartial tribunal)

Presumption of innocence: Statement by Prosecutor General indicating that a journalist had committed the criminal offence of threat of terrorism prior to formal charges

Fatullayev v. Azerbaijan - 40984/07
Judgment on 22.4.2010

The applicant, a newspaper editor, was sentenced to a total of eight and a half years' imprisonment for having criticised in his articles the Azeri Government's foreign and domestic political moves.

The European Court recalled that the presumption of innocence was violated if a statement by a public official concerning a person charged with a criminal offence reflected an opinion that he was guilty before he had been proved guilty according to law. While the applicant's position as a well-known journalist meant that it had been necessary to keep the public informed of the alleged offence and ensuing proceedings, the Prosecutor General should have exercised particular caution in his choice of

words. However, he had unequivocally declared at the start of the investigation that the applicant's article contained a threat of terrorism. Those specific remarks, made without any qualification or reservation, had amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism and had thus prejudged the assessment of the facts by the courts.

Conclusion: violation of Article 6 § 2 (presumption of innocence)

Domestic courts' failure to address legitimate concerns about possible "planting" of evidence

Sakit Zahidov v. Azerbaijan - 51164/07
Judgment 12.11.2015

The applicant (an independent Azeri journalist) was arrested and taken to local police premises where a search was conducted and drugs were found in one of his pockets. He was later convicted of illegal possession of drugs. Before the domestic courts, the applicant claimed that the drugs had been planted on him by the police officers.

The applicant's conviction had been based solely on the physical evidence, namely narcotic substances found on his person during a search.

The European Court noted a number of concerns regarding the circumstances in which the physical evidence had been obtained. Firstly, the search of the applicant was not carried out immediately following the arrest, but twenty minutes later, nowhere near the place of arrest. The time lapse between the arrest and search raised legitimate concerns about possible "planting" of evidence, because the applicant was completely under the police's control during that time. There was nothing to suggest that there were any special circumstances that had made it impossible to carry out a search immediately after the arrest. Secondly, the domestic courts had declined to examine a copy of the video-recording of the search and the Government had failed to provide a copy of the recording to the Court when specifically requested to do so. Thirdly, the applicant's arrest was not immediately documented by the police and the applicant was not represented by a lawyer during his arrest or the search. Overall, therefore, the quality of the physical evidence on which the domestic courts' guilty verdict was based was questionable because the manner in which it had been obtained cast doubt on its reliability.

The Court further found that the domestic courts had not properly considered the questions of the authenticity of the physical evidence and its use against the applicant. They had, in particular, failed to examine why his search had not been immediately conducted at the place of arrest and whether the proper procedure had been followed.

These two factors – the manner in which the physical evidence had been obtained and the domestic courts' failure to address the applicant's arguments regarding its authenticity and use against him – had thus rendered the proceedings as a whole unfair.

Conclusion: violation of Article 6 of the Convention

Trial in absentia: Failure to take sufficient steps to identify journalists' address in civil proceedings

Dilipak and Karakaya v. Turkey - 7942/05 and 24838/05
Judgment 4.3.2014

Civil proceedings were brought against the applicants following the publication of two articles in their newspaper. Neither the writ of summons nor the statement of claim could be served at the address

supplied by the claimant as the applicants were unknown there. Fresh writs were sent to the addresses established by the police. The documents were served on the "authorised employee" for one of the applicants. The other applicant could not be traced. The domestic court then decided to have the notification published in the press. The applicants were convicted in absentia. When the judgment had become final, the claimant brought enforcement proceedings. Orders to pay were sent to the applicants' homes. The applicants, who were thus apprised simultaneously of both the proceedings and the findings against them, produced evidence that the authorities had known their addresses. Three appeals were lodged with a view to obtaining a fresh trial. None of these appeals had been successful.

The first question to be examined was whether the authorities had taken the requisite steps to inform the applicants of the existence of the trial and whether the latter had waived his or her right. No enquiries seemed to have been made in respect of either of the applicants with the civil registry, professional bodies or the authority responsible for issuing press cards, although their journalist status could hardly have been unknown. In short, there was nothing to show that the enquiries which might legitimately and reasonably have been expected from the authorities had actually been carried out; indeed, all the evidence was to the contrary. It was quite troubling that, when it came to enforcing the judgment, the real addresses of the two journalists had then been traced without difficulty. The applicants had therefore been deprived of the opportunity to participate in the civil proceedings against them or to defend their interests. Moreover, there was nothing to suggest that they had waived their right to a fair trial.

It therefore remained to be seen whether domestic law afforded the applicants, with a sufficient degree of certainty, the opportunity to appear at a new trial. The Court found that the domestic proceedings did not guarantee with sufficient certainty that the applicants would have the opportunity to appear at a new trial to present their defence. In conclusion, the requisite steps had not been taken to inform the applicants of the proceedings against them and the latter had not had the opportunity to appear at a new trial, despite the fact they had not waived their corresponding right.

Conclusion: violation of Article 6 § 1 of the Convention

Unreasonable length of criminal proceedings against a journalist

Dilipak v. Turkey no. 29680/05
Judgment 15.9.2015

Relying on Article 6 § 1 (right to a fair trial within a reasonable time), Mr Dilipak, a writer and journalist, alleged that the length of the proceedings against him breached the "reasonable time" requirement.

In August 2003, following an article containing criticisms of high-ranking members of the military who were about to retire, the military prosecutor's office sought Mr Dilipak's conviction under the Military Criminal Code. Mr Dilipak raised an objection alleging that the military court lacked jurisdiction to try him as he was a civilian. While the case was pending before the Military Court of Cassation, Law no. 5530 of 29 June 2006 was enacted, amending the Military Criminal Code and doing away with the military courts' jurisdiction to try civilians for offences of the type of which Mr Dilipak was accused. The case was referred to the civilian courts, and in June 2010 a civilian court ruled that the prosecution was time-barred. According to the European Court, the total length of the proceedings initiated against the applicant (2003-2010) exceeded the requirements of a reasonable time-frame set by Article 6 § 1 of the Convention.

Conclusion: violation of Article 6 § 1 of the Convention

Journalist tried by National Security Courts in which one of the three judges was a military judge

Sürek v. Turkey (No. 2) no. 24122/94
Judgment 8.7.1999

On 2 September 1993, Istanbul National Security Court found the applicant, in his capacity as the owner of the review, guilty of revealing the identity of officials responsible for combating terrorism and thus making them terrorist targets. It sentenced him to pay a fine under section 6 of the Prevention of Terrorism Act 1991.

The Court held that the applicant had been denied the right to have his case heard by an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention, as he had been tried by the National Security Courts, in which three judges sat, one of whom was a military judge. The Court pointed out that, although the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality, certain aspects of these judges' status made their independence and impartiality questionable: for example, the fact that they were servicemen who still belonged to the army, which in turn took its orders from the executive; the fact that they remained subject to military discipline; and the fact that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army. The Court held that, viewed objectively, the applicant had a legitimate reason to fear that the court which tried him lacked independence and impartiality.

Conclusion: violation of Article 6 § 1 of the Convention

Additional information – Other European tools

- Recommendation of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies
- Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies
- Resolution 2035 (2015) of the Parliamentary Assembly : Protection of the safety of journalists and of media freedom in Europe
- Resolution 1535 (2007) of the Parliamentary Assembly: "Threats to the lives and freedom of expression of journalists"
- OSCE Guidebook on Safety of Journalists (2014)